

The International Sports Law Journal



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ANNOUNCEMENTS

This issue of ISLJ opens with Emile Vrijman's comment regarding the official statement of the World Anti-Doping Agency (WADA) on the Report "Analysis Samples from the 1999 Tour de France" which was drafted by Emile Vrijman and others at the request of the Union Cyclist International (UCI) by way of an independent investigation into Lance Armstrong having been accused of the use of doping.

In this issue, particular attention is further paid to the Council of Europe, European Sports Law, and Players' Agents.

In this context it should be mentioned that the ASSER International Sports Law Centre in cooperation with T.M.C. Asser Press has recently produced three books on these subjects, namely "The Council of Europe and Sport - Basic Documents" with a Foreword by Dr Ralf-René Weingärtner, Director for Youth and Sport at the Council of Europe, "European Sports Law: Collected Papers" by Stephen Weatherill with a Foreword by Jean-Louis Dupont, Avocat in Belgium, and "Players' Agents Worldwide: Legal Aspects" with a Foreword by Roger Blanpain, who is a Professor in Labour Law at the Universities of Leuven (Belgium) and Tilburg (The Netherlands) and one of the founders and the first President of the global players' union FIFPro.

This issue of ISLJ also contains several papers that were presented at the Conference on "The Implications of Poland's Membership of the European Union for Polish Sport" that was organized by the Polish Institute of International Affairs in cooperation with the Polish Ministry of Sport, Warsaw, 28-29 September 2006. In this Conference Roberto Branco Martins and Robert Siekmann participated on behalf of the ASSER International Sports Law Centre.

The ASSER International Sports Law Centre has launched a new initiative to regularly publish data on sports law centres and journals abroad as well as regarding national sports law associations on www.sportslaw.nl and in ISLJ. This initiative is also instrumental to the Centre's support of the Peace Palace Library in The Hague in its effort to maintain and improve its Bibliography on Sports Law.

Last but not least, we heartily welcome Dr Richard Parish, Edge Hill University, United Kingdom, and honorary chairman of the Association for the Study of Sport and the European Union, as a new member of ISLJ's Editorial Board.

The Editors

General Agreement of Cooperation with Budapest Universities on International Sports Law

On 19 March last a General Agreement of Cooperation was signed in Budapest (Hungary) between the Deans of the Faculty of Physical Education and Sport Sciences, Semmelweis University and the Faculty of Law and Political Sciences, Peter Pazmany Catholic University, Dr Mihaly Nyerges and Dr Gyula Bandi respectively, and Dr Robert Siekmann on behalf of the ASSER International Sports Law Centre.

The agreement concerns in particular cooperation on "sports law-specific lawyer training" as from the 2008/2009 academic year. In cooperation with the sports lawyer Dr Andras Nemes of Semmelweis University who also is an Executive Board Member of the International Association of Sports Law (IASL) the programme will be elaborated in the forthcoming year. After the signing of the Agreement at Semmelweis University Robert Siekmann and Roberto Branco Martins lectured on "European and Sport: Law and Policy: Developments and Prospects". In the afternoon a visit was paid by both lecturers to the Law Faculty Library of Peter Pazmany Catholic University and to the tomb of Ferenc Puskas in Budapest. In the evening as part of the social programme of their visit to Hungary they attended the Premier League association football match MTK v. Vasas Budapest.

The “Official Statement from WADA on the Vrijman Report”: Unintentional Proof to the Contrary?

by Emile Vrijman*

I. Introduction

1.1 It is surely nothing less than remarkable that there has, to date - particularly in view of the media attention which the matter of the alleged use by American cyclist Lance Armstrong of prohibited substances itself received at the time - been little or no substantive response to, let alone criticism of, the findings of what has become known as the “*independent investigation of all facts and circumstances regarding the analyses of the urine samples of the 1999 Tour de France conducted by the French WADA-accredited laboratory, the ‘Laboratoire Nationale de Dépistage du Dopage’* (hereinafter: the ‘LNDD’) in Châtenay - Malabry, France”, as reported in “*the Vrijman report*”¹. In spite of the very strong criticism expressed in this report regarding (the quality of) the research it conducted and its subsequent behaviour in this matter, the LNDD has, to this day, not responded to any of the findings of the investigation, while the French newspaper ‘*L’Equipe*’ - responsible for publishing the relevant article in which Lance Armstrong was accused of using the prohibited substance “*recombinant erythropoietin*” (“*r-EPO*”) during the 1999 Tour de France² - merely stated in an editorial that it continued to support fully the findings of its own investigation.

“*There is nothing to retract from the revelations. [...] For our part, we remain convinced of the need to battle without compromise against mafialike tendencies that still and always threaten the sport of cycling. Both in the method and the substance, L’Equipe stands firm.*”³

1.2 Procedural aspects

Where there has been criticism in respect of the investigation that has been conducted, it usually related to the procedural aspects of that investigation. The premature publication of the most important findings of the investigation in the Netherlands newspaper “*de Volkskrant*” on May 31, 2006, in particular appears to have been the cause of this⁴. For some, also my reputation as being pro-athlete - earned because of the role I allegedly played according to some in the doping affair involving the German athletes Katrin Krabbe, Grit Breuer and Silke Möller - as well as my being acquainted with Mr. Hein Verbruggen, the current Vice-President of the “*Union Cycliste Internationale*” (“*UCI*”), the International Cycling Federation, did already provide sufficient reason to criticise (the results of) the investigation that had been conducted, in particular as far as its “*independence*” and “*impartiality*” were concerned⁵.

1.3 WADA’s response

Apart from Lance Armstrong⁶ and the UCI⁷, the only other party directly involved in this matter that did respond to (the substance of) the findings contained in the “*Vrijman report*” has been the “*World Anti - Doping Agency*” (“*WADA*”).

In its initial response on May 31, 2006, WADA carefully re-iterated its position that, as far as this investigation was concerned:

“*an investigation into the matter must consider all aspects - not limited to how the damaging information regarding the athletes’ urine samples became public, but also addressing the question whether anti - doping rules were violated by athletes*”⁸

and that:

“*WADA will respond in due course once it has fully examined the report*”⁹.

However, on 2 June 2006, barely two days later and almost three weeks before the results of WADA’s examination of the Vrijman report were published, WADA President Richard Pound, already concluded in an interview with the press agency “*Agence France - Presse*” (“*AFP*”) that the investigation report was full of holes. “*They put as facts things that are suppositions, suspicions and possibilities*”, said Pound¹⁰. He also announced that WADA rejected the “*Vrijman report*” and “*will consider legal action against Vrijman and any organizations including the UCI, that may publicly adopt its conclusions*”¹¹. On 19 June 2006, WADA eventually published its so-called “*Official Statement From WADA On The Vrijman Report*” (hereinafter: “*the Statement*”), “*highlighting a number of unprofessional, inaccurate, unfair and misleading elements of the [Vrijman] report*”¹².

1.4 Purpose of this article

Based on a general analysis of (the content of) *the Statement* itself, this article will examine in detail WADA’s criticism regarding (the conduct of) the investigation in general and, more specifically, its results, in particular as far as the assessment of (the extent and nature of) WADA’s involvement in this matter and the legitimacy of that involvement are concerned. Furthermore, this article will show why both the manner of WADA’s response, as well as the arguments it has put forward in *the Statement*, appear to confirm - it must be assumed unintentionally - rather than deny the investigation’s findings and assessment of WADA’s involvement in this matter.

Finally, this article will consider whether, and to what extent, the investigation’s findings regarding WADA might, at the same time, provide a possible explanation for the absence of any response or reaction, let alone action, by the “*International Olympic Committee*” (“*IOC*”), “*International Sports Federations*” (“*IFs*”) and national governments. Given the fact, however, that almost one year has passed since the “*Vrijman report*” was first published, I will begin by briefly summarising the principal facts and events which prompted the (“*UCI*”), the coordinating International Federation responsible for

* Former Director of NeCeDo (The Netherlands Centre for Doping Affairs).

1 The expression “*the Vrijman report*” was first used to describe the report of the “*independent investigation of all facts and circumstances regarding the analyses of the urine samples of the 1999 Tour de France conducted by the French WADA-accredited laboratory, the ‘Laboratoire Nationale de Dépistage du Dopage’ (LNDD) in Châtenay - Malabry, France*”, by the “*World Anti-Doping Agency*” (WADA). See: WADA press release, “*WADA*

Expresses Concern regarding Vrijman Report”, May 31, 2006.

2 Damien Ressayot, “*Le mensonge d’Armstrong*”, *L’Equipe*, August 23, 2005.

3 *L’Equipe*, June 1, 2006.

4 R. Kerckhoffs, “*UCI woedend op advocaat Vrijman*”, *de Telegraaf*, June 1, 2006. See also: J. Macur and S. Abt, “*Investigator and Anti-Doping Group Clash on Armstrong Test*”, *New York Times*, May 31, 2006.

5 Jens Jungermann, “*Der Schatten einer gefallenen Radsportlegende*”, *Die Welt*, July 13, 2006.

6 Associated Press, “*Report clears Armstrong of ’99 doping allegations*”, May 31, 2006.

7 UCI Official Statement, “*Vrijman report: statement of the UCI*”, Aigle, Switzerland, June 2, 2006.

8 WADA Expresses Concern regarding Vrijman Report, supra note 1.

9 WADA Expresses Concern regarding Vrijman Report, supra note 1.

10 Agence France-Presse, “*WADA rejects report that cleared Armstrong*”, June 2, 2006.

11 Id. The response of WADA’s President Pound bears a remarkable resemblance,

both in nature, as well as in wording, to those usually made by athletes reported as having been found guilty of having committed a doping offence. To date however, no legal action has been taken either against the investigator, Lance Armstrong or any organization having adopted the conclusions of the investigation, including the UCI.

12 WADA, “*WADA Official Statement on Inaccuracies of Vrijman Report*”, Montreal, Canada, June 19, 2006.

the sport of cycling, at the time to commission the independent investigation concerned, before proceeding to consider the main findings of the investigation in this matter as contained in the “*Vrijman report*”.

II. The reason for an investigation

2.1 An article in a newspaper

On 23 August 2005, the French (sports) newspaper, *L'Equipe*, published an article headlined “*The Armstrong lie*” written by the French journalist Damien Ressiot¹³. In this article, Ressiot accused the American cyclist and seven times-winner of the Tour de France, Lance Armstrong, of having used the prohibited substance *r-EPO* during the 1999 Tour de France. According to Ressiot, six of Armstrong's urine samples from the 1999 Tour de France allegedly tested positive for *r-EPO* when analysed by the LNDD as part of ongoing research to further improve the existing detection method for *r-EPO*. In addition, Ressiot alleged that six urine samples, from six other riders, had also tested positive for *r-EPO*₁₄.

Ressiot was able to make this accusation against Armstrong because he not only was aware of the contents of the relevant research report of the LNDD, but also had in his possession copies of all doping control forms relating to the urine samples collected from Lance Armstrong during the 1999 Tour de France. According to WADA, Ressiot had, at his own request, obtained the copies of these forms from the UCI itself¹⁵. These copies revealed the original code numbers present on the glass bottles that had been used during the 1999 Tour de France to collect and store the relevant urine samples for each separate doping control that had been carried out at the time on Lance Armstrong. As the LNDD had, at the express and repeated request of WADA, in addition to the analytical findings for each urine sample, also specified in its research report for each of these urine samples - as “*additional information*”¹⁶ - the aforementioned original code numbers, it was simple for Ressiot to establish - by comparing the code numbers appearing on the aforementioned doping control forms with the code numbers reported as such in the LNDD's research report - which of these urine samples from the 1999 Tour de France had been obtained from Lance Armstrong and what the result of the LNDD's analysis that been¹⁷.

Ressiot's article triggered a storm of (widely varying) responses in the international sports world. While Lance Armstrong, in his initial response, expressly denied ever having used any Prohibited Substance and questioned the manner in which the LNDD apparently had conducted the analyses of these urine samples, Tour de France director Jean - Marie Leblanc, by contrast, stated in an interview with *L'Equipe* that, as far as he was concerned, it was a “*proven scientific fact*” that Armstrong had used a banned substance during the 1999 Tour de France¹⁸. WADA chairman Richard Pound also considered that “*doping*” was likely to have been used¹⁹, while Professor de Ceaurriz, director of the LNDD, in an interview with the Netherlands newspaper “*De Volkskrant*” expressed having no doubt whatsoever as far as the results of his laboratory's analyses were concerned²⁰.

Within days, heated debates were conducted in the media regarding the credibility of the article in question, as well as the nature, the reliability and - above all - the purpose of the analyses conducted by the LNDD²¹. All sports organisations and anti-doping bodies, both national and international, that had become involved in this affair in one way or another quickly agreed therefore, in the face of the public commotion that had arisen, on the necessity of conducting an investigation in this matter. The same could not be said, however, or at least to a far lesser degree, with regard to the objective(s) of such an investigation.

2.2 An investigation?

WADA and the UCI in particular strongly disagreed with one another regarding the objectives of the investigation. According to WADA, the only aspect of this matter the UCI was really interested in to investigate was the question of how confidential information in this matter could have been disclosed. WADA however, took the position that such an investigation should be concerned with all aspects of the matter - including such questions as to whether the LNDD's research findings in this matter were correct, if the riders concerned had in fact committed an “*anti-doping rule violation*” as well as the extent of the use of *r-EPO*, during both the 1998 and the 1999 Tours de France, including the identification of those riders implicated in the use of *r-EPO* at the time - and not just one or two aspects only²². WADA therefore informed the UCI in late September 2005 that it did not wish to cooperate (further) in such a one-sided investigation and that it was considering the possibility, if necessary, of conducting its own investigation²³. The UCI responded to this notification from WADA by announcing on 6 October 2006 that it was concerned that “*such an investigation from WADA as an involved party, would be based on aspects out of its [i.e. WADA's] competencies*” and that it had therefore decided to appoint itself an independent investigator: “*to undertake a comprehensive investigation regarding all issues concerning the testing conducted by the French laboratory of urine samples from the 1999 Tour de France*”²⁴.

2.3 Letter of Authority

The UCI explained what it had meant with the preceding words in its so-called “*Letter of Authority*”²⁵. In this letter, the UCI described in detail (the nature and scope of) the mandate the independent investigator had been given. The latter was asked, as part of his investigation, to:

1. determine what the reason(s) has/have been for the LNDD to analyse, in 2004 or 2005, the urine samples collected at the 1998 and 1999 Tours de France, which were being kept within its storage facilities and whether or not Third Parties might have been involved in the decision making process regarding such analyses;
2. determine the manner in which the analyses of the aforementioned urine samples have been conducted by the LNDD, in particular with regard to compliance with any applicable procedures for WADA accredited laboratories regarding research on and the analysis of urine

13 Ressiot, supra note 2.

14 Ressiot, supra note 2.

15 See: Hedwig Kröner & Jeff Jones, “*Pound: Verbruggen was the leak*”, *Cycling News*, September 16, 2005.

16 According to the “*Vrijman report*”, the expression “*additional information*” should be understood to mean: “*as the following information that is normally not included in a routine research report: i.e. the code numbers present on the original glass bottles used for doping controls during the 1998 and the 1999 Tour de France, but also the name of the sport, the name of the race, codes indicating the successive deliveries of samples to the LNDD.*” See: Emile N. Vrijman et al., *Report Independent Investigation Analysis*

Samples from the 1999 Tour de France, Scholten c.s. Advocaten, The Hague, the Netherlands, May 31, 2006, par. 3-5, p. 47

17 Hedwig Kröner, “*The author of it all*”, *Cycling News*, September 7, 2005.

18 “*For the first time, and these are no longer rumours or insinuations, these are proven scientific facts; someone has shown me that in 1999 Armstrong had a banned substance called EPO in his body*”. See: Angela Doland, “*Tour Chief: Armstrong Doping Proven Fact*”, Associated Press, August 24, 2005.

19 Hans - Joachim Seppelt, “*Pound siebt Dopingaktivität bei Armstrong*”, *Netzzeitung*, September 5, 2005.

20 Marije Randewijk, “*Een zaak met duidelijke feiten*” [A matter of clear facts],

de Volkskrant, October 23, 2005.

21 Prof. Ayotte, Director of the WADA - accredited doping control laboratory “*INRS-Institut Armand Frappier*”, Pointe-Claire, Quebec, Canada, said they had been extremely surprised at her laboratory that “*urine samples could have been tested in 2004 and have revealed the presence of EPO*”. According to Ayotte, “*EPO - in its natural state or the synthesized version - is not stable in urine, even if stored at minus 20 degrees*”. See: Charles Pelkey, “*Top lab official wonders if delayed testing is possible. We are not that lucky here, says Canada's Christiane Ayotte*”, *VeloNews*, August 23, 2005.

22 Emile N. Vrijman et al., *Report Independent Investigation Analysis*

Samples from the 1999 Tour de France, Scholten c.s. Advocaten, The Hague, the Netherlands, May 31, 2006, n.37.

23 Emile N. Vrijman et al., *Report Independent Investigation Analysis Samples from the 1999 Tour de France*, Scholten c.s. Advocaten, The Hague, the Netherlands, May 31, 2006, n.75.

24 UCI press release, “*Analysis of samples from the 1999 Tour de France: Independent investigator appointed by the UCI*”, UCI, Aigle, Zwitserland, October 6, 2005.

25 Letter from Pat McQuaid, President, UCI, to Emile Vrijman, independent investigator (November 9, 2005).

samples conducted for doping control purposes in general and for the Prohibited Substance EPO in particular;

3. examine the manner in which the LNDD -after having completed the analyses of the aforementioned urine samples- subsequently reported its findings, to whom it did report those findings and why, in particular with regard to the inclusion of data allowing the owner of the sample to be identified;

4. examine allegations that a number of these urine samples should be regarded as constituting a so-called adverse analytical finding under applicable anti-doping rules of the UCI; and, if so

5. give an opinion on whether or not these alleged adverse analytical findings may be considered for an apparent anti-doping rule violation justifying the opening of disciplinary proceedings according to the applicable anti-doping rules, regulations and procedures of the UCI; and

6. examine how confidential research reports and doping control documents came in the possession of an unauthorized Third Party.”²⁶

It is evident from the above list that the investigation the UCI intended to have conducted by the independent investigator, entailed more than just finding the answer to the question how confidential information in this matter - i.e. the analyses results of the urine samples from the 1999 Tour de France and the identity of the riders concerned - could have been leaked and who or which body had been responsible for this. No fewer than four (4) of the six (6) issues that were to be examined relate, either directly or indirectly, to the analyses conducted by the LNDD in this matter and their evaluation, thus making it clear where the focal point of the independent investigation that was to be carried out in this matter would lie, namely on the analysis of the urine samples collected from the 1998 and 1999 Tours de France by the LNDD.

At the same time, UCI chairman, Pat McQuaid, also emphasized in the aforementioned “Letter of Authority” the independent nature of the investigation to be conducted by specifying that:

“Mr. Vrijman is fully authorized by the UCI to make any inquiry he deems necessary and appropriate to fulfil his mission.”;

and, further, that:

“In conducting his investigation and preparing his report, Mr. Vrijman is to be free from control of the UCI, and any person working for, or associated with the UCI and/or its members.”²⁷

McQuaid concluded his “Letter of Authority” by calling explicitly on all persons and bodies associated with the UCI’s doping control programme - including WADA and the LNDD - to cooperate fully and completely with the independent investigation:

“that all persons associated with the UCI and its doping control program -including the LNDD, the World Anti-Doping Agency (WADA), the various WADA accredited doping control laboratories and all officers, directors and staff of those laboratories, national cycling federations, as well as coaches, administrators, officials, cyclists and other individuals associated with international cycling and/or cycling events- shall fully and completely cooperate with Mr. Vrijman and his investigation.”²⁸

III. Findings of the independent investigation

3.1 The investigators²⁹ have, as part of their independent investigation, examined in detail all relevant aspects of the research conducted by the LNDD in this matter and have included such aspects in their final opinion on this matter. As it is impossible to discuss all the aspects in the context of this contribution, I will limit myself in this article to those conclusions relating to the manner in which (i) the research concerned was conducted in terms of the laboratory conditions, (ii) the urine samples were analysed were managed and handled, (iii) the results of the research thus obtained were reported, (iv) other persons and bodies subsequently handled the information thus

obtained, and (v) how the testing results concerned must, finally, be assessed from the perspective of enforcement.

3.2 Analyses LNDD of the urine samples from the 1999 Tour de France

The investigators have taken the position that the analyses results of urine samples from the 1999 Tour de France identified by the LNDD as “positive” in its final research report do not qualify as a “Presumptive Analytical Finding”³⁰, let alone an “Adverse Analytical Finding” as respectively defined in either WADA’s “International Standard for Laboratories” (“ISL”) or “World Anti-Doping Code” (“WADC”)³¹.

This is further compounded by the fact that the “accelerated measurement procedure” used for conducting the analyses of the urine samples from the 1998 and the 1999 Tours de France was not validated and to date never fully disclosed by the LNDD to the investigator. Furthermore, the LNDD has also not disclosed the standards for declaring a sample to be allegedly positive under the research and no assessment has been made as to whether those standards comply with the current WADA rules³² for declaring a *r-EPO* screen to be presumptively positive³³.

Moreover, the LNDD admitted that it is unable to produce any “chain of custody”, making it impossible to link, in a sufficiently reliable manner for doping control purposes, an analysis result to a particular sample. Moreover the fact that the samples were opened previously and used for unknown research purposes means that the “integrity” of the urine samples from the 1998 and the 1999 Tours de France can not be guaranteed as required by the applicable rules³⁴. Consequently, the LNDD is also unable to prove, let alone guarantee, that a strict temperature control with regard to the urine samples from the 1998 and the 1999 Tours de France had been maintained continuously all the way through from receipt, sometime in 1998 or 1999, to their final disposition, let alone that this had been done at a temperature of -20°C, given that the contents of some of these urine samples had already been thawed once before, as some of these had been opened before for unknown research purposes³⁵.

3.3 The LNDD’s report

The investigators are of the opinion that the manner in which the LNDD documented and eventually reported the findings of the research it conducted on the urine samples from the 1999 Tour de France in this matter is contrary to the applicable rules and regulations for WADA-accredited doping control laboratories with regard

26 Id.

27 Id.

28 Id.

29 Although the request to conduct the independent investigation in this matter had been directed at the author only, the actual investigation has been conducted by a team consisting, besides the author, of Dr. Adriaan van der Veen, a scientist currently working for the Dutch Metrology Laboratory, the Nederlands Meetinstituut (NMI), in Delft, the Netherlands and Mr. Paul Scholten, currently heading Scholten c.s. advocaten in The Hague, the Netherlands. Being an internationally renowned expert regarding the application by laboratories in general and doping control laboratories in particular of the international standard “ISO/IEC 17025: 1999”, “General requirements for the competence of testing and calibration laboratories” (hereinafter “ISO/IEC 17025 international standard”), Dr. Van der Veen has been responsible for the evaluation of all of the technical issues of the independent investigation concerning the measurements and related matters such as the application of procedural rules and implementation of

requirements. Mr. Paul Scholten has been responsible for providing the necessary administrative support.

30 A “Presumptive Analytical Finding” is identified as “The status of a Sample test result for which there is an adverse screening test, but a confirmation test has not been performed.”. WADA, “International Standard for Laboratories”, Version 4.0, August 2004, Lausanne, Switzerland, p. 11 [hereinafter ISL].

31 WADA, *World Anti-Doping Code*, Lausanne, Switzerland, 2003, “Definitions”, p. 72 [hereinafter WADC].

32 WADA, supra at 30. See also: WADA, Technical Document - TD2004EPO, “Harmonization of the method for identification of Epoetin alfa and beta (EPO) and Darbepoetin Alfa (NESP) by IEF-double blotting and chemiluminescent detection”, version 1.0, Montreal, Canada, October 15, 2004 (approved January 15, 2005).

33 Vrijman, supra at 16, § 4.58, p. 93.

34 At least not for doping control purposes. Vrijman, supra at 16, § 4.59 - 4.60, p. 93 - 94.

35 Vrijman, supra at 16, § 4.56, p. 91 - 92.

to documenting and reporting, as set out in the relevant laws and rules in this respect³⁶.

The LNDD should - under the aforementioned rules - have made a reservation in its research report with regard both to the (degree of) representativeness of the reported analyses results as well as to the traceability of these results to specific urine samples and, additionally, should have refrained from including in its research report any (additional) information which could possibly be used to link the reported analyses results with the identity of the rider(s) supposedly responsible for having submitted these urine samples at the time³⁷. Finally, the LNDD should have refrained from making any statements in the media which violate the "athlete's confidentiality" which it must necessarily respect in this matter³⁸.

If, on the other hand, the LNDD had stated in its research report that it:

- (i) when testing the urine samples from the 1999 Tour de France, had not used the mandatory analytical methods prescribed in this regard for WADA-accredited doping control laboratories, but instead had used an analytical method which was neither validated, nor approved by WADA and which differed considerably from the mandatory required analytical methods for *r-EPO*;
- (ii) was not able to provide the required "chain - of - custody" for any of the analysed urine samples, in the knowledge that several of these urine samples had previously been opened for other unknown research purposes; and
- (iii) had refrained from including in its report any (additional) information which could possibly be used to link the reported analyses results, on the one hand, with the identity of the rider(s) supposedly responsible for having submitted the urine samples concerned at the time, on the other;

the article in *L'Equipe* could not have been written and there would have been no grounds whatsoever for the commotion and speculation in this matter which have since arisen³⁹. By commenting in public on (various aspects of) this matter in its role as *WADA - laboratory*, however, the LNDD has not only violated the confidentiality in this matter which it was required to observe, but it has, moreover, further aggravated the existing misunderstandings surrounding its analysis of the urine samples from the 1999 Tour de France 1999 and hence caused a (further) increase in the public commotion⁴⁰.

3.4 The UCI's role

The investigators reject the suggestion that it was the UCI itself which, by handing over copies of the doping control forms pertaining to Lance Armstrong from the 1999 Tour de France to the journalist Ressiot, violated the "athlete's confidentiality" which all persons and bodies involved in this matter were required to respect⁴¹.

Firstly, at the time Ressiot submitted his request to the UCI, there was absolutely no question (yet) of a possible "doping affair" relating to Lance Armstrong, or the 1999 Tour de France. The UCI was therefore not acting in the capacity of responsible "Anti-Doping Organization" ("ADO"), as provided for in the applicable regulations⁴². The UCI did not know and could not reasonably have known that "athlete confidentiality" might be an issue for consideration when

it was confronted with Mr. Ressiot's request. Secondly and more importantly, the investigators believe that the copies of the aforementioned doping control forms provided by the UCI to Mr. Ressiot, while perhaps useful for the identification, were not material for identifying Armstrong as having been one of the riders supposedly responsible for having submitted one or more of the urine samples from the 1999 Tour de France which the LNDD alleges tested "positive"⁴³.

3.5 WADA's role

As regards the attitude and conduct of WADA, the investigators have come to the conclusion that the request made by WADA to the LNDD - that it should include in its research report not only the analyses results of each of the urine sample from the 1999 Tour de France, but also the code numbers present on the original glass bottles used to collect and store these urine samples when collected during the 1999 Tour de France - was the condition without which the relevant article in *L'Equipe* could never have been written, let alone that this affair could ever have arisen⁴⁴. The investigators are, furthermore, of the opinion that there was no reason whatsoever for WADA to make any such request to the LNDD and consider the justification(s) (subsequently) given by WADA to be implausible. The above considerations necessarily entail, in the investigators' opinion, that WADA officials should have refrained in this matter from (continually) making statements in the media which appeared to be intended to give weight to the accusations appearing in *L'Equipe* but which were, in actual fact, incorrect and, moreover, violated the "athlete's confidentiality" which they were required to respect in this matter⁴⁵.

3.6 Evaluation of the results of the investigation

In view of the above-mentioned findings, it will come as no surprise that the investigators reached the conclusion that there is no question, nor can there have been any question, that an anti-doping rule violation had occurred in this matter, and that the UCI is therefore recommended:

*"to refrain from initiating any disciplinary actions whatsoever regarding those riders alleged to have been responsible for causing one or more alleged "positive" findings, on the basis of the confidential reports of the LNDD "Recherche EPO Tour de France 1998" and "Recherche EPO Tour de France 1999", and to inform all of the riders involved that no action will be taken based on the research testing by the LNDD."*⁴⁶

IV. The "WADA Statement"

4.1 Structure of the WADA Statement

An initial consideration (of the contents) of the *WADA Statement* confirms the picture outlined above with respect to the criticism that has so far been expressed of the findings of the independent investigation in this matter. Eight (8) of the twelve (12) pages of this response are used to describe certain facts and procedural aspects of the research that was carried out which are considered relevant. WADA reserves no more than four (4) pages for its criticism of the substance of the research that was conducted, and it is worth noting that a substantial part of that criticism is expressed in such general terms that it cannot be linked (any longer) with concrete findings of the investigation.

³⁶ This relates, successively, to the following relevant legislation and regulations:

- WADA, supra at 16, Annex B, "Laboratory Code of Ethics";
- International Standard, "General requirements for the competence of testing and calibration laboratories, ISO/IEC 17025", 1999;
- World Medical Association ("WMA"), "World Medical Association Declaration of Helsinki, Ethical Principles for Medical Research Involving Human Subjects", Helsinki, June, 1964; and
- The "Code Civil", the French Civil Code.

See: Vrijman, supra at 16, § 4.66, p. 99 and § 4.72, p. 101.

³⁷ Vrijman, supra at 16, § 4.73, p. 101 - 102.

³⁸ Vrijman, supra at 16, § 4.86, p. 108.

³⁹ Vrijman, supra at 16, § 4.73, p. 101 - 102, § 4.83, p. 106.

⁴⁰ Vrijman, supra at 16, § 1.17, p. 17.

⁴¹ Vrijman, supra at 16, § 4.91, p. 111.

⁴² WADA, "Result Management Guidelines", version 1.0, February 2004, art. 1.1, p.7.

⁴³ Vrijman, supra at 16, § 4.92, p. 111 - 112.

⁴⁴ "According to Mr Ressiot, the manner in which the LNDD had structured the results table of its report - i.e. listing the

sequence of each of the batches, as well as the exact number of urine samples per batch, in the same (chronological) order as the stages of the 1999 Tour de France they were collected at - was already sufficient to allow him to determine the exact stage these urine samples referred to and subsequently the identity of the riders who were tested at that stage. While it is true that possession of these forms might have confirmed matters for Mr. Ressiot, to permit him to claim that that six (6) of Lance Armstrong's fifteen (15) urine samples were positive, the fact remains that

he did not necessarily need copies of the doping control forms of Lance Armstrong from the 1999 Tour de France to identify Lance Armstrong as having been one of the riders supposedly responsible for having submitted one (1) or more of the alleged positive urine samples." See: Vrijman, supra at 16, § 4.22 - 4.25, p. 65 - 67.

⁴⁴ Vrijman, supra at 16, § 4.95, p. 113.

⁴⁵ Vrijman, supra at 16, § 4.93, p. 112 - 113.

⁴⁶ Vrijman, supra at 16, § 1.15, p. 17.

4.2 WADA's criticism with regard to the findings of the investigation

4.2.1 Factual inaccuracies

The main charge which WADA levels at the investigators in this matter is that in their report the investigators wrongly created the impression that the LNDD should have conducted its research of the urine samples from the 1999 Tour de France in the same manner and using the same analytical procedures as it should have done when examining these urine samples for doping control purposes:

*"The process used by the French laboratory in conducting its research was not the process used for analyzing samples for the purpose of sanctions. Mr. Vrijman, at all times, confuses this fundamental difference and seems to indicate that, in conducting research, the laboratory was required to carry it out in the same manner as for analyzing samples for adverse analytical findings. This is not the case, and Mr. Vrijman, in directing himself to the rules relating to samples collected for analysis rather than understanding the difference for research, has totally misdirected himself in his inquiry."*⁴⁷

Additionally, WADA asserts that it is incorrectly suggested in the investigation report that WADA was not formed until 2003. "As any expert in anti-doping matters knows, WADA was formed in 1999. The Code, for which WADA is responsible, and its allied Standards, have been in place since 1 January 2004", states WADA in the aforementioned Statement⁴⁸.

Finally, WADA says in its Statement that it did not exercise any pressure on the LNDD in this matter and that there was no "leak" from WADA⁴⁹.

*"WADA solely advised the laboratory it would be interested in the findings, and disclosed this in the response WADA gave to Vrijman's questions. There was no other action taken by WADA in relation to the publication of the results of the research."*⁵⁰

4.2.2 Aspects which were wrongly not investigated

Furthermore, WADA is of the opinion that the investigators have wrongly neglected to include the following aspects relating to this matter in their investigation. For example, it states, the investigators neglected:

1. to establish in their report which rules and laws were applicable in 1999 at the time of the events which led to the research being conducted⁵¹; and
2. to inquire into why the UCI sought Armstrong's consent for the release of copies of all the doping control forms relating to him from the 1999 Tour de France as well as into why Armstrong gave his consent to this request⁵².

4.3 Response to WADA's criticisms

4.3.1 Factual inaccuracies

It would appear that WADA has not studied the *Vrijman report*, or at least not fully, before expressing its criticism in relation to it. Firstly, nowhere in their report do the investigators assert that the LNDD was obliged, when conducting its testing of the urine samples from the 1999 Tour de France, to use the same analytical methods and procedures which are mandatory when testing urine samples for doping control purposes. Additionally, the investigators have stated, with respect to the "accelerated measurement procedure" used by the LNDD, that this procedure does not satisfy the relevant requirements, including those relating to conducting of research, and that the reported analytical findings may therefore not be qualified as "analytical findings". This is not just because it concerns a non-validated analytical method, also the criteria the LNDD applied to declare a urine sample "positive" are unknown, and no information has been forwarded as to how these criteria might relate to those normally applied in case of mandatory prescribed analytical methods and procedures.

Additionally, the investigators have been requested explicitly in the "Letter of Authority" to establish:

"the manner in which the analyses of the aforementioned urine samples have been conducted by the LNDD, in particular with regard to compliance with any applicable procedures for WADA accredited laboratories regarding research on and the analysis of urine samples conducted for doping control purposes in general and for the Prohibited Substance EPO in particular";

and, moreover, to investigate the accusations that:

"a number of these urine samples should be regarded as constituting a so-called adverse analytical finding under applicable anti-doping rules of the UCI."

This means that the mandate is to establish not just the manner in which the LNDD conducted its "scientific research" of the urine samples concerned, but also how this "scientific research" and the results thereof relate to the manner in which these urine samples are normally analysed in WADA-accredited doping control laboratories. After all, according to the *WADA Code* and the *UCI Anti - Doping Rules*, there can only be an "Adverse Analytical Finding," or an "anti-doping rule violation" if the urine sample concerned has been analysed according to the mandatory prescribed analytical methods and procedures which are approved by WADA. This makes a comparison between the "accelerated measurement procedure" applied by the LNDD and the mandatory prescribed procedure for the analysis of urine samples for doping purposes unavoidable.

WADA fails to specify on what grounds it has come to the conclusion that it has been suggested in the investigation report that WADA was formed in 2003, and not in 1999. The investigators are in any event unaware of having made any such suggestion in their report. To the extent that this may nonetheless be the case, the investigators fail to see the relevance of this with regard to the correctness of their findings in this matter.

WADA asserts, finally, that it has not acted wrongfully in this matter and has not exercised inappropriate pressure on the LNDD to include (additional) information in its research report, let alone that it was responsible for any leak, and furthermore that it took no other action in relation to the publication of the results of the analysis.

Yet it was the LNDD itself which has stated that it was put under pressure by WADA during a period of almost six (6) months to include the aforementioned "additional information" in its research report, in spite of the fact that the information concerned was not necessary for a better understanding of the research that had been conducted, nor for the interpretation of the analyses results. In the absence of further cooperation and information, no evidence has been found for any leaks from WADA in relation to this matter. It remains nonetheless remarkable that the journalist Ressiot should state in an interview that one of reasons for focusing on Armstrong, while paying little or no attention to the six other riders who might also have submitted positive urine samples during the 1999 Tour de France, was the fact that Armstrong, as "patron of the peloton", "addressed WADA director Dick Pound sharply by writing an open letter which got published in a lot of newspapers."⁵³

Finally, it is incorrect that WADA took no further action in relation to the publication of the results of the research. It was WADA that, less than two days after the publication of Ressiot's article in *L'Equipe*, insisted that the UCI carry out an investigation and it was WADA that commented that the question of whether there might possibly be evidence for a doping violation in this matter should be an integral part of such an investigation, including the identification of the riders who at that time were involved with the use of *r-EPO*⁵⁴.

47 WADA, supra at 12, p. 8-9.

48 WADA, supra at 12, p. 10-11.

49 WADA, supra at 12, p. 11.

50 Id.

51 WADA, supra at 12, p. 10-11.

52 WADA, supra at 12, p. 9-10.

53 Hedwig Kröner, supra at 17.

54 Vrijman, supra at 16, § 2.4, p. 25-26.

4.3.2 Aspects which were wrongly not investigated

With regard to this part of its criticism, WADA has also manifestly failed to recognise certain issues. For example, the *Vrijman report* examines in detail the question of which regulations must be deemed relevant in this matter as regards the addressing of the various issues of law in this matter, including the question of who or which body must now be considered as the “owner” or “entitled party” with regard to the urine samples concerned⁵⁵. Perhaps this is the reason why WADA mistakenly designated the so-called “1999 Olympic Movement Anti-Doping Code” as leading in relation to this matter, whereas it is evident from the investigation report that this should be the “1999 IOC Medical Code” because the first code mistakenly referred to by WADA above, the so-called “1999 Olympic Movement Anti-Doping Code”, did not come into force until 1 January 2000.

WADA’s conclusion that the investigators neglected to inquire into why the UCI sought Armstrong’s consent for the release of copies of all the doping control forms relating to him from the 1999 Tour de France as well as into why Armstrong gave his consent to this request is incorrect. This is also the case with regard to the conclusion that there is allegedly evidence of a “serious factual and process deficiency, which cannot be remedied in any fashion” because the investigators are of the opinion that further investigation in relation to this aspect would not serve any purpose since the relevant article in *L’Equipe* could also be published without the relevant copies of the doping control forms of Lance Armstrong from the 1999 Tour de France.

The *Vrijman report* not only specifies in detail why Ressiot had requested the UCI to make the doping control forms of Lance Armstrong from the 1999 Tour de France available to him, but also how the UCI handled this request and the reason(s) for this. The investigators’ conclusion that the release by the UCI of copies of the aforementioned doping control forms to Ressiot must not be deemed material to the publication of the relevant article in *L’Equipe* because Ressiot would have been able to write the article concerned even without these copies follows from the comments on this matter which Ressiot himself made in an interview on September 7, 2005.

Q “How can you know that four of the positive samples in 1999 were taken after the prologue?”

A “When you read the results table of the laboratory, you see that the first series of samples that arrived in Châtenay-Malabry (the four flasks) bear one number that differs from the next number of presumably the first stage, where Lance’s sample also revealed traces of EPO. Therefore we can conclude this.”

Q “But the names of the four riders tested at the prologue 1999 are no secret?”

A “Yes, that is true. If you take the book *L.A. Confidential*, on page 202, the names of the riders that were tested after the prologue are listed. [Cycling news knows of at least one other source which would also reveal those rider’s names] But I don’t want to take the responsibility of publishing them because on the lab results table, there are very technical remarks added to one of the prologue samples, which also tested positive but where some sort of reservations were made by the lab director. So we decided not to publish those names, as we’d need the original 1999 protocols to identify which sample belonged to whom. But the concerns of the lab director weren’t directed at Armstrong’s sample.”⁵⁶

4.4 Conclusions with regard to the WADA Statement

It is evident, in view of the above, that WADA is unable to specify, let alone substantiate, the “holes” which it claims to have identified in the *Vrijman report*. Not a single point of the criticism levelled by WADA of the investigators’ conclusions as set out in the aforementioned report is factually correct, let alone correct at law.

At the same time, it is remarkable that WADA with respect to the main aspects in this matter - in spite of overwhelming evidence to the contrary - nonetheless continues to maintain in full its own interpretation of the facts. For example, WADA maintains, against better

judgement, that the research conducted by the LNDD satisfies all regulatory requirements and that the findings thus obtained are representative, even though the LNDD itself acknowledges that, with regard to the analysis of the urine samples as well as to the storage of such samples, it did not act in accordance with the relevant mandatory procedural requirements and analytical methods prescribed by WADA-accredited doping control laboratories. In spite of a statement from the LNDD to the contrary, WADA maintains that it did not exercise (inappropriate) pressure on the LNDD in this matter also to include in its research report, alongside the analytical findings, (additional) information for each of the urine samples analysed by it, for which, viewed objectively, there is moreover not a single reason, and the relevant statements issued in respect to this are not, or are barely, plausible. The continually repeated accusation that the UCI is itself responsible for the breach of confidentiality in this matter is a further example. WADA claims that no blame can therefore be attached to it in this matter. After all, “Without a breach of rule, there cannot be allegations of misbehavior or wrongdoings. There have not been any”⁵⁷.

That WADA understands very clearly that even without a breach of rule there can be evidence of wrongdoings is evident from the fact that WADA in its *Statement* fails to address in any way the investigators’ observation that its request to the LNDD - to also include (additional) information in the research report - was the condition in this matter without which the relevant article in *L’Equipe* could never have been written, let alone that this affair could ever have occurred. The existence of this recognition, but also the knowledge of having acted inappropriately in this manner, is perhaps most tellingly illustrated by the fact that there is not a single reference to the request concerned in the listing of relevant facts in the *Statement*.

The above might actually explain the absence of any response or reaction, let alone action, from the “International Olympic Committee” (“IOC”), (umbrella) “International Sports Federations” (“IFs”) and national authorities in relation to the findings of the independent investigators in this matter as set out in the aforementioned *Vrijman report*. After all, they were and still are, all “stakeholders” of WADA.

Postscript

However, on January 7, 2007, the IOC Executive Board decided to approve the conclusion and recommendation made by the IOC Ethics Commission concerning the complaint submitted on behalf of Lance Armstrong against WADA and Mr. Richard Pound of WADA and IOC member, which was founded essentially on the *Vrijman report*. According to the IOC Ethics Commission it appears from the press cutting attached to the complaint, that:

“Mr Richard Pound made personal statements which could have been regarded as likely to impugn the probity of an athlete, given the high profile of the sports personalities in question.

The Ethics Commission, like all the Olympic family members, can only approve of and support the unceasing fight against the scourge of doping conducted by Mr Richard Pound, WADA Chairman and IOC member.

Nonetheless, it recalls that, in accordance with the principle set out under point 4 of the Fundamental Principles of Olympism in the Olympic Charter, “the Olympic spirit which inspires the whole Olympic Movement, requires mutual understanding, a spirit of friendship, solidarity and fair play” within the Olympic Family. In this regard, a degree of prudence is indispensable out of respect for the Olympic Spirit. As a result, the Ethics Commission recommends the IOC Executive Board remind Mr Richard Pound of the obligation to exercise greater prudence consistent with the Olympic spirit when making public pronouncements that may affect the reputation of others.”

⁵⁵ *Vrijman*, supra at 16, § 4.47, p. 80-84.

⁵⁷ WADA, supra at 12, p. 10.

⁵⁶ Hedwig Kröner, supra at 17.

Appendix

International Olympic Committee Ethics Commission Decision with Recommendation No. D/01/07 Case No.-03/2006

Mr Lance Armstrong

v/

Richard Pound, IOC member and WADA Chairman,
and the World Anti-Doping Agency (WADA)

Referral:

On 3 July 2006, the Ethics Commission received a complaint from Mr Mark S. Levinstein, an American lawyer, on behalf of Mr Lance Armstrong jointly against Mr Richard Pound, IOC member and Chairman of the World Anti-Doping Agency (WADA), and against WADA itself. Attached to this complaint was a copy of the report on the “independent investigation - analysis samples from the 1999 Tour de France” by Mr Emile Vrijman, a lawyer in The Hague (NL), and the appeal submitted by Mr Levinstein before the IOC Executive Board on 20 June 2006, based on the conclusions of this investigation.

After the validity of the brief which Mr Armstrong had given to his lawyer was established, the parties concerned by the complaint, WADA and Mr Richard Pound, were informed by mail on 7 July 2006 that they had the possibility of submitting observations.

At the same time, the Ethics Commission was informed by the IOC President that the IOC Executive Board had proposed to Mr Armstrong, WADA and its Chairman, the French Laboratoire National de Dépistage du Dopage (LNDD) and the International Cycling Union (UCI), that they make use of the mediation procedure provided before the Court of Arbitration for Sport (CAS) to settle the dispute between them following the publication of a press article in the French newspaper *L'Equipe* on 23 August 2005.

The Ethics Commission members wished to allow the greatest possible scope for mediation to resolve the dispute.

In a letter dated 13 July, WADA asserted that, as an international organisation, it did not fall under the jurisdiction of the IOC Ethics Commission.

In a letter dated the same day, Mr Richard Pound asserted that, as he was involved as the Chairman of WADA, the jurisdiction of the Ethics Commission did not apply to him for the same reasons as those cited by WADA.

After being informed of the official decision regarding the impossibility of implementing the mediation procedure before the CAS, the Ethics Commission Chairman asked Mr Lance Armstrong to refer the case to the Commission once more.

Mr Armstrong confirmed his complaint by return of fax on 25 October 2006 in exactly the same terms as in the complaint filed on 3 July 2006. At his request, Mr Levinstein was allowed a period of time in which to submit any relevant document. On 27 November 2006, it was noted that no new document had been sent. On 9 January 2007, Mr Levinstein sent a copy of a press article dated 7 January 2007.

Mr Richard Pound's observations on these various documents were requested. But the latter did not react.

Facts:

The following facts emerge from the documents sent:

After two editions of the Tour de France cycling race in 1998 and 1999, the leftover samples from those tested as part of the anti-doping controls were preserved, with the agreement of the athletes, for scientific research purposes. The LNDD performed two studies for research purposes on these samples to improve the precision and reliability of the test results, particularly as regards the detection of EPO. The results of the first study (on the samples from 1998) were published in 2000 in the scientific journal *Nature*, without producing any reaction from the media or the athletes. The results of the second study (on the samples from 1999) were made public, not by a scientific publication,

but by a press article published in the French sports daily *L'Equipe* on 23 August 2005, under the title “le mensonge d'Armstrong” (“Armstrong's lie”), revealing that traces of EPO had been found six times in the urine of American cyclist Lance Armstrong, winner of the Tour in 1999.

After noting that the EPO detection tests carried out in December on the leftover samples were not intended to expose anyone cheating during the 1999 Tour, the author of the article explained that he had been able to compare the numbers of the samples taken from the rider Lance Armstrong, recorded on the doping control forms completed by the Tour doctor in 1999, and match these with the number of the samples tested as part of this scientific study, some of which the LNDD described as positive for EPO.

In the months which followed, the UCI tasked a Dutch lawyer, the former Director of the Dutch Anti-Doping Agency, with conducting an investigation. The report from this investigation did not succeed in proving how the journalist had been able to obtain the different information, even though it did wonder for what reason the additional information identifying the samples used had been included with the scientific report. It did however conclude that the research had been performed on a number of samples which had already been opened and analysed previously; that there had been no internal chain of storage; and that the identity and integrity of the samples was not guaranteed. As a result, the report recommended that the UCI take no disciplinary measures against the cyclists, and Mr Armstrong in particular, on the basis of the LNDD study results.

From all the press articles published after this affair, it appears that Mr Richard Pound made statements to the media which were likely to enable journalists to draw negative conclusions concerning the integrity of Mr Armstrong.

Opinion:

a) Regarding the World Anti-Doping Agency (WADA)

The Ethics Commission notes that, because of the International Convention Against Doping in Sport signed under the auspices of UNESCO in Paris on 19 October 2005 by the IOC and various States, WADA is a body with its own status and organisation, which provides *inter alia* for equal representation of the Olympic Movement and governments of States which are party to it, as well as equal responsibility for the funding of it. Consequently, this organisation falls outside the sole sphere of the Olympic Charter.

The IOC Ethics Commission recalls that its mission is to be found exclusively within the framework of the Olympic Charter and finds that it is not able to intervene to evaluate the conduct of an institution which is not bound by the application of Rule 23 of the Olympic Charter.

As a result, the Ethics Commission decides, pursuant to point B.5 of its Regulations, to declare itself to have no jurisdiction with regard to the complaint against WADA.

b) Regarding the personal activity of Mr Richard Pound, IOC member

With regard to Mr Richard Pound, IOC member, the Ethics Commission notes that he is an Olympic party as defined by the Code of Ethics and that, based on the application of the Code of Ethics by the IOC Session and Executive Board, IOC members in their personal activities must respect their obligations vis-à-vis the Olympic Charter and Code of Ethics at all times, including in their activities outside the IOC.

Mr Armstrong's complaint is founded essentially on the report of the “independent investigation - analysis samples from the 1999 Tour de France”. From reading the conclusions of this report, it is clear that there is no personal reproach, against Mr Richard Pound for his activity.

As a result, without having to assess the content of this report, the Ethics Commission may observe that its conclusions do not contain any incriminating element regarding the personal conduct of Mr Pound, IOC member.

However, from the press cuttings attached to the complaint, it appears that Mr Richard Pound made personal statements which

could have been regarded as likely to impugn the probity of an athlete, given the high profile of the sports personalities in question.

The Ethics Commission, like all the Olympic family members, can only approve of and support the unceasing fight against the scourge of doping conducted by Mr Richard Pound, WADA Chairman and IOC member.

Nonetheless, it recalls that, in accordance with the principle set out under point 4 of the Fundamental Principles of Olympism in the Olympic Charter, “the Olympic spirit, which inspires the whole Olympic Movement, requires mutual understanding, a spirit of friendship, solidarity and fair play” within the Olympic Family. In this regard, a degree of prudence is indispensable out of respect for the Olympic spirit.

As a result, the Ethics Commission recommends that the IOC Executive Board remind Mr Richard Pound of the obligation to exercise greater prudence consistent with the Olympic spirit when making public pronouncements that may affect the reputation of others.

Decision:

After deliberating in accordance with its Statutes, the Ethics Commission decides:

1. to declare itself to have no jurisdiction regarding the complaint made against the World Anti-Doping Agency;
2. to recommend that the IOC Executive Board remind Mr Richard Pound, IOC member, of the obligation to exercise greater prudence consistent with the Olympic spirit when making public pronouncements that may affect the reputation of others.

Done in Lausanne, 2nd February 2007

For the Chairman,
Pâquerette Girard Zappelli
Special Representative

The International Sports
Law Journal

Proportionality in the World Anti-Doping Code: Is There Enough Room for Flexibility?

by Jannica Houben*

The biggest advantage of the introduction of the World Anti-Doping Code in 2004 is the harmonization, but a disadvantage is that there are still some unclear matters left. The drafters of the WADC opted for a system of strict liability with mandatory (tough) penalties and a possibility of sanction reduction in the case of exceptional circumstances. The question of fault or negligence only plays a role in the determination of the sanction. In this article, I will evaluate this system and the rulings by the CAS. Are the sanctions imposed proportionate to the offenses? Does the Code leave room for the use of the principle of proportionality? If yes, does the CAS use the flexibility in the Code?

In this contribution it is argued that the CAS does not interpret the Code in a correct way. Although the Code can be seen as well drafted, the CAS does not use the flexibility that is incorporated therein. But there is hope: recently a CAS Panel held in the *Puerta* case¹ that “in those very rare cases in which Articles 10.5.1 and 10.5.2 of the WADC do not provide a just and proportionate sanction, i.e., when there is a gap or lacuna in the WADC, that gap or lacuna must be filled by the Panel.”²

In this article I will, in the first section, look at the system of strict liability, as this is the most important part of the system of sanctioning.

Then I will evaluate the burden of proof and the different types of

sanctions and sanction reduction under the Code, in section 2, since these are important features in the Code.

In section 3 I will come to the main point of this article: proportionality. I will look at the way CAS used the principle of proportionality before and after the introduction of the Code. In this section I will also look at the recent developments in the *Puerta* case.

I will end with a conclusion.

1. Strict liability

The Code lies down a principle of strict liability. Under this system the question of fault or negligence only comes into play in the determination of the sanction. The drafters opted for this system because they believed it to be the best way to fight doping in an effective manner.

The rule states that the mere presence of a prohibited substance will be sufficient to cause the loss of any results arising out of the competition during which the positive sample was taken. Article 9 of the Code stipulates that an anti-doping rule violation in connection with an in-competition test automatically leads to disqualification of the individual result. This is because the athlete had a potential advantage over the other athletes, regardless of whether he or she was at fault in any way.

The system of strict liability was known before, both in CAS case law and in the vast majority of existing anti-doping rules (The IOC Anti-Doping Code for example). The WADC can be seen as a codification of this principle. In fact, CAS has always used the strict liability principle: in one of the first doping cases ever to be examined by CAS a provision was qualified as a strict liability rule³. In the pre WADC *Quigley* case⁴ the CAS panel stated that the practical necessities of the fight against doping justify the application of the strict liability rule.

Two purposes of WADA are the protection of the athlete’s right to participate in a doping-free sport and securing a harmonized, coordinated and effective fight against doping⁵. To reach this second goal the concept of strict liability is laid down in the WADC. In a line of awards⁶ the panels stated that, notwithstanding a certain degree of hardship, this strict rule was necessary. In literature too, the concept

* Clifford Chance LLP Law Firm, Amsterdam, The Netherlands. This article is an elaborated version of a master thesis at the University of Tilburg (2006).

1 CAS 2006/A/1025 *Puerta v. ITF*.

2 CAS 2006/A/1025 *Puerta v. ITF*, 11.7.23.

3 CAS 91/A/53, *G. v. International Equestrian Federation*.

4 CAS 94/129, *USA Shooting & Quigley v. UIT*.

5 *The Court of Arbitration for Sport 1984-2004*, Ian S. Blakshaw, Robert C.S. Siekmann & Janwillem Soek, p. 260

T.M.C. Asser Press, The Hague, The Netherlands.

6 See e.g. CAS 95/141, *V. v. FINA*, CAS 99/A/239, *UCI v. Moller*.

7 See for example: *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration of the German legal position*, K. Vieweg, *Marquette Sports Law Review*, vol. 37, 2004-2005 and *Harmonization of Anti-Doping Code through arbitration: the case law of the Court of Arbitration for Sport*, F. Oschütz, *Marquette Sports Law Review*, 675 2001-2002.

is generally considered a necessary instrument in the fight against doping⁷, although there is criticism as well⁸; as the outcome in some cases might be quite harsh and can be seen as unfair. The criticism is especially pointed at the imposing of additional sanctions without addressing the issue of guilt⁹. As long as only disqualification was at stake, the CAS panels have always felt prepared to apply the strict liability regime without any alteration¹⁰. The traditional means in the fight against doping did not work very well. It is an almost impossible task for an International Federation (IF) to prove that the athlete doped him- or herself intentionally or negligently, especially since these organizations do not enjoy any rights of investigation. The system of strict liability makes it easier for IFs to fight doping in an effective way, since they do not have to prove fault or negligence. Strict liability might not be an ideal system, but currently this is seen as the best option available. It provides a reasonable balance between effective anti-doping enforcement and fairness in the exceptional circumstance where a prohibited substance entered an athlete's body through no fault or negligence on his or her part¹¹.

Notwithstanding the fact that the Code works with a system of strict liability, there is an article that takes fault and negligence into account. Article 10.5 WADC provides for a system of sanction reduction, and the question of (no) fault or negligence comes into play here. This approach reflects a compromise between the IFs applying the strict liability doctrine without any exemptions and those IFs attaching great importance to the principles of fault and proportionality. Article 10.5 was incorporated to satisfy the (in many countries) constitutional principles of fault and proportionality, since the possibility existed that national courts would not have accepted the regulation¹².

2. Proof and Sanctions

2.1. Proof of an anti-doping rule violation

The consequence of the system of strict liability is that the burden of proof shifts to the athlete. He or she has to prove that there were exceptional circumstances, and that he or she bears no (significant) fault or negligence.

Under the Code the burden of proving that a violation of an anti-doping rule occurred lies with the IF¹³. The IF must thus prove two points: a substance has to be detected in the bodily fluids of the athlete (1) and that substance has to be on the Prohibited List (2). Strict liability in doping cases means that the sanction is an inevitable consequence if an anti-doping rule violation has been established¹⁴. The athlete has the burden to prove the facts on the basis of which the sanction could be reduced. This is laid down in Article 10.5 WADC. According to Article 3 WADC the IF must prove an allegation 'to the comfortable satisfaction of the hearing body', which is a relatively high standard. It is not quite as high as the criminal standard of 'beyond all reasonable doubt', but certainly higher than the ordinary civil standard of 'a balance of probabilities'. The criminal standard cannot be applied, since this would confuse the public law of the state with the private law of an association¹⁵. The athlete on the other hand must prove the facts on a balance of probabilities. The last sentence of Article 3 states:

Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

This wording leaves enough room for the principle of proportionality to be applied.

This shifting of the burden of proof to an athlete after a positive finding is called 'prima facie' proof. Prima facie proof allows culpable behavior or a cause of a finding to be proved in an indirect manner by using presumptions based on experience¹⁶. An athlete in whose bodily fluids a prohibited substance is found has, according to experience, used the prohibited substance, in a culpable way (thus with intent or due to negligence)¹⁷. By proving the existence of the fact, the behavior that may have caused it is therefore also proven. The prima facie proof therefore consists of a double presumption: first, of the use of the substance, and second, of a culpable element¹⁸. However, this proof is only a presumption, which can be rebutted by the athlete.

It could be argued that the presumption of fault in the strict liability system might not be consistent with Article 6 ECHR. The principle of the presumption of innocence is laid down in 6(2). The European Court of Human Rights however held in the *Salabiaku v. France* case¹⁹ that presumption of fact or law that operates against an accused is not inconsistent with Article 6(2). So, if one assumes that the criminal law principles of Article 6(2) are applicable to doping offenses, this provision does not prohibit offenses of strict liability, provided that an IF respects the rights protected by the ECHR²⁰. Professor Steiner, a judge of the German Constitutional Court, is of the opinion that the shifting of the burden of proving fault is consistent with general rules of civil procedure and does not raise constitutional concern²¹. This view was reconfirmed in the *Baumann* case²². In the United States, a similar view has been expressed in the *Mary Decker Slaney* case²³.

2.2. Sanctions

With the introduction of the Code, the intention was to have every sanction imposed reflect the seriousness of the offence. A distinction was made between sport sanctions (disqualification) and disciplinary sanctions (suspension).

In case the athlete is unable to prove that he or she bears no significant fault or negligence for the violation, Article 10.1 provides that an anti-doping rule violation in connection with a competition may also lead to disqualification from the entire event. In considering whether to disqualify other results in the event grounds may include the severity of the athlete's anti-doping rule violation and whether or not the athlete tested negative in the other competitions.

The part on suspension can be found in the Articles 10.2 to 10.4. The sanctions range from a warning to a lifetime ban depending on various matters, including²⁴:

8 See for example CAS 95/142, *L. v. FINA* at 231, "Strict Liability" Drug Rules of Sports Governing Bodies: Are they legal?, A.N. Wise, Defensor Legis 119 (1997).

9 Harmonization of Anti-Doping Code through arbitration: the case law of the Court of Arbitration for Sport, F. Oschütz, Marquette Sports Law Review, 675 2001-2002, p. 689.

10 Harmonization of Anti-Doping Code through arbitration: the case law of the Court of Arbitration for Sport, F. Oschütz, Marquette Sports Law Review, 675 2001-2002, p.686.

11 *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration*

of the German legal position, K. Vieweg, Marquette Sports Law Review, vol. 37, 2004-2005, p. 42.

12 *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration of the German legal position*, K. Vieweg, Marquette Sports Law Review, vol. 37, 2004-2005, p.43.

13 Article 3.1 of the WADC.

14 *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration of the German legal position*, K. Vieweg, Marquette Sports Law Review, 37 2004-2005.

15 *The Court of Arbitration for Sport 1984-*

2004, Ian S. Blakshaw, Robert C.S. Siekmann & Janwillem Soek, p. 237, T.M.C. Asser Press, The Hague, The Netherlands.

16 *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration of the German legal position*, K. Vieweg, Marquette Sports Law Review, 37 2004-2005, p.45.

17 *The definition of doping and the proof of an anti-doping offense (an anti-doping rule violation) under special consideration of the German legal position*, K. Vieweg, Marquette Sports Law Review, 37 2004-2005, p.45.

18 CAS 1998/222 *Bernhard v. International*

Triathlon Union.

19 ECHR, *Salabiaku v. France*, Decision of October 7th 1998.

20 *Legal opinion on the conformity of certain provisions of the draft WADC with commonly accepted principles of international law*, G. Kaufmann-Kohler & G. Malinverni p. 29, to be found on the WADA website <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=377>.

21 Steiner, reported in *Doping-Forum*, p.149.

22 *Baumann v. DLV*, Decision of the OLG Frankfurt of April 18th 2001.

23 *Slaney v. IAAF*, 7th Cir. Ind. March 27th 2001, 244 F.3d.

1. The type of the anti-doping violation;
2. The circumstances of the individual case (level or absence of fault or negligence);
3. The substance (or quantity found for certain substances) in case of the detection of a prohibited substance; and
4. Repetition of an anti-doping violation (recidivism).

If an athlete committed multiple anti-doping violations at the same time, he or she will be considered to have committed one doping offense, but the sanction to be imposed will be based on the violation that carries the most severe penalty²⁵.

As a general rule there is a fixed sanction, e.g. two years for a first time violation and a lifetime ban for a second violation. These sanctions apply regardless of the specific characteristics of the sport concerned, without regard to length of the career or the age of the athlete.

If these sanctions (fines and bans) are to be imposed, the principle of strict liability is no longer applicable from a legal point of view²⁶. So, for disqualification the principle of strict liability is applied in its original meaning, but for fines and bans the consequences of the system are softened. This is in compliance with the Counsel of Europe's Anti-Doping Convention. A German judge already ruled that liability without fault is incompatible with the rights of the athlete and even unconstitutional under German law²⁷. An athlete can thus only be sanctioned with a fine or a ban in the case of fault^{28,29}.

In the WADC this is implemented as follows. According to WADA "The trend in doping cases has been to recognize that there must be some opportunity in the hearing process to consider the unique facts and circumstances of each particular case in imposing sanctions^{30,31}."

This is laid down in Article 10.5.1 (no fault or negligence) and Article 10.5.2 (no significant fault or negligence). The question of guilt comes into play in these Articles.

If a sanction is eliminated due to a finding of no fault or negligence this will also prevent the incident from later being regarded as a first offense for purposes of calculating later sanctions. Therefore, the athlete is treated as a first time violator if he or she subsequently tests positive. This is a highly important provision: were this incident to count as a first offense, a subsequent positive test would result in a lifetime ban³¹.

These are mandatory provisions of the Code that must be adopted in the rules of International Federations. It is clear that these Articles only apply to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred³², since culpability can no longer be discussed for the purpose of determining whether an anti-doping violation has occurred. According to the comment to Article 10.5.2 this Article "applies only to the identified anti-doping violations because these violations may be based on conduct that is not intentional or purposeful" (thus to the violation of anti-doping rules referred to in Article 2.1 and 2.2). It does not apply to Article 2.4 because the sanctions in this Article already build in sufficient discretion in allowing the Athlete's degree of fault.

These Articles are vital to the CAS, as they provide a playing field to pursue its flexible approach under the Code. The CAS will have to clear the way to explain the meaning of the terms 'no fault or negligence' and 'no significant fault or negligence'. The definition in the

Code itself does not provide a lot of comfort. One may hope that the CAS will be prepared to reduce or even lift the suspension if the particular circumstances of the case should so warrant³³.

2.3. The limited impact of the question of guilt

In the comment to the Code it is stated "Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases"³⁴.

The importance of this phrase lies in the limiting effect it has on the impact of Article 10.5. Questions remain as to which circumstances should be seen as truly exceptional. It seems likely that different IFs will each use their own interpretation of exceptional circumstances, since this is a very open terminology that allows for flexible jurisdiction. If this interpretation conflicts with WADA's point of view, WADA is entitled to appeal the final decision of an IF disciplinary tribunal to CAS upon the condition that the relevant case has arisen from competition in an international event or in cases involving international-level athletes³⁵.

In Article 21.1 the roles and responsibilities of the athletes are laid down. Given these provisions it will be difficult to demonstrate exceptional circumstances, especially since Article 21.1.3 states that athletes are responsible for what they ingest and use.

Inadvertent stimulant cases like *Baxter* and over-the-counter medicine cases like *Raducan* and *Edwards v. IAAF*³⁶ cried out for relief from the rigid application of the strict liability principle. The supplement cases involving manufacturers' contamination or mislabeling of the contents of supplements highlighted the need to mitigate the effects of strict liability in many cases³⁷. The CAS panel in the case of the American swimmer *Kicker Vencill*³⁸ revolved around the definition of no fault or negligence which entails that the athlete establish

"That he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of the utmost caution, that he or she had used or been administered the Prohibited Substance or Prohibited Method".

According to the panel, exceptional circumstances could not be found in this case. Until now, there has been no case where a suspected athlete has been able to establish no fault or negligence. As it is very difficult to prove for an athlete that there is no culpability and no degree of fault on his or her side, it is unlikely this category will ever be of much use. All the case law on exceptional circumstances has arisen out of Article 10.5.2. The test for this provision involves measuring the degree of culpability of the athlete with respect to the analytical positive result.

The system that provides for strict liability for athletes testing positive can result in the punishment of more or less innocent people. This can now be mitigated by the reversal of the burden of proof: the athlete is presumed guilty but is at least given the opportunity to prove his or her innocence in order to reduce the sanction. The possibility in the Code to claim exceptional circumstances may offer an escape to the athlete who is free of blame or whose degree of guilt is not serious enough to make him pay the full. The basis however for relying on such circumstances is very narrow, forced upon us by the rulings of CAS. Moreover, this argument does not change the fact that the athlete remains guilty of the offense; its effect is only reflected in the determination of the penalty³⁹.

24 *Sanctions under the World Anti-Doping Code*, David Howman, p. 2, to be found on the WADA-website <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.

25 *Sanctions under the World Anti-Doping Code*, David Howman, p. 2, to be found on the WADA-website <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.

26 CAS 2001/A/317, *Aanes v. FILA*.

27 See the article by K. Vieweg, footnote 16, p. 44.

28 See the article by F. Oschütz, this opinion shows at different points in the article.

29 *Doping en de sportbeoefenaar: gedopeerd of gedupeerd?*, F. Hendrickx, *Doping en medisch verantwoord sporten. Sportrecht en praktijk*. Instituut voor Arbeidsrecht, Leuven, 31 mei 2005.

30 see the Comment to Article 10.5.2 of the Code.

31 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 19.

32 see the Comment to Article 10.5.2 in the Code.

33 *The Court of Arbitration for Sport 1984-2004*, Ian S. Blakshaw, Robert C.S. Siekmann & Janwillem Soek, p. 263-264, T.M.C. Asser Press, The Hague, The Netherlands.

34 see the Comment to Article 10.5 WADC.

35 Article 13.2.1 and 13.2.3.

36 CAS 2002/A/376 *Baxter v. IOC*, CAS OG00/011 *Raducan v. IOC*, CAS OG 04/003 *Edwards v. IAAF* (for a descrip-

tion of these cases see 3.1.1. of this article).

37 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 18.

38 TAS 2003/A/484, *Kicker Vencill v. USADA*.

39 Dissertation of JW Soek, *The Strict Liability Principle and the Human Rights of the Athlete in Doping Cases*, March 3, 2006, p.173.

The *Baxter* case⁴⁰ is a pre WADC case. Baxter is a British alpine skier. He tested positive for methamphetamine during the Olympic Winter Games in Salt Lake City in 2002, where he won a bronze medal. He has a well-documented long-standing medical condition of nasal congestion. He uses a non-prescription Vicks Vapor Inhaler for relief. In the UK the inhaler is included in the list of permitted substances issued by the Sports Council. In the US however, the Vicks inhaler that is sold over the counter has a different formulation, the US version contains 'levmetamfetamine'. The term methamphetamine, which is on the doping list, includes both isomers of methamphetamine, including levmetamfetamine'.

Mr. Baxter did not consult with the team doctor because it appeared to be the same product as the one he had used regularly in the UK, neither did he read the back of the package, which clearly stated that the product contained levmetamfetamine. He was disqualified and his bronze medal was withdrawn. The level of substance found in his body is consistent with his taking the medication for therapeutic use. Baxter appealed to the CAS. The panel held that athletes are strictly responsible for substances they place in their body and that for purposes of disqualification (as opposed to suspension!) neither intent nor negligence needs to be proven. In summary, the panel was of the opinion that: (i) a prohibited substance was present in his body, (ii) that this presence alone constitutes a case of doping (since the IOC did not establish a threshold level for methamphetamine) and (iii) that pursuant to OMAC this case of doping automatically leads to invalidation of the result obtained, whether or not his performance was enhanced⁴¹. But the panel did express its sympathy for Mr. Baxter, since he did not intend to enhance his performance or to gain a competitive advantage.

From the *Raducan* case⁴² it follows that the young age of an athlete does not fall in the scope of exceptional circumstances under the Code. However, I do think that this should be viewed as a possible exceptional circumstance. Minors should be treated differently; their young age should be taken into consideration. They should not be given the same degree of responsibility in taking 'the utmost caution'.

In this case the panel upheld the disqualification of a 16-year old gymnast who took a medication provided by the team doctor that contained the prohibited substance of pseudoephedrine.

In the *Edwards* case⁴³ the doping offense took place almost four months before the beginning of the Olympic Summer Games in Athens. Edwards, a 27-year old American athlete with a distinguished career in track and field, tested positive for nikethamide in April 2004. She stated that the prohibited substance was contained in two glucose tablets ingested by her after having been given by her physical therapist. USADA suspended her for two years. She admitted before a First Instance North American CAS Panel that she, by mistake, committed a doping offense, but she claimed that exceptional circumstances existed. The panel decided that such circumstances might exist, and referred the case to an IAAF Doping Review Board, since that is mandatory under IAAF Rules. This board concluded that no such circumstances existed, and ordered the CAS panel to impose a two-year ban. Edwards appealed this decision at the CAS in Lausanne, as she was entitled to do. This was a final effort for her to be eligible to compete at the Athens Games. Her case was heard by an Ad Hoc tribunal in Athens, in order to hear her case on an expedited basis. Edwards contented that she was unaware that the tablets she had taken contained a prohibited substance. The panel confirmed the findings of the Review Board. It rules that it would have been clear to any person reviewing the tablets that there was more than one ingredient in the tablets, and that there was negligence in not making sure that the tablet did not contain a prohibited substance, before she ingested them. It is each athlete's personal duty to ensure that no prohibited substance enters his or her body. In the circumstance of buying a product in a foreign country more steps could and should have been taken, especially since the packaging contained the name 'nikethamide' on it, and there was a leaflet inside warning that the product contained an active stimulant that could result in a positive doping test. The panel also stated:

"It would put an end to any meaningful fight against doping if an athlete was able to shift his or her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself or herself did not know that substance."

One recent case dealing with the presence of exceptional circumstances is *Hipperdinger*⁴⁴.

In this case the ATP rules were applicable, but since there was no guidance in these rules as to whether something constituted exceptional circumstances, the panel referred to the WADC.

Because he did not enquire about what he was consuming the panel ruled that he could not satisfy the no significant fault or negligent element.

The exceptions to the system of strict liability are limited. Another example of how limited they are, is the invoking of a physician's error.

In order to invoke a physician's error an athlete needs to prove, by showing medical files, that he or she did receive medical treatment. The validity of the prescription and the diagnosis may be reviewed. If a prohibited substance was prescribed without a therapeutic justification, no exceptional circumstances can be invoked⁴⁵.

In the *Koubek* case⁴⁶ the narrow application of Article 10.5 and, more importantly of the trying to hide behind the physician's fault is justified. A different approach would open the door to abuse. If athletes were allowed to hide behind their physician's fault to escape sanctions, the fight against doping would be seriously undermined. So, the fault of an adviser, such as a physician must be attributed to the athlete, even if the athlete is not personally at fault. A personal responsibility is placed on athletes to ensure that any medical treatment received in no way violates the anti-doping rules. The athlete must convince the hearing body that they did everything in their power to avoid a positive test result. The reasonableness of the athlete's conduct is no longer the applicable criterion.

The criterion is now use of the 'utmost caution', a very high standard that will only be met in the most exceptional cases⁴⁷. This 'utmost caution' must be shown at each of the stages of the treatment process, e.g. the choice of the physician, the information provided.

That it is of course negligent to use a drug without consulting a physician at all was confirmed in the *Squizzato* case⁴⁸. The athlete must always inform the physician that he is in fact an athlete, and thus subject to anti-doping rules, and the athlete must always check the information appearing on the product for himself, and compare this with the list of prohibited substances⁴⁹.

3. Proportionality

3.1. The principle of proportionality

The proportionality of sanctions imposed for a violation of the anti-doping rules is probably the subject that has received the most attention since the introduction of the Code. This is a very important principle since this is the main possibility for a flexible interpretation of the Code by CAS. The principle is laid down in Article 6 ECHR, and this is applicable to disciplinary law as well.

The principle of proportionality was laid down in the rules and regulations of some IF's in the pre WADC era. CAS used the concept in a series of cases⁵⁰. It recognized proportionality as a general principle of law applicable to everyone and particularly to disciplinary sanc-

40 CAS 2002/A/376 *Baxter v. IOC*.

41 CAS 2002/A/376 *Baxter v. IOC*, c.3,30.

42 CAS OG00/011 *Raducan v. IOC*.

43 CAS OG 04/003 *Edwards v. IAAF*.

44 CAS 2004/A/690 *Hipperdinger*.

45 *Selected Case Law Rendered under the World Anti-Doping Code*, Olivier Niggi & Julien Sieveking, p. 3, to be found on the WADA website: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.

46 ITF Independent Anti-Doping Tribunal (18.01.2005), *ITF v. Koubek*.

47 ITF Independent Anti-Doping Tribunal (18.01.2005), *ITF v. Koubek*.

48 CAS 2005/A/830 *Squizzato v. FINA* ("(...) the Panel is of the view that it is indeed negligent for an athlete willing to compete in continental or world events to use a medical product without the advice of a doctor (...)").

49 *Selected Case Law Rendered under the World Anti-Doping Code*, Olivier Niggi & Julien Sieveking, p. 2-6, to be found on the WADA website: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.



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tions. It may not have been applied consistently in similar circumstances, but a sense of disproportion between the stipulated sanction and an athlete's violation guides the doctrine⁵¹. Proportionality focuses on perceived fairness to the athlete based on the pretence that the sanction imposed is deemed excessive or unfair on its face. The adoption of the Code raises the question of whether and how the principle of proportionality will continue to evolve⁵². Article 10.5 suggests that this mechanism is the only means by which a sanction can be reduced; the principle of proportionality is incorporated herein. The CAS panel in the *Lichtenegger* case⁵³ confirmed that the principle of proportionality is incorporated into the Code. Later cases suggested that the introduction of the Code would eliminate the application of the doctrine of proportionality in future cases, except as provided for in the Code. This might lead to situations in which a CAS panel is tempted to reduce a sanction on the basis of proportionality, even though the strict requirements of sanction reduction under the Code might not be met⁵⁴, as happened in the *Puerta* case⁵⁵.

The former president of the Swiss Federal Tribunal, Justice Claude Rouiller said that associations have the power to adopt rules of disciplinary law and that an athlete who is a member to a federation that is a signatory to the Code agrees, in a deliberate manner, that he or she may be a subject of an abrupt sanction⁵⁶. The Swiss Federal Supreme Court held in the *N. et al. v. FINA* case⁵⁷ that the appropriate question is not whether a sentence is proportionate to an offense, but whether the athlete can prove mitigating circumstances. The issue of proportionality would only be legitimate if a CAS award constituted an extremely serious infringement of individual rights and would be completely disproportionate to the penalized behavior. Therefore sentences handed down without an examination of proportionality did not constitute a violation of the general principles of Swiss law⁵⁸.

It can be argued that the need for harmonization is the most important objective and should prevail over any interest in allowing flexibility to consider objective differences that may exist between sports. The imposition of different sanctions could have a negative impact on the perception of the public of the fairness of anti-doping actions. Furthermore, greater flexibility may lead to more lenient sanctions for high-profile athletes, and IFs could start taking all kinds of irrelevant factors into account, or even at odds with the very purpose of the anti-doping rules⁵⁹. I, however, do not agree. The proportionality principle means that a balance must be achieved between the seriousness of the offense and the severity of the sanction. In imposing a sanction, it must be taken into account that suspension is not the only penalty, but that on top of that there can be other consequences, such as loss of income, cancelled sponsoring contracts, loss of fame and loss of profession due to the fact that at the end of the period of ineligibility the athlete is often too old to achieve top performances once again. This differs per sport; in some sports a two-year ban will not be a problem, but in other sports it will mean the end of a career⁶⁰. If there should be no flexibility allowed, one cannot speak of harmonization, but of unification. As Dr. Soek states in his

dissertation, the effects of the sentences should be the same in all sports, not the sentences themselves⁶¹.

As mentioned above, if additional sanctions (fines and bans) are to be imposed, the principle of strict liability is no longer applicable from a legal point of view⁶². This is in compliance with the Counsel of Europe's Anti-Doping Convention. A German judge already ruled that liability without fault is incompatible with the rights of the athlete and German law⁶³. An athlete can thus only be sanctioned with a fine or a ban in the case of fault^{64,65}. This means that the principle of proportionality should be applied, and I believe the wording of the Code leaves enough room for this.

3.2. Proportionality cases

3.2.1. Pre WADC cases

An example of the use of the doctrine of proportionality is the pre WADA Code *Meca-Medina & Majcen v. FINA* case⁶⁶. Meca-Medina and Majcen, two long-distance swimmers tested positive for nandrolone after finishing first and second in an event. The amount of nandrolone in their systems only slightly exceeded the limit, and both swimmers claimed that they had unknowingly ingested nandrolone by consuming uncastrated boar meat. FINA suspended them for four years and CAS upheld the suspension. After the publication of a scientific study suggesting that uncastrated boar meat could lead to positive nandrolone tests, FINA and both athletes agreed to a re-hearing. Although they were unable to prove that their positive tests were due to the consumption of boar meat, the panel applied the proportionality doctrine and reduced their suspension to two years. This was based on the otherwise good behavior of the athletes, the fact that a four-year suspension often equals a lifetime ban and that many other IFs used a two-year ban for a first offense.

Another pre WADC case is the *Lichtenegger* case⁶⁷. This case was reviewed just prior to the implementation of the Code. Lichtenegger tested positive for nandrolone in 2003, due to a contaminated supplement (which was said to be free of a prohibited substance by an IOC/WADA accredited laboratory!). The existence of exceptional circumstances was found, and he was suspended for six months by the Austrian federation of athletics. IAAF appealed the case to the CAS, since it was of the opinion that a higher sentence would be correct. Lichtenegger asked the CAS to apply the *lex mitior* principle, so that he could benefit from the more lenient sanctions under the WADC regime, as he perceived those rules. Article 24.5 of the Code however states that the Code is not to be applied retroactively, so the panel ruled that the IAAF Anti-Doping rules were to be applied. These rules provided for a mandatory minimum of a two-year suspension, except in case exceptional circumstances existed. These exceptional circumstances did not include contamination of nutritional supplements. The panel held that a strict compliance of the rules in this case would lead to unfairness and injustice, which is in fact contrary to the proportionality principle. His previous good conduct and the fact that the supplement was described as 'free of the prohibited substance' were found to be mitigating factors, and his suspension was reduced to 15 months⁶⁸.

50 The principle of proportionality was first developed in two CAS awards of 1996: CAS 1995/A/122 *NWBA v. IPC*, CAS 1995/A/141 *C. v. FINA*. Both cases found that the penalty imposed must be in proportion with the circumstances of the present case. Other case that dealt with the principle of proportionality are: CAS 97/180 *P. et al. v. FINA*, CAS 98/214 *Bouras v. IJF*, CAS 99/A/246 *W. v. FEI*, CAS 2000/A/270 *Meca-Medina & Majcen v. FINA*, CAS 2001/317 *Aanes v. FILA*, CAS 2000/A/312 *Leipold v. FILA*.

51 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 16-17.

52 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 16-17.

53 CAS 2004/A/624, *IAAF v. OLV & Elmar Lichtenegger*.

54 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 18.

55 CAS 2006/A/1025 *Puerta v. ITF*.

56 Opinion of Justice Rouiller on the compatibility of the sanctions provided for in the Code with Swiss law and with the proportionality principle, see Olivier Niggli & Julien Sieveking: *Selected Case Law Rendered under the World Anti-Doping Code*, p.9, to be found on the WADA website: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.

57 CAS 1998/A/208) *N., J., Y., W. v. FINA*.

58 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 18.

59 *Legal opinion on the conformity of certain provisions of the draft WADC with commonly accepted principles of international law*, G. Kaufmann-Kohler & G. Malinverni p. 49-52 to be found on the WADA website <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=377>.

60 Dissertation of JW Soek, *The Strict Liability Principle and the Human Rights of the Athlete in Doping Cases*, March 3, 2006, p. 252.

61 Dissertation of JW Soek, *The Strict Liability Principle and the Human Rights of the Athlete in Doping Cases*, March 3,

2006, p. 252.

62 CAS 2001/A/317, *Aanes v. FILA*.

63 See the article by K. Vieweg, footnote 16, p. 44.

64 See the article by F. Oschütz, this opinion shows at different points in the article.

65 *Doping en de sportbeoefenaar: gedopeerd of gedupeerd?*, F. Hendrickx, *Doping en medisch verantwoord sporten. Sportrecht en praktijk*. Instituut voor Arbeidsrecht, Leuven, 31 mei 2005.

66 CAS 2000/A/270, *Meca-Medina & Majcen v. FINA*.

67 CAS 2004/A/624, *IAAF v. OLV & Elmar Lichtenegger*.

68 *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 17.

3.2.2. Post WADC cases

The *Hipperdinger* case⁶⁹ is an example of a post WADC introduction case. Hipperdinger is a Spanish tennis player who tested positive for cocaine. He claimed that this was a result of the consumption of tea made of coca leaves, and that he did not know that these leaves were in fact coca leaves and that he did not even know that the consumption of coca leaves could lead to positive tests for cocaine. The ATP Tennis Anti-Doping Program 2004 rules had to be applied; these rules were based on the WADC. Under the Code (and so idem under the ATP rules) the only possibility of reducing a fixed sanction is by proving no (significant) fault or negligence by means of the existence of exceptional circumstances. The panel held that if no such exceptional circumstances existed, it had no other choice than to apply the appropriate fixed sanction. It held that the doctrine of proportionality that had developed in previous CAS case law had been based on the anti-doping rules of many different IFs, and that the situation had changed such that the doctrine of proportionality could not be applied in the same way as it had previously. The Anti-Doping Program rules did not allow the panel to apply the doctrine except in accordance with the rules. In this case, no exceptional circumstances were proved, so the panel upheld the two-year suspension⁷⁰.

In the *Knauss* case⁷¹ the CAS panel held that:

"(...) The purpose of introducing the WADC was to harmonize at the time a plethora of doping sanctions to the greatest extent possible and to uncouple them from both the athlete's personal circumstances (amateur or professional, old or young athlete etc.) as well as from circumstances relating to the specific type of sport (individual sport or team sport, etc.)."

It thus recognized that the proportionality principle has been applied more restrictively since the introduction of the Code, and that this restriction is justified by the goal of the Code, namely the harmonization of anti-doping rules⁷². The element of fault or negligence is 'doubly relevant' now. Firstly it is relevant in deciding whether the sanction reduction article applies at all, and if yes, secondly whether the term of the appropriate sanction should be set somewhere between one and two years. The panel also states that the threshold for proving no significant fault or negligence cannot be set too low; otherwise the two-year ban for a first offence would form the exception, rather than the general rule. But neither can it be set too high, for otherwise no opportunity remains for differentiating meaningfully and fairly within the range of sanctions⁷³.

In the *Hondo* case the panel said that:

"A more flexible interpretation of the said system that would allow for the mitigation of the sanction even in the absence of the specific circumstances could jeopardize the uniform application and effectiveness thereof⁷⁴."

I think that the CAS interprets the Code in an unjust way in this point. The Code can be seen as well drafted and, in itself, leaves room for the use of the proportionality principle. In the last sentence of Article 3.1 it is stated that the standard of proof for the athlete shall be by a balance of probability. This sentence is broad enough to allow for the use of the doctrine of proportionality to be taken into account. I agree with Dr. Janwillem Soek's opinion in his dissertation: I believe penalties should be harmonized, not unified. In some sports a two-year ban is not a problem, while in other sports a two-year ban means the end of a career⁷⁵. The principle of proportionality that is incorporated in the Code in my point of view can help to impose a proportionate sentence.

As mentioned in the introduction, the *Puerta* case⁷⁶ is one of the most recent cases in this area. Puerta is an Argentinean tennis player who tested positive for etilefrine after his lost final at Roland Garros in May 2005. His wife uses the drug effortil to treat hypotensive episodes, which can be bought over the counter in certain countries like Argentina. The written information supplied with the drug states that its active ingredient is etilefrine, a stimulant which is a prohibit-

ed substance under the ITF Tennis Anti-Doping Programme. Mrs. Puerta usually takes the drug by dripping drops of the drug in water. The drug has no taste when mixed with water. Puerta was aware of the fact that his wife takes the drug in case of stress, such as when he plays an important match.

The ITF Panel found on the balance of probabilities that the player was contaminated by effortil and that this occurred during the period of about one to two days before the final at a time and place unknown, that the source was Mrs. Puerta's medication, and that the player was unknown of the contamination. The amount found in his body was too small to be performance enhancing. Puerta contented that there were exceptional circumstances in his case. The Panel found that he could not prove no fault or negligence, since he did not exercise the utmost caution, but he succeeded in establishing the defense of no significant fault or negligence. Puerta was suspended before (for nine months), in 2003, when he tested positive for clenbuterol, so this incident would count as a second offense. Puerta stated that it would be disproportionate to count this offence as a second offense, since there was no significant fault or negligence. The Panel did not agree, since the Code is intended to be severe. The proportionality principle is more difficult to sustain under the Code. The Panel is not persuaded that it is open to IFs to say that eight years for two mistakes is disproportionate. It concluded that it should not disapply the written provisions of the Programme applicable to this case. He was suspended for eight years.

The Panel had an

"Uncomfortable feeling about the severity of the sanction, even a very uncomfortable one. But that is not enough."⁷⁷

Puerta appealed his case to CAS. The Panel came to a quite surprising decision: it considered the eight year ban as disproportionate, and was willing to reduce the sanction to two years! The Panel said that in all but the very rare case the Code imposes a regime that provides a just and proportionate sanction, and one in which the particular circumstances of an individual case can be properly taken into account, but that there are inevitably going to be instances in which the "one size fits all" solution does not work. The *Puerta* case is the paradigm of such a case. Mr. Puerta's ingestion of the prohibited substance was inadvertent, and that the degree of fault or negligence that he exhibited was so small as almost to amount to No Fault or Negligence. The Panel held that "in those very rare cases in which Articles 10.5.1 and 10.5.2 of the WADC do not provide a just and proportionate sanction, i.e., when there is a gap or lacuna in the WADC, that gap or lacuna must be filled by the Panel."⁷⁸

This definitely is a good start, now we will have to see if CAS is willing to apply this principle more often in cases where the outcome is disproportionate. However, the Panel makes it clear that the circumstances in which a tribunal might find a gap or lacuna in the Code will arise only very rarely.

According to case law of the European Court for Human Rights the principle of proportionality is incorporated in Article 6 of the European Convention of Human Rights (ECHR)⁷⁹. In Article 6 TEU it is laid down that the European Union respects the ECHR, and that

69 CAS 2004/A/690 *Hipperdinger*.

70 CAS *Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R., issue 1 2006 p. 18.

71 CAS 2005/A/847 *Knauss v. FIS*.

72 *Selected Case Law Rendered under the World Anti-Doping Code*, Olivier Niggli & Julien Sieveking, p. 9, to be found on the WADA website: <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=539>.

73 CAS 2005/A/847 *Knauss v. FIS*, c.7.3.5.

74 CAS 2005/A/922, 923, 926, *Hondo v. UCI, Swiss Olympic and WADA*.

75 Dissertation of JW Soek, *The Strict Liability Principle and the Human Rights*

of the Athlete in Doping Cases, March 3, 2006, p. 252.

76 ITF Independent Anti-Doping Tribunal (21.12.2005), *ITF v. Puerta*.

77 ITF Independent Anti-Doping Tribunal (21.12.2005), *ITF v. Puerta*, c.98.

78 CAS 2006/A/1025 *Puerta v. ITF*, 11.7.23.

79 See for example the cases of *Malige v. France* (23.09.1998) and *Waite & Kennedy v. Germany* (18.2.1999) before the European Court for Human Rights. This is confirmed to me by Dr O. Janssen of the department of Constitutional and Administrative law of Utrecht University, who can be considered an expert in this area.

this Convention is applicable to all the inhabitants of the European Union. The EU is a party to WADA. Article 6 ECHR deals with the right to a fair trial. It is a fundamental right of an athlete to have a fair trial; this is laid down in Article 13.2.2. of the Code.

Also, the decisions of IFs can affect athletes in their deepest professional interests, and can even go as far as preventing them from exercising their profession. Procedural guarantees should thus apply⁸⁰.

Article 6 ECHR is applicable to compulsory arbitration. In the *Bramelid & Malmstrom v. Sweden* case (Appl nr 8588/79 en 8589/79) the European Commission for Human Rights stated that:

“A distinction must be drawn between voluntary arbitration and compulsory arbitration (...) If (...) arbitration is compulsory (...) the parties have no option but to refer their dispute to an arbitration board, and the board must offer the guarantees set forth in Article 6(1)81.”

Since Article 6 is applicable to compulsory arbitration it is applicable to disciplinary law as well, as there is more discretion. One can say that the WADC deals with compulsory arbitration since it is laid down in the Code that decisions by IFs can exclusively be appealed to CAS⁸². Arbitration in sports matters is characterized by the fact that the arbitration clause is never freely accepted by the athlete, it is imposed by the IF. Therefore arbitration by the CAS can be seen as compulsory⁸³. The above-mentioned means that CAS thus has to use the principle of proportionality in its cases.

It can be argued that the way in which CAS interprets the Code now is contrary to the right to a fair trial, since the principle of proportionality is incorporated in Article 6 ECHR. National courts that will have to review a CAS award can invalidate the award if it violates the guarantees of Article 6 ECHR on the basis of incompatibility with public policy of the forum⁸⁴.

4. Conclusion

Recently there have been a great number of doping cases before CAS. This is probably a temporary result of the coming into force of the WADC. Once all the principles in the Code are better understood and refined, the number of cases is likely to decrease⁸⁵.

From all the cases it has become clear that according to CAS the proportionality doctrine has lost its importance. It cannot be applied in the same way anymore, and it seems that the only way proportionality can be taken into account is via the proving of exceptional circumstances under Article 10.5. It can only play a role in the fixing of the penalty.

I think this view is flawed as it risks the Code being misinterpreted in case law. The Code can be seen as well drafted, and in itself creates space for the use of proportionality; it just does not codify it. The Code offers more room for flexibility than one might think at first sight. I think the Code is written in a good way, but that CAS does not interpret it correctly. I believe that the last sentence of Article 3.1 (*Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability*) is broad enough to allow for

the use of the doctrine of proportionality to be taken into account. CAS does not use the flexibility that is incorporated in the Code.

The outcome in the *Puerta* case was therefore quite surprising. It is a good start, but now we will have to see if more Panels are willing to reduce fixed sentences if the proportionality principle should so warrant.

The WADC is currently under review and it might be amended in 2007. Perhaps it could be an option to explicitly codify the principle of proportionality.

Can a panel go below the limits set by the Code? In the *Squizzato* case⁸⁶ the Panel seems to answer in the affirmative, but according to Justice Rouiller this is not allowed⁸⁷. It is not entirely clear what the point of view of the CAS is in this respect.

Currently, many IFs such as FIFA are continuing to impose sanctions far below the minimum. Rio Ferdinand for example was suspended for eight months for missing a doping test⁸⁸. Will the CAS continue to allow this?

I agree with Dr. Janwillem Soek's opinion in his dissertation: I believe penalties should be harmonized, not unified. In some sports a two-year ban is not a problem, while in other sports a two-year ban means the end of a career. There are already IFs that impose higher sentences for a first violation, like IAAF in the *Collins* case⁸⁹. The question therefore is whether a panel should have the power to increase or reduce a sanction should the circumstances of the case so warrant. I think this question should be answered in the affirmative. Fixed sanctions make it almost impossible to translate the gravity of the anti-doping rule violation into a proportional sanction. I believe it is highly important to have the impact of a penalty in one sport be equal to the penalty in another sport. Again: proportionality is the keyword!

Questions still remain as to what constitute exceptional circumstances, but I expect that this will become clear in the near future, when CAS will have refined all the principles in the Code. Contrary to the current view in case law, I think that the young age of an athlete should be seen as a possible exceptional circumstance. Minors should not be given the same degree of responsibility as adults in taking 'the utmost caution'.

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⁸⁰ *The Trials and Tribulations of the Court of Arbitration for Sports. Contribution to the Study of the Arbitration of Disputes concerning Disciplinary Sanctions.* Andrea Pinna, I.S.L.J. 2005/1-2, p. 15.

⁸¹ *Bramelid & Malmstrom v. Sweden* ECHR (12.12.1983, Appl nr. 8588/79 and 8589/79), published in Decisions and Reports (D & R) vol. 38, p. 38.

⁸² Article 13.2.1. WADC.

⁸³ *The Trials and Tribulations of the Court of Arbitration for Sports. Contribution to the Study of the Arbitration of Disputes concerning Disciplinary Sanctions.* Andrea Pinna, I.S.L.J. 2005/1-2, p. 13.

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Andrea Pinna, I.S.L.J. 2005/1-2, p. 16.

⁸⁵ *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R. issue 1 2006 p. 22.

⁸⁶ CAS 2005/A/830, *Squizzato v. FINA*

⁸⁷ Legal opinion of October 25th, 2005, given by Claude Rouiller, p.36-37 (a summary can be found in the article: *Selected Case Law Under the World Anti-Doping Code*)

⁸⁸ *CAS Doping Jurisprudence: What Can We Learn?*, Richard H. McLaren, I.S.L.R. issue 1 2006 p. 19

⁸⁹ AAA No.30 190 00658 04 (2004),

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List of abbreviations

ATP	Association of Tennis Professionals
CAS	Court of Arbitration for Sport
ECHR	European Convention on Human Rights
EU	European Union
FIFA	Fédération Internationale de Football Association
FILA	Fédération Internationale des Luttes Associées
FINA	Fédération Internationale de Natation Amateur
FIS	Fédération Internationale de Ski
IAAF	International Association of Athletics Federations
IF	International Federation
IOC	International Olympic Committee
ITF	International Tennis Federation
NeCeDo	Nederlands Centrum voor Dopingvraagstukken
OMAC	Olympic Movement Anti-Doping Charter
TEU	Treaty on European Union
UCI	Union Cycliste Internationale
UNESCO	United Nations Educational, Scientific and Cultural Organization
USADA	United States Anti-Doping Agency
WADA	World Anti-Doping Agency
WADC	World Anti-Doping Code

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Sports People's Right to Defence under the New Spanish Anti-Doping Law. A Perspective

by Fernando del Cacho Millán*

1. Introduction

"Doping" cannot be considered as a typical sports phenomenon but as one that is found throughout our entire society. In our society, sport is only one of the mirrors in which doping is reflected. These circumstances have given rise to numerous discussions¹ in other European countries² on the opportunity of promulgating the so-called "anti-doping law"³. It is misleading to try and resolve such a complex phenomenon by law, regardless of one's intentions of enforcing it. However, it is also true that a law can always be an effective instrument, especially if the law in question is a precise and convincing one. One of the difficulties when legislating in this matter is that although health is a social (and individual) value, it is not an absolute value and it is not even possible to know, scientifically speaking, if some substances are harmful or not. Further difficulties are posed by the innumerable substances and ongoing research resulting in new discoveries all the time. The above points constitute such a complex panorama that some sportspeople have been sanctioned "fortuitously", without any intention of doping themselves⁴. It is also a fact that nowadays, individuals in general can easily become addicted to drugs, although they would not survive without them either. This is the paradox.

2. Historical and legislative backgrounds of doping in Spain

The different legislative landmarks and institutions that have gradually provided a framework in which to fight in favour of clean sports are summed up in the Exhibition of Motives of the Law 7/2006 of 21 November (International Olympic Committee -COI-, Law 10/1990 of 15 October, National Anti-Doping Commission, laboratory of the High Council of Sports -CSD-, World Anti-Doping Code, different Conventions within UNESCO, International Anti-Doping Agreement approved in 1989 by the European Council and its additional Protocol, laboratory of the Municipal Institute of Medical Investigation of Barcelona, World Anti-Doping Agency -AMA)⁵. Monitoring of substances and drugs (as well as methods) is carried out by listing substances considered to be prohibited; this is elaborated every year by the High Council of Sports. This list is published annually in the State Official Bulletin. This new law is intended to "harmonise" national and international regulations (in the middle of a ratification and adaptation process), while simultaneously "speeding up" mechanisms for greater effectiveness in the fight against doping in

sports. This complies with the right to health protection laid down in Article 43 of the Spanish Constitution and the obligation of the authorities to protect and foster this right. In this regard, the Spanish Government approved the Plan to Fight against Doping in Sports with the aim of laying down a number of foundations and means to eradicate a phenomenon considered as the biggest threat to professional sport competition⁶. On 1 February last, the International Agreement against Doping in Sports - drawn up by UNESCO - took effect.

3. First steps towards the defence and principles of sportspeople's defence⁷

The organic law 7/2006 of 21 November concerning health protection and the fight against doping in sports has the following two objectives: it tries to establish mechanisms of prevention and control, and it sets up proceedings for the imposition of sanctions strengthened with the introduction of a new Article in the Criminal Code. Here, it is important to bear the principles of the proceedings in mind, since the imposition of a sanction must be carried out with the maximum guarantees⁸, such as the right to be heard and the right to appeal. Article 82⁹ of Law 10/1990 governing Sport refers to the "general and minimum conditions of disciplinary proceedings". Starting with the principles of defence that inform the proceeding, we should highlight the fact that, according to this Organic Law, sportspeople are legally obliged to undergo doping tests (Article 5.1). This limits the right to remain silent and not to declare against oneself. In principle, it affects sportspeople with a licence to participate in official state competitions, but the law itself extends the subjective environment to those sportspeople who have not renewed their licence and to those that have been suspended. Sportspeople can even be forced to undergo a "surprise" test. The law is clear in this respect and states that sportspeople are obliged to undergo this test, expressly recognised in the First Section of Chapter II of Title I. However, this is not the problem: the problem is to determine the legal consequences for those cases in which sportspeople refuse to be vetted. It is also important to define the responsibility of their trainers, physicians or executives when they refuse to indicate the medical treatments to which the sportspeople are subject, those responsible for such treatments and their extent. In this sense, the law recognises sportspeople's right to "refuse to authorise" such people to provide such information. This is

* Larrauri & López Ante Abogados, Lisbon, Portugal. The author hereby wishes to thank Paula Miñana Alonso for her help in compiling the present Article.

1 An extensive and intensive debate on doping has been held in Germany. See Jahn, Matthias, *Doping zwischen Selbstfärdung, Sittenswidrigkeit und staatlicher Schutzpflicht*, Zeitschrift für Internationale Strafrechtsdogmatik 2/2006, page 57.

2 For a general view, see Chaker, A.: *Study on National Sports Legislation in Europe*, Éditions du Conseil de l'Europe, Strasbourg, 1999, and Gulland, E. *The Reynolds and Barnes Cases and the Integrity of International Dispute Resolution*, in Sport and Law. Supplement to the Official Proceedings of the IAAF Symposium on Sport and

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3 See Vieweg, Klaus, *Eigenverantwortliches Doping und Strafrecht. Materiell-strafrechtliche, strafprozessuale und verfassungsrechtliche Aspekte eines "Anti-Doping-Gesetzes"*, in: Prisma des Sportrechts. Referate der sechsten und siebten interuniversitären Tagung Sportrecht, Berlin 2006, pages 33 to 63. See Koch en Röhrich/Vieweg, Doping-Forum, 2000, page 53.

4 In this regard, Jason Robert Klein from the Spanish ACB League was sanctioned because he was given Bisolvón composition instead of Bisolvón tablets at the chemist's. The *Audiencia Nacional* eventually declared the sanction invalid.

5 To study the historical development of the fight against doping from Criminal Law, see Ahlers, *Doping und*

strafrechtliche Verantwortlichkeit, 1994.

6 To see the content of this Plan of Fight against Doping, please consult the High Council of Sports' website.

7 For a definition of sportsperson, see Article 66 of Law 14/1998, of 11 June, on Sports of the Basque Country. For the Autonomous Region of Valencia, Law 4/1993, of 20 December of Generalitat Valenciana.

8 See Resolution from the Supreme Court dated 12 February 1986 (Aranzadi 2.156).

9 For further elucidation, we now reproduce Article 82.1 of the Sports Law: "The following are general and minimum conditions of disciplinary proceedings: a) The judges or arbitrators immediately exercise the disciplinary imperium during the course of the encounters whereby it is necessary to provide in this case, an appropriate system of later complaints. b) In sports competitions whose nature

requires the immediate intervention of disciplinary bodies to guarantee the normal development of these competitions, procedural systems shall be provided making it possible to combine the peremptory action of such bodies with the interested parties' right to be heard and their right to lodge a complaint. c) The ordinary applicable proceeding for the imposition of sanctions for transgression of the rules of the game or the competition shall ensure the normal development of the competition, as well as guarantee the interested parties' right to be heard and the right to appeal. d) The extraordinary procedure, for the sanctions corresponding to other violations, shall be adjusted to the principles and rules of the general legislation, all the necessary extremes are defined in the regulation of development of the present Law".

a trace of their right to remain silent, not to incriminate themselves and not to state their guilt. However, if the law did not establish any legal consequences for the cases of non-subjection of sportspeople to a test that it describes as mandatory (Article 5), it would be ignored, at least with regard to this point. The truth is that the law expressly contemplates the possible “...refusal of a sportsperson to be subjected to anti-doping tests...” (Article 6.2), when practised outside a “time frame” (to be legally determined with regard to sleeping times). However, when being notified of the imminent test, sportspeople are entitled to be informed of their rights¹⁰ and obligations. These rights include the right to refuse to take the test (Article 6.3 paragraph 2). However, such a refusal can be considered as “sufficient evidence”¹¹ to “punish his conduct”. Here we understand that, in the event that the sanction is imposed, the conduct to be “repressed” will be the refusal to undergo the test and not the doping, although both types of conduct are considered very serious transgressions bearing the same sanctions (suspension or deprivation of licence for two to four years and fines, depending on the case, of between 3,001 and 12,000 euros). A refusal to undergo a test is justified when “a just cause” concurs: not any just cause, but only the one stipulated by the legislator, not without a certain ambiguity. In this way, sportspeople can prove that there was a “just cause” for refusing to take the test. The Law conceptually defines what may be considered as a just cause, so that the simple fact of being unable to attend is not valid but has to be the result of “accredited injury”, or the test must “pose a serious risk to the sportsman’s health”. In the case of “accredited injury”, it does not seem very logical if, for example, a sprinter could avoid the anti-doping test if he has broken the little finger of his right hand. With respect to the other cause, the definition of a “serious risk” to sportspeople’s health has to be determined, since having a cold and having to go outside when it is raining to take the test could be considered as a just cause for avoiding the obligation, or having to drive on an icy road, for instance. In any case, the courts will determine what should be considered as “just cause” for not being subjected to the test for the purposes of the law, despite the fact that this still has to be determined. The principle of proportionality when obliging sportspeople to undergo the test has not been taken into consideration, at least expressly, what entails a better application of the measure to sportspeople’s own personal circumstances, but leaves the decision to the monitoring bodies with regard to making some sportspeople undergo the test and not others¹². Finally, the fact that the physician documents a refusal to undergo the test and that the document enjoys the presumption of truthfulness on the verified facts does not mean that there is no room for defence, but that this should be understood “without the prejudice of the tests that, for the defence of their respective rights or interests, sportspeople can indicate or put forward”. Sportspeople can bring forward all the documents and testimonies that they consider favourable in spite of their refusal to undergo the test, although the same is reflected in a document to which the law grants probative value.

Having said that, one example of sportspeople’s right to put forward a defence is their ability to forbid their trainers, physicians and executives to provide information to those responsible for the doping test. Here, the first issue is the one relative to the type of “information” that sportspeople’s authorisation can veto. And the answer is that, pursuant to the law, not all the information with which a trainer or a physician counts is submitted to sportspeople’s authorisation but only the one relative to “their medical treatment, those responsible for the same and the extent of the treatment” (Article 5.4). Article 13.4 refers to the “sportsman’s illnesses”. Therefore, it seems that the persons in the sportspeople’s immediate environment provide other “data” such as their usual whereabouts in order to carry out the test, as long as the right and duty of professional secrecy and his right to privacy is respected. There is no doubt that these limits have been taken into consideration by the legislator in order to subject the information from the professionals to the sportspeople’s authorisation. Those in the sportsman’s immediate environment (doctors, trainers, etc.) are also responsible in the event of not making information available to the monitoring bodies when the sportsman has authorised the utilisation of such data. Article 14.1.e refers to the extent of such

responsibility. This means that if a sportsman does not authorise the disclosure of the information, the people in his immediate environment will not be held responsible. The data relating to the sportsman’s usual localisation are excluded (ex Article 13.3).

4. Sports People’s right to defence before the proceedings for the imposition of sanctions regarding doping.

To sum up, we can affirm that the path followed by the legislator to sanction doping conducts branches into two: firstly, the fact that we can denominate administrative disciplinary proceeding and secondly, that of the jurisdictional criminal tribunals with the introduction of a new precept in the Criminal Code, Article 361bis, to which we refer in the last section. With respect to the administrative disciplinary proceeding, it is set up *ex officio* (with the exception that claims can be filed before the Commission of Control and Follow-up of Health and Doping). After a doping test, the laboratory that has carried it out usually communicates a positive result to the sports federation affiliated with the sportsman; in other words, to the sports federation’s disciplinary body. However, not only the inception of the proceedings takes place *ex officio*, but all other steps are also impelled by the disciplinary body in charge of the proceedings (28.2). This is important, since the legislator has elected to incept proceedings *ex officio* so that the proceedings are able to progress. This means that when the system of terms which the Spanish legislator has established is not complied with in practice, the opportunities for progressing with the defence are very limited. We should stop at this point, since it is logical that a sportsman against whom disciplinary proceedings have been filed is eager to have these resolved, and in spite of the extent to which the law establishes a term for resolution or tries to ensure that the necessary measures of anonymity are adopted to conceal the sportsman’s identity, reality shows us that it is not so easy. The law establishes a maximum term of two months (Article 27.3), so that the disciplinary body of the relevant sports federation can complete the file and impose a sanction. However, in the event that this term elapses without having completed the file, the legal provision is that the Commission of Control and Follow-up of Health and Doping (CCSSD) is placed in charge of it, and the terms no longer apply. Therefore, the proceedings can remain open *sine die*, but a more serious aspect is that the sportsman is not able to make a plea in this sense with a legal basis, since there is not a term for the resolution by this Commission. We say a plea because the law excludes all type of appeals in these proceedings (Article 28.4). This Article makes express reference to a “sole instance”; therefore, there is no distinction between the instruction phase and the sanctioning phase (Article 27.4) that corresponds to the same disciplinary body of the relevant sports federation¹³. The terms of Article 28 may contradict the doctrine of our highest courts with respect to the imposition of administrative sanctions, such as the ruling of the Constitutional Court 18/1981 of 8 June, according to which “the guarantee of the constitutional order demands that the decision is adopted through proceedings where the prospective inculpated party has the opportunity to propound and bring forward the evidence that he deems relevant and to state his rights”. Article 28 confirms that there are no facilities for the above, since the proceedings are, as already stated, “set up and instructed *ex officio* in all its stages” (Article 28.2). This is important, given that the imposition of a sanction on a sportsman can be declared invalid if the guarantees of defence, such as not allowing him to make allegations, are omitted. Actually, to enable him to make a statement, sportspeople have the right to information and to obtain a hearing. Continuing with the proceedings, the court ruling issued by the relevant disciplinary body is communicated to CCSSD, and it will be finalised within fifteen days after notification unless it is

10 *Inter alia* the right to access, rectification, cancellation and opposition of the Law of Personal Data Protection.

11 Article 137.3 of Law 30/1992, 26 November of the Legal Regime of the Public Administrations and Common Administrative Procedure refers to the

principle of presumption of innocence. 12 See in this regard the Resolution from the German Constitutional Court, 1990, 145 (185).

13 See Article 134.2 of the Law of the Legal Regime of the Public Administrations and Common Administrative Procedure.

impugned within this period by means of an appeal (*recurso de revisión*), as stated in Article 29, which will be heard by a specific section of the Spanish Committee of Sport Discipline. Here the sportsman's right to defend himself comprises the option of appointing one of the three members of the arbitration body that will come to a decision on the appeal. Therefore, a system of special administrative revision has been adopted with an arbitration formula that replaces the administrative remedy. If the sportsman is the one who seeks to use this special appeal, he will bear the costs of the arbitration, except when dealing with common current expenditures that will be borne by all parties. One aspect that is unclear is the sportsman's option of submitting proof at this stage of the appeal, since Article 29.2.a) only contemplates the possibility of formulating "pleas". A contentious-administrative appeal against the ruling in this special appeal could be filed in accordance with the accelerated proceedings pursuant to Article 78 of the Law 29/1998 of July 13.

5. New Article 361 bis of the Criminal Code. A perspective from the right to defence.

Although this matter cannot be approached with the depth it deserves, we cannot omit it in view of its importance in connection with the defence of what we have called the sportsman's "environment", since it is not relevant in this case, at least not as an active collaborator in the offence. This does not mean that sportspeople are unable to "prescribe, provide, dispense, supply... substances..." It is about protecting health and fair play and applies to everyone¹⁴. Some people are opposed to creating punishable offences such as the above, arguing in favour of minimal legislation and the possibility of violating the principle *non bis in idem* when combining criminal and disciplinary legislation¹⁵. However, in forensic practice, the criminal proceedings are not a model example of efficiency and diligence: even less so at a time when new amendments are about to be made. The Article referred to mentions "therapeutic justification"¹⁶ in order to exonerate those who exhibit the typified conduct from liability. Another problem is that the term "therapeutic justification" is not defined, since this term is not mentioned in all the criminal types contemplated in Chapter III of Title XVII of Book I regarding offences against public health. Organic Law 7/2006 of November 21 may clarify the matter. However, according to Article 7.1 paragraph 7 of this law, "the medical, therapeutical or sanitary procedure to be prescribed or applied ... administered for medical purposes and with due therapeutical autho-

risation [...] shall follow a procedure of informed consent that will be established by means of regulations". We do not know what should be understood by "due therapeutical authorisation", or who should grant it and, in any case, the definition of "procedure of informed consent" must be laid down in a regulation. However complex it is, this must include what the Penal Code defines as "therapeutical justification" that can be put forward by the defence. By definition, the conduct defined in Article 361 bis of the Penal Code cannot be the performing of a therapeutically-justified action, such as prescribing or supplying "prohibited substances". If we understand the "therapeutic justification" in relation to a generic qualification established by a regulation that does not yet exist, we are facing a standard that may not be constitutionally sound according to the doctrine of the Constitutional Court relative to the admissibility of the criminal framework acts¹⁷. The reference to "prohibited substances or pharmacological groups" - published every year in the State Official Bulletin (BOE) - is a different matter. The same applies to the "no-regulation methods". The prohibited substances must "put the lives or health" of sportspeople at risk, and such substances must be "destined" to increase sportspeople's physical performance or to "modify the results of competitions". Therefore, it is not any "prohibited" substance or pharmacological group (or non-regulation method): however, other circumstances must concur that could be very complex. Therefore, for example, there might be a danger that an innocuous product turns into a prohibited substance under certain circumstances. These definitions do not include the treatment of animals in the world of sport with regard to the lives or health "of sportspeople" being endangered. However, the first Additional Disposition of Organic Law 7/2006 does contain the provision of drafting a bill to amend all the obligations and the appropriate supervision to include the animals participating in state competitions.

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¹⁴ "UniversalRechtsgüter". See comment from Roxin at Kreuzer, *Handbuch des Betäubungsmittelstrafrechts*, 1998, pages 20 et seq.

¹⁵ Among the detractors of the creation of criminal types to repress doping, see Millán Garrido, A., *La lucha contra el dopaje en el Derecho español: síntesis nor-*

mativa, Régimen jurídico del dopaje en el deporte, Ed. Bosch, Madrid, 2005, pages 126 et seq.

¹⁶ The bill made a reference to the "medical justification".

¹⁷ In this sense, see Sentence from the Spanish Constitutional Court 127/1990 of 5 July.



On the Front Foot Against Corruption

by **Urvasi Naidoo*** and **Simon Gardiner****

Introduction

In 2001 cricket was in crisis with corruption threatening to tear the fabric of the game apart. Research into the problem revealed that corruption involving match fixing linked to betting on international matches had been in existence for over 20 years. This corruption was permeating all aspects of the game and the international governing body, the International Cricket Council (ICC) was ill-equipped to deal with the magnitude of the problem. Although gambling is legally prohibited in countries such as Malaysia, India, Pakistan and Sri Lanka¹ an estimated \$150 Million is bet on the unlawful market on an average One Day International (ODI) match anywhere in the world.² The sheer scale of the problem had been suppressed for years with each country's domestic cricket board dealing with it in their own way and often concealing events. There was no international structure in place to handle the corruption, no formal penalties to be applied and certainly no culture of integrity. The game was wide open to the corrupters.

The truth is that all sports are vulnerable to corruption. Around the world, horse racing, tennis and football have all recently made the headlines because of corruption scandals. In football, 26 year old German football referee, Robert Hoyzer was sentenced in 2005 to two years and five months in prison for his role in match fixing and banned for life by the German Football Association.³ In 2006, the Italian football authorities punished a number of Serie A clubs for col-

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¹ See Raja, N, *Sports Gambling in Malaysia*, For the Record - the Official

Newsletter of the National Sports Law Institute (1997) 8(2) pp.3-5.

² Lord Condon, *Bounce Corruption out of Cricket* leaflet (2002). Also see ICC Anti Corruption Unit Interim Report April 2001 (the Condon report) - www.icc-cricket.com

³ See news.bbc.co.uk/sports/hi/football/europe/4445896.stm.

lusion and match fixing. In March 2007 an Australian horse racing jockey was jailed in Hong Kong for 30 months for fixing races.⁴

This article looks at how the ICC tackled this ethical challenge and evaluates the various internal measures it took to address the problem of corrupt practices. In particular the ICC established a Commission to oversee and conduct enquiries and secondly it established a dedicated and largely independent anti-corruption unit. An evaluation will be made of how effective the ICC has been in engaging with corruption in international cricket and what other methods of legal and non-legal regulation operate in this area. Suggestions will be made as to what further reforms need to be made in this regard. What is clear is that governing bodies must put in place good governance structures and processes and personnel to manage them and this article will evaluate the debate around the need for improved sports governance. Lastly, the authors' interview with Jeff Rees the head of the ICC's Anti Corruption and Security Unit (ACSU) is appended. This provides some insight into the operation of the ACSU, evaluates whether international cricket matches are still being fixed, what the ICC is doing now and how he sees the next few years unfolding.

Background

Cricket is no stranger to gambling. In the early part of the eighteenth century the game owed a great deal of its popularity to the gambling opportunities that it offered. His Royal Highness Frederick Louis, Prince of Wales' passion for gambling regularly drew him to cricket matches.⁵ Mason in "Sport in Britain" writes:

"in the early 19th century the relatively small number of professionals could exert a disproportionate influence on some cricket matches and they were occasionally bribed or removed from the game by false reports of sickness in the family. One professional was banned from Lord's in 1817 for allegedly selling the match between England and Nottingham. The gradual assumption of authority by MCC and the county cricket clubs, the improvement of the material rewards of the average professional cricketer and the increasing opportunities to bet on other sports - notably horse racing and after 1926, greyhound racing- probably killed off gambling on cricket by cricketers."⁶

It is likely that small scale betting by players continued but there is little evidence that it impacted upon result of games. One incident that gained considerable media coverage occurred in 1981 during the Test Match between England v Australia at Headingley, when two Australian players, Dennis Lillee and Rodney Marsh placed a £15 bet at 500-1 on England to win. Against the odds, England pulled off a stunning victory and the Australians won their bet! No disciplinary action was taken against the players as it was believed that the bet was light hearted and there was no evidence that they had not done everything within their power to try and ensure a win for Australia.⁷ At that time there were no rules about players betting on matches in which they were involved. In the light of events in the 1990's which are discussed below, that was changed and it is now a rigid condition in first class cricket that players and officials are not allowed to bet on cricket matches in which they are involved. In 2000 this condition was extended to cover those involved in the administration of international cricket.⁸ In 2002 a Code of Ethics was introduced which applied the rule to all ICC Directors, Staff and Committee Members and extended it to state that they are not allowed to bet on any cricket matches at all.⁹

An accident waiting to happen

Despite this historical link between cricket and gambling, when revelations of corruption in the sport started to emerge in the 1990s, the sport and, in particular, the ICC had to face one of the greatest ethical challenges faced by any sport in the twentieth century. In 1995, Salim Malik, the former Pakistan captain, had allegedly attempted to bribe Australian players Mark Waugh, Shane Warne and Tim May to throw matches during their Tour of Pakistan in 1994.¹⁰ Malik was suspended in March 1995 by the Pakistan Cricket Board (PCB) whilst

they investigated the allegations. He was initially cleared but due to repeated allegations and public pressure the PCB decided to constitute a further official inquiry into match fixing allegations. The inquiry released an interim report in September 1998 implicating Malik and additionally Wasim Akram and Ijaz Ahmed. The report called for the suspension of all three players until a wide-spread new investigation could be completed. The PCB appointed Justice Malik Mohammed Qayyum to head the investigation. The Quayyum investigation and subsequent report in 1998 turned out to be but the first in a line of major enquiries into corruption. In December 1998, the PCB admitted it secretly fined Waugh and Warne in 1995. It stated that both players agreed that they 'were stupid and naïve' but denied they gave information concerning team line-ups or tactics. The PCB convened an independent inquiry into any other possible involvement of players headed by former Chairman of the Queensland Criminal Justice Commission, Rob O'Regan. In February 1999, the O'Regan Inquiry pronounced no evidence of Australian players' involvement in the practice of match fixing and players had always played to their optimum potential. The Report was critical however of the PCB's handling of the Waugh/Warne affair and highlighted the way that the problem of match fixing had been largely suppressed by the authorities.

These events exposed a systematic flaw in international cricket. The ICC's constitution gave sovereignty to each individual country to determine their own rules on player discipline and this meant that the ICC were powerless to do anything about the allegations of corruption. Something had to be done fast to rectify this and give the ICC authoritative power to tackle the problem head on and ensure that confidence in world cricket was restored. In January 1999 the nine Test playing nations (increased to ten in 2001) agreed to relinquish an element of their sovereignty and arm the ICC with wide ranging powers to deal with match fixing, bribery and other serious ethical violations. The individual countries from that point on were to be bound by uniform penalties established and enforced by the ICC.¹¹ It was also decided in 1999 that a commission, independent of any country cricket board would be convened to oversee investigations into allegations of corruption and recommend appropriate punishments.¹²

ICC Code of Conduct Commission

The ICC Code of Conduct Commission (the Commission) was established as the ultimate authority sitting over the governing body and its Member cricket boards. The ICC wanted to put in place a formal mechanism to operate with similar weight and authority as a permanent Judicial Commission. Although it is a Committee of the ICC, the Commission is totally independent of the ICC Executive Board of Directors and ICC Senior Management and has been given the specific task of making enquiries or overseeing enquiries into conduct which in the opinion of the ICC Executive Board is prejudicial to the interests of the game of cricket and to make recommendations to the ICC Executive Board accordingly.

The Commission operates in accordance with detailed Terms of Reference which were approved by the ICC Executive Board in 1999.¹³ Lord Griffiths, was appointed the first Chairman of the ICC Code of Conduct Commission in April 1999.¹⁴ He remained in post

4 "Aussie champion jockey jailed", www.bbc.co.uk/news 1st March 2007.

5 See Fraser, D, "A Temptation that has been hard to resist and Balls, Bails and Bribes" *The Times* 10th December 1998.

6 See Mason, T, "Sports in Britain; A Social History" (Cambridge University Press, 1989).

7 See "Stumped but not out for two decades", www.CricInfo.com, 18th April 2000, which gives a chronological history of match fixing/betting allegations.

8 See ICC Media Release 18th October 2000, www.icc-cricket.com.

9 See "The ICC Code of Ethics" www.icc-cricket.com.

10 See Oslear, D and Bannister, J "Tampering with Cricket" (HarperCollins/Willow, 1996).

11 See ICC Media Release 11th January 1999 www.icc-cricket.com, and - ICC given power to act over match-fixing" *The Times* 12th January 1999.

12 Ibid. ICC Media Release 11th January 1999 and "ICC reveals plan to hunt match-fixers", *The Independent* 12th Jan 1999.

13 See ICC Media Release 11th January 1999 www.icc-cricket.com.

14 See ICC Media Release 30th April 1999 www.icc-cricket.com.

until Feb 2002 when the Hon Michael Beloff Q.C was appointed. The Commission comprises one nominee from each Test Playing nation. The current Members include Richie Benaud, former Australian Captain and renowned commentator, Sir Oliver Popplewell, retired High Court judge and former President of Marylebone Cricket Club, Justice Dr Nasim Hasan Shah, retired Chief Justice of Pakistan and former President PCB and Justice Albie Sachs, current judge with the Constitutional Court of South Africa.

The first Code of Conduct Commission's Official Inquiry arose in 1999 when the Commission was referred by the ICC Executive Board to review the findings of two investigations and to advise the Board if any further action was required. The investigation of the Board of Control for Cricket in India (BCCI) dated 17 November 1999 and the investigation of the Australian Cricket Board (ACB) dated February 1999 were referred for consideration. Their unanimous report reached the following conclusion:

"It is troubling indeed that allegations should be made and widely publicised to the effect that players are approached by bookmakers not only to give inside information but to influence the outcomes of games. Such allegations are by their nature difficult to investigate, the more so when they relate to matters that have taken place some time previously and are based overwhelmingly on hearsay evidence"¹⁵

The following recommendations were made:

- a. The Code of Conduct be amended to include an obligation on the part of players to report to the captain and team manager any approach made to them by bookmakers, or knowledge of such approach to any other player.
- b. Failure to make such a report be made a punishable offence.
- c. If a player is found guilty of accepting money from a bookmaker for any reason, the penalty should be a substantial suspension, and the reason should be made public, as should other serious breaches of the Code of Conduct.
- d. National Cricket Boards be requested to ensure that all players are told in plain language that betting on matches is not permitted.
- e. Players should be warned that bookmakers and betting syndicates might try to corrupt them and be advised of the serious consequences of their ever taking bookmakers' money.
- f. Where approaches are made to players by or on behalf of bookmakers, the local police should be informed as soon as possible so that criminal investigations may take place.¹⁶

These recommendations were adopted by the ICC and subsequent changes to the ICC Code of Conduct for Players and Officials were made. In particular stringent offences relating to betting and match fixing were included.¹⁷

It's Just Not Cricket

The events during the 1990s lead to the ICC to put into place a mechanism to inquire into acts of match fixing. However the one calamitous event which lead to the ICC realising it had a real and major problem and needed to act without delay occurred in April 2000. On 7 April, the Indian Police claimed they had evidence that four South African cricket players, including the then captain Hansie

Cronjé, had taken money for match fixing during their series against India in March 2000. In the course of a separate investigation, they had intercepted mobile phone calls between Cronjé and an Indian bookmaker, Sanjay Chalwa. Criminal charges were laid down against Cronjé, Herschelle Gibbs, Henry Williams and Nicky Boje. Cronjé initially denied the allegations. However on 11 April, he stated that he had not been 'entirely honest' in his earlier denials and had taken nearly US\$15,000 from bookmakers for 'providing information and forecasting'.¹⁸ The United Cricket Board of South Africa (UCBSA) together with the South African Government set up the King Commission to carry out an investigation. The subsequent King Report lead to disciplinary hearings for all four players. Cronjé received a life-ban for all playing and related activities in September 2000. He failed in his challenge of the life ban in the South African High Court.¹⁹ Gibbs and Williams were both banned for six months and fined. The Code of Conduct Commission reviewed the reports of the King Commission in South Africa and endorsed the penalties imposed by the United Cricket Board of South Africa (UCBSA) on Cronjé, Gibbs and Williams.

In addition to the investigations in South Africa, the Central Bureau of Investigation of the Indian Police (CBI) produced a Report in 2000 and there were a number of quasi-judicial investigations in a number of the other Test playing countries.²⁰ The ICC published the Condon Report in 2001.²¹ The sport had been severely damaged; three captains of the top nine teams had been banned for life in a short space of time.²² Stakeholders were understandably shaken.

Cricket's response

Lord Condon, ex-Commissioner of Metropolitan Police in London from February 1993 to February 2000, was appointed director of the International Cricket Council's Anti-Corruption Unit in June 2000 and became Chairman when the organisation was renamed the ICC Anti-Corruption and Security Unit (ACSU) in July 2003.²³ His detailed and often disturbing report was probably the most comprehensive study to date as it tried to get to the heart of the problem²⁴ and it also provided a list of 24 recommendations for the organisation and gave guidance as to how these recommendations should be implemented.²⁵ A key phrase from Lord Condon's Report is that "Corruption in any aspect of life is caused by human weakness, greed and opportunity."²⁶ Although Lord Condon goes on in his Report to identify probable explanations for why corruption established such a strong foothold in the sport of cricket, such as unique variables (e.g. the number of runs a batsmen might score) which make it susceptible to all sorts of spread betting, many sports are susceptible to corruption.

Radical and fundamental changes were necessary to achieve a turnaround and rapidly eradicate corruption and other practices prejudicial to the interests of the game. The ICC had to realise the enormity of the problem it faced and take serious internal measures which included the introduction of two bodies dedicated to that purpose. First, the ICC established a Commission to oversee and conduct enquiries and secondly it established a dedicated independent anti corruption unit.

ICC Anti-Corruption and Security Unit

The ICC Anti-Corruption Unit was set up in 2000 to provide international cricket with a dedicated, professional operation to aggressively tackle and root out match-fixing and corruption and those involved

¹⁵ Conclusion of the ICC Code of Conduct Commission Report of Official Inquiry held 28th and 29th October 1999 can be found at www.icc-cricket.com.

¹⁶ Recommendations of the ICC Code of Conduct Commission Report of Official Inquiry held 28th and 29th October 1999.

¹⁷ The Code of Conduct for Player and Officials can be found at www.icc-cricket.com. The Code is discussed further below.

¹⁸ See "Test star Cronjé sacked after lying about bribe", www.telegraph.co.uk/, 12 April 2000.

¹⁹ For more on Cronjé scandal, see Gardiner et al, *Sports Law* (2005) 3rd ed. London: Routledge Cavendish pp 325-339. Also see Le Roux, R, 'The Cronjé Affair' (2002) 2 *The International Sports Law Journal* 11; Gouws, D, '... And Nothing But the Truth?' (2000), Cape Town: Zebra; Alfred, L, *Lifting the Covers: the Inside Story of South African Cricket* (2001),

Claremont: Sperahead; Oosthuizen, A and Tinkler, G, *The Banjo Players: Cricket's Match Fixing Scandal* (2001), Hout Bay: Riverside.

²⁰ E.g. See Sharjah investigation discussed below.

²¹ Op cit. fn 2 Hyperlink to all these reports can be found at the ICC website www.icc-cricket.com.

²² Hansie Cronjé, Salim Malik, and Mohammed Azharuddin Hyperlink to reports on BBC

http://news.bbc.co.uk/sport/hi/english/static/in_depth/cricket/2000/corruption_in_cricket/default.stm.

²³ A full biography for Lord Condon can be found at www.icc-cricket.com.

²⁴ Op cit fn 2 paras 79 to 82 describe possible reasons why corruption developed in cricket.

²⁵ Ibid, paras. 106 to 138.

²⁶ Ibid, para. 61.

in it.²⁷ The Terms of Reference for the Unit have been reviewed and amended to extend the remit of the Unit to include prevention as well as investigation of corrupt practices. With effect from July 2003, the Anti-Corruption Unit was renamed as the ICC Anti-Corruption and Security Unit (ACSU).²⁸ The change in nomenclature is slight but appropriate as the Unit takes on a broader mandate that gives equal weight to the tasks of prevention and investigation of corruption.

Its two principal roles therefore are:

- To assist the ICC Code of Conduct Commission and the Members of ICC in the eradication of conduct of a corrupt nature prejudicial to the interests of the game of cricket
- To provide a professional, permanent security infrastructure to act as a long-term deterrent to conduct of a corrupt nature prejudicial to the interests of the game of cricket

The ACSU is an operating division of the ICC Code of Conduct Commission. Lord Condon leads the Unit as Chairman. He acts in consultation with ICC Chief Executive, Malcolm Speed. Day-to-day operational responsibility rests with Jeff Rees who is General Manager and Chief Investigator of the Unit. The Unit has an annual budget of over \$US1 million. In addition to the Chairman and General Manager, there is a full time staff of five Regional Security Managers (based in Australia, India, Pakistan, South Africa and the UK), two investigators, an intelligence officer and an administrator. In August 2005 the whole Unit relocated, with the ICC, to Dubai in the United Arab Emirates.

The preventative work of the ACSU falls into three main areas: education, physical security, and the appointment of security personnel. Extensive education and awareness programmes have been introduced with the Unit working with the younger players in world cricket briefing them and warning them about what to look for, how they might be approached and seduced into corruption. The "Bounce Corruption Out of Cricket" campaign was launched at the ICC's annual conference of 2002. It involved distributing brochures, posters and videos throughout the cricket playing nations. The professionally made video features high profile international players Steve Waugh, Sachin Tendulkar and Shaun Pollock who all pledge their support for the anti-corruption campaign.

The ACSU has had to respond sensitively and pro-actively to the needs of all ICC Members. For example in March 2001 as a result of allegations in the CBI report and elsewhere relating to matches in Sharjah, the United Arab Emirates Cricket Board commissioned an inquiry.²⁹ This inquiry was headed by George Staple QC, from England assisted by Clive Lloyd, the former Captain of the West Indies and Brigadier Mohammed K Al Mualla from Sharjah. This Commission was appointed to conduct an Official Inquiry into a number of specific allegations which related to alleged match fixing and/or related activities which it is said have either:-

1. Taken place in Sharjah
2. Effected cricket matches held in Sharjah or
3. Been carried out by persons involved in the organisation of international cricket matches in Sharjah.

Lord Condon expressed concern in his report in 2001 about what had happened in the past at the fringe tournaments in places like Sharjah.³⁰ As a direct result of the work of the ACSU the authorities in Sharjah re-organised the security aspects there. The authorities implemented every single recommendation that the Unit made and also allowed the Security personnel of the Unit to attend the triangular tournament of October 2001 and both the triangular one-day tournament of April 2002 and the rescheduled Test matches between Pakistan and West Indies in February 2002.

In relation to the appointment of regional security personnel the ICC benefits from appointments which span the respective cultures and countries that make up world cricket. Ex-police officers were recruited for the Australia/New Zealand region, the South Africa/Zimbabwe/Africa region and West Indies/England while India and Sri Lanka now have as their regional security manager one of the

CBI officers who previously worked on cricket corruption, the remaining region Pakistan/Bangladesh has a high-calibre ex-army officer appointed to them. The Regional Security Managers act as the ICC's own 'police force' and attend every international cricket match and ensure that the physical security protocols are being adhered to. They also report any unusual incidents which the investigators in Dubai would follow up on.

The most difficult role is that of physical security. Without making it intrusive to the players or supporters, the aim was to make it far harder for the corruptors to carry out the sort of activity they had in the past through ease of access to participants. That included installing a small number of closed-circuit TV cameras outside doors to dressing rooms, and establishing better control of access to the dressing rooms and players' areas. Stringent security measures were introduced, for example restricting the players and officials use of mobile phones in dressing rooms.³¹

The small but dedicated security unit acts together with staff at the ACSU to ensure the game remains clean of corruption this is no easy task. The worldwide market in illegal gaming has continued to grow as cricket's popularity has risen. As an example, it is estimated that during each One Day International match of India's home series against Pakistan in 2004 around US\$500 million changed hands through the illegal betting market.³² More wagers, more money and more bookmakers add up to greater pressure on the game and those who play it. Turf wars between rival bookmakers have resulted in gangland killings.³³

Recent preventative measures and the infrastructure put in place by the ACSU for the ICC tournaments have proved successful and Lord Condon has said that the outcomes of recent matches have not been tainted by corruption.³⁴

Additional steps taken by the ICC

Codes of Conduct & Ethics

The ICC's drive to exercise its new found powers extended to ensuring that clear and consistent penalties were in place to deal with corruption. The ICC Code of Conduct for Players and Team Officials (the Code) was re-written specifically to include offences such as betting on cricket matches, inducing someone else to bet on matches, contriving or attempting to contrive the result of any match and failure of a player to perform on his merits during a match. The Code is applied to all international cricket matches conducted under the auspices of the ICC. This includes all Test Matches, One Day Internationals and international tournaments such as the ICC Champions Trophy, the ICC Cricket World Cup and the ICC Under19 World Cup.

The Code is a constantly evolving document. Since 2000 it has been amended several times to include wide reaching corruption offences and to prescribe appropriate penalties for such offences. It was even recently amended to provide that it may be a valid defence to a charge of corruption if a player or official can show that his conduct was the result of an honest and reasonable belief that there was a serious threat to the life or safety of himself or any member of his family. Due to betting links with the criminal underworld and the vast sums of money involved the possibility of threats to the players was a real possibility so this provision was introduced to offer them some re-assurance that they would not be penalised if this occurred.

The ICC strengthened its internal and external audit processes. An internal Auditor was employed in April 2002 and at the same time a separate Audit Committee was formed to review ICC processes. A comprehensive and explicit Code of Ethics was also put in place. This Code sets out the ethical responsibilities and duties which apply to all ICC Directors, Committee Members and Staff.

27 Refer to ICC Media Release 3rd May 2000, www.icc-cricket.com.

28 The new Terms of Reference for the ACSU can be found at www.icc-cricket.com.

29 See The Guardian 11th December 2000 Lloyd to lead Sharjah Probe.

30 Op. cit. fn 2, para. 42.

31 This is a measure which the Jockey Club has tried to replicate in Horse Racing, see www.thejockeyclub.co.uk.

32 Lord Condon in ICC Annual Report for 2004-2005, see www.icc-cricket.com.

33 See timesofindia.indiatimes.com/articleshow/3650634.cms.

34 Op. cit. fn 33.

“The overriding objectives of the Code are to enhance the reputation of the ICC, to foster public confidence in the ICC’s governance and administration of the sport of cricket worldwide and in particular to strengthen its authority to deal with corruption. As the guardians of the sport internationally and because Directors operate in the public spotlight, they are expected to conduct their affairs on a basis consistent with the great trust that has been placed in them. This requires their behaviour to conform to the highest standards of honesty, impartiality, equity and integrity when discharging their duties and responsibilities. Directors’ actions must be dedicated to the promotion and development of the sport of cricket worldwide. The Code of Ethics should be read and understood as a minimum standard of acceptable conduct.”³⁵

In 2003 Chetram Singh, president of the Guyana Cricket Board and the then forerunner for the post of president of the West Indies Cricket Board (WICB), withdrew from the elections amidst controversy about his bookmaking business. The ICC Code of Ethics clearly states that no director “shall be engaged or actively involved in, directly or indirectly, any conduct analogous to... gambling or any other form of financial speculation.” Singh, in a media release, said that he had “accepted the nomination for the post out of my love for West Indies cricket and my desire to continue to serve wherever I am most needed. It is that same love of this game and our region that has prompted me to withdraw from this election.”³⁶

This is illustrative of the far reaching effect that the ICC Code of Ethics has had over the sports administrators and that it is a respected aspect of the corporate governance of the organisation.

Improved Internal Governance

Historically in many sports, two strong traditions have operated. Firstly, voluntarism where sports administrators have generally been unpaid or lowly paid and have worked their way up into positions of authority in organisations from the grassroots. Secondly, sports have managed themselves on the basis of having a great deal of autonomy and exercising self-regulation. However when faced with financial corruption in the guise of activities such as match fixing, it has become clear that sports bodies have been unable to engage effectively with this problem. Pressure has been brought upon sports bodies such as the ICC to bring about internal change, comply with external legal rules and norms and support an ethical environment to uphold the integrity of the sport.

These historical traditions and a culture of obfuscation have meant that at best sports bodies have attempted to deal with these problems in-house; at worst ignored them. The pressure for improved and effective internal governance has very much been on the agenda of external regulators such as national governments and supra-national bodies such as the European Union. The debate within European sport is instructive in this regard and was crystallised by the 2001 conference entitled ‘*The Rules of the Game - Europe’s first conference on the Governance of Sport*’.³⁷ It has been recognised as in the corporate world generally, the values of openness, integrity and accountability are important aspirations but are not an exhaustive list.³⁸ Other terms can be substituted for these listed-values such as transparency are closely linked to openness. Transparency is partly about openness, but also allows outsiders to see, for example in sport, as to how disciplinary procedures oper-

ate and how decisions are made. It is also about the need for effective communication of key information in a form and way that is meaningful to target audiences. With companies, this is constructed in terms of the rights of the shareholders *vis a vie* the directors of a company. Some sporting bodies and clubs may have shareholders, but it is more accurate to talk of ‘stakeholders’ in sport including, players, administrators, fans, media and commercial interests.

In recent years sport governance has fallen into disrepute primarily because of the involvement of sports federations not only in the rules of the game but also in wide ranging commercial activities.³⁹ Because of the monopolistic position of virtually all sports federations, this distinction which appeared so clear in the past when governing sport for the ‘good of the game’ has become blurred by commercial activities. The EU Commission and the European Court of Justice have on several occasions drawn attention to this dichotomy (rules for the governance of the game on the one hand and rules that have a commercial impact on the other).⁴⁰ As Jaques Rogge has argued:

“Governance is about clarification between the ‘rules of the games’ and the economic and commercial dimension related to the management of a sport. Because sport is based on ethics and fair competition, the governance of sport should fulfil the highest standards in terms of transparency, democracy and accountability.”⁴¹

A major development that has facilitated improvements in internal governance has been the supplanting of voluntarism with increased levels of professional expertise. The ICC is a leading exemplar with both organisation and the personnel of the body almost indistinguishable from the 1990s. Lord Condon commenting in his 2001 Report on the structure and operation of the ICC claimed:

“If the ICC continues as a loose and fragile alliance it is unlikely to succeed as a governing body. It must become a modern, regulatory body with the power to lead and direct international cricket⁴² ... the ICC has tried to address ‘conflict of interest’ issues for those who serve on the Executive Board of the ICC. The matter has not been resolved satisfactorily and needs to be revisited.”⁴³

Memoranda of Understanding

The ICC and, in particular the ACSU has worked extremely hard to build a network of good working relationships with governments, police forces, betting exchanges, gambling boards, other sports and all other relevant entities.

Since January 2004 the ICC has signed a number of agreements with internet betting exchanges, including Betfair in the UK. Betfair is an online betting exchange which acts as an intermediary and claims a commission on all bets struck. Unlike traditional betting companies it allows members of the public to “lay” as well as “place” bets.⁴⁴ Information which they supply can assist in identifying unusual betting activities and patterns which may be cause for concern.⁴⁵ Betfair has signed “Memorandum of Understanding” with several sport governing bodies in addition to the ICC. This has included the Jockey Club and the Association of Tennis Professionals (ATP), whose security departments will have access to individual identities and betting records of Betfair gamblers when a race or match produces unusual betting pat-

35 ICC Code of Ethics paragraph 1.3, see www.icc-cricket.com.

36 See www.cricInfo.com 15th July 2003.

37 *The Rules of the Game - Europe’s first conference on the Governance of Sport*, see papers at www.governance-in-sport.com. The Conference was jointly organised by the FIA, the European Olympic Committee and lawyers, Herbert Smith. For more information, see Caiger, A and Gardiner, S, ‘The rules of the game: Europe’s first conference on the governance of sport’ (2001). 4(2) *Sports Law Bulletin* 1, and *SportBusiness*, April 2001, p 26.

38 Note that there have been many more reports on corporate governance since the Cadbury Report 1992, e.g. OECD - Principles of good practice (2004), see Birkbeck College’s Football Governance Research Centre web site for copies of other Reports- www.football-research.org/library.htm.

39 For example the huge increases in value of TV rights of sport including international cricket matches, see “ICC Agrees \$1.15bn Deal with ESPN Star Sports”, www.sportbusiness.com/news/160922/icc-agrees-1-15bn-deal-with-espn-star-sports/.

40 The Court of Arbitration for Sport has shown a distinction between issues involving technical decisions, standards or rules that essentially concern rules of the game are beyond arbitral or judicial scrutiny and should not be reviewed, e.g. *M. v Assoc. Internationale de Boxe Amateur (AIBA)*, CAS Ad Hoc Div. (O.G. Atlanta 1996) reported in Reeb, *M. Digest of Awards of CAS Awards 1986-1998*, (1999), Berne: Staempfli, where case was made to review a referee’s decision when Boxer M was disqualified for landing a below-the-belt punch on his opponent. Most recently this has

occurred in the *Delige* (Case 191/97 [2002] ECR I-4135 and *Lehtonen* (Case C-176/96) judgement of 13 April 2000.

41 Rogge, J, “Governance in Sport: a Challenge for the Future”, www.governance-in-sport.com.

42 Op cit fn 2, paras 4-6.

43 *Ibid*, para 135.

44 A lay bet is a bet that something will not win. This type of bet has grown significantly in popularity over the last few years with the growth of betting exchanges in particular.

45 See <http://news.bbc.co.uk/sport/hi/cricket/3406861.stm>

terns or competition results. Betfair points out that by developing internal policing relationships with relevant sport governing bodies, sports corruption will be deterred because electronic transactional records will help investigators catch any wrongdoers, and, therefore create “safe” Internet gambling sites. The downside is that if an exclusive commission is paid to sport governing bodies when they recommend that gamblers deal with “official” or “approved” betting exchanges a conflict of interest can be created where sports contest integrity is sacrificed in order to maximise sports related gambling revenues. The ACSU has also formed similar collaborations with organisations in Australia, New Zealand and South Africa.

As these Memoranda of Understanding play a pivotal role in the investigation of corruption in sport, it is inevitable that at some point in time they will be scrutinised by a criminal or civil court, whether in the UK or abroad. Under many jurisdictions there may be privacy issues relating to exchange of data. For example, in the UK, the Data Protection Act 1998 provides the regulatory framework over the transfer of data (for example unusual patterns of betting on a particular match including information on who made certain bets) that would be provided by Betfair to a sports governing body such as the ICC. Currently, the transfer works on the basis that “the data subject has given his explicit consent to the processing of the personal data”. The legal arguments behind this approach are strong, both resting on the fact that Betfair’s website terms and conditions extract explicit consent for the transfer. However, it may be that what is essentially a private form of regulation involving commercial bodies such as bookmakers and sports bodies, requires a new, clear statutory gateway be created to permit these data transfers. Such a gateway would make lawful the transfer of personal data from any organisations concerned with gambling to any licensed organisation concerned with the investigation of corruption in sport. This may be an appropriate development especially on reinforcing the reliability of this data on evidential grounds especially where there is increased criminalisation in the area.

The External Legal Framework.

The criminal law can be a rather blunt instrument in bringing prosecutions for corrupt sports-related activities such as match fixing. An array of imprecise common law offences and confusing criminal statutory provisions has been employed to prosecute those involved in match fixing. One of the most notorious was the fixing of the 1919 baseball World Series which led to eight Chicago White Sox players (collectively re-named the “Black Sox”) being banned. The players were faced criminal charges but despite being acquitted never played baseball again.⁴⁶

In Britain, football players Peter Swan, David Layne and Tony Kay were convicted of fraud and given prison sentences in 1964.⁴⁷ More recently in 1994, three premiership players, corruption scandal in football concerned the allegations of match fixing against Bruce Grobbelaar, Hans Segers and John Fashanu were prosecuted with conspiracy to defraud.⁴⁸ At their first trial, the prosecution allegations were that Grobbelaar whilst playing for Liverpool FC and Segers for Wimbledon FC, let in goals to try to achieve certain results and thereby fix matches in Premier League games during the 1993-94 season. In addition it was alleged that there was a conspiracy involving Fashanu acting as a middle-man in the payment of sums to the two goalkeepers for a Malaysian businessman, Heng Suam Lim. At their first trial, lasting 34 days, the jury could not reach a verdict. At their second trial, with the prosecution only relying on the conspiracy to defraud charges, the four were acquitted. It has been estimated that the two trials cost more than £10 million.⁴⁹

As with fraud trials generally, there are significant problems with adducing appropriate evidence that will lead to convictions. When the conduct of individuals in sporting activity is questioned, for example a batsman deliberately getting himself out, or as was one of the issues in this footballing case, whether goalkeepers Grobbelaar and Segers were purposefully letting in goals, there is likely to be conflicting evidence. A major factor in the failure of the prosecution was the conflicting expert evidence of past-goalkeepers. For example World Cup 1966 England keeper Gordon Banks, argued that the

video replays of the questionable incidents did not provide evidence that the goalkeepers threw the game. In addition, there will always be problems over admissibility of evidence. In India, bookmaker Gupta’s allegations, which were the basis of the claims of the CBI Report, have not been repeated on oath and therefore could not be used in a court of law.

In the near future in the UK, the suitability of criminal prosecutions in such matters will be tested. After a long investigation, the Crown Prosecution Service has stated that a number of horse racing jockeys will finally come to trial in September 2007. Leading jockey, Kieren Fallon, and five fellow riders, are charged with conspiracy to defraud punters of internet firm Betfair by ensuring horses lost races. The offences are alleged to have taken place between December 2002 and September 2004.⁵⁰

New Gambling Legislation - criminal liability

The alternative to the general criminal law is to enact specific criminal offences of cheating in gambling. Under English law there have been long-standing statutory offences in the Gaming Act 1845, but it was little used and certainly not in the area of sports corruption. The new Gambling Act 2005 introduced a specific offence to punish those who for do anything to enable another to cheat at gambling including under performing in sport.

“Section 42 - Cheating

- (1) A person commits an offence if he-
 - (a) cheats at gambling, or
 - (b) does anything for the purpose of enabling or assisting another person to cheat at gambling.
- (2) For the purposes of subsection (1) it is immaterial whether a person who cheats-
 - (a) improves his chances of winning anything, or
 - (b) wins anything.
- (3) Without prejudice to the generality of subsection (1) cheating at gambling may, in particular, consist of actual or attempted deception or interference in connection with-
 - (a) the process by which gambling is conducted, or
 - (b) a real or virtual game, race or other event or process to which gambling relates.”⁵¹

The word “cheating” under the Act is not defined but has its normal, everyday meaning. The offence is committed by both cheating directly or by doing something for the purpose of assisting or enabling another person to cheat. On conviction, an individual can be given up to a two-year custodial sentence. Lord Condon felt that the introduction of this legislation was a major step for the ICC although the ICC had sought tougher penalties to help protect the integrity of sport.

“I am of the view that legislation and, therefore, regulation of betting on sport provides a more effective framework for dealing with the total criminalisation of the activity. If betting is effectively regulated by governments then effective penalties can be introduced to deal with corruption.”⁵²

In South Africa similar provisions of sports specific criminalisation

⁴⁶ See www.1919blacksox.com/.

⁴⁷ See Tongue, S, ‘Bribery and corruption: English football’s biggest ever match fixing scandal’, *Total Sport*, March 1997.

⁴⁸ See Gardiner et al, *Sports Law* 2nd ed (2001), pp359-362, for further analysis.

⁴⁹ See *Grobbelaar v News Group Newspapers Ltd* (2002) 4 All ER 732- in November 1994 *The Sun* newspaper published a series of very prominent articles charging Grobbelaar with corruption. He promptly issued writs claiming damages for libel. After some delay caused by the intervening criminal prosecution of the appellant and others, these libel proceedings came before Gray J and a jury. The jury found in favour of

the appellant and awarded him compensatory damages of £85,000. On the newspaper’s appeal against this decision the Court of Appeal (Simon Brown, Thorpe and Jonathan Parker LJJ) set it aside as perverse and November 1994. The House of Lords allowed appeal against the Court of appeal discussion but awarded Grobbelaar nominal damages of only £1.

⁵⁰ For further analysis of the internal reforms within the governing bodies of British racing, see *Op cit* fn14 Gardiner et al.

⁵¹ The Gambling Act 2005 - can be found at www.opsi.gov.uk.

⁵² *Op cit*. fn 33.

can be found in the Prevention and Combating of Corrupt Activities Act [No. 12 of 2004]. Whether Criminalisation is the answer is a moot point. We will see whether these provisions are meaningfully used resulting in more prosecutions. They may of course merely have a symbolic value backing up other quasi and non-legal measures.

Regulation of Gambling

Gambling and sport have almost been inseparable and gambling has been subject to considerable regulation by the State. Gambling is part of the general commercialisation of sport and has a close relationship with corrupt practices such as match fixing. Sports-related gambling has become a huge industry today, with the development of new forms such as spread betting and the availability of new mediums such as via the internet. Around the world, there are different mechanisms in place for the state regulation of gambling. In some countries around the world such as on the sub-continent, gambling is essentially prohibited. It of course flourishes as an 'illegal underground activity'. In others it is prohibited in some areas and regulated in others through strong and enforceable government legislation, e.g. in the United States, where there are many instances of specific sports gambling legislation to govern the behaviour of people within and outside sports. In a third grouping of countries a liberal regulatory framework exists, e.g. as in Britain, where over the last few years an increasingly liberal approach has been adopted. At a time when the administration of sport has become more complex than ever before, and vast amounts of new money are flowing into sport from sources such as the selling of media rights, it is essential that more effective regulatory frameworks are developed in the sporting world to counter the impact of gambling on particular sports and players. It is also vital that there is effective policing of these new regulatory frameworks.

In Britain, the current popularity in sports-related gambling is nothing new - gambling was endemic in 18th century Britain. During the nineteenth century, a puritanical reaction, aimed particularly at working class betting, grew culminating in what was probably the greatest achievement of the anti-gambling lobby, the Street Betting Act 1906. Subsequently, gambling on sport has been increasingly raided by governments to provide income for the State and has also played a crucial role in the financing of the major sports of football and horse racing.

The government set up a Gambling Review Body in 1999 under the chairmanship of Sir Alan Budd.⁵³ A wide ranging review of the legislation on gambling in Britain, it submitted its report in June 2001. This led to the Gambling Act 2005 and can be seen as generally a liberalizing law relaxing controls on when and where gambling can take place. But the match fixing scandal in cricket shows that there is a need for an effective regulatory framework concerning gambling and sport. The ACSU had provided input to an All Party Committee in the UK, which had been established to consult on this proposal

Conclusion

Five years ago corruption threatened to tear international cricket apart. The sport was on its knees with new revelations and allegations of malpractice seemingly emerging somewhere in the world on a weekly basis. Since then working for the good of the sport the ICC brought about fundamental governance and structural changes and campaigned hard to establish a culture of zero tolerance to corruption. The organisation has developed a working infrastructure to prevent corrupt practices occurring at cricket matches under its control. Cricket is now back on the right path and the sport seems largely free from serious corruption but the risk remains.

"Cricket has come a long way in tackling the evils of corruption. It has had to grow up quickly, but it can never relax and become complacent. If it does, the problem will inevitably return. No one at the ICC is prepared to allow that to happen and the newly-defined role and remit of the ACSU is proof of that long-term commitment."⁵⁴

The Code of Conduct Commission and the ICC ACSU have been instrumental in achieving a successful turnaround of what could have been the end of international cricket. The two bodies now provide the ICC with the skills, knowledge and resources to act on and implement the mandate given to the ICC by its Members to protect the sport from the all too real threat of corruption. There continue to be periodic allegations of misconduct but there have been few disciplinary actions. In 2004 Maurice Odumbe of Kenya was banned for five years by his home board, the Kenyan Cricket Association after being found to have 'received money, benefit or other reward' which could bring the game into disrepute. This decision followed an extensive investigation by the ACSU and a hearing in Nairobi chaired by Justice Ahmed Ebrahim, a former Zimbabwe High Court Judge.⁵⁵ At the time of writing, allegations have been made against the West Indies player, Marlon Samuels, which are under investigation.⁵⁶

More recently ICC liaisons with governments and relevant authorities have shown that more can be done to tackle corruption. In April 2005, in a speech to other heads of sports, ICC Chief Executive Officer Malcolm Speed urged governments to follow the UK's example and legislate to criminalise cheating in sports.⁵⁷ He also strongly urged sports to put pressure on governments to take stronger measures to regulate sports gambling and then punish those who operate outside or against such regulations. His message was quite clear, be vigilant, take internal steps to protect yourselves and make sure that governments and all relevant agencies are working with you to prevent corruption striking at the integrity of your sports.

The ICC can be held out as exemplar of good practice for sports bodies engaging with corrupt practices. It has responded to a problem and has effectively upheld the integrity of international cricket. However, it is vital that engaging with corrupt activities is an ongoing progress and constant monitoring of policies and procedures is crucial. Codes of Practice are essential in helping bring about real change in pervasive sporting cultures, but they do need to be constantly updated and effectively policed, and as such, is simply an application of proper sports governance. If International cricket under the stewardship of the ICC wants to bring to fruition its ambitious plans to expand globally, the game will need to continue to be vigilant to the scourge of match fixing.

APPENDIX

Interview with Jeff Rees, Chief Investigator and General Manager of the ACSU.

Jeff Rees served as a London police officer for 35 years, spending his last 10 years as one of a very small number of senior investigators at New Scotland Yard. He successfully headed a host of high profile murder and kidnap investigations, and wrote the national instructions for the latter. He was awarded the Queen's Police Medal for outstanding service in 2000. He retired from the Metropolitan Police in September 2000 to join the ICC and become the Chief Investigator and then General Manager of the ACSU.

Match fixing

Q How do you think the ACSU has been effective in addressing match fixing in international cricket over the last 5 years?

A Back in 2000 international cricket was in crisis, it has recovered and is in much better shape now but I have to emphasise in the strongest terms that there is no room for complacency and that the threat of corruption still exists and indeed increases as the level of betting and the amount of money involved in betting increases.

Q What single specific development has had the most success?

A The long term benefits of the education programme which we have put in place are huge. Every player at international level, even those

⁵³ *Gambling Review Report* (2001), London: The Stationary Office; it can be found at www.culture.gov.uk/gambling_and_racing.

⁵⁴ *Op cit.* fn 33.

⁵⁵ see www.icc-cricket.com/icc-news/content/story/135251.html.

⁵⁶ See news.bbc.co.uk/sport1/hi/cricket/other_international/west_indies/6354441.stm 'ICC begins Samuels bookie probe' 12 February 2007.

⁵⁷ See www.icc-cricket.com/icc-news/content/story/207080.html.

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participating in the ICC U19 Cricket World Cup, will have attended an ACSU presentation and seen the ACSU anti-corruption video. Players are alert to the issues and aware of how corrupters operate. The naivety which used to exist amongst players is no longer there.

Q How has the culture that allowed these problems to seemingly develop in the past, amongst international cricketers, been effectively changed?

A Players are educated about the corruption problem they therefore recognise the issues and respect the tight security protocols put in place. The naivety which used to exist amongst players is no longer there. Players are now constantly observed, a Regional Security Manager attends every international match and that is a constant and visible reminder that anti corruption measures are in place.

Q Are cricketers more likely to report their suspicions of corrupt activities? If yes, what is your evidence and at what frequency does this occur?

A Firstly, I should point out that it is an offence under the Code of Conduct if a player is aware that any other Player or individual has engaged in corrupt conduct, or received approaches and failed to disclose that to his Captain or to his team manager, or to a senior Board official or to us. The reality is that cricket is a team sport and no player wants to report a member of his team. Players also still harbour fears that they will be penalised/ and or ostracised in some way if they do report but the ICC is addressing this through its education programme so that the next generation of international cricketers will have no hesitation in reporting suspicions.

Q How do the political tensions and rivalries between the test-playing countries that the ICC has been confronted by (e.g. between the sub-continent countries and the old-guard i.e. England and Australia), hinder the activities of the ACSU?

A No the ACSU is unaffected by any such tensions as it operates independently.

Q Do you think international cricket in 2005 is clear of match fixing?

A I am confident that match fixing as we knew it in 2000 no longer occurs but the real danger now is micro fixing and in particular session manipulation which is much harder to detect. Let me explain. Matches are divided into sessions of rolling 20 overs for a five day Test Match and 15 and 20 overs for a one day match. Each session becomes an entity in itself and bets are placed on the outcomes of that session. Many manipulations could be possible in any given session and this may not affect the end result of the match at all. This micro fixing forms a key part of our player education, for instance we have strict dressing room protocols in place which prevent a player from contacting a potential corruptor on a match day.

Q Should the public think international one day matches are completely free from manipulation or are they right to have a continued healthy skepticism? If there is healthy skepticism (also on part of major stakeholders in cricket such as sponsors), what might this mean for the future legitimacy of international cricket?

A At the moment the legitimacy of international cricket is intact. What you see on the cricket pitch in international matches is legitimate but the threat is always there and the ACSU will continue to play an active role in investigating alleged corrupt activities and preventing potential corrupters from harming the sport.

The role of the ACSU

Q What are the ACSU powers of investigation?

A The powers and processes for the investigation are contained within the Unit's Terms of Reference which are attached. We have to work within the laws of the country that we are investigating in and we are also very respectful of issues such as data protection and confidentiality.

Q What increased powers would benefit the operations of the ACSU?

A It would greatly benefit the work of the ACSU if more cricket playing nations would introduce tougher legislation firstly to criminalise cheating in sport and secondly to enable prosecution and conviction of the corrupters/fixers as well.

Q What other agencies do the ACSU work with?

A The ACSU has developed good working relationships with a wide range of international authorities and organisations for instance police forces, customs officers, immigration authorities, gambling boards, players associations and other sports governing bodies.

Q Is the ACSU funded sufficiently by the ICC?

A From our inception we were given a budget of US\$4 million to cover the period up to the ICC Cricket World Cup in 2003. We managed to achieve many of our strategic aims within that time and kept to the budget set. We will aim for similar success in our next budget period.

Q What are the wider issues of corruption, if any, that the ACSU should address?

A If the ICC Executive Board decides that the ACSU should become involved in wider corruption related issues such as financial corruption and/or maladministration then we will use our skills and expertise to further that aim but presently the focus is purely on corruption linked to betting on cricket.

Q What form will the ACSU be in existence in 10 years time?

A Due to the increased volume of betting both legal and illegal the ACSU's work is likely to remain highly relevant to the sport. I see the ACSU continuing to lead in the area of responding to corruption in sport. I also see us working much more closely with other sports.

Q Should the ACSU be involved with addressing prohibited performance enhancing drugs on the one hand and social drugs on the other?

A The ICC is currently in the process of introducing an Anti Doping Code which will apply to all its events. I would not rule out our future involvement in the anti doping process. I would also add that if a player is mixed up in drugs he is open to blackmail and it makes him so much more vulnerable.

Q Do international cricketers have confidence in the activities of the ACSU? What is your evidence?

A I believe that the work of the ACSU has won the confidence of international players. The players' association, FICA, has always been very supportive of our activities; it appreciates the threats and the need for proper preventative measures. As I stated previously, we still need to overcome the players' fears about being penalized and/or ostracised for reporting their suspicions.

Gambling

Q Has the ICC/ACSU been effective in engaging with government over changes for e.g. to national gambling laws? Please provide examples.

A The Unit participated in the Parliamentary consultation which took place before the new Gambling Act in the UK was passed. This Act, which received the Royal Assent in April 2005, criminalises cheating in sport. The penalty is up to two years imprisonment. The ACSU/ICC actually lobbied for a tougher penalty of a maximum of ten years imprisonment. It remains to be seen whether the current penalty of up to two years will be a sufficient deterrent. The Unit would like to see similar legislation in all cricket playing nations.

Q Should there be more effective laws criminalising those involved in match fixing activities? If so, what?

A Yes, all those involved; the fixers and would be corrupters should also be prosecuted for their role in the corruption of the sport.

Q What positive advantages are there in the 'Memorandum of Understanding' type agreements between sports bodies such as the ICC and betting exchanges such as Betfair?

A In those countries where the betting industry is regulated we have sought to enter into agreements which allow the Unit access to information which could help identify those involved in corruption. This information sharing obviously furthers the aims of the ACSU but unfortunately it does nothing to assist in the unregulated markets where betting itself is illegal.

Q Is cricket-related gambling supported by organised crime groups for example to facilitate laundering drug related monies?

A The amounts of money involved in the illegal betting industry are

so great that it will undoubtedly attract the interest of organised criminal groups. We also know and it has been widely reported that there have been a number of murders linked to cricket related betting.

Q How does cricket liaise with other sporting bodies on sports-related gambling and corruption issues?

A The ICC the first sport to establish a dedicated unit to deal with corruption. We are leaders in this field and we provide guidance

and information to other sports who seek our assistance. The ACSU ran an international conference for sporting bodies earlier this year. It was the first of its kind and focused purely on the issue of corruption in international sports.

The Authors would like to express special thanks to Jeff Rees, ICC General Manager ACSU and Chief Investigator -for participating in the interview.

The International Sports Law Journal

The Council of Europe and Sport*

by Stanislas Frossard**

1. Introduction

If a European Sports model exists, the Council of Europe is unquestionably the body that has made the most substantial contribution to pave its way. The Council of Europe was the first international inter-governmental organisation to take initiatives, to establish legal instruments, and to offer an institutional framework for the development of sport at European level.

The Council of Europe was the first international organisation established in Europe after the Second World War. With 46 Member States, the Council of Europe currently represents the image of a 'wider Europe'. The main objective of the Council of Europe is to strengthen democracy, human rights and the rule of law.

The extensive work of the Council of Europe on sport is evident through the main texts on sport, such as the European Sports Charter and the Code of Sports Ethics, the European Convention on Spectator Violence and the

Anti-Doping Convention.

The Sports Charter and the Code of Sports Ethics strive to support national sport policies and to promote sport for all as a means of improving the quality of life, of facilitating social integration and of contributing to social cohesion, particularly among young people. With respect to these core values of the Council of Europe, this kind of action contributes to the dissemination and the promotion of the core values in the whole of society, *through* sport.

The Conventions on violence and doping attempt to counter certain negative aspects of sport and contribute to enforcing the Council of Europe's core values *in* sport.

Sport is a cultural, social and economic phenomenon of unparalleled importance, and it is, therefore, natural that the Council of Europe should give it considerable attention. The first stage of the Council of Europe's work in this field was marked by the adoption of the Committee of Ministers' Resolution on Doping of Athletes in 1967.

The European Cultural Convention (1954) provided the basis for international co-operation in the field of education, culture, European heritage, sport and youth activities. Sport co-operation within the Council of Europe is organised in partnership with national governmental and non-governmental bodies in the framework of the *Committee for the Development of Sport (CDDS)*, which was established in 1977 and in force until 2005. The CDDS used to meet annually in Strasbourg to adopt its programme and discuss current topical questions in sport. Bringing together all the 49 States Parties to the European Cultural Convention, the CDDS established and managed a pan-European work programme, and prepared the *Conferences of European Ministers responsible for Sport*. These conferences, which meet on average every other year, give political guidelines for the direction of future co-operation in the field of sport.

In 2005, the Committee of Ministers of the Council of Europe decided to renew the framework of co-operation for sport within the Council of Europe and to consider the creation of a partial agreement on sport to succeed the CDDS. A feasibility study was prepared in

2006 on various factors and the 17th Informal Meeting of Sports Ministers in Moscow in October 2006 decided that partial agreement would be the only possible way to continue and to deepen the work of the CDDS, and to give a new perspective to the

pan-European sport co-operation within the Council of Europe. Partial agreement will allow all interested States to join, but all States party to the European Cultural Convention will continue to take part in ministerial conferences. Partial agreement will also provide a framework for an enhanced co-operation with international sport organisations, in order to address issues related to the good governance of sport in Europe.

2. General instruments and themes

On 24 September 1976, *the European Sport for All Charter* was adopted by European States. From this date, sports policies in Europe had a common programme based on the fundamental belief of the role of the Council of Europe in the values of sport.

The European Sports Charter, adopted as a recommendation of the Committee of Ministers of the Council of Europe in 1992 (revised in 2001), provides the framework for sports policy to which all European countries have put their names. It is a reference for public authorities and sports organisations alike.

In adopting the Charter, governments have made a commitment to give their citizens, in co-operation with the sports movement, the opportunity to practise sport under well-defined conditions, set out in 13 Articles. According to the Charter, sport must be healthy, safe, fair, tolerant and fulfilling; respectful of the environment; protective of human dignity; and accessible to everybody through the widest possible co-operation and the appropriate distribution of responsibilities between governmental and non-governmental organisations. *The Code of Sports Ethics* complements the Charter, placing fair play at the centre of the intrinsic value of sport. This is aimed particularly at children and young people, directly or indirectly, in order to influence and promote their experience and knowledge of sport, and at governments, sports organisations and individuals such as parents, teachers, coaches, umpires, doctors, journalists and top sports people, who often serve as role models.

The role that sport can play in strengthening *social cohesion* is another area where the Council of Europe - supported by the Committee of Ministers' adoption of a Recommendation (No. R(99)9) on the role of sport in furthering social cohesion) - contributes to the democratisation process, particularly among young people. Considerable emphasis has been put on providing sports programmes for minority groups, such as migrants, refugees, the unemployed, prisoners and young delinquents, and people with disabilities.

* The text is an updated and elaborated version of *Council of Europe's Work on Sport* by Mesut Özyavuz, formerly, Deputy Head, Sports Department, Council of Europe, in: *The International*

Sports Law Journal (ISLJ) 2003/3, pp. 25-27.

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The programmes are either implemented in close co-operation with central, regional or local government or entrusted to the voluntary sports sector in the countries concerned. Social cohesion through sport has a significant and very important role to play in the reconstruction and reconciliation process in regions of conflict.

As all children have *Physical Education* as a compulsory subject at school, it is a vital part of a child's learning process and also the way that many children are introduced to sport and games and other physical activities. Not surprisingly, therefore, the Conference of European Ministers responsible for Sport and the Committee for the Development of Sport (CDDS), are continuously interested in this topic and wish to take steps to improve the opportunities for Physical Education, the quality of teaching and the experiences dispensed during the classes. This includes giving children with disabilities equal opportunities for physical education during their school time.

At the 16th Informal Meeting of Sports Ministers in Warsaw in September 2002, on the basis of a European survey commissioned by the CDDS, there was an intensive and in-depth discussion of measures that could be taken at European level, as well as national steps, to achieve the goals of improving opportunities and the quality of physical education. These measures resulted in the adoption by the Committee of Ministers of Recommendation No. R(2003)6.

Aware of the primary importance of *sports legislation* to ensure democratic principles and accountability, and equal access to sports facilities and activities, the CDDS elaborated and put in place numerous legal instruments (resolutions, recommendations and conventions) to help governments and national sports organisations to establish democratic sports laws and rules.

The Council of Europe and the CDDS are conscious that democratising global sport is one of the main challenges to be faced in the coming years and for this reason this issue was discussed on the agenda of the Ministerial Conference on modernising sports governance, which took place in 2004. These deliberations facilitated the preparation of Recommendation No. R(2005)8 of the Committee of Ministers to Member States on the principles of good governance in sport, which was adopted in 2005.

3. Violence and racism

The Council of Europe fights to control the negative aspects of sport, in particular, *violence* and *doping*, through two sports Conventions: binding legal instruments which, in the case of doping, operate equally outside the boundaries of Europe.

Although particularly acute today, the problem of *violence* has been a matter of concern to sports officials for a very long time. As early as 1983, the Council of Europe expressed its determination to take action against the increase in violence - both on and off the sports field. It was in this year that the Parliamentary Assembly adopted its recommendation on cultural and educational methods of reducing violence.

The Heysel disaster gave added urgency to the Council of Europe's work in this field. Shortly afterwards, Member States set out to find the best means of combating violence and developing international co-operation. The events at Heysel required an urgent response; and it was in this dramatic context that the *European Convention on Spectator Violence and Misbehaviour at Sports Events and, in particular, at Football Matches* was signed in Strasbourg on 19 August 1985. Some 41 States have now ratified this Convention.

This Convention provides governments with measures and remedies for the control, prevention and, where necessary, punishment of violence, as well as educational measures to prevent outbreaks of violence. The Standing Committee monitors compliance with set measures and issues practical recommendations. Among the principal measures recommended by the Convention, notably under Article 4, are:

- deploying public order resources in stadia and along the transit routes used by spectators;
- separating rival groups of supporters;
- strictly controlling ticket sales;
- excluding trouble-makers from stadia and matches;
- prohibiting the introduction and restricting the sale of alcoholic drinks in stadia;

- conducting security checks, particularly for objects likely to be used for violence;
- clearly defining responsibilities between organisers and the public authorities; and
- designing football stadia in such a way as to guarantee spectator safety.

In addition to the Convention, numerous Recommendations have been adopted by the Standing Committee, covering the following aspects:

- ticket sales (efficient management of ticket production, sale and distribution of tickets, key factors for overall football match safety);
- identification and treatment of offenders;
- stewarding (reducing police numbers in football stadia);
- efficient crowd management inside stadia, taking account of spectator safety and security (clear definition of responsibilities, appropriate stadia design, measures concerning the sale of alcoholic drinks, and so on);
- action against racism and xenophobia;
- police co-operation and information exchange; and
- social and educational measures to prevent violence in sport.

The Convention on spectator violence encourages close international co-operation among States and close co-operation among the relevant national sports authorities.

The Standing Committee is the body responsible for monitoring the implementation of the Convention. UEFA and FIFA are both associated with the Committee's work. During major international championships - the World Cup, European Championships, and others - the Standing Committee sets up an ad hoc working group to assess the security measures adopted and, after the major event in question, to draw conclusions from the implementation of such measures.

Major sports events are often marred by racist behaviour. Such behaviour must be firmly condemned; given the educational role sport has to play in promoting mutual respect, tolerance and fair play, and combating discrimination.

Following the proposal of the Standing Committee, Recommendation No. R(2001)6 of the Committee of Ministers was adopted on the prevention of racism, xenophobia and racial intolerance in sport. It urges governments of Member States to adopt effective policies and measures aimed at preventing and combating racist, xenophobic, discriminatory and intolerant behaviour in all sports, particularly in football.

In January 2003, the Standing Committee of the Convention adopted Recommendation No. R(2003)1 on the role of social and educational measures in preventing violence in sport. Drawing on the experience of recent major championship events, it recommends adopting measures to improve the welcoming and coaching of supporters. Fan coaching activities and projects, fan embassies, and fan coaches are the cornerstones of the recommended prevention policies.

Long-term activities are also recommended, including encouraging football clubs to broaden co-operation with fans and supporters' clubs and to acknowledge the role of the latter in their social environment. Finally, local authorities are encouraged to play a major role in developing youth projects for preventing violence.

A Round Table on sport, tolerance and fair play was organised in 1996. As part of the follow-up to this event, many European States have appointed national ambassadors for sport, tolerance and fair play. To date, 22 States have appointed such ambassadors, who are persons who are known and respected by their fellow citizens. Their role is to promote fair play in sport in their respective countries and implement programmes to encourage tolerance in sport, in order to guide and inspire national programmes encouraging all citizens to practice sport fairly and with respect for the other players.

4. Doping

Doping is not only contrary to the values of sport and the principles for which it stands, such as fair play, equal chances, fair competition and healthy activity, but it also endangers the health and life of athletes.

Doping in sport is not a new phenomenon, but it has grown, expanded geographically and become more visible in recent years. It is a genuine problem for many competitive sports and jeopardises the health of millions of young athletes across the world.

The Council of Europe realises the extent of this problem and continues to fight against it. The Anti-Doping Convention which opened for signature on 16 November 1989 in Strasbourg and entered into force on 1 March 1990, demonstrates this commitment. It expresses the contracting parties' political will to combat doping in sport in an active and co-ordinated manner. To date, the Convention has been ratified by 49 countries.

The main objective of the Convention is to promote the harmonisation, at national and international levels, of the measures to be taken against doping. The Convention does not claim to create a uniform model for anti-doping, but sets a certain number of common standards and regulations requiring that the parties adopt legislative, financial, technical, educational and other measures.

The spirit of the Convention derives from the political desire to help safeguard the ethics of sport and to preserve the integrity of 'clean' sport.

By adopting the principles and objectives of the Convention, the contracting parties undertake, in their respective constitutional provisions, to put into place a national anti-doping policy to:

- create a national co-ordinating body;
- reduce the trafficking of doping substances and the use of banned doping agents;
- reinforce doping controls and improve detection techniques;
- support education and information programmes;
- guarantee the efficiency of sanctions taken against offenders;
- collaborate with sports organisations as well as at international level; and
- use accredited anti-doping laboratories.

An additional Protocol to the Convention, concerning the mutual recognition of anti-doping controls, was opened for signature in September 2002 and has been ratified by 21 States and signed by 11 States to date.

A project on monitoring compliance with commitments started in 1998. It studies Member States' implementation of the Convention. Advisory visits are organised to help the countries put in place the policies and programmes necessary to carry out the requirements laid down in the basic texts. Evaluation visits are organised and the resulting evaluation reports are published.

Furthermore, each party must complete a detailed annual questionnaire on their national anti-doping policy.

The recently adopted (2002) Protocol to the Anti-Doping Convention includes an article which makes it an obligation for parties to be available for evaluation, thus making it one of the few international conventions with a stringent control system.

The Anti-Doping Convention was the first international legal reference instrument in the fight against doping. It is open to all countries. The body responsible for monitoring the implementation of the convention is the Monitoring Group. Other bodies, for example, Unesco, the World Anti-Doping Agency (WADA), the International Olympic Committee (IOC) and international sports federations, are involved in its work. Several other non-European countries regularly participate as 'observers' in the activities of the Monitoring Group of the Convention, including China, Japan, New Zealand, South Africa and the United States.

Following the Lausanne Conference on Doping in Sport in

February 1999, a new body was established in November 1999 in the fight against doping: the World Anti-Doping Agency (WADA). The Council of Europe played an active role in the creation of this agency, which is the first joint venture between the sports movement and the public authorities in this field, and its expertise contributes substantially to the work of the WADA, in particular, for the elaboration of the World Anti-Doping Code and its standards. Since WADA was established, the Council of Europe set up a co-ordination body (the ad hoc Committee European Coordination Forum for WADA) to co-ordinate the European governmental position within the governing bodies of WADA.

The Unesco Round Table of Sports Ministers decided in January 2003 (which decision was confirmed by the Unesco Executive Committee in April 2003) that the Council of Europe's Anti-Doping Convention will serve as the basis for the future global instrument against doping, which will be prepared for the next MINEPS IV Conference (Sports Ministers Conference of Unesco), to take place just before the Athens Olympic Games in 2004 and to be adopted, if possible, before the Winter Olympic Games in 2006. Indeed, the General Conference of the Unesco adopted the International Convention against doping in sport in October 2005, and this Convention is expected to enter into force at the beginning of 2007. The Monitoring Group of the Anti-Doping Convention intends to co-operate with the Unesco Convention, supporting the development of the monitoring system and drawing the attention of the Unesco Conference of Parties to issues of relevance that will have been identified and discussed within the Monitoring Group.

5. Conclusion

The European Sports Charter and the Conventions are permanent constituents of the Council of Europe's sports programme.

Thus, many different subjects have been treated over the years. Once these programmes are finalised the Committee passes the responsibility to the Member States to follow up the work at national level. Examples of areas

- other than those mentioned above - where the Council of Europe is involved are:

- sport and physical education for children and young people;
- sports facilities;
- the promotion of sport;
- sport policy, management and economy;
- the economic impact of sport; and
- sport and the environment.

To conclude, the Council of Europe is aware that sport has a distinctive role to play as a force for social integration and co-operation. It is open to all, regardless of age, language, religion, culture or ability. It is the single most popular activity in modern society. Sport provides the opportunity to learn to play by commonly agreed rules, to behave admirably both in victory and in defeat and to develop, not only the physical being, but also social competences and ethical values. Its potential for improving health, but also in education is increasingly acknowledged.

The Council of Europe continues to play an active role in European sports affairs to establish international standards for States Parties to the European Cultural Convention, to help public authorities, in co-operation with national sports organisations, to promote and develop sport that is open to all, without discrimination, and run in a healthy, safe and ethical environment.

The International Sports Law Journal



European Sports Law: Collected Papers*

by Stephen Weatherill**

I am immensely flattered and honoured that the Asser Instituut has undertaken to publish a collection of my writing in the area of EC law and sport, and I thank them most warmly for this generous mark of approval. I am delighted too to be given this opportunity to write a short Introduction designed to sketch just why I have always found this area to be intellectually rewarding. 'Sport and the law' is, for sure, something of a niche interest - though, thanks to Jean-Marc Bosman (and Jean-Louis Dupont too) it is a good less esoteric to claim an interest in sport and the law today than it was back in the distant 1980s when I first grappled with the complexities - but it is one that repays the investment of time and energy. Researching the field tells us something about sport, of course. But it tells us something about EC law too. Examination of the special character of sport when placed under EC law's microscope reveals the scope of EC trade law's adaptability to the particular context in which it is applied. And the story of EC sports law told through the case law illuminates the way in which EC law is exploited by actors as a lever to prise open sometimes long-established organisational patterns. Sport has in recent years become more commercialised and more juridified too. The challenges to its self-regulatory preferences have strengthened, and EC law plays a significant part in this narrative. But how to assess the *quality* of the EC's contribution? That has been an abiding concern for me.

Where lies the interest in 'EC sports law'?

The EC Treaty does not refer to sport at all. The EC is therefore not constitutionally competent to adopt *legislation* with the explicit aim of regulating sport. But the EC Treaty contains provisions that exert a broad control over the functioning of the whole economy. These include, most significantly, the provisions on free movement of persons and services (Articles 39 and 49 EC) and the rules on competition (Articles 81 and 82 EC). Since sport has an economic dimension, sporting practices fall within the broad scope of the EC Treaty. Therefore sporting practices must comply with these Treaty rules. In this way EC law has overlapped with 'internal' sports law.

It is this complex and ambiguous confluence that has long stimulated my interest in this field. How legitimate is the EC's claim to subject sporting practices to the rules of the EC Treaty given that the Treaty offers no guidance on the extent to which sport's distinctive features should inform the legal analysis? How legitimate are the frequent appeals of sports federations to be permitted autonomy from legal intervention given that their decisions frequently carry significant economic implications? In fact, the rapid increase in recent years in the commercial significance of the sports sector, driven in part by the technological and regulatory re-shaping of the broadcasting industry, has brought with it ever more intense scrutiny of the role of *law* in influencing the choices available to sports governing bodies.

My general feeling is that EC trade law should not be applied to sport in a way that neglects sport's undoubted special characteristics. For example, clubs in a professional League are not competitors of the type found in normal markets. Sports clubs need opponents - they need credible rivals. There is a pattern of interdependence among clubs in a League which marks out organised sport as culturally and economically distinct from sausage-making. Sport is, in some respects, a special case, and the law should respect that, or else suffer justified criticism for insensitive mishandling of the subject-matter. On the other hand I have never been able to accept that sport is quite as special as is sometimes claimed by sports federations. That is, I cannot accept that the mere fact that a practice with economic implications is located in the sports sector is sufficient to entitle it to immunity from legal control. Nor can I easily hide my occasional frustra-

tion at the airily uncritical claims of those engaged in sports governance that things are best done as they always have been done. So I have always favoured a model which embraces an inevitable intersection between the EC's legal order and sports governance - that is, one according to which sport is subject to EC law but in which sport's special features are relevant to the legal analysis. The interest for me then lies in deciding just where sport has a convincing claim to special treatment at law which recognises its special social and economic characteristics and where, by contrast, sports bodies are engaged in self-serving defence of a *status quo* which deserves no place in modern life. Sport *is* special. But *how* special?

The European Court sets the scene

Three major judgments of the European Court demonstrate an evolution in the Court's own depiction and understanding of the issues at stake. My writing is by no means confined to the practice of the Court, for the challenge of understanding EC law and policy as it affects sport necessarily demands that account be taken of the Commission and more generally of the range of public and private actors who exploit the EC tier of governance in order to promote their interests and who, in doing so, frequently induce adaptation in existing national, international and predominantly self-regulatory patterns of sports governance. But the Court's judgments serve to structure much of the debate and the analysis. And they illuminate the awkward tensions involved in shaping EC sports law and policy.

In *Walrave and Koch v Union Cycliste Internationale* the Court treated the composition of national sports teams as unaffected by the EC Treaty's prohibition of nationality-based discrimination where their formation is 'a question of purely sporting interest and as such has nothing to do with economic activity.'¹ The result was understandable. There is simply no international representative football without restrictions on selection policies - a Dutch football team made up of Germans or Scots or Peruvians is no Dutch team at all. Rules relating to nationality define the very nature of the enterprise. But the Court, in showing respect for the nature of the sport, employed a poorly crafted legal formula. Its reference to 'a question of purely sporting interest' which 'as such has nothing to do with economic activity' is unhelpful. Clearly selection rules governing international representative football are of sporting interest. But - equally clearly, I think - such rules have plenty to do with economic activity. International football is big business - players enhance their profile and popularity, and therefore their earning potential, depending on their exposure as international footballers. In reality the spheres of sport and economics commonly overlap, for most sporting rules are of sporting interest and they also exert an economic impact. What is really at stake is not a group of sporting rules and a separate group of economic rules, but rather a group of sporting rules which carry economic implications and which therefore fall for assessment, but not necessarily condemnation, under EC trade law. This is the core of my thesis that EC law and 'internal' sports law cannot be kept separate.

Walrave and Koch introduced an unfortunate claim to a separation between the sporting and the economic sphere, while also accepting that sport's special expectations could be taken into account in the application of EC law. The second landmark decision, *Bosman*, is thematically similar.² The Court referred to the *problem* in drawing

* This is the Introduction to the book of the same name which is published by T.M.C. Asser Press this Spring.

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¹ Case 36/74 [1974] ECR 1405.

attention to 'the difficulty of severing the economic aspects from the sporting aspects of football'. But it did not offer a clear *solution*. '[T]he provisions of Community law concerning freedom of movement of persons and of provision of services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches'. The Court is in general terms accepting there is an area of sporting autonomy free of interference by EC law, but the precise nature and purpose of these 'non-economic grounds' is not easy to discern. However, as in *Walrave and Koch*, the Court in *Bosman*, though unwilling to rule out the possibility in principle of sporting practices falling foul of the EC Treaty, was prepared to discover scope for the promotion of sport's special concerns. It stated that

'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'.³

The EC Treaty offers nothing that points explicitly in this direction. It does not even mention sport. But the Court, while finding that the particular practices impugned in *Bosman* fell foul of EC law, showed itself receptive to an interpretative approach which in effect writes into EC law an active recognition of the special features of sport.

The third landmark case offers a clearer and intellectually more satisfying explanation of the relationship between sporting rules and EC law, while maintaining the thematic receptivity to sport's special concerns in the application of EC law. It is *Meca-Medina and Majcen v Commission*, a decision of July 2006.⁴ The applicants, professional swimmers who had failed a drug test and been banned for two years, had complained unsuccessfully to the Commission of a violation of the Treaty competition rules. The CFI rejected an application for annulment.⁵ So did the ECJ. But whereas the CFI attempted to insist that anti-doping rules concern exclusively non-economic aspects of sport, designed to preserve 'noble competition'⁶, the ECJ instead stated that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down'.⁷ And if the sporting activity in question falls within the scope of the Treaty, the rules which govern that activity must satisfy the requirements of the Treaty 'which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition'.⁸ This abandons the notion of the 'purely sporting rule' which has an economic effect yet automatically falls outwith the reach of the EC Treaty. The equivocation of *Walrave and Koch* is set aside. A practice may be of a sporting nature - and perhaps even 'purely sporting' in *intent* - but it must be tested against the demands of EC trade law where it exerts economic effects. But the Court did not abandon its thematically consistent readiness to ensure that in the application of EC law sport's special concerns should be carefully and sensitively fed into the analysis. It took the view that the general objective of the rules was to combat doping in order for competitive sport to be conducted on a fair basis; and the effect of penalties on athletes' freedom of action must be considered to be inherent in the anti-doping rules. The Court will not place such practices beyond the scope of judicial review as a matter of principle, but it is appropriately wary of questioning the expertise practised by sports federations in such sensitive realms. These are sporting rules - not *purely* sporting rules - and they are examined under an interpretation of EC law which is sensitive to sport's special concerns for *inter alia* clean competition.

I am not suggesting that this arrival at a model which embraces overlap between EC law and 'internal' sports law solves all problems. My argument is only that *Meca-Medina* focuses attention in the right direction. Previous practice, initiated by *Walrave and Koch*, has tended to generate unhelpful arguments about whether a practice is purely sporting in nature, and therefore immune from challenge under EC law. I have never believed this to be a helpful starting-point. Better to

accept that the vast majority of sporting practices have economic implications but then to apply EC law to them with appropriate respect for the particular sporting context in which they are used. In *Meca-Medina* the Court has taken a broad view of the scope of Community trade law, but having brought sporting rules within the scope of the Treaty it shows itself readily prepared to draw on the importance of matters not explicitly described as 'justifications' in the Treaty in order to permit the continued application of challenged practices which are shown to be necessary to achieve legitimate sporting objectives and/or are inherent in the organisation of sport. That, then, becomes the core of the argument when EC law overlaps with sports governance: can a sport show why prejudicial economic effects must be tolerated? As the Court put it in *Meca-Medina*, restrictions imposed by rules adopted by sports federations 'must be limited to what is necessary to ensure the proper conduct of competitive sport'.⁹ This is a statement of the *conditional autonomy* of sports federations under EC law - an overlap between EC law and 'internal' sports law is recognised but within that area of overlap sporting bodies have room to show how and why the rules are necessary to accommodate their particular concerns - fair play, credible competition, national representative teams, and so on. The result of *Meca-Medina* itself demonstrates that the sporting expertise informing (*in casu*) anti-doping inquiries will not lightly be set aside by judges.

The papers contained in this book

In this vein a strong message of much of my work holds that sporting practices typically have an economic effect and that accordingly they cannot be sealed off from the expectations of EC law - but within the area of overlap between EC law and 'internal' sports law there is room for recognition of the particular needs of sport, which may admittedly differ from 'normal' industries. *Meca-Medina*, I think, conforms to this pattern, and I welcome it. But I have long sought to make a more general case in my writing that a claim to unconditional sporting autonomy under EC law lacks intellectual appeal, unless it can be shown that EC law's absence of sports-specific material in its Treaty has led to an insensitive application of the law which washes over sport's legitimate interests. I have not been able to detect this. Quite the reverse. In fact the Court and the Commission have been scrupulous in ensuring that the special features of sport play a part in their interpretation and application of EC law. Sometimes they are profoundly unimpressed by the arguments advanced by sporting bodies. Sometimes they accept their force in principle while rejecting their relevance in the particular circumstances. Sometimes they are open to persuasion. But never is sport treated like sausage-making by the institutions of the EU.

I felt rather lonely when I wrote 'Discrimination on Grounds of Nationality in Sport'¹⁰. More than a decade had passed since the landmark decisions of the 1970s, *Walrave and Koch* the first of them¹¹, which had established that the EC Treaty is in principle applicable to sport. *Bosman* was not even a speck on the horizon. Using EC law to challenge sports practices seemed to lack practical relevance. Who would risk taking the slow route to court and risk exclusion from the fast-moving world of sport? My interest in writing the article published in 1989 was largely driven by the appreciation that sport offers a testing ground for an oddity in the structure of EC trade law. That is to say, I was using sport to try and develop a better understanding of EC law, rather than taking sport as the main focus of inquiry. The legal conundrum centres on practices of private parties which create distortions in the labour market, in particular those that are discriminatory on grounds of nationality. They could be dealt with under (what is now) Article 39 EC. They could be dealt with under (what are now) Articles 81 and 82 EC. If dealt with under both provisions, how could one cope with the clashes between the distinct assump-

2 Case C-415/93 [1995] ECR I-4921.

3 Para. 106.

4 Case C-519/04 P judgment of 18 July 2006.

5 Case T-313/02 [2004] ECR II-3291.

6 Para. 49 CFI.

7 Para. 27 ECJ.

8 Para. 28 ECJ.

9 Para 47 ECJ.

10 Yearbook of European Law, 9(1989), p.

55 et seq.

11 Note 1 above.

tions of competition law and free movement law? After all, in markets for goods, Article 28 controls the acts or omissions of public authorities (only), leaving Articles 81 and 82 to deal with private practices, so the labour market seems to be worryingly 'over-regulated' by EC law. My overriding concern was the scope of justification, which, as far as I could, see was different (and broader) under the competition rules than under the free movement rules. I did not advocate a demarcation between the two. Instead I argued that the restrictive labour practice is a curious creature which does not fit comfortably into the structure of the Treaty and I argued that a blended justification test should be devised.

Achieving this blend is, I think, more or less what the Court has subsequently done - though even now the matter lacks authoritative judicial guidance. I returned to the issue as recently as 2006, because in my view the *Meca-Medina* ruling on anti-doping is best understood against a background which assumes that practices of sports bodies that are necessary for the organisation of the game are legitimate and lawful whichever provision of EC trade law they are tested against.¹² Were it otherwise, the Treaty system would be exposed as incoherent.

My 1989 paper on Discrimination on Grounds of Nationality contains 'Concluding Remarks' which open with the observation that 'The organisation of football appears to be on a collision course with more than one area of the Treaty of Rome'. But I could hardly have imagined just how loud the collision would prove to be. The particular matter of discrimination in club football, which helped to structure the argument in my 1989 paper, allowed me to reflect on the extent to which such discrimination may be regarded as necessary to sustain professional leagues at national level. And the matter was, of course, vigorously addressed by the Court in *Bosman*¹³, the case that once and for all shattered the notion that EC law and sport mix in academic writing but never in practice.

The Annotation of the *Bosman* Case¹⁴ took as its purpose to reflect on the content of the judgment itself and to consider its impact from the perspective of both sport and EC law. The Annotation covers the litigation itself and the outcome of the case - the finding that the transfer system under challenge and nationality-based discrimination in club football were incompatible with EC law. It also (more ambitiously) seeks to look forward to outstanding issues, some of which had been aired already in my 1989 paper in the *Yearbook of European Law*, and to reflect on how much deeper into sporting autonomy EC law might be subsequently shown to reach. I considered the use of EC law to challenge transfer systems within a single Member State, reliance upon EC law by nationals of States that are not members of the EU and its invocation even in cases of players who are contracted to a club which they wish to leave, rather than players, like *Bosman* himself, who are out of contract. These issues have duly been the subject of litigation and consequent alteration in sporting practice. I concluded the Annotation in the *Review* by doubting that sport could or should be exempted from the scope of EC law. It has not been exempted, and I remain of the view that the case for such exemption lacks intellectual strength.

In 'European Football Law'¹⁵ I took the opportunity to develop some of the ideas advanced in my Annotation of the *Bosman* case and to situate them in the broader structure of the development of EC trade law. It is also a piece in which, in the Conclusion, I am able to reflect on an abiding theme: aghast sports bodies commonly declare that litigation will destroy their sport. But it doesn't. The paper was based on the classes I gave on 'European Football Law' at the Summer Course of the European University Institute, on the hills outside Florence, and it allowed me an early opportunity to appreciate just how appealing the mix of sport and the law is to students. One reason, and from a sternly intellectual perspective not a very good one, is that sport is vivid and generates passion. A better reason, I think, is that sport presents unusual challenges for the law. It is 'special'. How special?

My piece on the sale of tickets for the 1998 Football World Cup was published as '0033149875354: Fining the Organisers of the 1998 Football World Cup'¹⁶. It reveals a case where in my view the Commission Decision consists of a proper refusal to find sports-spe-

cific justification. This was a case of nationality-based discrimination, a blatant violation of the basic principles of EC law. But even here, in an instance of egregious violation of a fundamental principle of EC law, the Commission imposed a penalty which reflected its concern to take account of the concerns of sport. By imposing only a symbolic fine, amounting to 1000 Euros, the Commission explained that it took the view that the circumstances were not adequately covered by existing practice, which had not directly concerned sporting events, and that therefore it would show leniency. My article reveals reasons for supposing that the Commission's own acquiescence in the unlawful practices might have contributed to its reticence to impose a heavier fine. It is not an edifying tale.

In 'Sports under EC Competition Law and US Antitrust Law',¹⁷ I engaged in debate about the proper application of EC competition law to sport. *Bosman* famously involved the application of the free movement provisions to sport, and the Court carefully avoided examination of the Treaty competition rules. Advocate-General Lenz was not so reticent and nor was I in my Annotation of the case in the *Common Market Law Review*, mentioned above. By the time this paper was written the Commission was faced with an increasing number of complaints about alleged anti-competitive practices in the sports sector and it was plain that there was a pressing practical need to understand how the special features of sport - organisational solidarity, scrupulous preservation of uncertainty as to result - affected the handling of Articles 81 and 82. The paper was presented to the Annual Conference on Competition Law held at Fordham University in New York, one of the most, if not the most, high-profile competition law events staged anywhere, which itself demonstrates how hot a topic the intersection of EC competition law and sport had rapidly become.

The 1999 Helsinki Report represents an important attempt by the Commission to step beyond the accidents of litigation and instead to shape a framework for understanding how and why EC law applies to sport. I wrote about it in 'The Helsinki Report on sport',¹⁸ A core aim of the Helsinki Report is to help to clarify the law. In that, it is not unsuccessful. In particular, its attempt to separate out categories of practices that are outside the reach of EC law (as 'the rules of the game') from those which are within its scope (though not necessarily incompatible with it) is a helpful starting-point. And the Report's assertion 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' is about right in my judgement, though of course it does not set aside the need to conduct detailed examination of just when one might find sporting practices to be supported by objective justification et al. The Helsinki Report did not stop at the Treaty competition rules. The Commission recognised the social and educational functions of sport and expressed concern that increasingly ferocious commercialisation of the sector may damage these virtues. It identified a 'European Model of Sport', based on *inter alia* vertical solidarity between sport's elite and the grass-roots, promotion and relegation, and, broader still, concern to improve health and to combat social exclusion, xenophobia and intolerance. I have at least two anxieties about the Commission's thinking. First, that to make such claims is to adopt a worryingly homogenous view of sport. Professional sport and recreational sport are very different in structure and motivation, and to bind them together as part of a single model may be an exercise in wishful thinking. Second, the EC lacks compe-

12 See "Anti-doping revisited - the demise of the rule of 'purely sporting interest'?", (2006) *European Competition Law Review*, below.

13 Note 2 above.

14 33 *Common Market Law Review* (1996), p. 991 et seq.

15 Collected Courses of the 7th Session of the Academy of European Law (The Hague, London and Boston: Kluwer Law International, 1999), p. 339 et seq.

16 [2000] *European Competition Law Review*, p. 275 et seq.

17 B. Hawk (ed), *International Antitrust Law and Policy: Annual Proceedings of the Fordham Corporate Law Institute for 1999* (Yonkers, NY: Juris Publishing Inc., 2000), Ch 8, p. 113 et seq.

18 25 *European Law Review* (2000), p. 252 et seq.

tence to develop law and policy in these broad fields. The Commission, adopting the discourse of cultural renewal, is in danger of generating expectations that it cannot meet.

In 'Resisting the Pressures of Americanization: the influence of European Community Law on the "European Sport Model",¹⁹ I sought to develop my thinking about the 'European Model of Sport' advanced by the Commission in the Helsinki Report. The paper focuses on the underpinning assumption that Europe is significantly different in its approach to sport from North America. From 'draft picks' to closed leagues to vast salaries, Europe has a long way to catch up - and the Commission strongly believes that not only should it not try to catch up it should not even seek to run the same race. The paper examines the legal issues at stake in these competing 'models' of sport. It concludes by reflecting that while the Commission is plainly concerned that EC law should not propel European law down the American path it lacks powerful tools to prevent moves in such a direction. Moreover, there are hints that some actors in European sport are tempted by American models. Whispers of 'breakaway leagues' are as common today as they were when this paper was written, and it is likely that the 'European Model of Sport' will come under increasing pressure in the years to come.

My paper 'Fair Play Please!: Recent Developments in the Application of EC Law to Sport'²⁰ was prepared at the invitation of the editors of the Review. It is designed as an overview of Court and Commission practice in the field of sport, and it attempts to provide a thematic account of the principal concerns that animate EC law and policymaking in the field, against the familiar background acceptance that the EC Treaty is deficient in sports-specific material. Most of all, the article uses case law - on agents, on club ownership, on transfers, on broadcasting and so on - to explore that most basic of questions, that which asks how special sport really is. It also moves on to reflect on the 'wider terrain' of a policy on sport. Both the Commission, in its depiction of a 'European Model of Sport', and national political elites, in adopting the Amsterdam and Nice Declarations on Sport, display anxiety to make more of EU sports policy than economics alone. The problem which I identify lies in the absence of a comprehensive legal competence vested in the EC institutions to act in such broader realms. I doubt it is sensible for the EU to set itself up as an arena in which sport's wider social and cultural virtues can be comprehensively addressed when the constitutional reality is otherwise.

Is sport 'cultural'? I think it is. But what does this mean in law? In 'Sport as Culture in European Community Law'²¹ I took the opportunity to develop further some of the thinking directed at 'sport' as a heterogeneous legal and cultural phenomenon that I had pursued in earlier papers mentioned above. This contribution to a book on EC law and culture critically examines the transfer system in football and the regulation of sale of broadcasting rights from the perspective of the claim that 'sport is special' and that it therefore deserves special protection from the normal assumptions of EC law. At stake is sport's claim to *benefits* consequent on legal immunity. The paper then examines the 'protected events' legislation - which affects the freedom of sports bodies to sell rights to the highest bidder where particularly high-profile events are involved. Here I find that sport is special in that it is asked to shoulder *burdens* which would not be imposed on a 'normal' industry. The rationale behind the 'protected events' legislation is obscure but it clearly reveals and reflects the unusual cultural prominence of sport. The paper concludes with further expression of my anxiety that the attempts of the EU's institutions, most prominently the Commission, to shape a policy for sport that is infused by social and cultural concerns tend to strain the outer edges of EC competence, and, in so far as the Commission lacks the legal and material resources to make good its promises, I find risks that the EU's legitimacy may be damaged.

'Anti-doping rules and EC Law'²² criticises the Court of First Instance's decision in *David Meca-Medina and Igor Majcen v Commission*. I mentioned the case above.²³ The CFI dismissed an application for the annulment of a Commission decision rejecting a complaint against the compatibility with EC trade law of doping con-

trols practised by the International Olympic Committee. But in doing so it adopted an approach to the autonomy of sports federations which seemed to me to go far beyond the existing state of EC law and beyond what is wise. Most of all, the CFI took the view that anti-doping rules of an excessive nature would escape review pursuant to competition law provided that they remained limited to their proper object. This is contradictory in the sense that an excessive rule would by definition *not* be so limited. I developed the argument that a superior approach would be provided by reliance on the Court's decision in *Wouters*.²⁴ That is not a case concerning sport. But it is a ruling in which the Court insisted that a constraint on competition is unaffected by Article 81 EC where it is unavoidably required to sustain the functioning of an arrangement which is unobjectionable in the light of EC law. That, it seems to me, is the way to approach anti-doping rules. They have an economic effect. But are they necessary for the pursuit of sport? Yes - if confined to a basis for the imposition of proportionate sanctions. My broad concern was to connect EC competition law's application to sport to general trends in EC competition law, rather than to follow the CFI's approach which produces a peculiar generous niche in which sporting practices can hide.

The organisational structure of football is shaped like a pyramid. I considered this in 'Is the Pyramid Compatible with EC Law?'.²⁵ FIFA, the world governing body, sits at the apex. Beneath FIFA lie the continental associations - in Europe, UEFA. On the next level down are found the national associations. And then come the professional clubs, along with other interested actors within individual countries, the 'grass roots' which include regional associations and amateur bodies. Clubs have a voice via their national associations. The richer clubs want a louder voice and a more direct involvement in the decision-making process. The tension that runs through this pyramid structure is created by the conflict of interest held by the governing bodies. The pyramid makes obvious sense as a means to arrange decision-making on the rules of the game. But it is a good deal more controversial in so far as commercially sensitive decisions emerge from the process. Consider setting the international fixture calendar or requiring the release of players for international duty. Clubs are increasingly frustrated by their perception that they have too little input into decisions of this type which have a direct impact on their business. And they are increasingly ready to go to law. The paper discussed the *Oulmers/Charleroi* case on player release, which has the potential to be the next high-profile sport-related decision of the European Court.²⁶ The issue at bottom is one of governance. Can the pyramid survive in its current form or will the law be used to require a redistribution of functions, involving a separation between regulatory and commercial activities of sports federations? I doubt the pyramid can be sustained unaltered. It allocates too much commercial power to the federations in circumstances of conflict of interest between their commercial and regulatory functions.

In writing 'The sale of rights to broadcast sporting events under EC law'²⁷ I was particularly concerned to take the opportunity to connect the important depiction of the detail of the law with the broader thematic literature about the possibilities and limitations of describing an EC 'policy' in a field where the Treaty does not provide a comprehensive mandate. The paper accordingly traverses important issues of competition law and policy pertaining to *inter alia* the permitted scope of sale of broadcasting rights on an exclusive basis and

19 S. Greenfield and G. Osborn (eds), *Law and Sport in Contemporary Society* (Frank Cass Publishing, London, 2000), p. 155 et seq.

20 (2003) 40 *Common Market Law Review*, p. 51 et seq.

21 R. Craufurd Smith (ed), *Culture in European Union Law* (Oxford University Press, 2004), Ch. 4, p. 113 et seq.

22 [2005] *European Competition Law Review*, p. 416 et seq.

23 Case T-313/02 note 5 above.

24 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.

25 2005/3-4 *International Sports Law Journal*, p. 3 et seq.

26 Pending Case C-243/06, lodged 30 May 2006 - *SA Sporting du Pays de Charleroi, G-14 Groupement des Clubs de Football Européens v. Fédération Internationale de Football Association (FIFA)*.

27 2006/3-4 *International Sports Law Journal*, p. 3 et seq.

arrangements for collective buying and selling of broadcasting rights. The law develops with necessary appreciation of the extraordinary changes in the technological and regulatory structure of the broadcasting sector. When I first began to write about the application of EC law to sport I had no need to think about unbundling of packages to allow sale of internet rights, for example, nor indeed to think beyond traditional free-to-air media as the place to watch televised football. But the paper also reflects on how other areas of EC trade law, beyond sport, demand an infusion of concerns poorly mapped out by the Treaty. EC health care law, EC consumer law and EC labour law, for example, are shaped by the intersection of the rules of trade integration and the values promoted in these sectors by national policymakers. Sport is not intellectually unique in the challenge it presents to those seeking to understand how its special features affect the interpretation and application of EC trade law.

In 'Anti-doping revisited - the demise of the rule of 'purely sporting interest'?'²⁸ I addressed the ECJ's handling of the appeal in the anti-doping case, *Meca-Medina and Majcen*.²⁹ As explained above, the CFI's approach to anti-doping rules was to accept that there are rules concerning questions of 'purely sporting interest' which have nothing to do with economic activity. There are such rules. The offside rule, for example. But there are few such rules and they are hardly likely to provoke litigation. Most rules that are relevant to the organisation of sport also have direct and nowadays substantial economic implications. So it is with anti-doping rules. On appeal the ECJ set aside the CFI's decision. The ECJ dismissed the application for annulment of the Commission's Decision but it rejected the CFI's relatively generous approach to the scope of sporting autonomy to apply rules with economic effects. Sporting rules must be examined in their proper context, including recognition of their economic effect. The Court did not doubt that sport needs rules against doping. And it saw no reason on the facts of the case to interfere with the two-year ban imposed. EC law recognises the need to respect sporting expertise in such matters. But there is no special category of rules with an economic effect which are beyond review. This analytical formula will be put to renewed test in *Oulmers/Charleroi*.³⁰

Concluding remarks

I believe that the practice of the European Courts and the Commission reveals a painstaking concern to piece together a sports policy of sorts at EU level. The Treaty does not help. It does not mention sport. Article 5(1) stipulates that the EC possesses a set of attributed competences, of which sport is not one, and so - one may argue - there is sports governance and there is EC law, and there is no overlap between the two. So one option was to refuse to apply EC law to sport. That would have sheltered a huge range of practices with economic impact from the assumptions of EC law, damaging the

achievement of the objectives of the Treaty. It would have been deeply undesirable and the Court rejected that route *ab initio* in *Walrave and Koch*.³¹ Another option would have been to apply EC law to sport as if it were a normal industry. That did not tempt the Court in *Walrave and Koch* either - rightly so, for sport is not an industry like any other. Instead the Court and Commission have taken a more ambitious, creative and yet realistic approach. That has demanded a significant investment of resources in making sense of the intersection between the demands of EC law and the aspirations of sport. The EU institutions necessarily proceed in an incremental manner. The opportunities to shape a 'policy' are constrained by the constitutional limitations on the matters to which they may pay attention. Article 5(1) stipulates that the EC possesses only the competences attributed to it. Its authority to supervise sporting practices derives from the broad functional reach of the relevant rules of EC trade law (free movement and competition law, most conspicuously), but it is denied any specific legislative competence in the field of sport. Incrementalism is also ensured by the accidental patterns of litigation, which may cause practice to develop according to unexpected, eccentric rhythms. These observations concern most prominently the Court and the Commission, both of whom are responsible for individual decisions applying the law, though the broader policy direction periodically offered by the Council, the European Council and the Parliament may also serve to embroider the tapestry. It is therefore of the highest importance to ensure that one does not over-state the possibilities of a systematic account of relevant EC law. On the other hand, this is not necessarily to concede that EC law is ripe for criticism. A qualitative account of its role is required. That the EC Treaty does not lend itself to the shaping of a comprehensive policy of the type that one would expect to find in a national setting does not entail that it is flawed, only that it is different. This is not a challenge that is in any sense unique. In fact, across a great many areas of EC law, policy and practice, one is confronted by the need to make some sort of sense of a set of laws and practices which are not constitutionally dedicated to dealing with the particular subject matter of concern and which are frequently lacking in detail and sophistication. So the EC has to shape a policy of sorts on all manner of things. Such is the *practice* of attributed competence, guaranteed as a *principle* of EC law by Article 5(1) of the Treaty. I hope that my work is thematically bound together by concern to explore how far the argument that 'sport is special' convincingly reaches, and to consider whether EC law is apt to reflect the aspirations of sport when it is shown to be truly special. My general conclusion is that the institutions of the EU have built an EC trade law which is respectful of sport's peculiarities.

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²⁸ [2006] European Competition Law Review, p. 645 et seq.
²⁹ Note 4 above.

³⁰ Note 15 above.
³¹ Note 1 above.



UNIVERSITY OF STIRLING (SCOTLAND): SPORTS STUDIES PROGRAMME: SPORT AND THE LAW

The 'sport and the law' module is an optional module for students on the sports studies MSc (which is available either one year FT or two years PT). It runs in the second semester and the MSc students attend the same lectures as the students taking the Sports Law module on the LLB/BA law programme. They have separate seminars and a different coursework but the end-of-year exam is the same for both cohorts. There are usually about 18 students on the MSc, of whom about 12 will normally do the Sports Law module. The module focuses on EU law issues, liability for personal injury and human rights issues including 'hooliganism', animal sports and discrimination.

Within Scotland, undergraduate modules in sport and the law are offered at Stirling and at Napier University, Edinburgh. At Stirling, postgraduate supervision in the field (MPhil/PhD) is offered by David McArdle (especially EU issues, comparative perspectives, sport and human rights, personal injury and employment law aspects) and Bill Stewart, who has particular expertise in Scots law issues, personal injury and sports bodies' disciplinary processes. Further details are available at www.law.stir.ac.uk/research/index/php.

At Napier students can study two modules as part of their studies: Sports Law 1 and Sports Law 2. Sports law 1 would typically be studied by 2nd year students - it is an introduction to the subject. Sports law 2 is studied in the final year and involves more in depth analysis of sports law issues.

Regulating Players' Agents: A Global Perspective*

by Richard Parrish**

Three recurring themes have emerged in the contributions to this book: what are players' agents, why should they be regulated and how should they be regulated? The first question appears straightforward as agents perform similar functions throughout the world. Nevertheless, as the contributions reveal, the manner in which agents operate varies. The questions of why and how to regulate again reveals common themes but also considerable variations in patterns of regulation. Many of the contributors cite instances of agent abuse although on closer inspection we see that the forms of regulation employed by the governing bodies and the norms of industry practice can also cause problems. Are agents inherently corrupt or do the rules, as currently constituted, and the industry norms preclude agents from practicing within existing rules? By industry norms we are not referring to agent conduct but the conduct of clubs and players who engage their services in a manner inconsistent with current rules. Furthermore, have the regulators actually shown any great enthusiasm on clamping down on such practices? If indeed football has an 'agent problem', are not the regulators, the clubs and the players equally complicit? Questions of agent regulation therefore need to reflect the wider, and to some extent more uncomfortable, issues facing football. 'Cleaning up' the game and injecting much needed transparency into agent activity might be universally welcomed as a sound bite headline, but should the regulators recognise industry norms within the rules, thus guaranteeing genuine transparency, or should they ensure that industry norms reflect *current* industry rules? This debate can easily be juxtaposed. On the one hand, does firmness and prohibition maintain the integrity of the game? On the other, does flexibility and openness create transparency? The reality is surely that transparency *equals* integrity and in this respect there is therefore much to play for.

What are Players' Agents?

An agent is a person authorised to act for another when dealing with third parties. In theory, a players' agent is merely an intermediary ensuring the supply and demand for labour within sport is met. For a fee (commission), they assist players in finding clubs, or clubs in finding players. Who benefits from the work of agents? One the one hand a player (particularly a young player) negotiating a contract with a club without representation is disadvantaged as the power relationship between the negotiating parties is often stacked in favour of the club. For example, a player is unlikely to be familiar with the inner workings of a club including its existing pay structures. They are therefore more likely to succumb to pressure tactics used by the club and accept 'take it or leave it' contract offers. An agent, equipped with the relevant skills and knowledge, can significantly improve a players pay and conditions and can provide valuable career advice. Nevertheless, a similarly unequal power balance can emerge in the relationship between a player and an agent, particularly if a player becomes heavily reliant on their agent and their agent negotiates on their behalf without the knowledge of the player. In this instance, the old adage that an agent looks after the affairs of a player so that he can concentrate on his sporting duties simply means that a player-agent contract conceals the subordination of the player. A club can also benefit from employing the services of an agent. Although clubs often complain that agents unsettle players by encouraging their nomadic instincts and at the same time take large sums of money out of the game, clubs frequently use, and pay agents to attract new talent. Agents who work for clubs are often required to persuade players to accept terms favourable to the clubs. In some instances, agents act for a club whilst having a contract to act exclusively for a player, a clear conflict of interest. Such dual representation is

prohibited by the FIFA Players Agent Regulations and amounts to a breach of contract with the player. Nevertheless, it is an industry practice and here lies an interesting starting point for our analysis. Not all players' agents are inherently corrupt, far from it. Perhaps many of the instances of agent 'abuse' detailed throughout this book are actually agents working to industry norms rather than abiding by industry rules. This is not to condone their actions but it does rather shift the analysis onto the sports regulators and how they make and enforce the rules, and also onto the clubs and players who are often complicit in the rule breaking.

In France, statute defines an agent as '*any person carrying on, occasionally or regularly, for valuable consideration, the activity of bringing together parties interested in the conclusion of a contract relating to the carrying on of a remunerated sports activity...*'. Similarly, in other states statute stresses the intermediary role of an agent. The FIFA Regulations state that '*the players' agent is a natural person, who, for a fee, on a regular basis introduces a player to a club with a view to employment or introduces two clubs to one another with a view to concluding a transfer contract, in compliance with the provisions mentioned below*'. Whilst these definitions describe the essence of an agent's activity, they do not tell the whole story and this has implications for the effectiveness with which intermediation laws are employed in sport. Brokering a deal between parties is often supplemented by so called 'related services', often called management services, the nature of which depends upon the needs of the sportsman or women. Thus whilst the rules of governing bodies attempt to regulate the intermediary activities of agents, the rules leave untouched the management services provided by agents.

In his contribution on Belgium, Frank Hendrickx considers an agent performs a number of services including (1) contract negotiation and mediation (employment contracts, sponsoring agreements, television rights etc); (2) management and services in matters such as housing, taxes, social security, permits and licences, financial planning, legal advice, career development, health, ...; (3) organisation of sports activities and events, press conferences, publicity and sports promotion and (4) acting in case of conflicts, mediation and arbitration. Consequently, an agent performs multiple roles allowing the player to concentrate on their professional (sporting) activities. As Hendrickx notes, most legal systems do not actually recognise the notion of 'sports agent' as a legally pre-defined concept. The use of this term refers to a natural or legal person who acts as an intermediary between a sports man or women and other parties, for example between a football player (employee or potential employee) and a club (employer or potential employer). In this connection, an interesting theme to emerge in the contributions is the role of lawyers as agents. Whilst in some states lawyers act as agents, in others, codes of conduct (such as the Italian Deontological Code) or direct statutory prohibitions (as in France) prevent them from offering agent services, this despite FIFA Regulations providing that an agent's licence is not necessary for a lawyer.

Why Regulate Players' Agents?

Agents have been representing players for many years. John Wolohan's United States contribution cites the influence of sports agent Charles "Cash & Carry" Pyle, who in 1925 reportedly negotiated the contract

* This is the Introduction to the book of the same title which is published by T.M.C. Asser Press this Spring.

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between Red Grange and the Chicago Bears, guaranteeing Grange at least \$100,000. However, it has only been since the 1960's and 1970's in the US that agents have come to prominence. The agent phenomenon has arguably only become routine in Europe in recent years. Consequently, the question of player agent regulation is relatively new and it is therefore to be expected that agent regulation will evolve in the future. Until recently, sport did not require the services of agents and where agents were employed by players a form of self regulation took over. For instance, Wolohan tells the tale of Jim Ringo, a high profile pro-football player traded for hiring an agent. Similarly, in Japan in 1992 Yakult Swallows baseball player Atsuya Furuta was rejected by his team when he proposed that his lawyer negotiate his contract with the team on his behalf. Nevertheless, agents did not go away and their role in sport increased. For example, in 1986, the US National Football League Players' Association conducted a survey and found that the number of certified agents outnumbered the number of actual players. Currently, the number of licensed agents varies considerably between countries. According to FIFA.com there are 380 licensed agents in Italy, 333 in Spain, 289 in England and 119 in Brazil. By contrast there are just 16 agents in Japan, 8 in Belarus, 7 in Ireland and 1 in Estonia.

The high number of licensed agents in Italy, Spain and England is unsurprising for these are the most well developed football nations in Europe. Yet, their presence also reflects the commercial value of the game in those states and the financial rewards an agent can derive from facilitating the transfer of players. The Brazilian market can be especially lucrative for agents given the availability of talent and the willingness of European clubs to sign such players. As documented by Luiz Roberto Martins Castro, since 2002 over 3500 players have left Brazil, most with the assistance of an agent. In Europe, the European Court of Justice's ruling in *Bosman* enhanced players' employment rights and as sport commercialised, agents assumed a more prominent role in sport. But concern has been raised at the money agents are taking from the game, the instability they are causing within it and even the legality of their actions. The question has turned to issue of their regulation. Some incidences of agent abuse have acted as the catalyst for the enactment of agent-specific legislation, as occurred after the case of *United States v. Walters*. In Greece, the Greek Constitution (article 16 para. 9) provides that the State shall protect and supervise sport. Partly in response to financial problems experienced in Greek sport, the government decided to intervene more directly in sport. It was acknowledged that agents had played a role in this financial crisis. Subsequently, the Law 2725/1999 introduced greater agent regulation.

The case for agent regulation was articulated in the case of *Piau*, in which the European Court of First Instance argued that the type of player agent regulation adopted by FIFA was necessary in order 'to introduce professionalism and morality to the occupation of players' agent in order to protect players whose careers are short'. Re-phrased, the absence of player agent regulation will result in a lack of professionalism, immorality and a lack of protection for players. This perhaps is the popular perception of the player's agent and one supported by the conduct of some unscrupulous agents, these activities well documented throughout the contributions. For example, in the US it was revealed in *Hillard v Black* that US agent William "Tank" Black stole up to \$14 million from the 35 professional football and basketball players that he represented for his own personal and business use. Similarly, Luiz Roberto Martins Castro details a number of abuses by agents ('football managers') including the case of an agent effectively stealing half a million dollars of a one million dollar transfer fee and an agent who persuaded an internationally renowned Brazilian footballer currently playing in Spain to sign a contract with his manager whereby 70% of the player's income reverted to the manager.

Bungs

Throughout the summer of 2006, more examples of illegal practices came to prominence in the UK - 'bungs', 'tapping-up' and 'dual representation'. *Bungs* refer to illegal payments paid by and to agents (and others) in order to facilitate the transfer of a player. It has long been suspected that football managers and other team officials have been

complicit in these acts by accepting payments from agents in order to conclude player transfers although in England only (then) Arsenal manager George Graham (in 1995) has received a sanction for receiving such payments from a Norwegian agent. However, accusations continue to this day with the 2006 BBC Panorama programme suggesting the use of bungs is still common in English football. In March 2006, the FA Premier League announced that it had commissioned an investigation under the chairmanship of Lord Stevens, previously the Metropolitan Police Commissioner, into the bung allegations surrounding Premier League transfers. Lord Stevens examined all 320 Premier League transfers taking place since 1 January 2004 and in his interim report published in October 2006 he identified 39 transfers as requiring 'further investigation', a figure one prominent manager suggested should be multiplied by four or five if the investigation also examined football league transfers.²

Tapping Up

Another breach of FIFA and association rules highlighted in the BBC programme was the common practice of 'tapping-up' which refers to a process, often facilitated by agents, whereby players are offered for sale to other clubs without the knowledge and consent of the club with whom the player is registered. Article 14(c) of the FIFA Players' Agents Regulations state that a licensed players' agent must never 'approach a player who is under contract with a club with the aim of persuading him to terminate his contract prematurely or to flout the rights and duties stipulated in the contract'. Similar rules are contained within national association laws and are designed to maintain contract stability between the club and player. In June 2005 Chelsea, its manager Jose Mourinho and (then) Arsenal player Ashley Cole were found guilty of tapping up charges by the FA Premier League Independent Disciplinary Commission and later in September 2006 Cole's agent had his agents licence revoked for eighteen months (nine months suspended) for his role in the affair. Chelsea received a fine and a suspended three point deduction and Cole eventually signed for Chelsea. In September 2006, the BBC documentary alleged that Chelsea, with the help of an agent, had once again attempted to 'tap-up' a player contracted to another club. If proven, Chelsea could face the points deduction suspended following the Cole affair. As discussed elsewhere in the book (such as in the Italian contribution) questions remain as to whether the prohibition on tapping up, currently constituted, is disproportionately restrictive on agents' activities.

Dual Representation

The third issue reaching prominence in the UK in the summer of 2006, albeit to a lesser extent than those issues exposed in the Panorama programme, was the issue of *dual representation*. This refers to an agent who represents both a club and a player in negotiations. This is prohibited by Article 14(d) of the FIFA Players' Agents Regulations which state that a licensed players' agent is required 'to represent only one party when negotiating a transfer'. The prohibition on dual representation is defended on the grounds that it avoids conflicts of interest. Nevertheless, agents prefer to claim their commissions from clubs in order that their client is not disadvantaged. However, in the UK this is considered from a tax perspective as a benefit to the player and is taxable at 40% income tax, payable by the player. To avoid this, an agent needs to act creatively. He would do so by suspending his representation of the player at the point at which he found a club willing to sign the player. He would then move sides in order to represent the club. Often, another agent from the same agency firm would step in and represent the player. This did not breach the FIFA Regulations and as the agent would be acting for the club, his commission would not be taxed as a benefit to the player. However, as White explains in his UK contribution, the 2006 (English FA) Regulations extend the prohibition on acting for more than one party to a transaction to cover *agencies* as well as individual *agents*. The practice described above is therefore incompatible with

1 'Bungs Inquiry Targets 39 Transfers', www.bbc.co.uk, 02,10,06.

2 'Newell Maintains Stance on Bungs', www.bbc.co.uk, 04,10,06.

these regulations. As explained by White, the draft 2007 English regulations may well either tighten up further the rules on dual representation, or even permit a limited form of this practice.

In the case of Newcastle United PLC (Appellant) and the Commissioners for Her Majesty's Revenue and Customs (Decision 19718) the practice of dual representation was made public. In this case it was revealed that Newcastle United FC often approached a player's agent and asked him to persuade his player to sign a contract on terms favourable to the club. The club would then pay the agent on the basis of how close to the clubs terms he secured the players signature. The player who is also represented by the agent is ignorant of the agent's dual representation and consequently is unaware that the agent has breached his contract with the player as he no longer works 'exclusively' for the player and is in breach of his fiduciary duty to the player to obtain for him the best possible contract terms in the form of signing-on fees and remuneration.

After concluding new contracts with players, clubs are required to submit to the FA two forms stating the parties involved in the negotiation and the agent is required to sign these forms. This is confirmed in the FIFA Players' Agents Regulations (Article 14). In the above case Newcastle United lodged papers with the English FA stating that the agents involved in the transfers worked exclusively for them when in fact the agents were also representing the players. Furthermore, the tribunal found no evidence of the club using FIFA's standard representation contract with the agent (required by the Regulations), a common breach of the rules found in other associations. In this case, the agent is in breach of Article 14(a) of the FIFA Players' Agents Regulations having failed to adhere to Code of Professional Conduct in Annexe B to the Regulations, by behaving untruthfully. Furthermore, in some jurisdictions such as the UK and Spain, this failure to confirm contractual relations in writing would breach state law. For example, in Spain Article 1280 of the Spanish Civil Code requires written formalities when the obligations to fulfil exceed 9 euros, a princely sum for a modern agent.

Whilst the club may benefit from tax advantages by declaring to the tax authorities their relationship with the agents, they are making false statements in their paperwork submitted to the FA and are in breach of regulations on dual representation. On that point, and in evidence given to the VAT and Duties Tribunal, an unnamed players agent (and solicitor) said that *'whilst the Club, players and licensed [players'] agents are obliged to follow the FIFA rules and guidance, it is generally acknowledged that the rules do not always reflect industry practice'*.³ Furthermore, Russell Cushing, Newcastle United's chief operating officer said that during the same proceedings that *'it is generally acknowledged throughout the industry that the rules cannot accurately reflect the global business we are now operating in'*.⁴ As the tribunal pointed out, industry practice cannot prevail over the Regulations and if practice differs from them, it contravenes them. The FA will investigate these breaches once any appeals process has been exhausted. The implications of the Newcastle case are potentially far reaching. Not only has the case revealed that industry norms are not always in accordance with industry rules, raising questions about the vigour with rules are enforced, it has also confirmed (subject to appeal) that in the circumstances described above, clubs are not allowed to claim back the tax on fees paid to agents involved in transfers. Clubs may now face investigation by Her Majesty's Revenue and Customs and backdated tax may be demanded. Some clubs may take the view that paying agents fees is not in their interests and thus wish to see the burden of paying agent fees pass to the players.

How to Regulate Players' Agents

Traditionally, job placement has been considered a duty of public authorities rather than private profit making entities. Indeed, until 1997, an International Labour Organisation Convention (no. 96 of 1 July 1949) prohibited private employment intermediation. Whilst labour market liberalisation has been a theme in many states, particularly within the EU where the principles of the single market are influential, debate in some countries points to a reluctance of the state to cede control in this field. For example, although in France the com-

petent sports federation issues the agents licence, debate raged as to whether the ministers responsible for labour and sport should be involved in the licensing process. The proposal (ultimately unsuccessful) reflected the view that, as the placement of sportsmen constitutes derogation from the principle of the public monopoly of placement, the ministry of labour should at least be involved in the derogation procedure. But as Nick White explains in his UK contribution, regulators must also be aware that a market in player transfers also exists and if clubs within one jurisdiction are hindered in their ability to attract players due to stringent agent regulations, the clubs will not be able to attract the best players as agents will seek their commissions in territories with less restrictive rules. Therefore, whilst 'cleaning up' the game is often the publicly stated ambition of regulators, ensuring the market works effectively for the stakeholders is often the reality. In other words, rules often don't reflect industry norms and therefore they have a tendency to be breached and/or not enforced. This tension was reflected in the UK contribution which explained that the Football League (consisting of non-top flight teams) had actively embraced agent regulation whilst the Premier League (or some clubs within it), perhaps fearful of damaging their chances of attracting top quality overseas players, resisted greater controls. In this connection, there are, in effect, three tiers of agent regulation; international law, national law and the law of the sports bodies.

International Law

From an international law perspective, patterns of national regulation may be affected by the International Labour Organisation Convention C181 (1997) on Private Employment Agencies. This convention seeks to allow the operation of private employment agencies as well as protecting the workers using their services. It permits members, after consulting the most representative organizations of employers and workers concerned, to adopt national measures in respect of agency regulation. Article 3 states that *'a Member shall determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate national law and practice'*. Interestingly, Article 7(1) of the convention forbids private employment agencies from charging directly or indirectly, in whole or in part, any fees or costs to workers. This contradicts the FIFA regulations which provide that only the client engaging the services of the players' agent, and no other party, may remunerate him (Article 12.4). Indeed, as Hendrickx explains, as far as employment mediation services are concerned, Flemish law provides that no payment can be asked from the employee (the player) even if the employee (player) is the agent's client. UK law also prohibits payments although the relevant Act, the Employment Agencies Act 1973, exempts the activities of professional sportsmen and women from this prohibition. However, the manner in which payments are permitted by the association regulations (lump sum or instalments) appears incompatible with the specific regulations stemming from the Acts regulations, which prohibits lump sum payments. In practice, agents tend to recover their commissions from the clubs rather than from players and whilst UK law and national association law does not prohibit the hirer paying remuneration on behalf of the employee, Article 12.4 of the FIFA regulations appears to contradict this. Another pertinent issue concerns Article 9 of the ILO Convention which provides for protection of minors by stating *'a Member shall take measures to ensure that child labour is not used or supplied by private employment agencies'* although the Member may, after consulting the most representative organizations of employers and workers, authorize exceptions to this provision. At the time of writing nine countries discussed in this book have signed the convention. These are; Belgium, Czech Republic, Finland, Hungary, Italy, Japan, Netherlands, Portugal and Spain.

National Law

The FIFA Player Agent Regulations state that when drawing up their

3 At para. 15.

4 At para. 15.

regulations the national associations shall take the FIFA Statutes and regulations into account as well as their own national legislation and international treaties. As discussed above, nine countries discussed in this book have signed the ILO Convention thus establishing a legal basis for agent regulation in national law. In *Piau*, the European Court of First Instance concluded that *'it seems that, first of all, within the Community, France alone has adopted rules governing the occupation of sports agent' (para 102)*. As discussed below and in the contribution by Branco Martins this assertion is questionable. Many states, through general statutory interventions or common laws such as contract law, regulate agency work and others have established a sports specific statutory basis for agent regulation. Consequently, there is a wide pattern of national laws regulating both the exercise of agent activities and also access to the profession. In this connection, some states require agents to possess a state licence to undertake their duties whilst others do not. From this perspective, it is fair to conclude that the states renowned for their interventionist approach to sport (such as France, Portugal and Greece) are in the former category.

In France, the profession of sports agent has been regulated by statute since 1992. This law evolved and now requires that *'any person carrying on, occasionally or regularly, for valuable consideration, the activity of bringing together parties interested in the conclusion of a contract relating to the carrying on of a remunerated sports activity must hold a sports agent licence'*. This law establishes strict criteria for the issuance of a licence including issues relating to incompatibilities and incapacities and the process of acquiring a licence. Carrying on the activity of agent without a licence is an offence punishable by imprisonment for up to one year and a fine of 15 000. The French law requires *any person carrying on* the activities of an agent to hold a licence whilst FIFA Regulations stipulate certain exempt persons, such as a parent, sibling, spouse or lawyer, need not hold such a licence. Agents from other EU/EEA member states who wish to provide their service within France can do so *'provided that they obtain a licence under the conditions laid down in this decree, or they produce a licence issued in one of the said States, or they prove that they have the capacities or professional qualification permitting them to carry on this profession there'*.⁵

Greece is also an interventionist state in sporting matters. The Law 2725/1999 (Amateur and Professional Sport and other provisions) acts as the basis for sports regulation. The main provisions on agent regulation can be found at Article 90, para. 9 of this legislation. As explained by Andreas Zagklis in his Greek contribution, this law does not directly regulate agents activity, it rather provides the legal authorization for a decision issued by the competent representative of the administration, in this case the Minister of Finance and the Minister Responsible for Sport. The subsequent Ministerial Decision (23788/2002) set the terms and prerequisites for the exercise of the profession of agent. One such requirement is the holding of a licence issued by the General Secretariat of Sport (G.S.S). A list of stringent incompatibilities and incapacities is contained including the requirement that agent licence applicants have a University degree and deposit a 59,000 euros bank guarantee plus equivalent professional liability insurance.

Similarly, in Portugal state law (Law 28/98 of June 26th 1998 as amended by Law 114/99 of August 3, 1999) establishes conditions relating to access to the profession of agent and their subsequent conduct. The contribution by Pedro Cardigos, Ricardo Henriques and Gonçalo Pimentel reveals that Portuguese law requires that the person that acts as a player's agent may only act on behalf of and in the interest of one of the parties of the contractual relationship. Furthermore, agents should be licensed by the relevant sporting federation which in the case of football is the Portuguese Football Federation (FPF). Also, the law states that the individuals or legal entities that undertake the activity of intermediaries, occasionally or permanently, can only be remunerated by the party which they represent. The potentially restrictive nature of issuing licenses via examination (also a FIFA requirement) was questioned in relation to its compatibility with the Portuguese Constitution. The Constitutional Court dismissed such arguments by finding that such rules did not block the access to the

activity of player's agent, they merely regulate its performance in an appropriate manner.

In circumstances in which the state requires a licence, this raises the prospect of agents requiring two licences, one issued by the state, the other by the sports association. As we have seen above, the state will often delegate this power to the competent sports governing body. Frank Hendrickx points out that Flemish regional law, influenced by the ILO Convention 181, requires state licenses in addition to any sports governing body requirement. Experience from the Flemish Advisory Commission show that applicants for a governmental license often argue that the fact that they possess a FIFA-license would automatically imply their suitability for a governmental license although as Hendrickx explains, the Flemish Advisory Commission undertakes an autonomous investigation, whereby the possession of a FIFA-license is considered to be only one element of the file.

Other states do not require agents to hold state licenses in order to carry out their activities although general statutory frameworks regulate agency work. In the Netherlands the Labour Market Intermediaries Act (*Wet Allocatie Arbeidskrachten door Intermediairs* - WAADI) regulates employment agencies generally although specific rules are absent in the field of sports agents and agents no longer require a licence to carry out their work. The legislation contains a number of rules of conduct with which the job agent must comply, such as the prohibition on the person seeking work to be required to provide anything in return for this service. Whilst there exists the possibility to exempt this prohibition, as in UK law, the use of such a General Administrative Order (AMVB) has yet to be employed and consequently if an agent requests payment from the player, the contract is null and void.

In the UK, statute regulates agency work generally via the Employment Agencies Act 1973 and the associated regulations, the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003 No. 3319). These regulations place restrictions on how commissions are to be paid although they place no restriction on the hirer paying remuneration on behalf of the employee. They also stipulate the need for a written contract between the player and the agent, the need to maintain proper records and provisions relating to the protection of minors. Further duties deriving from, for instance, contract and tort law are also owed to players.

In the United States, the first attempts at agent regulation were at state level when in 1981 California enacted the California Athlete Agents Act. Now 39 states have adopted similar legislation although as John Wolohan explains, many of these statutes are vague and vary considerably from state to state and this has implications for the overall pattern of agent regulation and has contributed to widespread disregard for the rules. Wolohan points out that this pattern of agent regulation is designed to control corrupt agents rather than ensure agents are not incompetent. Only Florida currently requires agents to pass a competency examination as a requirement for obtaining a license. In the US the focus of agent regulation is on College and University students. Since 2000, the Uniform Athlete Agents Act (UAAA) has attempted to create a uniform system for regulating agents. The Act contains a number of provisions designed to uphold high standards of agent conduct whilst providing for a mutual recognition system for agent licenses between states. As of June 2006, 35 states had passed the UAAA. At federal level, it was not until September 2004 that Congress passed national legislation regulating the conduct of sports agents - the Sports Agent Responsibility and Trust Act. The Act is however very much focussed on student sport as opposed to professional sport. As Wolohan explains, other laws have also been applied to agents including the common law civil remedies of breach of contract, misrepresentation, fraud, deceit, negligence and the criminal law.

Some countries, such as Ireland have no specific statutory regulation, agent activity being regulated by the law of agency which has developed through case law to impose certain duties on the principle

5 Decree No. 2002-649 of 29 April 2002, Article 19, taken for application of

Article 15-2 of Law No. 84-610 of 16 July 1984.

and the agent. In India only statutory provisions on contracts apply. Elsewhere, agent regulation has come under scrutiny from competition laws, as discussed in the Italian submission. One might conclude therefore that whilst the pattern of agent regulation, both current and potential, varies somewhat, FIFA regulations are by no means the only form of regulation applicable to agents. This varied pattern of regulation creates tensions between national law and FIFA law, particularly over issues concerning restricting access to the profession and questions of remuneration. For example, the Brazilian law on sport (the Pelé) law stipulates that the maximum duration for public or private sports representation agreements and the use of professional athletes' images is one year, whereas the FIFA regulations provides for two.

Whilst the above review of national laws on agent regulation is far from complete (the reader needing to consult the individual national contributions to build up such a complete picture), it is clear that national law does intervene in the principal - agent relationship. Furthermore, and as discussed above, many states have ratified the ILO Convention granting player regulation a legal base in national law. Nevertheless, the level of state intervention in agency agreements rather contradicts the view of the European Court of First Instance expressed above.

Association Law

FIFA and national association agent regulation is the third regulatory tier applicable to agents. FIFA's Licensed Players' Agent Regulations require national associations make their own Regulations for Players' Agents based on the guidelines provided by FIFA and such guidelines must be approved by the FIFA Players' Status Committee. The FIFA Regulations have received a wide airing throughout most of the contributions and these regulations have in turn been transposed into national association law. Nevertheless, the pattern of transposition has been varied and conflicts and inconsistencies remain. For some states, the interventionist nature of state involvement in sport (such as in Greece) can pose problems for national associations obliged to follow national law whilst also being required to pay heed to FIFA regulations. In other cases, some national associations have adopted more detailed and restrictive rules than FIFA requires (as in England), whilst others have simply incorporated the FIFA principles into their registration procedures (as in Scotland). Furthermore, jurisdictional problems exist as witnessed in the protracted investigation into Harry Kewell's transfer from Leeds United to Liverpool in 2003 and the FA's inability to sanction Israeli agent Pini Zahavi for his part in the Ashley Cole affair (both matters discussed in the UK contribution). In short, if an agent is not licensed by a national association then no contractual relationship can exist between the two and consequently the agent falls outside the regulatory control of that association.

A conflict between national and FIFA regulations was also witnessed in the Netherlands where the Dutch Regulations for Players' Agents were tested in the judgement of the Court of Appeal in The Hague (October 2001). Here a contract between a player and an agent was concluded for a term of three years. The question was whether this contract should be considered as terminated in accordance with the FIFA regulation then applicable (which stipulated a two year duration). The question was whether the footballer could invoke the FIFA regulation in his contractual relationship with the players' agent. The Appeal Court came to the conclusion that this was not possible, overturning the judgment of the lower court. Further conflict arose in Belgium where the calculation of an agent's commission differs from FIFA rules.

In addition, and as documented above, FIFA rules, even though adopted or transposed into national association law, are frequently breached, particularly in relation to the work of unlicensed agents, the lodging of documentation with national associations following the conclusion of new player contracts and on the issue of dual representation and conflicts of interests generally. Two views of the issue of conflicts of interest are emerging. On the one hand some agents object to the prohibition contained in the English FA's agent regulations (Article 12.8) which prohibit clubs, their officials and employees

having any interest in an agent's business. This, they consider, is a restraint of their trade. On the other hand, in Italy the Italian Anti-Trust Authority has raised concerns on the practice of agents representing players from clubs where the agent has other family members in key roles. The impact of this activity is compounded in stances whereby the agency holds a position of dominance within the market and uses this to distort effective competition. The FIGC Regulations allow for the identification of an agent or an association of agents taking unfair advantage of a dominant position yet do not specify the concrete measures that the Committee can prescribe to eliminate the abuse. As Luca Ferrari explains, only one investigation has been carried out and the Committee has never identified any such abuse. This finding may alter with the on-going Antitrust Authority's investigation into Italian football.

The question of agent regulation and competition law has also been raised at EU level and indeed one of the most interesting issues emerging in the field of agent regulation generally is the role of the EU. The challenge to FIFA agent regulations brought by Laurent Piau illustrates the issues involved in a private sporting body (FIFA) attempting to regulate a profession normally only controllable by a public body. Although Piau's appeal failed, the ECJ did acknowledge that the legitimacy of a private body such as FIFA to regulate a profession such as agents is questionable given that FIFA have not received a mandate from a public authority (at para. 76, 77). The court's reasoning to allow such regulation to continue was based, according to Branco Martins, on questionable logic. The court argued that in Piau's case, only questions of competition law could be heard and the rule making power exercised by FIFA was legitimate as there was an almost complete absence of national rules on player agent regulation. Furthermore, the court stressed that players' agents are not organised collectively and consequently do not constitute a profession with its own internal organisation. Branco Martins questions both these assertions by claiming that within the EU sixteen out of the twenty five member states established some type of legislation or legally structured framework for regulating the profession of players' agent and that a collective organization of players' agents does in fact exist, the International Association of FIFA Agents (IAFA). Nevertheless, the 2006 Independent European Sports Review argues in favour of current patterns of agent regulation finding favour with Community law. The review concludes that '*it is submitted that rules concerning players' agents are inherent to the proper regulation of football and therefore compatible with Community law*'.⁶

The case against the current pattern of agent regulation could be strengthened further by the impending EU Services Directive which seeks to further liberalise the single market's service sector. Depending on the final wording of the Directive, an agent, having satisfied the requirements of national law, should be able to provide services in another member state of the EU. So, for example, a Dutch national is not required by Dutch law to hold an agents licence. He or she should therefore be free to offer an agency service in France. French law attempts to make provision for such an eventuality by requiring that the agent would either need to produce a licence issued in the one of the other member states, '*or they would need to prove that they have the capacities or professional qualification permitting them to carry on this profession there*'.⁷ However, the Directive's country of origin principle (should it remain) places the control element on the host state, in this case the Netherlands. Consequently, Dutch law would judge an agents suitability to provide services in another territory of the EU. This principle also clearly leaves FIFA mandatory licensing rules fragile. Clearly, the Directive will affect members of the EU and states within the European Economic Area. Restrictions on agents outside these territories can still be still subject to restriction.

Conclusions

Publicly, at least, there appears to be a strong collective will within football to clean up the game, to make the work of players' agents

⁶ Independent European Sports Review (2006), p.40.

more transparent and to allow a greater share of the games profits to stay within the game. Privately, there seems to be unease that current agent regulation is out of step with industry norms and that if the sector is to operate effectively, practices which are prohibited by the rules should in fact be tolerated. Here lies the problem. Stringent agent regulation may well look impressive but over-regulation will merely compound the problem of non-compliance and a lack of transparency. Finding the balance which not only addresses the problems facing

football and satisfies the supporters and other interested stakeholders but which also satisfies the requirements of national, EU and international law is just one of the many challenges facing football's governing bodies.

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⁷ Decree No. 2002-649 of 29 April 2002, Article 19.

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

by Roberto Branco Martins**

1. Introduction

On 23 February 2006, the European Court of Justice (ECJ) decided on appeal against a decision of the Court of First Instance in the so-called Laurent Piau case. Laurent Piau is a French players' agent who lodged a complaint related to the FIFA Players' Agents regulations with the European Commission. The object of this contribution is to describe the course and outcome of this case. After presenting the judgement of the ECJ, I will explore whether a legal basis exists for FIFA to draft and control the current Players' Agents regulations: was the judgement in accordance with the law? Finally I will research possible alternatives for regulating the profession of Players' Agents, alternatives that promote legal certainty and the limitation of a new legal challenge to the FIFA Players' Agents regulations.

2. Laurent Piau v. FIFA and the European Commission

Piau's initial complaint - and the starting point for further litigation - of 23 March 1998 focussed on the content and objectives of the FIFA Players' Agents regulations and their incompatibility with the Articles 49 and further of the EC Treaty (free movement of services). Piau objected to the fact that he could only carry out the profession of Players' Agent on the condition that he possessed a compulsory licence. He particularly objected to the necessity of passing a written exam before being able to receive such a licence. His complaint also concerned the necessary financial deposit that a (starting) players' agent needed to make as a type of insurance, FIFA's power to sanction and the fact that the FIFA Players' Agents Regulations did not foresee the possibility of appealing against a FIFA sanction or decision in court.¹

The European Commission received the complaint and intervened. The European Commission made the abovementioned grievances clear to FIFA in a statement of objections.² FIFA then changed its regulations in such a way that the European Commission authorised the use of the new Regulations now that they were compatible with European Union law. FIFA abolished the compulsory deposit of a considerable amount of money and introduced the conclusion of insurance instead. FIFA also introduced a code of conduct; a model-contract for players' agents and a method for calculating the fee to be paid to the agent.³

Piau upheld his complaint however, and sought a decision from the European Commission on 28 September 2001.⁴ He added to his initial complaint the aspects that, in his view, restricted competition: the code of conduct, the model-contract and the fee calculation method.

The Commission acted upon this complaint as if it was related solely to an action based on Regulation No. 17, therefore only making it possible to approach the complaint from a competition law perspective or, more specifically, using the perspective based on Articles 81 and 82 of the EC Treaty.⁵

In contrast to Piau's contention, the European Commission did not think the amended FIFA Players' Agents Regulations opposed Article 81 of the Treaty and decided that the Regulations were legitimate. Piau then appealed against this decision before the European Court of First Instance (CFI). In most respects the CFI upheld the decision of the European Commission. In its judgement, the CFI decided on the rule-making action of FIFA and the compatibility of the FIFA Players' Agents Regulations with competition law. It concluded as follows:⁶

"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 restrictions 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".

Understandably, Piau was not satisfied with this decision and he appealed again, this time before the European Court of Justice. His claims were that the Court should set aside the judgment and annul the decision of the European Commission. In its judgment of 23 February 2006 the Court grouped the pleas and arguments of Piau in

* This contribution is an elaborated and updated version of *The Laurent Piau Case of the ECJ on the Status of Players' Agents*, *The International Sports Law Journal (ISLJ)* 2005/3-4 pp. 8-9, 11-12.

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¹ Case T-193/02 *Laurent Piau vs. Commission of the European Commission*

supported by FIFA, Jur EG 2005, p. - 0029, no. 8.

² *Idem*, no. 9.

³ The current regulations can be found on <http://www.fifa.com/en/regulations/regulationlegal/0,1577,3,00.html>.

⁴ *Supra* 61, no. 21.

⁵ Regulation No. 17 of the Council of 6 February 1962, First Regulation implementing Articles 81 and 82 of the Treaty, to be found on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:en:html>.

⁶ See the press release of the Court of First Instance <http://curia.europa.eu/en/actu/communiqués/cpo5/aff/cpo50008en.pdf>.

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three parts:⁷ a violation of Article 81 of the EC Treaty; a violation of Article 82 of the EC Treaty; and the violation of other Treaty articles or general principles of law. Piau doubted whether the Court of First Instance had been accurate on the issue of exempting the FIFA regulations from the application of competition law under Article 81 sub 3 EC Treaty. Piau argued that the Court of First Instance had not been able to prove the necessity of such an exemption and that a legal basis for such a decision was lacking. He questioned the conclusion that the FIFA regulations did not impose a quantitative effect. Piau was of the opinion that the Court of First Instance did not use any factual evidence for its decision. The Court of Justice disagreed with Piau. As to the violation of Article 81 the Court first stated that was not in its power to judge on the Court of First Instance's appreciation of facts or evidence; therefore this objection was not be considered by the Court. The decision of the Court of First Instance was upheld and no new appreciation of the facts was carried out.

The view of the Court of First Instance therefore still stands: it had been proven by FIFA that fair competition is not eliminated. Evidence for this was the fact that FIFA recorded only 214 registered Players' Agents in 1996, when the initial Regulations entered into force, whereas there were around 1,500 Players' Agents in 2003; so the Regulations had a qualitative effect instead of being a quantitative restriction.⁸

Piau also complained about the fact that the Court of First Instance erred in law as to the non-existence of a Community interest in the case. Unfortunately these arguments were considered to be new arguments upon which the Court of Justice could not decide in the appeal procedure. With regard to Article 82 of the EC Treaty, Piau agreed with the Court of First Instance that a dominant FIFA position exists, but in addition to this he thought that the Court should have ordered a more thorough research into the Regulations' abusive effects. The Court of Justice applied the definition of the abuse of dominance as defined in the Hoffmann La Roche case⁹ and concluded that Piau's plea was unfounded. The Court referred to the above-mentioned fact that FIFA did not impose a quantitative restriction but only a qualitative restriction on the profession of players' agent.

Piau's other complaints focused on the abuse of Articles 39 (free movement of workers) and 49 (free movement of services) EC Treaty. The European Commission did not react to Piau's complaints that were based on these Articles and Piau was of the opinion that this passive attitude resulted in a breach of Article 253 of the EC Treaty. According to this Article the European Commission must give their reasons for decisions, and in the Piau case it had not acted in accordance with this Article. Unfortunately for Piau, the Court of Justice did not share this view. The European Commission had acted on the basis of Regulation No. 17, therefore it only needed to focus on competition law. It did not abuse its rights by not judging and thus not giving its reasons for Piau's complaints on the basis of other than fair competition law articles.

3. The legal basis that allows FIFA to regulate the profession of Players' Agents

The CFI raised an interesting question in its judgement dealing with the authority of FIFA to regulate the profession of Players' Agents. The CFI mentions specifically in considerations 74-79 of the judgement that "regulations which govern a profession are in principle only legitimate when drawn up by a public authority." An exemption to this rule may arise when an organisation receives a formal mandate, based upon public law.¹⁰ Apart from this, an association has the free-

dom to draw up rules and regulations for its internal organisation. One final aspect that could lead to an exemption to the rule that a public authority should regulate a profession, is that such regulations could fall under the specificity of sport principle. I shall elaborate on these specific aspects in order to assess whether the CFI came to the right conclusion in the Piau case.

3.1. The existence of a formal mandate based upon public law

FIFA has drafted and adopted 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 its Regulations concerning the profession of players' agent in football, geographically speaking, cover the entire world.

Thus a formal mandate to regulate the profession of an agent should have been given to FIFA by an international organisation, composed of representatives from national public authorities, through their official and formal channels. Such a mandate does not exist.

3.2. Internal organisation of FIFA

The regulations of FIFA are binding upon its members and must be in conformity with national and international public law. The members of FIFA are the national football associations, therefore the FIFA regulations are binding upon these national associations and they 'trickle down' to clubs and players due to their compulsory membership of their national associations. Players' agents are not members of FIFA, nor are they members of the national football associations. Therefore, there is no legal basis for player's agents to be formally bound by the regulations issued by FIFA.

3.3. Specificity of sport

In the jurisprudence of the European Court of Justice the notion of the 'specificity of sport' was developed.¹¹ In addition to the jurisprudence this principle was laid down and recognised in official documents originating from official European Union authorities. On the basis of the specificity of sport, on a case-by-case basis exemptions of the sports sector from the applicability of European Law may be justified. However the Court of First Instance acknowledged in the Piau judgment that the profession of a players' agent does not fall under the specificity of sport. The profession of a players' agent must therefore be characterised as an economic activity consisting of the provision of services on the employment market and hence falling under the free movement of services in Article 49 of the EC Treaty. This means that European Union law is fully applicable to the profession of a players' agent.

3.4. No public authority of FIFA

It has become clear in the passage above that FIFA lacks the public authority to regulate the profession of players' agent. I will now assess the reasons of the Court of First Instance for allowing FIFA to regulate the profession, even without 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 into the occupation of players' agent in order to protect players whose careers are short;
- National rules were almost absent (except in France);
- A collective organisation of players' agents was lacking.

7 Case C-171/05P *Laurent Piau v Commission of the European Communities, FIFA*, OJ C 155 25.06.2005, no. 13.

8 In fact this is an interesting argumentation of the Court. The FIFA judges the growth of Players' Agents on the basis of the licensing which it has introduced itself; however there are many non-licensed agents who carry out the profession and do not wish to take the exam.

Another aspect is that the vast majority of those taking the exam fail to achieve the licence.

9 Case 85/76, *Hoffmann-La Roche v AGU. Commission* [1979] ECR 461, [1979] CMLR 211

10 The CFI refers in no. 74 of the Laurent Piau case to the C-309/99 *Wouters and others* [2002] ECR I-1577, paragraphs 68 and 69.

11 Relevant cases before the ECJ are Case

36/74 *Walrave & Koch v Union Cycliste Internationale* [1974] ECR 1405; Case 13/76 *Donà v Mantero* [1976] ECR 649; Case 222/86 *Unectef v Heylens* [1987] ECR 4097; Case 415/93 *Union Royale Belge Sociétés de Football Association and Others v Bosman* [1995] ECR I-4291; Case 51/96-191/97 *Delière v Asbl. Ligue Francophone de Judo and Others* [2000] ECR I-2549; Case 176/96 *Jyri Lehtonen and Castors Canada Dry Namur Braine v*

Fédération Royale des Sociétés de Basketball and Ligue Belge [2000] ECR I-2681; Case 438/00 *Deutscher Handballbund v Maros Kolpak* 8 May 2003; Case 265/03 *Igor Simutenkov v Abogado de Estado, Real Federación Española de Fútbol y Ministerio Fiscal*, 12 April 2005; Case 519/04 *Meca-Medina Majcen v. Commission*.

At this point it must be stated that the Court of First Instance probably intended to say that there is a lack of public legislation on a national or international level, issued by a body with public authority. After all, if there were national legislation to regulate the profession and if these regulations contained requirements that ensured professionalism and morality, then the FIFA Regulations would be null and void due no legal basis would exist for FIFA to regulate an economic activity, in this case the provision of services on the employment market.

The Regulations of FIFA would then be in breach of Article 49 EC Treaty on the free movement of services, because, as a private organisation, it would limit the free movement of services without having the authority to do so. In other words: if there is (inter)national legislation governing the work of players' agents, then the basis for the application and enforceability of the FIFA Agent Regulations disappears. Below I will therefore research the possible existence of formal regulations governing the work of players' agents.

3.5. The existence of public legislation on the profession of players' agent

First, the starting point of this research must be made clear. A definition of the work of an agent is needed. I will use the definition formulated by the Court of First Instance in the Piau judgment: "*The object of the occupation of a 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.¹² Second, when researching 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 international law as well as EU law is their direct applicability. The following questions therefore need to be formulated:

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 agents' profession?
3. Is there a collective organisation of agents and is this needed?

Is there any international law applicable to the agents' profession?

On an international level there is a specific ILO Convention which is applicable to the work of players' agents. The International Labour Organisation is the UN specialised agency which seeks the promotion of social justice and internationally-recognised 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 specialised agency of the UN in 1946.¹³ 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 organise, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work-related issues.

The ILO issued a Convention in 1997, C181: Private Employment Agencies Convention.¹⁴ A section of Article 1 of this Convention determines the scope of these provisions. Private employment agencies means any natural or legal person, independent of the public authorities, who 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 the ILO Convention C181.

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 the

protection of the workers using their services. Restrictions on the freedom of performing as a private employment agency can only be introduced by the ILO Members and after having consulted the relevant and most representative organisations of workers and employers. The Convention sums up 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, provided that adequate protection is otherwise assured for the workers concerned. Any of these restrictions need to be reported to the ILO with mention of the reasons for these restrictions. 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, after first having consulted the relevant representatives of workers and employers. An exception can be made on the basis of national law and practice. The Convention safeguards the protection of the workers by ordering respect as to the workers' rights on privacy, freedom of association, collective bargaining, prevention of abuses deriving from international recruitment and placement and the prevention of child labour. An interesting aspect of the Convention is the fact that it is prohibited for private employment agencies to charge any fees to the workers directly or indirectly. This may (again) only change after consultation of the relevant, most representative organisations of employers and workers.

It can be concluded that countries which have ratified this Treaty safeguard the quality of the profession of private employment agencies and the protection of the workers. If there is a lack of regulation concerning private employment agencies, then ratification of the Convention will serve as a 'safety net.' An additional conclusion in the light of the Piau case is that there is (inter)national public legislation that is further-reaching than the FIFA Players' Agents Regulations in promoting quality and professionalism, as well as protection of the workers and the prevention of child labour. In addition it can be concluded that the FIFA Players' Agents Regulations are contrary to international law because the Regulations only allow payment by the worker to the agent if the worker engages the services of an agent.¹⁵

Countries that have ratified Convention C181

I will focus on the European Union Member States. The countries which have ratified the Convention are: Belgium, Czech Republic, Finland, Hungary, Italy, Lithuania, the Netherlands, Portugal and Spain. This would mean that, including France, ten countries have a legal basis for the regulation of the profession of agents. Considering that the majority of Member States are not a party to the Convention, I will further research if any legislation exists on a national level that regulates the profession of players' agent.

Is there any existing national law in the EU Member States applicable to the agents' profession?

For reasons of efficiency I will clarify in a table how the Member States have regulated the profession of an agent. I will use the following categories.

Has the EU Member State ratified the ILO-Convention C181?

If this is the case, then there is a directly applicable legal basis for the profession of players' agent in the Member State.

Interventionist legal system

By using the term interventionist legal system I refer to Member States which have established a basis for regulation of their sport sector by introducing one or more public sport laws. The sports governing bodies are autonomous in these countries, but the autonomy is based on these public laws. Therefore the rules and regulations of the sports governing bodies, such as associations, are binding due to a

¹² See also no. 105 of the *CFI Laurent Piau* judgment in first instance. ¹⁵ FIFA Players' Agents Regulations, Article 12 (3) and (4).

¹³ www.ilo.org.

¹⁴ <http://www.itcilo.it/english/actrav/telearn/global/ilo/law/il0181.htm>.

Countries	<i>ILO Convention</i>	<i>interventionist legal system</i>	<i>specific sports law</i>	<i>other legislation</i>	numbers of agents
Austria				X ¹⁷	24
Belgium	X			X ¹⁸	48
Cyprus					19
Czech Rep.	X				21
Denmark					24
England				X ¹⁹	289
Estonia		X ²⁰			1
Finland	X				7
France		X ²¹	X ²²		153
Germany				X ²³	148
Greece		X ²⁴	X ²⁵		51
Hungary	X				12
Ireland					
Italy	X	X ²⁶		X ²⁷	379
Latvia		X ²⁸			4
Lithuania	X	X ²⁹			2
Luxemburg					8
Malta					3
Netherlands	X			X ³⁰	69
Poland		X ³¹			33
Portugal	X	X ³²	X ³³		36
Slovakia					8
Slovenia					15
Spain	X	X ³⁴			365
Sweden				X ³⁵	21

'trickled-down' mandate issued by the legislative public authority. The associations' regulations can therefore be characterised as (semi-)public law. There are several degrees of interventionist systems; I will not go into detail on the background of these differences, which are based on types and usages of the various jurisdictions.

A non-interventionist system is characterised by a high degree of self-regulation by NGOs in sport - the governing bodies in football are the football associations, which are responsible for the overall

organisation of the game of football - and the lack of legislation in the field of sport. Within these non-interventionist systems the regulations of associations are characterised as 'association law' and national (public) legislation prevails over these rules. In other words, if public law regulates a certain situation in sport which is also regulated by association law, then the association regulations are formally not binding for those to whom they are addressed.¹⁶

16 For more information concerning these two systems see André-Noël Chaker, *Study on national sport legislation in Europe*, Council of Europe Publishing, July 1999.

17 *Gewerbeordnung* jo.

Arbeitsmarktförderungsgesetz.

18 Flemish Decree of 19 April 1999 on Private Labour Conciliation and KB of 28 November 1975.

19 England has a common-law system which is developing by case law. There is no specific law governing the profession of a players' agent. The safeguarding of the integrity and morality of the agent is based on various duties which are implied in the contract between agent and player, such as good faith; trust; openness of dates; con-

flicts of interest. These special provisions prevail over association regulations.

20 Eesti Spordiseadusest 15 June 1998.

21 Loi n.º 84-610 du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives.

22 Loi n.º 84-610 du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives, Article 15-2.

23 The following legislation is applicable: Sozialgesetzbuch III; Rechtsberatungsgesetz; Bürgerliches Gesetzbuch.

24 Law 2725 / 1999 art. 90 par. 9.

25 Ministerial Decision No. 23788/2002.

26 Various sports acts, most relevant: L. marzo 1981, n. 91 - Norme in materia di rapporti tra società e sportivi profession-

isti 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.

27 Various general laws are applicable to the work of agents, such as Libro IV, Titolo II, Capo VI Codice Civile articles 1387-1400; Libro IV, Titolo III, Capo IX Codice Civile articles 1703-1730 and articles 2229-2238. These articles create the basis in a civil law framework.

28 Sporta Likuma 13 November 2002.

29 Lietuvos Respublikos Kūno Kultūros ir Sporto Ástatymas 1995.

30 WAADI (Wet Allocatie Arbeidskrachten door Intermediairs).

31 Constitution of Republic of Poland art.

65 (Journal of Laws No. 97.88.553) Art. 95-109 of the Civil Code of 17.11.1964 (Journal of Laws No. 64.43.296). These articles prohibit an organisation without public authority regulating a profession that falls under the freedom of the provision of services.

32 Lei. N.º 1/90 Lei de Bases do Sistema Desportivo de 13 de Janeiro.

33 Lei N.º 28/98 Regime jurídico de contrato de trabalho do praticante desportivo e do contrato de formação desportiva, especialmente capítulo IV articles 22-25.

34 Ley 10/1990, de 15 de octubre, del Deporte.

35 Lag (1993:440) om privat arbetsförmedling och utyrning av arbetskraft.

The existence of a specific sports law as a basis for the regulation of players' agents

It is possible that a specific sports law is in force and serves as a legal basis for the official regulation of the profession of players' agents. Such a formal sports law is only present in EU Member States that have some kind of interventionist system.

Other legislation regulating intermediary services on the employment market

We have seen above that the profession of players' agent falls within the definition of the ILO Convention C181 and that the work of agents is in fact to provide services in the searching and concluding of employment contracts. On the national level there might exist a law, or a set of laws, which safeguard(s) the integrity of the profession of agents and serve(s) as a legal basis for regulation.

Results of table

The table shows that in one way or another, 16 out of the 25 Member States have a type of public regulation or legally structured framework for regulation of the profession of players' agent. This legislation prevails over rules of national football associations, which have to be in accordance with FIFA regulations due to the membership of the national associations of FIFA. Apart from that, it is possible that the national football association has the power to issue the regulations due to a mandate based on public law (cf. the interventionist system).

Percentage of FIFA-licensed players' agents subject to prevailing public legislation

Currently there are a total of 1,592 FIFA licensed players' agents in the European Union. A total number of 1,477 FIFA licensed players' agents are operating in an economic market where they are bound by public laws in some form or another; hence they are not bound by the FIFA Regulations. This number covers 93% of all FIFA-licensed players' agents in the European Union.

Is there a collective organisation of agents and is it needed?

There has been a collective organisation of agents, the International Association of FIFA Agents (IAFA). But this organisation was not very active. One of the reasons for this inactivity was that regulations are imposed on the agents and that there were never negotiations concerning the profession's rules and regulations; these are drawn up unilaterally by FIFA, as has been made clear above. However due to recent developments and renewed pressure on players' agents worldwide, new initiatives are developing. I will return to these developments later.

Conclusion of the research

The Court of First Instance has made a misjudgement with regard to the lack of national public legislation on the profession of players' agents. A total of 93% of all the FIFA players' agents are subject to such legislation. The FIFA Regulations do not prevail over this legislation because these Regulations are based on association law. Natural persons carrying out the profession of players' agent are not bound by the FIFA Regulations, which are therefore redundant. On an international, global level a special ILO Convention exists. This Convention offers a framework of rules for private employment agencies. The FIFA Regulations on players' agents are in conflict with this Convention on a crucial point: the payment of a fee to the agent by the worker is strongly prohibited in the ILO Convention; in the FIFA Regulations the payment of a fee to the agent by the player is obliged, whenever the player engages the services of an agent.

The main conclusion of the research is that a legal basis is lacking for FIFA to issue a set of rules that create a barrier to carry out the profession of players' agent in the European Union. In the vast majority of cases, (national) formal legislation exists regulating the profession of an agent that safeguards professionalism and moral standards, even to a further extent than the FIFA Regulations. The FIFA Regulations create an artificial barrier for parties wishing to enter the services market of players' agents, and are in breach of international

law. On the basis of this information it seems possible that a new challenge of the FIFA Players' Agents Regulations will be successful. Piau never had the opportunity to challenge the rules under Article 49 of the EC Treaty (free movement of services), but he may start a procedure in the French courts which could ask for a prejudicial decision of the European Court of Justice.

However, some questions arise when one realises the possible impact of a future ruling on the legality of the Players' Agents Regulations. Is there really a need for specific regulation, including the licensing of the profession of players' agents? If so, are there other ways of regulating the profession in a manner that may bring more legal certainty to the actors in professional football? I will answer these questions and present possible alternatives that serve legal certainty.

The need for regulation

I have shown that in the vast majority of cases a prevailing source of public legislation regulates the profession of players' agents. In theory this means that 93% of EU players' agents could return their licences and provide services on their own conditions respecting public legislation. But how does the football world itself regard the regulation of players' agents? If there is a shared view on the activity of agents and the necessity for regulation of this profession in a way that ensures participation of all the relevant football authorities, not only FIFA, then that could be a reason for maintaining the system of licensing agents, or the creation of a form of regulation that is binding upon the agents. I will assess what activity or opinions leading football stakeholders have recently communicated which concern the position of agents. I will use publicly available materials and media statements.

The position of FIFA is clear; it results from the position of this organisation in the Laurent Piau case. The most powerful regional confederation of FIFA is UEFA. The words of the UEFA Chief Executive best serve the purpose of expressing UEFA views:³⁶

"Players' agents and the trafficking of child footballers have been identified by UEFA Chief Executive Lars-Christer Olsson as two major areas of concern facing the European football authorities."

Agents

"The issue of players' agents is one of the key problems that we have to address today," added Mr Olsson, who has highlighted a need for a better control of agents and their activities, because of the financial amounts that they are handling or as a result of agents' conduct. "We are not afraid to act against agents. What we are asking for is firm legislation on agents and their activities."

Trafficking

Turning to the trafficking of young footballers, Mr Olsson described as "alarming" the situation whereby they could be brought to Europe and then left on the streets if they failed to make the grade. "Bringing young children from Africa and South America into Europe is a major problem, and we have to address it," he said. "Proper rules and regulations on agents would help."

These statements were made by Mr Olsson at a meeting of the Council of Europe during the Play Fair with Sport conference on the 29 September 2006, and can be considered as a follow-up to the activities of the Working Group on the Role of Agents in European Football established by UEFA's Professional Football Committee. This Working Group produced draft recommendations for its member associations on 28/29 November 2005.

The recommendations can be divided into three categories: the first related to access to the profession, a second related to the activity of an agent and a third category about enforcement of the rules. The extension of the use of compulsory licences is an elaboration of these categories. It is clear that UEFA strives for a firm regulation of the profession.

³⁶ <http://www.uefa.com/uefa/Keytopics/kind=2048/newsId=462974.html>.

The views of FIFPro, the worldwide players' union, are best reflected in a statement by one of the organisation's board members:³⁷

FIFPro board member Mick McGuire responsible for the portfolio for Players' Agents: "Why should lawyers not have to know the regulations with regard to players' contracts and transfers? These regulations are in fact so specific that a good knowledge of them is required. Furthermore you must surely know exactly what you are putting your signature under. The player is always the victim if a contract contains disputable conditions. We are therefore of the opinion that no exception must be made for lawyers.

"Furthermore, it can be questioned whether lawyers can be sanctioned in the same manner as licensed agents if the FIFA regulations are contravened. The fact is that they have not signed FIFA's Code of Professional Conduct", according to McGuire.

And if a lawyer should be punished, what are then the consequences for the customer, the non-licensed agent? Mick McGuire: "He probably remains out of harm's way and he can continue his fraudulent practices unpunished."

By implementing a licence for anyone who represents players the market for players' agents becomes more transparent according to FIFPro. McGuire: "In this way you know exactly who represents which player and all the non-licensed agents are put out of action. This is also good for the reputation of players' agents."

A recently established organisation in the international football world is the Association of European Premier Football Leagues (EPFL). On 30 November 2005 this organisation adopted a proposal paper on players' agents drafted by its working group. This proposal paper focuses on the existing problems (from the EPFL's perspective) with regard to the football agents' activities. It distinguishes the causes, the effects, the issues and possible solutions. To illustrate the content of the proposal I cite the causes mentioned in the report: different national laws and national regulations vs. the FIFA Regulations; licences and renewal; dual capacity of agents; relationships of players / clubs / agents; payments; taxation; number of agents and supervisory body; collaborators of agents; legal entities representing players.

The G14 grouping of professional football clubs does not focus on the activities of agents, at least not in the media or through other official channels.

Of course it is also necessary to include the agents themselves in the overview. A recent phenomenon is the creation of national players' agents associations. The members of these associations are FIFA-

licensed players' agents. So it seems obvious that these groupings wish to uphold the system of the compulsory licensing of agents in order to protect their business and their market. In addition to this, one can extract from the ruling of the Court of First Instance that the position of licensed agents needs to be taken seriously: the lack of an international organisation at an EU level is one of the reasons for recognition of FIFA's authority to regulate the profession. Now there are recently established players' agents associations in Spain, England, Portugal, Italy, France, the Scandinavian countries and the Netherlands.

It seems that most football stakeholders wish to maintain a regulatory system for players' agents and their activities. However as we have seen, the requirement of a specific licence is, in principle, contrary to (inter)national public law and may very well be contrary to the free movement of services principle and competition law. Still, could there be a way in which a system of licensing the profession could be brought into accordance with the law?

4. Alternatives to counter a possible new legal challenge to the FIFA Players' Agents Regulations

I will assess various options. First, I will look at the possibility of empowering FIFA with the task of drafting legally-binding players' agents regulations including the issuing of a compulsory licence. Secondly, I will assess the feasibility of a Directive on this matter on the basis of European law. And finally, I will explore the possibility of creating a binding legal basis by means of collective bargaining.

In consideration no. 105 of its judgement, the Court of First Instance made it clear that FIFA could not rely on the specific nature of sport to derogate from the rules of competition law. So, FIFA could derogate from the rules of competition law only if the rules regarding players' agents would be brought under the specific nature of sport. The concept of the specific nature of sport has been developed in various judgements of the European Court of Justice. There is no clear definition about what constitutes a sport-specific element and thus would 'fall' directly under the autonomy of regulation by the sports governing bodies. In his study on *Sports Law and Policy in the European Union* Richard Parrish presents a framework called the 'separate territories' framework. In this framework he indicates which topics fall under (purely) sporting autonomy; the topics that fall under supervised autonomy by the European Union institutions and EU law, and the topics which have been subject to judicial intervention. His theory is translated into a table consisting of various 'boxes':^{38 39}

Sporting Autonomy	Supervised Autonomy	Judicial Intervention
Rules preventing club relocation	Collective sale of broadcasting rights	Periods of long exclusivity for sports rights
Transfer windows	Collective purchasing agreements	Export bans for sports goods
Selection criteria	Restrictions on the cross-border transmission of sport	Nationality restrictions
	Ticketing arrangements	Out-of-contract transfer payments
	In-contract transfer payments	Rules maintaining commercial and regulatory dominance in a sport
	The granting of state aid to sport	

³⁷ <http://www.FIFPro.org/index.php?mod=one&id=15145&PHPSESSID=4d842b5d33f768e279d9f56fbc3a3461>.

³⁸ Parrish R, "Sports Law and Policy in the European Union", Manchester University Press, 2003, especially pages 202-220.

³⁹ The separate territories framework of

Parrish has been affected by the outcome of the 'doped swimmers' case, C-519/04P Meca-Medina and Majcen, judgement of 18 July 2006. In this case the ECJ has introduced a sort of 'preliminary EU law test' for every sporting rule. The ECJ stated that "the mere fact that a rule is

purely sporting in nature (thus falling under sporting autonomy in the 'separate territories' framework, RBM) does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down". Now

restrictions must be limited to what is necessary to ensure the proper conduct of competitive sport, and this relates to both defining the crime of doping and selecting penalties. This case led to a change of the purely sporting rule into a conditional autonomy under EU law. This topic

The FIFA Players' Agents Regulations could, under the current circumstances, having regard to the Piau judgement, be positioned under supervised sporting autonomy. However, as I argued above, in case of new legal proceedings, if it takes the prevailing public legislation into account the ECJ will consider the Regulations contrary to the principle of free movement of services and the Regulations would then 'shift' from supervised sporting autonomy to judicial intervention. Therefore FIFA should strive to bring the Players' Agents Regulations into the (purely) sporting autonomy 'box'. The only way to do that is to identify sport-specific elements which would justify that the issue of players' agents is qualified as a case of (purely) sporting autonomy. Currently FIFA describes the activities of an agent as performing consultancy services in the field of job placement, as was explained above. This is a very narrow description, as the agent does a lot more than performing such consultancy services.⁴⁰ If FIFA can identify and specify these other services and show that the profession of players' agent is in fact a sport-specific profession that needs to be supervised by the sports governing bodies, then this might be a valid argument in a possible new court challenge. However at this moment the activities of a players' agent are still narrowly defined by the ruling of the Court of First Instance and the FIFA Regulations.

Another possibility for avoiding a legal court challenge is the use of an EU Directive to organise the activities of a players' agent, including the necessity of issuing a licence. A Directive needs to be implemented in every European Member State and may have a direct binding effect. It is addressed to the Member States and it can also impose duties and restrictions on citizens of third countries when performing their activities in the territory of the European Union. Various methods of drafting a Directive exist, but the main responsible bodies of the European Union are the Council and the Commission. An important aspect that needs to be taken into consideration is that there must be a basis in the Treaty for regulation in a specific sector, and thus for making it possible to regulate a matter by means of a Directive. This aspect might create complications as there is no EC Treaty basis for sport. Therefore the Council cannot draft a directive concerning players' agents on the basis of grounds related to sport; it has to respect the Articles 5 and 7 of the EC Treaty (on competences of EU institutions). A possible grounds for action by these EU institutions might be Article 52 of the Treaty. This Article enables the Council to draft Directives to guarantee the free movement of services, and it can also possibly be used to restrict the free movement of services for reasons that justify a restriction. Article 52 EC Treaty has been the basis for the recently adopted Services Directive that will enter into force in 2010.⁴¹ The final draft Directive was highly scrutinised and the initial draft was subject to numerous European Parliament amendments. The aim of the Services Directive is the improvement of the basis for economic growth and employment in the EU. The proposal is part of the programme of economic reform launched by the Lisbon Strategy. Moreover, the Directive aims to achieve a genuine Internal Market in services by removing legal and administrative barriers to the development of services activities. Currently it is therefore even more difficult to restrict a profession which falls under the provision of services. The Council could adopt an exemption of the application of the Services Directive to sport but it has not decided to do so. The areas of activity currently exempted are, amongst others, gambling services, port services, financial services, social housing, audiovisual services and private security services.⁴²

Professional sports are not exempted; on the contrary, the Directive states that "*Non-profit-making amateur sporting activities are of considerable social importance. They often pursue wholly social or recreational objectives. Thus they might not constitute economic activities within the meaning of Community law and fall outside the scope of this Directive.*"⁴³ Furthermore, the Directive explicitly states that "*The services covered by this Directive concern a wide variety of ever-changing activities, including business services such as management consultancy; certification and testing; facilities management, including office maintenance; advertising; recruitment services; and the services of commercial agents.*"⁴⁴

It seems necessary to amend the present Service Directive in order to make an exemption for the activities of players' agents. However,

considering the time-consuming character of amendment and the lengthy consultation procedure already carried out within the framework of the Services Directive, the possibility of an exemption does not seem very likely. Thus another grounds for an initiative to draft a Directive needs to be identified in the Treaty. Besides the fact that the activities of agents have a connection with Article 49 EC Treaty (free movement of services) these activities also have an impact on the social conditions of workers in the professional football industries, that is if one takes into consideration the abovementioned concerns of UEFA about the trafficking of young players and the working/living conditions of football players. These aspects open the door for Community action. The chapter on social affairs in the EC Treaty contains relevant articles that could serve as a basis for action. Article 137 EC Treaty could explicitly serve this purpose:

Article 137 of the EC Treaty:

1. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:
 - a. improvement in particular of the working environment to protect workers' health and safety;
 - b. working conditions;
 - c. social security and social protection of workers;
 - d. protection of workers where their employment contract is terminated;
 - e. the information and consultation of workers;
 - f. representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
 - g. conditions of employment for third-country nationals legally residing in Community territory;
 - h. the integration of persons excluded from the labour market, without prejudice to Article 150;
 - i. equality between men and women with regard to labour market opportunities and treatment at work;
 - j. the combating of social exclusion;
 - k. the modernisation of social protection systems without prejudice to point (c).

In particular the points mentioned under a, c, g and j could support Community action. However, the next paragraph of Article 137 also needs to be taken into consideration:

2. To this end, the Council:
 - a. may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
 - b. may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in

was one of the issues addressed by Stephen Weatherill, Jacques Delors Professor of European Law, Somerville College, University of Oxford, in his speech at the FIFPro concluding conference on Social Dialogue on 27 November 2006 in Brussels. See also in particular: Stephen Weatherill, "Anti-doping revisited - the demise of the rule of 'purely sporting interest'?", in: *European Competition Law Review* (2006) pp. 645-657.

⁴⁰ Players' Agents are increasingly offering extra services ranging from representation regarding all commercial agreements such as dealing with endorsement,

sponsorship or advertising and all aspects related to administration, tax and legal issues, including day-to-day management.

⁴¹ More information concerning the Services Directive can be found on http://ec.europa.eu/internal_market/services/services-dir/index_en.htm. The text of the directive can be found on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006P00160:EN:NOT>.

⁴² Scope of the Directive, Article 2.

⁴³ *Supra* 101, point 35.

⁴⁴ *Supra* 101, point 33.

a way which would hold back the creation and development of small and medium-sized undertakings.

The Council shall act in accordance with the procedure referred to in Article 251 after consulting the Economic and Social Committee and the Committee of the Regions, except in the fields referred to in paragraph 1(c), (d), (f) and (g) of this article, where the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament and the said Committees. The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the procedure referred to in Article 251 applicable to paragraph 1(d), (f) and (g) of this article.

The second paragraph sub b of Article 137 creates a difficulty to the drafting of a Directive in relation to the regulation of players' agents, in particular by means of compulsory licensing of the profession. It is difficult to imagine how to avoid imposing administrative, financial and legal constraints in a way that would not impede the creation and development of small and medium-sized undertakings: a players' agent has a consultancy business and consequently the Directive would then create a barrier for the entry of that business on the market. It is therefore not very convincing that the Council would take such a decision without the consent of the sector that will be affected by such a decision. Another aspect is that such a decision would be based on the procedure mentioned in Article 251 EC Treaty and that it would need consent from various EU institutions such as the Commission, the European Parliament, the Committee for the Regions and the Economic and Social Committee; it is a lengthy and elaborate procedure that would not serve the initial purpose of such a Directive. An alternative method would be to involve the football stakeholders themselves in the Council's decision-making process. That involvement would mean that relevant stakeholders are heard and that they support a Directive at an EU level. With regard to creating the basis for a Directive, the decision-making process would ideally need to involve stakeholders who have social, economic and practical knowledge of the matter. It would therefore be helpful if all above-mentioned football stakeholders were involved.

A possible vehicle for a Directive would then be a combination of Articles 139 (Social Dialogue) and 137 EC Treaty: the adoption of a Directive by means of the European Social Dialogue. However before such a decision could be made it is necessary that representative social partner organisations arise in the industry, a process that is currently developing.⁴⁵

5. Conclusion

The outcome of the Piau case does not lead to the legal certainty that is so highly desired in the European professional football sector. The decision was not challenged under the EU free movement of services principle and therefore a real threat to the legality of the FIFA Players' Agents Regulations remains alive. Moreover, the judgement and its considerations relating to a possible abuse of a dominant position by FIFA are, simply stated, flawed. It has been outlined that the argumentation of the CFI is incorrect when it states that there are no (inter)national laws regulating the profession of agents. In fact, on an international level an ILO Convention exists dealing with private employment agencies and 10 European Member States have specific legislation dealing with the activities of players' agents. The vast

majority of the players' agents who are active in the EU fall under this public legislation, i.e. 93%. Moreover, the international and national legislation respects moral and social standards and safeguards the rights of workers in general, even to a further extent than the FIFA Players' Agents Regulations. This leads to another flaw in the CFI's judgment, and it therefore seems that the FIFA Players' Agents Regulations are a mere formality only for appearance's sake. However in view of the fact that the football stakeholders and probably even the licensed agents themselves are ambitious to license the profession of players' agents, I have shown that there are some alternatives that may serve to create legal certainty about, and a sound regulation of, the profession of players' agent. One such alternative is that FIFA could strive for bringing the activities of players' agents under the specificity of sport. Yet a complication in this option lies in the fact that both the CFI and FIFA have made clear that the players' agents' profession deals with the provision of services in the labour market and that it is more related to business and consultancy than it is to sport. Another option could be the adoption of a specific EU Directive for service providers in the field of employment, such as players' agents, on the basis of Article 52 EC Treaty. However there will most probably be reluctance amongst the main decision-makers to use this option, due to the fact that consensus has recently been reached in the European Union on a 'Service Directive'. Moreover, this Directive explicitly says that professional sport services and private employment agencies fall under the scope of the Directive. So an amendment of this recently-adopted Directive, even before the Directive has entered into force, does not seem very likely at this stage. The last option could be the use of the European Social Dialogue in football. The construction of a European Social Dialogue Committee in professional football is currently in full evolution⁴⁶ and the issue of players' agents is on the agenda of each organisation that wants to participate in the Dialogue. However before the kick-off of this process is formally accepted by the European Commission some time will have passed.

It seems that no clear-cut solution is currently present to create the desired legal certainty. I believe that, taking this last statement into consideration, a sound conclusion to this research would be that all stakeholders in EU football need to define their views on the profession of players' agent and that one of the above options will most probably serve as a framework for regulation in the near future. A second aspect is that the participation of a collective body of players' agents in these discussions might turn out to be crucial.

⁴⁵ *The first collective bargaining agreement in European Sport, European Professional Football*, pp. 90, a study commissioned by the Dutch federation of professional football clubs (FBO), May 2002; *The ESD in European football*, The International Sports Law Journal, December 2003; *Promotion of the European football clubs' interest on an international level*, Football Business International, October 2003; *The Kolpak Case, Bosman times 10?*, The International Sports Law Journal 2004/1-2 p. 26 et seq.; *ESD, a legal match heading towards extra time*, The International Sports Law Journal, January 2005.

⁴⁶ In the concluding Conference of FIFPro on Social Dialogue on 27 November 2006 in Brussels, the football authorities declared (in general) that they are positive as regards the introduction of an EU Social Dialogue in football. The speakers representing the football stakeholders were Theo van Seggelen (general secretary FIFPro); Thomas Kurth (general manager G-14); Philippe Diallo (director French league and EPFL committee member on social dialogue); Jerome Champagne (FIFA director international relations) and Alex Phillips (UEFA Head of Professional Football services).

FRANCE

by Delphine Verheyden*

1 Introduction

Sports agents continue to hit the headlines. Whether in the role of agent, manager, intermediary or negotiator, they appear to be an increasingly indispensable accompaniment to the negotiation of sports contracts. Intervening with players, clubs and sometimes coaches as well, the agents, even when they are not being accused of rigging the market or receiving commissions from all sides, are invariably suspected of making easy money.

French sport is growing ever more professional and professional leagues are now responsible for organising championships in disciplines such as football, rugby, handball, volleyball and basketball. It is against this background that the profession of sports agent in France has been made subject to precise regulation since Law No. 2000-627 of 6 July 2000. Though it was argued at the time that it would be impossible to bring in such a law as the problems are different from one discipline to another, the regulations are gradually being applied by the French sports federations.

2 Emergence of the applicable regulations

It was with the designation "sports intermediary" that the profession of sports agent was regulated in France for the first time. Article 15-2, concerning sports intermediaries, was added to Law No. 84-610 of 16 July 1984 by Law No. 92-652 of 13 July 1992:

"No natural person or legal entity may carry on the activity consisting in bringing together, whether occasionally or regularly, for valuable consideration, parties interested in concluding a contract whereby one or more sportsmen agree, for valuable consideration, to take part in one or more sports events, unless such person or entity has first been declared to the administrative authority."¹

With this text, the legislator sought not only to establish ethical standards in the profession but also to derogate from the ordinary law texts under which placement activity was a state monopoly run by the Agence Nationale Pour l'Emploi (ANPE).

Though this system proved relatively ineffective because the controls and requirements were insufficient to put the profession on a solid basis, it represented, nonetheless, a first step.

Meanwhile, certain sports disciplines were introducing their own regulations to govern the activity of agent. For example, the FIFA regulations of 11 December 1995, applicable with effect from 1 January 1996, made it compulsory for players' agents to hold an agent's licence, which was awarded only after an examination to check the technical competence of candidates. In addition, agents were required to satisfy ethical conditions and to satisfy the financial guarantees laid down in the FIFA regulations.

In view of the inadequacy of the system established by the law of 1992 and faced with the growing number of transactions and the amounts at stake, the French legislator intervened again on 6 July 2000² to amend Article 15-2 and thus set in place the arrangements which remain applicable to this day. However, the questions raised by the new legal text resulted in the drawing up of an inquiry report³, which should be followed during the course of 2006 by a partial amendment of the texts presently applicable.

3 What is a sports agent?

French law currently defines the position of the sports agent as follows:

"Any person carrying on, occasionally or regularly, for valuable consideration, the activity of bringing together parties interested in the conclusion of a contract relating to the carrying on of a remunerated sports activity must hold a sports agent licence."⁴

We see that, between 1992 and 2000, there has been a change in the way the profession is defined. Instead of "sportsmen" and "sporting events", we now have "a contract relating to the remunerated carrying

on of a sports activity". So, what exactly does this new definition cover?

3.1 "Any person carrying on": The licence is compulsory not only for a professional agent, but also for a father or brother who might act as agent for a sportsman. There is no exception to the obligation to hold a licence on the basis of the capacity of the person concerned.

What is the situation with regard to lawyers? Is it possible for them to act as a sports agent and, at the same, remain in the legal profession? The main task of a lawyer is to give legal advice, to draw up documents and to represent clients before the courts. Though the courts have held that, in addition to these functions, he can also conduct negotiations, this does not in any way mean that he can act as a broker, bringing people together with a view to concluding a contract.

It must be recalled that Article 115 of Decree No. 91-1197 of 27 November 1991 regulating the legal profession provides that, subject to any special provisions of the laws or regulations, the profession of lawyer is incompatible with the exercise of any other profession. No such legislative or regulatory provisions exist for sports agents.

Furthermore, Article 111 of the same decree provides that the profession of lawyer is not compatible with any activity of a commercial nature, whether carried on directly or through intermediaries, or with the functions of an active partner in a simple partnership or partnership limited by shares, or of a manager of a limited liability company, or of a chairman of the board of directors or member of the management board or general manager of a company limited by shares or the manager of a civil company, save where their corporate purpose is the management of family or professional interests, subject to the control of the bar association, which may demand any additional information necessary.

In this context, the profession of sports agent would appear to be of a commercial character, preventing a lawyer from adding it to his functions. The fact is that the profession of sports agent is very close to that of artists agent, a profession which the legislator has expressly stated to be of a commercial character within the meaning of the provisions of the Commercial Code (Article L.762-4 of the Employment Code). Accordingly, it is difficult to see how the two activities could be combined. Only in the case of football could there be a certain ambiguity, as the FIFA regulations provide that an agent's licence is not necessary for a lawyer.

However, in such an eventuality, the French lawyer would intervene in the capacity of lawyer and not in the capacity of agent. In other words, though he could take part, where applicable, in drawing up a contract, his code of professional ethics would prevent him from "bringing together parties interested in the conclusion of a contract relating to carrying on a remunerated sports activity" (Article 15-2 of Law No. 84-610, as amended). He could not be mandated by a club, a coach or a player to find another club, coach or player corresponding to an expressed wish. This example applies not only to football, but also to all other disciplines.

From the foregoing, it is clear that the issue of a licence by a French federation to a French lawyer wishing to carry on the activity of sports agent would be contrary to the fundamental principles of the legal profession.

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1 Article 15-2 of Law No. 84-610 of 16 July 1984 introduced by Law No. 92-652 of 13 July 1992.

2 Law No. 2000-627 of 6 July 2000.

3 Report of the inquiry into the practice of the profession of sports agent, drawn up by Pierre François, Inspector General of

Youth and Sport, Jean-Philippe Saint-Martin, Catherine Sueur and Amélie Verdier, Inspecteurs des finances, under the supervision of Jean-Luc Lepine, Inspecteur général des finances, January 2005.

4 Article 15-2 of Law No. 84-610 of 16 July 1984 amended by Law No. 2000-627 of 6 July 2000.

3.2 “occasionally or regularly”: The frequency of the interventions is not a criterion. Even a single intervention brings the activity under the regulations.

3.3 “for valuable consideration”: Only agents who wish to be paid for their intervention require a licence.

3.4 “bringing together interested parties: The wording of the law of 1992 specified that the parties were sportsmen on the one hand and sporting events on the other. The new law does not specify the capacity of the parties. Is the agent the person who intervenes for the player, the club, the coach?

The answer to this question is to be found in the regulations of each sports federation. For example, the regulations of the French Rugby Federation provide that any person mandated by a player, a coach or a club must hold a licence.

3.5 “contract relating to the remunerated exercise of a sports activity”: What are the contracts referred to by the law? Are they contracts between player and club, between player and sponsor, between club and coach? The contracts concerned are employment contracts concluded between professional sportsmen and their club. This excludes contracts under which a sportsman exploits only his image and which have no connection with his sporting activity.

Looking further, each federation must determine case by case whether or not the activity submitted to its scrutiny comes under the regulations. Take, for example, arranging for the registration of an athlete at a meeting, managing a professional project for a skipper, organising a boxing match. Should these be deemed interventions to permit the conclusion of contracts relating to carrying on a remunerated sporting activity?

The answer to this question becomes all the more complicated when we take into consideration the obligation that the law imposes on the federations to organise an examination permitting the issue of a licence when they receive an application to this end. Who is responsible at this point for checking whether the application is well founded? This is just one of the questions now being debated.

4 Regulations have been established in France to govern the activity of sports agent. Who do these regulations apply to?

4.1 It is perfectly clear that the French legal requirements apply to situations in which the parties to the contract are French nationals and the contract concluded will permit the sporting activity to be carried on in France. On the other hand, what is the situation where some or all of the elements of the transaction are connected with foreign jurisdictions?

4.2 In the case of an agent who is an EU national, but not French, two principles have been laid down in the legal texts. These principles ensure compliance with the twin constraints of freedom of services and freedom of establishment.

On the one hand, “the occasional exercise of the activity of sports agent by a citizen of a Member State of the European Union or a State Party to the European Economic Area Agreement who is not established on the national territory is subject to compliance with the ethical conditions laid down in this paragraph”.⁵

It remains to be seen how it will be possible to prove the occasional nature of the interventions. To overcome this difficulty, the inquiry into the exercise of the profession of sports agent has proposed “the deletion of Article 15-2, II (4), which provides for the possibility of the activity of sports agent being conducted on an ad hoc basis by foreign agents not in possession of a licence”.

On the other hand, “nationals of a Member State of the European Community or of another State Party to the European Economic Area Agreement may carry on the activity of sports agent in France provided that they obtain a licence under the conditions laid down in this decree, or they produce a licence issued in one of the said States, or they prove that they have the capacities or professional qualifications permitting them to carry on this profession there”.⁶

To overcome the difficulties in applying this other principle, the commission of inquiry has recommended that foreign agents resident on French territory should be under an obligation to take the examination.

However, until the legal texts have been so amended, the difficulty remains as to determining which body is competent to rule on the equivalence of the certificates presented. To answer this question, reference may be made to Decree No. 2004-371 of 27 April 2004, which states that the sports agent commission to be established by the federations shall examine the situation of nationals of a Member State of the European Community or of another State Party to the European Economic Area Agreement who wish to obtain the sports agent licence without having to take the written tests provided for in Article 1 of the Order of 29 April 2002, either on the basis of the licence produced by the interested party or by checking the documents and qualifications submitted by the candidate to carry on the activity of sports agent.

4.3 Apart from the case of French or European Community agents, what should be the international application of Articles 15-2 and 15-3 of the Law of 16 July 1984, as amended? Some legal scholars⁷ hold that French legislation should be applied in an extensive manner. As the texts in question are intended to regulate the profession of sports agent with the aim of providing social protection, they are in the nature of a police and safety law. In other words, the Law of 16 July 1984, as amended, finds application not because the sports agent contract relates directly to the French legal order (by the traditional means of the regulation of a rule of conflict) but because, by its very nature, it applies directly to its particular object⁸.

5 Incompatibilities and incapacities

5.1 Article 15-2 II, as amended, contains an exhaustive list of incompatibilities. The list provides that no-one can obtain or hold a sports agent licence if he exercises, directly or indirectly, in fact or in law, with or without remuneration, the functions of sports management or training, whether in an association or a company that employs sportsmen on a remunerated basis or organises sporting events, or in a sports federation referred to in Article 16 or a body that it has established, or if he has exercised any such function during the preceding year.

5.2 As regards incapacities, Article 15-2 II, as amended, further provides that no-one can obtain or hold a sports agent licence if he has been convicted of a crime or offence listed in Criminal Record Form 2, including particularly: sexual assault, drug trafficking, living off immoral earnings and related offences, fraudulent misrepresentation, abuse of trust, offences relating to the protection of the health of sportsmen and the fight against doping (Article 27 of Law No. 99-223 of 23 March 1999), Article 1750 of the General Tax Code.

5.3 Who is covered by these incompatibilities and incapacities? Apart from the agent himself, the incompatibilities and incapacities also apply to his employees and, where the licence has been granted to a legal entity, to its managers and, in the case of partnerships, sleeping partnerships and limited liability companies, to the partners. In addition, we have already seen that the carrying on of the business of sports agent by a national of a Member State of the European Union or a State Party to the European Economic Area Agreement not established on the national territory is subject to compliance with the same incompatibility and incapacity conditions.

5 Law No. 84-610 of 16 July 1984, Article 15-2 II (4).

6 Decree No. 2002-649 of 29 April 2002, Article 19, taken for application of Article 15-2 of Law No. 84-610 of 16 July 1984.

7 E. Loquin and G. Simon, note under

Cassation, Civil Chamber, 18 July 2000, Clunet 2001, p.97 et seq.; E. Loquin, *Sport et droit international privé*, Lamy, Droit du sport 2003; Fr. Rizzo, *Agents des sportifs et groupements sportifs*, 8 Dictionnaire permanent droit du Sport, 1 September 2005.

5.4 What happens if a candidate for the examination is covered by an incompatibility or incapacity or if a person who already holds the licence becomes subject to an incompatibility or incapacity during the term of his licence? The answer to this question will be found in the general regulations of the federation responsible for organising the sport concerned. The regulations sometimes provide for such an eventuality at the time of applying for the examination and sometimes during the validity period of the licence.

6 Compulsory examination to become a sports agent

6.1 Any natural person or legal entity wishing to carry on the activity of sports agent for valuable consideration, whether occasionally or regularly, must hold a three-year licence issued by the sports federation competent for the discipline in which the agent wishes to operate. The agent must obtain a separate licence for each discipline in which he wishes to carry on business. Such licences are issued directly by the sports federations concerned after the candidate has taken and passed a written examination.

6.2 How does this compare with the system established for the artists agents? The two systems are in fact comparable. Both derogate from the principles that placement is a public monopoly and that no charge is made.

The placement of performing artists may be effected for a consideration. Placements on such conditions may be effected only by natural persons or legal entities (excluding companies limited by shares and partnerships limited by shares) holding an annual artists agent licence. This provision is applicable, in particular, to persons who, under the designation of impresario, manager or the like, are mandated, during the course of one and the same calendar year, to obtain engagements for more than two performing artists.

A consultative committee has been established under the minister responsible for labour with the task of advising on the granting, renewal or withdrawal of the annual artists agent licence, as well as on any applications relating to the transfer of the registered office of a theatrical agency or the establishment of branches or related offices. Applications for licences must be sent to the minister responsible for labour by registered letter with request for acknowledgement of delivery. If no reply has been received more than four months after the licence application, the licence shall be deemed to have been granted.

The licence is issued for a period of one year by order of the minister with responsibility for labour upon the advice of the above-mentioned committee. The licence is tacitly renewed upon the expiry of this annual period, unless the minister of labour decides otherwise and gives at least one month's notice of termination to the parties concerned. The minister may also withdraw the licence at any time for serious cause.

Each artists agency is required to send monthly statistical information on the placements effected to the central labour and employment office of the département in which the registered office of the agency is located. In addition, artists agents must keep a register containing information concerning their placement activity. All books and documents relating to the activity of the agency must be held at the disposal of labour inspectors and officers of the judicial police responsible for the control of the agency, as well as officials of the social security organisations.

The sums that the artists agent can charge must not exceed 10% of the artist's total remuneration. The charges are subject to the tariffs laid down by joint order of the minister responsible for employment, the minister of cultural affairs and the minister of the economy and finance, after consultation with the professional organisations. In particular, this order determines the elements of the remuneration of the artist to be taken into consideration in calculating the percentage, as well as the costs that the artists agent incurs and can claim back from the artist over and above the remuneration for his placement services.

Finally, artists agents who are nationals of a Member State of the European Union or a State Party to the European Economic Area Agreement may carry on their activity in France, provided that they obtain a licence in accordance with the conditions laid down in

Article L.762-3 of the Labour Code or they produce a licence issued in such a state under comparable conditions. In the absence of a reciprocity agreement, artists agents who are nationals of other states cannot effect the placement of performing artists in France without going through a French artists agent.

6.3 In each discipline, the sports agent licence is issued by the executive committee of the federation concerned to the candidates who have passed the written tests, whether natural persons or, in the case of a legal entity, its representatives.¹⁰ Any delegate federation receiving an application for a sports agent licence is required to set up the commission and arrange the written examination provided for in the decree.

7 Establishment of a special federation commission

In application of the new legal provisions, each federation has had to establish a commission, the chairman and members of which are appointed by the executive committee. The main task of the commission is to organise the sports agent examination in the discipline concerned.

7.1 Membership of the commission: The commission established by the federations consists of the following: the chairman; two members selected on the basis of their competences in the discipline concerned and in legal matters; one representative of the sportsmen in the discipline; one representative of the sports companies established in application of Article 11 of the Law of 16 July 1984; where applicable, one representative of the professional league established in accordance with the provisions of Article 17 II, of the Law of 16 July 1984; one representative of the sports agents; and one representative of the coaches designated on the proposal of their organisations. The members of the commission are appointed by the executive committee or the federal council of the federation for a period of three years, renewable once. One substitute member is appointed for each regular member on the same basis. The following take part in the work of the commission on a consultative basis: the national technical director appointed to the federation or his representative, a representative of the French National Olympic and Sports Committee, and a representative of the National Agency for Employment.

7.2 Special conditions applying to commission members: The members of the commission are bound by an obligation of professional confidentiality with regard to the information that comes to their knowledge in the exercise of their functions. Any breach of this obligation will result in the exclusion of the party concerned. The mandate of a member may end by resignation, by loss of the capacity permitting appointment as a member of the commission or by breach of the obligation of professional confidentiality.

7.3 Missions: The commission draws up its own internal regulations, organises the examination and proposes the programme and tests to the executive committee. It constitutes itself as the examination jury for the choice of the subjects and the correction of the test papers. For the renewal or the withdrawal of the licence, it submits an opinion to the executive committee for a decision to be taken on a case-by-case basis.

8 Licence application

8.1 Who is the application made to? Any natural person or legal entity wishing to carry on the activity of sports agent must submit a licence application to the French sports federation concerned, which will acknowledge receipt.

8.2 Who can submit an application? Applications may be submitted by natural persons or by legal entities.

9 Articles L.762-3 et seq and R.762-2 et seq of the Labour Code.

10 Article 1 of Decree No. 2000-649 of 29 April 2002.

8.2.1 The application must be made in the form of a simple letter, accompanied by the information and documents listed in the Order of 16 July 2002.

If a natural person appearing as a candidate for the sports agent examination in a sports discipline wishes to be dispensed from the part of the examination permitting an assessment of the aptitude of the candidate to carry on the activity of sports agent, he must supply proof that he already holds a licence in another discipline and show that he has the necessary knowledge to carry on the activity, particularly with regard to social, fiscal, contractual and insurance matters.¹¹

9 The examination

The examination is organised by the agents' commission of each sports federation. The examination must make it possible, (i) to assess the ability of the candidate to carry on the activity of sports agent by ensuring that he possesses the necessary knowledge to carry on the activity, particularly with regard to social, fiscal, contractual and insurance matters and (ii) to verify his knowledge of the laws and regulations applicable to physical and sporting activities and the federal, national and international regulations in the discipline.

To distinguish between these two aspects, there are two tests: (i) the general test and (ii) the special test. A sports agent who holds a licence in one discipline and applies for a licence in another discipline is dispensed from the general test.

9.1 The general test

The general test relates to a programme of various types of legal knowledge in the fields of social law, contract law, social security law, insurance law, tax law and company law, listed in detail in the Order of 24 December 2002.

The general test, which is sometimes referred to as the "common core", does not need to be taken by a candidate who already holds a licence in another discipline. The same applies to a candidate who already holds a licence as a natural person and who appears for the examination in the capacity of representative of a legal entity. The legal entity then enjoys the benefit of the dispensation granted to the natural person it designates to take the examination.¹²

9.2 The special test

The special test relates to a programme of knowledge concerning the regulations for physical and sporting activities and to the sports regulations in the discipline concerned:

- Law No. 84-610 of 16 July 1984 as amended by Law No. 2000-627 of 6 July 2000 concerning the organisation and promotion of physical and sporting activities and the implementing decrees thereto;
- Law No. 99-223 of 23 March 1999 concerning the health of sportsmen and the fight against doping (codified in Articles L.3611-1 et seq of the Public Health Code) and the implementing decrees thereto;
- rules relating to sports agents; national disciplinary regulations; federation regulations and regulations relating to the professional sector (where applicable); international disciplinary regulations.

10 The issue of the licence

The licence issued to sports agents must be distinguished from the licence permitting participation in the activities of the federation. An agents licence permits the carrying on of the profession of agent but not the practice of the sports activity and vice-versa. The decision to issue the licence is notified to the interested party by the executive committee of the federation within one month with effect from the date of the examination. It is published in the official bulletin of the federation. Each year, the federation is required to communicate to the minister responsible for sport a list of the sports agents to whom the licence has been issued. The licence is valid only for the discipline in which the examination has been passed.

11 Why is it that the federation issues the licence?

When the Law of 2000 was at the drafting stage, the cultural affairs committee proposed an amendment whereby the licence would have

been issued not by the sports federations but by a joint order of the ministers responsible for labour and sport. The proposal reflected the view that, as the placement of sportsmen constitutes a derogation from the principle of the public monopoly of placement, it was normal that the ministry of labour should at least be involved in the derogation procedure. After all, it will be noted that the activity of artists agents is controlled not by the minister responsible for culture, but by the minister responsible for labour. At the same time, it was argued that, if the regulations established in France were too rigid, the sports agents would set up in another State and so would encourage their players to take their talents abroad. Moreover, it was pointed out that only the IOC could impose rules at the international level, given that the federations depended on the French National Olympic and Sports Committee, which itself depended on the National Olympic Committee.

The minister of sport, Marie-Georges Buffet in person, stated the following position on the subject:

"I will vote against this power being taken from the federations. It seems to me that the French sports movement is capable of assuming its responsibilities and that it wishes to do so in association with the State. It can play a major role in establishing the profession of sports agent on an ethical basis. The international aspect that has just been raised is also an important one. It is vital that the federations should be accountable for their decisions, even if the ministry figures as an appeal body for the disputes which could arise."

Thus, the draft amendment was rejected and it was the federations that were assigned the task of issuing the licences and overseeing this profession so as to arrive at a clear objective, i.e. to give the actors the means to retain control of their sport.

12 Refusal to issue the licence

Any candidate who obtains a mark lower than the mark required by the federation concerned is failed. The decision not to issue the licence is notified to the interested party by the executive committee of the federation within one month of the date of the examination. The refusal to issue the licence may be appealed to the minister responsible for sport within a period of three months from the date of notification of the refusal.

13 What is the penalty for carrying on the activity of agent without a licence?

Carrying on the activity of agent without a licence is an offence punishable by imprisonment for up to one year and a fine of _15000.

14 Supervision of agents

It is up to the federations issuing the licences to oversee the licensed agents in their discipline. To facilitate this supervision, the law requires the agents to communicate a copy of the contracts they sign with their clients.¹³

15 The renewal of the licence

The issue date marks the beginning of a three-year period during which the licence will be tacitly renewed on each anniversary date, i.e. without need to carry out any particular formality. At the end of the three-year period, the party concerned must apply for the licence to be renewed by no later than two months prior to the expiry date. The application, sent by ordinary letter, must be accompanied by a summary of activities, a list of mandates and contracts signed and, where applicable, a statement of disputes relating to the said contracts. The renewal of the licence is not subject to the examination being taken again. The executive committee of the federation will make its deci-

11 Article 8.1E of the Decree of 29 April 2002.

12 A principle recalled in the Ministerial Instruction of 12 November 2002.

13 "The sports agent shall communicate to the federation, by no later than one month after their date of signature, the contracts and mandates referred to in

Article 15-2 III of the above-mentioned Law of 16 July 1984, as well as any amendments or terminations thereof. In the event of refusal to communicate these documents, the federation shall apply the sanctions laid down in its disciplinary regulations." Article 18 of Decree No. 2002-649 of 29 April 2002.

sion with regard to the application upon the advice of the commission.

The decision to renew the sports agent licence is notified to the party concerned by the executive committee of the federation within a period of two months from the date of the filing of the renewal application. The decision is published in the official bulletin of the federation. Each year, the federation communicates to the minister for sport the list of sports agents having been the object of a renewal decision.

If the licence holder does not apply for its renewal within the stipulated period, his licence will not be renewed. In such an eventuality, if he wishes to continue his activity as agent, he must make a new application and sit the examination again.

16 Notice of termination

Apart from the control that it can carry out at the end of the three-year period, the executive committee of the federation has the power, each year, to terminate the licence by giving at least three months' notice before its tacit annual renewal. This decision must be notified to the party concerned and may be the object of an appeal to the minister responsible for sport within a period of three months with effect from the date of notification. Such notice of termination has the effect of preventing the tacit renewal of the licence. Any person whose licence has been terminated in this way must make a new application and retake the examinations if he wishes to resume his activity as agent.

17 Refusal to renew

At the end of the three-year period, the executive committee of the federation may decide, upon the binding opinion of the commission, not to renew the licence. Such a decision must be communicated by the executive committee of the federation to the interested party, stating the reasons, within a period of two months from the date of the application for renewal. The decision will be published in the official bulletin of the federation. The decision to refuse renewal may be appealed to the minister responsible for sport within a period of three months with effect from the date of notification. The refusal to renew the licence obliges the party concerned to take the examination again if he wishes to resume his activity as agent.

If the agent continues to carry on his activity despite the decision to terminate or not renew his licence, this constitutes an offence punishable by imprisonment for up to one year and a fine of 15000.

18 Withdrawal and suspension

18.1 The sports agent licence may be withdrawn or suspended in the event of a breach of the obligations under Article 15-2 of the Law of 16 July 1984. Unlike decisions not to renew or to terminate the licence, which are administrative measures, the withdrawal and suspension of the licence are disciplinary measures. As such, they must be taken at the end of a procedure in which the party concerned is able to attend or to be represented by a person of his choice.

18.2 The withdrawal of the sports agents licence is decided by the executive committee of the federation upon a binding opinion to this effect by the agents' committee. The decision to withdraw the licence is notified to the party concerned by the executive committee of the federation. It is published in the official bulletin of the federation. Each year, the federation communicates to the minister responsible for sport a list of sports agents who have been the object of a decision to withdraw their licence. The decision to withdraw the licence, which has the effect of preventing the tacit renewal of the licence, may be appealed to the minister for sport within a period of three months from the date of its notification. If a decision has been pronounced to withdraw the sports agent's licence, he cannot continue his activity as agent. In order to resume his activity, he must take the examination again.

18.3 In the event of serious acts, the executive committee of the federation may, prior to implementing the withdrawal procedure, suspend

the licence for a period of up to three months. A withdrawal decision may be appealed to the minister for sport within a period of three months from the date of its notification. Once the decision to suspend the licence has been taken, the sports agent cannot continue to carry on his activity as agent during the period of the execution of the measure. He must wait until the end of the suspension period before resuming his activity. He will not need to retake the examination.

18.4 If the agent continues to carry on his activity despite the decision to withdraw or suspend his licence, this constitutes an offence punishable by imprisonment for up to one year and a fine of 15000.

19 Cessation of activity

The law lays down no special formality for an agent who wishes to cease his activity. Thus, each federation may decide particular formalities in its own regulations. Otherwise, there might be doubt as to when the federations should issue a decision to terminate or not to renew a licence.

20 Insurance

The sports agent must be able to prove at all times the existence of a professional indemnity insurance contract covering his activity. This insurance must provide cover for sums and damages that could be due to players, clubs, coaches or other agents through the activity of the insured sports agent.

21 Penal sanctions

It is an offence punishable by a maximum of one year's imprisonment and/or a fine of 15000 (1) to carry on the activity of agent without having obtained a sports agent licence, (2) to carry on the activity of agent despite a decision not to renew or to withdraw the licence, and (3) to carry on the activity of agent contrary to the incompatibilities and incapacities laid down in Article 15-2 II of the Law of 16 July 1984, as amended.

22 Civil sanctions

Under the civil law, agreements contrary to any one of the following provisions shall be deemed null and void: (i) a sports agent may act for only one of the parties to the same contract, (2) he may act only for the party that has mandated him, (3) he may be remunerated only by the mandating party, (4) the amount of the remuneration must be stated in the mandate, (5) the amount of the remuneration must not exceed 10% of the amount of the contract concluded, (6) the conclusion of a contract relating to a minor carrying on a remunerated sporting activity cannot give rise to any remuneration or compensation or to the granting of any advantage whatsoever, whether in favour of a person carrying on the activity of sports agent, of a sports association or a company connected with such an association, or of any person acting in the name and for the account of the minor. If the parties seek to act contrary to these principles in a contract between them, the contract will be a nullity by virtue of public policy.

23 Administrative sanctions

Under the old regulations, prior to the Law of 6 July 2000, administrative sanctions could be pronounced by the minister responsible for sport who might issue an order, stating the grounds, against any person carrying on the activity of a sports intermediary who had infringed the material or moral interests of one or more sportsmen or one or more sports groupings, prohibiting him from carrying on all or some of his functions, whether temporarily or definitively. The regulations further provided that such an order would be issued upon the advice of a commission comprising representatives of the State, the sports movement, the local authorities and the various categories of interested parties. However, in an emergency, the minister could issue a temporary ban of up to three months without consulting the commission. Within this framework, the federations were asked to notify the ministry of youth and sport directly of their comments and suggestions with regard to any reported offences by agents declared within their discipline.

Under the terms of the new regulations, the sports federations can now pronounce the administrative sanctions themselves. "Administrative sanctions" is understood to mean the refusal to renew the licence and the notice of its termination. These sanctions may be pronounced, for example, in the event of failure to produce the documents certifying the renewal of the compulsory insurance.

24 Disciplinary sanctions

As the licence issued to sports agents is different from the licence permitting sportsmen to take part in the activities of the federation, sports agents are excluded from the disciplinary power that is granted, in principle, to the disciplinary bodies of the sports federations. It is the executive committee of the delegate sports federation concerned that has disciplinary powers over agents. Any licensed agent is liable to have a disciplinary sanction imposed by the executive committee of the federation if he has acted contrary to the laws and regulations in force in the discipline in which he has obtained his licence. The sanctions available to the federation are a warning, a reprimand, a suspension of the licence for up to three months and withdrawal of the licence.

The sports agent commission may at any time notify the executive committee of the federation of acts committed by an agent which appear, in its opinion, to be contrary to the laws and regulations in force. The executive committee will then implement a disciplinary procedure complying with the principles guaranteeing a fair hearing, namely, written notice to appear before the commission or the executive committee in accordance with the regulations laid down by each federation, written notice of the facts alleged against him, notice that he may be represented or assisted by a lawyer or any person of his choice and the possibility of presenting his comments orally or in writing and inspecting the file held on him at the headquarters of the federation. After the hearing, a decision will be taken by the executive committee. It is notified to the interested party by registered letter with acknowledgement of delivery. This decision may be appealed to the minister with responsibility for sport within a period of three months from the date of the notice. Throughout the term of the suspension of the licence, the agent is prohibited from carrying on his activity as sports agent. He can no longer conclude new mandate contracts. In the event of the withdrawal of the licence, the agent must cease carrying on the profession of sports agent. He can resume it only if he takes the examination again and passes it. An agent who fails to comply with such suspension or withdrawal decisions is liable to penal sanctions.

25 The remuneration of the agent

The limitation of the remuneration that the agent can receive applies only to his core business, i.e. to bringing parties together for the purpose of concluding contracts relating to the remunerated exercise of the sporting activity. Within this framework, the agent may not receive more than 10% of the amount of the contract concluded¹⁴. Not more than 10% means that he can receive between 0% and 10%. The exact percentage will depend on the outcome of the negotiations between the agent and his client when negotiating the contract binding them to each other.

26 Who pays?

In practice, in the great majority of cases, sportsmen present themselves in the negotiations with an agent who is paid by the club when the transaction takes place. The legal requirement that the party who mandates the agent must pay him is intended to preclude the practice of double commissions or payment by the club instead of the player for social and tax reasons. Even before the law was amended in 2000, Article 15-2 provided that the agent could act for only one of the parties to the contract and that party alone could remunerate him. However, the new text, which is based on the same principle, is perhaps more likely to be obeyed because of the sanctions incurred by the parties if they fail to comply with the rule that it is the person who gives the mandate that pays. Nevertheless, there is still a risk that agents will sign a mandate contract with a sportsman, conduct the

negotiations and then, at the time of payment, substitute for the first mandate a second one signed with the club. To avoid switches of this kind, resulting in a substitution of the payer, the federations will have to be particularly vigilant in monitoring the transmission of the mandate contracts that the agents sign with their clients, often insisting that the contracts be transmitted as soon as they are signed.

27 Image contracts

To obtain partnership contracts with sponsors, sportsmen often rely on the services of their agent. In this case, their relationship no longer falls within the framework of Article 15-2. The contract concluded between them is a standard mandate contract without any special constraints regarding the amount of the remuneration. In the broad sense, an image contract may consist in conferring on an enterprise the right to use the image of a sportsman in order to promote its products, to authorise the manufacture of derived products in the effigy of the sportsman, to take part in seminars, public relations operations and the like. In general, the practice is for agents to charge a commission of 20% of the amount of the image contracts concluded.

28 Related services

Related services depend on the needs of the sportsman and the opportunities offered by the agent. They include, for example, routine assistance, helping to find a house, monitoring a timetable of appointments with specialists following an injury, obtaining insurance against loss of licence, etc.

Most agents claim that they do not make any charge for such routine assistance. Some acknowledge that they bill a monthly lump sum based on the number of hours they spend dealing with everyday matters.

29 More than one agent

There is nothing to prevent a sportsman, a coach or a club from having several agents. So long as the mandate contracts signed in favour of each agent are not exclusive agency agreements, the parties may freely mandate several of them with a similar mission of bringing together parties for the conclusion of contracts relating to the remunerated carrying on of a sporting activity. It is also possible to conceive of tasks being divided between them (e.g. one for sports, another for image contracts, etc).

On the other hand, an agent can intervene only for the account of one of the parties to the same contract.¹⁵

30 The special case of minors

The wish to protect minors appeared in 1999 with the aim of putting a stop to the trade in young players that was developing around the training centres established by professional football clubs. Law No. 99-1124 of 28 December 1999 prohibited any remunerated intervention by an agent in a contract relating to a minor. However, the limits laid down by law with regard to the intervention of agents are not confined to remuneration. To ensure the protection of minors, the law provides that the conclusion of a contract relating to a minor carrying on a sporting activity cannot give rise to any remuneration or compensation or to the granting of any advantage whatsoever.¹⁶ The protection afforded to minors goes even beyond agents, extending to sports associations or companies or, more generally, to any person acting in the name and for the account of the minor.

By specifying that "any agreement contrary to the provisions of this article is null and void", the legislator has introduced a public policy nullity, in other words, one from which the parties cannot derogate in

¹⁴ "The mandate shall specify the amount of this remuneration, which may not exceed 10% of the amount of the contract concluded. Any agreement contrary to the provisions of this paragraph shall be deemed null and not to have been written." Article 15-2 III of Law No.1984-610 of 16 July 1984, as amended.

¹⁵ "A sports agent may act only for the account of one of the parties to the same contract, namely the one who mandates him and who alone can remunerate him." Article 15-2 of Law No. 84-610 of 16 July 1984.

the contract between them and which the judge may raise *ex officio*. As the remuneration is stipulated to be the criterion limiting the intervention, there is nothing to prevent an agent from signing an agreement with a minor over several years to take care of him free of charge until he reaches a majority, and provide that a remuneration will not be paid until such time as the young person reaches legal age.

31 The report of the inquiry

In a joint letter dated 26 October 2004, the ministers of finance and of youth and sport called for an inquiry into the conditions for the implementation by the main French sports federations for team sports of the legal texts governing the exercise of the profession of sports agent.

The summary report drawn up after this analysis gave rise to a list of proposals which could be taken up by the legislator in the coming months. They are as follows:

1. Simplify the procedure for the renewal of licences by limiting it to a tacit annual renewal.
2. Extend the incompatibility regulations to the holding of shares in the capital of a club.
3. Harmonise the situation of the members of the management of a club wishing to become agents and that of agents wishing to become members of the management of a club.
4. Remove the possibility of a licence being granted to a legal entity.
5. Clarify the position with regard to foreign agents:
 - (i) remove the possibility of an *ad hoc* intervention as it is too difficult to define;
 - (ii) oblige foreign agents resident in France to take the examination;
 - (iii) for foreign agents who are nationals of an EU or EEA country, a choice should be given between, on the one hand, obtaining

a licence by equivalence, accompanied by the corresponding obligations such as filing mandate contracts and, on the other, recourse to an already licensed agent;

- (iv) for foreign agents who are not nationals of a EU or EEA country, the government authorities must choose between a treatment similar to that for EU and EEA agents or the obligation to pass the examination.
6. Authorise clubs to remunerate agents, including agents mandated by players.
7. Supplement the range of sanctions capable of being imposed on sports agents.
8. Authorise an agent to cease temporarily the carrying on of his profession.
9. Ensure the validity of the information contained in the candidate application file.
10. Make the clubs and federations aware of their responsibilities.

These are developments which could emerge in the profession of sports agent in France in the near future.

Along these lines, see an order of the Court of Appeal of Paris of 11 October 1991, *Gazette du Palais* 1992, p.374, note Farthouat

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16 The conclusion of a contract relating to a minor carrying on a sporting activity cannot give rise to any remuneration or compensation or to the granting of any advantage whatsoever in favour of:

- a person carrying on the activity defined in the first paragraph of Article 15-2

- a sports association or company referred to in Article 11
- or any person acting in the name and for the account of the minor.

Any agreement contrary to the provisions of this article is null and void". Article 15-3 of Law No. 1984-610 of 16 July 1984, as amended.

GERMANY

by Martin Schimke*

1 Introduction

Hardly a transfer deal in professional football is concluded without the involvement of players' personal agents. Professionals in other areas of sport, and even lower-ranking athletes, are using the services of a "personal manager" too. These advisers, who are often called "managers" or, in team sport, "players' agents", represent their sports clients in negotiations with the clubs, promoters and sponsors. However, depending on the scope of their actions, the legality of what they do can be dubious. Whether and in what form the *non-legal* advising and placement of athletes is permissible depends, in essence, on *compatibility with the following laws*:

- Code of Social Law III (Sozialgesetzbuch, SGB III)¹
- Act on Rendering Legal Advice (Rechtsberatungsgesetz, RBERG)
- Civil Code (Bürgerliches Gesetzbuch, BGB), in particular §§ 312 and 355 ff.²
- Trade Regulations (Gewerbeordnung)

2 Licence to act as players' agent no longer required

The liberalisation of the labour market in 2002 also brought about considerable changes for the profession of players' agent.

According to § 291 Para. 1 SGB III old version, a licence was required for player agency unless one of the exceptions listed in § 291 Para. 2 applied. In the field of professional sport, player agency is the placement of those seeking work or employment. § 291 Para. 1 SGB III old version was abolished with effect from 27 March 2002.

Nowadays, any natural or legal person can set up as a private employment agent and offer the corresponding services without a special licence.

§ 292 SGB III only provides for the possibility of introducing compulsory licensing in the area of international placement, whereby the Federal Ministry of Economic Affairs and Labour can decree by Statutory Order that international placement for certain professions and activities is the reserve of the federal labour office, the Bundesagentur für Arbeit. The purpose of this authorisation by decree is to place restrictions on international placement when such restrictions are necessitated by labour market conditions.

Although the federal legislature has not yet made use of this authority.³ Thus private employment agents no longer require a licence to engage in placement activities from and to other countries, which again is a far more liberal arrangement than under the old legal situation. According to § 292 Para. 2 SGB III old version, employment placement outside the European Union or an EMU contracting state required a special licence from the federal labour office, the Bundesanstalt für Arbeit, which could only be issued subject to strict criteria. This licensing requirement was also abolished with effect from 27.03.2002.

However, compliance with the obligation pursuant to § 14 Trade Regulations (Gewerbeordnung) to notify the competent industrial

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1 Formerly the Employment Promotion

Act (Arbeitsförderungsgesetz, AFG), since the start of 1997 incorporated as SGB III in the Code of Social Law.
2 Until the 2002 reform of the law of contracts, these regulations were contained in the Law on Withdrawal from Door-to-Door and Similar Transactions (HWiG).

inspection authority continues to be mandatory. Such notification is likewise required under § 14 Para. 1 (2) if the business is relocated, the object of the business is changed or the business is discontinued.

If the intended activity does not qualify as a trade (for instance in the case of job placement by public-law bodies without a profit motive⁴), no trade registration is required⁵.

Sanctions may be imposed under the Trade Regulations (Gewerbeordnung). For particularly serious breaches of the rules on job placement, the most severe penalty is a prohibition of gainful economic activity, § 35 Gewerbeordnung.

A players' agent must be prohibited from engaging in gainful economic activity in the event of his untrustworthiness pursuant to § 35 Para. 1 Gewerbeordnung. The notion of untrustworthiness is a vague legal concept. If the trader is to be deemed untrustworthy, the competent authority no longer has any discretionary authority and the trader must be banned from gainful economic activity.

The administrative tribunals have full powers to review the question of the trader's untrustworthiness. The trader must be regarded as untrustworthy if, in light of his overall conduct, there is no guarantee that he will conduct his trade in the proper manner in future⁶. This must be investigated on the basis of verifiable facts which permit a prediction about future conduct. Trustworthiness must be investigated specific to each sector, in light of the activity in question⁷.

To specify these criteria, legal precedents have formed various case groups, whereby a trader and, by extension, a players' agent is particularly untrustworthy if he

- fails to honour his obligations to pay and declare taxes for an extended period, particularly if he has substantial tax arrears (at least 2,500 euros) or evades taxes,
- commits criminal or regulatory offences, especially if they are related to his business enterprise (such as tax evasion),
- is not solvent, which is particularly relevant if the players' agent administers third-party assets, e.g. players' assets.

Any blame must - as is usual in regulatory law - be disregarded when considering these factors.

3 What constitutes job placement?

The notion of job placement is defined in § 35 I 2 SGB III, which provides that job placement encompasses all activities the purpose of which is to introduce jobseekers to employers in order to establish an employment relationship.

According to § 296 I 3 SGB III, this includes all activities resulting in placement, including the preparatory and implementation stages.

According to legal precedent, the mere act of *approaching* someone for the purpose of establishing contact constitutes an activity aimed at effecting an introduction under the aforementioned definition (e.g. the remittance of a list of interested parties; suggesting an interested party; establishing telephone contact).

§ 35 SGB III defines an "employer" as anyone intending to employ employees. A "jobseeker" is anyone interested in the placement of a working relationship. An employment relationship is typified by the employee's personal dependence on an employer, in contrast to self-employed activity. What must therefore be established is whether there are any traits typical of dependent work (e.g. being bound by the employer's instructions, integration into the business of the recipient of the performance etc.). The position in which the job placement is exercised, be it as an employment bureau, authorised representative, manager, employee, adviser (full or part-time) or in any other form, is immaterial. The sole criterion according to § 35 SGB III is the activity itself.

Nor does the act of placement have to be successful. Since § 291 II (4) SGB III was abolished, it is likely that the recommendation of manpower on a non-commercial, free-of-charge basis falls within the definition of job placement pursuant to SGB III.

It is unnecessary to differentiate clearly between the notion of job placement and that of career advice pursuant to § 30 SGB III. Since the licensing requirement was abolished, the distinction is irrelevant -

particularly as, according to § 296 I 3 SGB III, career advice as an activity cannot be the subject of separate remuneration. Rather, the legislature intends that career advisory activity should be regarded as being compensated in the agreed agency commission.

The new Agents' Remuneration Order does not provide otherwise. Whereas § 13 of the old Employment Agents Order allowed for individual activities to be remunerated separately, there is no such provision in the Agents' Remuneration Order. Consequently, only those services that constitute neither job placement nor career advice pursuant to SGB III may be remunerated separately.

4 Categorising the players' agent contract

The legal categorisation of a players' agent contract is facilitated if pure player agency is separated from the other activities of an "adviser", "agent", "manager" or "marketer".

There are a number of permutations of the players' agent contract: the agency agreement pursuant to § 675 BGB in conjunction with § 611 ff. BGB, a brokerage contract pursuant to § 652 BGB or a mixed contract (service-type brokerage contract). If the players' agent contract issued by FIFA is used as the model, it will usually be a brokerage service contract⁸. The service to be rendered by the players' agent consists solely of providing his athlete with the opportunity to conclude a contract. Like an estate agent mediating between tenant and landlord, the players' agent is a contact between club and athlete and that is where his role ends. Unless otherwise agreed, the players' agent only receives his commission if the negotiations are successful, i.e. the club and athlete conclude a contract based on the agent's activities. As this constitutes job placement, §§ 296 ff. SGB III must be observed.

In practice, however, an athlete's adviser or manager do not confine themselves to pure placement activity but - either with the player or as his representative - negotiate the contract to be concluded with the club or a sponsor. In addition, managers often assume numerous organisational tasks and advise the player on everything from media appearances to the "right" investment and "optimum" tax arrangements. Although all of these activities are, in principle, permitted, such management or advisory contracts are often in breach of the provisions of special laws. Of particular relevance in this context are the Act on the Rendering of Legal Advice, the Law against Unfair Competition (Gesetz gegen unlauteren Wettbewerb, UWG) and the general principles on unethical contracts, in particular the ban on oppressive contracts.

5 Prerequisites pursuant to § 296 SGB III new version

§ 296 SGB III new version sets forth the prerequisites for the establishment of an effective agency contract *between agent and player*.

The requirements to an effective contract between agent and player are now as follows:

- Written form (§ 126 BGB); verbal contracts are without effect pursuant to § 297(i) SGB II
- Provision for remuneration
- Recording of the mutual performances (including career advice)
- Agent must make the agency contract available to the jobseeker in written form

For the domain of football, a model standard agency contract can be found in Annexe C of the new Players' Agents Regulations⁹.

Breaches of § 296 III SGB (e.g. failure to observe the written form) will render the agency contract null and void pursuant to § 134 BGB.

3 Cf. Hauck/Noftz, Kommentar zum SGB III, Volume 3, § 292 marginal note 8.

4 Vgl. Rixen, NZS 2002, 468.

5 Vgl. Küttner-Voelzke, Personalbuch (12. Auflage 2005), C. 2. Rn. 15.

6 Cf. Federal Administrative Court, Gewerbearchiv 1999, 72 f.

7 Cf. Federal Administrative Court GewA 1997, 68.

8 Cf. Higher Regional Court Dresden, SpuRt 2004, p. 257, 258; also Kröniger, SpuRt 2004, p. 233, 234; unresolved: Higher Regional Court Celle, SpuRt 2004, p. 67 ff.

9 downloadable at: <http://www.fifa.com/de/regulations/regulationlegal/0,1577,4,00.html>.

6 Remuneration arrangements

In principle, the agreed remuneration pursuant to § 296 III SGB in conjunction with § 421 g II(3) SGB III may not exceed the sum of 2,500 euros. Any agreement on higher remuneration is ineffective.

§ 301 SGB III in conjunction with § 2 of the order on agents' remuneration makes exceptions for certain professional groups, such as *professional athletes*, artists, performers, photographic models etc. This order entered into force on 27.03.2002 and supersedes the old job placement order (Arbeitsvermittlungsverordnung, AVermV).

6.1 Agents' Remuneration Order

The professional groups cited in § 1 of the Agents' Remuneration Order may, according to that Order, agree remuneration with the agent that is based on their earnings.

§ 2 of the Agents' Remuneration Order contains a kind of "salary cap" provision, whereby the agreed agency commission may not exceed 14% of the employment earnings negotiated for the professional athlete.¹⁰ If the activity mediated by the agent exceeds a 12-month period, the remuneration may not exceed 14% of the salary due to the employee *for 12 months*. Thus the maximum rate is 2% higher than that provided for by the old Job Placement Order, but the maximum 12-month assessment period has been retained.

The other prerequisites of an effective agreement on remuneration are now dictated - as is the case for all other professional groups - by SGB III, thus putting to bed the old dispute as to the legal nature - constitutive¹¹ or declaratory¹² - of the written form requirement set forth in the AVermV. § 296 I 2 SGB III explicitly requires a written agreement on remuneration. Verbal agreements on remuneration are without effect on the grounds of § 297 (1) SGB III. In the absence of any provisions to the contrary, this also applies to professional athletes and the other professional groups covered by the Agents' Remuneration Order.

In principle, only the jobseeker is obliged to pay the agency commission, and then only if the placement is successful (performance fee). However, in addition to remuneration by the employee, a remuneration obligation on the part of the employer may also be agreed.

Although the agreement of an advance is not permitted (§ 296 II 2 SGB III), advances that have nevertheless been paid can, according to § 812 BGB, have conditions attached to them. The acceptance of advances renders the agency contract null and void (§ 134 BGB in conjunction with Art. 2 Introductory Act to the BGB).

In any event, the placement performance must have become causal to the conclusion of the contract, § 296 II 1, or else there is no obligation to pay remuneration.

Further remuneration may only be effectively agreed for such activities - and management services in particular - if they do not constitute career advice. Career advice must be regarded as an aspect of placement activity and, as such, cannot be invoiced separately (cf. § 296 SGB III).

6.2 Unethical nature of exclusivity clauses

Although there are, of course, so-called "Exclusive Managers", more often than not the reverse is true: thus it is common contractual practice for the athlete to undertake vis-à-vis his agent not to conclude any independent contracts for the duration of the existing contract, but to forward enquiries addressed directly to him to the adviser. In this way, the manager is aiming to secure the commissions for all contracts concluded by the athlete (service contracts, sponsorship agreements, advertising contracts, licence agreements etc.). As they inherently restrict the athlete's freedom of economic action, contractual clauses of this nature are suspected of being contrary to law or ethics. Incompatibility with the law is derived from § 297 (4) SGB III, which requires that the athlete be allowed to avail himself of the services of any legally active private employment agent¹³. Incompatibility with ethics is derived from the oppressive situation into which the athlete is forced¹⁴. The upshot of this is obvious: exclusive agreements with the content outlined above are null and void pursuant to § 134 BGB in conjunction with § 297 (4) SGB III and pursuant to § 138 I BGB.

7 Legal consequences of breaches

If the players' agent is in breach of provisions of law, there are various legal consequences.

7.1 Nullity of the agency contract

Certain breaches of § 296 SGB III or the Agents' Remuneration Order result - as already discussed - in the nullity of the individual agreements (in the case of § 139 BGB) or of the agency contract as a whole pursuant to §§ 134, 138 BGB (e.g. failure to observe the written form, acceptance of advances, agreement on higher remuneration).

7.2 Recourse pursuant to §§ 812 ff., 823 ff. BGB

The employment agent may be susceptible to claims on the grounds of unjust enrichment (§§ 812 ff. BGB) and/or compensation claims (§§ 823 ff. BGB).

8 Conclusion of a contract with the interested party

In practice, it often happens that the players' agent will only conclude a written agreement with the player, but not with the club vis-à-vis whom he acts as the player's agent. Normally, the players' agent seeks to obtain a commission from the club that is taking the player¹⁵. This frequently gives rise to disputes, as the club taking the player usually refuses to pay, on the grounds of the absence of a written agreement.

It is therefore advisable for the player's agent to conclude a written agreement on remuneration at all times.

8.1 Conclusion of a contract through conduct implying an intent to effect a change in legal position?

Whilst the legal situation, in light of §§ 296, 297 SGB III new version, explicitly denies the conclusion of a contract between *agent and player* through conduct implying an intent to effect a change in legal position, the relationship between *agent and interested party* (sports club or separate sports corporation) begs the question of whether the players' agent is entitled to remuneration even in the absence of a written agreement. At any rate, this is the case if the parties have concluded a brokerage contract through conduct implying an intent to effect a change in legal position, but this always depends on the circumstances of each individual case. These individual circumstances may be: conclusion of the contract with the player for whom a place has been negotiated; deployment of that player in club fixtures or for the sports corporation. Recently, the Supreme Court (Bundesgerichtshof, BGH) affirmed the effectiveness of a players' agent contract by deeming the silence of a club's governing board to be implied assent to an agency contract and the commission agreement contained in that contract: the court found that, in exceptional cases, mere silence could be deemed in good faith to indicate assent¹⁶.

If, however, the conclusion of a contract cannot be deduced and proven on the grounds of conduct implying an intent to effect a change in legal position, entitlement pursuant to § 354 HGB is conceivable if the broker is a merchant. However, particularly in the case of players' agents who are new to the business, merchant status can sometimes be a moot point, as they will often lack the requirement of a commercially-organised business enterprise. Trading companies (such as limited companies) acting as brokers, do, however, have merchant status as they are merchants by legal form pursuant to § 6 HGB.

In the past, however, legal precedents have only acknowledged the existence of a claim on the grounds of § 354 Para. 1 HGB if the reasons for the non-conclusion of a brokerage contract are purely formal, but the requirements for an entitlement to commission have other-

10 Cf. Lampe/Müller, SpuRt 2003, 133 ff.

11 Cf. AG (District Court) Munich, SpuRt 2000, 114.

12 Cf. LG (Regional Court) Braunschweig, SpuRt 2002, 250.

13 Cf. also Kröniger, SpuRt 2004, 233, 234.

14 Cf. Kretschmer/Karakaya, SpuRt 2004, 45, 47.

15 Cf. Kröniger, SpuRt 2004, 233 ff.; Summerer, in: Fritzeiler/Pfister/Summer, Praxishandbuch Sportrecht, 2/184.

16 Cf. Federal Supreme Court, SpuRt 2005, 108 f.

wise been met pursuant to § 652 Para. 1 BGB. This is because legal precedents have set strict conditions for entitlement to commission pursuant to § 354 Para. 1 HGB: the broker must be authorised to act on behalf of the interested party. Although this does not require an effective brokerage contract - if it did, § 354 Para. 1 HGB would be superfluous¹⁷ - it does presuppose that, objectively, the broker is acting at least for the interested party too and that, subjectively, this is discernible to the interested party. In many cases, entitlement on the grounds of § 354 I HGB has been denied on the grounds of subjective discernibility for the interested party. The interested party may assume that the broker has obtained possession of the object he is offering for sale from the vendor and therefore, in offering to pass on the information, wishes to render a service for the vendor¹⁸. This holds true as long as the interested party has no knowledge to the contrary; thus the onus of presentation and proof of subjective discernibility should rest with the broker.

If entitlement cannot be established pursuant to § 354 Para. 1 HGB, for want of subjective discernibility neither can an entitlement arising from the service condition pursuant to § 812 I 1, 1st Alt. BGB. The putative beneficiary of the service, in this instance the club, must construe the placement not as a service to itself but as a service to the player¹⁹.

There is no question of the players' agent being entitled to remuneration on the grounds of spontaneous agency without authority in accordance with § 683 BGB in conjunction with § 670 BGB²⁰; in principle, private law does not acknowledge any obligation to pay remuneration for unsolicited information passed on which is not protected by rights of exclusivity²¹. For this reason, this must not be re-introduced "through the back door" via the regulations on spontaneous agency without authority.

Likewise, § 242 BGB cannot be relied up on to make a claim for remuneration. The interested club is not acting in bad faith if it exploits information given to it by the players' agent before a players' agent contract was concluded. Inasmuch, the players' agent is acting at his own risk²². However, the exploitation of the information may, pursuant to § 242 BGB, be deemed to constitute an implied conclusion of a contract. The assessment of this will always depend on the overall circumstances of each individual case.

8.2 Customary remuneration

If no commission is set, the customary remuneration is due, as it is clear to everyone that a players' agent will only provide a service in return for payment, § 653 Para. 1 BGB. The customary remuneration is what is generally deemed, in the relevant circles, to be paid in remuneration at the time of conclusion of the contract at the location of the placement service²³, i.e. what is "appropriate".

The yardsticks for appropriateness include the Agents' Remuneration Order, which states that 14% of earnings in a 12-month period is a permissible commission, and the FIFA Players' Agents Regulations, which provide for compensation of 5% of the player's basic income. However, for the *agent-club* relationship these regulations can only serve as a guide, as they exclusively regulate the *agent-player* relationship²⁴.

In practice, therefore, it is difficult to determine the customary remuneration. The Higher Regional Court (Oberlandesgericht, OLG) of Dresden set the amount of appropriate remuneration within the meaning of § 818 Para. 2 BGB at 5% of annual salary, mentioning that this amount of commission was also customary for brokers in other industries²⁵. However, this assessment refers only to a claim on account of unjust enrichment, which is questionable and runs counter to the Supreme Court's legal precedents. It should be pointed out, however, that this amount of remuneration is in line with the recommendation of the German football association (Deutscher Fussball-Bund, DFB)²⁶ made in proceedings before the OLG Celle and also with the FIFA Players' Agents Regulations²⁷. All the same, both these sets of regulations can only be used as guides²⁸. In the case ruled upon by the OLG Celle, the players' agent was demanding (customary) remuneration of 15% of basic salary or 12% of gross annual salary including bonuses. The claim was rejected because of the OLG Celle's

(excessively) stringent requirements with regard to the claimant's obligation to substantiate the claim. The OLG Celle demanded a detailed explanation of the placement activities of other players' agents, which had to include the number of placement activities for similar players and the fees paid in each case. In practice, it is nigh on impossible to meet these demands as it is highly unlikely that any players' agent would be willing to divulge such sensitive information and, if required, testify in court. The court rejected the evidence provided by an expert report on the grounds of the changes that had been made to the Players' Agents Regulations while the dispute was ongoing. Although this is just one specific case, it does illustrate the special and general problem that, with regard to the time of the remuneration, the time of conclusion of the contract is decisive²⁹. Thus there is often no valid data basis for periods in the more distant past. The OLG Celle was, however, right when it clarified that the appropriate commission must be based on the value of the transaction concluded or brokered, and that only the player's first year of contract is relevant. This is borne out by the view of the DFB, which deems the customary commission to be 5% of one year's basic salary³⁰.

9 Compatibility of advisory activity with the RBERG

Activities of players' agents and players' advisers that exceed the scope of mere placement and constitute the commercial handling of third-party legal affairs are, in principle, subject to the provisions of the Act on the Rendering of Legal Advice.

According to § 1 Para. 1 RBERG, third-party legal affairs and legal advice may only be handled/provided on a commercial basis by persons to whom the competent authorities have granted the necessary permit, i.e. in particular by a lawyer.

As a rule, the courts confer a broad interpretation upon the notion of legal advice, which includes both the drafting and amendment of contracts and the negotiation of contractual terms with third parties. If, however, an agent does not confine himself simply to brokerage, i.e. merely establishing the option of concluding a contract for his player, but also negotiates with the club about the content of the employment contract, he is in breach of the RBERG; if tax matters are involved, he is also in breach of the law on tax consultancy. This applies to players' employment contracts and also to sponsorship agreements and other contracts concerning the athlete.

9.1 Breach of the RBERG

A breach of the RBERG can have unpleasant consequences for an adviser.

On the one hand, pursuant to § 8 Para. 1 RBERG, the manager is committing a regulatory offence punishable by a fine of up to 5,000 euros. As the manager is violating a statutory prohibition in acting thus (§ 134 BGB), his manager/adviser contract with the athlete is also null and void, which means that the athlete is not obliged to pay the agreed fee or the agreed commission. If he has already paid, the athlete may demand restitution from the manager/adviser, by making a claim on the grounds of unjust enrichment. In contrast, the negotiated contracts between the club and player or between sponsor and ath-

17 Cf. Federal Supreme Court, Re 1966, 776; RGZ Amtliche Sammlung der Entscheidungen des Reichsgerichtshofs in Zivilsachen 122, 129.

18 Cf. Federal Supreme Court, Neue Juristische Wochenschrift 1986, 177, 178.

19 Cf. Federal Supreme Court, Neue Juristische Wochenschrift 1986, 177.

20 Cf. also Federal Supreme Court Neue Juristische Wochenschrift 2000, 1560, 1562.

21 The Supreme Court explicitly stated this in the famous Erbensucher judgment - Neue Juristische Wochenschrift 2000, 72, 73 - referring to the rules on brokerage.

22 Cf. Federal Supreme Court, Neue Juristische Wochenschrift 1986, 177, 178.

23 Cf. Federal Supreme Court, BB 1969, 1413; Federal Supreme Court, Neue Juristische Wochenschrift 1970, 699.

24 Cf. Kröniger, SpuRt 2004, 233, 236.

25 Cf. Higher Regional Court Dresden, SpuRt 2004, 257, 259.

26 Cf. Higher Regional Court Celle, SpuRt 2004, 67 ff.

27 A downloadable at: <http://www.fifa.com/de/regulations/regulationlegal/0,1577,4,00.html>.

28 Cf. Kröniger, SpuRt 2004, 233, 236.

29 Cf. Palandt-Sprau, § 653 BGB marginal note 15; Higher Regional Court Celle, SpuRt 2004, 67 ff.

30 Cf. Kröniger, SpuRt 2004, 233, 235.

lete do remain effective, even if there has been a breach of the RBERG. Lastly, the manager can always be given a warning on the grounds of unfair competition pursuant to § 1 UWG, in which case he must pay the costs of the lawyer serving the warning. Consequently, the sword of Damocles constantly hangs over agents or managers who act alone in that they may be “sent off the pitch” by means of a prohibitive injunction by rivals or clubs who would prefer to negotiate directly with the player.

In light of the potentially devastating financial consequences for the agent, it is therefore in his interests to leave it up to the athlete to negotiate the contract or to engage the services of a lawyer to draft and negotiate such contracts. By cooperating in this way with a lawyer, he averts the risks outlined above, especially the risk of the player or club not paying the agreed fee or subsequently demanding its restitution. It also shifts the threat of liability for compensation on account of any drafting errors onto the lawyer, who is protected by professional liability insurance. It is, however, crucial that the adviser does not remain “master” of the contract negotiations to be conducted.³¹ A breach of the RBERG is only ruled out, and the agent is only entitled to the agency commission, if, taking account of the overall situation, it is not the adviser but the duly authorised lawyer who is providing the legal services under his own responsibility and without any instructions from the adviser.³²

9.2 Exception: Art. 1 § 5(i) RBERG

However, the exceptional fact set forth in Art. 1 § 5(i) RBERG must be borne in mind, which states that the prohibition, in principle, of the handling of third-party legal affairs without a special permit to give legal advice does not apply to those commercial or other trading enterprises that handle legal affairs for their customers which are directly connected with a transaction undertaken as part of their trading operations.

Therefore, Art. 1 § 5(i) RBERG would apply if job placement were the primary activity and the handling of legal affairs - such as conducting contract negotiations - were merely a *necessary auxiliary transaction*.³³

This is clearly not the case if the management and advisory contract provides not only for the conclusion of sponsorship and advertising contracts, the procurement of entry fees or point premiums or negotiations with other brokerage activities aimed at committing an athlete, but - as is so often the case - also provides for the *enforcement of the athlete's fee payable* in the context of a collection process, the *protection of the athlete's personal rights* both before and out of court, or providing him with general *legal and tax advice*, which is usually remunerated separately³⁴.

In the relevant writings, opinion is divided as to whether and to what extent player advisers can otherwise rely upon the exceptional rule of Art. 1 § 5(i) RBERG:

- 1st opinion³⁵
When engaging in placement activities for professional athletes, involvement in the contract negotiations is to be regarded as a necessary auxiliary transaction connected directly with the job placement.
This was the conclusion of the Federal Social Court (Bundes sozialgericht, BSG) in a ruling on artists' managers and artists' agents³⁶. If Art. 1 § 5(i) RBERG is interpreted accordingly, the provisions of this law do not preclude the involvement of the players' agent in contract negotiations.
- 2nd opinion³⁷
*A connection cannot be deemed to exist on the grounds that the job placement could not be properly executed without contract negotiations subsequently being conducted*³⁸.
- 3rd opinion³⁹
The conducting of contract negotiations of any kind constitutes the inadmissible exercise of a right if the contract negotiations were not preceded by brokerage activity. The exception of an auxiliary transaction is only conceivable if preceded by agency activity, and

then only if the governing body's specimen contract is used and any arrangements regarding remuneration and bonus payments and the amount of any contractual penalties and the maximum term are made.

Two legal cases in particular have received much publicity.

In August 1995, in a case against players' agent Wolfgang Fahrian, the Cologne association of lawyers took the view that Fahrian was in breach of the RBERG as he had given financial and legal advice to numerous professional footballers when they transferred to new clubs. However, contrary to expectations at the outset, the legal dispute in Cologne, which was regarded as a test case, did not deliver clear “guidelines” which could have served as practical pointers. The action culminated, not with a judgment but with a declaration of forbearance by Fahrian, in which he undertook not to “legally represent licensed footballers vis-à-vis football clubs in negotiations with a view to the conclusion of (preliminary) contracts, including transfer terms.”

In 2002, the OLG Dresden⁴⁰ was called upon to pass judgment on the agency commission of a players' agent in connection with a player contract for the regional football league. It did not find that there had been a breach of the RBERG, which, it said, did not absolutely prohibit anyone other than lawyers from handling third-party legal affairs; rather, the prohibition applies only if the handling of third-party legal affairs is the core activity⁴¹. Legal advice, the court deemed, is not prohibited if it is directly connected with the main transaction to be handled, i.e. if from an economic perspective it constitutes an ancillary activity conducted in connection with the main transaction and serving the purposes of the main transaction, and there is a material connection between the conduct of legal matters and the main transaction. This is the case with a players' agent who only receives his commission from the club and/or player if the employment contract between club and player is concluded. Inasmuch, he is a placement agent (not a business transfer agent) in respect of whom the BGH had already ruled that, by way of exception, he is permitted in accordance with Art. 1 § 5 I(i) RBERG to handle his client's legal affairs without a licence, as a corollary to his main business activity⁴².

10 Compatibility with §§ 312, 355 BGB new version (formerly the Act on Withdrawal from Door-to-Door and Similar Transactions)

In some circumstances, the location of the activity can dictate whether or not advisory and/or placement activity is legally permissible. In certain situations, the agent must inform the athlete of his right of withdrawal pursuant to §§ 312 I 1, 355 I BGB⁴³.

The provisions of § 312 I 1 BGB regarding withdrawal from door-

31 Cf. Kröninger, SpuRt 2004, 233, 234.

32 Cf. LG Hanover, Neue Juristische Wochenschrift 1987, 3013, 3014.

33 Cf. Federal Court for Civil Matters 79, 238, 244; Higher Regional Court Düsseldorf, Anwaltsblatt 1999, 618, 619; Higher Regional Court Bremen, Anwaltsblatt 1999, 619, 620; Jungmann, Berufsregelungen des Weltfußballverbandes für Spielvermittler (2002), 174.

34 Cf. Nasse, SpuRt 1996, 113, 116.

35 Cf. Kathmann, in: Württ. Fußballverband (Hrsg.), Rechtsfragen zur Sportlervermittlung und des Sportlermanagements 2003, 20, 25; Löhner, Neue Juristische Wochenschrift 1995, 2148 f.; Nasse, SpuRt 1996, 113, 116; Wertenbruch, Neue Juristische Wochenschrift 1995, 223, 225.

36 Cf. Decisions of the Federal Social Court 37, 1; Social Welfare Legislation No. 1 re § 23 AFG.

37 Cf. Johnigk, in: Festschrift für H. Fenn, 2000, 121, 129 with further references

38 For a criticism of this, Buchberger, Anwaltsblatt 2000, 637 ff; on the some-

times difficult distinction between legal and economic matters, see also Rennen/Caliebe, RBERG, 2nd ed. marginal note 16 re Art. 1 § 1; Altenhoff/Busch/Chemnitz, RBERG, 10th edition, marginal note 65 ff.

39 Cf. Buchberger, Anwaltsblatt 2000, 638, 639 f.; similarly Kröninger, SpuRt 2004, 233, 234: „einfache Vertragsgestaltung“.

40 Cf. Higher Regional Court Dresden, SpuRt 2004, 257 ff.

41 Cf. also in this respect Federal Court for Civil Matters 37, 263; Federal Supreme Court, Neue Juristische Wochenschrift 2000, 1560, 1562.

42 Cf. Federal Supreme Court, Neue Juristische Wochenschrift 1974, 1329.

43 The old Law on Withdrawal from Door-to-Door and Similar Transactions (HWiG) was incorporated in the BGB in connection with the reform of the law of contracts and the implementation of the consumer protection guidelines. § 312 I BGB new version, for instance, largely corresponds to the former § 1 HWiG.

to-door transactions apply to a person if, at the time of conclusion of the player agency contract, the players' agent is an entrepreneur pursuant to § 14 BGB and the player is a consumer within the meaning of § 13 BGB. The players' agent must be regarded as an entrepreneur, as he is carrying out his commercial activity at the time of conclusion of the contract. The matter is not so straightforward as regards the player. Whether he is to be regarded as a consumer depends on the contract to be brokered between the club/association and the athlete.

Depending on the form of this contract, what is being established between the athlete and the club/association may be either a service or employment contract.

As they are bound by their employer's instructions and are integrated into training and competition schedules, team athletes who receive remuneration (football, basketball, handball, volleyball, hockey, ice hockey etc.) and are committed for a full season must be classed as employees⁴⁴. For individual athletes (such as tennis players, boxers, track and field athletes, wrestlers, racing drivers, cyclists etc.) the employee/self-employed distinction must be assessed in light of individual overall circumstances. Thus individual athletes are classed as self-employed if they organise their training and competitions themselves and can decide independently whether or not to compete. However, individual athletes are employees if they commit for the duration of, for instance, a tournament or take part in a competition for their club, regardless of whether or not they can organise their own training⁴⁵.

Since the reform of the law of contracts, there has been much debate, and no conclusive argument in either the relevant literature or legal precedents, as to whether the employee must also be regarded as a consumer. The point of departure in the debate is whether the notion of consumer must be confined only to those who procure goods and services to satisfy their own needs (known as the relative, area-specific notion of consumer⁴⁶). Proponents of this narrow interpretation⁴⁷ believe that an employment contract constitutes a quite different situation to that of the conventional purchase or loan agreement, in which the purchaser or borrower is evidently a consumer. They take the view that, in an employment contract, the employee's position is the diametrical opposite of this, as he is making his work services available to the employer in return for payment of a wage. Consequently, the employee does not merit protection in this regard.

This debate is immaterial as far as the player agency contract - as opposed to the ensuing employment contract with the club/association - is concerned. The employee-athlete must be regarded as a consumer, as even applying the narrow interpretation of the relative notion of a consumer, the employee-athlete, in concluding the player agency contract, is procuring either placement or a service - depending on the type of contract - for his own needs. The situation is similar to that of an employee buying a car for the journey to work⁴⁸, in which instance, even applying the relative notion of a consumer, there can be no dispute that the employee is a consumer.

Things are different, however, if the athlete is not to be regarded as an employee, but has merely concluded a service contract with the association/club. This is the case if the athlete is not personally dependent or bound by the club's/association's instructions. Particularly in individual competition sports, such as boxing, tennis and skiing, service contracts are likely to be very common (though not in the case of team matches, even in these types of sport, such as in tennis)⁴⁹. If he has concluded a service contract, the athlete is not a consumer in regard to the player agency contract, as he is concluding this contract for a purpose that can be ascribed to his independent professional activity, § 13 BGB.

Whether the factual scope of application of §§ 312 I 1, 355 BGB is engaged depends solely on the circumstances in which the player agency contract is concluded. The subject of a player agency contract itself is always a remunerated service.

Pursuant to § 312 I 1 BGB, the player must have been caused to conclude the contract by a door-to-door situation. Three permutations are listed, although this does not, per se, preclude a wider interpretation and analogy.

For player agency, the most practically relevant is probably that ver-

bal (not telephone) negotiations took place at the player's place of work or within a private residence, § 312 I 1(1) BGB. The player's place of work is any place within the club/association's building or site, i.e. including the canteen or training ground⁵⁰. The players' agent's private residence might also constitute a door-to-door situation. This private residence status is retained even if business dealings are regularly concluded from that residence⁵¹. However, this does not hold true if the player calls at the residence for the purpose of contract negotiations⁵².

In contrast, the other two permutations, whereby the player was induced to conclude the contract either at a recreational event staged by the entrepreneur or by a third party acting at least partly in the entrepreneur's interests (§ 312 I 1 (2) BGB), or during a surprise approach in a means of transportation or publicly accessible traffic areas (§ 312 I (3) BGB), probably have little practical relevance with regard to player agency.

The player must have been induced to conclude the contract as a result of the door-to-door situation, i.e. this situation must, in part at least, have prompted the conclusion of the contract. The circumstances of each individual case are the determining factor; whether or not the door-to-door situation and the player's declaration of intent that led to the conclusion of the contract occurred within a short space of time is immaterial. The crucial factor is whether the client's freedom of decision is curtailed and the element of surprise still has a bearing⁵³.

However, there is no right of withdrawal if the verbal negotiations were conducted at the player's prior behest, § 312 III (1) BGB. The determining factor here is that the negotiations were instigated at the player's request, rather than on the entrepreneur's initiative⁵⁴. However, in this instance the player must have invited contract negotiations regarding a player agency contract.

If, on the other hand, the players' agent provokes the player's request, the right of withdrawal is not precluded. In particular, a request can be said to have been provoked if the player agrees to the players' agent's visit during a telephone conversation not initiated by the player⁵⁵.

The other exceptions pursuant to § 312 III BGB (value below 40, No. 2, or notarisation, No. 3) are of no practical relevance to the players' agent.

In light of the wide scope of application of the door-to-door rules in the BGB, it is advisable for a players' agent to always inform the player of the option of withdrawal; if this notification is superfluous, there's no harm done, but failure to inform is hugely detrimental. If no notification whatsoever is given, despite being required, player agency contracts may be annulled without limitation, § 355 III 3 Clause 1 and 3 BGB.

When the player is duly informed, he then has a period of two weeks within which he may withdraw from the player agency contract. According to § 355 II 1 BGB, the period does not start to run until the players' agent has given the player clearly-worded information, in writing, about his right to withdraw. This notification must also include the name and address of the recipient and mention that the timely dispatch of notice of cancellation is sufficient for the period to be deemed to have been observed.

44 Cf. Fritzsche, in: Fritzsche/Pfister/Summer, Praxishandbuch Sportrecht, Section 3 marginal note 15 a.

45 Cf. ArbG Bielefeld, NZA 1989, 966; FG Saarland, SpuRt 1995, 81.

46 Hümmerich/Holthausen, NZA 2002, 173, 175 is instructive regarding the concepts involved in this debate

47 Cf. Hromadka, Neue Juristische Wochenschrift 2002, 2523 f.; Löwisch, NZA 2001, 465 f., for a rejection of this view, Däubler, NZA 2001, 1331ff., Boemke, DB 2002, 96, 97.

48 Cf. example at Palandt/Heinrichs, § 13 BGB, marginal note 3

49 Cf. Fritzsche, in: Fritzsche/Pfister/Summerer, Praxishandbuch Sportrecht, Section 3 marginal note 15a.

50 Cf. Higher Regional Court Hamm, Neue Juristische Wochenschrift-RR 1993, 1532 f.

51 Cf. Palandt/Heinrichs, § 312 BGB, marginal note 15.

52 Cf. Federal Supreme Court, Neue Juristische Wochenschrift 2000, 3498.

53 Cf. Palandt/Heinrichs, § 312 BGB, marginal note 27.

54 Cf. Palandt/Heinrichs, § 312 BGB, marginal note 27.

55 Cf. Federal Supreme CourtZ 109, 127.

11 The FIFA agents' licence

A players' agent's licence issued by a member association of the FIFA world football association is required in order to act as players' agent. Applicants who have been resident in Germany for at least two years, and EU/EMU citizens, can apply for the licence from the DFB. Lawyers and a player's siblings, spouses and parents do not require a licence.

11.1 Scope of application and rules

The players' agent's licence is issued subject to FIFA's Players' Agents Regulations. The regulations apply only to the activity of a players' agent. The regulations define a players' agent as a natural person who, for a fee, on a regular basis introduces a player to a club with a view to employment or introduces two clubs to one another with a view to concluding a transfer contract, in compliance with the regulations. Consequently, under the FIFA definition legal entities cannot be players' agents.

The FIFA regulations provide that the services of a players' agent can be engaged in connection with negotiations with other footballers or clubs, Art. 1 (1) of the Regulations. However, the players' agent must be in possession of a licence issued to him by the competent national football association.

The DFB will only issue a players' agent's licence to persons who have passed a written examination. Two examination dates are offered each year, in March and September, and are set by FIFA. The examination tests knowledge of the Statutes and Regulations of FIFA and the European football union UEFA, as well as the statutes and regulations of the DFB and league association. The applicant is responsible for preparing for the examination. The relevant provisions can be requested from the respective associations and some of them can be downloaded via the Internet at www.fifa.com, www.uefa.com, www.dfb.de and www.bundesliga.de (Statutes). The DFB notifies applicants who have passed the written examination, and they must then sign the Code of Professional Conduct (Annexe B of the FIFA Players' Agents Regulations) and send the signed copy to the DFB, also furnishing proof that they hold a professional liability insurance policy. The DFB then issues the players' agent's licence to the applicant, at which point the licence is deemed to have been granted.

FIFA's Players' Agents Regulations can be downloaded via FIFA's website www.fifa.com. The national provisions referred to in these regulations have already been adopted, although FIFA has not yet approved them. It will probably do so by the end of 2005.

The general conditions for the issue of licences by the national association are set forth in Arts. 2 to 10 of the Regulations. The three key requirements are as follows:

The applicant must have an impeccable reputation. According to Art. 2 Clause 2^{2ND} sentence of the Regulations, the respective association decides whether the applicant fulfils these requirements: In Germany, the presentation of a clean excerpt from police records suffices. In addition, the applicant is required to sit an examination that takes the form of a multiple choice test on law and sport. This examination is staged by the respective national associations. The aptitude test covers knowledge of personal, contractual and transfer law, Art. 5 Clause 4 in conjunction with Annexe A of the Regulations.

In Art. 12 of the Regulations, FIFA lays down rules for the conclusion of contracts, some of which take the form of bans. Particularly significant is the fact that the term of a players' agent contract may not exceed two years, although the contract may be renewed by mutual agreement. In addition, the contracts must specify what share of the player's gross income the adviser will receive. Remuneration in excess of 5% of annual basic income is not permitted. Additional payments to the players' adviser by clubs are not allowed.

Furthermore, in the conduct of his activity the licensed agent⁵⁶ must - as Art. 14 of the Regulations explicitly stipulates - comply with the relevant public law provisions governing job placement. For players' agents licensed by the DFB, this means they must comply with §§ 291 ff. SGB III.

The standard representation contract contained in Annexe C to the Regulations should make for greater transparency in future.

However, the new Players' Agents Regulations do not alter the fact that, as association laws, the FIFA Players' Agents Regulations and the DFB's regulations based on them must rank inferior to state law on account of the applicable ranking principle.

Consequently, neither FIFA nor the DFB can force German clubs and players to only work with licensed players' agents. Accordingly, the provisions set forth in the Regulations are without legal relevance, as they unacceptably restrict the activity of players' agents vis-à-vis the higher-ranking source of law contained in § 296 SGB III.⁵⁷

11.2 Consequences of breaches

Art. 1 Clause 2 of the Regulations forbids players and clubs from using the services of a non-licensed players' agent. In the event of contraventions, it is left to the discretion of the national associations (in the case of national transfers) or FIFA (in the case of an international transfer) to pronounce financial or disciplinary sanctions, Art. 17 (players) and Art. 19 (clubs) of the Regulations.

If these provisions are contravened, these agreements are null and void pursuant to § 134 BGB, as associations' statutes are not laws within the meaning of § 134 BGB⁵⁸. However, owing to the Regulations' status as a part of the Statutes, both the player (if he is a member of a national FIFA association) and the licensed players' agent are committing a breach of duty under the law of contract as, from the perspective of the law of contract, both are tied to the association in an internal relationship.

The association may respond by pronouncing its own sanctions, including on the players' agent, Art. 15 of the Regulations. This is permissible, as, through the licence at least, the players' agent has submitted himself to the association's punitive power⁵⁹. If the players' agent is a member, he is subject to that punitive power through his membership alone. If - as is usually the case - he is not a member, then, according to the legal precedents of the BGH, he may only become subject to that power through a separate contractual deed, which the issue of the licence constitutes. The following sanctions may be pronounced:

- caution, censure or warning
 - fine
 - suspension of the licence
 - withdrawal of the licence
- The sanctions may be imposed jointly.

11.3 Compatibility with European cartel law

In 1994 FIFA adopted regulations on players' agents which entered into effect on 1.1.1996. *Laurent Piau*, a French players' agent, filed an objection to the regulations with the European Commission. He took the view that these regulations were in breach of the provisions of the EC Treaty. After the Commission instituted proceedings under competition law, at the end of 2000 FIFA adopted new regulations which entered into force on 1.3.2001, containing the provisions discussed above. In light of the changes in the new Regulations, the Commission decided to abandon the proceedings regarding the objection. However, *Monsieur Piau* maintained his objection, which was rejected by the Commission in 2002. The players' agent then appealed to the European Court of Justice to annul the Commission's decision, asserting that the revised regulations were in breach of Art. 81 EC Treaty, as they constituted a decision by the association of undertakings, FIFA, which restricts competition. Further, he alleged that FIFA was abusing its dominant position, in violation of Art. 82 EC Treaty.

At the start of 2005, the European Court of First Instance confirmed the legality of the FIFA regulations⁶⁰. The judges fully endorsed FIFA's licensing practice, stating in their reasons for the judgment: "The need for professionalisation and greater moral

⁵⁶ FIFA publishes a list on the Internet (www.fifa.com) of all the players' agents it has licensed.

⁵⁷ A view shared by Lampe/Müller in *SpuRt* 2003, 136.

⁵⁸ Cf. *Bamberger-Wendtland*, § 134 BGB, marginal note 8; *Palandt/Heinrichs*, §

134 BGB, marginal note 2 referring to introduction to § 1, marginal note 25.

⁵⁹ Federal Supreme Court, *Neue Juristische Wochenschrift* 1995, 583 f.

⁶⁰ Cf. European Court of Justice, *SpuRt* 2005, 102 ff.

responsibility in the profession of a players' agent, the fact that the licensing system does not rule out competition, the absence of corresponding regulations in almost all European countries and the absence of a professional organisation for players' advisers justify the rules and regulations of FIFA."

The Court first explains that FIFA is an association of undertakings, as the associations and clubs organised within it pursue economic objectives. Consequently, FIFA is subject to the ban on cartels in Art. 81 EC Treaty. The regulations, according to the Court, must also be viewed as a decision by an association of undertakings, as they regulate economic rather than sporting activities. However, there is no Community interest in the continuation of the cartel proceedings.

In particular, the Court bases this argument on its belief that the regulations are capable of exemption according to Art. 81 Para. 3 EC Treaty, arguing that the FIFA regulations do not exclude competition, but merely bring about qualitative selection by professionalising the role of players' agent. For these reasons, the Court denies any abuse of a dominant market position. It does, however, note that FIFA occupies a collective dominant position on the market, as through the Regulations it ensures the uniform conduct of its member associations and clubs.

Beyond the case discussed, the judgment has fundamental significance for the control under cartel law of association regulations. According to previous legal precedents, association rules⁶¹ could be subject to control under cartel law if they related only to sporting activity per se. Now, the European Court of First Instance also admits such sensible grounds as the protection of players as justification. Furthermore, the judgment finds that FIFA's activity is, in principle, subject to control under the EU cartel law. In all probability, the findings of this judgment also apply to other international associations in the sphere of professional sport.

Meanwhile the European Court of Justice in its decision dated 23.02.2006 (OJ C-171/05) adjudged the appeal by Laurent Piau against the decision of the Court of First Instance manifestly unfounded in some respects and manifestly inadmissible in all other respects and dismissed it on the basis of Art. 119 of the procedural regulations of the European Court of Justice. The proceedings have thereby become final and conclusive and the validity of the contested decisions of the European Commission and the Court of First Instance have been upheld in full.

12 Means of legal protection of law-abiding players' agents against "black sheep"

The matter of permissible means of legal protection for law-abiding managers and players' agents or players' agents against the industry's "black sheep", i.e. against rivals whose activity is in breach of the provisions of law, is still of great practical relevance.

As already explained, players' agents (who are not lawyers, cf. § 6 Gewerbeordnung) may be prohibited from engaging in gainful economic activity by the competent authority in the event of their untrustworthiness. This applies especially in the case of anti-competitive behaviour⁶². § 35 Gewerbeordnung does not constitute a protective standard for a trader's individual contracting parties, but the general protection afforded for creditors and contracting parties is a protective element of § 35 Gewerbeordnung⁶³ that serves the public at large. In this respect, the authority may at least be prompted to prohibit gainful economic activity pursuant to § 35 Gewerbeordnung. It should, however, be borne in mind that this instrument can only be employed in the event of untrustworthiness; yet untrustworthiness only exists in the cases mentioned above, not in the case of a simple breach of the standards of association law, which are not laws according to the definition of the Federal Administrative Court (Bundesverwaltungsgericht, BVerwG).

Pursuant to § 8 RBERG, a breach of the Act on the Rendering of Legal Advice also constitutes a regulatory offence, for instance if the activity of the players' agent or players' adviser is not covered by the exception rule in Art.1 § 5 (1) RBERG.

Moreover, a breach of the RBERG or of § 35 Gewerbeordnung usually also constitutes a breach of the Law against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG), which means there is a right to forbearance against the colleague who is acting in an admissible manner. This right can be asserted before the courts in the form of an action for restraint, or by means of a preliminary injunction.

Whether a players' agent can assert a right to forbearance against another players' agent licensed by a national FIFA association if this contravenes the FIFA regulations is a moot point. There may be a right ensuing from the legal institution of the contract with protective character in favour of third parties, as the breach of the FIFA rules jeopardizes not just FIFA itself but also the other licensed agents who abide by these rules and rely on their observance (need for protection). FIFA, meanwhile, has an obligation to the licensed agents on the grounds of the licence agreement to warrant compliance with the Statutes (creditors' interest). As the agent who is violating the rules can discern the need for and interest in protection, rights to forbearance can be derived from the institution of the contract with protective character in favour of third parties.

If, at the same time, a players' agent incurs a penalty in connection with a breach of the FIFA players' agents regulations (§§ 263, 267 Penal Code (Strafgesetzbuch, StGB), for instance) he also runs the risk of a probation from practising his profession within the meaning of § 70 StGB.

61 Cf. Newsletter Sport, January 2005, p.4 (Anti-doping rules compatible with Community law).

62 Cf. Tettinger, § 35 Gewerbeordnung, marginal note 73; Higher Administrative

Court Hamburg, Gewerbearchiv 1991, 423, 424.

63 Cf. Tettinger, § 35 Gewerbeordnung, marginal note 112.

ITALY

by Luca Ferrari*

1. Introduction.

On 10 December 2000 FIFA issued new regulations for players' agents, effective the 1^o March 2001, which were subsequently amended in 2002. The changes were stimulated by the E.U. Commission's investigation on the compliance of the Regulation with articles 81 and 82 of the Treaty of Rome, which had been prompted by an application of a French citizen.¹

The FIFA Regulations control both the eligibility to the agent's profession and the performance of the agent's activity. At the same time FIFA has defined agents' duties in a "Code of Conduct", which imposes professional and ethical standards. The new Regulations con-

tain the requirement that the National Associations enact the set of rules described through special national provisions.

The Italian Football Association (FIGC) had already regulated the activity of players' agents². When FIGC enacted FIFA Regulations it

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a French candidate for agents examinations, and FIFA, Piau reported the contrast between FIFA Players' Agents Regulations and Articles 81 and 82 of the Treaty of Rome. See paragraph 6.1 for more notes on this decision.

1 See Court of first Instance of European Communities, 26 January 2005, T-193/02: some changes were introduced after the dispute between Laurent Piau,

did not simply translate them in Italian, but rather amended pre-existing domestic rules in light of the guidelines set forth at the international level. Apparently deeming Italian Regulations substantially identical to its own, FIFA did not make them the object of specific evaluation and approval. This is particularly unfortunate as in fact there are several provisions of the Italian Regulations, as we shall see, which do not appear entirely compatible with FIFA rules.

Now FIGC is preparing further modifications to the enforced regulation in compliance with the guidelines of the Italian Antitrust Authority³. The focus of this revision is on the conditions for the exercise of the players' agent profession. This matter is very problematical, so at the moment FIGC is not able to provide a term for the approval of the new set of rules.

2. FIGC Players' Agents Regulations and its scope.

On 22 November 2001 the Italian Football Association issued the Players' Agents Regulations to govern the activity of agents working in a national and international context (article 1, 1st paragraph). The enacting provision does not clearly identify the scope of the regulations, thus it is not sure whether the provision refers to Italian agents or foreign agents, or rather to registered or non-registered agents notwithstanding their nationality, or both. Another provision establishes more properly that "players and clubs can avail themselves of the services of an agent if he has a regular licence issued by FIGC or by an other national football association" (article 3, 1st paragraph). The possession of a licence - obtained anywhere in compliance with FIFA Regulations - appears sufficient to carry on the profession in Italy, although a different conclusion could be authorized by a literal interpretation of the article 5, 1st paragraph, and of the article 13, 1st paragraph,⁴ which indicates that a player or a club can only utilise the services of a person enrolled in the FIGC Register of practising agents. This fallacious conclusion would follow from the confusing use of the defined term "Albo", indicating the FIGC Register of licensed agents, in both provisions. Instead we prefer to adopt the meaning of article 3, 1st paragraph, described above, adhering to the principle that, between two possibly conflicting interpretations, the interpreter must choose the one that is valid and enforceable. Therefore, the two references to the FIGC Register should be considered as two references to the register of any national football association. This interpretation is compulsory to bring the Italian rules in line with the international ones and it corresponds to the FIFA's reading and application of the international regulations especially of article 22, par. 1 (Ch. IV - Disputes).

Article 22, par. 1 of FIFA Regulations defines national disputes as those where the parties involved (player, agent or club) are both registered with the same national association. National disputes are submitted to the judicial bodies of the relevant national association. This, as we will see, is significant in terms of applicable rules, in those few Countries, including Italy, where special national regulations - different from the FIFA ones - have been enacted. In fact, all other disputes are "international disputes" and submitted to the FIFA's Players Status Committee. According to what was referred to us by the FIFA's Legal Services, the Players Status Committee applies the FIFA Regulations to any dispute under its jurisdiction, i.e. to any dispute in which the parties are not registered for the same national association. On reverse "national disputes" appear the only ones in which national regulations, if enacted by the relevant association, are applicable.

In conclusion, Italian Players' Agents Regulations and any other national regulations apply only where the agent and his client are both registered with the same national association, whereas it is perfectly lawful for Italians players or clubs to hire a foreign agent under FIFA Regulations.

Article 3 of the FIGC Regulations defines an agent as a person who, in possession of a contract given in compliance of the formal requisites of the same Regulations, pursues players' interests by conducting activities of negotiation (previously "mediation") and advice in order to consummate sports contracts⁵.

The original version of article 3 was recently modified by FIGC. The word "mediation" appeared as an activity of the players' agent in

the previous text. In fact, the profession of mediator and the profession of player's agent are different⁶, beginning with the standard that a player's agent signs a contract with only one party⁷. Generally the agent will represent this party in the negotiation. Moreover the agent may represent his client not only in a single transaction but repeatedly to promote one or more transactions during the validity period of the representation contract. Only this party can pay the agent for his assistance.

The regulatory listing of an agent's typical activities is completed by article 3, 4th paragraph. It establishes that the agent may look after the interest of a club under a regular contract. This disposition refers to the possibility that a club employs an agent "to promote the acquisition or the transfer of a player". This wording appears restrictive: while it is clear that a club may appoint an agent to employ a free player or a player under contract with another club, as well as to transfer one of its players to another club, it is uncertain whether a club may appoint an agent to negotiate a new contract with a player already employed by that club.

3. The FIGC reception and implementation of the FIFA Regulations.

3.1 The licensing procedure.

The acquisition of a licence is an essential requisite to exercise the agent's profession (article 3, 1st paragraph). Upon application to Players' Agents Commission⁸ of those seeking to become a players' agent the FIGC sets written examinations twice a year⁹. The announcement of the examination identifies requirements for eligibility to the exam failing which the applicant is rejected without further inquiry (article 6). One of these requirements is the residence of the applicant in Italy for at least two years. Thanks to the recent decision of the Court of first Instance of the European Communities¹⁰, this time condition is not required for the admission of a candidate who is a citizen of a Member State.

Moreover, under article 7, a candidate holding a position with FIFA, FIGC or with any club is disqualified by reason of "incompatibility" (article 7, 1st paragraph).

The examination is (or should be) held on a single date worldwide. The National Association determines the results of the tests. In Italy, the last session of the exam yielded a very small percentage of successful candidates¹¹. In view of the fact that the number of applications sent to the Commission has constantly increased, this severe evaluation standard, which should reflect a special interest of FIGC to induce maximum preparation of the applicant to guarantee the agents' professionalism, may conceal protectionist intents. The possibility of an artificial barrier to limit the admission of new agents, to the advantage of the ones already in trade, is one of the matters of interest to the Italian Antitrust Authority.¹²

After successful examination the candidate obtains admission in the FIGC Register, whereupon he or she subscribes to the relevant Code of Conduct, provides an insurance policy for the professional liability and pays the relevant tax to the Commission. The candidate

2 See previous FIGC Players' Agents Regulations, issued by the FIGC Federal Council and published on Official Notice no. 52/A of 19 December 1997.

3 See paragraph 6.2 of this text.

4 See article 13, 1st paragraph, FIGC Players' Agents Regulations, when a player wishes to avail himself of the services of an agent, he shall use only a registered agent, after the subscription of a written contract in compliance with article 10, as provided by article 5".

5 See article 3, 2nd and 3rd paragraph, FIGC Players' Agents Regulations.

6 According to articles 1754 and ss. of the Italian Civil Code, intermediation characterises a profession that is different from the agent's one. In fact, a "mediator" seeks to reconcile two or more parties in order to conclude an accord in keeping with their mutual interests. He

or she must maintain an impartial stance in development of the negotiations. The mediator usually signs a written contract with both clients and is compensated by both parties.

7 See article 10 and article 3, 3rd and 4th paragraphs, FIGC Players' Agents Regulations.

8 The Players' Agents Commission is a body of FIGC, instituted in 2002. It has several functions, administrative, judicial and disciplinary.

9 See article 5, 1st paragraph, FIFA Players' Agents Regulations, "the national association shall set written examinations twice a year".

10 See note 1.

11 FIGC organised the last session of exams on 30th March 2006. The successful candidates were 59 (388 participants).

12 See paragraph 6.2.

forfeits admission if the application form with the necessary documents is not delivered to the Secretariat of the Commission within six months from the date of the exam's approval (article 8, 4th paragraph).

The institution of the Agents' Register poses serious conflict with the Italian Law. Indeed, the FIGC has instituted a new register of a professional activity notwithstanding article 2229 of the Civil Code, which states "only the law can constitute new registers of intellectual professions". Article 33 of the Italian Constitution declares also "a national exam is prescribed...for the legal exercise of a professional activity".

The Players' Agents' profession may qualify as an intellectual activity, given that it shares many points in common with the commercial agents' profession. Because it is established and administered by regulation of a private association (FIGC and FIFA) and not by an Italian law, the institution of an independent register and of a new regulated and restricted intellectual profession appears unlawful.

However, the particular features of the agents' profession provides an argument to refute the potential invalidity of the FIGC Regulations, as players' agents operate in a specialized contest, the sportive one. Thus it could be considered as a further manifestation of the autonomy of the sportive institutions. Yet this characterisation is very weak, especially after the agents' activity has been defined as an economic service by the recent decision of the Court of first Instance of European Communities¹³. The decision held that the profession cannot be considered instrumental to the organisation of football and, consequently, subject exclusively to the sportive "jurisdiction"¹⁴.

Article 8 of the Italian Regulations requests that each agent obtain professional liability insurance coverage. In addition to liabilities towards clients, the policy shall also cover the risk of monetary sanctions imposed upon the agent by the Agents Commission. The insurance coverage should be consistent with the level of the activity carried out by the agent, but it cannot be less than euro 500.000,00. The policy should be in conformity to the model approved by the FIGC and released by a primary insurance company (article 8, 1st par., lett. a).

At this moment there are very few insurers on the Italian market providing this kind of coverage. The players' agents associations (A.I.A.C.S., I.A.S.A.)¹⁵ have made special arrangements with some insurance companies so as to obtain the cover required at favourable conditions.

Unlike the FIFA Regulations¹⁶, FIGC rules do not foresee the possibility to substitute the professional liability insurance cover with a bank guarantee.

Players' associations (actually, the Italian Players Association), under article 9, may offer a service of job placement. The interested association shall provide insurance coverage for professional liability equal to five standard policies and retain no more than five agents. Each agent must be admitted in the FIGC Register, possess the FIFA licence and be a member of the players' associations.

The licensing system grants exclusive title to provide agency services to players and clubs, with the exception of the representation by the players' close relatives or a lawyer in good standing (article 5, 1st paragraph). In Italy, the National Legal Council¹⁷ has recently established that possession of a licence and enrolment as a player's agent is incompatible with the exercise of the legal profession. The solicitor's activity is disciplined by a Deontological Code, which contains rudiments in conflict with the agents' regulations. For example, the sports agent's ability to organize his activity as a business and the particular method of compensation cannot be reconciled with the Deontological Code. As a consequence, attorneys at law can act in the interest of a football player or club, without restrictions from the football regulators but, according to the bar association, may not be formally registered as football agents.

The decision of the National Legal Council does not prohibit lawyers from assisting players and clubs during a negotiation. Rather it states that this type of assistance shall be governed by the deontological principles of the legal profession. One of the main differences between the agents' regulations and the solicitors' Code of Conduct is the term of clients' appointments. Agents can be appointed for two years, whereas attorneys at law cannot limit the client's facility to dis-

miss them at any time. This is probably the main reason why a lawyer would take the pain to obtain a FIFA licence.

As mentioned above, in a negotiation a player can use the assistance of a parent, a sibling or his spouse instead of an agent or a lawyer. The regulations state a relevant condition: a contract negotiated with these modalities shall describe such circumstance (article 5, 2nd paragraph).

3.2 Formalities for the validity of agents' contracts.

The agent must obtain a written contract to assist a client in compliance with article 10 of FIGC Regulations. This contract consist of the standard form, prepared by the FIGC Players' Agents Commission¹⁸, and it shall be delivered - or sent by a registered letter - to the Secretariat of the Commission for its registration not later than twenty days from its subscription (article 10, 1st paragraph). This period is shorter than the thirty days required by FIFA for delivery of the relevant agreement under article 12, 10th paragraph, of the International Regulations.

Paragraphs 10 and 11 of article 10 specify further formalities for the validity and effectiveness of the agents' appointments. The contract shall be signed in four copies. The first and the second copy are reserved to the parties, while the third and the fourth shall be sent to FIGC Agents Commission.

Both paragraphs add, respectively, that if the player is not registered or the club is not affiliated with the FIGC, one copy of the standard contract must be sent to the National Football Association that registered the player. This provision is somehow in contrast with the common interpretation of the FIFA Regulations, whereby the international rules and not the national ones should apply to agency relationship where the parties are registered or affiliated, as the case may be, with different football associations.

In the FIFA Regulations there is no rule that prescribes the necessary use of a standard form. Article 12, par. 9 states it is necessary that the subscription of a written document be in compliance with the standard contract annexed to the FIFA Regulations. However, it is added, "the parties to the contract are at liberty to conclude additional agreements and to supplement the standard contract accordingly". No such freedom is granted under the Italian Regulations. The FIGC Regulations state very clearly (articles 3.2, 3.3, 3.4, 10.1, 13.1, 23.1) that Agents may only conclude an agreement with a player or a club using the standard form annexed thereto. The Agents Commission does not accept the deposit of a written agreement not corresponding to the standard form. The form can only be filled out, but not altered, expanded or supplemented, by the parties, save for the forms used for the appointment of an agent by a club, which contains a section (no. 4) that permits, within the space of only three lines, the discretionary addition of further provisions. The Agents Commission accepts the deposit of an agency contract not corresponding to the Italian form only if such contract is subject and made in conformity to the more liberal FIFA Regulations. In this latter case, the registration of the representation contract only serves the purpose of providing certainty as the existence and date of the appointment. Instead, when it comes to appointments subject to the FIGC Regulations, the registration of the standard form is essential for its validity and effectiveness.

However, standardised forms and their deposit are unsuitable in relation to certain modalities that characterise the relationships between clubs and agents. For instance, a club that wishes to use the service of an agent for the acquisition of a player often lacks sufficient time to execute and to deliver a form. In such a transaction the acquisition of the player is the main focus of a club while the protection of

13 See note 1.

14 See article 1, Law 17 October 2003 n. 280.

15 There are two players' agents' associations currently existing in Italy: A.I.A.C.S. "Associazione Italiana Agenti Calcio Società", see www.agenticalcio.com, and I.A.S.A. "International Association of Soccer Agents", see www.iasaweb.it.

16 See article 7, FIFA Players' Agents Regulations.

17 See Pronouncement of the National Legal Council, 27 April 2005, in www.consiglionazionaleforense.it.

18 There are three type of form. The first referred to relationship between an agent and a player, the second between an agent and a club, the third between an agent and a young player. See appendix 2.

the agent's rights, such as exclusivity and the public registration of the appointment, for future reference, is not of moment to the club. Such regularization of the agent's services coalesces with effective and timely action of the agent.

In conclusion, the Italian sportive system does not acknowledge the validity of a contract that is not entered using the prescribed forms. As a consequence any other, albeit written, contract will not be accepted by the Commission, will not have legal validity and will not be enforced nor considered by the Arbitral Chamber.

The FIGC Regulations establish a maximum period of two years for the duration of the agreement signed by an agent, a player or a club. Extension is allowed, but only when the renewal is by agreement of the parties expressed in the standard form and delivered to the Agents Commission before the original contract expires¹⁹.

3.3 Data protection of players and clubs.

With reference to the procedure for the registration of the contract, article 10, paragraph 12, contains a peculiarity. Registration should be accomplished inserting the contract in a sealed double envelope in order to protect the identity of the players and clubs involved. This envelope must be delivered to FIGC General Secretariat, who shall keep it for two years. In that period no one will be able to open the envelope and read the data, except with an express authorization either of the data owners or of FIGC and FIFA. After two years the envelope shall be unsealed and the data shall be registered by the Agents Commission. In any case the agents shall communicate all the necessary information about the sealed contract, upon request, to the Commission and to the FIFA.

3.4 Agents' remuneration.

With reference to agents' payments the FIGC Regulations describe a different discipline depending upon whether a player or a club is obligated to pay the agent. When the obligor is a player the payment amount must be calculated on the basis of the player's yearly gross income, excluding benefits and individual or collective bonuses²⁰. Moreover the parties decide whether to pay the agent a lump-sum upon signing the contract or a yearly annual share at the end of a fixed term²¹. If the parties have agreed upon this second option and the duration of the playing contract exceeds the agency contract (unless earlier terminated or renewed), the remuneration shall be paid on the terms fixed also after the expiry of the agency contract.

The parties may freely decide on the remuneration but, if there is no provision in the contract that refers to this matter, in compliance with article 10, 8th paragraph, the payment is fixed in an amount of 3% of the player's yearly gross income. However, the agent's payment is due only if the player's compensation is superior to the minimum wage fixed in the Collective Agreement. The player's right to obtain the minimum wage is connected to the acquisition of the *status* of professional player. As a consequence, if a playing contract establishes the player's remuneration on the minimum wage, the assistance of the agent is deemed of no significant value to the player.

If the client is a club, the compensation due shall be quantified only by a lump sum that has been agreed in advance. This rule, inserted both in FIGC and in FIFA Regulations²², forbids the parties to agree to different modalities for the agent remuneration. Moreover, in case of non-compliance to said limitation, the Italian Regulations entail the invalidity of the agency contract (article 10, 9th paragraph).

3.5 Business organization of agents' activity.

The agent may organize his professional activity as a business. This is afforded both in FIFA²³ and in FIGC Regulations²⁴. Thus, the agent may retain employees and collaborators to do administrative duties. The Italian rules specify that the agent, under certain circumstances, may also assign to a company any income or economic benefit generated by such activity. Nevertheless, the assignment of these income and economic benefit to a company can occur only if the agent fulfils three requisites. The first is that the player²⁵ shall authorize expressly the assignment when the agency contract is signed or subsequently. The second is that the agent shall be the legal representative of the

company. The third is that the agent shall deliver the list of the employees, the statute, the book of the partners, the list of the bodies of the company to the Agents Commission within twenty days from the constitution of the company. The agent shall thereafter communicate to the Commission every variation that occurs in the organization of the company.

3.6 Agents, players and clubs' rights and duties.

The agent's conduct must be in compliance with the prescriptions of Title IV, "agent's duties". The agent is obliged, under article 12, 1st paragraph, to respect the rules of the Association and to conform his behaviour to the principles of correctness, loyalty, good faith and professional diligence. Among these prescriptions, the agent's duty to insert his name in all the playing contracts signed with his assistance is expressly comprehended. The rationale of this provision favours the transparency in the relationships of the parties and avoids possible disputes about the agent's right to remuneration. In the same way if a contract is signed without the assistance of an agent the parties must mention that circumstance in the contract.

Article 12, 3rd paragraph, fixes a corollary to the previous prescriptions. It prohibits an agent approaching a player already signed with another agent. This prohibition expires one month before the expiration of the other agent's contract. Agents that intend to approach a player can request relevant information from the Secretariat of the Commission.

Another rule of conduct establishes that the agent cannot approach a player until six months before the expiration of the playing contract (article 3, 7th paragraph). This rule protects the stability of the relationship between a player and his club, which may be tarnished by "unscrupulous agents". More than the previous one, this foreclosure seems illegal because it provokes a disproportionate limitation of individual freedom and economic initiative. The mistrustful assumption and the somehow hypocritical aim of this discipline do not appear legitimate reasons to justify such a relevant restraint of trade²⁶. There are many reasons for a player to seek the assistance of an agent during the validity of his contract, and therefore no valid reason why an agent should not offer his services to players under contract at any time. In fact it is widely known, albeit not officially admitted, that this rule is generally disregarded.

As described above²⁷, players (article 13) and clubs (article 16) have the essential duty to use only the services of registered agents, by executing an agency contract (i.e. fill out the form) in compliance with the FIGC Regulations²⁸. Once appointed in compliance with the Regulations, if the agent is excluded from the execution of the contract, under article 13, 4th paragraph, he is still entitled to receive 5% of the player's yearly gross income or the lesser amount of money due

19 See article 10, 2nd paragraph, FIGC Players' Agents Regulations, "the players' agent shall send the third and fourth copies to his national association for registration within 30 days of their having been signed".

20 See article 10, 4th paragraph, FIGC Players' Agents Regulations. In the previous regulations of 1997, article 11, the agents' payments were due not only for the assistance in a negotiation of a playing contract, but also for the assistance in a negotiation concerning exploitation of players' rights of image.

21 See article 10, 5th paragraph, FIGC Players' Agents Regulations: the payment of the yearly share shall be effected within four months from the subscription or the date of registration of the contract in the first year of validity, and within the term that correspond with that date in the eventual following years.

22 See article 12, 8th paragraph, FIFA Players' Agents Regulations, "a players' agent who has been contracted by a club shall be remunerated for his services by

payment of a lump sum that has been agreed upon in advance"; see also article 10, 9th paragraph, FIGC Players' Agents Regulations.

23 See article 13, 1st paragraph, FIFA Players' Agents Regulations, "a players' agent may organize his occupation as a business".

24 See article 4, 2nd paragraph, FIGC Players' Agents Regulations.

25 The rule only refers to players, therefore no express authorization is required by a Club.

26 The President of the Italian Antitrust Authority, Antonio Catalicà, explained these questions during the last "Expogool" event in Milan. See also paragraph 6.2 in this text.

27 See paragraph 3.1 in this text.

28 See paragraph 3.2 in this text.

29 This penalty is an innovation of the Italian Regulation 2001. The previous (1997) established that if the player signed a contract without the assistance of the agent (with regular agency contract), the agent payment was excluded.

under the agency agreement.²⁹ A literal interpretation of this provision could have a perverse effect: if a player had agreed to a higher percentage, he could end up paying only 5% by simply excluding his agent from the negotiations and/or the execution of the playing contract. Notwithstanding this somehow misleading wording, the agent should be entitled to receive a higher commission on the evidence of the actual percentage agreed in the relevant contract.

4. Special rules introduced by the FIGC Regulations.

4.1 Termination by agreement and earlier termination.

Article 11 of the FIGC Regulations represent the evolution of a traditional Italian discipline protecting stability of player/agents contracts.

Under the 1st paragraph of article 11, the termination by agreement may occur at any time in writing on condition that the parties regulate all pending matters. Unilateral termination before the expiry of the term agreed in the contract is possible at any time with 30 days notice in writing sent by registered letter (with return receipt) to the other party and the Agents Commission.

If earlier termination is decided by the player, the indemnification of the agent is regulated precisely by article 11, 2nd paragraph. Absent a liquidated damages provision, which can always be inserted in the standard form, the player is bound to pay the following indemnifications, depending on the category: euro 2.600,00 for Serie C2, euro 5.200,00 for Serie C, euro 15.500,00 for Serie B and euro 31.000,00 for Serie A. However, if, after unilateral termination but during the original term of the contract, the player enters a new playing contract, the former agent is entitled to a commission of 5% on the new contract, if it exceeds the minimum indemnification set forth by the FIGC Regulations. In this case, if a new agent has been appointed, the latter is jointly responsible for payment of the commission to the former agent.

The Italian Regulations do not clarify whether the agent is entitled to damages in excess to the penalties foreseen under article 11. However, the Arbitral Chamber does not consider those amounts as a maximum indemnity. The agent may be entitled to higher indemnity, as long as further damages and their causal nexus with the player's earlier termination are supported by evidence.

The earlier termination of the contract does not prejudice the agent's right to remuneration for the activity done. As a consequence, notwithstanding earlier termination, the club or the player shall pay the compensation earned by the agent during the validity of his appointment, in addition and not in lieu of damages.

If the agency contract is terminated for just cause, the party notifying earlier termination does not bear any liability. In accordance with article 11, 2nd paragraph, the interested party should file a petition within 30 days from the notice of termination in order to have the Arbitral Chamber ascertain the presence of a just cause.

4.2 Agent's conflict of interests.

The FIGC Regulations complement the FIFA Regulations with certain provisions to assure that the agents act scrupulously and independently. In particular, article 15 presumes a conflict of interests whenever the agent conducts a negotiation with a club where the agent's spouse, a parent or a relative holds a managerial office. The provision was introduced after few relatives of famous football managers, club directors or club owners were licensed as players' agents.

In any case, it is possible that the conflict of interests be caused by other circumstances that are independent of family relationships, to be evaluated case by case.

The agent must notify immediately the potential conflict of interests to the player, who must sign the relevant acknowledgement. Unless the circumstances generating a potential conflict are notified to and accepted by the player, under article 15, 2nd paragraph the player has the right to have the contract declared void.³⁰

4.3 Abuse of dominant position by the agent.

FIGC introduces autonomous provisions to identify an agent or an association of agents taking unfair advantage of a dominant position. This situation occurs when an agent, also in association with other professionals, reaches a dominant position in the market and uses it

to impair effective competition.³¹ Under article 3, 5th paragraph, the Agents Commission may conduct a preliminary investigation to verify the existence of an abuse. Anyone can report a relevant case to the Commission. The FIGC Regulations do not specify the concrete measures that the Commission can prescribe to eliminate the abuse, so the Commission is believed to have considerable discretionary power. Yet, until this date, although at least one investigation has been carried out, the Commission has never identified an abuse of dominant position.

Notwithstanding the (limited) role of the Agents Commission within the football association, the Italian Antitrust Authority's general competence in matters of market abuse includes any competition matter concerning the football agents' business³².

4.4 Lapse of contract.

Italian Regulations establish two cases of lapse of contract, while nothing similar is prescribed by FIFA. In article 10, 7th paragraph, if the status of the player changes from professional to amateur the contract lapses automatically and the agent does not have the right to obtain any compensation. The rules relate only to the case of the relegation of the club of the player to an amateur series, although the change of status can occur for other reasons, including the athlete's will. The second case of lapse of the contract will be explored in the subsequent paragraph.

4.5 Protective measures for young players.

The FIFA Regulations, under article 12, 11th paragraph, prohibit, without parental express authorization, underage players to sign a contract with an agent. The FIGC Regulations, under article 14, impose a more strict discipline. If the young player is less than eighteen but at least sixteen, he can use the services of an agent to sign his first contract as a professional player, on condition that the agent's contract is countersigned by the player's parents. Moreover, the FIGC establishes that if within 120 days from the signing of the agent's contract the first playing contract is not entered, the agency contract lapses automatically.

The FIGC allows young players from fifteen to seventeen, as long as they are not professional players, to use the services of an agent for advice, which the agent must perform without remuneration and only after he has obtained the player's parents written consent. This appointment is subject to severe formal requirements. In addition to the use of the federal form especially drafted for young (amateur) players representation/advice and its subsequent registration, the signature of the player's parents on the form must be attested by a notary and the President of the FIGC Juvenile Sector must also sign the contract. If not rejected, after thirty days from the transmission of the contract to the Agents Commission, the parties may consider it approved.

The young player's agent has the duty to send to the Secretariat of the Commission a written report every six months on his activity as the player's advisor. Thereupon, the Commission has the duty of transmitting the report to the FIGC Juvenile Sector.

5. The FIGC Players' Agents Commission, disciplinary proceedings and litigation.

5.1 The Players' Agents Commission.

The Players' Agents Commission ("Commissione Agenti di Calciatori") was instituted by the FIGC Regulations in 2002. The Commission has many functions, including administrative, judicial and disciplinary. The Commission substitutes the "Commissione Procuratori Sportivi" that was governed by the previous Italian Agents' Regulations of 1997.

The Players' Agents Commission is comprised of thirteen members and serves for two years. Four members are nominated by the FIGC Federal Council, among jurists qualified by sports law expertise³³. Six

³⁰ See paragraph 6.2.

³¹ See article 3, 1st paragraph, Law 10

October 1990 no. 287. See also Court of

Appeal of Milan, 12 April 2005, for a definition of "dominant position".

³² See paragraph 6.2 in this text.



T · M · C · A S S E R P R E S S

The Strict Liability Principle and the Human Rights of Athletes in Doping Cases

by

Janwillem Soek

*With a Foreword by Hein Verbruggen, UCI Honorary President for life
and IOC Member*

This book deals with the legal position of the athlete in doping cases under the law of the regulations of national and international sports federations and how this legal position can be reinforced.

According to the rules of the sports organizations applicable to doping offences, where prohibited substances are found in athlete's bodily fluids the athlete in question is strictly liable for a doping offence. In the disciplinary procedure there is no discussion about his guilt and the athlete is not given an opportunity to disprove his guilt. One of the starting points of the European Convention of Human Rights (ECHR) is that suspects are not guilty until their guilt has been proven conclusively based on the law, which includes the right of defence.

The author analyzes the nature of doping offences and puts forward arguments in favour of the application of the rights of the defence as laid down in the ECHR in disciplinary doping proceedings. In his argumentation he also addresses the procedural system of sanctions and the practical and economic consequences the sanctions may have for the athlete concerned.

As not only the athlete himself, but also sports clubs and sponsors may suffer serious damage from such sanctions, this book on the strict liability principle will be of great interest to practitioners and academics in more than one field of law. Moreover, it will be a welcome addition to the literature and the continuing debate on doping in sport, which is a matter of great concern to many interested parties.

Janwillem Soek is a senior researcher at the ASSER International Sports Law Centre, The Hague, The Netherlands.

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T · M · C · A S S E R P R E S S

The Council of Europe and Sport *Basic Documents*

Edited by

Robert Siekmann and Janswillem Soek
ASSER International Sports Law Centre

With a Foreword by Dr Rolf-René Weiskirchen, Director for Youth and Sport, Council of Europe, Strasbourg

The Council of Europe is unquestionably the body that has made the most substantial contribution to paving the way for a European sports model. The Council of Europe was the first international intergovernmental organisation to take initiatives to establish legal instruments and to offer an institutional framework for the development of sport at the European level. The first stage of the Council of Europe's work in this field was marked by the adoption of the Committee of Ministers' Resolution on Doping of Athletes in 1967. The extensive work of the Council of Europe on sport is evident through the main texts on sport, such as the European Sports Charter, the Code of Sports Ethics, the European Convention on Spectator Violence, and the Anti-Doping Convention. Sport co-operation within the Council of Europe is organised in partnership with national governmental and non-governmental bodies.

The Council of Europe and Sport: Basic Documents is the second volume in the Asser series of collections of documents on international sports law, containing material on the intergovernmental (interstate) part of international sports law. The first volume was devoted to the European Union. In previous other publications, non-governmental materials, i.e. statutes and constitutions, doping rules and regulations and the arbitral and disciplinary rules and regulations of the international sports organisations were published.

This book 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.

The book's editing team consisted of Dr Robert Siekmann and Dr Janswillem Soek, both of the ASSER International Sports Law Centre, The Hague, The Netherlands.

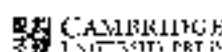
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members are appointed by the Federal President and confirmed by the "Serie A and B League" (L.N.P.). Three other members are nominated by the agents' associations³⁴. Thereupon, the FIGC Federal Council appoints the President and the Vice-president.

The Commission uses the services of a Secretary and may require the assistance of two lawyers. These assistants may participate without voting right in the Commission meetings.

The Commission can use the FIGC Inquiry Office and any other FIGC body to exercise its disciplinary competence under article 18. The players' agents are obliged to supply all the information requested. The relevant penalty for failure to do so is the suspension from the Agents' Register.

When an agent is charged with a violation, he has the right to be heard. If the Commission hands down a penalty, its decision is enforceable from the date of publication on the Official Bulletin. However, the agent may pursue an appeal to the FIGC Federal Commission of Appeal (C.A.F) and in the same time he may request the suspension of the execution of the penalty.

The Arbitral Chamber is competent to decide any dispute rose between an agent and his client under the arbitration clause of article 23 of FIGC Regulations. Paragraph 5.3 of this chapter refers to the arbitration clause.

5.2 Penalties.

A violation of the Regulations invokes the penalties described in article 17. These measures include a warning, a censure, or disapprobation, which are instruments that admonish the agent. In addition, the penalties applicable in more serious situations may be a monetary fine, the suspension and the permanent cancellation from the Agents' Register, which is the most drastic measure.

The Commission has ample discretionary power to ascertain misconduct and apply penalties, but there are some exceptions. The Italian Regulations impose minimum penalties for certain violations, like prohibitions concerning young players, conflicts of interests, or the failure to observe formalities for the admission in the FIGC Register.

The Agent Commission, as disciplinary judge, is empowered to ascertain the violations and to apply the penalties. The disciplinary powers of the Commission comprehend also intervention with precautionary measures if there are important and urgent matters at stake. In any case the agent can appeal such measures to the C.A.F.

5.3 Arbitration clause.

Under article 23 any dispute arising out of or in connection with an agency agreement is subject to arbitration by the Arbitral Chamber, pursuant to the rules of arbitration set forth in Annex B of the FIGC Regulations. The arbitration provision is also included in the forms that must be used for the appointment of the agent.³⁵ Italian football regulators are very keen on maintaining an absolute monopoly over the adjudication of any disputes among its affiliates and members. Football agents' activity makes no exception. It is actually at least doubtful whether it is lawful to impose submission to the judicial bodies appointed and administered by the FIGC. As we shall see, business and trading activities connected with professional football, like that of players agents, should be preserved from unreasonable, pervasive and unjustified restraints imposed by the sports regulators. Whereas FIFA Regulations for the Status and Transfer of Players acknowledge under article 22 "the right of any player or club to seek redress before a civil court for employment related disputes", the same right is not granted by the FIFA Players' Agents Regulations, or by the Italian ones, as it has been reported. On the contrary article 23, fourth paragraph, of the Italian Regulations impose sanctions on the agent (suspension up to six months), players and clubs (a fine of no less than euro 15,000.00) that should file any claim before an ordinary court of law. This is quite clearly an anomaly of the sports regulations, which could and should be challenged before an ordinary court of law, or addressed by the competent market authorities.

Article 22 of the FIFA Players' Agents Regulations deals with national and international jurisdiction³⁶.

According to FIFA, the FIGC Arbitral Chamber should only be competent in relation to disputes between two parties, each registered or affiliated with the FIGC. All other disputes are considered international and subject to the FIFA Players Status Committee. From which it follows, as confirmed by the legal services of FIFA, that such international disputes are subject to the FIFA rules, although this is not expressly stated in the Players' Agents Regulations. This conclusion confirms the proper interpretation of the scope of Italian Regulations, encompassing national and international activity of football agents as stated by article 1, on condition that both parties of the agency relationship belong to the FIGC. Therefore, any dispute between an Italian agent (*rectius*, any agent licensed/registered in Italy) and an Italian club or a player registered in Italy, would follow under the competence of the FIGC Arbitral Chamber, even if it involves an international transfer or negotiation.

Annex B to the FIGC Regulations defines the arbitral procedure under the arbitration clause. A Directive Council governs the Arbitral Chamber. It is comprised of a President, two effective members and two substitutes nominated by the FIGC Federal Council every two years. They are chosen among lawyers and magistrates that have at least ten years of experience or among university law professors. Such office arranges the rules for the organisation of the Chamber and also adopts the relevant resolutions to guarantee the maximum effectiveness of the arbitral proceedings. The Council forms the lists of the arbitrators that may be appointed by the parties consisting of the individuals nominated proportionally by the associations representing agents, players and clubs (the Leagues). The President of the Arbitral Chamber appoints the third arbitrator, chairman of the panel. Disputes whose value is below euro 10,000.00, are submitted to a sole arbitrator, appointed by the parties or, absent an agreement, by the President of the Arbitral Chamber.

Articles 3 and 4 of annex B regulate the arbitral procedure. The petition must be signed by the party and by a lawyer with a power of attorney³⁷, and sent by registered mail/rr to the respondent. It must contain the description of all the facts, their evidence, the legal grounds, the conclusions and the relevant claims. Moreover it must include the election of domicile of the claimant and the appointment of the arbitrator. The petition must be also delivered to the Secretariat of the Agents Commission within ten days of its mailing to the respondent followed by payment of the relevant administrative fee.

Within fifteen days from the receipt of the petition, the respondent can file a statement of defence including possible counterclaims. If the statement contains a counterclaim, the petitioner can respond within five days.

The President of the Arbitral Chamber³⁸ checks the regularity of the introduction procedure, appoints the third arbitrator (chairman of the board) and subsequently schedules the first hearing where, under article 7 of Annex B, the parties must appear personally. At this hearing the arbitrators try to settle the dispute, failing which the case is set for resolution. The arbitrators must pronounce the decision within 180 days from the acceptance of the appointment.

6. Legitimacy of the sportive regulations.

The business of players' agent is strictly regulated by FIFA and FIGC, with reference to both admission in the Agents' Register and the practice of the profession. A person who desires to become an agent must respect of these regulations and accept *in toto* their prescriptions and limitations.

33 See article 22, 1st paragraph, FIGC Players' Agents Regulations.

34 See note 14.

35 See article 11, annex B, FIGC Players' Agents Regulations, which also establishes the duty of the parties to give voluntary execution to the arbitrators' decisions.

36 "In the event of disputes between a players' agent and a player, a club and/or another players' agent, all of whom reg-

istered with the same national association (national dispute), the national association concerned is responsible".

37 See article 3, 2nd paragraph, Annex B, FIGC Players' Agent Regulations, which states that the power of attorney must be in compliance with the code of civil procedure.

38 See article 5, Annex B, FIGC Players' Agent Regulations.

6.1 The FIFA Regulations and the Treaty of Rome.

As already mentioned, in January 2005 the Court of First Instance of the European Communities pronounced a decision concerning the legitimacy of sportive regulations (26 January 2005, no. T-193/02). A French agent candidate, Mr. Laurent Piau, decided to test the regulatory scheme after he apprehended the extensive limitations and formalities imposed by FIFA on the agent profession. He decided to report this situation to the European Commission to verify the compliance of FIFA Regulations with the Treaty of Rome, with particular reference to the freedom of establishment, the restraint of trade and the market abuse (art. 49, 81 and 82 of the Treaty).

The European Commission had received similar complaints by Multiplayers International Danmark and decided to open proceedings against FIFA, with particular reference to: the licensing system; the exclusion of juridical persons (companies); the rules forbidding players and clubs from dealing with unlicensed agents; the request of a bank guarantee in the amount of CHF 200,000.00. Notwithstanding firm opposition to the European Commission procedure, FIFA adopted the new set of rules now in force on 10 December 2000, which was subsequently amended in April 2002. Notably, the new FIFA Regulations reduced the bank guarantee to CHF 100,000.00 and allowed alternatively an equivalent professional risk insurance policy. In 2002 the amendments concerned the right for EU citizens to apply for a license in any EU Country where they are domiciled (art. 2). In light of the new rules and the amendments introduced thereby, the Commission decided to dismiss the proceedings.

Mr. Piau decided to challenge such decision of the Commission before the Court of First Instance of the European Communities. In the opinion of the plaintiff, FIFA is an association of enterprises enjoying a dominant position on the market, and the new FIFA Regulations established by it, as the previous ones, obstruct free competition in the provision of services and the freedom of establishment, thus hindering access to the profession and the market by unlicensed agents as well as economic freedom of licensed agents.

The Court found that FIFA must be considered in fact as an association of enterprises, as it is composed of national associations, which in turn comprise clubs organizing football activity as a business. The presence of a large number of affiliated amateur clubs does not detract from such characterization.

The Court also affirmed that the players' agent's profession can be considered as an economic activity consisting in the provision of services and not so strictly linked to the organization of competitive activities so as to be exclusively subject to sporting regulations.

Notwithstanding these conclusions, the Court deemed the decision of the European Commission correct, to the extent that it appears adequately motivated and, on the outset, reasonable.

The conclusion of the Luxembourg judges might be less tolerant with FIFA and, *mutatis mutandis*, Italian Regulations, were the latter to be the object of a proper judgment pursuant to art. 177 of the Treaty of Rome.

Most likely, to focus on the Italian Regulations, the prohibition to address ordinary courts of law (art. 23) and the imposition of a standard form (art. 10), which completely deprives the parties of the right to negotiate and agree the specific terms and conditions of the appointment, to name only the most obvious abuses, would not pass any serious judicial test of conformity to the Treaty, as constantly applied by national and European courts.

6.2 The FIGC Regulations and Competition Law.

The Italian Antitrust Authority³⁹ has just terminated an investigation on the regulations governing players' agents' activities. This investigation obliged FIGC to initiate discussions with the Authority in order to identify the aspects of the FIGC Regulations, which are in conflict with free competition and, thereafter, provide remedial amendments.

In its decision, announcing the start-up of investigations, and while acknowledging that the sporting field, and, in particular, football, is a special sector, the Antitrust Authority highlighted that any restrictive rules on competition, affecting the economic activities of those involved in the sport-related market, can only be justifiable if they are

aimed at guaranteeing the correct and reliable organization of these sports activities. Said rules must be fairly balanced and must be strictly necessary in order to achieve the relevant aims.

During this investigation, the FIGC submitted a draft of the new text of the Players' Agents Regulations to the Authority. As a consequence, the Authority took into consideration both the regulations currently in force and the draft regulations.

The two main players' agents' associations in Italy⁴⁰, the Players' Agents Commission⁴¹ and the Italian Professional League (L.N.P.)⁴² contributed to the Antitrust investigation. The I.A.S.A. and the A.I.A.C.S. both discussed the matter with the Antitrust Authority, while the Players' Agents Commission, did not limit itself merely to discussion, it also provided the Authority with information and documents on players' agents' activities. The Italian Professional League provided the Antitrust Authority with playing contracts, which were negotiated with the assistance of an agent.

In its final report⁴³, the Authority described the players' agents' market in Italy and highlighted a serious imbalance in competition. Consequently, it illustrated what aspects of the FIGC Regulations contrast with Competition law, what rules shall be modified and which provisions shall be introduced to re-establish the regular course of the sport-related market.

6.2.1 Admittance to the profession of agent.

The Authority was found that FIGC rules, on licensing of football agents creates unreasonable obstacles to the admittance of new agents to the market.

As explained before⁴⁴, besides passing the FIFA exam, in order to obtain the FIFA license, the applicant must also be admitted to Players' Agents Register. The Authority believes the Register to be an unnecessary additional restriction for the applicants who have passed the FIFA exam. In the Authority's opinion, "the institution of the Players' Agents Register does not seem justifiable by reasons such as the protection of the regular course of the market or the safeguarding of agents' clients"⁴⁵.

A further, albeit reasonable and justified, restriction to the access of new agents to the market is posed by Article 8. In compliance with Article 8, the applicant must obtain professional liability insurance coverage, issued by a first-class "Italian" insurance company. The FIFA Regulations have established the same provision in order to guarantee agents' solvency if clients claim for damages. The Authority has considered that this obligation is not in conflict with Competition Law, as long as it does not discriminate insurance companies of other EU or EEA member states, policy from any EU-EEA insurance company. The FIGC has just introduced this amendment to the draft regulations.

6.2.2 Freedom of contract.

The report continues with the analysis of the rules governing players/agents contracts⁴⁶. The Authority has pointed out that the FIFA Regulations have established only a few binding clauses, which could be supplemented by the parties in compliance with relevant national labour laws. On the contrary, Article 10 of the FIGC Regulations has prescribed the use of a standard form, denying to the parties any freedom to contract. This "brutal" limitation of the possibility to negotiate and agree specific and additional terms was deemed illegal by the Authority, because "an agent could use only few restricted variables to persuade a player to choose him rather than a rival"⁴⁷.

The exclusive character of the appointment, imposed by the FIGC

39 See Italian Antitrust Authority, decision no. 14156 dated March 31st, 2005 and Report IC27, published on www.agcm.it.

40 See note 14.

41 See article 22, the FIGC Players' Agents Regulations.

42 All the clubs, those playing in "serie A" and "B" competitions, are associated in the Italian Professional League (Lega Nazionale Professionisti), which has its

registered offices located in Milan. See Italian web site www.lega-calcio.it.

43 See Italian Antitrust Authority, Report IC27.

44 See paragraph 3.1.

45 See Italian Antitrust Authority, Report IC27, page 23, paragraph 63.

46 See paragraph 3.2.

47 See Italian Antitrust Authority, Report IC27, page 41, paragraph 129.

form, also causes a negative effect on competition. Italian clients cannot sign a non-exclusive contract with their agents, while the FIFA Regulations grant this option. In the Authority's opinion, the FIGC Regulations shall admit the option granted by the FIFA, because the competition between two or more agents, equally appointed, can provide benefits to the clients. Moreover, "the absence of an exclusive clause should contribute to differentiate agents' activities, supporting agents' specialization"⁴⁸. For example, a player may decide to appoint different agents to different territories, or club. Also, a player may benefit from specialized assistance in relation to the licensing of his image rights, appointing a second agent in that respect.

6.2.3 Preservation of the relationship between a player and his agent.

Some of the rules contained in the FIGC Regulations are clearly directed at preserving the relationship between a player and his agent. In particular, Article 12, third paragraph, of the FIGC Regulations has established that "an agent cannot approach a player who has appointed another agent in order to substitute the competitor until one month before the expiration of their agreement". An agent who does not fulfil this provision shall be subject to serious disciplinary penalties. This restriction is not justified by a valid reason. However, the Authority has noted that, this protective measure has been removed from the FIGC proposed new Regulations.

The purpose of discouraging early termination of the player/agent contract is even more evident in Article 11 of the FIGC Regulations, which states that in the event player terminates the agency contract before its natural expiration the agent is entitled to receive, in absence of a liquidated damages clause, a pre-determined indemnification proportional to the category of the player or, if higher, a 5% commission to be calculated on any new playing contract the player may enter within the term of the original agency contract.

The Antitrust Authority also censured Article 13, fourth paragraph, of the FIGC Regulations, which obliges a player to pay his agent even if he does not use the agent's services during negotiations. This kind of payment, qualified as indemnification, amounts to 5% of the player's gross, annual income, or to the minor percentage agreed. The Authority did not find any legitimate reason to sustain the mandatory character of this provision.

6.2.4 Limitations imposed on the agent's activity.

Article 3, seventh paragraph, of the FIGC Regulations states that an agent can only contact a player, in order to assist him towards a new employment during the six months prior to the expiry of the playing contract. This regulatory restriction derives from the FIFA Regulations, article 14 c)⁴⁹. The aim is to protect contractual stability between players and Club, so that the regular course of the championships is not disturbed. The Authority has pointed out that this regulation reasonably safeguards a recognised interest of the sports regulations, and, therefore, can be justified. The rule is, at best, ineffective. It is hard to see how the "destabilising" purpose of the agent's appointment can be proved. A player may require agency services during the course of his employment contract for many legitimate reasons, like the intention to extend or renew his playing contract.

6.2.5 Conflict of interests.

The Authority has taken note of the regulation currently in force⁵⁰ concerning the conflict of interest: we make reference to the rules concerning situations where the agent's relative or spouse holds a management position in the club negotiating with the agent's player/client. They have noticed that this issue is not dealt with by FIFA rules. In the Antitrust's opinion the current remedies are inadequate to impede the agent performing his professional activity in a conflict of interest. According to the Authority, a conflict of interest is present "when the commitment required for carrying out a given activity fails because of the contextual representation of conflicting interests"⁵¹. Compulsory information of the parental or family bondage, an instrument often used in connection with express or implied for the purposes of releases and waivers, is unsuitable in the football context. Informing especially a potential client about the

existence of an important family tie, could cause an effect contrary to that for which the regulation has been introduced, because "players may be persuaded that an agent with family ties within a club, can procure them better contracts"⁵². Therefore, the disclosure imposed by the Regulations "allows some agents to get a competitive advantage"⁵³.

The Authority suggests plainly to consider the existence of possible family ties, at least within the second degree, as a cause of incompatibility. The new Regulations should, therefore, introduce a provision which prohibits the relatives of Club owners and managers from practicing as agents and, at the same time, it should prohibit relatives of players' agents from holding these positions within a Club.

The Authority has taken into consideration other possibilities of conflict of interests, which do not depend on family ties. These situations occur when, during the negotiation, an agent provides his services to both the player and the club involved, or when, independent of any specific negotiations, an agent assists clients in different categories (i.e. players, coaches, clubs or team managers). With reference to the first case, the Authority has considered that the new text of the FIGC Regulations should expressly forbid agents from assisting both parties. With reference to the second case, the Authority has pointed out that an agent, who is appointed by clients who belong to different categories, can benefit from an unlawful advantage over his competitors. It is acknowledged that "the coach has an essential role in the players' transfer decisions", therefore, an appointment signed by a coach favours "the transfer of players represented by the same agent"⁵⁴. In other words "a large diversification among an agent's clients increases the risk of a conflict of interest"⁵⁵.

The adoption of a rule that forbids agents from assisting players and coach who belong to the same club was suggested. Alternatively agents may be required to specialize their activity, choosing only one category of clients (i.e. players or clubs or coaches).

6.2.6 Registration of contract and data protection.

Under 10 of the FIGC Regulations agency must be registered with the Players' Agents' Commission to come into force⁵⁶. This requirement raises concern about protection of privacy and confidentiality. In particular, sensitive data are made available to the players' agents Commissioners, among whom are players' agents, who may have access to information concerning the activity of their competitors. In addition to recommending adoption of adequate measures to restrict access to the contract's provisions and data, the Authority has suggested that players' agents cease to be appointed as members of the Players' Agents Commission.

6.2.7 Arbitration clause.

The Antitrust Authority has also raised the question relating to compliance of the mandatory arbitration clause⁵⁷, contained in the FIGC Agents Regulations, with Competition Law. Independent of the validity of such imposition, the consequences of its violation, ranging from suspension to radiation from the Register appear disproportionate and unjustified.

6.2.8 Findings.

On the whole, the Antitrust investigation conducted on the Italian players' agents market has highlighted a serious imbalance in competition. This situation has been provoked or made possible by the

48 See Italian Antitrust Authority, Report IC27, paragraph 131.

49 See article 14, FIFA Players' Agents Regulations: "A licensed players' agent is required: c) never to approach a player who is under contract with a club with the aim of persuading him to terminate his contract prematurely or to flout the right and duties stipulated in the contract".

50 See paragraph 4.2.

51 Italian Antitrust Authority, Report IC27, page 31, paragraph 93.

52 Italian Antitrust Authority, Report IC27, page 28, paragraph 80.

53 Italian Antitrust Authority, Report IC27, page 28, paragraph 80.

54 See Italian Antitrust Authority, Report IC27, page 28, paragraph 82.

55 See Italian Antitrust Authority, Report IC27, page 28, paragraph 83.

56 See paragraph 3.2.

57 See paragraph 5.3.

FIGC Players' Agents Regulations. As described above, the FIGC Players' Agents Regulations are issued by the FIGC in consideration of the guidelines set forth in the FIFA Players' Agents Regulations. Nevertheless, a comparison between the two sets of regulations reveals that the FIGC has departed from FIFA's principles in respect of several important parts of the agents' rules. Quite surprisingly, FIFA has not felt the need to object to any of the clearly anticompetitive dispositions of the Italian Association, notwithstanding its statutory duty of supervision and the specific power to convalidate national players' agents' regulations.

As the current Regulations appears certainly useful to protect and preserve a restricted domestic market, the licensed agents reaction comes as no surprise. IASA⁵⁸ has recently published a press release, which "communicates serious concerns about the Antitrust Authority's report, due to its negative effects on the future of agent's profession and for the "soccer system" in general"⁵⁹. In the IASA's opinion, the complete liberalization of the market could lead to a general reduction of agents' professionalism, as it would reduce or eliminate.

On the other hand, while sharing the Antitrust's concern about the

conflict of interests, IASA disagrees with the remedy proposed, because foreclosure of a profession or activity in consideration of an agent's family ties, would violate the Italian Constitution.

Apart from the reactions of the operators on the market and of the agents' associations, it is clear that the Antitrust Authority's intervention is fundamental in reorganizing the players' agents sector and to set indispensable limits to the power of sporting institutions. The players' agents profession cannot be held exempt from the application of Competition Law, just like any other economic and lucrative profession.

It is now left to be seen how in the near future the new Italian Regulations on Football Agents, currently under discussion, will reflect the recommendations of the Antitrust Authority. The International Sports Law Journal

⁵⁸ See International Association Soccer Agents, www.iasaweb.it.

⁵⁹ See IASA Press Release, May 2006, on www.iasaweb.it (in Italian). The IASA has also published an autonomous mani-

festo that explains the principles, which, in its opinion, should be incorporated in the new text of the Players' Agents Regulations.

SPAIN

by José M. Rey*

1. Introduction

1.1. Sport in Spanish law

Sport is a physical activity engaged in as a game or as a competition which is governed by rules established by various legislative bodies, which rules aim to protect the sphere of sports and its future development.

The Spanish Constitution of 1978, which has priority over all other laws in Spain, in Article 43.3, which is part of Chapter III entitled "Governing principles of social and economical policy", establishes the right of every citizen to practise sport or any physical activity as well as a duty for public authorities to encourage the organization of sporting activities and to monitor how these are practised. It is worth noting that in 1978 sports law was already deemed significant. Obviously, the legislator already understood the necessity of regulating sport not only as exercise, but as a professional activity and an activity providing public entertainment. This conception of sport has shaped the new legal meaning of sport in recent years and has led to new views on how to regulate sport.

Sport is commonly perceived as a key element in the welfare of countries, not only because it represents a basic need for human health, but also because it is an excellent means of creating relations between people, both nationally and internationally.

If we consider what sport means in Spain, we can understand the importance of specific laws to regulate all matters that may play a role in this extensive field. As a consequence, the Sports Act (Law no. 10/1990) was established on 15 October 1990, which includes and further elaborates all the legal precepts related to sport included in other Spanish regulations. The Act deals particularly with sport at a high level, and defines the subject in its "Preliminary Comments" emphasizing in Article 6.1 the significance of top level sport for the country as an "essential element for sportive development, as an incentive for minors, and for its representative role" when practised at official events among all five continents.

The Sports Act establishes sports legislation in general terms, but there are many more ways of regulating sport depending on the subject-matter dealt with, for example by means of the different Sports Laws of the Autonomous Regions in Spain, of Ordinance no. 1835/1991 concerning the Spanish Sports Federations, of the Ordinance concerning Doping Controls or of Ordinance no. 1412/2001 of 14 December 2001 concerning sports stock companies.

As a brief conclusion to this introduction it can be said that sports law is a fast expanding and developing area of legal debate and inquiry. It is both an area of significant practitioner activity and of increasing academic analysis. The private law rules governing the national and international sports world itself form the backbone of sports law. However, sports activities are as much influenced by ordinary rules of public law. The complexity of sports law thus results from interconnected disciplines and sources.

1.2. Sports law

Sport permeates all areas of life and involves multiple business, legal, political and social issues. For example, professional sport as show business has grown at such a rapid pace that nowadays it represents a highly influential activity exerting great appeal from a cultural, social and economical perspective.

As a result of the progressive commercialization of professional sport, the need for regulation of the different types of relations in this field has become increasingly evident. Such relations may be between the various sports associations that organize the different competitions at professional level, as well as relations between the clubs and these associations and relations between players and clubs (which will depend on the legal form of each individual club) and even relations which all of these actors may have with player's agents, which subject will be dealt with further on.

The same holds true for any disputes that may arise between these actors. Due to the broad field covered by sports in terms of the millions and millions of fans that it brings in, and all the financial and marketing operations it involves, it is obvious that the words 'sport' and 'law' must be somehow brought together.

As a consequence, a branch of law called sports law is gradually emerging, not as an independent legal field, but as a set of multidisciplinary rules that regulate all aspects related to sport in general terms, and especially in the field of professional sport. These rules may originate in almost any legal field, from administrative law to labour law, from commercial law to private law. A perfect example to illustrate this is the position of players vis-à-vis their clubs, as obviously players are not ordinary employees and the clubs are not ordinary

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companies, given that the Sports Act in Article 6.2 provides that “the public authorities are responsible for providing an educational system for top sportsmen and for their complete integration in society”. Another example is that disputes in sport and athletes themselves are subject to a separate sports jurisdiction which is unconnected to the ordinary system of courts of justice.

In that respect, sports cannot be equated with ordinary work activities, due to the fact that players are not like ordinary employees and clubs are not like ordinary enterprises. Both have special features that allow them to establish multidisciplinary relationships between several legal fields, namely public law, labour law, administrative law and commercial law, which each regulate different aspects of sports.

2. Sports agents

2.1. Concept and comments

In defining the term ‘agent’ we encounter several problems connected with the nature of agency and the activities performed by agents. To begin with, it should be noted that it is difficult to formulate a precise definition of the nature of players’ agents activity due to the huge variety of circumstances and elements that can be combined. However, it is evident that the agent, regardless of whether he/she/it is a natural or legal entity, always operates in the market, attempting to negotiate deals and mediate between the seller and the purchaser, in our case between the players and the sports clubs. Although it is not possible to regulate these qualities in a general manner through sports law, we still find important specifications in the rules as to who can participate in this field, for example in the Player’s Agents Regulations which define an agent as a natural person, who, for a fee, on a regular basis introduces players to clubs with a view to employment or introduces two clubs to one another with a view to concluding a transfer contract (Art. 1).

If we go back to the origins of the concept of agency, we find that the term agent is used mainly to refer to a concept imported from Anglo-Saxon law and has been adapted to represent the figure of the sports agent. Nowadays, the agent plays a mediating role between the parties, but without the impartiality that in Spain distinguishes a mediator from other professionals. The reason for this is the commercial nature of the relationship between the player and the agent which induces the latter to act on behalf of the former, who is contractually his/her client, in exchange for remuneration that mostly consists of a percentage of the total economic value of the deal made, which from now on will be called ‘commission’.

As we can see, depending on the activity carried out and on other elements such as the legal status provided or the remuneration agreed upon, we may be talking of different contracts and therefore of different parties.

In any case, a very apt definition that accurately reflects the agent’s duties is the one contained in the second paragraph of Article 1 of the FIFA Player’s Agents Regulations (hereinafter referred to as FPAR) which states that “The player’s agent is a natural person who, for a fee, on a regular basis introduces a player to a club with a view to employment or introduces two clubs to one another with a view to concluding a transfer contract”.

Sports agents’ activities have widened the scope of the agency contract. These days, the agent for example often handles the public relations of his/her client and in some large sports agencies, agents deal with all aspects of a client’s finances connected to sports, from investment to taxes.

The Player’s Agents Regulations regulate these contracts under which players and clubs can make use of the services of a player’s agent during negotiations with other players or clubs provided the player’s agent possesses a licence issued to him by the national association in conformity with Article 2.

2.2. Specifying the tasks

As we have seen, defining an agent’s field of activity is quite a complex task due to the immense variety of activities which agents may perform, although it is at least clear that his/her main activity is to mediate between the player and the club with a view to concluding a

contract between them. From this task, we may derive another function of the agent which is widespread in Spain and worldwide, and this is his/her function of providing professional advice to the player. This task can be divided into several dimensions, as we are not only talking about advice concerning the different aspects involved in the terms and conditions of the contract, but also about advice on tax and financial matters throughout the duration of the contract. Examples of these activities are registration, recruitment, renegotiating and changing agents, personal services to and counselling of clients, and preparatory activities such as tryouts, personal training and marketing. All of these activities must be performed in conformity with prevailing ethics.

In accordance with this economic function, we can see that if we take the example of an international athlete who is known worldwide, the agent acts as his/her promoter and as the manager of the merchandising businesses that the player’s fame has given rise to. In this context, mention should be made of a subject that generates huge profits in the sphere of professional football, namely image rights, which includes advertising contracts, relations with the media, public appearances, etc. as it is the agent who in this example negotiates and assesses the benefits of TV appearances or of using the player in advertising for a specific product.

Finally we must include as one of the agent’s functions his/her duty to provide sportive and technical guidance in the decision to accept one offer or the other. This decision requires a thorough examination of the offering team, for example an analysis as to the capabilities of the team’s coach and his/her characteristics, an analysis of the player’s competence to play in a specific position, the means available to the team and its opportunities for victory, and many more circumstances that cannot always be adequately assessed by the player him/herself and that can influence his/her professional career.

All these duties that define more precisely the parameters that govern the relationship between players and agents are often regulated in a contract between them which is concluded on the basis of contractual freedom. This is an important point, because it is in this contract that the parties must define the limits of the duties and powers of the agent, the form and quantity of the remuneration to be paid to him/her, the exclusivity of representation, and many more aspects.

We must therefore analyze the contract both in general terms and as adapted to the situation of players and agents.

2.2.1. A contract under Spanish law: requirements, validity

The Spanish Civil Code (SCC) regulates all matters pertaining to contracts in Articles 1254 to 1314 of Title II. First of all, according to these provisions, a contract is a bilateral or multilateral juristic act resulting from a free meeting of minds between the parties concluding the contract, in which certain matters are stipulated and from which legal consequences follow.

One of the main principles underpinning all Spanish private law is that of the freedom of contract, which allows the parties to negotiate the terms, clauses and agreements as they see fit, provided that they are not contrary to the law, morality or public order. Contracts concluded between professional players and their agents often include, as we have seen, clauses related to money transfers (the agent’s remuneration), exclusivity (when the agent has 100% of the representation rights), or to future legal obligations (renewal of the contract in case certain objectives are achieved). A contract becomes effective “from the moment that one or more persons consent that obligations have arisen between them” (Art. 1254 of the SCC), for which reason one of the main requirements for the validity of contracts is “mutual consent” that allows the parties to execute the obligations agreed in the document. As to requirements of form, Spanish law gives the parties “the freedom to use the form preferred, as long as this does not affect the validity and effectiveness of the contract, except in certain concrete situations specified by the law” (Supreme Court, 30 September 1998). Initially therefore we might conclude that a player and an agent could for example conclude a contract verbally and that this would be legal. However, if we examine more closely the concrete situations specified in Article 1280 of the SCC, we find that it is mandatory to

establish the contract in writing if the obligations that are to be fulfilled in value exceed the amount of 1500 Spanish pesetas (9 euros). Given the sums of money that are involved nowadays in professional sport, the remuneration received by the agent will always exceed nine euros, and player-agent contracts must therefore be in writing. There are many kinds of contracts, and if we examine the player-agent contract in the light of the classification under the SCC, it is possible to list several characteristics elements. Therefore, a contract concluded by a professional player and an agent is:

- bilateral: namely between one player and one agent;
- onerous: both parties stand to benefit from the contract;
- causal: it not only includes the promise of fulfilling an obligation, but also the agreement as to the legal intention with which they give and receive that promise;
- consensual: effectiveness is subject to the existence of agreement;
- of constant operation: its legal effects operate periodically.

A very important element of the player-agent contract is that of representation and its legitimacy. When agreement has been reached and the contract has been signed, the agent begins to carry out his duties in order to obtain a contract for his/her player. However, can the agent sign documents on behalf of the player and by that act produce the same effects as if the player had signed him/herself? It is not possible to answer this question with any precision, as the answer depends on what the parties have agreed, but in practice, in most agent-player relationships the power conferred by the player is absolute, and the agent's signature is therefore even often required.

One example of the above concerned a case in 2000 involving the player Mr L. Figo and his agent Mr J. Veiga. Mr Veiga had signed an agreement with the then candidate club president, later winner of the elections to Real Madrid's presidency, Mr F. Pérez. They agreed that if Mr Pérez was indeed elected president, in exchange for remuneration, Figo would join the white team from the moment that Pérez had paid the cancellation fee under Figo's present contract (sixty million euros payable to FC Barcelona). This meant that Figo had to move from his club, FC Barcelona, to its historical rival Real Madrid. Another important example is the following. In Italy, recent legal proceedings forced the relegation from the A series to the B series of five teams of the Calcio, among which Lazio of Rome, Juventus de Turin and Fiorentina and the agents are trying their best to obtain new contracts and a better competitive future for their clients, in this case, footballers.

In the next few sections, we will attempt to further define the player-agent contract, considering the various possibilities which Spanish law offers.

2.2.2. Agency contract: Law no. 12/92

The agency contract is regulated in Law no. 12/1992 of 27 May 1992 concerning the Agency Contract. According to this Law, an agent is "a natural or legal person who in exchange for remuneration undertakes to promote commercial acts and operations on account of another, or to promote and conclude these on behalf of another as an independent intermediary, without assuming the risk of those operations". In practice, the agency contract is used by persons who act in representation of third parties in return for a percentage of the economic value of what they have brought about.

Another relevant fact concerning the agency contract is its basis in Directive 86/653 EEC of 18 December 1986. As opposed to other European countries, Spain decided to enact specific rules on the agency contract, where the other Member States included the agency contract in their Commercial Codes. In Spain, Article 1 of Chapter 1 of Law no. 12/1992 explains the concept of the agency contract. The main difference between ordinary agents and sports agents is that agency contracts may be concluded by both natural and legal persons, but according to the Sports Agent Regulations, footballers can only be represented by natural persons. Another significant difference is that ordinary agents do not require authorization, whereas sport agents need the authorization of both the client and the country in which the contract is to be performed.

If the player's performs his/her duties under this kind of contract, he has to generate sufficient publicity for his/her player in a correct manner and the right to conclude business deals on behalf of his/her player. An interesting aspect of Law no. 12/1992 is that it is possible that each party may in fact consist of several persons, in which case prior consent is required from the other party for the representation of more than one player, or to have several agents.

Article 11 of Law no. 12/1999 concerns the remuneration of the agent which will be a "determined amount or commission, or a combination of both. If no amount is stipulated in this way, the remuneration will be determined having regard to the commercial usages of the region where the operations take place and, lacking these,, depending on the particular circumstances of the transaction". If the remuneration consists of a commission, this becomes payable immediately after the conclusion of the transaction brought about by the agent's intervention, and will remain so throughout the duration of the contract. The exact moment of payment may be agreed, but payment may never take place after the last day of the subsequent month of the term in which the transaction was concluded. In summary, the agent's remuneration can be fixed or variable or a combination of the two. He may be compensated through a special indemnity when contributing new clients to the business of the principal or significantly increasing the volume of work performed for existing clients.

All parties may demand a written copy of the agreement, and as to duration, it is important to note that the contract can be for a fixed period or for an indefinite period, although the FIFA clearly stipulates in Article 12 of the FPAR that the contract must not exceed the maximum period of two years (after which it is renewable for the same period of time).

The agency contract seems to inspire professional relations, and appears to be well suited for establishing a stable and continuous relationship between the parties, as it does not concern isolated commercial acts, but a succession of these throughout the duration of the contract. It would therefore appear to be a successful option for players and agents to develop their trade relations with complete guarantees and security.

2.2.3. Commission contract: mercantile commission

The Spanish Commercial Code in Articles 244 to 280 describes the commission contract as a concrete, consensual and informal commercial act, in which the commission merchant (the agent) executes an assignment for the principal (the player), or for him/herself. Here the main duty is to carry out the task as has been assigned, carefully and diligently following the instructions received. After completing the task, the agent must be paid for his/her work, and never before the end of the assignment, but if he/she receives money from the principal at the beginning of the relationship, such money shall be used in full to cover costs, with a detailed report of the amounts received and the use to which they were put being required.

As opposed to the agency contract, in the commission contract the agent "is responsible for any risks occurring during the transaction", which means that he/she is liable for the money and the goods in his/her possession. The only exemption from responsibility here is if he/she is not to blame for any damage to or the loss of goods.

As we can see, the commission contract expires when the transaction has been concluded, and for this reason does not appear suitable for the player-agent relationship, especially not where agents are concerned, as it would not be profitable for them only to represent a player for one deal, as they require a long-term relationship that may provide them with some security. However, many agents play this role alongside their principal activity, not only to obtain a certain profit, but also to promote good relations with other clubs and professionals.

Finally, another characteristic that makes the commission contract special is that the principal is allowed to cancel it unilaterally whenever he/she so desires without giving reasons or explanations. Could this be a viable option in today's professional sport? Obviously the answer is no, as the parties always wish to include some security, if only to guarantee compensation for this kind of case, especially the agents.

After analyzing this form of representation, we may conclude that this is not what players and agents are looking for, although the commission contract might be suitable for third persons who do not represent any of the parties, but who still have an interest in the negotiation.

2.2.4. Mediation contract

This mediation contract is a consensual and bilateral contract where the mediator undertakes to notify to the principal (the player) any possibilities to conclude a deal with a third party, or offers his professional services as a mediator.

The most typical aspect of this contract is that the mediator can perform these activities regularly or as isolated acts. Mediation is considered a profession whereby persons act as independent mediators in negotiations without having “any links with the contractual parties” (Supreme Court, 10 January 1922). In the same way, the mediator is not responsible for not reaching a successful agreement between the parties, as this is not his/her job, but depends on what the parties do or do not wish to agree to or concede.

Another interesting element concerns remuneration, which the mediator will only receive if he/she performs his/her assignment correctly, i.e. carries out the necessary research and introduces clients to the right persons, etc.

The main duty here appears to be making every effort to provide a client with a meeting with the right person with whom to conclude a contract. If we consider this kind of relationship in the light of professional sport, mediation seems to be suitable only as an additional activity complementing the agent’s main activity.

In performing his/her duties, the agent is obliged to maintain absolute confidentiality concerning the assignment received, as otherwise serious damage could be done to his/her client, for example, if the instructions given become public, a transfer could become more expensive, or the present club of the player could adopt harmful measures against him/her, such as no longer including him/her in the lineup (this happened in the case of the transfer of Christian Karembu from the Italian club Sampdoria to the Spanish club Real Madrid). Such problems would result in a loss of remuneration for the agent.

2.2.4.1. Mediation in Labour Law: Ordinance no. 1006/95

Mediation in labour law may be awkward in the case where employee representatives conclude a labour contract with a company, because according to Article 7 of the Labour Code “representation is only permitted when the employee is between sixteen (minor) and eighteen (adult) years of age, and therefore requires the authorization of his/her legal representative”.

In Article 16.2 of the Labour Code and more specifically in Ordinance no. 1006/1995 of 26 June 1995 which regulates the special labour relations of professional sportsmen, it is stipulated that mediation for profit is not allowed, and for this reason if the player and the sports club are linked by an employment contract, neither the agent’s activity nor any contract concluded through his/her intervention would be valid. Another element worth bearing in mind is the financial and commercial information which some agents supply to their players, especially agents who represent world-famous players that generate great interest among the fans and the media. As these functions are not covered by a labour contract, the mediation of an agent in this kind of activity would be perfectly valid.

Returning to the issue of labour law and sport, if mediation by an agent is legally not permitted, can the sports clubs or sports stock company refuse to pay the agent the commission agreed? This would appear to be the case, however, if the agent decided to bring a claim to recover his/her remuneration, it would depend on the court before which this claim is brought. Different conclusions might be reached depending on whether the claim is brought before the Labour Courts or the Civil Courts. If the matter falls within the jurisdiction of a labour court and the remuneration is included in an additional clause of the labour contract (as it has been in many sports for a long time), the court would probably reject the agent’s claim. On the other hand, if the matter falls within the jurisdiction of a civil court, it would be

necessary to prove the agent’s participation and the agreement reached in terms of remuneration. If the proof is sufficiently convincing, the court will probably uphold the agent’s claim.

This issue is different in cases of agents representing athletes who play individual sports (tennis, motor racing, etc.) as it would be quite difficult to consider the agent as a person working on another’s account, or in cases where apart from the labour contract a commercial contract also exists in which the transfer of image rights is included. This latter case can become quite polemical, due to the existence of two contracts effective between the same parties, with identical duration, in the same place and at the same time. A problem could also occur from a labour law point of view where any remuneration obtained from the player’s activity must be considered as part of his wages. At present, the connection with labour law is an extremely delicate issue, and it is to be hoped that future case-law will soon put an end to the confusion.

Article 83 of Ordinance no. 1006/1995 concerns mediation. Mediation can be applied in certain prescribed cases or upon agreement by the parties. In either case the minimum requirements must be fulfilled. The aim of mediation is to avoid legal action and to resolve the dispute as quickly as possible and at minimum cost for the parties. If however a party fails to attend the mediation, the mediation is terminated and court proceedings will be started. The court then also first attempts mediation and will inform the parties that the rights and obligations established in the process will be binding. In some cases, it is not possible to establish an agreement between the parties. In such cases, the mediation will end immediately and the next step will be taken, i.e. the starting of ordinary court proceedings (Article 85).

2.2.5. Doctrinal position: ST 73/2002

Sophisticated legal doctrine considers the activity of agents as “possibly illegal”, not only because of the legal precepts contained in so many Spanish laws, but also due to the distortion that it can cause in the labour market, as regular and permitted intervention of these agents in any deal or transfer can “considerably affect the freedom to choose one’s own employment for this special category of workers”.

The Provincial Court of Badajoz in case no. 73/2002 decided similarly by considering in ground 3 that “the undoubted damage that this activity does collectively speaking to the labour market in professional sport, as a consequence of possible inflation created by the simple economic interests of some agents and managers, causing obstacles to the desired movement of workers as well as huge increases in salaries, wages and cancellation clauses, not forgetting the respective commissions which increase these already high figures even further”.

However, one positive aspect alluded to in this judgment was that the agent’s activity may benefit the player individually as the agent’s actions “will possibly raise the athlete’s value, offer the possibility to consider job offers not only at a national level, but also at an international one, and finally will be of help and advice to youngsters”.

Therefore, although mediation for economic purposes is legally not permitted in sport, it is actually widespread and accepted due to the fact that athletes are not considered to be subject to the ordinary courts, but to sports courts.

2.2.6. Conclusions

If we consider the socio-economic reality, the fact is that hardly any transfers are made without the interference of an agent. However, not much legislation refers to agents in the world of professional sport, which is regulated by a complicated mixture of international sport associations’ internal rules and State and autonomous regions’ rules.

The world of sport revolves around sportsmen, who delegate economic decisions to other professionals who together act as colleagues in the process of movements in sport. However, given all the legal concepts described in the sections above, the option best suited to the figure of the agent seems to be that of an intermediary, although it will remain important to consult the actual contract signed between the player and the agent in each individual case in order to define their relationship.

In spite of the ambiguity and the wideness of the field, we believe that until Spanish case-law and doctrine have delved more deeply into these issues, the best name for this figure is agent, as a promoter with a view to concluding a contract.

3. Licence

At a meeting on 10 December 2000, the FIFA Executive Committee adopted the FPAR, with the aim of regulating the profession of the player's agent who arranges the transfer of players within a national association or from one national association to another. Through these regulations the agents acquired the possibility of developing their activities in total freedom, and the players acquired the possibility of calling upon their services during negotiations with other players or clubs.

As the first requirement for being allowed to carry out this activity, the agent must be in possession of a licence, except when the agent acting on behalf of the player is a parent, a sibling, or the player's spouse, or if he/she is legally authorized to practise as a lawyer in conformity with the rules in force in his/her country of domicile.

3.1. Requests: applications, applicants, requirements

Any natural person wishing to act as a player's agent shall send a written application to the national association of the country of which he/she is national, i.e. in Spain: to the Spanish Association of Player's Agents (hereinafter referred to as AEAF), or if he/she lives in the territory of the European Union, to the country in which he/she has his/her legal domicile.

According to point 3 of Article 2 of the FPAR, "only a natural person may apply for a licence", and these persons must have an impeccable reputation and recognized prestige in their professional areas, but may not be a member of other confederations, clubs, associations or the FIFA itself. These requirements are extremely important as in their absence the national association will reject the application.

If an application is officially rejected, the applicant may send it to the FIFA Players' Status Committee for a second examination, and if it is rejected again, the applicant is not allowed to reapply to the national association concerned for the next two years. On the other hand, if the application is correct in terms of form, the agent can move on to the next stage.

In Article 2 of the FPAR the issue of the licence is dealt with. This provision states that "Any natural person wishing to act as a player's agent shall send a written application to the national association of the country of which he is a national or if he lives elsewhere, to the national association of his country of domicile provided he has lived there constantly for at least two years".

3.2. Exam: preparation and content

This is the second stage in obtaining the licence, and consists of a written exam prepared by the FIFA together with the AEAF, with the FIFA having established that March and September will be the months in which the exam can be sat.

The exam is taken in the head office of each national association and in terms of contents requires the following knowledge:

- knowledge of football transfers;
- knowledge of private law (the law of persons and contract law).

The exam consists of 20 questions of which 15 deal with international rules and 5 with national legislation (prepared by the AEAF).

Candidates who score the minimum amount of marks required or over will immediately be informed that they may proceed to the next step which consists of taking out professional liability insurance with an insurance company in the country of which he/she is a national or where he/she is legally domiciled. If the candidate fails the exam, he/she will be informed of the next opportunity to retake it.

As stipulated in Articles 6 and 7 of the FPAR, the insurance is taken out in order to cover possible damage caused to players, sports clubs or others as a result of the agent's disloyal conduct. The policy may also be substituted by an amount of money deposited as a guarantee for such eventuality.

3.3. Licensing

After completing the steps referred to above, the candidate will be required to sign a Code of Professional Conduct as a promise that he/she will carry out his/her activities correctly and having due regard to the Code's principles. The Code must be regarded as an implied declaration on the part of the FIFA that it aims to provide agents' activities with a background of transparency, honesty and impartiality. After this, the AEAF will issue a licence to the candidate.

3.4. Validity

Once the agent is in possession of the licence, he/she is authorized to carry out his/her activities worldwide and for an unlimited period. Of course, the agent will not be allowed to perform any transactions if he/she has been given a sanction or has been banned by the FIFA or the AEAF.

3.5. Compensation

If a lawsuit filed against an agent by a player, a club or another agent is successful, both the FIFA and the AEAF have a system of compensation to indemnify the injured party. Compensation is paid from the insurance policy taken out by the player's agent or from the guarantee, which must also be extensive enough to cover any claim filed during its validity, but payable after its expiry.

The guarantee must always be kept at the same level, which means there is a duty to restore it to its original value once a deduction has been made. However, it is not necessary to maintain it at the level of the highest possible compensation.

3.6. Expiry

An agent's licence will only be withdrawn if the FIFA Executive Committee so decides as a consequence of a disloyal act or attitude of the agent going against the Code of Professional Conduct.

However, if the agent voluntarily decides to cease professional activity as an agent, he/she must return the licence to the AEAF which will inform the FIFA of this so that the agents list can be updated accordingly. As regards the insurance, this will only be cancelled after the agent has left the profession but without prejudice to claims filed after this date concerning conduct which occurred during the time when the insurance had effect.

4. Licensed agent

The agent in possession of a licence is authorized to carry out any transaction worldwide, not only with players, but also with sports clubs, for which agents can even act as managers and legal advisors. An important aspect is that agents are free to organize their activities as they see fit, i.e. acting individually or as a company (Art. 13 of the FPAR) provided that if they do organize themselves collectively, their employees will only be allowed to carry out administrative tasks, as representation duties are to be exclusively performed by the agent.

4.1. Rights

When dealing with a player or club, there are several rights that all player's agents have. These are the following:

- to contact any player who is not under contract;
- to represent any player or club that requires his/her services for any negotiation;
- to take care of the interest of his/her client.

These rights are thoroughly elaborated in Article 11 of the FPAR. Other specific rights, such as the right to remuneration, exclusivity, or compensation in case of cancellations, will be examined in section 4.3 of this Chapter concerning the contract concluded between the player and the agent.

4.2. Obligations

This field is extremely wide and in delimiting it we must therefore take into account several elements, such as the contract between the agent and the player, the contracts concluded on behalf of the player, the national legislation of the country that issued the agent with a licence, or the European rules connected with this subject.

Without going into the specific obligations deriving from each relationship as described above and summarizing the elements already listed above, it will suffice to state that the approach which an agent should follow when representing a player must include the following points:

- always adhere to the statutes and regulations of the AEAF and the FIFA when negotiating and concluding a transaction;
- never approach a player under contract;
- represent only one party's interests in the negotiation;
- supply the AEAF and the FIFA with the necessary copies of the documents required by them on which both the agent's and the player's signature must be included;
- comply with the relevant public law provisions governing job placement in the country concerned.

4.3. Contract between agent and player

The conclusion of a contract by the parties represents the beginning of a legal relationship between them.

In addition to what has been observed so far, we must add that the contract can be drawn up in the language of the country where it is concluded, and that for security reasons a copy in English will be required.

Also, the agent's signature and name shall appear in all employment contracts and in any transaction in which the player's agent represents the player's interests.

4.3.1. How to conclude a contract: requirements

The first step towards the conclusion of a contract is to reach agreement on every single term included in it. Agents' interests may diverge, because the circumstances surrounding agents may be different, but nevertheless the FIFA obliges all agents to use the standard contract which they have supplied to every national association. This contract includes all the aspects on which agreement is required, for example, the duration must be indicated provided it is not longer than 24 months, a formal declaration of acceptance of every mandatory national public law is required, and finally, when the form is officially correct both parties must sign the document and send copies of the contract to the AEAF and to the FIFA so that they can approve the form and place their respective official stamps on it.

4.3.2. Contents

4.3.2.1. Remuneration: payment, quantity, form

The contract will explicitly name the person responsible for paying the agent's fee and according to the FIFA rules, "only the client engaging the services of the player's agent, and no other party, may remunerate him". This remuneration in return for professional services rendered shall be calculated on the basis of the player's annual basic gross income negotiated by the agent, but if they fail to reach an agreement, the agent will be entitled to 5% of the basic income described. As to the moment of payment, the parties are allowed to decide whether they prefer payment to take place at the beginning of the contract or at the end of every natural year; in this they are free, as long as they respect the terms agreed.

4.3.2.2. Clauses

4.3.2.2.1. Clauses related to remuneration

As was already stated above, it is important that the contract includes every single item of the agreement on payment, given that if either one of the parties fails to perform his/her obligations, the injured party can rely on a document on which to base a lawsuit. Normally the agent receives 10% of the player's income, but the question might arise whether that also includes commercial and advertising contracts or only what the player receives from the club. All aspects related to any possible source of income must therefore be clear, i.e. income from the player's sportive activity, from other commercial contracts, from possible transfers, from collaborations with other agents; such matters must all be included in the contract.

Disputes easily arise over such aspects. We may cite an example from the Canary Islands, Spain, where player R.M. demanded a per-

centage of the sum involved in his transfer from Tenerife SAD to Deportivo de La Coruña SAD. The first club tried to pressure the player into refusing his percentage by threatening not to let him transfer otherwise, but R.M. withstood the pressure by claiming that his agent insisted on the percentage (the agent would probably receive a portion of the percentage). However, in the end the player did accept Tenerife's conditions.

4.3.2.2.2. Clauses related to exclusivity

The contract must also contain a clause on exclusivity. Nowadays very few agents worldwide are prepared to agree to such a clause, which is understandable if we imagine the situation of an agent acting on behalf of a medium-level player who would not stand to profit much. However, if representing a world-famous star player, the agent's reputation is set to rocket, attracting many more players who require his/her services, not only as an agent, but also as a legal advisor for other matters. Players for their part will also prefer a representative with a good reputation and with important contacts worldwide.

There are cases where one player has several agents and each of them bears part of the responsibility towards the player, or where one of them has more power to negotiate than the others. Nevertheless, if a player has more than one agent, the obligations incumbent upon each of them are the same as if they acted individually. It is also possible that a player has several agents who delegate some of their duties to other persons or companies. In this case, the player must always be informed of this fact as the player is responsible for any consequences if he/she authorizes such delegation. An example of this is the case of football star Ronaldo Nazario de Lima who had several natural persons as his agents, and these, with Ronaldo's permission, gave the Gortin Corporation the power to negotiate any other contracts. In this way the agents ensured a wide range of contracts for the player so that he could improve his lifestyle, and in exchange for this they would receive a percentage of any transaction concluded by them.

4.3.2.3. Lawsuits and complaints

Although the FIFA has a Players' Status Committee to supervise compliance with the relevant rules, including the Code of Professional Conduct, disputes related to agents' activities or to the contracts concluded regularly arise.

Any complaint shall be sent in writing to the national association concerned (AEAF) if the dispute is between a player's agent and a player, a club or another player's agent all registered with the same national association, or to the FIFA if the parties come from different countries, within two years of the incident or no later than six months after the player's agent concerned has terminated his/her activities, after which deadline no reclamation will be accepted. This time-limit is absolutely fixed, as is the FIFA's prohibition for player's agents, players and clubs to file any complaint to the ordinary courts.

Although many sports bodies are undoubtedly capable of resolving all problems that may arise, we still have to realize the enormous number of different interests involved in so many areas that all converge in the field of professional sport. Sometimes it may be preferable to solve a matter extra-judicially rather than by initiating lengthy proceedings in an attempt to solve the conflict. In this respect, the Spanish Sports Act, Law no. 10/1990 in Article 87 offers the possibility of "solving any legal sports dispute through the application of specific formulas used for conciliation and arbitration, under the conditions stipulated for these mechanisms by State laws". Especially in this context, we must note the role which the AEAF plays, as this association often acts as a mediator in these kinds of disputes since the summer of 1995 when the first claims were received, which resulted in mere warnings to the parties involved, but whose role has increased considerably to currently including regularly acting as an interested party defending a certain party's rights.

4.3.2.4. Sanctions

Player's agents who abuse the rights granted to them, contravene any of the duties listed or engage in any other harmful activity will be liable to sanctions. These may range from a simple warning to with-

drawal of the licence. Sanctions may only be imposed by the AEAFF or by the FIFA.

Players who engage the services of unlicensed player's agents will also be liable to sanctions that may range from a caution to a fine or even disciplinary suspension of up to twelve months.

Repeat offending either by a player's agent or a player is set to be liable to additional sanctions in the future to prevent its occurrence.

4.3.2. Nullity

According to Article 1265 of the Spanish Civil Code a contract concluded in which "consent was given by mistake, violence, intimidation or misdemeanour" shall be void. This also applies to the contracts under discussion in this article as there have been occasions where abusive clauses were signed under pressure or coercion.

4.3.3. Expiry

The relationship between a player's agent and his/her principal may terminate due to ordinary reasons such as the expiry of the contract, the completion of the assignment, etc. In most contracts concluded nowadays the parties often safeguard their position by including a clause that covers the possibility of compensating injury caused by unilateral cancellation.

5. Spanish Association of Players' Agents (AEAFF)

5.1. Creation

In accordance with Article 22 of the Spanish Constitution and Law no. 191/1964 of 24 December 1964, the AEAFF was created in 1994 as a not-for-profit professional association whose objective is to protect the rights of its members as well as those relating to their clients. It has a large variety of social purposes which we will describe further on, but its main characteristic is the altruism with which they pursue them.

The AEAFF has its head office in Valencia and is competent to act throughout Spain, but it can also act in the territory of any Member State of the European Community if it complies with the national legislation there and of course with European rules.

5.2. Organization: organs and members

Currently, the AEAFF is composed of 265 licensed agents, but has unlimited membership. Membership may to all intents and purposes last for any period of time desired, until agents voluntarily cease their activities and leave the association for this reason, or membership may terminate if an agent fails to pay the membership fees or does not comply with statutory duties.

Highest in the hierarchy is the General Assembly in which all the members of the association are represented as an inalienable right and in absolute equality. The Assembly will decide by majority which topics are discussed and any agreements reached are binding on all members who all have one vote when voting on agreements. The association is managed and represented by the Board of Directors, which at this moment consists of the President, Mr Roberto Dale, the Vice-Presidents, Mr José Navarro Aparicio and Mr Manuel García Quilón, the Secretary, Mr Salvador Gomar, the Treasurer, Mr Ginés Carvajal Seller, who are all elected by secret ballot, and seven regular members.

According to its articles of association, the AEAFF has no capital on formation and its annual budget cannot exceed 24,000 euros. Therefore the funding necessary for the pursuit of its social objectives will consist of the initial and periodical fees paid by its members, donations and legacies received, the capital of the association itself, or other income obtained through the organization of events approved by the Board of Directors.

5.3. Duties

The AEAFF in cooperation with the FIFA plays an extremely important role in the licensing of agents, as apart from other tasks it is responsible for the issuing of licences. First the AEAFF examines the applications received in order to decide on whom to grant access to the written exams that will take place at its head offices on the dates set by the FIFA and which are prepared by both organizations joint-

ly, as was mentioned above. The association is also responsible for distributing the results obtained by the applicants and for receiving the insurance policies of the agents who pass the exam.

The AEAFF also plays a role in cooperating with the FIFA and acting as a liaison between the agents and the European organization in terms of deciding on or informing of any sanction or ban, supplying a list of player's agents licensed in Spain, receiving and transmitting to the FIFA all mediation contracts signed by agents in possession of an AEAFF-issued licence and cancelling the insurance policies of agents who notify to the AEAFF their intention of leaving the association.

From the perspective of the association itself, its main purposes are the following:

- to promote the good reputation of the player's agents;
- to protect and defend the rights of its members and of the clients represented by them;
- to represent the player's agents nationally and internationally over other associations;
- to defend its members in any pending disputes.

In the execution of these aims, the AEAFF may organize conferences, cooperation sessions with other organizations, projects and other events, provided that these are initiated for non-profitable purposes.

6. AEAFF - FIFA relations

6.1. In terms of collaboration

As has been remarked above, the FIFA and the AEAFF have a good cooperative relationship. The best example of this is the mandate which the AEAFF has to create rules to govern the activity of player's agents who operate in national territory and that must be approved by the Players' Status Committee of the FIFA. Apart from the considerable influence which the AEAFF has on player's agents' professional life, its existence is also crucial in terms of all the duties which the FIFA delegates to it such as controlling and regulating the agents' legal status, solving disputes and imposing sanctions, compiling and transmitting the list of all agents operating under an AEAFF-issued licence, registering all contracts concluded under its jurisdiction, among many more.

Upon inspection of the FIFA Player's Agents Regulations and the AEAFF Regulations, it must be concluded that their fields of activity are quite different, given that the national association is the competent authority for matters occurring within its jurisdiction that can be resolved by it individually, while the international association is responsible for dealing with larger issues or issues that require the application of the legislation of another country or of European rules if one of the parties or the subject itself is from another country. Here the competent association will unquestionably be the FIFA.

Given these facts, it may be said that the AEAFF plays a subordinate role. This is made clear by the liaising function of the AEAFF between the FIFA and the agents when notifying instructions or new rules and by the FIFA's supervision of national associations' activities.

6.2. Code of Professional Conduct

The Code of Professional Conduct reflects perfectly what both the AEAFF and the FIFA have suggested in their respective regulations should be the model attitude displayed by a player's agent. Every candidate is required to sign the Code and submit to the discipline imposed by it. The agent's signature signifies that he/she promises to act transparently and correctly and with due regard to the different considerations established.

A copy of the Code bearing the agent's signature shall be transmitted along with other documents required by the national association to the FIFA, and shall include the AEAFF's signature and stamp as a symbol of approval of the agent.

6.3. Case-law

Given that the AEAFF is of recent creation, there is not much case-law available concerning the relationship between it and the FIFA. However, we do know of some documents that prove that such a relationship exists, such as the circulars sent by the FIFA. One example is

Circular No. 818 of 12 September 2002 where the FIFA informed the national associations of the possibility of inscribing players once the

period stipulated had finished and the players mentioned had been unable to conclude a contract with any sports club.

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by Nick White*

1. Introduction

1.1. Agency in sport

While the term “agency” in the sporting context can encompass a range of different activities, it is the role of agents in player transfers that chiefly concerns the sports regulators. Agents in football in particular have been regarded in many quarters with a degree of suspicion over the years. There have been numerous stories of agents acting for or taking money from both parties to a transaction, trying to entice players away from other agents or of making illicit payments - so called “bungs” - to club officials to help deals go through.

The culture of suspicion relating to the profession is probably unfair on the majority of football agents, who conduct their business properly and in accordance with the sport’s regulations. Nonetheless, fuelled in no small part by media interest, there have been a number of initiatives directed at trying to “clean up” football and the role of agents within the game. The FA Premier League (“Premier League”) announced on 3 March 2006 that it had commissioned an investigation under the chairmanship of Lord Stevens, previously the Metropolitan Police Commissioner, into the bung allegations surrounding Premier League transfers. Lord Stevens’ company Quest Limited was briefed to look into all 362 Premier League transfers taking place between 1 January 2004 and 31 January 2006. The investigation was not specifically focused on the role played by agents but inevitably they have been subjected to close scrutiny. On 20 December 2006, Quest issued its finding that 17 of the 362 transfers merited “further investigation”. The Premier League board resolved that Quest should be asked to undertake that further investigation, which is ongoing at the time of publication.

Perhaps even more significant in terms of football’s attempt to clean up the sport and the perceptions of agents within it is the FA’s programme of updating of the agents’ regulations. As of the opening of the transfer window on 1 January 2006, new regulations (referred to herein as the “2006 Regulations”) were enacted under which - inter alia - controls on agents in respect of the issue of dual representation (i.e. an agent or agency acting for both sides of a transaction) were tightened. The changes effected by the 2006 Regulations are considered in detail in Section 4.1.2. As is explained in Section 4.1.5 below, further changes to those regulations are currently scheduled to be enacted as what are referred to in this Chapter as the “Proposed 2007 Regulations”

1.2. How far should the regulators go?

The question of the appropriate level of regulation in respect of agents is a vexed one. Clearly, a major concern is to ensure that sport is seen to be as “clean” as possible and in this regard, the more safeguards that can be put in place the better. Furthermore, acting as an agent for a player in respect of a proposed transfer brings employment regulations into play and, specifically, the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (for more on which see Section 3.2 below). These regulations bring with them specific duties, which agents must observe and which governing bodies must reflect in their own regulations.

For an entity like the FA, ensuring that football in England is as clean as it can be and fully in compliance with applicable employment agency regulations is not the only aspiration. It is crucial that clubs are not overly fettered in terms of their ability to do deals and to trade in players. It is an undeniable fact that a player’s agent has a massive

influence on which club the player moves to. And if an agent finds it harder to operate in a particular territory it follows that he is likely to focus on other territories where it is easier for him to do deals and secure the commission he is after. The regulators must therefore be wary of creating a regulatory regime which impacts on teams’ ability to attract the best players.

Finally, of course, the FA and other governing bodies want to ensure that their regulations are legal and will resist challenge from parties affected by them, particularly on the grounds of restraint of trade. So, while generally the courts are reluctant to interfere in the sporting regulatory process in any event, immunity from legal challenge is another important factor in assessing how far sporting regulations should go.

1.3. This chapter

Section 2 deals with the structure of professional sport in the UK, focusing on football. The often tricky issue of jurisdiction and the division of responsibilities between national and international governing bodies is also covered. Section 3 concerns the law of agency and the effect of employment agency regulations, establishing the legal context in which sporting regulations are set. The provisions of the various sporting regulations themselves are covered in Section 4. Finally, some of the key legal and disciplinary cases are covered in Section 5.

Because a number of different sets of regulations and codes are referred to in this chapter, there are a number of terms that appear with capitalised initial letters. The reader can assume that these are terms which are defined in the relevant set of regulations being considered. Where the definition is not set out in the text or in the footnotes, it can also be assumed that the meaning of the term does not materially differ from the common sense meaning of that word.

2. Structure of professional sport in the UK

2.1. Football

2.1.1. *England, Scotland, Wales, Northern Ireland and the relationship with FIFA*

England, Scotland, Wales and Northern Ireland each have their own football governing bodies: the Football Association, the Scottish Football Association, the Welsh Football Association and the Irish Football Association. The Republic of Ireland, which is not part of the United Kingdom, and is therefore lies outside the scope of this Chapter also has its own governing body, the Football Association of Ireland.

The world governing body of football is the Fédération Internationale de Football Association (“FIFA”). FIFA is comprised of six confederations, including the Union of European Football Associations (“UEFA”), and currently has a membership of 207 nations, including the four UK associations. The membership of those nations is conditional upon agreement on behalf of those nations to abide by FIFA’s various rules, regulations, statutes and codes.

Article 14 of the Regulations Governing the Application of the FIFA Statutes¹ provides simply that:

* Couchmann Harrington Associates, London.

¹ http://www.fifa.com/documents/static/regulations/FIFA_statutes_o8_2004_E.pdf

“Players may use the services of agents to negotiate transfers. Only players’ agents in possession of a licence may carry out this work. The Executive Committee shall issue appropriate provisions to this end.”

Pursuant to that provision, FIFA’s Executive Committee passed the Licensed Players’ Agent Regulations on 10 December 2000. The FIFA regulations have not been materially altered between that date and the time of writing.

The FIFA Licensed Players Agent Regulations require that each national association produce their own regulations reflecting the provisions of FIFA’s. On 1 January 2006, the FA enacted the 2006 Regulations, as referred to above, which are more detailed and restrictive than FIFA’s. These are the regulations in effect at the time of going to print. A version of the Proposed 2007 Regulations is likely to replace them in time for the summer 2007 transfer window.

The FIFA Licensed Players’ Agent Regulations include the Code of Professional Conduct, which has been incorporated with only superficial changes into both the 2006 Regulations and the Proposed 2007 Regulations.

2.1.2 Jurisdiction: FIFA, the FA, the Premier League, the Football League

The scope of FIFA regulations and of the 2006 and Proposed 2007 Regulations are essentially limited to the agent’s role in the transfer of players from one club to another, or in the negotiation or renegotiation of a player’s contract with a club. Other services which may be supplied by an agent - such as the procurement and negotiation of endorsement deals for a player or assistance with day to day administrative matters - are not regulated by the footballing authorities.

Turning to the structure of professional football in England, clubs are arranged into two leagues: the Premier League and the Football League (of which the top division is known as the “Championship”). While the Football League does have its own provisions on agents², it is the FA that is responsible for monitoring and managing licensed agents in England. The Premier League lacks the power to sanction licensed agents, a point which was highlighted by the investigation into Chelsea FC’s “approach” in January 2005 to the then Arsenal player Ashley Cole. On 1 June 2005 an independent commission appointed by the Premier League issued its findings on the incident. The commission handed out fines for breaches of Premier League rules to Chelsea, its manager Jose Mourinho and to Cole himself.³ However, although there was little doubt that agents Jonathan Barnett (an FA licensed agent) and Pini Zahavi (an Israeli licensed agent) played significant roles, agents’ conduct falls outside the scope of the Premier League rules and the commission was not therefore able to investigate the conduct of the two agents. The commission did however recommend that the “responsible bodies” carry out such investigations. Subsequently, the FA charged Barnett; the charges were upheld and he was sanctioned, as is explained in further detail in Section 5.2.4 below. The FA was unable to investigate Zahavi’s role, as he is not an English licensed agent.

As things stand at the time of going to press, the basic rule of thumb is that an Association, such as the FA, will have jurisdiction over transfers between its member clubs as well as over agents who are licensed by it. FIFA will have jurisdiction in other circumstances, for example in respect of transfers of players between Associations⁴. Jurisdiction over licensed agents in respect of transfers between clubs, where the agent is licensed by an Association other than the Association or Associations of which those clubs are members has always been a slightly grey area - as is demonstrated by the Harry Kewell transfer saga.

Australian player Kewell, who had previously been with Leeds United, signed for Liverpool on 9 July 2003. The FA was concerned about the role played in the transfer by Bernie Mandic, who is not a licensed players’ agent. A £2 million payment was made by Leeds to Mandic’s company, Max Sport but, according to Mandic, the money related to work he did in assisting Leeds in trying to build a majority stake in Australian club Sydney Olympic. To complicate matters,

Mandic’s brother, Nikola Mandic - who *is* a licensed players’ agent - was also involved in the transfer.

One of the issues in question was therefore whether the player, or either of the clubs, had breached any applicable rules or regulations by using an unlicensed agent.

The FA referred the matter to FIFA on 15 July 2003 with the following statement:

“Due to the international element of the transfer, and the fact that The FA has jurisdiction only over agents licensed by The FA, the matter therefore falls within the jurisdiction of the world governing body.”

However, a FIFA Players’ Status Committee judge ruled on 29 July 2005 that FIFA did not after all have jurisdiction to decide on Kewell’s role or that of either Leeds or Liverpool as the transfer was not an international one:

So, in respect of Kewell himself and of the two clubs, the judge referred the matter to the FA. He acknowledged that FIFA did have jurisdiction to decide on the role of the licensed Australian players’ agent, Nikola Mandic, but declined to make that decision until the FA had itself decided on the role of the player and the two clubs. As at the time of going to press the FA has not concluded its investigations.

As briefly mentioned in Section 1.1, the FA is planning to enact the Proposed 2007 Regulations in time for the summer 2007 transfer window. One of the proposed changes is the introduction of the concept of the “Registered Agent”. The FA wants to extend its jurisdiction over agents licensed by other national associations by compelling such agents to register with the FA in order to entitle them to act for any English club or player involved in any transaction with an English club. The effect of this change will be to bring overseas agents acting for any of the aforementioned clubs, players or licensed agents under the jurisdiction of the FA. This would mean that, as from the time the Proposed 2007 Regulations are enacted, the FA would have the competence to charge and sanction overseas agents such as Pini Zahavi and Nikola Mandic who would have previously fallen outside its jurisdiction.

2.2. Other sports

2.2.1. Cricket

The England and Wales Cricket Board (“ECB”) is the national governing body for cricket within England and Wales. It is one of ten Full Members of the International Cricket Council, which is the global governing body for the sport. The Professional Cricketers’ Association (“PCA”) administers and maintains a register of agents on behalf of the ECB, in accordance with the ECB’s Players’ Agents Registration Regulations.

Cricket in Northern Ireland is administered by the Irish Cricket Union, which is also the governing body of the sport in the Republic of Ireland. In Scotland the sport is run by Cricket Scotland. The game is not at a commercially significant enough level yet to justify the Irish Cricket Union or Cricket Scotland promulgating their own dedicated agents’ regulations.

2.2.2. Rugby Union

The International Rugby Board (the “IRB”) is the global governing body for Rugby Union. It administers and enforces the Regulations Relating to the Game. Regulation 5 is the agents regulation.

The Rugby Football Union is the governing body of the sport in England. The UK’s other governing bodies are the Welsh Rugby Union, the Scottish Rugby Union and the Irish Rugby Football

2 See Regulation 43 of The Football League Limited

3 Cole was found to have breached Premier League Rule K5, which prevents players from meeting with other clubs, without the permission of the club with which they are registered. Chelsea FC

were found guilty of breach of Rule K3 which prevents clubs from approaching players contracted to other clubs (subject to limited exceptions which did not apply here). Mourinho was in breach of Rule Q, which relates to the conduct of managers.



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Union (whose jurisdiction includes both Northern Ireland and the Republic of Ireland).

2.2.3. Rugby League

Globally the sport is run by the Rugby League International Federation. The governing body of the sport in the UK is the Rugby Football League ("RFL"). The RFL has its own set of agents regulations.

Further details on agents regulations applicable to these other sports is set out at Section 4.2.

3. The law of agency and relevant regulations

3.1. A survey on the duties generally owed by agents under English Law

The concept of agency under English law is grounded in numerous diverse sources including master and servant common law, old ship-master cases and the law of equity and trusts. This chapter does not contain a detailed exposition or analysis of agency law per se. Readers looking for such exposition or analysis should refer to a specialist text such as *Bowstead and Reynolds on Agency*. Instead, the real purpose of this chapter is much narrower - to explain and investigate the role and regulation of agents in transfers between clubs or teams and in player contract and related negotiations.

In spite of this tight focus, it is helpful to look, very briefly, at some of the important themes and concepts of agency under English law.

An agent must, as a rule, observe some basic obligations relating to the performance of his role. For example, an agent should act within the scope of his principal's instructions and is generally obligated to use a level of skill and care. Of course, the amount of discretion the agent has to fulfil his role and the degree of skill and care he is required to observe will vary according to the nature of the relationship and the terms of the contract between the parties.

In addition to these basic performance obligations, an agent will generally also owe so-called "fiduciary" duties to his principal. Fiduciary duties are those that arise from the special nature of the relationship between agent and principal. The obligation of trust and good faith is an important element of most agent/principal relationships and it is this element that that serves to differentiate them from standard contractual relationships. The fiduciary duties owed by an agent to his principal generally include the following:

- to act in good faith;
- not to make a profit out of the relationship of trust;
- not to act for his own benefit or the benefit of a third person unless it is with the informed consent of the principal.

Of course, the law of agency concerns the relationship between the agent and his principal. However, the regulation of agents by sporting governing bodies tends not to be directed solely at this relationship, but rather at the conduct of agents generally.

3.2. The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the "CEAEB Regulations")⁵

3.2.1. Introduction to the CEAEB Regulations

The CEAEB Regulations are supplementary to the Employment Agencies Act 1973 (the "EAA"). The EEA provides a definition of employment agency as:

"the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of providing services (whether by the provision of information or otherwise) for the purpose of finding workers employment with employers or of supplying employers with workers for employment by them."

A licensed football agent, regardless of whether he or she acts for a player or a club, acts as an "employment agency" and must observe the terms of the EEA and of the CEAEB Regulations.

Section 6 of the EAA includes the following wording:

"(1) Except in such cases or classes of case as the Secretary of State may prescribe-

(a) a person carrying on an employment agency or an employment business shall not demand or directly or indirectly receive from any person any fee for finding him employment or for seeking to find him employment..."⁶

On the face of it, this would mean that an agent for a professional sportsman or woman would not be entitled to charge that person a fee for finding them a new club or team. However, the CEAEB Regulations provide an exception to this provision. Regulation 26 provides that:

"(1) Subject to paragraphs (3) and (4)⁷, the restriction on charging fees to work-seekers contained in section 6(1)(a) of the Act shall not apply in respect of a fee charged by an agency for the service provided by it of finding or seeking to find a work-seeker employment in any of the occupations listed in Schedule 3."

One of the professions set out in that Schedule 3 is that of the professional sports person.

Paragraph (2) of Regulation 26 restricts the nature of the fee that the agency may charge, specifying that it "may consist only of a charge or commission payable out of the work-seeker's earnings in any such employment which the agency has found for him." The reasoning behind this provision is to ensure that commission payments are manageable for the work-seeker.

Interestingly, under Article 14.7 of the regulations in effect at the time of going to print (the 2006 Regulations), an agent's remuneration may be made either by lump sum or by way of instalments calculated on the basis of the player's "annual basic gross income (excluding all benefits, bonuses or other privileges that are not guaranteed)". This is probably inconsistent with CEAEB Regulation 26, paragraph (2). The FA is therefore now proposing, under the Proposed 2007 Regulations, that remuneration of a player's agent by lump sum be prohibited.

There is no prohibition under the EAA or the CAEAB Regulations on the hirer paying remuneration on behalf of the employee and this right is enshrined in Article 14.5 of the 2006 Regulations. However, where a club does pay the agent's remuneration on behalf of a player, it will be viewed by HM Revenue & Customs as "employment income" - a benefit to the player associated with his employment. Accordingly, any such payment must appear as such on the player's Form P11D and will incur income tax at 40%. National insurance contributions will also have to be made, both by the player and the club.

In practice, players' agents have traditionally tended to try to avoid charging fees to players and instead sought to recover their commissions from the clubs. So, in their negotiations with the clubs, agents have generally tried to ensure that their fees are built into the overall package being paid by the club. This is set to change as and when the Proposed 2007 Regulations are enacted. They currently contain an outright prohibition on payments to player's agents being made by anyone or any entity other than the player himself.⁸ Having said all this, it is possible that some agents, in respect of certain deals, will be able to negotiate an increase in the player's salary that will effectively transfer the burden of paying the agent's commission to the club.

4 See FIFA Regulations for the Status and Transfer of Players, Article 22(e).

5 SI 2003 No. 3319

6 The original wording was substituted by this wording pursuant to the Employment Relations Act 1999, Schedule 7, paragraphs 1 and 3.

7 Paragraph 3 states that this exception will not apply where the agent/agency charges a fee to the hirer, e.g. a club; this principle is reflected by Article 14.4 of

the FA's 2006 Regulations. Paragraph 4 states that, where there is "a connection" between the agency and the hirer, the Regulation 26(1) exception will only apply where the agent has informed the work-seeker about that connection.

8 The only exception to this is that the club can, if the player so requests, pay the agent by making a deduction from the player's salary.

3.2.2 Other CEAEB Regulations impacting on the FA's agent regulations

CEAEB Regulation 14, paragraph (2) states that, "all terms in respect of which the agency ... has obtained a work-seeker's agreement are recorded in a single document, or where this is not possible, in more than one document." This provision is reflected by the requirement under Article 14.12 of the 2006 Regulations for a written contract between the parties, which must contain the entire agreement between them.

Under CEAEB Regulation 24, paragraph (7), where a work-seeker is under 18 an agency may generally not introduce him or her to a hirer where the hirer will require the work seeker to live away from home unless the agency has first secured consent directly from the individual's parent or guardian. The Proposed 2007 Regulations contain a provision stating that agents may only enter into representation agreements with players under 18 years of age where the agreement is countersigned by the player's parent or guardian.

The CEAEB Regulations also contain certain provisions relating to the maintenance of proper records. So, an agency's records need to include, inter alia:

- details of the terms that apply between it and the work-seeker (generally, a copy of the contract);
- where the agency is entitled to require payments from its work-seekers, as a football agency is, details of the amounts requested and the dates on which those requests were made.

Similar provisions are contained in the 2006 Regulations, for example, within the Code of Professional Conduct which appears at Article 17.9 of the 2006 Regulations.

4. Regulations of sporting bodies

4.1. The FA

In late 2005, Birkbeck College's Football Governance Research Centre released its report, "State of the Game: The Corporate Governance of Football Clubs 2005", revealing that some 94% of clubs in the FA Premier League and the Football League were in favour of greater agent fee transparency and 92% believed there should be greater regulation of agents. However, it was apparent that there was a tension between the Premier League on the one hand and the Football League on the other. It seemed that the Premier League had been dragging its heels on the issue of greater regulation. The Football League on the other hand was already regulating for itself, for example obliging its member clubs to produce regular lists of payments made to agents. Agents acting in respect of Football League transactions need to make sure that they comply with Regulation 43 of the Regulations of the Football League Limited as well as the FA regulations that may be in place from time to time.

4.1.1. The 2006 Regulations and the Proposed 2007 Regulations

The regulations in place in England at the time of Birkbeck's report were the FIFA Licensed Players' Agents Regulations. Since that time and the publication of this book (2006), a new set of regulations, the 2006 Regulations, were enacted in time for the opening of the transfer window on 1 January 2006 and a further set of agents regulations, the Proposed 2007 Regulations, has been tentatively approved by the FA.

4.1.2. The 2006 Regulations

The FA announced in November 2005 that it would be enacting the new regulations - i.e. the 2006 Regulations - on 1 January 2006. These 2006 Regulations were divided into 24 different articles. These articles are divided into eight different Parts: (I) Introduction and Interpretation, (II) Obtaining a Licence, (III) Duties of Players, (IV) Duties of Clubs, (V) Duties of an Agent, (VI) Special Provisions, (VII) Disputes and (VIII) Miscellaneous. In this section 4.1, we shall look at some of the key provisions of the 2006 Regulations before focusing on three specific areas in which the rules are significantly different from FIFA Licensed Players' Agents Regulations, namely the

new definition of "Transaction", the conflicts of interest disclosure requirement and the broadening of the definition of agency.

4.1.3. The 2006 Regulations - Some key points "Licensed Agent" and "Club"

A central concept under the 2006 Regulations is that of "Licensed Agent". This definition covers any "Agent" who carries an FA agent's licence or who carries a licence issued by another national football association in compliance with the FIFA regulations. An Agent is defined as:

"any person ... who undertakes to facilitate the transfer of the registration of a Player from one Club to another or who undertakes to negotiate or renegotiate the terms of contracts between Players and Clubs." (Article 2.2)

"Club" under the 2006 Regulations means any English football club. So the 2006 Regulations only bite in respect of transactions involving English clubs exclusively. FIFA will have jurisdiction where there is an international element to the transfer.

Both Players and Clubs (by virtue of Articles 10.1 and 12.1 respectively) are prohibited from using any Agent other than a Licensed Agent or an Exempt Individual⁹.

Obtaining a licence

Part II of the regulations sets out the procedure that must be followed in order for an individual to obtain a licence. The individual must pass the FA's written examination and must ensure that he or she has a professional indemnity insurance policy in place for the duration of the licence.

Agent is only permitted to act for one party to a Transaction

Under Article 14.2, A Licensed Agent/Exempt Individual "may only represent one party when negotiating a transfer". There is an argument that the wording of the 2006 Regulations leaves open the possibility of agents' terminating or suspending their representation agreements with players and then switching to act for the club during the transfer. The advantage of switching sides in this way is that the agent's commission could in theory be paid by the club (on its own behalf, rather than on behalf of the player), and would not therefore be seen as a taxable benefit to the player - which would be subject to income tax, at a higher level.

However, it is worth noting that the Football League especially has shown itself willing to adopt a fairly tough line on this dual representation issue. It is unlikely to tolerate switches of this nature, regardless of whether there is an argument that such behaviour is permissible under the terms of its (and the FA's) agents regulations.

Agent is only permitted to be paid by one party to a Transaction

Article 14.4 states that an Agent, "may only be remunerated by one party to any Transaction". The concept of "Transaction" is an important one in that it covers contract renegotiations as well as transfers. It is defined as follows:

"any negotiation or arrangement or deal, the intention of which is to facilitate or effect the transfer of a Player from one Club to another or to facilitate or effect the negotiation or renegotiation of the terms of contracts between Players and Clubs."

Further analysis of the significance of the definition of "Transaction" is set out under Section 4.1.4 below. Note that it is expected that further refinements to this definition will be made when the Proposed 2007 Regulations come into effect.

In spite of the restriction requiring that an Agent only be remunerated by one party to a Transaction, Article 14.5 makes it clear - as is

⁹ An Exempt Individual is a player's parent, sibling or spouse or a qualified lawyer.

touched on in the discussion of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 at Section 3.2.1 above - that this restriction does not prevent a Club making a payment to a Licensed Agent/Exempt Individual on behalf of a Player. The requirements of any applicable tax law must however be observed. In other words, the club may pay a player's agent but that payment is likely to be treated as a taxable benefit to the player and therefore taxed at 40%. Again, national insurance will also be payable.

Other important provisions

Article 14 also specifies, inter alia, that the Licensed Agent/Exempt Individual must:

- Article 14.6: when acting for a Player on a Transaction ensure that the amount of remuneration due to him (which must be based on the Player's annual basic gross income under the contract the agent has negotiated for him) is set out in the agent's contract with the Player;
- Article 14.8: not attempt to induce the Player to breach any contract the Player has with a Club or another agent;
- Article 14.9: not, where a Player is under contract with a Club, make any approach with a view to facilitating the Player's transfer unless the Club has given written permission or unless such an approach is permitted under Premier League, Football League or FIFA rules;
- Article 14.13: have a written representation agreement in the FA's standard form with the Club or Player, which must be lodged with the FA within five days of its execution;
- Article 14.16: ensure that his name, signature and licence number (if applicable) appear in each applicable contract relating to a Transaction in which he is involved.

4.1.4. The 2006 Regulations - Three significant differences from FIFA Licensed Players' Agents Regulations

As touched on above, the 2006 Regulations were characterised by some significant changes from FIFA Licensed Players' Agents Regulations, which both widened the scope of the previous rules and ushered in a regime of disclosure of "potential conflicts of interest". Three of the most significant changes are analysed here.

First point of difference: A new definition of "Transaction"

While the FIFA Licensed Players' Agents Regulations do make reference to "transactions", the precise meaning of that term is unclear. In particular, where a player is staying with a club but is involved in contract negotiations or renegotiations, there is under FIFA's regulations an argument that the regulations were not applicable. The new definition of "Transaction" in the 2006 Regulations, which is set out in Section 4.1.3 above, closed the door on this argument.

Moreover, the use within the definition of the phrase "negotiation or arrangement or deal" makes it very clear that a proposed transfer need not actually take place in order for the regulations to be applicable. The new definition also broadens the application of the regulations so as to make it more likely that the new provisions would catch an agent with only a secondary role in a transaction.

Second point of difference: Disclosure of "potential conflicts of interest"

The 2006 Regulations require that Licensed Agents/Exempt Individuals must, "disclose in writing any potential conflict of interest when dealing with Clubs or Players"¹⁰. Clubs and Players are also obliged to declare potential conflicts of interest when dealing with Licensed Agents/Exempt Individuals.¹¹ In every case, the declarations must be made in advance to all parties to a Transaction and lodged with the FA. Licensed Agents/Exempt Individuals must also disclose to the FA details of all payments received or made as a result of their involvement in a Transaction.

The introduction of such disclosure obligations is an interesting one. Generally, the approach of governing bodies to the regulation of agents has been a prescriptive one, setting out what can and cannot be done. However, given that much of the criticism traditionally

directed at agents and their role in football is based on the clandestine manner in which some of them are perceived to operate, it make sense for the FA to try to increase openness in the game as opposed simply to increasing the list of prohibited behaviour. Furthermore, because disclosures must be made to all parties to a Transaction prior to that Transaction being initiated, those other parties have the chance to consider the conflict that is disclosed to them. They then have the opportunity to take whatever steps they deem appropriate, including refusing to deal with that party on that Transaction.

For the FA, the disclosure mechanism should also be a useful way to gain an even greater insight in the operations of agents and to bring some light into areas and dealings that may previously have been regarded as shady.

Third point of difference: Extension of definition of "agency"

Arguably most significant, certainly for the bigger agencies, was the extension of the prohibition on acting for more than one party to a Transaction to cover agencies as well as individual agents. Article 14 of FIFA Licensed Players' Agents Regulations simply states: "A licensed players' agent is required: ... to represent only one party when negotiating a transfer". This wording is mirrored by Article 14.2 of the 2006 Regulations. However, Article 14.3 of the 2006 Regulations specifies that:

"For the purposes of Articles 14.2 [only able to act for one party in a transfer] and 14.4 [agent may only be remunerated by one party to a transaction] ... the phrase "Licensed Agent/Exempt Individual shall include:

- agencies employing more than one Licensed Agent; and
- Agents who are assigned or subcontracted to fulfil any of the obligations under any contract or arrangement in relation to a Transaction.

For the avoidance of doubt, where an agency has more than one Licensed Agent acting on its behalf, such Licensed Agents are restricted to acting on behalf of one party to a transfer in line with Article 14.2."

That final paragraph added little to the substance of Article 14, but did make it very clear that no longer were two agents from the same agency permitted to act on opposite sides of a transfer or other Transaction.

4.1.5. The Proposed 2007 Regulations

On 21 November 2006, the FA announced that they had approved a new set of agents regulations. Because the regulations have not yet been fully finalised, we are referring to them here as the "Proposed 2007 Regulations". These new regulations are subject to some minor amendments, need to be approved by FIFA and have not, as at the time of going to press, been officially published. The FA's intention is that the new regulations will be put into effect in time for the summer 2007 transfer window.

While the Proposed 2007 Regulations continue to encapsulate the spirit of disclosure enshrined in the 2006 Regulations, they contain a number of new, stricter, provisions. Some of the most significant are outlined below. Before looking at these in detail it is worth briefly explaining the scope of the Proposed 2007 Regulations. They state clearly that they relate to agency activity insofar as it consists in employment/player contract negotiations and the transfer of players' registrations. Negotiations relating to, for example, image rights, do not appear to be covered. So, where references are made in this Section 4.1.5 to "acting as an agent" or to "agency activity", it should be remembered that such activity would seem to exclude image rights negotiations or other, commercial, agent work. So, while these new proposed regulations are generally stricter than the 2006 Regulations, the scope of their effect is intended to be somewhat narrower. This

¹⁰ Article 14.27, 2006 Regulations

¹¹ See Article 10.6 in relation to Players

and Article 12.10 in relation to Clubs, Club officials and Club employees

narrowing of scope is probably an attempt to minimise the possibility of the regulations being challengeable on restraint of trade or similar grounds.

Prohibition on agents acting for club if they have acted for player in preceding three years

As we saw under section 4.1.4 above, the 2006 Regulations extended the application of the prohibition on acting for more than one party from the individual agent to that agent's whole agency. This closed off the possibility of two representatives of the same agency acting for club and player respectively on a transaction. However, the 2006 Regulations do not prohibit the actual possibility of an agent switching clients during a deal. The Proposed 2007 Regulations will ban this process, providing that an agent cannot act for a club in respect of a player's employment contract or negotiations relating thereto if the agent (or any representative from the agent's agency) has acted for that player in respect of any such contract or negotiations at any time in the three previous years.

This change should have a significant effect on the way transfer business is conducted. As mentioned in section 4.1.3 above, the 2006 Regulations leave open the possibility of structuring deals in such a way that the player's agent can switch to "act" for the club on the transfer. By closing off this possibility, the 2007 Regulations should mean that in deals under those regulations the player's agent's commission will always be borne by the player, and taxed at 40%. The 2007 Regulations still allow the club to make the payment to the agent, but only by deducting the payment from the player's salary and only where the player has requested in writing that this happen.

Prohibition on an agent who has acted for a club in respect of a particular player from acting for any other club (whether English or not) in respect of the same player

The intention of this prohibition is to prevent what the FA refers to as "shadow representation", where an agent purports to act for a club in respect of a particular negotiation, although in reality he is the player's agent. This provision is undoubtedly severe. It will mean that an agent who acts, entirely properly and in good faith for more than one club, will be unable to act for more than one of his client clubs in respect of the transfer of the same player. This prohibition is a good example of the considerable lengths to which the FA is willing to go in order to try to clamp down on agents' ability to "bend the rules".

Registration of overseas agents, lawyers and close relations

This is an important change. We have touched earlier in this chapter on the lack of jurisdiction of the FA, and of the Premier League, over agents like Pini Zahavi and Nikola Mandic, who are registered with foreign national associations. The Proposed 2007 Regulations require such overseas agents to register with the FA before they are entitled to act for any English club or for any player who is registered with an English club.

The confusion between FIFA and the FA over the issue of jurisdiction in the Harry Kewell transfer saga and the FA's inability to act against Pini Zahavi in respect of the Ashley Cole "tapping up" matter will both have been significant factors in the FA's decision to extend its reach to overseas agents by requiring them to register. The move should help eradicate misunderstandings over jurisdiction in the future, giving the FA very broad powers over anyone undertaking agency activity. A slight problem remains in that the FA will not be able to sanction an overseas agent who fails to register with it because - by that very failure - he will be outside the FA's jurisdiction. In such circumstances then, the FA will need to go after the player or club who is alleged to have used an unregistered agent. Alternatively, it could pass the matter on to FIFA, which would have jurisdiction over an overseas licensed agent.

While making a reference to FIFA is one possible means of ensuring that overseas licensed agents are accountable for their actions, lawyers and close relations will not fall under FIFA jurisdiction (unless, of course, they are licensed). Hence, the Proposed 2007 Regulations also require lawyers and close relations to register with

the FA. It is worth looking briefly at the differences between the 2006 and Proposed 2007 Regulations in this regard.

The 2006 Regulations allow an Exempt Individual (a player's parent, sibling, spouse or a lawyer) to act as an agent for a player without registering with the FA. However, the Exempt Individual must still have a written representation contract with the player before being entitled to act as agent.

The Proposed 2007 Regulations are somewhat different. Dealing first with close relations: a parent, legal guardian, person with parental responsibility, sibling or spouse must - where any payment is to be made by a player to the person in question, or to anyone else, in return for that person acting as the player's agent - be fully licensed in order to act for a player. Where no such payment is to be made, that individual will fall under the defined term "Close Relation" and is required only to register with the FA; there is no requirement to become fully licensed. The Registered Close Relation does not need to enter into a representation agreement with the player although, in such circumstances, he or she must, in addition to registering, make a declaration to the FA in the form prescribed by the FA.

The position with regard to lawyers under the Proposed 2007 Regulations is more straightforward. They are required to register (but not become fully licensed) if they want to engage in any agency activity.

So, the FA's new proposals under the Proposed 2007 Regulations are much tighter in respect of overseas agents, close relations and lawyers. All are required to register except for a close relation who is being paid for the agency services he or she is providing, who must be fully licensed. This tightening of the requirements is another example of the FA's determination to bring the commercial elements of transfer and player contract negotiation activity more firmly under its control.

Prohibition on agents owning interests in players

The Proposed 2007 Regulations state that no agent or "Organisation"¹² of an agent may carry owns any interest of any kind in respect of the registration rights of a player. It is specified that this prohibition includes owning any interest in any transfer fee or future sale value of a player. No doubt one of the drivers behind this new requirement was the developing trend, most prominent in South America, of the ownership of interests in players' registration rights by third parties. The prohibition seems a sensible one as the ownership of such rights by an agent would sit very uneasily with the agent's duty to act in his client's best interests, whether that client is the player in question, or a club.

4.2. Other Sports

4.2.1. Cricket

The Professional Cricketers' Association administers and maintains a register of agents on behalf of the England and Wales Cricket Board (ECB).

Any person may apply to be an agent. Applicants must pay an initial registration fee and must undertake to observe the Regulations Governing the Qualification and Registration of Cricketers for Competitive County Cricket and their Qualification for England, the Discipline Committee Regulations, the current Directives of ECB and the Advertising Insignia Regulations. The PCA provides a standard form agents' contract that registered agents may use but are not obligated to do so. However, if they do not use the standard form they must advise the player with whom they are proposing to enter into an agreement that he should consult with the PCA if he so wishes. The agent must also undertake to provide in the contract with the player that the player may terminate that contract in the event that the agent loses his registered agent status.

¹² "Organisation" means an agency, person, firm or company retaining, comprising, employing, or otherwise acting

as a vehicle for more than one Authorised Agent.' Draft 2007 Regulations

4.2.2. Rugby Union The IRB Regulations

The International Rugby Board's Regulation 5 relates to Agents¹³. Under Regulation 5 each Union must draw up its own set of provisions relating to the authorisation and regulation of Agents operating under its jurisdiction. The provisions drawn up by the national Union must contain the general principles set out in Regulation 5.1, which include the following:

- The Agent may not act for more than one party in a transaction and must disclose to his principal any relationship which he has, or has had, with any other party to the transaction.
- The Agent must act in good faith and make it clear which person or entity he is representing.
- The Agent may not take any steps to induce (or which are intended to induce) a breach of contract between a person and any union, rugby body or club.
- Agents must behave ethically and "observe the highest standards of integrity and fair dealing".
- They must have professional indemnity insurance in place up to an appropriate level.
- They may not transfer the approval or licence granted by the Union to any other person.
- They must follow best accounting practice.
- The Union must ensure that the IRB has jurisdiction over cases arising from international transactions or any breach of the relevant regulations that is of an "international nature". The IRB must then have the right to impose a reprimand, censure or caution, a fine, a suspension or withdrawal of the right to act as an Agent or any other appropriate sanction.

Regulation 5.2 states that the Union must as far as is practicable, require that contracts between Agents and their principals are in writing, may not be in force for longer than two years, are non-transferable or assignable and state the basis (which must be reasonable) on which the agent is to be remunerated. Finally, Regulation 5.2 requires that the Agent may only receive fees or remuneration from his principal.

The RFU Regulations

Under the RFU's own regulations, clubs or players are only allowed to use Agents who are licensed by the RFU and must use reasonable endeavours to ensure that the Agent complies with the RFU's Code of Conduct for Agents. No contract or inducement may be made to any player under the age of 18. There are also restrictions on making approaches to players already contracted, or registered, to a club, without that club's prior written consent.

The RFU also requires Agents to observe its Code of Conduct for Licensed Agents. The Code of Conduct requires, inter alia, that Agents do not act for more than one party in any transaction, do not bring the game into disrepute and act in utmost good faith in all discussions and negotiations relating to the employment of a player. It also requires Agents to register with the RFU any agency contract with a player (although not, unlike football, with a club).

The Code of Conduct also contains a number of provisions relating to approaches to players. An agent may only approach a player registered with, but not contracted by, a club if he has given the club 7 days' written notice. Approaches to contracted players are not permitted without the prior written permission of the club. A club's permission is also required before the agent representing a player contracted to the club may approach another club about the possible transfer of the player. Similarly, if an agent is representing a club, he needs the permission of any player under contract at the club before approaching another club with regard to the possible transfer of that player. Generally however, if a player is in the last three months on his playing contract with a club, an approach may be made to another club in relation to that player.

4.2.3. Rugby League

The Rugby Football League has its own set of licensed players' agent

regulations. These are set out at Section C.4 of the RFL's Operational Rules. Any club, player, coach, manager or official may only use Licensed Agents¹⁴ or "Exemption Holders" (i.e. relatives of individuals, barristers or solicitors). The relative or lawyer who wishes to act as an agent must agree in writing to abide by the Operational Rules. There are also provisions prohibiting club officials, directors or employees, or anyone who has more than a ten per cent shareholding in a club, from being Licensed Agents.

A three man panel reviews all Licensed Agent applications and has absolute discretion over the granting of licences. An interesting feature of the application process is the distribution by the Panel of Section One of each application (which sets out the identity, address and occupation of the applicant) it receives to all the RFL clubs. The clubs have fourteen days from receipt of the Section One in which to submit comments to RFL. These comments are then forwarded to the applicant, who then has seven days in which he may respond. Undoubtedly this system helps foster a culture of integrity. Giving clubs the opportunity to pass their comments on applicants is a useful mechanism for minimising the chances of unsuitable characters receiving licences.

Once a licence is granted the successful applicant must procure a guarantee from a UK bank in favour of the RFL for £10,000. After a year's satisfactory performance, the licence holder may apply to have the sum reduced to £5,000. Note that the Panel may also require an agent to take out a professional indemnity insurance policy, in such sum as the Panel may require.

The licence lasts for two years and may be revoked by the Panel if it reasonably considers the agent no longer fit to hold the licence.

Section C.4:17-26 contains provisions relating to the agent's conduct. These broadly reflect the provisions of FIFA's Code of Professional Conduct. The Licensed Agent must:

- always conduct himself in an ethical and professional manner and must observe the highest standards of integrity and fair dealing;
- only act for one party in a particular transaction;
- not act or seek to act for any manager, club official, coach or player who is contracted to any other Licensed Agent;
- always act in the best interests of his principal;
- accept fees only from his principal (which fees must be reasonable);
- not induce or attempt to induce any individual employed by a club or contracted with an agent to breach the terms of his contracts;
- act so as to encourage his principal to comply with the Laws of the Game and the Operational Rules;
- take all possible steps to promote the reputation of the game and prevent it from being brought into disrepute.

For breach of the regulations, the Panel may impose a wide range of sanctions, including:

- ordering the Licensed Agent to pay compensation to his principal;
- suspending or withdrawing the licence or Exemption Holder status;
- refer any alleged misconduct to the Disciplinary Commissioner.

5. Legal and disciplinary cases

This section is split into two parts: the first touching on the issue of unlicensed agents and the second dealing in some detail with actual charges brought against licensed agents by the FA.

¹³ Under the IRB's Regulations, an Agent is defined as "an agent or adviser acting on behalf of a Person, Union, Rugby Body or Club in relation to that Person's, Union's, Rugby Body's or Club's activity in the Game." Regulation 1.1.

¹⁴ The Operational Rules specify the following definitions:
"Agent" means a person who for reward represents, negotiates on behalf of, advises or otherwise acts for a Principal in the context of either:

(i) the transfer of a Player's registration;
(ii) the terms of a contract between a Player and a Club;
(iii) the terms of a contract between a Manager or Club Official or Coach and a Club," and "Licensed Agent" means an Agent to whom a licence has been granted under the provisions of this Section of these Rules".

5.1. The use of unlicensed agents

FIFA or, where appropriate, the national association, has jurisdiction over the player, the clubs and licensed players' agents themselves, all of whom in one way or another must have agreed to abide by the applicable rules on use of player's agents. Articles 10.1 and 12.1 of the 2006 Regulations specify that players and clubs respectively may only deal direct with each other, with a licensed players' agent or with Exempt Individuals (i.e. a player's parent, sibling or spouse or a qualified lawyer).

So, in cases where there is a finding that an unlicensed agent (who is not the player's parent, sibling or spouse or a qualified lawyer) has been used in a transfer, FIFA or the national association in question have the jurisdiction to sanction the clubs or the player but not the unlicensed agent.

On 24 January 2005, FA Premier League club Arsenal FC was given a warning as to its future conduct, fined £10,000 and handed a transfer ban suspended for two years after they negotiated with an unlicensed agent in relation to the player Quincy Owusu-Abeyie. Arsenal admitted to the FA's Disciplinary Commission that they had dealt with the agent from Dutch company Foursports in relation to the player's contract. The FA's statement on the matter was fairly terse but it appears that the negotiations in question were not in relation to the transfer of the player at all. Instead, they concerned the step up in the status of the player's contract from scholarship to professional terms.

The sanctions imposed on Arsenal seem fairly harsh, especially given the amount of the commission actually paid by Arsenal (only £2,000) plus the fact that the preamble to FIFA's Players' Agent Regulations states that the Regulations only govern the role of player's agents in respect of transfers - and not in relation purely to contract negotiations with the same club.

As mentioned in section 2.1.2 above, the FA is currently supposed to be looking at the Harry Kewell transfer and the role played by unlicensed agent Bernie Mandic, but has not come to a decision as at the time of writing.

5.2. Charges against licensed agents brought by the FA

5.2.1. Dennis Roach

On 27 July 2001, the FA charged registered player's agent Dennis Roach over the transfers of Paulo Wanchope from West Ham to Manchester City for £3.65 million and Duncan Ferguson from Newcastle to Everton for £3.65. The FA had received a letter of complaint about the agent's conduct. Roach was charged under the FIFA Licensed Players' Agents Regulations. The FA accused Roach of acting for more than one party in the same transaction, failing to act at all times in an ethical and professional manner and observe the highest standards of integrity and fair dealing and accepting a payment from a source other than his principal. The then managers of the two clubs, Joe Royle of Manchester City and Newcastle's Bobby Robson both criticised Roach for delaying the respective transfers.

Roach hit back at the FA, accusing then chief executive Adam Crozier of leading a "witch-hunt" against him. Roach also launched legal proceedings against the FA, challenging their jurisdiction: "It's a matter for FIFA to deal with," he said, "not the FA."

There is little doubt that the FA's charges were undermined by Roach's re-election to the post of president of the International Association of Football Agents in December 2001. The charges were never heard.

5.2.2. Paul Stretford

On 17 June 2005 the FA issued four charges against registered players' agent Paul Stretford. The charges related to Stretford's alleged conduct in obtaining the right to represent Wayne Rooney in 2002 as well as the evidence he gave at a criminal case at Warrington Crown Court in October 2004.

That criminal case had been brought as a result of accusations of blackmail made by Stretford himself against John Hyland, a boxing promoter, and two brothers, Christopher and Anthony Bacon. Hyland and the Bacon brothers were loosely associated with another licensed players' agent, Peter McIntosh, from whom Stretford was

accused of "poaching" Rooney. Stretford videotaped a meeting held at a Warrington hotel in June 2003 apparently showing the defendants trying to force Stretford to sign a contract under which he would hand over 50% of his earnings from Rooney. When giving evidence, Stretford had told the court that he had not begun to represent Rooney until December 2002. However, two documents disclosed during the trial suggested that, by September 2002, he had already signed up the player. Prosecutor John Hedgecoe said: "We do not feel able to rely on Paul Stretford as a witness in this case and in view of his importance as a witness to the way in which we have put this case from the outset, we have decided that the only appropriate course is to offer no further evidence." The judge subsequently passed not guilty verdicts on the three defendants.

The significance for the FA of the fact that Stretford had already signed Rooney by September 2002 was that the player was, at that time, still contracted to another agent, Peter McIntosh.

Charges 1 to 3

The first three charges were based on alleged breaches of the FIFA Licensed Players' Agents Regulations and in particular on the provisions of the Code of Professional Conduct. The FA allege that Stretford breached part III of the Code by failing to protect the best interest of his client and breached part IV by failing to respect the rights of his negotiating partners and failing to refrain from any action that could draw clients away from other parties.

Charges 4 to 6

Stretford was also charged with three breaches under Article 12.1 of the FIFA Licensed Players' Agents Regulations, which require licensed players' agents to lodge copies of any player representation contract they enter into with the appropriate national association. The FA alleged that Stretford failed to lodge three such contracts. It appears that this alleged failure only came to light as a result of the evidence that Stretford gave at the trial at Warrington Crown Court.

Charges 4 to 6

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Charge 7

The final "misconduct" charge was that Stretford had breached Article 12.2 or, alternatively, Article 13 of the FIFA Licensed Players' Agents Regulations. Article 12.2 states that the contract between the agent and the player may not be longer than two years. The FA alleges that the contract Stretford entered into with Wayne Rooney was longer than this. Under Article 13, while a licensed players' agent is permitted to carry on his occupation as a business and to have employees, "as long as his employees' work is restricted to administrative duties connected with the business activity of a players' agent." Article 13 goes on to say that "only the players' agent himself is entitled to represent and promote the interests of players and/or clubs with other players and/or clubs." The FA alleges that Stretford breached this provision.

Charges 8 and 9

The final two charges were not misconduct charges unlike the first three sets of charges but instead related to purported breaches of FA Rule E3 which requires agents and other participants in the game to act at all times in the best interests of the game and not to act improperly or in a way which brings the game into disrepute. The charges relate to making false and/or misleading witness statements to police and giving false and/or misleading testimony to Warrington Crown Court.

Stretford's response

Stretford responded by issuing High Court proceedings against the FA on the grounds that their disciplinary proceedings against him breach the principles of natural justice and the European Convention on Human Rights. Stretford additionally asked the High Court to rule that FA Rule E3 is contrary to public policy and should not therefore be enforceable.

Stretford's principal argument was that the members of the tribunal which the FA proposed will hear his case is selected solely by the FA and is mainly composed of FA officials and Councillors. According to the Agent, it therefore breaches the right to a fair trial provision of the European Convention on Human Rights - Article 6¹⁵.

On 17 March 2006, the High Court found against Stretford and in favour of the FA in relation to the natural justice argument. The Chancellor of the High Court found that the Agent was indeed bound by the arbitration procedure prescribed under FA Rule K. The Chancellor disagreed with Stretford's contention that the FA arbitration process breached Article 6 of the European Convention on Human Rights.

However, the FA conceded, in the light of the recent case *Meadow v General Medical Council*¹⁶, that it would have to suspend its charges 8 and 9 under FA Rule E3. The effect of the *Meadow* case was to immunise an individual from the disciplinary action of a regulator based upon false testimony given to the court. The point of this immunity was to ensure that individuals would not be put off giving evidence to the courts by the possibility of subsequent action by a regulatory body in respect of their testimony.

So, in this particular case, the FA had to concede that, while the *Meadow* judgment stood, Stretford was immune from disciplinary action in respect of the charges that related to his alleged false testimony.

At the time of publication, those two FA Rule E.3 charges remain suspended and the other charges have yet to be decided.

5.2.3. Carl Dunn

The FA fined agent Carl Dunn £1,500 and handed him a three month suspension after charges of improper conduct were upheld on 9 November 2005. Dunn had disseminated information about his client Grant Holt to other clubs while he was under contract at Rochdale.

Dunn was charged under FA Rule E3 which states that: "A Participant shall at all times act in the best interests of the game and shall not act in any manner which is improper or brings the game into disrepute".

5.2.4. Jonathan Barnett

On 7 April 2006 the FA announced it was charging Licensed Agent Jonathan Barnett in relation to his alleged involvement in a meeting attended by his client - the then Arsenal player Ashley Cole - and representatives of Chelsea FC. The player himself, as well as Chelsea manager Jose Mourinho and Chelsea FC had all been charged and disciplined by the FA over the meeting, which took place on 27 January 2005.

Barnett was charged on three counts.

The first charge

The FA charged Barnett with breach of FA Rule E1(e), under which it claimed the authority to act in respect of the agent's bringing about a breach by Ashley Cole of Premier League Rule K5. FA Rule E1 states that the FA may act against any participant (which includes players, clubs and agents) in respect of misconduct, which is defined to include breaches of the rules or regulations of a competition sanctioned by the FA, including those of the Premier League.

Rule K5 states that a player registered with a Premier League club "either by himself or by any other Person on his behalf, shall not either directly or indirectly make any ... approach [to another club with a view to negotiating a contract] without having obtained the prior written consent of his Club."

To most, the charge seemed fairly shaky - Rule K5 imposes an obligation on the player, but not on the agent. Certainly it seems very

possible that Barnett did indeed procure a breach of Premier League Rule K5 by Ashley Cole. But, an agent's procuring a breach by a player is not in itself a breach of the Premier League Rules and therefore cannot be misconduct as defined under FA Rule E1: "Misconduct' ... is defined as being a breach of ... the rules or regulations of ... [an FA sanctioned competition]".

In spite of that, when the FA delivered its findings on 26 September 2006, it found the charge proved.

The second charge

The FA also charged Barnett with a breach of Paragraph IV of the Code of Professional Conduct contained at Annexe B of the FIFA Licensed Players' Agents Regulations which reads:

"The players' agent shall, without fail, respect the rights of his negotiating partners and third parties. In particular, he shall respect the contractual relations of his professional colleagues and shall refrain from any action that could entice clients away from other parties."

This charge was also found to be proven by the FA, in that the agent had failed to respect the rights of a third party, Arsenal FC.

The third charge

Finally, the FA charged Barnett under FA Rule E3, which requires a player's agent to respect the rights of third parties, act in the best interests of the game, refrain from acting improperly and from bringing the game into disrepute.

This charge was not made found to be proven, although unfortunately the FA did not make public its reasons for this.

Sanctions

Barnett's licence was initially suspended for 18 months, with the second nine months of that suspension being itself suspended on condition that no breach of an FA Rule takes place during the 18 month period. Additionally, he was ordered to pay a fine of £100,000, give up his personal hearing fee and pay the full costs of the disciplinary commission. After an appeal hearing, the fine was upheld while the 18 month licence suspension was reduced to 12 months.

It is worth noting that the FA saw a need for there to be "an element of deterrence" in the punishment it handed the agent. In deciding upon the appropriate sanctions it was also influenced by the agent's failure to admit any guilt and by the fact that he had appeared to be a prime mover in setting up the meeting.

5.2.5. Ian Elliott

Elliott was charged by the FA on 6 July 2006. He had allegedly taken care of the interests of the player Grant Leadbitter at a time when he did not have a concluded written representation contract with him, in breach of Article 12.1 of the FIFA Licensed Players' Agents Regulations. A second charge related to an alleged breach of the Code of Professional Conduct. Paragraph IV of the Code requires that "The player's agent shall ... respect the contractual relations of his professional colleagues and refrain from any action that could entice clients away from other parties." The FA charged the agent for breach of this provision as the Leadbitter was at that time contracted to another agent.

The third and final charge against Elliot was for failure to lodge a representation contract with The FA within five days of its execution, as is required by Article 14.13 of the FA Football Agents Regulations.

6. Final comment

There is every chance that the regime envisaged by the Proposed 2007 Regulations will be subjected to legal challenges, brought by aggrieved

¹⁵ Article 6 ECHR provides as follows "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reason-

able time by an independent and impartial tribunal established by law ...".

¹⁶ [2006] EWHC 146 (Admin).

agents on the basis of purportedly unlawful restraints of trade. The extent (if any) to which such challenges will lead to changes in the FA's proposals remains to be seen. However, it seems unlikely that there will be any significant dilution of the regulations. While the headlines may be grabbed by Lord Stevens' findings in respect of the 17 Premier League transfers his company has identified for closer scrutiny, it is the new regulations that are likely to have the greater impact on football and the role of agents within the game.

The focus of this chapter has of course been on football. However, while the sport does face a unique set of problems and challenges, the principles that run across the governance of agents tend to be the

same regardless of the sport involved: acting for only one party in a transaction, seeking the permission of a player's current employer before approaching other potential employers, upholding the good name of the sport in question, respecting the rights of fellow agents and other parties, to name but a few. In the long term, we may find that other sports follow football's suit in tightening their agents regulations. In the meantime, it is worth remembering that for all the attention football receives, the principles that govern agents' conduct and their relationship with their clients are actually reassuringly uniform.

The International Sports Law Journal

Wayne Rooney Wins Domain Name Dispute

by Ian Blackshaw*

The latest domain name dispute in the sporting arena to come before the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center (the Center), a UN specialized agency based in Geneva, Switzerland, involved the Manchester United and England footballer, Wayne Rooney, who was born in Liverpool in 1985. The domain name (internet address) in contention was *waynerooney.com* which was registered by the respondent in the case, a busy actor and ardent fan of Everton Football Club, with whom Rooney started his career as a fifteen year old in 2000, turning professional with them in 2003 and then moving on to 'ManU' the following year.

In order to win, Rooney had to prove that, under the provisions of the ICANN¹ Uniform Domain Name Dispute Resolution Policy (UDRP) (the Policy),² approved on October 24, 1999 and administered by the Center, this was a case of so-called 'cybersquatting'.

Under the Policy, cybersquatting involves the abusive registration of a domain name and the complainant, in order to obtain the transfer or cancellation of the offending domain name, must establish that the domain name concerned is:

- identical or confusingly similar to a trademark of another;
- registered by a party who has no rights or legitimate interest in that domain name; and
- registered and used in bad faith³.

For the complainant to succeed, all three of these conditions must be satisfied.

But, what, one may ask, is meant by the expression 'bad faith'? The Policy provides the following examples of acts, which *prima facie* may constitute evidence of bad faith:

- an intention to sell the domain name to the trademark owner or its competitor;
- an attempt to attract for financial gain internet users by creating confusion with the trademark of another;
- an intention to prevent the trademark owner from reflecting his trademark in a corresponding domain name; and
- an intention to disrupt the business of a competitor⁴.

It should be noted that this list is not exhaustive, but merely illustrative of the kinds of situations that may fall within the concept of bad faith.

In practice, many of the disputes are not defended by the respondent to the complaint, and this fact, along with a failure to respond to any 'cease and desist' letter from the complainant issued before the WIPO proceedings were commenced, may constitute further evi-

dence of bad faith on the part of the respondent. Likewise, the respondent may have been previously involved in registering disputed domain names that have been the subject of previous WIPO cases, in which those names have been found to be without legal justification and ordered to be transferred to the complainants. Again, this would constitute evidence of bad faith.

As also would registering a fanciful or bizarre name, which happened in the so-called Pepsi case⁵. In that case, an Italian Company, with the name of "Partite Emozionanti Per Sportivi Italiani", which, in translation, stands for "Leave the Histronics for Italian Sports Fans", and known for short as "P.E.P.S.I.", registered 70 domain names incorporating the famous soft drink trademark PEPSI in relation to an extensive range of sports, including 'pepsicricket.com', 'pepsigolf.com', 'pepsisoccer.com', 'pepsirugby.net', 'pepsisuperbike.net' and 'pepsivolleyball.net'. The sole panelist in this case held that there was "opportunistic bad faith" because the domain names were so obviously connected with such a well-known product with which the respondent had no connection⁶.

In the Rooney case, the domain name in contention had been registered before Rooney's trade mark rights in his name had 'matured' and this was one of the legal issues to be determined by the sole panelist appointed by the Center to decide the case. Likewise, in such circumstances, could the respondent be held to be acting in bad faith in registering and using the domain name? Irrespective of this, the other legal issue raised by the case was whether, at the time the respondent registered the disputed domain name, Rooney had already acquired a sufficient reputation, the 'goodwill' in which could be protected under the English Common Law Doctrine of 'Passing Off' (unfair competition in a legal sense).

The facts of the case, the contentions of the parties, and the discussion and findings of the panelist are set out in the decision itself,

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3 Paragraph 4(a) of the Policy.

4 Paragraph 4(b) of the Policy.

5 *PepsiCo, Inc. v PEPSI, SRL (a/k/a P.E.P.S.I.) and EMS COMPUTER INDUSTRY (a/k/a EMS)*, WIPO Case No. D2003-0696.

6 See also *Veuve Cliquot Ponsardin, Maison Fondée en 1772 v The Polygenix Group Co.*, WIPO Case No. D2000-0163.

1 Internet Corporation for Assigned Names and Numbers.

2 To access the Policy, log onto 'www.icann.org/udrp/udrp-policy-24oct99.htm'.

which is reproduced *in toto* in the Annex to this article.

As will be seen from a reading of the decision itself, the particular facts and circumstances of the case play a crucial role in determining the outcome.

It is interesting to note that in the Rooney case the panelist relies, to a large extent, on the 'WIPO Overview of WIPO Panel Views on Selected UDRP Questions' which are accessible on the WIPO official website.⁷ This is also a useful resource for parties contemplating bringing a domain name dispute before the Center.

As will also be seen from the decision in Rooney, certain procedural issues also needed to be addressed. And also, the decision, in accordance with the Policy, had to be rendered within 14 (natural) days of the date of the panel being constituted. Speed is particularly important in relation to sports disputes, where sporting deadlines often come into play.

As the Rooney case demonstrates, Domain name disputes concerning well-known sports persons, with famous and valuable trademarks to protect, can be quickly and effectively resolved using the WIPO adjudication process under the terms of the ICANN Uniform Domain Name Dispute Resolution Policy. However, no damages or costs are awarded under the UDRP.

A further advantage of this process is that decisions to transfer or cancel disputed domain names must be enforced by the Registrar that originally registered them. However, following the ruling, the Respondent has 10 days in which to file court proceedings challenging the decision, in an appropriate jurisdiction. This rarely happens in practice.

Again, the cost of using the WIPO process, which is user friendly, is relatively inexpensive. An undefended case costs a mere US\$ 1,500.

It never ceases to surprise me that, after seven years' operation of the UDRP Policy and many thousands of WIPO decisions,⁸ questionable domain names are still being registered. However, one thing can be said with some certainty: those registering and using domain names contrary to the terms of the UDRP Policy will not get away with them when challenged in the corresponding WIPO proceedings by those with a legitimate and rightful claim to them.

ANNEX

WIPO Arbitration and Mediation Center

Administrative Panel Decision

Stoneygate 48 Limited and Wayne Mark Rooney v. Huw Marshall
Case No. D2006-0916

1. The Parties

The Complainants are Stoneygate 48 Limited ("the First Complainant") and Wayne Mark Rooney ("the Second Complainant") both c/o Grant Thornton, Heron House, Albert Square, Manchester M60 8QT, United Kingdom of Great Britain and Northern Ireland, represented by Kilburn & Strode, United Kingdom of Great Britain and Northern Ireland.

The Respondent is Huw Marshall, of Wrexham, United Kingdom of Great Britain and Northern Ireland ("the Respondent"), represented by Trowers & Hamlins, United Kingdom of Great Britain and Northern Ireland.

2. The DomainName and Registrar

The disputed domain name *waynerooney.com* ("the Domain Name") is registered with Register.com ("the Registrar").

3. Procedural History

The Complaint was filed with the WIPO Arbitration and Mediation Center (the "Center") on July 19, 2006. On July 20, 2006, the Center transmitted by email to the Registrar a request for registrar verification in connection with the Domain Name. On July 25, 2006, the Registrar transmitted by email to the Center its verification response confirming that the Respondent is listed as the registrant and providing the contact details for the administrative, billing, and technical contact. The Center verified that the Complaint satisfied the formal

requirements of the Uniform Domain Name Dispute Resolution Policy (the "Policy"), the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules"), and the WIPO Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (the "Supplemental Rules").

In accordance with the Rules, paragraphs 2(a) and 4(a), the Center formally notified the Respondent of the Complaint, and the proceedings commenced on July 26, 2006. In accordance with the Rules, paragraph 5(a), the due date for Response was August 15, 2006. The Response was filed with the Center on August 15, 2006.

The Center appointed Mr. Tony Willoughby as the sole panelist in this matter on August 30, 2006. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the Center to ensure compliance with the Rules, paragraph 7.

On September 18, 2006, the Panel sought a further submission from the Complainants in respect of two matters raised in the Response. The Complainants responded on September 25, 2006, and the Respondent responded by way of a further filing on October 2, 2006.

On October 4, 2006, the Center forwarded to the Panel an email from the Registrar asking the Center whether the Registrar was compelled to answer some questions put to it by the Respondent. The Panel's reply, forwarded to the Registrar by the Center, was to the effect that it was a matter for the Registrar whether or not it responded to the Respondent's questions.

The issue is academic in that for the purposes of this decision the Panel will assume that the Registrar, if it were to reply, would provide answers consistent with the Respondent's contentions.

4. Factual Background

The First Complainant, a company incorporated in England on February 22, 2002, is the registered proprietor of CTM number 00298905 dated December 23, 2002, WAYNE ROONEY (words) covering a variety of goods and services.

The Second Complainant assigned to the First Complainant his trademark rights along with certain other image/merchandising rights in January 2003.

The Second Complainant is a very well-known professional footballer who was born in Liverpool in 1985. He made his name with Everton for whom he first started playing (in their youth team) as a 15 year old in 2000. He played his first game in the Premiership in August 2002, but by then he was well-known in footballing circles and particularly in the Liverpool area. The Liverpool Echo in the early months of 2002 featured several reports of Everton's youth team's matches in which the Second Complainant merited a headline.

One example from the February 7, 2002 issue read: "Wayne Stars in Show of Magic". Others from around the same time read: "No rest for Blues hotshot, Rooney" and "Rooney to lead Blues Youth Cup charge". At the time the Second Complainant was earning about £100 per week.

The Second Complainant turned professional with Everton in January 2003. He moved to Manchester United in August 2004 and rapidly achieved international status.

The Respondent is an actor. He is an ardent Everton fan and recognised the Second Complainant's star properties at an early stage. He registered the Domain Name on April 16, 2002. On the same day he registered the domain name *waynerooney.co.uk*.

On May 20, 2003, a sports management agency representing the Second Complainant wrote to the Respondent noting that the Respondent had registered the Domain Name and *waynerooney.co.uk* and asking the Respondent what plans he had for those domain names. There is a dispute as to what did or did not ensue following that letter.

As at the date of the Complaint, the Domain Name was connected to a directory site operated by the Registrar which feature links to

7 www.wipo.int.

8 All of which can be accessed on line at

www.arbiter.wipo.int/domains/search/index.html.

Beiträge zum Sportrecht

Herausgegeben von Kristian Kühl, Udo Steiner und Klaus Vieweg



■ 26. Klaus Vieweg, Klaus (Hrsg.)

Praxis des Sportsrechts

Referate der sechsten und achten internationalen Tagung Sportrecht.
1. Abt., 371 S. 2005 (978-3-428-12999-5) € 79,80

■ 25. Marc Seymer

Anforderkriterien im organisierten Freizeitport
275 S. 2005 (978-3-428-12157-0) € 68,-

■ 24. Simon Weiler

Mehrfachbeteiligungen an Sportkapitalgesellschaften

Verbote von "Joint-Club Shareholding" und deren Grenzen aus der Sicht europäischer Rechts unter besonderer Berücksichtigung des Profifußballs in Deutschland
Tb., Abt., 392 S. 2005 (978-3-428-12283-7) € 69,80

■ 23. Ingo Strauß

Hörfunkrechte des Sportveranstalters

352 S. 2005 (978-3-428-12001-7) € 64,-

■ 22. Ann Elna Busch

Das Arbeitsverhältnis des Fußballtrainers

Abt., 368 S. 2005 (978-3-428-11800-7) € 72,-

■ 21. Florian Deutsch

Polizeiliche Gefahrenabwehr bei Sportveranstaltungen

Darstellung und Grund des Profisports
264 S. 2005 (978-3-428-11907-3) € 74,-

■ 20. Im Küpperführerberg

Haftungsbeschränkungen für Verein und Vorstand unter besonderer Berücksichtigung von Sportersinen
294 S. 2005 (978-3-428-11723-9) € 82,-

■ 19. Klaus Vieweg (Hrsg.)

Perspektiven des Sportsrechts

Referate der vierten und fünften internationalen Tagung Sportrecht.
Abt., VIII, 308 S. 2005 (978-3-428-11919-5) € 69,80

■ 18. Frank Oeschütz

Sportschiedsgerichtsbarkeit

Die Schiedsverfahren des Tribunal Arbitral du Sport vor dem Hintergrund des schweizerischen und deutschen Schiedsverfahrensrechts
XXII, 442 S. 2005 (978-3-428-11608-9) € 79,80

■ 17. Udo Steiner: **Gegenwartsfragen des Sportsrechts**

Angewandte Schriften, Hrsg. von Peter J. Tettinger / Klaus Vieweg
280 S. 2004 (978-3-428-11543-3) € 56,-

■ 16. Grischa Petri

Die Dopingfunktion

Abt., XXIX, 438 S. 2004 (978-3-428-11353-3) € 98,-

■ 15. Antje Weihs

Zentrale Vermarktung von Sportübertragungsrechten

Kostenrechtliche Zulässigkeit nach deutschem und europäischem Recht mit vergleichenden Betrachtungen zum US-amerikanischen und englischen Recht
405 S. 2004 (978-3-428-11243-7) € 83,-

■ 14. Christian Paul

Grenzwerte im Doping

Naturwissenschaftliche Grundlagen und rechtliche Bedeutung
Tb., Abt., 353 S. 2004 (978-3-428-11299-9) € 72,-

■ 13. Steffen Krüger

Vereinsstrafen im deutschen, englischen, französischen und schweizerischen Recht

Insbesondere im Hinblick auf die Substantivierung von Sportverstoßen
245 S. 2003 (978-3-428-11169-5) € 65,80

■ 12. Klaus Vieweg (Hrsg.)

Spektrum des Sportsrechts

Referate zweier Gemeinschaftstagungen der Universitäten Erlangen und Tübingen im Deutschen Olympischen Institut, Berlin
Abt., VIII, 412 S. 2003 (978-3-428-11255-2) € 74,80

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Postfach 41 03 29 · D-12113 Berlin · Telefax (0 30) 79 00 66 31

Internet: <http://www.duncker-humblot.de>

a variety of other sites ranging from football related sites to on-line dating sites.

Following receipt of the Complaint the Respondent instructed the Registrar to remove the link to the directory site and the link was duly removed.

5. Parties' Contentions

A. Complainants

The Complainants contend that the Domain Name is identical to a trademark in which the Complainants have rights. The Complainants claim unregistered rights in addition to the trademark registration referred to above.

The Complainants contend that the Respondent has no rights or legitimate interests in respect of the Domain Name, pointing out that it is not the Respondent's name and that the Complainants have granted the Respondent no licence to use the Second Complainant's name in any shape or form.

The Complainants contend that the Domain Name was registered and is being used in bad faith. The Complainants point to the Respondent's lack of any rights in respect of the Domain Name and the use of it to connect to the Registrar's directory site which, while it contains references to the Second Complainant, is also linked to sites in respect of which the Complainants have no interest of any kind. The Complainants contend that the Respondent is deriving income from the directory site.

The Complainants allege that they have approached the Respondent with a view to acquiring the Domain Name, but the Respondent has never replied.

The Complainants' primary contention under the heading of "bad faith", which effectively wraps up within it the subsidiary contentions, is that the Respondent registered the Domain Name with a view to exploiting the Second Complainant's name, thereby causing damage to the Complainants in the form of loss of business opportunity and dilution and/or tarnishment of the WAYNE ROONEY trademark.

The Complaint concludes as follows:

"The [Domain Name] is an obvious Internet address for consumers to use when looking for the Complainants' website. Instead of locating the Complainants' website when waynerooney.com (sic) is entered in the Internet browser, consumers are directed to a directory of Internet websites which have no connection whatsoever with the Complainants.

It is evident that [the Respondent] is through the use of the website at *www.waynerooney.com* attempting directly to target and attract consumers in the UK, where the bulk of the Complainants' fans (and potential customers) are based. The fact that the registrant's website contains "sponsored" Internet links indicates that [the Respondent] has obtained payment for displaying these Internet links or obtains revenue through a click/pay arrangement. [The Respondent] has therefore used the [Domain Name] for the purpose of attracting Internet users for commercial gain. This has resulted in a potential loss of opportunity for the Complainants to exploit the WAYNE ROONEY name."

B. Respondent

The Respondent denies the Complainants' allegations.

While he accepts that the Complainants have trademark rights, he says that they should be ignored. He points out that the CTM which dates back to the application date in December 2002 (a) post-dated the registration of the Domain name and (b) in any event did not in fact mature into a registration until 2004, long after the Domain Name was registered. Publication of the registration did not occur until August 2004.

The Respondent denies that the unregistered rights existed at the time he registered the Domain Name. At that time the Second Complainant was a 16 year-old boy whose reputation and goodwill (such as it was) was very local. He had not at that stage turned professional. The Respondent observes that the Second Complainant was a junior employee of Everton

and that not all employees attract reputation and goodwill sufficient to acquire common law rights in passing off.

Additionally, the Respondent argues that trademark rights (registered and unregistered) are not so broad that they cover all uses of the mark in question. In particular, they do not cover uses other than in the course of trade.

The Respondent, an ardent Everton fan, claims that he registered the Domain Name in good faith having watched the Second Complainant play in a youth team football match in early 2002. He says that he immediately recognised the boy's potential and planned to set up a non-commercial fan site.

However, not then having the know-how necessary to set-up a website and being too busy as an actor to devote time to the matter, he did not immediately get around to doing anything about it. The Second Complainant then "betrayed" Everton by moving to Manchester United in August 2004, and the Respondent lost all interest in him. Certainly, there was now no question of the Respondent using the Domain Name for a fan site. Accordingly, he did nothing with the Domain Name.

Following receipt of the Complaint he learnt that the Registrar was using the Domain Name to connect to its directory site featuring sponsored links to other sites. He immediately contacted the Registrar and instructed the Registrar to remove the link to its directory site and this was done.

The Respondent denies all responsibility for any commercial use made of the Domain Name and denies too that he derived any commercial benefit.

The Respondent denies that at the relevant time he had no rights or legitimate interests in respect of the Domain Name. He claims that his intended use of the Domain Name for a non-commercial fan site gives rise to a legitimate interest. He claims that for such a site it is legitimate to use the name of the subject of the site. By way of illustration he points to two such sites, namely *www.waynerooneyonline.com* and *www.davidbeckham.us*.

The Respondent denies that the Domain Name was registered and is being used in bad faith. He reiterates that he had a legitimate interest in registering the Domain Name. He denies that he has blocked the Complainants from registering an appropriate domain name. He observes that there are several available including *wayne-rooney.com*. Insofar as the bad faith allegations concern the content of the website connected to the Domain Name, that is historical and in any event it had nothing to do with him, everything to do with the Registrar and he derived no commercial benefit of any kind. He knew nothing of it until the Complaint arrived.

Finally, the Respondent denies that he ever failed to respond to the Complainants when they approached him. He received a letter, which was followed by a telephone call. He says that he told them that he had never thought of selling the Domain Name and the call ended on that note. There were then a couple of follow-up calls from the agency, but the people to whom he spoke appeared to be unaware of the original call. The conversations led nowhere.

C. The Responses to the Procedural Order

The Procedural Order, directed to the Complainants, gave the Complainants an opportunity to respond to two matters raised in the Response, namely the Respondent's denials that he (a) failed to respond, as alleged by the Complainants, to an approach made by the Complainants to acquire the Domain Name and (b) derived any income from the content of the website connected to the Domain Name.

The Complainants dealt with the first of those matters by saying that they could not verify the position because of changes to the personnel at the Second Complainant's sports management agency. They went on to say that because the Respondent had produced nothing to verify his story they declined to accept it.

As to the second matter they produced a substantial argument in support of the proposition that even if the Respondent did not benefit from the content of the website and was not responsible for selecting the content, he should nonetheless bear the responsibility for the

result - he had demonstrated by getting the content removed that he could control the Registrar and when he registered the Domain Name the agreement he signed made it clear that unless he rejected the option the Domain Name would connect to a site featuring content selected by the Registrar including advertisements. He elected not to reject the option. While it may be the case that he did not derive any commercial benefit from the advertising links, the Registrar certainly did so and paragraph 4(b)(iv) of the Policy still applied.

The Complainants also disclosed that the Respondent had registered the domain name, *waynerooney.co.uk* on the same day that he registered the Domain Name. They contend that this is inconsistent with the Respondent's stated intention of creating a non-commercial fan site.

In relation to the first matter the Respondent produces a letter from the Second Complainant's sports management agency dated May 23, 2003, asking the Respondent what his plans were for the Domain Name and the domain name, *waynerooney.co.uk*. He has not retained notes of his telephone conversations. He stands by his story and contends that if the Complainants expect any weight to be given to their allegation, they should support it with evidence.

As to the second matter, the Respondent argues strongly that for a bad faith allegation under the Policy to succeed there has to be a bad faith intention on the part of the Respondent. The Respondent was completely unaware of what the Registrar was doing with the Domain Name until the content of the site was drawn to his attention in the Complaint.

Since the Panel does not intend to decide this case on the basis of the use made by it by the Registrar, it is unnecessary for the Panel to set out in full the weighty arguments advanced on the issue.

6. Discussion and Findings

General

According to paragraph 4(a) of the Policy, for this Complaint to succeed in relation to the Domain Name, the Complainants must prove that

- (i) The Domain Name is identical or confusingly similar to a trademark or service mark in which the Complainants have rights; and
- (ii) The Respondent has no rights or legitimate interests in respect of the Domain Name; and
- (iii) The Domain Name has been registered in bad faith and is being used in bad faith.

A. Identical or Confusingly Similar

There is no dispute that the Complainants have trademark rights in the name WAYNE ROONEY, nor is there any dispute that the Domain Name is identical to that trademark if one discounts the generic domain suffix.

That being so, the Panel finds that the Domain Name is identical to a trademark in which the Complainants have rights.

As will be noted from section 5B above, the Respondent argues that the Complainants' rights should be ignored because they did not exist at the date of registration of the Domain Name.

The Panel refers to the passage in paragraph 1.4 of the WIPO Overview of WIPO Panel Views on Selected Questions, which reads:

"1.4 Does the complainant have UDRP-relevant trademark rights in a mark that was registered, or in which the complainant acquired unregistered rights, after the disputed domain name was registered? Consensus view: Registration of a domain name before a complainant acquires trademark rights in a name does not prevent a finding of identity or confusing similarity. The UDRP makes no specific reference to the date of which the owner of the trade or service mark acquired rights. However it can be difficult to prove that the domain name was registered in bad faith as it is difficult to show that the domain name was registered with a future trademark in mind."

The Panel adopts the consensus view and stands by his finding above that the Domain Name is identical to a trademark in respect of which the Complainant has rights.

B. Rights or Legitimate Interests

The Respondent claims that as an ardent Everton fan, having watched the Second Complainant play in a youth team match for Everton in early 2002 and recognizing the latter's potential, he resolved to set up a non-commercial fan site devoted to the Second Complainant. He says that this gives him a legitimate interest in respect of the Domain Name. He says that it makes eminent sense for him to select a domain name for the website which features the name of the subject of the site. In support he draws the Panel's attention to two other such sites, namely *www.waynerooneyonline.com* and *www.davidbeckham.ws*.

The Panel confesses to finding this a difficult story to swallow.

The Respondent admits that he has no knowledge or experience of web design, yet following a football match he develops an urge to register not one domain name, but two domain names, the Domain Name and the '.co.uk' equivalent, featuring the name of a 16 year old footballer whose reputation and goodwill barely exists (see the Respondent's submission in relation to common law rights), but in whom he sees the potential for a fan site.

Thus far, while the story is unusual, it could be made good if this ardent fan, so motivated to do something wholly outside his knowledge and experience, actually took some steps to realize his ambition. But he did nothing. He registered the Domain Name in April 2002, but did absolutely nothing until the event occurred in August 2004, some two and a quarter years later, which is said to have dashed his dreams. The Second Complainant moved from Everton to Manchester United.

What might he have been expected to have done? He could have produced some plans for the fan site. He could have entered into talks with someone with the relevant expertise. He could even have booked himself on a course to acquire the relevant expertise. But he did nothing. His reason is that at that time his acting career precluded him from devoting the time to it.

Paragraph 4(c) of the Policy, which is addressed to respondents, includes a non-exhaustive list of what a respondent can produce to the Panel to demonstrate rights or legitimate interests for the purpose of paragraph 4(a)(iii) of the Policy. The only sub-paragraph relevant here is sub-paragraph (i) which reads:

"(i) before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services;"

As indicated, the Panel has nothing before him, other than the Respondent's assertion, to demonstrate his intention. Whether his stated intention would have been enough for this purpose is an open question. What is unquestionable is that without any supporting evidence the Panel has no alternative but to find that the Respondent has no rights or legitimate interests in respect of the Domain Name.

Before departing this section of the decision it should be explained that while it is for the Complainants to prove all three elements of paragraph 4(a) of the Policy, proving that the Respondent has no rights or legitimate interests is often impossible for a complainant to prove and particularly where, as here, the stated justification for registering the Domain Name is entirely in the hands of the Respondent. In these circumstances it is for the Complainants to make out a *prima facie* case and for the Respondent to answer that case. Here there is no question but that the Respondent deliberately adopted the Second Complainant's name, the only issue is as to the reason, hence the need for some demonstrable support as referred to in paragraph 4(c)(i) of the Policy.

C. Registered and Used in Bad Faith

Under this head it is necessary to re-visit the issue as to the date on which the Complainants acquired trademark rights in the WAYNE ROONEY mark. The Panel refers again to the WIPO Overview of WIPO Panel Views on Selected Questions. Paragraph 3.1 states:

“3.1 Can bad faith be found if the disputed domain name was registered before the trademark was registered/common law trademark rights were acquired?”

Consensus view: Normally speaking, when a domain name is registered before a trademark right is established, the registration of the domain name was not in bad faith because the registrant could not have contemplated the complainant's non-existent right. However: In certain situations, when the respondent is clearly aware of the complainant, and it is clear that the aim of the registration was to take advantage of the confusion between the domain name and any potential complainant rights, bad faith can be found. This often occurs after a merger between two companies, before the new trademark rights can arise, or when the respondent is aware of the complainant's potential rights, and registers the domain name to take advantage of any rights that may arise from the complainant's enterprises.”

Clearly, on that basis, it is open to the Panel to find bad faith under the Policy even if the Complainants' rights post-dated the Domain Name registration. There can be no doubt that the Respondent registered the Domain Name with full knowledge of the existence of the Second Complainant and in contemplation of the reputation and goodwill that he knew the Second Respondent would develop.

However, the Panel is satisfied on the balance of probabilities that as at April 2002, an English court would have entertained a passing off action at the suit of the Second Complainant based upon the Second Complainant's reputation and goodwill in existence at that date. Goodwill for this purpose need not be national. All the evidence points to the Second Complainant being very well-known in the Liverpool area at that time. Certainly, readers of the Liverpool Echo with an interest in football cannot have missed the headlines in which he featured.

The specific allegation of bad faith levelled at the Respondent is that he registered the Domain Name, knowing it to be the name of the Second Complainant, the name under which the Second Complainant carried on his profession, and intending to use it to connect to a commercial website. Thus, Internet users would be encouraged to visit the Respondent's website erroneously believing it to be the official website of the Complainants. The cause of the confusion is the web address, the principal element of which is the Domain Name. On the back of that so-called “confusion” visitors to the site would be faced with various commercial links and advertisements. Whether or not those visitors to the site then appreciated that it was not an official site, nonetheless they might be tempted to click on the links and make purchases. At any rate, that (according to the Complainants) would be the Respondent's hope and expectation.

If this can be proved, the Complaint succeeds under paragraph 4(b)(iv) of the Policy which reads:

“by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your website . . . , by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your website . . . or of a product or service on your website . . .”

The Complainants thought when they lodged the Complaint that they had clear evidence to support the claim. The Domain Name was connected to a directory page of the Registrar and featured sponsored advertisements.

However, it now turns out that the website in question was a creation of the Registrar, not the Respondent and the Respondent knew nothing about it. As soon as he read the Complaint and learnt of the website, he contacted the Registrar and the link to the offending site was removed. That is the evidence of the Respondent and the Panel accepts it.

The Complainants say that that is not the end of the matter because even if all that is true, the Respondent signed up to the Registrar's terms and could have rejected that option. In not having rejected it, the Respondent, while not actually operating the site or

responsible for the selection of the advertisements on the site, should nonetheless bear the overall responsibility for it. The Complainants produce a WIPO UDRP decision in support of that argument, but the Panel would prefer to deal with the matter on another basis.

As indicated under the previous head, the Panel has serious doubts as to the truth of the Respondent's story. It is an extraordinary story. It asks the Panel to assume that out of ardent fervour the Respondent behaved totally out of character registering a domain name for the first time and with a view to setting up a website devoted to the Second Complainant at a time when he (the Respondent) had no relevant knowledge or expertise and apparently without access to anyone having that knowledge or expertise. The Panel is then asked to believe that that ardent fervour died a death for over 2 years as the second Complainant's career was going from strength to strength until his move to Manchester United.

If the Respondent's story is a complete fabrication, then it is but a short step to conclude that the Respondent's purpose all along was abusive.

Nonetheless, truth can sometimes be stranger than fiction so the Panel explores the Respondent's story further. The Respondent says that he was going to set up a fan site and he points to two fan sites of the kind in question, *www.waynerooneyonline.com* and *www.davidbeckham.ws*. The Panel has visited those websites and they are commercial sites. The links connect to sites many of which have no connection with Wayne Rooney and David Beckham. They both offer merchandise (directly or indirectly) and feature sponsored links. It is inconceivable to the Panel that the operators of those sites do not derive any commercial benefit.

The Panel has no idea what the Respondent means by a non-commercial fan site if, as appears to be the case, those two fan sites, which he identifies, are typical of what he had in mind. The existence of the potential commercial benefit renders his story credible. In any event the Panel is unable to accept that the Respondent had no eye to the potential commercial benefit. The Panel does however accept that the idea was dependent upon the Respondent's support for the Second Complainant and the latter's move to Manchester United would have killed the idea off, if it was not already dead by then.

The Panel finds that when the Respondent registered the Domain Name he knew that the Second Complainant was likely to become a very hot property indeed and saw a benefit in registering the Domain Name with a view to creating a site and deriving a commercial benefit via that site. A high proportion of visitors to a site with the URL *www.waynerooney.com* would believe it to be the official website of the Complainants (in precisely the same way that people would expect *www.evertonfc.com* to be the official website of Everton Football Club) and would be visiting it for that reason. On reaching the site they might or might not appreciate that it is not an official site, but by then the deception will have occurred. If as is likely the site is offering (directly or indirectly) Wayne Rooney merchandise, there is a high chance that visitors will consider purchasing it. If they see other links that interest them, they will click on those links and thereby generate click revenue for the Respondent, the operator of the site.

The Panel finds that registration of the Domain Name with that intent in the circumstances of this case constitutes bad faith registration and use. The fact that, as things have turned out, the Respondent has never actually got around to using the Domain Name is neither here nor there.

This finding stems in part from the Panel's inability to accept as plausible the Respondent's claim that his fan site would be non-commercial and because the fan sites which the Respondent himself has cited as examples (*www.waynerooneyonline.com* and *www.davidbeckham.ws*) are indeed commercial fan sites.

Accordingly, the Panel finds for the Complainant under the third element of the Policy.

7. Addendum

In the Complaint the Complainants asserted that they had attempted to contact the Respondent regarding ownership of the Domain Name, but that no response had ever been received. Clearly they

regarded this failure on the part of the Respondent to be reprehensible.

The Respondent's response to that allegation was that he had been approached by a sports management agency and had responded to the effect that he had never thought of selling the Domain Name. There were then a couple of further telephone calls from the agency but to no purpose or effect.

In the face of that story one might have expected the Complainants either to come out with evidence to disprove the Respondent's response or to withdraw the allegation. They have done neither. They maintain the allegation, but say that they cannot verify it due to personnel changes at the agency. Effectively, they say that it is for the Respondent to disprove it.

In the view of the Panel that approach is, to say the least, most unfortunate. If factual allegations of that kind, the details of which ought to be in the possession of the party making the allegation, are

made, they should be properly particularised. If they cannot be particularised because there is nobody around to verify them, the allegation should be suitably qualified to indicate to the Panel the limitations to be placed on it. This is particularly important in a procedure such as this where for any number of reasons a response to the complaint may not be forthcoming.

8. Decision

For all the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the Domain Name, *waynerooney.com*, be transferred to the Complainants.

Tony Willoughby

Sole Panelist

Dated: October 6, 2006

The International Sports
Law Journal



Sport&EU: Association for the Study of Sport and the European Union

Sport&EU (the Association for the Study of Sport and the European Union) exists to promote academic research into the Union's involvement in sports and its consequences for law, policy and society. The association is committed to theoretical debate and also encourages comparative and interdisciplinary case studies focusing on various sports.

The association's email list provides researchers with a network for the exchange of ideas and information or the organisation of panels in international conferences. For instance, Sport&EU will have two panels at the upcoming European Union Studies Association (EUSA) 10th Biennial Conference in Montréal (Canada).

Sport&EU also publishes a quarterly newsletter edited by Dr Andrew Smith and Dr Simona Kustec-Lipicer available at: www.sportandeu.com/newsletter.

Contributions can be sent to newsletter@sportandeu.com.

In July 2006, Sport&EU, together with Loughborough University, organised a workshop on the situation and perspectives ten years after the Bosman ruling. Plans are underway for a workshop at the University of Chester. (More information will be published at www.sportandeu.com/workshop when available)

In 2007, Sport&EU is delighted to start a collaboration with The International Sports Law Journal (ISLJ) of the ASSER International Sports Law Centre.

Sport&EU is always happy to welcome new members who have an interest in Sport and the European Union (largely defined). Academics, including research students, from every branch of learning who work on sport in any area within the European Union are especially welcome.

Send an email with your contact details to join@sportandeu.com in order to join the association, to be on our mailing list, to receive our news and to take part in our conferences and other activities.

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Please, do not hesitate to contact the founding members for more information:

Borja García, B.Garcia-Garcia@lboro.ac.uk (sports policies and governance) An Vermeersch, An.Vermeersch@UGent.be (sports law and regulation) David Ranc, David.Ranc@cantab.net (sports and society)

The European Union and Sport: Law and Policy*

by Robert C.R. Siekmann**

Ladies and gentlemen, Dear audience!

First of all, I would like to thank the Polish Institute of International Affairs and the Ministry of Sports for inviting me and my colleague from the ASSER International Sports Law Centre, M Roberto Branco Martins, to speak at this Conference. Today the T.M.C. Asser Institute to which the Centre belongs is celebrating its fortieth anniversary at an official meeting in the Peace Palace in The Hague at which the Dutch Minister of Justice will also be present. Nevertheless, we chose to accept your invitation to attend this high-profile conference in Warsaw. Of course, the Netherlands and Poland recently tightened relations with the appointment of Leo Beenhakker as the coach of the Polish national football team. We hope and expect that he will be successful in Poland and that his legal status will soon be normalised... In this context, I would like to stress that I personally opposed the partial accession of the “new” Member States. Becoming a Member State of the European Union should imply full membership right from the start if all the conditions are fulfilled. It is good to note that as from 1 January 2007 all restrictions for Polish professional football players to play in our country will finally be lifted.

The subject of this introductory speech is “The European Union and Sport: Law and Policy”.

Not everybody knows that the European Union has a fairly extensive record in the field of sport. Last year, the Asser Centre published a book containing some 900 pages of selected legal and policy documents (resolutions of the European Parliament, decisions of the Commission, memoranda, jurisprudence of the European Court of Justice, etc.) and another 900 pages were put on the Centre’s website. The EU has dealt with a wide range of subjects since the so-called *Walrave* case in 1974. These include doping and football hooliganism, themes which were initially the exclusive domain of the Council of Europe, the human rights organisation that today includes about 50 European countries. The European Union is a financially powerful organisation which funds research in the field of sport. In recent years, for example, Brussels commissioned the Centre to conduct research into the harmonisation of doping rules in national and international sports associations and federations and into tackling transnational football hooliganism. In 2003/2004, Roberto Branco Martins and his team travelled around Europe visiting all EU Member States, “old” and “new”, in the framework of an EU project aimed at promoting Social Dialogue in Europe in the professional football sector. And last year, we produced a report on Professional Sport in the Internal Market for the European Parliament.

When we talk about EU and Sport, it should be emphasised that sport as such is not incorporated in the Treaties. The much debated Constitution for Europe contains a provision which also explicitly touches on sport. However as we know, the ratification process of this treaty - which is not a Constitution in the legal sense of the word - is now being suspended following last year’s negative referenda results in France and the Netherlands. In my opinion, these results were down to a basic misunderstanding among the populations of both countries about what Europe is all about and the function of the treaty. This development is regrettable and in my view definitely detrimental to political progress in Europe! In this situation, the sports provision in the Constitution for Europe may only be used by advocates as an argument before court. The text confirms the importance attributed by the EU to the social and cultural function of sport and the respect for its special character and structures. These aspects were incorporated in the Declarations on Sport attached to the Treaties of Amsterdam (1997) and Nice (2000), which were stepping stones in the development of the fundamentals of the EU. The Treaty of Nice is still the law currently in force after the postponement of the ratification process of the Constitution for Europe. The Declarations of Amsterdam and Nice on Sport could be qualified as “soft law”. They

are political texts. However, they have been and are explicitly referred to in the sports jurisprudence of the European Court of Justice, supporting the Court’s reasoning (*Deliège*, *Lehtonen*, *Meca-Medina*).

This brings us to the phenomenon of “sport specificity” which was developed by the Court.

In principle, the Court will apply European law to sport insofar as it concerns an economic activity (see *Walrave*, *Bosman*). There is no constitutional basis for sport in the European Treaties and therefore no general exception is made for sport under European Law.

The provisions relating to the freedom of movement for workers and fair competition must in principle be applied to professional sport to their full extent. However, the European Court of Justice has made exceptions in its jurisprudence for specific circumstances, where the rules of sports governing bodies or international sports federations have a purely sporting character. A clear example is the *Lehtonen* case. In ordinary society, workers and employees cannot be prevented from changing jobs at any time. In professional football, FIFA has stipulated that there are only two transfer windows, one before the start of the season and one during the winter break, when players are allowed to move from one club to the other. What is the reason for this far-reaching restriction which as such contravenes European Law since it is contrary to the freedom of movement, one of the four basic freedoms on which the Community is based? The reasoning is that it would be unfair, a falsification of competition, if a club could be strengthened in the final stages of the season when decisions about championship and relegation are at stake. If the transfer window rule did not exist, a weak club could suddenly contract players financed by external money suppliers in order to avoid relegation. It could even try to get a key player transferred from another club fighting relegation from the League. So this rule is a functional one. It is a necessary and proportional rule. It is objectively justified and non-discriminatory. Perhaps not in its details, but in general the rule is accepted by the international football community, FAs, clubs and players’ unions. The basis for the exception made by the European Court of Justice in cases like *Lehtonen* derives from the Nice Declaration. Another example is the Commission’s decision in the *ENIC/UEFA* case. This case concerns the potential situation where one company simultaneously owns two clubs which are due to play each other. In the present instance, the investment firm ENIC was co-owner of AEK Athens and Slavia Prague which were competing in UEFA Cup “knock-out” matches. According to UEFA policy aimed at preventing the manipulation of match results, this was not allowed and this ban was approved by the European Commission in its practice. The Commission did not consider the ban to be an infringement of fair competition under European Law. On the contrary, the ban actually promoted fair competition in sport.

So, here were two clear examples of the acceptance and recognition of sporting rules, although they have important economic implications and consequences. It seems that, in its role of supreme decision-maker on dispute settlement in the EU, the European Court of Justice is steadily restricting the freedom of international federations in their law and policymaking. This was illustrated recently by the *Meca-Medina* case in appeal. The European Court of First Instance fully respected the world swimming federation’s doping rules as being purely sporting in character, but at the same time ignored their economic impact. Of course, the purpose of anti-doping rules is to defend fair sporting competition and protect the health of sportsmen and women. However if a sportsperson is banned for two years, this

* Introduction presented at the Conference on “The Implications of Poland’s Membership of the European Union for Polish Sport”, that was organized by the Polish Institute of

International Affairs in cooperation with the Polish Ministry of Sport, Warsaw, 28-29 September 2006.

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From left to right: Mr Jacek Foks, The Polish Institute of International Affairs, Ms Joanna Zukowska-Easton, Ministry of Sport, Dr Slawomir Debbski, The Polish Institute of International Affairs and Robert Siekmann, ASSER International Sports Law Centre at the Conference on "The Implications of Poland's Membership of the European Union for Polish Sport", that was organized by the Polish Institute of International Affairs in cooperation with the Polish Ministry of Sport, Warsaw, 8-9 September 2006.

will undoubtedly have far-reaching financial consequences for the person concerned. Banned from competition, he or she may be unable to earn any money during this period and lose sponsors. The doping rules will therefore have to be scrutinised as to their necessity and proportionality. The outcome of the Meca-Medina case, whose verdict was initially rejected, in appeal shows that the concept of sport specificity should not be interpreted too broadly. So sports federations are advised to perform the sport specificity criteria test before adopting and implementing any new rules and regulations. European Law is supranational, superior law as demonstrated in the European Court of Justice's jurisprudence since *Walrave*, and as made abundantly clear in the famous *Bosman* case in 1995 which questioned the legality of the transfer system and the existence of 'quota systems' in professional football. *Bosman* was a landmark case with regard to the freedom of movement of sportspersons. A new case is currently pending at the European Court of Justice which can already be considered a land-

mark case on competition law in sports. The *Bosman* case addressed the relationship between player and club. In the new case, the relationship between the club and the sports governing body is at stake. This case was brought before the European Court of Justice for a prejudicial ruling in the summer. It concerns FIFA rules governing the release of players for international games. The Moroccan player Oulmers from the Belgian club Sporting Charleroi was injured playing for his country. Nobody in the international football world contests the necessity of the release rule. Without this rule it would be impossible to organise national team football, European Football Championships or World Cup competitions. However, in ordinary society it is totally unheard of that company A may force company B to release its employees to A for short periods of time or even one or two months as is the case when a national team is preparing for and participating in the World Cup! In professional football, A (clubs) and B (national teams) are similar types of companies competing for similar sponsorship and broadcasting rights markets. The players' release rule amounts to unfair competition. But national team football is impossible without this rule. So, the conditions for release should be improved for the clubs, not only because they continue to pay the players' salaries and insurance fees, but also because they receive no financial compensation from the national FA, UEFA and/or FIFA. Obviously there should be much more even-handedness between clubs and governing bodies. If this is the final outcome of the Oulmers case, this will mean a huge step forward in normalising the monopoly of the governing bodies. With regard to the Oulmers case, the European economic interest grouping G-14, which now consists of 18 top elite clubs of the Real Madrid category, supports Sporting Charleroi in its plea for change.

It is clear that much needs to be done in other respects too before European professional football fully complies with the demands of European Law and the Community. For example, the consequences of the *Bosman* verdict have not yet been fully realised everywhere. Two weeks ago I visited one of the new EU Member States, Malta, where players are still not free to move wherever they wish at the end of their contractual term. A transfer fee still has to be paid by the player's new club and if not, his FA registration remains unchanged, thus with the former club. So, the transfer system still has to be abolished in Malta. Moreover, Maltese professional football clubs are obliged to field at least eight nationals which is contrary to the abolition of nationality clauses according to *Bosman*.

I thank you for your attention!

Freedom of Movement in Relation to Sport*

by Roberto Branco Martins**

Since the mid-seventies it has become clear that sport falls under European Union Law whenever it becomes an economic activity.¹ One major area of EU law that has proved to have sports implications is the free movement of workers. The purpose of this article is to illustrate the legal freedom of movement framework in the EU, specifically as it affects sport. I will also illustrate that situations exist impeding the free movement of workers, or having an impact on the movement of workers. These latter situations particularly involve workers from the 10 new Member States or third-country nationals falling under the conditions as codified in association or partnership agreements with the European Union.

Analysing the status of free movement in sport and adjacent territories will lead to a description of criteria that need to be respected to guarantee the free movement of workers in the European sports sector. I will then question whether these criteria are still being respected in European sport, by looking at some practical issues. If not, are

there alternatives to safeguard the free movement of workers in European sport?

Free movement of workers

The free movement of workers is one of the European Union pillars and stems from Article 3c of the EC Treaty:

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¹ Case 36/74 *Walrave & Koch v Union Cycliste Internationale* [1974] ECR 1405.

For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

The free movement of workers is founded on the old Article 48 of the EC Treaty, and its use in practice was elucidated in Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers within the Community.² To describe the application of the free movement rules to the European sports sector clearly one needs to start with the basis and mention the content of Article 39 (48) of the EC Treaty:

Article 39 (ex Article 48)

1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - a to accept offers of employment actually made;
 - b to move freely within the territory of Member States for this purpose;
 - c to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - d to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

To describe the application of the free movement rules in practice one can immediately focus on the European sports sector. The most famous case in the young history of free movement in the European Union is also the most famous case in European sports: the legendary Bosman case.

The Bosman case³

Jean Marc Bosman was an employee of the Belgian RC Liege club and was working under a contract which had almost expired. Before its expiration RC Liege offered him a new contract. But this new offer entailed a substantial reduction in his wages, of almost 75%. Logically, Bosman refused this new offer and as a consequence was put on the so-called 'transfer list'; he needed to look for a new club and his contract with RC Liege expired. Eventually Bosman found a club in the French second division, US Dunkerque, willing to employ him.

In accordance with the rules and regulations for international transfers, the Belgian football association had to pass a transfer certificate to the French football association within a specific time. However RC Liege and US Dunkerque had agreed on the extent of a transfer fee and its payment as a precondition for the (one-season) transfer of Bosman. But for reasons which are not clear, RC Liege began to have doubts about US Dunkerque's financial solvency and refused to give the Belgian football association permission to issue Bosman's transfer certificate. Bosman was bound to his old club and was unable to work as a professional football player for the French club of his choice, even though he had a free transfer status.

It became clear to him, after a long journey through the Belgian judicial system, that all European clubs were boycotting him because of his actions, despite his free transfer status. He was forced to play for a third-division Belgian club. Yet he persisted and eventually came before the European Court of Justice, which ruled the following in his favour. I will focus on the most relevant decision in the light of free movement:

(114) *The answer to the first question must therefore be that Article 48 (39) of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a nation-*

al of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.

(137) *It follows from the foregoing that Article 48 (39) of the Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States.*⁴

The Bosman case meant the first step towards a crystallisation of the rule on the free movement of workers in the European sports sector. A second case has sharpened the contours of the free movement rules in sport further - the Lehtonen case.⁵

Lehtonen case

The Belgian Castors Namur-Braine ASBL basketball club signed an employment contract with the Finnish player Jyri Lehtonen. The transfer deadlines in Belgian basketball were as follows: the transfer of a player from one Belgian club to another could only occur from 15 April to 15 May; the transfer of a player from a European club to a Belgian club could only occur from 15 April to February 28 and all other players from outside the European zone could transfer up until 31 March. But Lehtonen's transfer occurred after the deadline for players from European clubs outside Belgium, just at the start of the play-offs on 3 April. The opponent of Castors Namur-Braine ASBL, Belgacom-Quaregnon, complained to the arbitral authorities for Belgian basketball, and were declared winners of the play-offs because of the participation of a non-eligible player on the Castor Namur-Braine ASBL side. Lehtonen should have been prevented from participating in the match, and as a consequence he would be obstructed in carrying out the duties deriving from his employment contract.

After bringing the case to the Belgian courts Lehtonen ended up before the ECJ, which decided as follows:

(60) *In the light of all the foregoing, the answer to the national court's question, as reformulated, must be that Article 48 of the Treaty precludes the application of rules laid down in a Member State by sporting associations which prohibit a basketball club from fielding players from other Member States in matches in the national championship, where they have been transferred after a specified date, if that date is earlier than the date which applies to transfers of players from certain non-member countries, unless objective reasons concerning only sport as such or relating to differences between the position of players from a federation in the European zone and that of players from a federation not in that zone justify such different treatment.*

The Lehtonen and Bosman cases have laid down the minimum requirements for the application of the rules on free movement of workers in the European Union. However, some other practical matters occurred after these two cases that, on first sight, appear to have a close connection to the free movement of workers in sport. Given the scope of the topic and for the sake of clarity I will include these two cases in this Article before concluding on the overall status of free movement in European sports and the position of workers performing under an employment contract.

The following two cases have had an impact on the movement of workers in Europe's professional sports sector. But this impact mainly concerns workers of the new EU Member States, and third-country nationals falling under a partnership or cooperation agreement with the European Union.

2 For a more elaborate description of the history of free movement see Blanpain R, *European Labour Law* (2003), Kluwer Law International.

3 Case 415/93 ASBL Union Royale Belge des Societes de Football Association and others v Jean-Marc Bosman [1996] I CMLR.

4 For a further elaboration on the Bosman case and its implications see Blanpain R, *The Bosman Case: The End of The Transfer System* (1996) London, Sweet and Maxwell.

5 Case C-176/96 Jyri Lehtonen and others v Fédération Royale Belge des Sociétés de basket-ball ASBL (FRBSB), (1996).

The Kolpak case⁶

Maros Kolpak is a Slovak national and the goalkeeper of the German TSV Ostringen handball club. Kolpak's contract was renewed so that he now had an employment contract until 30 June 2003.

But Kolpak fell under the regulations of the German handball associations which stated that only two non-EU or EEA nationals could be lined up per competition match. These players had a special mark, an 'A' in their registration pass. Kolpak was the third player in the TSV Ostringen team with an 'A' licence and he was thus prohibited from performing his duties deriving from his employment contract.

Kolpak argued that he was entitled to receive the same treatment as all other EU/EEA nationals. He pointed out that under the conditions of the association agreement between Slovakia and the EU he should not be hindered from working by the mere fact that there were two other 'A' players in his team.⁷

Kolpak brought his case before the ECJ and was successful. The court decided the following in his favour:

(51) Thus, the first intent of Article 38(1) of the Association Agreement with Slovakia precludes any application to Mr Kolpak of a rule such as that laid down in Rule 15(1)(b) and 15(2) of the SpO in so far as that rule gives rise to a situation in which Mr Kolpak, in his capacity as a Slovak national, although lawfully employed in a Member State, has, in principle, merely a limited opportunity, in comparison with players who are nationals of Member States or of EEA Member States, to participate in certain matches, that is to say, league and cup matches of the German federal or regional leagues, which constitute, moreover, the essential purpose of his activity as a professional player.

This case established or made concrete the rights of all workers falling under an association agreement⁸ and was actually the European Union variant of a case in French basketball.⁹

A similar case, decided by the ECJ, concerned football - that of the Russian football player Igor Simutenkov.

Simutenkov case¹⁰

The Simutenkov case deals with the situation of a football player who is a national of a third-country as opposed to the European Union.¹¹ Simutenkov had a contract with Spanish side Union Deportivo Tenerife. He was registered as a non-EU player and the regulations of the Spanish football federation impeded a team from fielding more than a certain amount of these non-EU players. Simutenkov wanted to acquire the same status as EU/EEA players on the basis of a cooperation agreement between his country Russia and the EU.¹² The ECJ followed his argumentation and decided against the Spanish football federation. The main decision was that Article 23 of the Communities - Russia Partnership agreement fully applied:

"...[Article 23] establishes for the benefit of Russian workers lawfully employed in the 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..."

The Kolpak and Simutenkov cases differ from those of Bosman and Lehtonen, but still have a tremendous impact on European sport.¹³

The Kolpak and Simutenkov cases clearly illustrated the position of non-EU workers working with a lawful employment contract as regards the applicability and execution of association regulations in EU sports. In essence these cases deal with the free movement of workers in EU professional sports. An interesting consequence of these cases is that the implications are applicable not only to nationals of these states but to nationals of up to 80 countries.¹⁴

Status of the free movement rules in European sport

Thus far I have described the landmark cases that have led to an understanding of the applicability of the free movement of workers

rule in relation to European sport. From this one can distil the following two principles:

1. *Free movement of workers must be guaranteed (Bosman), unless objective reasons concerning only sport as such, justify a different treatment (Lehtonen);*
- and
2. *Non-EU nationals with an employment contract do not fall under the free movement rules but benefit of employees' rights (Kolpak and Simutenkov).*

These conditions seem to be quite clear; however sport is a fascinating sector of the European industry. Sport itself has existed for ages and has traditionally been self-regulatory. With the commercialisation of sport, it became an economic activity and subsequently general law and EU law became applicable to sport. The commercialisation of sport is still proceeding and is ever-increasing. With this continuous evolution new situations may surface - new situations that may not be in accordance with the rules and principles of law, amongst others laid down in the Treaty and ECJ decisions.

This leads me to question whether the conditions for the free movement of sportsmen as set down in Bosman and Lehtonen, and less concretely in Kolpak and Simutenkov, are still being respected by the European sports sector. Is the sports sector still 'Bosman-proof'? And if not, can these situations that impede the application of 'Bosman' fall under objective reasons of justification connected to the sport as such?

Logically I cannot analyse the entire sports sector. I will therefore focus on seven notable issues that emerged in recent history, namely: the system of payment of training and education costs in the FIFA transfer system; the system of solidarity payments in the FIFA transfer system; the use of nationality clauses in Italian water polo; the UEFA home grown player rule; the use of registration/federative rights in international sports; the definition of amateur players and the application of immigration rules in relation to the issuing of work permits for professional sportsmen.

Training Compensation, FIFA transfer regulations Article 20

An alternative transfer system saw the light after the Bosman case. This transfer system is referred to as the 'Post-Bosman' system.¹⁵ In this system the payment of transfer fees at the end of a contract was substituted by the payment of a fee for a preliminary breach of contract. The basis for the payment became the compensation for the damages incurred by the 'selling' club arising from this breach. The result was that lengthy fixed-term contracts were concluded between a player and a club. This practice led to players never reaching the end of the contract; this was simply not the intention of the parties. The amount of compensation for damages soon skyrocketed and the

6 Case C-438/00 Deutscher Handballbund and Maros Kolpak, ECJ 8 May 2003.

7 Available at europa.eu.int/comm/enlargement/pas/assoc_agreements.htm.

8 Details of the various agreements the EU has with other countries including agreements with comparable conditions as the condition at stake in the Kolpak case can be found on www.consilium.europa.eu/cms3/Applications/applications/Accords/doSearch.asp.

9 CE 30 December 2002, n° 219646, Fédération Française de Basket-Ball, affaire Malaja.

10 Case C-265/03 Igor Simutenkov v Abogado de Estado, Real Federación Española de Fútbol and Ministerio Fiscal, ECJ 12 April 2005.

11 For a more elaborate description of the Simutenkov case in the light of the EU and its agreements with third countries see Schuilenburg K A, The ECJ Simutenkov Case: Is Same Level not

Offside after All?, Policy Papers on Transnational Economic Law, April 2005 No.13.

12 Supra no.7.

13 See in this respect the opinion of Richard Parrish on www.euractiv.com/en/sports/comment-simutenkov-spanish-football-federation-case/Article-135023

14 Branco Martins R, The Kolpak Case: Bosman times 10, football fears the arrival of Bosman, Bosmanovic and Osman, The International Sports Law Journal 2004/1-2, p. 26.

15 Halgreen L, European Sports Law, A comparative analysis of the European and American Models of Sport (2003), Copenhagen, Thomson and Van den Bogaert S, From Wembley to San Siro: Regulation of the mobility of sportsmen in the EU post Bosman (2003), EUI, Florence.

European Commission opposed this practice with a statement of objection on 14 December 1998.¹⁶

The FIFA was forced by the European Commission to draft a new transfer system. This new system received the European Commission's informal support in 2001.¹⁷ In 2005 FIFA drafted new transfer regulations which are currently still in force. Article 20 of the FIFA transfer regulations contains the instrument of training compensation:

Training compensation shall be paid to a player's training club(s) (1) when a player signs his first contract as a Professional and (2) on each transfer of a Professional until the end of the Season of his 23rd birthday. The obligation to pay Training Compensation arises whether the transfer takes place during or at the end of the player's contract. The provisions concerning Training Compensation are set out in Annex 4 of these Regulations.

This system of training compensation embodies a possible restriction of the free movement of workers. Why? The training compensation is due when a young player moves, or transfers, from one club to another. The player's previous clubs are entitled to receive this payment and should they have any doubt that the new club is not able to pay this compensation, they may block the player's movement. In any case, the payment of an extra sum of money whenever a young player moves forms a possible restriction.¹⁸

But does this restriction fall under 'objective reasons concerning only sport as such'? I believe this not to be the case.

Advocate General Lenz stated in the Bosman case that a suitable payment could be admissible whenever a player transfers from one club to another. He argued that these payments only needed to entail the actual training costs and were only due to be paid after the first transfer of a player. A logical contra argument is that the club that sells the player should be entitled to receive a suitable compensation. However AG Lenz has illustrated that there are less restrictive measures possible to compensate clubs without jeopardising the rules of the free movement of workers.¹⁹ Blanpain has demonstrated that calculating training compensation can lead to a serious amount of money and that it forms a true restriction.²⁰

What must be borne in mind here is that the European Commission never gave its formal consent to the transfer system. Neither is the European Commission the right body to judge on the legality of the rules in relation to the free movement of workers. Although the opinions in literature concerning the restriction to the free movement differ,²¹ the prevailing view seems to be that FIFA will have a tough time defending the legality of this rule before the European Court of Justice.

Solidarity Payments, FIFA transfer regulations Article 21

This Article is part of the FIFA transfer regulations and reads as follows:

If a Professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his previous club (solidarity contribution). The provisions concerning solidarity contributions are set out in Annex 5 of these Regulations.

The most striking difference between the solidarity payment and the payment of training and education costs is that the payment of the solidarity contribution is only due whenever a player transfers during his contract, hence, whenever there is a 'profit'. At first sight it seems that the payment of training and education costs is a more severe danger to Article 39 than the solidarity payments. However the solidarity payments need to be paid whenever a player moves from one club to another, no matter what his age. In addition, the price of the player is always raised by 5%.²² And in certain circumstances the solidarity payment will exist alongside the obligation to pay training and education costs.²³

The same arguments as those mentioned above for the training and education costs concerning the existence of a restriction on the free movement of workers, apply to the solidarity payments. It is unlikely

that such a 'double' restriction will survive scrutiny in a case before the ECJ.

The use of nationality clauses in Italian water polo

The next example derives from a case concerning the best water polo player the Netherlands ever had: Harry van der Meer. The facts were as follows.

In 1997 Harry van der Meer transferred from the Dutch water polo competition to the lucrative Italian water polo, becoming a water polo professional. In 2002 he was offered a three-year contract by the top Italian club Savona to work for them under favourable conditions. There was only one problem. The Italian clubs (and with the clubs the Italian swimming association) had agreed to limit the amount of foreigners in a water polo team to three. Unfortunately Savona already had the maximum amount of foreign players in its team. The transfer of Harry van der Meer could still be concluded under the condition that Van der Meer would apply for Italian nationality. This was not a difficult procedure given the fact that Van der Meer had been living and working in Italy for the preceding five years. Nor did Van der Meer have much time to think about other options: if he would not adopt Italian nationality Savona would proceed to offer 'his' contract to an Eastern European player who had already expressed willingness to change his nationality.

Van der Meer felt forced to obtain Italian nationality, to be able to perform his work in the first place. Eventually he became Italian and has been one of the key Savona players ever since.

This history only came to public notice when Van der Meer appeared in the Netherlands to play for the Dutch national team. Unfortunately for him this turned out to be impossible... Van der Meer could no longer play for the Dutch national team because he was not a Dutch national! Harry tried to recover his Dutch nationality alongside Italian, but did not succeed despite several procedures before the Dutch courts.²⁴

Two things immediately become apparent in this case. The first is that the practices of the Italian water polo teams and association are clearly an infringement of the free movement of workers. It is so clear that one does not even have to assess whether an objective justification could be identified. The second thing is the question as to why Harry van der Meer, or his lawyers, decided to lodge a case against the Dutch state for refusing to return Dutch nationality to Van der Meer instead of taking legal action against the Italian water polo clubs! The fear of becoming a 'persona non grata' in the business sector where he earned his money was bigger than the fear of his losing face before Dutch society. This case is an interesting illustration of the powers that sport employers are able to exert over sport employees and it also teaches us that Jean Marc Bosman really deserves (more) respect for showing such courage.

The UEFA home-grown player rule

The home-grown player rule was introduced as a result of UEFA's ordinary congress in April 2005 in Tallinn. With the home-grown

16 See for more general info on the transfer rules and the actions of the European Commission ec.europa.eu/dgs/education_culture/mag/14/page21_en

17 Letter, Joseph S. Blatter to Martio Monti 5 March 2001 and letter Mario Monti to Joseph S. Blatter 5 March 2001, to be found on www.fifa.com.

18 The FIFA circular letter on the calculation of training and education costs can be found on <http://www.fifa.com/documents/static/regulations/PS%20826%20EN.pdf>.

19 Opinion of Advocate-General Lenz in Bosman, supra 3.

20 See for a clear illustration of the restricting effect of the training and education cost system Blanpain R, The Legal Status of Sportsmen and Sportswomen under International, European and

Belgian National and Regional Law, (2004), Wolters Kluwer.

21 See for dissenting opinions amongst others Jellinghaus S, Het opleidings en solidariteitssysteem van de FIFA: de stand van zaken, (2005) ARA ed.2, p.4-45 and Kesenne S, Het Transfersysteem in de sport: nodig of overbodig?, (2002) in Hendrickx F (ed.) Transfers en Makelaars in de sport, Antwerpen, Intersentia, p.43-53.

22 In annex 5 of the FIFA regulations the system for calculating the solidarity payment is outlined.

23 See in this respect the Annexes 4 and 5 of the FIFA regulations in relation to each other.

24 Raad van State 21 December 2005.

player rule, clubs participating in UEFA competitions will be forced to set a minimum quota of locally-trained players on a sliding scale starting from the 2006-07 season. From then, clubs entering UEFA competitions will have to have four 'locally-trained' players, defined as players between the ages of 15 and 21 who have been registered with the club for three seasons/years.

The home-grown player rule seeks to enhance training and development of young players. One of UEFA's views is that clubs have a responsibility to the community, to players and to the sport to provide training. The increasing danger is that clubs with the best financial resources are now favoured: they simply buy the best players.²⁵

The term 'home-grown player' means every player between 15 and 21 years old who has spent three years in that club's training centre or academy, irrespective of their nationality. From the four fielded players a minimum of two need to be trained by the club in question and another two by a club belonging to the same association.

Is the home-grown player rule 'Bosman-proof'?

Article 39 not only forbids direct discrimination on nationality but also indirect discrimination: discrimination based on criteria other than nationality. It is not difficult to understand that the home-grown player in the majority of cases will be a national of the country of the club that wants to field this player. This would entail an indirect discrimination against foreigners, and nationals of other Member States are also foreigners for this rule.²⁶

That leads us to consider whether there would be a possible justification for this rule. The main goal UEFA wants to reach²⁷ with this rule is the creation of a 'level playing field': it has been proved that the current system leads to a situation whereby the richest clubs buy the best players; the smaller clubs need a helping hand to be competitive again. But there is a lack of legal backing for a rule that infringes as the home-grown player rule does. The only legally binding guideline in this respect is the Bosman case, and the explanatory vision of Advocate General Lenz mentions that less restrictive measures should be applied than measures that seriously infringe the free movement of workers.

In addition, the implementation and use of the home-grown player rule may encourage the trafficking of young players. If, for example, a 15-year-old Nigerian boy starts his training at a European club for at least three years he will be regarded as a home-grown player and he may be fielded in competitions. This situation can be contrasted with a 22-year-old who intends to transfer from Brazil to Europe for the first time.

The abovementioned conditions lead me to think that the home-grown player rule will not prove to be compatible with the rules on the free movement of workers in the EU.

Registration rights / federative rights

According to FIFA:

*"...Federative rights can be defined as a juridical link existing between a club and a player, which began with the registration of the player for that specific club at an Association. This link ended with a new registration of the player for another club. This juridical link was separate and independent from the link created by the employment contract signed by the player and the aforementioned club...."*²⁸

The FIFA also argues that the term 'federative' no longer exists. This is actually not the case. In the Netherlands a situation occurred concerning the acquisition of the federative rights of two players of Feyenoord Rotterdam: Salomon Kalou, now a Chelsea FC player, and Dirk Kuijt, now a Liverpool FC player. These players were supposed to be subject to the acquisition of their transfer rights by an investment fund in football players. Although the negotiations, the contract and the approach of the investment fund to the agent of one of the players turned out to be false, a signed contract appeared in a Dutch newspaper.²⁹ The articles of the contract dealing with federative rights read as follows:

The interest of the Company is to acquire the following percentages of the economic rights derived from the federative rights of the indicated players:

100% (one hundred percent) of the economic rights derived from the federative rights of the player SALOMON KALOU, for the amount of NINE MILLION EUROS (9,000,000.).

50% (fifty percent) of the economic rights derived from the federative rights of the player DIRK KUIJT, for the amount of FIVE MILLION EUROS (5,000,000.).

These terms shall have the following meaning:

"Federative right" is the right of subscribing the player in an official competition.

"Economic right derived from the federative" is any amount that a third party may credit for the acquisition of the player's federative rights, and shall include any amount that the player himself may credit to the CLUB as compensation for the termination of the labour agreement between the player and the CLUB, under the terms of the applicable rules.

Federative rights are therefore also used in European Union Member States' competitions but cannot be easily identified. However a country like Spain mentions that federative rights only belong to the player, thus acknowledging the existence of these rights.³⁰ In other jurisdictions such as Argentina³¹, Brazil³² and Bulgaria,³³ federative rights are also used in practice and mentioned in regulations or laws.

These federative rights may entail an infringement of the free movement of workers. In practice it may occur that a third party has acquired the right to register a player. This means that the player may be willing to sign a contract with a new club but that the third party, the party that owns the right to register the player, blocks the transfer, e.g. by asking for an amount of money from the player's new club to enable the acquisition of this right to register the player.

This situation not only constitutes a serious impediment to the free movement of workers, but it also opens the door to dubious practices in football. The use of federative rights encourages third parties to (externally) invest in (mainly young) talented football players. Due to the continuous application of labour law and the free movement rules to football these investors seek a method to guarantee a return on their investment, and the use of these federative rights could well serve this purpose.³⁴

Definition of an Amateur

A clear definition of an amateur sportsman or a professional sportsman does not exist in international sport. Realising that the rules of free movement only apply to workers, it may be clear that on first sight one may believe every sportsman with amateur status does not fall under the free movement of workers rule. But an athlete with amateur status could well fall under the definition of a worker, given that the criteria for the existence of an employment contract are applicable to him or her.³⁵ Many cases may exist within the regulations of

²⁵ See also www.euractiv.com/en/sports/uefa-home-grown-player-rule-may-court-eu-law-professor/Article-139418.

²⁶ See also Gerlinger M, UEFA home-grown player rule, *International Sports Law Journal* (2005) 1-2.

²⁷ The Independent football review, carried out by Mr Arnaut, elaborates on the need for a home-grown player rule. The complete report can be found on www.independentfootballreview.com and specifically p.39-40.

²⁸ Fax received from the FIFA Director of the Legal Division and Omar Ongano, Head of Player Status on 27 February 2006.

²⁹ The (fake) contract between Kuijt - Kalou and the investors in the federative rights was published in the *Algemeen Dagblad* on 8 August 2005.

³⁰ In the regulations of the Spanish league it is stated that the clubs need to register the parties that have a specific federative

right to an individual player. The regulations can be found on www.lfp.es.

³¹ Proyecto de Ley del Senado y Cámara de Diputados de la Nación Argentina, etc.

Ley de Regulación de Derechos Federativos Y Economicos en el Deporte.

³² Pessotti A, *Direito do Atletas*, (2003), *Lumen Juris*.

³³ Simov T and Kolev B, *Players' contracts in Bulgarian Football*, *International Sports Law Journal* (2005) 1-2.

³⁴ A recent case in which a transfer and the investment in the players was questionable was the transfer of Tevez and Mascherano to West Ham United. The role of the MSI investor company is still not clear to the public.

³⁵ Generally speaking in most of the jurisdictions the criteria for the existence of an employment contract are the duty to work; falling under the authority of someone and receiving remuneration for the work done.

federations that infringe on the rules of free movement. Unfortunately these are not out in the open generally speaking, and are therefore difficult to assess.

Yet again in football, a couple of easily identifiable infringements of the free movement of workers do exist deriving from the non-transparent application of the status of an amateur player.

In the Netherlands for example, some players in the professional football sector work under a so-called 'training agreement'. This agreement is characterised by the fact that the player is obliged to train with the first team; it has a duration of a year; the club will enter into an employment agreement with the player after he has appeared in five official matches; the player does not receive a wage but mostly receives his premiums from all the matches in which he played or appeared on the bench, after he signs the employment contract (after five matches).

The agreement also states that the club has a unilateral clause to offer the player a contract. In addition the player is not allowed to sign a contract with a club, nor in the home country of the player or abroad, during the existence of the training agreement. This can last for a year.

The restriction of free movement is twofold in these cases. Firstly, mainly the lower-ranked clubs with small budgets use this type of contract. The player is dependent on the manager to be fielded, and sometimes the manager is not allowed to field the player more than four times. The reason is that the club would then have to enter into an employment contract with the player, while the club would also be responsible for paying training compensation to the player's previous club(s). For small clubs this is a reason to 'rotate' with players under this type of contract.³⁶

The second reason for the impediment of free movement is the fact that the player is not allowed to sign a contract, even if it is an offer for a genuine employment contract, with another club as long as the unilateral offer stands. Even though the player is an amateur, the club still has the power to prevent him entering into an employment contract with another club.

There does not appear to be a possibility of justifying these situations on the basis of purely sporting-related objective reasons. On the contrary, it is sporting reasons making it possible that such infringements may occur.

The issuing of work permits in international football

This aspect does not have a direct effect on the free movement of workers for persons from the EU Member States, but it does have implications for the movement of workers from third countries or from workers from the new Member States.

Currently there is no equal access to the labour market in sports for non-EU workers. This might seem logical at first sight, but turns out to be less so if one realises that in football for example, we are truly dealing with an international labour market. A small case study may serve to illustrate the lack of a level playing field in the European Union in terms of issuing work permits.

The Netherlands

To employ a 20-year-old non-EU football player a Dutch professional football club needs to organise his work permit.

There are three important and specific criteria for employers in football. These are the income criterion, the quality criterion and the contingency principle.

In professional football, the income criterion and the age criterion are the most objective of those used by the CWI. Previously, employers had to explain to the authorities, with no grounds specified, why a foreign player was considered more suitable than a Dutch player. With the establishment of the income criterion the employer no longer needs to have this discussion. If the employer is prepared to pay the player a minimum salary that has been established beforehand, this will indicate that the player is considered suitable to play for the club. Further interference from the authorities concerning the ins and outs of this suitability does not occur.

The income criterion is established annually by the CWI in accor-

dance with the average gross annual income in the Premier League in the previous season. The salary information is supplied by the KNVB (Royal Dutch Football Association). Employers in football have to be prepared for changes in the income criterion around February of each year.

For non-EEA players the following remuneration is regarded as being in accordance with the market:

- The guaranteed income of players aged 18 and 19 must be at least 75% of the established average gross annual income in the Premier League in the previous season;
- The guaranteed income of players aged 20 and over must be at least 150% of the established average gross annual income in the Premier League in the previous season.

The criterion in calculating the guaranteed minimum income as of 1 July 2006 is 228,518 gross a year. This results in the following minimum remuneration:

- | | |
|----------------------------|-------------|
| • players aged 18 and 19 | 171,388.50; |
| • players aged 20 and over | 341,704.50. |

In determining whether the income which the employee will receive is in accordance with the established criterion, the following salary components can be included in the calculation:

- basic salary;
- possible guaranteed premiums;
- so-called earnest money, (a bounty), apportioned as an annual component;
- holiday allowance.

To be eligible for a permit the employer must be able to show, based on objective information, that the player has certain qualities. He may demonstrate that the player has these qualities based on one of the following two objective facts:

- just prior to his employment, the player participated in a competition which is at least as strong as the highest division of the Dutch competition. A competition is assumed to be as strong when it is the highest of a country which at the time when the work permit was applied for ranked among the top 40 countries on the FIFA country ranking list;
- the player has proved in some other way to have at least comparable qualities.

This quality criterion is based entirely on the player's individual performance. The criterion has been met when the alien played in:

- the national team of his country;
- the Olympic team of his country;
- a national youth selection of his country;
- recognised international club tournaments such as the Champions League, UEFA Cup, Copa Libertadores, etc.

The player must meet either criterion 1 or criterion 2. This is therefore not a cumulative criterion. It should also be noted that the experience may have been gained at any point during the player's career. It is therefore not necessary that this occurred shortly before the work permit application.

It is clear that it is quite difficult for a Dutch club to employ a Brazilian player, although there is no limit to the use of Brazilian players.

The same player would also need a work permit in Belgium, although conditions there are different. The player in Belgium would also need a work permit, but the only requirements are that the player receives a written contract and a minimum salary of around 60,000 euros.³⁷

³⁶ In a Dutch football magazine, *Voetbal International* of 2 October 2006, a chairman of the football club BV Veendam stated openly that he instructed the coach not to field a player for a fourth

time to avoid the payment of the training and education costs due whenever a player makes his fifth official appearance.



Beiträge zum Sportrecht

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Legal Comparison and the Harmonisation of Doping Rules

Pilot Study for the
European Commission

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In 2001 an international research group consisting of sports law experts from Germany, The Netherlands and the UK finalized a research study on „Legal Comparison and the Harmonisation of Doping Rules“, commissioned by the EU. The study provided the drafters of the World Anti-Doping (WADA) Code, which was finally adopted in 2004 and is now officially in force, with an important tool, giving them an overview of the doping rules and regulations of national and international sports organisations, including a comparative analysis, as well as a survey and analysis of the relevant public law legislation available.

This publication is instrumental to better understanding the background of the issue of the harmonisation of doping rules and regulations, the results of which are laid down in the WADA Code, which is a milestone in the international campaign to combat doping in sports.

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Criteria also exist in Italy³⁸, Portugal³⁹ and Spain⁴⁰. The player needs a work permit but is also subject to criteria issued by the football authorities. These criteria are not in fact illegal because these football governing bodies have received a formal mandate from the relevant governmental authorities to draw up rules and regulations for the entry of non-EU players into the football labour market.

Clubs in these countries may thus not align more than two or three non-EU nationals. As regards the Brazilian player in our case study: Portugal has a bilateral agreement with Brazil which is beneficial for Portuguese clubs, and they can employ Brazilians far more easily than other EU countries.

Conclusion case study

There is currently not a level playing field in the EU when it comes to the employment of non-EU nationals. On a national level different rules apply to the employment of these non-EU nationals.

General conclusions

It appears that the free movement of workers in the professional sports sector is not safeguarded in a number of concrete cases. The issues covered here might be brought to court as a result of a legal action taken by an athlete or worker. Three main elements may be identified as possible sources for the infringement of the right to free movement in the European Union.

First there are issues connected to the termination of contracts, such as the payment of training and education costs, solidarity payments and registration rights. All these aspects arise when a player or athlete transfers from one employer to another, hence the termination of one contract and the start of a new one.

Secondly, we have dealt with issues of third-country nationals. In the case of Van der Meer the nationality clauses were even in force for EU nationals, let alone third-country nationals. We have also noted that a level playing field for non-EU nationals still does not exist because of the differing status concerning the issuing of work permits in the sports sector.

Third is the defence of employees' interests. In the amateur players example it is clear that the player is in fact carrying out the same work under the same conditions as players with an employment contract. In practice the rights of these amateurs are not being defended, although the amateurs might be considered as workers or can be blocked should they want to become workers.

I mentioned in the introduction that there might be an alternative for a sound solution to these problems. In earlier articles and researches⁴¹ I have made clear that in my opinion the future of European sports, mainly football, lies in the outcome of the European Social Dialogue.

The European Social Dialogue

The European Social Dialogue can be defined as a consultation mechanism set up for employers and employees, both sides of the industry, at a European Union level. The objectives of the Social Dialogue can be twofold: on the one hand the Social Dialogue can serve as the basis for European-level organisations of workers and employers (the European Social Partners' organisations) to negotiate and conclude agreements, while on the other there is cooperation between the Community institutions and the European Social Partners' organisations.⁴²

The Social Dialogue is laid down in the Treaty Articles 137 - 139. There are three different types of Social Dialogue: cross-industry, sector level and enterprise level.

The negotiations between the social partners at the EU level in a specific sector can lead to agreements. These agreements can be put forward to the Council by the European Commission, with the intention of issuing a directive which is then binding on every member state. Another possibility for making the EU-level agreement 'drip

down' to the national level is to implement the agreement according to national practice.⁴³ This latter option does not imply obligatory implementation of the agreement.

In relation to this article I would like to point out the content of Article 137 sub 3. This Article clearly illustrates that binding agreements can be reached on all of the topics that have been discussed in relation to the free movement of workers, and needs to be read in connection with Article 139 of the EC Treaty:

Article 139 (ex Article 118b)

1. *Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.*

2. *Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.*

The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas referred to in Article 137(3), in which case it shall act unanimously.

Article 137 sub 3

However, the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions in the following areas:

- *social security and social protection of workers;*
- *protection of workers where their employment contract is terminated;*
- *representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 6;*
- *conditions of employment for third-country nationals legally residing in Community territory;*
- *financial contributions for promotion of employment and job creation, without prejudice to the provisions relating to the Social Fund.*

Conclusion

It has become clear that the sports sector is still not 'Bosman-proof', and that a lot needs to be done still. The outcome of this article may still be the 'tip of the iceberg'. Given that this is the year of Job Mobility in the European Union, the time is right to assess the European sports sector thoroughly. In addition to this important factor, the European Commission DG Education and Culture will issue a White Paper on sport. It would not be surprising if the Social Dialogue will be addressed as a possible instrument to let the sports world itself, more specifically the football world, safeguard application of the rules on the free movement of workers.

37 In the act KB of 9 June 1999 it is stated in Article 9 sub 11 that professional sportsmen will receive a work permit if they earn at least 4 times the amount of the minimum wage that is mentioned in the law of 79 concerning professional sportsmen. That amount in total would then be calculated at around 60,000 euros.

38 In the Italian Testo Unico 286/98 it is stated that professional sports also falls under a specific quota system. However this quota system, its creation and its implementation is left to the responsibility of the CONI, the Italian Olympic Committee.

39 Email received by Prof. João Leal, lawyer of the Portuguese Football Federation, 18

November 2002.

40 The general law on immigration is the Real Decreto 511/92 but in the regulations of the Spanish league one may find a quota system. The Spanish Ley 10/1990 del Deporte regulates the authority of the League in this respect.

41 Branco Martins R, European Sports First Collective Bargaining Agreement, (2002) FBO publication; Branco Martins R, A European Football Match Heading towards extra time, (2004) International Sports Law Journal 3-4.

42 E. Franssen, Legal aspects of the European social dialogue, Intersentia, Antwerp, 2002, p. 3.

43 Article 139(2) EC Treaty.

Corruption in Sport: Time for an EU Statement of Integrity and Good Conduct in Sport?*

by Jack Anderson**

Introduction

In a recent editorial in the *International Sports Law Review*, Michael J. Beloff, President of Trinity College Oxford and the leading sports law jurist in the United Kingdom, remarked:

“Like the four horsemen of the Apocalypse, violence, racism, drugs and corruption ride alongside sport with sometimes one, sometimes the other galloping ahead into temporary prominence. Recently, it has been corruption’s turn to take pole position.”¹

There is a growing awareness in sport of the risks posed by corruption. It has an insidious, corrosive and cyclical effect on sport. It damages the reputation of the individual sport concerned because illegal or illicit activities by players, coaches, referees or administrators throws that sport into public disrepute and shame. When the public loses faith in the credibility of a sport, participation levels fall dramatically, sponsors disappear and morale among those remaining within that sport plummets. It is difficult for a sport to “stop the rot” in that situation, as, for example, the various doping scandals in professional cycling demonstrate.

In that light, this brief paper has two main objectives. The principal objective is the contention that existing ethical guidelines in sports do not effectively prevent, detect, or counteract corruption. There is a lack of support for the vast majority of clubs, sports associations and federations who seek a corruption-free sports environment. There is limited merit in accusing clubs, associations and federations of a lack of good governance, transparency and accountability, if there is a lack of awareness and understanding of the corruption risks in the first place. In short, there is a need, possibly on an EU basis, to develop a clear and systematic strategy to counter corruption in sport. Transparency International, the global anti-corruption coalition, and Play the Game, an NGO founded to strengthen ethical values in sport, have recently published a “Statement for Integrity and Anti-Corruption in Sport”. This paper reviews that statement and argues that it should be endorsed at a higher, governmental level.

Before assessing the Play the Game Statement, this paper will highlight a number of examples of corruptive practices in sport, concentrating mainly on professional sport in the UK. Examples from sports such as football and horseracing will be given. A common thread within these case studies is that the social phenomenon that is sport has changed utterly in recent decades. Modern sport is now a spectator, sponsor and TV-oriented pursuit. It is no longer the participative, socially-motivated recreation of yesteryear. It has become more commercial and the more intensive the involvement of pay-per-view broadcasters, online gambling services and corporate sponsors, the more vulnerable sport becomes to corruption, embezzlement and fraud, not because TV broadcasters, online service providers or corporate sponsors encourage such activities, but because there are, simply, huge amounts of money flowing in and around professional sport.

Corruption in UK Sport

Horse racing

In July 2006, a six-time champion jockey, Kieren Fallon, was charged as part of a criminal inquiry into alleged race-fixing. Fallon, and a number of jockeys, horse trainers and owners are still awaiting trial on accusations of conspiring to defraud customers of an online betting exchange company called, ironically, Betfair. The investigation carried out by the Economic Crime Division of the City of London police began in September 2004, and is on a massive scale. The investigation team, which at one point involved more than 130 police officers, has arrested 34 people, conducted over 500 interviews, taken more than 1,300 statements and provided over 5,000 exhibits to state prosecu-

tors. The investigation has examined allegations to defraud involving more than 80 races between 1 December 2002 and 2 September 2004. The police began the investigation after being contacted by racing’s regulatory agency, the Jockey Club. The online betting exchange company Betfair had initially contacted the Jockey Club, raising concerns over the betting patterns for a number of races.²

British horse racing has a unique relationship with gambling - in cliché, the relationship with betting is horseracing’s greatest strength and its greatest weakness. In terms of benefit, British horseracing is a major contributor to society and the economy. In 2005, 6 million people went racing. Over 8,500 races were held with over £100million (150m) on offer as prize money. Horse racing and related activities support over 60,000 jobs with a further 40,000 staff employed in the betting industry, whose business depends on British horseracing to a significant degree. In fact, in 2005 £11billion (16b) was gambled on British racing. The burden or downside is the sport’s vulnerability to gambling swindles. Traditionally, corruptive practices involved the doping of horses where, for instance, third parties would secretly dope the pre-race favourite and place bets on opposing horses. The present difficulties centre on money wagered with online betting exchanges, where punters can “back” (to win) but also “lay” (to lose) a horse. Therefore, if someone has inside information about the likely performance of a horse in a race, they can make a significant amount of money by laying that horse. “Inside information” means information about the likely participation of a horse in a race which is known only by the owner, trainer, jockey, stable staff or those who have an interest in the horse, which is not in the public domain. Put simply, if you know that a horse is injured or not fully fit but is going to run anyway, you can lay the horse to lose and make money.³

The practice goes towards damaging the very integrity of the sport. The British horse racing authorities want to avoid a situation analogous to that in athletics and swimming in that whenever a record is broken in those sports, one now automatically and regrettably has suspicions as to whether that athlete or swimmer has been doped. Unfortunately, the core achievement of the athlete or swimmer is secondary to the doping suspicion. Similarly, it is feared that the British public might soon have doubts as to whether horse races, upon which they bet heavily, are in fact truly run on their merits. This would be catastrophic for the sport, which relies heavily on betting revenues to subsidise its various activities. Unsurprisingly, the Jockey Club has reacted swiftly and comprehensively. It has, as stated, co-operated fully with the City of London Police in their recent investigation of conspiracy to defraud. In an internal sense, it is a breach of the Rules of Racing (Rule 247) for trainers, owners and connected persons to lay any horse under their care or control - there has been prohibition on jockeys betting in place for more than a hundred years. Moreover, the Jockey Club has also sought to protect both the integrity of its sport and the rights of punters/consumers by signing up to the Department for Culture, Media and Sport’s “Code of Practice for Sport and Betting”.⁴

* Paper presented at the Conference on “The Implications of Poland’s Membership of the European Union for Polish Sport”, that was organized by the Polish Institute of International Affairs in cooperation with the Polish Ministry of Sport, Warsaw, 28-29 September 2006.

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1 Beloff, M., “Editorial”, *International Sports Law Review*, 2006, 2(May), 27-28.

2 On the background to this story see Armytage, M., “Champion jockey Fallon

charged with plotting to defraud gamblers”, *The Daily Telegraph*, 4 July 2007, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/07/04/nfallono4.xml&csSheet=/news/2006/07/04/ixuknews.html>

3 Note the Jockey Club’s “Inquiry into Inside Information - Phase One Report”, published on 20 December 2005 and available through <http://www.thejockeyclub.co.uk>

The 10-point code of practice drawn up by the Department for Culture, Media and Sport, in partnership with the Jockey Club and the Football Association, is a model of its kind. Those sports governing bodies signing up to the Code in the UK have to:

- Create provisions in their rules governing the behaviour of their participants in relation to betting
- Require participants to avoid any situation that may involve a conflict of interest with the sport and/or which may undermine the confidence of the public
- Prohibit participants from misusing privileged information
- Co-operate, and if appropriate, enter into information sharing agreements with the relevant authorities (e.g. police, Gambling Commission)
- Proactively pass information on corrupt practices (e.g. race or match-fixing scams) to the relevant authorities
- Nominate a betting integrity champion with special responsibility for betting issues

The Jockey Club has further recommended that an “inside information” offence be encompassed by section 42 of the Gambling Act 2005. Section 42 lays down a criminal offence of cheating at gambling with a 2-year maximum jail sentence for offenders. The Gambling Act, which modernises the UK’s gambling laws, comes into force in September 2007 and is one of the first Acts of its kind to regulate online gambling. The Act also introduces a unified regulator for gambling in the UK, a very powerful licensing body known as the Gambling Commission, which has the power to investigate, and render void, any unfair betting practices.⁵

Football

In October 2002, the BBC’s Panorama programme made a series of allegation on what it called “The Corruption of Racing”. The programme was the catalyst for a number of the reforms outlined above. One jockey, Graham Bradley, was suspended from racing for five years for, essentially, “bringing the sport into disrepute”, after admitting under cross examination to receiving bribes for passing on privileged, inside information to a gambling syndicate. Last year, the English Court of Appeal upheld the fairness of that suspension in a case called *Graham Bradley v The Jockey Club* [2005] EWCA Civ 1056. In that case, Bradley argues as to the disproportionality of the suspension and the possibility that the Jockey Club’s disciplinary mechanisms had breached his right to a fair trial under article 6 of the European Convention of Human Rights, were rejected.

More recently still, a BBC Panorama programme of 19 September 2006, made a series of allegation regarding corruption in English football. The programme has caused the biggest scandal in the English game since Bruce Grobbelaar, the former Liverpool goalkeeper, faced allegations of match-fixing in the 1990s, central to which were Grobbelaar’s poorly acted attempts at letting the occasional ball into the net during the 1993-4 Premiership season. Grobbelaar was eventually cleared of match-fixing allegations - a criminal charge of conspiracy to defraud could not be sustained - though it was evident that he had in some way contributed to a corrupt conspiracy, a fact that was gleefully exploited by the British tabloids. Subsequently, Grobbelaar successfully pursued a libel claim against a leading tabloid to the House of Lords. However, that court only awarded him a nominal £1 in damages, ordering him to pay two thirds of the newspaper’s legal cost, estimated at over £1 million.⁶

The most recent Panorama programme on corruption in sport gathered information on two activities notorious to English football: the alleged payment of what are called “bungs” and the practice of “tapping up”. Panorama claim that 18 past and present Premiership managers have taken illegal payments of this nature. Bungs are unauthorised secret payments seen as a financial incentive - a bribe - to help a player’s transfer to go through. It usually works by a player’s agent paying a club official, usually the manager, a percentage of that agent’s fee for the transfer. The current Bolton Wanderers manager, Sam Allardyce is at the centre of the bung allegations with footage

showing two agents claiming that they paid him bungs. Allardyce strongly denies the allegations and is considering a defamation suit against the BBC - though he should probably keep in mind that which occurred to Bruce Grobbelaar! A decade ago one of Arsenal’s most successful managers, George Graham, became the first and only manager thus far suspended for taking bungs. A Football Association inquiry in 1995 suspended Graham from all football-related activities for a year when he was found guilty of taking over £400,000 (600,000) in illegal payments from an agent to sign players. UEFA has stated that those caught in a “bung” transaction should be banned for life from all football-related activities. This sanction seems disproportionate but it highlights the seriousness with which UEFA views the practice.

The second illicit practice attracting the Panorama investigation concerns a FA regulation whereby it is not permitted to approach a player who is under contract with a club with the aim of persuading that player to terminate his contract prematurely or to flout the rights and duties stipulated in that player’s contract. The programme showed Chelsea’s director of youth football, Frank Arnesen, secretly filmed making an illegal approach for, or the “tapping up” of, Middlesbrough’s England youth star, 15-year old Nathan Porritt, who was supposedly “unhappy” at Middlesbrough. Chelsea have denied that the filmed meeting broke any industry rules. It is interesting to note that during the current 2006/7 football season, the Premiership champions are operating under a suspended three-point deduction by the Premier League consequent to the club being found guilty of illegally meeting Arsenal’s Ashley Cole in January 2005. Cole, who was fined £100,000 for his part in the affair, has since moved to Chelsea. Cole remains dissatisfied with the way he has been treated by all parties concerned, but he is particularly aggrieved with the “hypocrisy and double standards” of his former club Arsenal, who he has accused of using an international sports consultant to indirectly “sound out” targeted players. This, he claims, was the method used by Arsenal to attract the Brazilian Gilberto Silva to the club in 2002. Cole concludes:

“Look, tapping-up takes place in football. And if it’s not blatant tapping-up, it’s a diluted, more subtle form of the same thing. I’d be amazed if every club doesn’t do it.”⁷

It is difficult to feel any sympathy for a player who fell out with the club he joined as a nine-year-old because they would only offer him £55,000 (82,000) a week, and not the £60,000 (90,000) he felt he was worth thus he felt “compelled” to talk to Chelsea.⁸ That personal frustration aside, Cole’s sense of injustice is such that he has instructed legal council to issue proceedings through the ordinary courts. He claims that the fine imposed upon him *inter alia* constitutes a breach of European competition law, the principle of the free movement of workers, article 4 of the European Convention of Human Rights concerning forced labour and the common law doctrine of an unreasonable restraint of trade. The case, if it goes ahead, will be yet another repercussion of the European Court of Justice’s *Bosman* ruling of 1995 whereby on the one hand contracted players seek to remove all restrictions on their movement to other clubs and, on the other hand, the football authorities hope that a “sporting” exception is granted from the ordinary principles of European employment law in order to protect the “unique” characteristics of sport.

Overall, and returning to the Panorama exposé, the UK Sports

4 The Department for Culture, Media and Sport’s “Integrity in Sports Betting: A 10-point Plan” is available through <http://www.culture.gov.uk>

5 Explanatory Notes on the background to the Gambling Act 2005 and a link to this legislative provision is available at <http://www.opsi.gov.uk/acts/en2005/2005en19.htm>

6 *Grobbelaar v News Group* [2002] UKHL 40.

7 Cole’s autobiography was serialised in

the (London) Times, see further Hughes, M., “Cole puts Chelsea in dock over tapping-up inquiry”, *The Times*, 12 September 2006, available at <http://www.timesonline.co.uk/article/0,,283-2353340,00.html>

8 Dickinson, M., “I have nothing to be ashamed of - it’s about respect”, *The Times*, 9 September 2006, available at <http://www.timesonline.co.uk/article/0,,27-2349809,00.html>

Minister, Richard Caborn, has called on the BBC to hand its evidence to an existing football inquiry into illegal payments in football. That inquiry began in March 2006 after comments by the former England manager, Sven-Goran Eriksson, alleging that a number of leading Premiership managers were “notorious” for their involvement in corrupt deals. The inquiry is led by Lord Stevens, the former chief of the London metropolitan police, and is investigating all 320 transfer deals involving 24 Premier League clubs completed since January 2004. The findings of that inquiry, which consisted of a 10-man team of forensic accountants and fraud investigators, are to be announced on 2 October 2006. The scope of the investigation, and the fact that it is led by such an authoritative and respected figure - once Britain’s most senior police man - demonstrates a commendable commitment by the English football authorities towards eradicating corruption.

The UK Sports Minister has also said that the Panorama investigation reinforces the efforts to bring in greater regulation into football through the Independent European Football Review, which the sports ministry part sponsored along with the UEFA Chief Executive Lars-Christer Olsson and headed by the former Portuguese Minister José Luís Arnaut. The findings of that Review were published recently.⁹ It is a comprehensive and fascinating document, chapter 5 of which is devoted to corporate governance issues in European football, including protection against match fixing and corruption. The conclusion to the Review’s Executive Summary is also of interest because, though football-oriented, it is of wider application:

“The findings of this Report demonstrate that there is a crucial need to have a formal structure for the relationship between the EU institutions and the European governing body for football. In the last few months alone, several European countries (such as Belgium, Finland, Germany, Italy, Portugal etc.) have been shaken by match-fixing and corruption scandals, linked to betting and to players’ agents. In addition, the financial situation of many European clubs is perilous, with bankruptcy cases and deficits of hundreds of millions of Euros. Furthermore, there has been a consistent series of legal challenges to fundamental sports rules and practices that only serves to undermine confidence in the system and creates a climate of instability. Against this background, a comprehensive and proactive approach is needed by both the EU institutions and the football authorities in order to deliver greater legal certainty in football and also to protect the European sports model.”¹⁰

Similarly, and also to protect the European sports model, a comprehensive and proactive approach is needed by both the EU institutions and the various European sports authorities in order to deliver a uniform and authoritative statement on corruption in sport. Fortunately, European sport can, in this regard, benefit from the work done by Transparency International and the Play the Game NGO, who in November 2005, jointly sponsored the publication of a Statement for Integrity and Anti-Corruption in Sport (“the Statement”).¹¹

Play the Game

The underlying objective of the Statement is to provide a guiding tool or reference to counter corruption in sport in the sense that the Statement can be used by national sports associations, international sports federations even governments as a starting point for developing codes of conduct and benchmarks in the fight to eliminate all forms of corruption from sport. In point of detail, the Statement recommends various anti-corruption actions for national sports associations, governments and the media.

National Sports Associations

1. Demonstrate a strong commitment, within own organisation, to countering corruption and to improving standards of integrity, transparency and accountability in sport.
2. Endorse, within own organisation, a strict “zero tolerance” policy against all forms of corruption.
3. Publicly speak out against corruption.
4. Hold to account, within own organisation, those in positions of

power who abuse these positions for private gain.

5. Ensure that corrupt practices do not develop in relationship with the sponsor companies they partner.
6. Increase awareness among their leaders and administrators, as well as among the members of sports associations and federations, trainers, players, and sponsors of the issue of corruption and its consequences through publicity and training.
7. Adopt and adhere to appropriate corporate codes of conduct that commit them to a strict anti-corruption policy. They must, *inter alia*:
 - Ensure that the integrity of sport management is upheld through strong leadership and by maintaining the highest standards of ethical behaviour
 - Adopt measures to ensure protection of whistleblowers (i.e. secure and accessible channels through which players and others can raise concerns and report violations without risk of reprisal)
 - Adopt transparent measures to maintain financial accounting, internal controls and independent auditing practices
 - Establish independent ethics committees whose role it is to monitor the implementation of the code of conduct within the organisation
 - Establish sanctions and means of restitution in the case of breach of the codes of conduct
8. Encourage members to adopt and adhere to appropriate corporate codes of conduct that commits them to a strict anti-corruption policy. The code should provide a disciplinary mechanism under which members who breach the code are sanctioned.
9. With regard to international sport associations, national sport associations should:
 - Assert their rights and legitimate means, laid down in the rules and regulations of the international federations, to influence the good governance of the international organisations
 - Work in conjunction with them, both in the developed and the developing world, so as to develop a co-ordinated approach to anti-corruption issues
 - Demonstrate a commitment to countering corruption and to improving standards of integrity, transparency and accountability in international sports organisation
 - Question and debate the role of international sports leaders and how they interact with the corporate world
 - Hold to account those international leaders who abuse their positions for private gain
10. Work in conjunction with government bodies to ensure that national and international efforts to curb corruption in sport are well-founded, consistent and effective.

Actions for Governments

1. Hold to account government officials who, directly or indirectly, are involved in sport corruption. There must be no immunity or impunity for corrupt practices.
2. Hold to account government officials who allow, by connivance or complacency, sport administrators to corrupt sport.
3. Effectively defy any attempt by international sport associations, in criminal matters, to claim superiority over national legislation and national authorities.
4. Co-operate with other governments in preventing corruption in international sports.
5. Increase their efforts to work with appropriate international institutions, to ensure that all countries properly implement their international obligations under the UN, OECD and other international anti-corruption conventions and agreements.
6. Co-operate with the sport sector in effectively implementing national anti-corruption initiatives.

⁹ Available at <http://www.independent-footballreview.com/doc/A3619.pdf>

¹⁰ Available at http://www.independent-footballreview.com/doc/Executive_Summary_en.pdf

¹¹ On this, and various other anti-corruption initiatives taken by Transparency International and Play the Game, see <http://www.playthegame.org>

The role of the media

1. Foster greater transparency in the coverage of sport corruption. A particular responsibility lies with the international media organisations, including those which support the 2003 Charter on Media Transparency, to raise issues of transparency and accountability in sport management in national and international sports organisations.
2. Media organisations and institutions must adopt policies that ensure coverage of social issues in sport as a way to monitor corruption in sports organisations.
3. Encourage journalists to investigate allegations of corruption in national and international sport associations.
4. Educate journalists in sport corruption and its consequences

Conclusion

Corruption in sport should be addressed quickly, tackled heavily and punished severely. Sports bodies in Britain, such as the Jockey Club

and the Football Association, have recently had to face a number of unwelcome and fraud-based allegations, and they have done reasonably well as supported by the UK Sports Minister. Corruption in sport is not, of course, confined to Britain. For instance, Italy's victory in the FIFA World Cup of 2006 did little to hide the extent of the problems faced by domestic football in that country. The time to address corruption in European sport is now. The only four horseman that should "ride alongside sport" are not violence, racism, drugs and corruption but integrity, fairness, transparency and trustworthiness. In order to ensure this, it is hoped that the Play the Game initiative on anti-corruption standards in sport will be endorsed, even adopted, at a higher level. It would be most apt if the Polish Ministry for Sport - which has, in the guise of this conference, shown its commitment to good governance in sport - would raise and promote a similar programme at future council meetings of EU Ministers for Sport.

The International Sports Law Journal

Effects of the EU Anti-Doping Laws and Politics for the International and Domestic Sports Law in Member States*

by Magdalena Kedzior**

Introduction

It is generally believed that the greater the role of economic factors in sport, the greater the impact of law in sport.¹ This is also true of Community law.² In her speech delivered on 28 November 2003, Viviane Reding, then the EU commissioner for sports matters, announced that the elimination of doping in sport is to become one of the priorities in the Community's policy.³ Such a declaration raises the question of the legal grounds that might lie at the EU anti-doping policy, or of the extent to which Community law might influence the anti-doping laws and regulations adopted by international sports federations, or of the relationship between WADA (*World Anti-Doping-Agency*) and EU policy, regarding the fight against doping going on today.

Legal sanctioning of doping at the international level - historical background

The battle against doping in sport that had been fought until late 1990s under the auspices of the International Olympic Committee was not successful. Poor international collaboration rendered the unification of procedures or jurisdiction impossible.⁴ Despite the existence of an international legal document that addressed the problems of doping in sport, which took the form of the Anti-doping Convention of the Council of Europe No 135 issued on 16 November 1989 and ratified by the government of Poland on 1 November 1990⁵, it soon turned out that it was not an instrument capable of resolving

the technical complexities (or technical problems) encountered in the fight against doping in sport.⁶ The unquestionable advantage of having the Convention, however, is the fact that it triggered off mechanisms that broadened awareness of, and interest in the problem of doping in sport.⁷

The impulse that had significantly accelerated the efforts to develop effective ways of eliminating doping worldwide - and therefore also within the Community - were the doping scandals that came to light during the *Tour de France* race in 1998, when substances known for their doping characteristics were found in the samples taken from the *Festina* team. It was then that both the Council of Europe and the European Union resolved to take measures that would decidedly fight doping in sport.

At the Vienna summit in December 1998, the Council of Europe expressed its concern about the growing number and scale of doping scandals in sport. Those concerns were later reflected in the so called Community Plan to Combat Doping in Sport. That document had laid the grounds for a large-scale information and education campaign. The Council underlined the necessity of joint action at the Community level and obliged the European Commission to investigate the existing anti-doping laws in member states.⁸ Further, basing on the opinion of the European Group of Ethics⁹, the European Committee announced mobilisation of all Community instruments that might contribute to the elimination of doping in sport. At the same time it was agreed that

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1 For more on the increasing role of the legal factor in sport see in Verrechtlichung, B. Heß, Aktuelle

Rechtsfragen des Sports, Heidelberg 1999, p. 10; M. Kedzior, Gerichtliche Überprüfung von Vereinsstrafen am Beispiel von Sportverbänden im deutschen und polnischen Rechtssystem, Hamburg 2005, p. 62. (in German)

2 A. Röthel; Kompetenzen der Europäischen Union zur Dopingbekämpfung, (in:) V. Röhrich, K. Vieweg, (ed.), Doping-Forum: aktuelle medizinische und rechtliche Aspekte, Stuttgart 2000, p.109.

3 www.europa.eu/rapid/pressReleasesAction.do?reference=IP/01/983.

4 The beginnings of the fight against dop-

ing internationally date back to 1967 when a list of prohibited substances, and later also methods, was adopted by the Medical Commission. The list is regularly revised and updated.

5 conventions.coe.int/Treaty/Commun/ListeTraites.asp

6 R. Wyszczanski, Implementation of the Council of Europe Anti-Doping Convention and the International Olympic Anti-doping Card in Polish sports rules and educational activity (in:) A. Szwarz (ed.) Legal Issues of Doping in Sport, Poznan 1992, p. 80.

7 The appendix contains a list of substances and methods regarded to be of a

doping character. A protocol to the Conventioned signed in Warsaw on 12 September 2002 with effect on 1 April 2004 provides for mutual recognition of the anti-doping control tests results and permits anti-doping controls being performed by one state, signatory to the Convention, in another signatory state without prior notice.

the protection of sportsmen's rights was a higher goal of the world-wide anti-doping policy that should involve the harmonisation of doping rules and procedures, as well as disciplinary sanctions and the determination of a uniform list of illegal products and methods, giving priority to the health of the sportsmen through exercising anti-doping controls and checks also at times between competitions. The document failed, however, to specify on what legal grounds the European Union could base its intended action.

Legal grounds of the Community anti-doping policy

The EC founding Treaties and subsequent reforming treaties¹⁰ do not contain any provision that would regulate *stricte* sports issues¹¹. Consequently, the classification of sport, and therefore the anti-doping policy as an area of EU activity, is not at all clear.¹² Doping in sport is a multi-dimensional phenomenon and therefore the European Commission, in seeking to combat it, reaches for legal instruments which are also available in other policies. Depending on the needs and the intended goals, the Commissions may apply measures that already exist in health protection policy (Art. 152 TEU), cultural policy (Art. 151 TEU), consumer protection (Art. 153 TEU), education and youth policy (Art. 149 TEU), research (Art. 163 TEU), or workers' protection (Art. 137 TEU). It should be noted here that in all the above areas, the Community activities follow the subsidiarity principle, i.e. they are reduced to merely assisting, coordinating and complementing the efforts undertaken in individual member states.¹³

In a document on the European model of sport published in 1998¹⁴, the European Commission pointed to the fact that sportsmen were *inter alia* bound by EU directives prohibiting the taking of pharmaceuticals to achieve purposes other than the intended ones.¹⁵ Community law also prohibits advertising pharmaceuticals¹⁶ or selling them without prescription¹⁷. Sportsmen are also bound by the provisions of the directive on the implementation of measures to improve the safety of workers and health protection at the place of work.¹⁸ Doping may also be combated within the framework of the 3rd pillar of the EU - Police and Judicial Co-operation in Criminal Matters.¹⁹

Another issue that requires consideration here is the extent to which the anti-doping laws and regulations in member states may be the subject of harmonisation of legislation as provided in the Treaty.²⁰ Under Art. 94 TEU and Art. 95 TEU, the harmonisation of the legislation of member states shall only be for economic purposes resulting from the harmonisation of the common market. This, in turn, means that pursuant to Art. 94 and 95 TEU, harmonisation for economic purposes applies mainly to laws regulating the products of a

doping character, and, *inter alia*, their importation or marketing. Other anti-doping regulations, such as *eg.* penalties for the use of doping products, are considered to fall outside the scope of the competences of the Community due to their *stricte* sports related nature, and their harmonisation in different member states is not deemed necessary.

Doping in the jurisprudence of the European Court of Justice

The starting point of every decision of the ECJ in sports matters is the continuous or unchanging statement that the Treaty provisions apply to a sporting activity insofar as that activity may also be treated as economic.²¹ Consequently, the cases that had come before the ECJ until very recently, concerned different economic aspects of sporting activity, such as transfer rules (*Bosman*)²², rules governing the composition of sporting teams (*Dona*²³, *Bosman*), or rules on the dates of transfers (*Lethonen*).²⁴ Cases related to non-economic aspects have been exceptional and the decisions of the ECJ have not been unanimous.²⁵

Consequently, the ECJ decision in *Meca Medina & Majcen v. Commission*²⁶ may be treated as a certain breakthrough in the approach to sports jurisdiction in the Community. Here, the ECJ expressed an opinion on the legal character of doping sanctions and the extent of the applicability of Community law to the anti-doping rules and regulations of international sports organisations.²⁷ In *Meca Medina & Majcen v. Commission I* of 30 September 2004 the Court of First Instance although confirmed that the rules regulating the elimination of doping in sport are based exclusively on premises related to sport only, it also held that since those rules are not directed to achieve an economic purpose, they fall outside the scope of the Community competition law (Art. 81 TEU), or the provisions protecting freedom to provide services (Art. 49 and subsequent articles of TEU)²⁸. In its final ruling of 18 July 2006 the ECJ held that "the very fact that a given provision is of a strictly sports nature, does not automatically result in excluding the person involved in the activity regulated by the provision in question, or the organ that issued that provision". The ECJ held that if a given sports activity falls within the scope of the Treaty provisions, the conditions under which this activity is performed must take notice of the requirements of Community law, and in particular those seeking to provide for free movement of people, freedom of establishment or free competition.²⁹ Consequently, the stance taken by the *Court of First Instance* has been qualified.

In *Meca-Medina & Majcen*, the ECJ took a general view that anti-doping provisions set out by sports organisations and the provisions of Community competition law belong to two different legal systems³⁰. At the same time the Court held that in their essence the anti-

8 In consequence of the above decision, the European Commission initiated a number of projects conducted by research institutes in selected member states, one of them being "Legal comparison and the harmonisation of doping rules", No C116-15, carried out in the years 2000-2001 by an international group consisting of scientists from the Asser Institut, Erlangen-Nürnberg, Max-Planck Institut, and Anglia Polytechnic-University, Chelmsford. The same project contained a report of the legal situation of anti-doping in sport in Poland. (see: M. K. dzior, Country Report: Poland - legal situation in 2001, available on CD-ROM).

9 Look for the position of the European Ethic Group on Ethical Aspects of Doping in Sport from 11 November 1999; www.ec.europa.eu/european_group_ethic/doc/avis14_en.pdf. The following are recommended: formation of specialist information units composed of medical doctors and psychologists to support sportsmen, adoption of a directive protecting young sportsmen, adoption of a separate directive protecting sportsmen as a professional group under particular risk

, close collaboration of police forces and the administration of justice, inclusion of anti-doping clauses in contracts signed with sportsmen.

10 The draft of the Treaty establishing a Constitution for Europe includes some significant proposals towards regulating sports activities. Till date, the EU has issued the following documents: Appendix No 29 to the Treaty of Amsterdam of 1997, i.e. the Declaration on Sport and the Nice Declaration on the specific characteristics of sport (2000). Also see: Foks, Sport in the draft of the Treaty establishing a Constitution for Europe in "Sport Wyczynowy" 2004, No 7-8, p. 6.

11 K. Vieweg, The legal autonomy of sport organisations and the restrictions of European law, (w:) A. Gaiger, S. Gardener (ed.), Professional Sport in the European Union, Den Haag 2000, p. 90, com. J. Foks, National vs international law in sport - case Poland, "Sport Wyczynowy" 2006, No 1-2, p. 74.

12 M. Kedzior, op.cit., p. 60.

13 Das Europäische Sportmodell, Diskussionspapier der Generaldirektion

X der Europäischen Kommission, SpuRt 2000, p. 62, com. A. Röthel, op. cit., p.109; com. Steiner, Doping aus verfassungsrechtlicher Sicht, (in:) V. Röhrich, K. Vieweg, (ed.), Doping-Forum: op. cit., p. 128.

14 www.europa.eu.int/comm/dg10/sport/publications.

15 EEC Directive 65/65/ amended by EEC Directive 89/341.

16 EEC Directive 84/450.

17 EEC Directive 75/319 amended by EEC Directive 89/341.

18 EEC Directive 89/391.

19 Das Europäische Sportmodell, op. cit., p. 62.

20 A. Röthel, op. cit., p. 112.

21 Also see case 36/74 of 12 Dec.1974

Walrave & Koch (Rec. 1405 point 4), case 13/76 of 14 July 1976 Dona (Rec. 1333 point 12), case C-176/96 Lethonen of 13 April.2000, (Rec. 2681 point. 32).

22 Case C-415/93 of 15 Dec.1995, Rec. I 5078.

23 Case 13/76 of 14 July1976, Rec. 1333.

24 Case C-176/96 of 13 April, Rec. 2681.

25 W. Schroeder, Anmerkung zum EuG Urteil v. 30.9.2004 - RS. T-313/02, Meca

Medina und Majcen / Kommission, SpuRt 2005, p. 23.

26 Judgement of the EC First Instance Court of 30 Sep..2004 regarding case T-313/02, Meca-Medina and Majcen / EC Commission (See. Orz. II-3291).

27 See M. Kedzior, op. cit., p. 120.

28 Judgement of the ECJ in case C-519/04 P, Meca-Medina and Majcen / EC Commission of 18 July 2006, nb. 9.

29 ECJ judgement in case C-519/04 P, op. cit., nb. 28.

30 The application of anti-monopoly law in sport has been considered by European legal scientists since the 70s of the 20th century. The legal grounds for that can be found in Article 81 of the TEU prohibiting concerted practices and Article 82 TEU on dominant position. The establishing of tolerance thresholds in regards of prohibited substances and their use may be viewed as concerted practices, while the abuse of a dominant position shall occur when a given sport organisation administers a disqualification that shall be too long. For more, see K. Vieweg, op.cit., p. 90.

doping provisions do not restrict or limit the freedom of movement of persons because as such they address only sports issues and have nothing to do with economic activity. However, the ECJ noted a possible correlation between the anti-doping provisions and Community anti-monopoly law. It held further, that anti-doping rules on a scale exceeding that absolutely necessary to ensure proper execution of sports competitions may contravene Community law by prohibiting free competition. In the reasons for its judgement the ECJ said that “the repressive character of anti-doping regulations and the weight of the applicable penalties in case those regulations are violated may negatively influence competition because if those penalties turned out unjustified, this could lead to the unjustified exclusion of a sportsman from sports competitions, thus distorting the conditions necessary for performing a certain activity”.³¹ The ECJ stated explicitly that a doping related disqualification that infringes the principle of proportionality, too severe a sanction or faulty differentiation of sanctionable doping instances from those that are not punishable ones, would amount to an infringement of Community competition law.³²

This statement constitutes a certain novelty in the line taken by the ECJ in its anti-doping jurisprudence, despite the fact that the application of the principle of proportionality to adjudicate in matters where Community law is in conflict with the autonomy of the sports movement has already been proposed by sports law scholars.³³

The principle of proportionality must also be observed when disqualification, which in fact restricts or limits the right to exercise a certain activity, is a result of disciplinary proceedings conducted in compliance with the requirements of the state of law. Such proceedings should first of all be based on clear anti-doping laws applied in a uniform manner with regard to all sportsmen, and coordinated at the national and international level.³⁴ Further, the principle of proportionality shall be respected only if the organs administering the sanction of disqualification are independent. Last but not least, the principle of proportionality requires that each time the gravity of the infringement of the law is weighed against the grounds justifying that infringement.³⁵

Formal reasons precluded the ECJ from formulating an opinion regarding a claim that the anti-doping rules of international sports federations may infringe the Community provisions protecting the freedom to provide services (Art. 49 TEU and subsequent articles). It seems, however, that the ECJ deliberately refrained from expressing its opinion regarding that issue. The effects of the ECJ decision in *Meca-Medina & Majcen* that anti-doping provisions infringing the principle of proportionality are contrary to Art. 49 TEU might be of a similar weight for the sports world as the consequences of its decision in the *Bosman* case.

Relations between the EU and WADA

Great hopes are pinned on the World Anti-Doping Agency WADA constituted on 10 November 1999, whose main objective is a fight against illegal doping in sport. Alongside the representatives of the Olympic movement, the Council of Europe and government administrations, its membership includes representatives of the European Union³⁶ in the person of the president of the European Council and members of the European Commission.³⁷

The idea was that WADA would be a fully independent, non-governmental institution. The way it is financed though, indicates strong

influences of the International Olympic Committee (IOC). In its first two years, the only funds WADA obtained, which was US\$ 18.3m, came exclusively from the IOC.³⁸ Since mid 2002, however, the IOC has been financing only half of WADA's expenses. The other half has come from the governments of member states. Its total budget in 2006 was US\$ 20.3m. Membership fees from European states accounted for 47.5 %, in comparison with 0.5% from Africa, 20.46% from Asia, 29% from both Americas and 2.54% from Oceania.³⁹

It must also be added that the Nice summit in 2000 envisaged a direct support of WADA from the EU budget. That decision of the European Commission was prompted by the provisions of Art. 152 of the TEU (health protection), demanding, at the same time, *inter alia*, a wider control of the expenses originating in WADA's budget. This hope, however, was not fulfilled for political and legal reasons. The EU demanded greater competences in deciding on matters concerning WADA, such as a detailed estimate of its costs planned for the budget years 2003-2006, and a transparent determination of the mechanisms by which the contributions and donations were paid⁴⁰. Consequently, the EU has continued to be financially involved in WADA's activities through the so-called ‘pilot projects’ realised on a case by case basis. An example of such an involvement here is, *i.a.*, the financing by the EU of a project concerning the so-called “sportsman's passport”. The total cost of that project is EUR 400,000, of which the EU financed EUR 300.000.⁴¹

The fact that WADA managed to adopt, at its summit in Copenhagen in 2003, the World Anti-Doping Code (WADC) that harmonised the procedures and sanctions for using doping in sport was certainly an indisputable success. However, as there were certain difficulties in the implementation of the code, the provisions of the WADC had been encapsulated in a so-called Anti-Doping Convention, subsequently adopted by UNESCO on 19 October 2005⁴². Currently the Convention is in the process of ratification. The Convention, being a source of international public law, may now constitute grounds for implementation in each member state of binding anti-doping norms.⁴³

Doping in Polish legislation

The current anti-doping laws of Poland⁴⁴ are contained in the Act of qualified sport (Law on Professional Sport) of 29 July 2005⁴⁵, and more precisely, in chapter 6 (Art. 50-55). Polish anti-doping regulations seem to be largely in line with the provisions of the World Anti-Doping Convention, and undoubtedly the list of methods and substances (products) prohibited by Polish law as having a doping effect⁴⁶ is the same as that provided in the Convention.⁴⁷

What needs to be amended though, are the provisions that are overtly contrary to those set out in the Convention, i.e. art. 53 clause 3 of the Act that states that a refusal of a sportsman to subject him/herself to an anti-doping check, or failure to turn up for such a check shall result in the loss of a licence to participate in competitions for a period of 6 to 24 months.⁴⁸ Another highly controversial regulation in the Polish act is the provision of Art. 55 which very generally stipulates that sportsmen, coaches, and other persons shall be held liable for the breach of disciplinary anti-doping rules issued by international sport organisations, but does not specify, which rules, or of which international organisations or federations, it refers to.

31 ECJ judgement in case C-519/04 P, op cit., nb. 47.

32 ECJ judgement in case C-519/04 P, op cit., nb. 48.

33 R. Streinz, *Die Rechtsprechung des EuGH nach dem Bosman-Urteil*, (in:) P. J. Tettinger (ed.), *Sport im Schnittfeld von europäischem Gemeinschaftsrecht und nationalem Recht*, Stuttgart 2001, p. 52; K. Vieweg, op. cit., p. 104.; K. Vieweg, A. Röthel, *Verbandsautonomie und Grundfreiheiten*, ZHR 166 (2002), p. 26.

34 In Polish literature of sports law on legal aspects of disciplinary proceedings, see: S.

Stachowiak, *Disciplinary proceedings in sport*, (in:) A. Szwarc (ed.), *Disciplinary liability in sport*, Poznan 2001, p.119; in foreign literature, see: J.W. Soek, *Die prozessualen Garantien des Athleten in einem Dopingverfahren*, in: V. Röhrich, K. Vieweg (ed.), and *Doping-Forum*: op. cit., p. 35 and others.

35 K. Vieweg, A. Röthel, op. cit., p. 26.

36 “Sport Wyczynowy” 2004, No 3-4, p. 106.

37 www.europa.eu/rapid/pressReleases_IP/01/983.

38 www.wada-ama.org/en/dynamic_259.

39 www.wada-ama.org/rtecontent/document/Funding_2006_en.pdf.

40 www.europa.eu/rapid/pressReleases_IP/01/1727.

41 www.europa.eu/rapid/pressReleases_IP/02/212.

42 A. Wach, *World Anti-doping Code - legal aspects*, “Sport Wyczynowy” 2003, No 7-8, p. 38.

43 A. Wach, op. cit., p. 43.

44 The first anti-doping rules in Poland of a legal binding force were contained in Article 18 of the Act on Physical Culture of 1984, Dz. U. No. 34 of 1984, item 181, subsequently extended and included in

the Law on Physical Culture of 18 January 1996t.(Article 47 and others.), Dz. U. of 1996 No 25, item 113.

45 Dz.U. of 2005, No 155, item 1298.

46 Ordinance of the Minister of National Education and Sport of 13 August 2004 on pharmacological substances and methods regarded as of doping character and consequently prohibited, Dz.U. No 195, item 2005.

47 J. Foks, op. cit., p. 72.

48 Com. A. Wach, *Comments and opinions on professional sport of 25 July 2005*, “Sport Wyczynowy” 2005, No 9-10, p. 46.

Conclusions

Because of the commercialisation and professionalisation of sport, the significance of fighting illegal doping has grown in importance and has now become a wide-ranging anti-doping policy within European Union law, while the relations between the anti-doping regulations of international sports federations and the Community laws have become the subject of the jurisdiction of the European Court of Justice. The European Union is an active supporter of the various WADA's activities, including the organisational and the financial. The adoption of the World Anti-Doping Convention may be seen as a certain achievement, or an accomplishment, justifying the reasons why the EU decided to cooperate with WADA, since it clearly shows that the Convention meets the expectations advocated by the EU, that first of all, the health and rights of sportsmen should be protected.

In its most recent case law the European Court of Justice has demarcated the autonomy and the limits of the international sports movement to set out anti-doping regulations. That boundary was based on the proportionality principle. Consequently, where disciplinary sanctions for doping in sports infringe the principle of proportionality, the autonomy of the sports movement ends, and EU anti-monopoly law applies. Consequently, the task before international sports federations and sports associations in member states is to set out anti-doping regulations as will meet the Community standards.⁴⁹

One would also expect that in its jurisdiction in the future, the ECJ will specify the line adopted in *Meca-Medina and Majcen* and will eventually take a clear stance on deciding whether a disqualification resulting from the use of illegal doping shall amount to a breach justifying a denial of the freedom to provide services on the EU market.

In order to comply with Community law, the Polish legislator should respect (i.e. incorporate into Polish law) the provisions of the EU directives on the anti-doping policy, and the guidelines articulated by the ECJ. At the same time all other players who may also become the subject of anti-doping policies, such as entrepreneurs, employers and the like, must additionally abide by the applicable domestic norms resulting from the incorporation of the relevant Community instruments into the domestic laws. Hence the hope that the Polish Act on qualified sport and the provisions of the World Anti-Doping Convention, when ratified by Poland⁵⁰, shall together constitute a coherent anti-doping system of legal regulations. Once that is accomplished, the next challenge will be the dissemination of those provisions throughout the whole sporting community in Poland.

49 Com. R. Streinz, op. cit., p. 49.
50 As at 14 August 2006, the Convention had not been ratified by Poland yet. For

those states that have ratified the Convention, see: [//www.wada-ama.org](http://www.wada-ama.org).

Conceptual Approaches to Protecting the Publicity Value of Athletes in Germany and the United States^{*}

by Saskia Lettmaier^{**}

I. Introduction

In a media-driven economy, nothing, to paraphrase an old saying, sells like success - success in sports in particular. Performance on the pitch frequently spells prominence off it, and prominence, in its turn, opens up a host of marketing opportunities: commercial exploitation of an athlete's publicity value may take forms as varied as catering to a public interest in his person and lifestyle, enlisting his charismatic qualities for advertising purposes, or selling merchandise bearing his name or other distinguishing characteristics.¹ In fact, many top athletes today make more money "mining" their celebrity status than they do exploiting the primary sporting talent which first created it.²

From a legal perspective, this growing commercialisation of the athlete persona raises two thorny issues: firstly, how does or should the law conceptualise the object traded in and, secondly, what protection against third parties does or should it afford? In other words, is an athlete's publicity value an asset in the public domain, a part of the intellectual commons that is free to all comers, or is it the property of the athlete concerned and as such subject to his (exclusive or limited) control? The following article represents an effort to answer these questions by reviewing the conceptual approaches taken and the protective regimes afforded to an athlete's publicity value in Germany and the United States.

The article provides first a status report on the current state of German law, where the debate on protecting publicity values was recently given a new lease of life by a string of high-profile court decisions. While remaining wedded to a personality-rights-based analysis, the German courts have upped both the level of protection and the amount of compensation available to athletes whose "personas" are commercially appropriated without their consent (II.). The article next takes a comparative look at leading US-American jurisdictions that promote the commercialisation of identity by recognising an intellectual property right in persona known as a right of publicity (III.). The concluding sections attempt a synthesis of the foregoing analysis and offer reflections on the likely future development of

German law: they argue that while the US-American concept of separate protective regimes for dignitary and economic concerns may serve as an aid to clear thinking, giving athletes a freely alienable property right in the commercial value of their own identities is not a path Germany should follow (IV., V.).

II. The German "kommerzielles Persönlichkeitsrecht" as a personal-ity right in the commercial value of identity

In German law, a person's identifying characteristics are protected either by special statutory personality rights - § 12 of the German Civil Code (Bürgerliches Gesetzbuch - BGB) protects a person's name and §§ 22 *et seq.* of the Art Copyright Act (Kunsturhebergesetz -

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1 On the different varieties of commercial exploitation, see *van Caenegem*, Different Approaches to the Protection of Celebrities against Unauthorised Use of Their Image in Advertising in Australia, the United States and the Federal Republic of Germany, 12 E.I.P.R. (1990), pp. 452, 453; *Magold*, Personenmerchandising: Der Schutz der

Persona im Recht der USA und Deutschlands (1994), pp. 14 *et seq.*
2 Lucrative endorsement contracts signed by Olympic (gold) medallists may serve as an example. Nor does an athlete's publicity value necessarily decrease as his sporting prowess wanes. The "value" of former German tennis champion *Boris Becker*, e.g., was recently assessed at 1.2 million Euros for a Germany-wide ad campaign. See the recent judgement by the Landgericht München I [LG] [county court], Urteil v. 22.02.2006, Az. 21 O 17367/03. Another illustration of the same principle is provided by the case of former England captain *David Beckham*. Despite the fact that Beckham failed to win any major titles in his three and a half seasons with Real Madrid, where fading skills and injuries had increasingly left him on the bench, Beckham recently was offered and accepted a five-year contract worth nearly 200 million Euros to play for the Major League

KUG) protect the right to one's image - or, in default thereof, by a general unwritten personality right developed by the German courts.³ In the year 2000, in a seminal judgement concerning the unauthorised advertising use of photographs showing a look-alike of the late Marlene Dietrich in one of the actress's most memorable roles,⁴ the German Federal Supreme Court (Bundesgerichtshof - BGH) made clear that these rights provide redress, not only against invasions of privacy causing injury to *feelings*, but also against the unpermitted appropriation of the *commercial* value of identity. It follows that an athlete may claim an infringement and be entitled to money damages whenever his publicity value is commercially exploited without his consent - e.g. by someone selling coffee mugs bearing his image - quite apart from any need to establish bruised feelings. Indeed, bruised feelings may well be lacking where the image used is a flattering one.

It is only in exceptional cases that the unpermitted taking of another's publicity value will be *immune* from liability under German law. Immunity may attach where countervailing values override the athlete's personality right, in particular where the use in question satisfies a public demand for information and is not just motivated by private economic gain.⁵ Thus, uses of identity in the media are generally privileged,⁶ and even merchandising uses may, on occasion, qualify for immunity, provided the merchandise in question serves to inform and educate the public about the athlete concerned.⁷

Infringement of the commercial personality right entitles a plaintiff to injunctive and/or monetary relief. Because liability in these cases is triggered by an injury to the *commercial* (rather than the emotive or reputational) aspects of identity, damages are assessed by reference to the criteria applicable to measuring damages in intellectual property cases. This means that an athlete may, at his discretion, (1) claim his actual loss, (2) ask for the fair market value of the infringing use (license-fee-analogy), or (3) recover the infringer's profits.⁸ By contrast, invasions of the dignitary aspects of identity only rarely found a claim to monetary redress. Money damages for emotive or reputational injuries are only available where the invasion in question is exceptionally grave and of a nature not adequately compensable other than by money damages.⁹

Recent awards in cases involving commercial misappropriations of identity testify to the enormous value of an athlete's "persona" as a new kind of intangible economic asset. In 2006, for instance, a Munich court awarded former German tennis champion Boris Becker 1.2 million Euros in damages for a Germany-wide ad campaign by a national newspaper (Frankfurter Allgemeine Zeitung) making unauthorised use of Becker's name and image.¹⁰ The size of the award, which has yet to survive an appeal,¹¹ appears all the more staggering

in view of the fact that Becker's photograph was so tiny as to be barely visible.

To conclude: under German law, it is generally the athlete concerned who both controls the commercial use of his identity and is entitled to the (often quite considerable) profits to be derived from such use. Doctrinally, the athlete's right to control and profit is based on an expansive vision of personality rights as rights protecting, not just the psychic, but also the commercial aspects of identity.

III. The American Right of Publicity as a Quasi-Intellectual Property Right in Persona

Like the German "kommerzielles Persönlichkeitsrecht", the US-American right of publicity developed from a personality right designed to protect against psychic injury resulting from unwarranted intrusions into a person's private life - the so-called right of privacy.¹² However, unlike its German counterpart, the right of publicity does not represent a development *within* the framework of personality rights. It was the result, not of a gradual expansion, but of a radical departure that transcended the bounds of personality rights protection altogether.¹³ The right of publicity was born of the realisation that a market for publicity values existed and that the traditional right of privacy was wholly inadequate to protect these publicity values.¹⁴

The right of privacy was inadequate as a protective mechanism against the commercial exploitation of a celebrity's publicity value because its exclusive rationale was seen as providing protection against *unwanted* publicity and the mental distress resulting therefrom.¹⁵ In the 1940s, for instance, a famous football player lost his privacy suit against a brewing company that had used his picture on a beer calendar without his consent.¹⁶ The court reasoned that this ordinary advertising use had caused the plaintiff neither unwanted publicity nor mental distress. Rather, the publicity the plaintiff had got was only that which he, as a sportsman, "had been constantly seeking and receiving".¹⁷

A further and decisive reason for recognising a right of publicity distinct from and unfettered by the traditional right of privacy was the latter's conception as a personal - and hence inalienable - personality right.¹⁸ This conception was increasingly at odds with developments in the real world and an emerging market in publicity values. The market's call for a freely alienable property right in the commercial value of identity was finally answered in 1953 in the groundbreaking case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*¹⁹ This was an action brought by a manufacturer of chewing gum (who had an exclusive contract with leading baseball-players for the use of their likenesses on trading cards to be sold along with the packs of gum) against a rival manufacturer (who had used the images without a

Soccer side Los Angeles Galaxy. According to newspaper estimates, only 20% of this grand total are accounted for by Beckham's "player's salary". The lion's share of the money is said to derive from endorsements and image rights. See "A pair of stars, an L.A. sky, a happy Galaxy", *Los Angeles Times* 12 January 2007.

3 The leading decision on the general personality right was handed down by the Bundesgerichtshof [BGH] [Federal Supreme Court] in the famous "reader's letter"-case, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 13, 334 - *Leserbrief*. The general personality right provides residual protection in cases that are not caught by any of the enumerated codified personality rights. For a detailed analysis, see *Forkel, Das allgemeine Persönlichkeitsrecht - Betrachtung einer fünfzigjährigen Entwicklung der Persönlichkeitsrechte im deutschen Privatrecht*, in: *Forkel/Sosnitzer, Zum Wandel beim Recht der Persönlichkeit und ihrer schöpferischen Leistungen* (2004), pp. 12 *et seq.*

4 BGH, *Neue Juristische Wochenschrift* [NJW] 2000, 2195 - *Marlene Dietrich*; see also the companion decision, BGH, *Neue Juristische Wochenschrift* [NJW] 2000, 2201 - *Blauer Engel*.

5 Münchener Kommentar, *Bürgerliches Gesetzbuch - BGB* (2001), § 12 Anh. para. 50.

6 Oberlandesgericht Düsseldorf [OLG] [court of appeals], *Gewerblicher Rechtsschutz und Urheberrecht-Rechtsprechungsreport* [GRUR-RR] 2003, 1 - *Jan Ullrich*; Oberlandesgericht München [OLG], *Gewerblicher Rechtsschutz und Urheberrecht-Rechtsprechungsreport* [GRUR-RR] 2003, 292, at p. 293 - *Boris Becker*.

7 BGH, *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 1979, 425 - *Fußballspieler* (use of players' images as part of a calendar held no infringement of their personality right, because calendar depicted major players in competitive situations and thus served an educational purpose). Immunity would probably also attach to memorabilia containing information about the life, achievements, and

victories of famous sportspeople (cf. BGH, *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 1996, 195 - *Abschiedsmedaille*).

8 BGH, *Neue Juristische Wochenschrift* [NJW] 2000, 2195, at p. 2201 - *Marlene Dietrich*.

9 See BGH, *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 1996, 227 - *Wiederholungsveröffentlichung*.

10 Landgericht München I [LG] [county court], *Urteil v. 22.02.2006*, Az. 21 O 17367/03. The court arrived at this figure on the basis of expert testimony that Becker could have asked for 2 million Euros for an ad campaign of the kind conducted by the respondent newspaper. The court did, however, make a 40% deduction since Becker had not been represented as actively endorsing the print product advertised.

11 The case is currently under appeal to the Oberlandesgericht München (OLG) (as Az. 18 U3961/06).

12 The "origins" of the right of privacy are generally traced to an 1890 article by Samuel D. Warren und Louis D.

Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193, still considered one of the most influential articles ever to have been published in a law review. For a history of the right of privacy, see *Prosser, Privacy*, 48 Cal. L. Rev. 1960, 383.

13 Götting, *Persönlichkeitsrechte als Vermögensrechte* (1995), p. 191.

14 *Nimmer, The Right of Publicity*, 19 Law & Contemp. Probs. 1954, 203, at p. 204.

15 See *id.* at p. 207 *et seq.*

16 *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941).

17 *Id.* at p. 170.

18 This conception was thought objectionable because the inalienability dogma reduced the amount of money to be made from one's personal popularity. See *Nimmer, The Right of Publicity*, 19 Law & Contemp. Probs. 1954, 203, at p. 209: „if a prominent person is found merely to have a personal right of privacy and not a property right of publicity, the important publicity values which he has developed are greatly circumscribed and thereby reduced in value.”

19 202 F.2d 866 (2nd Cir. 1953).

licence from the players to do so). The defendant manufacturer argued that the plaintiff's "exclusive" contract was no more than a release by the ball-players to the plaintiff of the liability which, absent the release, the plaintiff would have incurred in using the photographs and that therefore the contract vested in the plaintiff no property right or comparable legal interest which the defendant's conduct invaded.²⁰ The court, however, disagreed. It found that in addition to and independent of the right of privacy, a person had a proprietary right in the publicity value of his identity, which he or she was free to license and to alienate.²¹ Subsequent courts and commentators built on the foundations laid in *Haelan Laboratories*. Currently, under either statutory and/or common law, the right of publicity is recognised in 28 states.²²

In terms of its legal nature, the right of publicity is uniformly characterised as an intellectual property right, freely transferable and in a plurality of states descendible on death.²³ Athletes frequently grant exclusive licenses of their publicity rights to players' associations (like the Major League Baseball Players Association - MLBPA) that function as collective "one-stop shops" for potential sublicensees.²⁴ Famous athletes, including Tiger Woods, have even set up companies specifically to deal with their publicity rights.²⁵

Delineating the scope and the limits of protection is complicated by the fact that the right of publicity is a creature of state law, whose shape and contours change as one crosses state borders. There is fairly little inter-state variation as regards the question of who may be a right-holder. As its name implies, the right of publicity protects the commercial value to be derived from publicity. This makes the right obviously applicable to celebrities, whose persons and doings excite public interest.²⁶ According to most courts and commentators, however, the right of publicity is not confined to celebrities, but is the inherent right of every human being, whether famous or not, to control the commercial use of his or her identity.²⁷

In terms of the aspects of identity protected, most state statutes only list the most important identifying characteristics.²⁸ However, failure to qualify for statutory right of publicity protection does not preclude recovery where the state also recognises a broader common-law right of publicity - as, in fact, most states do. Infringement of this broader common-law right is triggered by the appropriation of any indicia of personality by which the plaintiff is identifiable.²⁹

The right of publicity is not absolute. As in Germany, the practical difficulty lies in balancing the right against competing values, in particular against the First Amendment guarantees of free speech and free press. Because of the impact of the First Amendment, unpermitted uses of identity in the traditional news and entertainment media are generally immune from liability.³⁰ These non-contentious cases apart, however there is considerable uncertainty over where to draw the line

between infringing and constitutionally protected uses.³¹ Marking out satisfactory boundaries has proved especially difficult as regards uses of identity in "non-traditional media of expression"³² - such as on games, posters, or other articles that combine a utilitarian with a communicative function - and as regards the use of factual information - e.g. references to an athlete's accomplishments - in advertising. It is these "hybrid cases" on the borderline between commercial and communicative speech that continue to spark off hot debates among courts and commentators.³³ In the more recent past, there has been a trend towards a more userfriendly approach, as illustrated by *ETW Corporation v. Jireh Publishing*,³⁴ a 2000 case considered by many to be a landmark decision.³⁵ The case revolved around a limited-edition art print after an original painting by American sports artist Rick Rush depicting Tiger Woods on the occasion of his Masters victory in Augusta in 1997. According to Woods, the prints were commercial merchandise attempting to cash in on his renown as a golfer - and as such plain invasions of his right of publicity. The court, however, disagreed. It characterised the prints as works of art expressing their own original message.³⁶ As fully protected communicative speech, the prints did not constitute an infringement of Woods' right of publicity that would have entitled him to compensation.

Although the law in this area is still unsettled - a fact which should make one wary of generalisations - it does seem fair to say that creative or transformative uses of identity may qualify for First Amendment protection.³⁷ The distinction would seem to be between uses that contain at least some creative elements and uses that "freeride" on another's publicity value without any contributive input on the user's part.³⁸

While informative or transformative merchandise may therefore claim First Amendment protection, using a sports star's statistics in advertising generally falls foul of the right of publicity.³⁹ Thus, a car commercial making use of a basketball player's name and record was held to constitute an infringement of his right of publicity.⁴⁰

Infringement of the right of publicity entitles the athlete to compensatory damages, based on the criteria applicable to measuring damages in intellectual property cases.⁴¹ That means that the athlete may, as in German law, recover (1) a hypothetical licence fee, (2) the infringer's profits, or (3) his actual loss. Most states also grant a right to punitive damages to prevent the infringer from walking out of court after merely paying plaintiff the market value of the intellectual property which he has "stolen".⁴² In addition to damages, the athlete is entitled to injunctive relief.

IV. The Two Regimes Compared

In comparing the two regimes, it makes sense to consider the problem first from the point of view of the defendant's wrong: what are the consequences, in German and US-American law respectively, of the

20 Id. at p. 867.

21 Id. at p. 868.

22 *McCarthy*, The Right of Privacy and Publicity (2004), §§ 6.3-12.

23 *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (868) (2nd Cir. 1953); on the post-mortem right of publicity, see *McCarthy*, The Right of Privacy and Publicity (2004), §§ 9.2 et seq.

24 See, e.g., Major League Baseball Players Association, The Players Choice Group Licensing Program, at <http://mlbplayers.mlb.com/NASApp/mlb/pa/info/licensing.jsp>.

25 Woods' company - ETW (for Eldrick Tiger Woods) - has registered the trademark "Tiger Woods" for all kinds of memorabilia. Cf. *ETW Corp. v. Jireh Publishing, Inc.*, 99 F.Supp.2d 829 (830) (N.D. Ohio 2000).

26 Famous plaintiffs are the norm and include sporting greats such as Muhammed Ali and Tiger Woods, cf. *Ali v. Playgirl, Inc.*, 447 F.Supp. 723 (S.D.N.Y. 1978); *ETW Corp. v. Jireh*

Publishing, Inc., 99 F.Supp.2d 829 (N.D. Ohio 2000).

27 *Nimmer*, The Right of Publicity, 19 *Law & Contemp. Probs.* 1954, 203, at p. 217; Restatement (Third) of Unfair Competition (1995), § 46 cmt. b.

28 Cal. Civ. Code § 3344 (a) ("name, voice, signature, photograph, or likeness") may serve as an example.

29 *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (1398) (9th Cir. 1992); *Barnett*, The Right of Publicity Versus Free Speech in Advertising: Some Counterpoints to Professor McCarthy, 18 *Hastings Comm. & Ent. L.J.* 1996, 593, at p. 595.

30 *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967). Codifications of the right of publicity generally provide exceptions for uses of identity in news reporting and the entertainment media, see, e.g., Cal. Civ. Code § 3344 (d) (exemptions for "any news, public affairs, or sports broadcast"); Restatement (Third) of Unfair Competition (1995), § 46 cmt. a: „The use of a person's identity

in news reporting, commentary, entertainment, or works of fiction or nonfiction is not ordinarily an infringement of the right of publicity [...]."

31 *Felcher/Rubin*, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 *Yale L.J.* 1979, 1577, at p. 1589.

32 *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 399 (2001).

33 *Kwall*, Preserving Personality and Reputational Interests of Constructed Personas through Moral Rights: A Blueprint for the Twenty-First Century, *U. Ill. L. Rev.* 2001, 151, at p. 152.

34 99 F.Supp.2d 829 (N.D. Ohio 2000).

35 Because of the expected precedential value of this case for the further development of the right of publicity, both the National Football League and the Major League Baseball Players Association saw fit to file amicus briefs. See *McEvoy/Windom*, A Tale of Two Cases: Right of Publicity versus the First Amendment, 25 *Comm. & L.* 2003, 31, at p. 32.

36 99 F.Supp.2d 829, 836 (N.D. Ohio 2000).

37 *Wanat*, Entertainment Law: An Analysis of Judicial Decision-Making in Cases Where a Celebrity's Publicity Right Is in Conflict with a User's First Amendment Right, 67 *Alb. L. Rev.* 2003, 251, at p. 275.

38 *Felcher/Rubin*, Privacy, Publicity, and the Portrayal of Real People by the Media, 88 *Yale L.J.* 1979, 1577, at pp. 1596, 1604.

39 *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 868 F.Supp. 1266, 1273 (N.D. Oklahoma 1994): „a parody sold for profit has a stronger claim to First Amendment protection than a parody used to advertise another unrelated product."

40 *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996).

41 *Ropski/Cooperman*, Schadensersatz in Rechtsstreitigkeiten über geistiges Eigentum in den Vereinigten Staaten, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 1990, 411, at pp. 411 et seq.

42 *McCarthy*, The Right of Privacy and Publicity (2004), § 11.36.

unpermitted taking of an athlete's publicity value? In a second step, one may take the opposite vantage point and look at the question from the point of view of the athlete's *right*: how do the two regimes classify the athlete's right to the commercial value of his own identity and what are the implications of these respective classifications?

1. The Infringer's Wrong

Looking at the matter first from the point of view of the defendant's *wrong*, it bears stressing that under neither German nor US-American law are athletes helpless when it comes to the unpermitted commercial exploitation of their identities by others. Both countries provide regimes that protect, not just the chief distinguishing characteristics of name and likeness, but *all* indicia by which a person is identifiable.⁴³ Both regimes call for a *balancing* of the competing interests involved, with similar outcomes in similar cases.⁴⁴ The remedies, too, are alike. The measure of damages is uniformly derived from intellectual property law. In fact, there is only one major difference as far as remedies are concerned. Under the German regime, an athlete cannot claim punitive damages for an infringement of his commercial personality right - the reason being that civil damages are not generally penal in function in Germany.⁴⁵

Despite these many similarities, there is one key difference. The US-American approach to protecting identity is a dualist one. Both as regards the elements necessary to state a case and the remedies available for infringement, there is a sharp divide between *commercial* interests - which are the province of the right of publicity as a quasi-intellectual property right - and *dignitary* concerns, which are protected by the right of privacy as a traditional personality right. Germany, on the other hand, adheres to a monistic theory and provides only one unitary personality right for both monetary and moral concerns. The commercial variant of this unitary right comes close to being a right of publicity as far as *remedies* are concerned - in that damages are assessed on the criteria applicable to intellectual property cases - but it retains its moral overtones in other respects. This is clear from the leading *Marlene-Dietrich*-decision referred to above,⁴⁶ which makes commercial personality protection in large measure "follow" the protection of dignitary concerns. The duration of post-mortem protection for commercial interests, for instance, is directly tied to the continued existence of dignitary concerns deemed worthy of legal protection.⁴⁷ Because of this intermingling of commercial and dignitary considerations, the German approach has been labelled a "dishonest use of legal instruments designed for other purposes"⁴⁸ by one international commentator.

Although this verdict may seem a little harsh, there are at least two virtues to a dualist approach. For one thing, a dualist approach is an aid to clear thinking, because it forces the court to consider a case both as a potential right of privacy *and* as a potential right of publicity violation. This stops judges from failing to view a case in the round and from failing to "spot" an infringement of commercial concerns -

a lapse that German judges have occasionally been guilty of. When former German ice-skater and Olympic gold medalist Katharina Witt complained of the unauthorised publication of nude photographs in a magazine, for instance, her case was thrown out of court because she had given her consent to the photos being published (in exchange for a hefty fee) by another magazine. The court failed to see how Witt's dignity could be compromised by nude shots when she had voluntarily presented herself to the public in the nude. This is fine as far as it goes. However, it does not follow from the fact that the second (unpaid for) publication could not have caused Witt any *moral* harm that it could not have caused her any *economic* injury either - an aspect of the case the court evidently missed.⁴⁹ For another thing, a dualist approach counteracts the danger of *overvaluing* the interests weighing in favour of the identity-right-holder. German judges, finding themselves within a personality rights framework, have in the past engaged in typical, usually emotionally overcharged "personality rights" rhetoric, even when dealing with cases that are not about invasions of privacy or assaults on dignity, but about more mundane *commercial* interests.⁵⁰ This rhetoric has tended to obscure the fact that there are in fact commercial interests on both sides of the equation and that the user's commercial interest - particularly where he or she has made a valuable creative contribution - may well predominate in an appropriate case.⁵¹

2. The Athlete's Right

The differences between the German and the American regimes are brought out in even sharper relief when one considers the problem from the point of view of the athlete's *right*. The German commercial personality right, although recently declared descendible on death by the Federal Supreme Court,⁵² continues to be non-transferable *inter vivos*.⁵³ In German law, an athlete who signs an endorsement contract does not "transfer" any interest, but merely "waives" his right to sue for damages. The right of publicity, on the other hand, is a quasi-intellectual property right, which may be licensed or assigned. From a legal perspective, this seems problematic. Young athletes, in particular, risk losing control over the commercial use of their identities by signing comprehensive license agreements or assigning their right of publicity outright. Should they prefer not to "market" their identities a few years down the line, there is not much that they can do. US courts are slow to interfere with a valid license⁵⁴ and generally refuse to undo an assignment unless it is vitiated by fraud or duress.⁵⁵ What is more: an athlete who assigns his right of publicity is taken to thereby waive his right of privacy.⁵⁶ This means that he may not be able to enjoin even offensive uses of his identity by the assignee.⁵⁷ An athlete may also lose control over the commercial exploitation of his identity involuntarily. The right of publicity is generally viewed as marital property distributable on divorce,⁵⁸ and some commentators have even gone so far as to suggest that it is subject to seizure and sale in bankruptcy.⁵⁹ For an athlete, the US-American concept of a fully

43 In Germany, this comprehensive level of protection is the result of the general personality right (BGH, Neue Juristische Wochenschrift [NJW] 2000, 2195, at p. 2197 - *Marlene Dietrich*), in the US it is the result of the "common law" right of publicity. See, e.g., *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1398 (9th Cir. 1992).

44 There are striking similarities as regards the treatment of uses of identity in the media (privileged under both regimes) and as regards the criteria applicable to unauthorised advertising uses (the criteria are comparably strict in both countries).

45 *Wandtke*, Doppelte Lizenzgebühr im Urheberrecht als Modell für den Vermögensschaden von Persönlichkeitsrechtsverletzungen im Internet?, Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 2000, 942, at p. 945; *Siemes*, Gewinnabschöpfung bei

Zwangskommerzialisierung der Persönlichkeit durch die Presse, Archiv für civilistische Praxis [AcP] 2001, 202, at p. 212.

46 BGH, Neue Juristische Wochenschrift [NJW] 2000, 2195.

47 Some German commentators have criticised the decision for this "tagging" approach. See, e.g., *Götting*, Die Vererblichkeit der vermögenswerten Bestandteile des Persönlichkeitsrechts, Neue Juristische Wochenschrift [NJW] 2001, 585, at p. 586.

48 *Link*, 50 Years of Publicity Rights in the United States and the Never-Ending Hassle with Intellectual Property and Personality Rights in Europe, 4 I.P.Q. 2003, 363, at p. 387.

49 Oberlandesgericht Frankfurt a. M. [OLG], Neue Juristische Wochenschrift [NJW] 2000, 594, at p. 595 - *Katharina Witt*.

50 German courts tend to stress that the unauthorised commercial use "objectifies"

and somehow debases the person concerned. See, e.g., BGH, Neue Juristische Wochenschrift [NJW] 2000, 2195, at p. 2197 - *Marlene Dietrich* ("den Geschäftsinteressen Dritter dienstbar gemacht"); Landgericht Hamburg [LG] [county court], Urteil v. 25.04.2003, Az. 324 O 381/02 - *Oliver Kahn* ("zu eigennützigen und zudem kommerziellen Zwecken [...] instrumentalisiert").

51 The user's creative contribution is not accorded sufficient weight by the German courts. This is clear from a decision rendered by the Landgericht Hamburg [county court], which held that a computer game making unauthorised use of German goalkeeper Oliver Kahn's identity was not immune from liability quite irrespective of the fact that the game contained significant creative and transformative elements. See Landgericht Hamburg [LG], Urteil v. 25.04.2003, Az.

324 O 381/02 - *Oliver Kahn* (aff'd Oberlandesgericht Hamburg [OLG], Urteil v. 13.01.2004, Az. 7 U 41/03).

52 BGH, Neue Juristische Wochenschrift [NJW] 2000, 2195 - *Marlene Dietrich*.

53 Id. at p. 2198.

54 *Shields v. Gross*, 461 N.Y.S.2d 254 (1983).

55 *McCarthy*, The Right of Privacy and Publicity (2004), § 10.14: "in the ordinary situation of a freely bargained assignment [...], the courts should treat persons as freely consenting adults, capable of protecting themselves in assignments of the right of publicity."

56 *Götting*, Persönlichkeitsrechte als Vermögensrechte (1995), p. 235.

57 Id. at p. 272.

58 *Jacoby/Zimmermann*, Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity, 77 N.Y.U. L. Rev. 2002, 1322, at p. 1339.

59 Id. at pp. 1322 *et seq.*

negotiable intellectual property right in persona may therefore turn out to be a very mixed blessing.

V. Conclusion

Because of the growing commercialisation of the athlete persona - a phenomenon which is not likely to go away - legal systems around the world are faced with the problem of how to conceptualise the object traded in and what protection against third parties to afford. Under German law, it is generally the athlete concerned who both controls the commercial use of his identity and is entitled to the profits to be derived from such use. Doctrinally, the athlete's right to control and profit is based on an expansive vision of personality rights as rights protecting, not just the psychic, but also the commercial aspects of identity ("kommerzielles Persönlichkeitsrecht"). As a consequence of this personality-rights-based conceptualisation, the athlete's interest in the commercial value of his own identity is non-transferable *inter vivos*. Rather than expanding the scope of personality rights to embrace both dignitary and commercial concerns - like their German colleagues did - American judges opted for a sharp divide between

commercial interests, which are the province of the right of publicity as a fully negotiable quasi-intellectual property right in persona, and dignitary concerns, which continue to be protected by the right of privacy as a traditional personality right.

As regards the future development of German law, a comparative look across the Atlantic can act both as a catalyst and a deterrent. Looking at the problem from the point of view of the defendant's *wrong*, the American distinction between monetary and moral concerns may serve as an aid to clear thinking and head off potentially dangerous rhetorical excesses. Looking at the problem from the point of view of the athlete's *right*, on the other hand, a different picture presents itself. The German Constitution protects the values of personal dignity and autonomy as inalienable rights⁶⁰; giving athletes a freely alienable property right in the commercial value of their own identities is not therefore a path Germany could or should follow.

⁶⁰ Grundgesetz [GG] [German Constitution] art. 1.



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Florida Coastal School of Law established the Center for Law and Sports in 2005. The Center offers students a comprehensive sports law curriculum in which to obtain a certificate in sports law and concentrate their legal studies on the rapidly changing and dynamic sports industry. A variety of unique and specialized course offerings are taught by three dedicated full-time sports law faculty members, as well as adjunct faculty employed in the sports industry. Students enrolled in the certificate program may also have the unique opportunity to participate in an internship with a sports organization or university athletic department. The law school also participates annually in a national sports law moot court competition. For more detailed information about the Center's resources, please see: www.fcsf.edu/centers/lawandsports.

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Why WADA Should Not Ban Athletes for Recreational Drug Use*

First class cricket in England and Wales has had four positive anti-doping tests in the last decade. All four were for “recreational” drugs - cannabis, cocaine and ecstasy. Not one of the players involved was trying to gain a competitive advantage in his cricket. Not one was cheating anybody except, perhaps, himself. All were banned from cricket for periods of time that, in one case at least, brought an end to their playing days. One was an amateur who had devoted 15 selfless years to Scottish cricket at great personal sacrifice. In all cases, they were subject to disciplinary proceedings because cricket had opted to use the World Anti Doping Authority (WADA) list of prohibited substances as the basis for its anti-doping regime. Why were these drugs on the list at all?

The inclusion of more than half the substances on the list completely defy logic when applied to individual sports, but most people in Anti-Doping agree that you need a unified list to fulfil the overall aims of WADA. The inclusion, however, of cannabis, cocaine and ecstasy defies logic for every sport.

Let's go back to basic principles: Why are certain substances put on the list at all? First of the three justifications is performance enhancement. This doesn't justify the inclusion of the “social” drugs and, before everyone starts writing in about the efficacy of cocaine for this purpose, I retain an open mind, but, in my experience, no-one who has actually used cocaine would consider it a viable stimulant for top level sport.

The second justification is health. If this were enough on its own, why don't we add cigarettes and alcohol to the list? Why don't we start measuring body fat percentages? The logic is further undermined by the fact that cannabis is only tested for in competition. Surely, if WADA was actually concerned about cannabis on the health front, it would test for it all the time? Why test in competition when it has no performance enhancement value?

The third justification is the “role model” argument. I don't believe many young people will start to abuse drugs because they find out a particular sportsman has used them, but, even if they would, the only reason they know the sportsman takes them is because the sport went out of its way to catch him. The “role model” argument is a piece of circular, self justifying logic from WADA. All sports have more than

adequate disciplinary procedures for dealing with athletes caught with recreational drugs by the police or in a tabloid sting. It's called “bringing the game into disrepute” and can carry fines and suspensions commensurate with the “crime”.

The fact is the inclusion of these drugs on the list is simply political. The politics of appeasement and lowest common denominator thinking; primarily aimed at satisfying America that WADA takes its broader social responsibility seriously. Ironically, whilst the American government has given WADA the thumbs up, American sport has, by and large, given WADA a less complimentary hand gesture.

It's high time WADA realised that it exists to stop people cheating at sport. It has to drop the hubristic notion that it can be the moral guardian of world sport too. It needs to be strictly scientific and forgo it's misplaced paternalism before sports will embrace it fully, instead of under duress from their governments and the International Olympic Committee (IOC).

Finally, people who abuse recreational drugs need help. Banning them from their careers for any length of time is not only disproportionate, but also does nothing to address why they take the drug in the first place. I'm in favour of still testing for these drugs, but, instead of prosecuting, the results should be passed on to the employer to then determine what they can do to help their employee. I would also be happy with a “three strikes and you're out” policy; but I cannot abide the simplistic, politically driven prosecution and criminalisation of athletes for no good reason.

Ian Smith**

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Anti-Doping Education Programme with one to one meetings with all first class professional cricketers. He was a solicitor in private practice for 10 years and a recognised expert in Sports Law. The views expressed in this article are personal and do not necessarily reflect the views of the PCA.

WADA Should Ban Athletes Who Take Recreational Drugs

Ian Smith of the Professional Cricketers' Association has argued that recreational drugs, such as cannabis, cocaine and ecstasy, should not be on the World Anti Doping Authority (WADA) list of prohibited substances in sport. In this article, I take a different point of view and put forward some arguments for their continued inclusion on the banned list.

I entirely agree with WADA that doping is “*fundamentally contrary to the spirit of sport.*” In other words, drugs and sport, like oil and water, do not mix. Drugs are incompatible with the integrity of sport, which stands for health, fairness and setting a good example: the essence of *Olympism* as espoused and promoted by the International Olympic Movement. *Olympism* is defined in the Olympic Charter of 2000 as follows:

“Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on joy found in effort, the educational value of good example and respect for universal fundamental ethical principles.”

Any kind of drugs, whether performance enhancing or recreational, are contrary to health, with the exception of therapeutic drugs that are medically prescribed for health reasons, that is, for the control of certain medical conditions, such as epilepsy. Cocaine can hardly be described as therapeutic or an essential part of a healthy life style. Rather than enhancing life, it often leads to its destruction, when addiction cannot be controlled. Ecstasy and cannabis also cause physical and mental problems over a period of time; and the former has also been responsible for death. For example, in the high profile case of the young English girl Lea Betts, who died from taking ecstasy. Her distraught parents are not calling for the use of ecstasy, but for its prohibition. And certainly would not countenance its legalisation in sport. Sport is a celebration of life - not death!

All forms of drug taking should also be banned in order to provide a ‘level playing field’ in all sports for those competitors who do not indulge in them - whether for performance enhancing or recreational purposes. Otherwise, competition is unfair and, indeed, otiose. Sporting prowess and achievement should be obtained through hard work, self-discipline, dedication and a drug-free healthy body. Success

should not depend upon the taking of unnatural, synthetic and harmful substances.

Again, a drug-free healthy life style sets a good example and is something for society at large to look up to, admire and emulate, especially amongst the young people of today, who are subject to so many pressures and temptations to succeed in whatever they do - at any cost! And are also very impressionable. Successful athletes are role models and examples of a healthy life style. And, if recreational drug taking is considered to be normal healthy behaviour, and as such generally approved, then what is good for the goose is good for the gander. Not the kind of message to send out to the young people of today, who are constantly seeking to know and are often confused about what is right and what is wrong in modern society, in which the traditional moral order, which has stood the test of time, is constantly under threat and at risk of being undermined.

The WADA Code holds that the spirit of sport is “*the celebration of the human spirit, body and mind*”, and is characterised by, amongst other things, the following values:

- Character and education
- Dedication and commitment
- Respect for rules and laws
- Respect for self and other participants
- Community and solidarity

The Independent European Sport Review - An Update

The Independent European Sport Review (‘IESR’), published during the Summer of 2006 (referred to as ‘the Arnault Report’ after its Portuguese author), started life as ‘The Independent European Football Report’ following an initiative in 2005 of the UK Presidency of the European Union to review the state of European football. This review had the following terms of reference:

“To produce a report, independent of the Football Authorities, but commissioned by UEFA, on how the European football authorities, EU institutions and member states can best implement the Nice Declaration on European and national levels.”

The Nice Declaration on Sport of 2000, whilst quite comprehensive on the relationship between sport and the European Union, was not a legally binding document. Thus, the Declaration did not change the rules that, over the years, had established that economic activity in the sporting field was to be treated like any other business activity within the European Single Market and, as such, sports bodies and sports persons were subject to EU law in general and EU Competition Law in particular. However, the Declaration is a strong political statement by the EU Council of Ministers issued at their ‘Summit’ in Nice on 6 December, 2000 and may be viewed in certain sporting circles as a possible ‘blueprint’ for legal regulation in the future.

For further background information on and also a critical overview of the IESR, readers are referred to the article by Samuli Miettinen of Edge Hill University College in the United Kingdom, published in ‘The International Sports Law Journal’ ISLJ 2006/3-4, at pages 57 - 62.

Since its publication, several major sports organisations have issued some interesting comments on the IESR. For example, the International Olympic Committee in a letter to the EU Commissioner, Jan Figel, who is currently consulting on a ‘White Paper’ on Sports, due to be published during the Summer of 2007, signed by the President, Jacques Rogge, and dated 22 September, 2006, has declared that:

“The report of Mr Arnault does not represent the Olympic and sports movement’s view as a contribution to this consultation process.”

And added:

“We believe that the issue of governance is of the utmost importance for the sports movement..... therefore, it does not fall within the EU’s competence.”

Doping in any of its forms, I would submit, is incompatible with and anathema to any of these values. Indeed, I would argue that any of these ideals can only be achieved without engaging in drug taking of any kind, but only by clean living.

As far as education is concerned, which is very important, article 18 of the Code defines the basic principle and primary goal of anti-doping educational programmes in the following terms:

“The basic principle for information and education programmes shall be to preserve the spirit of sport as described in the Introduction to the Code, from being undermined by doping. The primary goal shall be to dissuade Athletes from using prohibited Substances and Prohibited Methods.”

And goes on to say that these programs should promote the spirit of sport, in order to establish an anti-doping environment that influences behaviour amongst athletes.

And that, in my opinion, goes for doping in all its forms - the taking of performance enhancing and recreational drugs alike. Otherwise, the fight against doping in sport would be compromised by excluding recreational drugs from the WADA Code. And sport would be the loser!

FIFA Presidential Delegate for Special Affairs, Jerome Champagne, not surprisingly, shares the same point of view:

“The autonomy of sport is fundamental, as we need to protect it from political and economic interference. The issues related to sport must be dealt with by sport authorities globally, since they are world issues, not just European issues. We need legal stability in Europe to define what we accept in sport. Sport has specific characteristics on which autonomous rules should apply. For example, in the case of doping, this is why we have a World Anti-Doping Agency.”

These remarks, it may be said, are quite typical of FIFA, which is always beating the ‘global drum’, so to speak, and thereby emphasizing that it is the *world* (emphasis added) governing body of football, especially when threatened with any kind of outside interference in its affairs or challenge to its autonomy within Europe, even though Europe is so important in the world of football. The special pleading in relation to doping must now, of course, be read in the light of the full European Court of Justice Decision on 18 July, 2006 in the *Meca-Medina* case (see the author’s comments on this ruling in ISLJ 2006/3-4, at pages 119 & 120).

Unease has also been expressed, following a meeting in Brussels on 20 September, 2006, by certain European Team Sports Federations, including, UEFA, FIBA Europe and the IIHF, in the following terms: *“The European Sports Model, including the pyramid structure and as defined in more detail in the Independent Sport Review, is currently under threat and must be preserved.”*

An ‘online’ consultation process is due to be launched during November, 2006, and an EU Sports Ministers’ Conference held in Brussels on 28 November, 2006. And no doubt many sports administrators, lawyers and academics will be taking advantage of this opportunity and making their feelings felt too.

With the pending ECJ Decision in the FIFA-G14 case and very likely other cases in the future, as well as further in depth analyses of the IESR, we are set to hear a good deal more about the autonomy of sport and sports bodies and the evolving EU Law in relation to sporting issues and how best to reconcile the two of them in the months - and probably years - to come!

FIFA's Powers to Sanction Clubs Upheld

On 5 January 2007, the Swiss Federal Court handed down a landmark decision upholding the right of FIFA, the world governing body of football, to impose sanctions for breaches of its disciplinary rules.

The case arose in the following circumstances. In October of 2005, the FIFA Disciplinary Committee imposed a fine of 25,000 Swiss Francs on a Spanish club in connection with a transfer dispute, as well as other sporting sanctions, the deduction of points and compulsory relegation to a lower division, if the Spanish club failed to pay a Brazilian club 373,226 for a player by a certain deadline. Prior to this, the Spanish club had ignored a decision rendered by the FIFA Players' Status Committee and then appealed against the disciplinary decision to the Court of Arbitration for Sport in Lausanne. This latter appeal also went against the Spanish club.

The Spanish club then appealed to the Swiss Federal Court in Lausanne. The club argued that, by threatening to deduct points or impose relegation, FIFA was, in effect, enforcing a financial claim. And, as such, this was a violation of the so-called 'public policy' ('*ordre public*') principle, as FIFA was claiming to impose sanctions that were exclusively within the power of the State to award. In other words, FIFA, a private body, was acting like a Criminal Court. And, by implication, exceeding its powers and usurping the role of the State.

The Swiss Federal Court denied this legal challenge to the authority of FIFA. The Court held that, pursuant to the Swiss Association Law, to which FIFA - as an organisation established and operating under the Swiss Civil Code ('*Code des Obligations*') - is subject, any violation of a member's duties may result in the imposition of sanctions. The Court further held that, if a private association (such as FIFA) draws up rules and regulations to which its members are subject to achieve its objectives, it is lawful for FIFA, as a governing body

of its sport, to impose sanctions that safeguard the members' duties. As the Spanish club is a member of the Spanish Football Association (RFEF), which, in turn, is a member of FIFA and subject to its rules, the club, through such membership, is also subject to the jurisdiction of FIFA.

Commenting on the decision of the Swiss Federal Court in this case, the President of FIFA, Joseph Blatter said:

"I am very pleased that the Swiss Federal Court rejected the claim that the Spanish club had lodged. Using its statutes and regulations, FIFA and its various bodies ensure that every member of the football family is given access to fair, balanced and, above all, fast-moving jurisdiction as well as the opportunity to appeal to the Court of Arbitration for Sport, in the best interests of sport."

FIFA also contends that this judgment endorses and reaffirms its independence and has global implications. The decision will certainly apply to FIFA's operations, which are world-wide, and also to other International Sports Bodies in the lawful exercise of their rule making powers, particularly in relation to the right to enforce disciplinary measures governing their respective sports. However, FIFA's contentions regarding the scope of this decision so far as its autonomy is concerned (a favourite topic of FIFA and other International Sports Federations) have to be set against the recent European Court of Justice (ECJ) decision in *Meca-Medina* and also considered in the light of other legal challenges against the autonomy of FIFA pending before the ECJ, such as the *Charleroi FC/G-14* case, which concerns FIFA's right to call up players for international duty and the question of legal liability for any resulting injury claims.

French Football Clubs 'To Float' in 2007 - A Topical Note

Manchester United Football Club was one of the first football clubs to 'float' - that is, to have its shares quoted on the Stock Exchange. And at one time, its capitalisation was worth £1 billion, making it the richest football club in the world. But, according to the recent Deloitte and Touche Annual Soccer Finance Report, ManU, as it is known by its fans, has been dislodged from this heady position by Real Madrid.

The floating of Football Clubs on Stock Exchanges has had a chequered history to date, in that not all floatations have been successful and returns for investors in football clubs have not always turned out to be lucrative. In fact, the jury is still out in financial and investment circles. Apart from the fact also that fans of the clubs concerned have not always fared very well under such arrangements - witness the takeover of ManU by the Glazer family. However, floating on stock exchanges does have certain advantages, including opening up the possibility of wider share ownership (including fans) and the raising of finance for the development of clubs and their facilities, including new stadia (not every football club has a Roman Abramovich to bank roll them!), although it has to be acknowledged that a large proportion of additional finance is often swallowed up in payroll costs, especially players' wages, which still continue to figure as a significant item on clubs' profit and loss accounts!

In France, floatation to date has been prohibited. But, in December 2006, the European Commission requested the French Government to open up the market and modify the Act No. 84-610

of 16 July, 1984, which, pursuant to article 13, prevents a French Limited Company (*Societe Anonyme (SA)*) operating in the sporting arena from raising capital from members of the general public. In other words, from going public and floating their Companies on the French Stock Exchange (*Bourse*).

The necessary implementing legislation is currently going through the French Parliament. On 11 October, 2006, the National Assembly (Lower House) adopted the relevant provisions in article 44 of the wider '*Projet de Loi pour le Developpement de la Participation et de l'Actionnariat Salarie*'. And the Senate (Upper House) is now discussing the new legislation. However, a spokesman for the Senate has indicated that the new Law is unlikely to be passed before the end of the year (2006). And added that the Senate is likely to make changes to the draft Law.

All this comes at a time when FIFA, the World Governing Body of Football, is wrestling with a number of corruption scandals affecting the 'beautiful game', particularly match-fixing in Italy and Germany; and is also addressing the need to strengthen football governance generally, including the possible introduction of the concept of a 'fit and proper person' to be a director of a football club, all 'for the good of the game'.

The New Year 2007 promises, therefore, to be a challenging and interesting time for the 'world's favourite game' in these respects. So let us hope that appropriate measures will not only be adopted but will also prove to be effective!

Hackney Spikes Nike Guns

The Council of the London Borough of Hackney has recently scored a major legal victory over sportswear giant NIKE in a landmark copyright infringement case.

The case arose in the following circumstances. NIKE used Hackney's logo on a range of sportswear without their authorisation. The matter came to light when the Council's legal adviser saw the range when shopping in 'Niketown' in London's famous Oxford

Street. He purchased a t-shirt bearing Hackney's logo and brought it to the Council's attention, informing them that the use by NIKE of the Hackney logo had not been authorised.

As the Mayor of Hackney, Jules Pipe, has commented: "*NIKE were trying to capitalise on the image of Hackney Marshes, Europe's biggest grassroots football venue, which lies on the east side of the Borough.*" NIKE, in fact, were trying to recapture the spirit of their 'Parklife'

advertising campaign, featuring the famous - some might say infamous - French footballer, Eric Cantona, one of the iconic ads of the 1990s, on a Hackney range of clothing. As the Mayor has also pointed out: "NIKE had adopted and used the corporate identity of Hackney and our name, 'The London Borough of Hackney'. They had created an unsought and unapproved brand association." So, the Council were concerned that the general public, especially the people living in the Borough, would infer from this that a commercial agreement had been concluded between the Council and NIKE. This was not, in fact, the case, and the Council was, not unnaturally, concerned about any negative impact this might have on their reputation.

The Council approached NIKE to discuss and try to settle the matter amicably, but soon came up against their big guns; NIKE has a global reputation for fiercely protecting and defending their Intellectual Property rights. So, the Council briefed a leading Barrister, with many years' expertise and experience in dealing with IP and sportswear brand disputes, to advise and represent them. He advised them that, although the Council had not registered the Hackney logo as a trademark (*quaere*, whether the Council had acquired any trademark rights in the logo at Common Law through long use?), they would have a strong case for copyright infringement if they could establish copyright ownership in the logo.

Delving into the history of the matter, the Council discovered that the logo had been designed for them in 1965 by Alex Davis, who was the founding editor of the 'Design Magazine' and a leading graphic designer of the 1960s. Also, the Council had been created in the same year (1965) and the Council had only had this one logo. Under the UK Copyright Designs and Patent Act of 1988, 'artistic works' enjoy copyright protection. Section 4 (i)(a) of the Act defines such works as "a graphic work, photograph, sculpture, collage, irrespective of artistic

quality." A logo clearly qualifies as an 'artistic work' and as such enjoys copyright protection under the Act. However, Davis, the creator of the logo, had died in 1976. But copyright in an 'artistic work' continues for 70 years after the artist's death.

Cutting the story short: relying on expert legal advice on copyright and its ultimate transmission and assignment and supported by a strong media campaign, the Council were finally able to convince NIKE to come to the table and talk. As a result of these discussions, NIKE agreed to settle the Council's claim and pay them £300,000 for infringement of their copyright in the logo.

As the Mayor of Hackney has further remarked: "We were determined to beat NIKE for the sake of the people of Hackney, which is why we will spend the money we got from them on sports activities for young people in the Borough." And he gave this message to the public sector: "Councils should remember that their logo belongs to the people who live in the area, and in protecting it they are protecting public property."

As the matter was settled out of court, unfortunately the case does not set a legal precedent, but it does show that, in the absence of trademark protection, copyright protection in sports brands is a valuable legal weapon to stop the likes of NIKE from misappropriating a valuable logo, even where the logo belongs to a public authority. Unlike, trademark protection, there is no need to register copyright - it automatically exists in a protected work. However, in practice, it is advisable to put on the material concerned the international copyright symbol C in a circle followed by the year in which the work was created and the name of the copyright owner. In this way, one is giving notice to the whole world that copyright is claimed in respect of the work concerned and woe betide anyone who tries to steal it!

Ian Blackshaw



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The Council of Europe and Sport: Basic Documents

By Robert C.R. Siekmann & Janwillem Soek (Editors)

TMC Asser Press, The Hague 2007, pp. 414 + XXVI, Hardback, ISBN 90-6704-239-0, Price GBP 65.00 / USD 120.00

The Council of Europe has often been regarded as the 'Cinderella' of the European Institutions, but its contribution in the sporting arena over the last forty years has been quite substantial and not to be underestimated.

The Council of Europe, which now has 46 Member States, was the first international intergovernmental organisation to establish legal instruments and to provide an institutional framework for the development of sport at the European level. Indeed, its work in this field has paved the way for a European Sports Model. Since 1967, the Council of Europe has had a Policy on Doping in Sport, which has been quite influential in Europe and beyond in the continuing fight against drugs cheats. In fact, the Council of Europe played an important role in the establishment of the World Anti-Doping Agency in 1999. And the Council's pioneering work in the field of doping has provided the basis for the UNESCO International Convention against Doping in Sport adopted in 2005, which came into force at the beginning of 2007.

The Council of Europe has also produced a European Sports Charter, a Code on Sports Ethics, as well as the all-important European Convention on Spectator Violence, a subject that, sadly, is never far from the sporting headlines, not least in relation to the behaviour of players and fans of the world's favourite sport: football.

Writing in the Foreword to the Book, Dr Ralf-René Weingärtner, Director for Youth and Sport at the Council of Europe, underlines the importance of sport and the Council of Europe in the following terms:

"The Council of Europe is aware that sport has a distinctive role to play as a force for social integration, tolerance and understanding. It is open to all, regardless of age, language, religion, culture, or ability. It is the single most popular activity in modern society. Sport provides the opportunity to learn to play by commonly agreed rules, to behave admirably both in victory and defeat and to develop, not only the physical being, but also social competences and ethical values."

And adds:

"Sport has a key contribution to bring to the promotion of the core values of the Council of Europe: democracy, human rights and the rule of law."

The Book is the second volume in the ASSER International Sports Law Centre series of collections of documents on the intergovernmental (interstate) field of international sports law; the first volume of which on the European Union and Sport appeared in 2005.

The subjects covered in the present Book include amongst others: Children and Young People; Discrimination; Disability; Doping; the Environment; Ethics; European Co-operation; Good Governance; and Violence. All these topics are of current and continuing concern amongst sports bodies and sports persons and also their advisors.

The Book is completed with an Introduction by Stanislas Frossard of the Sports Department of the Directorate of Youth and Sport at the Council of Europe, which provides a useful contextual background; a workmanlike Index; and a helpful List of Acronyms.

The Editors of the Book, Rob Siekmann, the Director of the ASSER International Sports Law Centre, and his colleague, Janwillem Soek, Senior Research Fellow at the Centre, are to be warmly congratulated on putting together a valuable resource on International Sports Law, which will, I am sure, be a welcome addition to the literature, much of which has emanated from initiatives taken by Dr Siekmann, and also much appreciated by national and international sports bodies, policy makers, sports administrators, sports law practitioners and academics alike.

Ian Blackshaw



Legal Comparison and the Harmonisation of Doping Rules: Pilot Study for the European Commission

By Klaus Vieweg and Robert Siekmann (Editors)

Duncker & Humblot, Berlin 2007, pp. 703 ISBN 978-3-428-12413-8

Price: € 96,00

In 2000, the European Commission commissioned sports law experts from the University of Erlangen-Nuremberg, Germany, the TMC Asser Instituut for International Law in The Hague, The Netherlands, the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany, and Anglia Ruskin University, Chelmsford, United Kingdom to undertake a Research Study on the comparison and harmonisation of doping rules within the framework of the 'Pilot Project for Campaigns to Combat Doping in Sport in Europe'. The final report of this research project was presented on 7 November, 2001, and discussed at an International Conference in Brussels, organised by the TMC Asser Instituut in collaboration with the Flemish Ministry for Sports during the Belgian Presidency of the European Union. This Conference was attended by representatives of the International Sports Federations and also Sports Ministries and National Sports Organisations of the EU Member States.

The Study, the subject of this publication, was commissioned during the initial stages of the drafting of the World Anti-Doping Code, which, following the publication of the Study, work continued on this

Code, which was finally completed and adopted in 2004. It is fair to say, therefore, that the final content of the WADA Code owed much to the Study and the wealth of material that it contains. In particular, the Study provided the drafters of the Code with an important overview of the doping rules and regulations of National and International Sports Bodies, including a comparative analysis of them, as well as a useful survey and analysis of the relevant Public Law Legislation. As such, the study can be considered to form part of - and an important one at that - the so-called '*travaux préparatoires*' for understanding the background to and the application of the WADA Code, especially, under the Continental system of the interpretation of legal texts; unlike the Anglo Saxon '*litera legis*' principle of interpretation, whereby only the words of the text, generally speaking, are to be considered in determining its meaning and reference, therefore, to background studies and documents is very restricted.

Thus, this Study, apart from its historical importance in the literature on doping in sport, has a contemporary significance, which well justifies its publication as a Book.

Although the Book does not include the texts of the more than 300 Doping Rules of Sports in the Olympic Programme in the EU, or the national reports of the Doping Legislation of the EU member States, which would have made the Book unwieldy, a CD-Rom, containing all this material, may be freely downloaded from the TMC Asser

Instituut International Sports Law Centre website, which may be accessed at 'www.sportslaw.nl'.

The Book is divided into five parts: The Institutional Framework; Public Law; Sports Rules and Regulations; Analysis of Doping Cases of the Court of Arbitration for Sport; and General Conclusions and Recommendations.

The Book is completed with an excellent Bibliography of relevant Literature and Documents, comprising 27 pages; particulars of the participating institutions and research team and other contributors; a useful List of Acronyms; and a detailed Table of Contents.

This Book, whose publication is timely, in that the WADA Code is currently being revised and updated, is not only an excellent work of scholarship but also a valuable and useful reference work. No self-respecting person or body, therefore, involved in the fight against doping in sport can afford to be without a copy; and this also, perforce, applies to their professional advisors.

Ian Blackshaw



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'Just Sports Ireland'*

Introductory

Arbitration has become the preferred method of dispute resolution across many strata of society and diverse areas of legal practice, in particular, commercial contract disputes, but not, of course, limited to them. Arbitration is also proving to be a very important tool to the sporting world because it can be completed quickly, quietly and confidentially in an often time-sensitive situation, where sports events and outcomes depend on rapid decisions. Witness, the rise of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, and the increasing number of sports disputes of various kinds being referred to this forum for settlement.

Arbitrating sports issues - as opposed to litigating them - is essential because of the relative speed in which a hearing can be conducted and a decision made. The need for a specialised arbitral body, designed specifically for resolving sporting disputes outside the ordinary court systems, has been seen to be necessary by sports bodies and sports persons alike.

'Just Sports Ireland'

'Just Sports Ireland' (JSI) is a sports arbitration scheme, which will be available to Irish sports. The scheme has the full support of the Federation of Irish Sports. At the launch of JSI, Derek Brennan, President of the Federation, said:

"JSI will, when established, provide an independent, accessible, efficient and affordable dispute resolution system, for sport, away from the glare and potentially crippling costs of the courts."

The Bar Council of Ireland is also supporting the involvement of members of the Bar as arbitrators on a *pro bono* basis. The criteria for arbitrators are that they will be barristers, solicitors and arbitrators familiar with and/or experienced in some field of sports.

JSI has patterned its Rules and Regulations to follow the CAS model clauses. Simply put, it is intended that the arbitrations will be speedy, efficient and cost effective. The scheme is designed so that the parties, whether they are a sporting body or athletes, need not be represented by lawyers. They may represent themselves. Although costs are at the discretion of the arbitrator, the arbitrator is entitled to exercise his/her discretion, and make no award of costs, if that is appropriate to the circumstances of the case, after the parties' submissions on the same.

There are dedicated arbitration rules and mediation rules of JSI. They are consistent with the sports arbitration rules of the CAS. If the parties have in their constitution or rules governing their sport, the right to appeal to CAS, then an appeal may be made from the JSI arbitrator to CAS. Otherwise, the decision/award of the arbitrator is final and binding on the parties, with no appeal.

It has been decided that, for the moment, anti-doping situations and employment disputes will not be handled by JSI. The major Irish sports bodies, such as the GAA, the FAI and IRFU (Gaelic Athletics Association, Football Association of Ireland and Irish Rugby Football Union) already have arbitration clauses upon which they rely, but JSI may later become the centre of choice for those bodies as well.

A major factor in designing JSI documents has been to place an emphasis on simplicity: simplicity in written documents; simplicity in making submissions; simplicity in appointing an arbitrator. All documents are written in simple English, in language easily understood by laypeople, and all instructions are easily understood. The parties are

able to use forms which they can pick up or download when they need to, and which they can fill in, using their own words, to put their case. If the party or parties need to give more information, they simply submit what they wish on additional sheets.

A primary objective of JSI is the speedy handling of claims, using Irish barristers, solicitors and arbitrators familiar with sport. The arbitrators will have the ability to act quickly if needed, as the *Ad Hoc Division* of the CAS does with disputes arising during the Olympic Games.

Further, JSI will be beneficial both to the Irish sporting world as well as to those younger or less experienced barristers who would like to learn the process of arbitration, in that this scheme will provide invaluable experience to young members of the Bar. More senior members of the Bar will mentor younger members, who will receive training in a field which is fast becoming a mainstream of legal practice.

The Bar Council of Ireland has enthusiastically agreed to set up a panel of qualified members of the Bar, who would be available to represent indigent parties, for example, young athletes (or even small NGB's, national governing bodies) who do not have the means to afford legal representation, and where such representation is necessary to the parties.

Governing Body

I have the privilege of being appointed the first chairman of JSI, and I will be assisted by a distinguished board, all accomplished in their own fields and in the sport of their choice. These board members are:

Derek Brennan	(Cricket)
Paddy Boyd	(Sailing)
David Casserly	Barrister-at-Law
Sinead O'Connor	(Camogie)
Debbie Massey	(Basketball)
Paddy Boyd	(Sailing)
Jim Glennon	(Rugby)

Mr. Finbarr Flood, former Chairman of the Labour Court and also a football and management professional for many years, will be the Chairman of the Arbitration Panel.

We have great expectations for JSI, and believe that this process will help to resolve sporting disputes and reduce, if not eliminate, the costs involved in the present system for the resolution of sporting disputes.

Acknowledgements

My thanks must go to those mainly involved in the setting up of JSI and the drafting of the JSI arbitration rules and mediation rules. In particular, I wish to thank Derek Brennan, Paddy Boyd and David Casserly.

Ercus Stewart

* Ercus Stewart, S.C. is a Senior Counsel (practising at the Bar since 1970, took "Silk", Senior Counsel 1982). Mr. Stewart is a Chartered Arbitrator (CIArb, London), FCI Arb - Fellow of the Chartered Institute of Arbitrators, London, Arbitrator with CAS/TAS, Switzerland; Chairman JSI - Just Sport Ireland - He was instrumental in the formation of Just Sport Ireland, an Irish national sports dispute resolution body,

as well as the Small Claims Arbitration Scheme. He is a lecturer in Arbitration Law and Employment Law in King's Inns and University College Dublin (UCD). Mr. Stewart has authored three books, *Labour Law* (1979), *Arbitration*, *FirstLaw Limited* (2003), *Compensation on Dismissal*, *FirstLaw Limited* (2007). He has also authored many articles and papers.

The Australian and New Zealand Sports Law Journal

ANZSLA - The Australian and New Zealand Sports Law Association - has since its birth in 1990 continued to provide its membership with regular publications and conferences.

Within a month of then Vice President, and now Chief Executive

of the International Cricket Council, Malcolm Speed chairing the First Session of the First Annual ANZSLA Conference in Melbourne in 1991, the quarterly "Newsletter" touching upon all matters pertaining to sports law was published.

In due course the Hayden Opie edited ANZSLA Newsletter changed format and became "The Commentator" a publication that soon found itself available to members via electronic publishing. At

about that time "Sports Shorts" containing items relating to sports law from around the world that teased the reader into greater research also became part of the electronic publishings from ANZSLA.

On 13 December 2006 the latest offering "The Australian and New Zealand Sports Law Journal" 2006 Vol. 1 No. 1 was launched at Kennedy's Law Firm in Sydney, by Sir Laurence Street, former Chief Justice of the Supreme Court of New South Wales.

This valuable addition to sports law libraries is published by ANZSLA itself and as was stressed by Sir Laurence and Editor, Barrister Paul J. Hayes who has chambers in Melbourne and London that great care has been taken in the quality of the offering. Every manuscript accepted for publication is subject to peer review by at least two independent expert referees for the purpose of establishing and maintaining that high professional and academic standard for the journal.

Initially to be published in December each year it is the expectation of the publishers that it will move, hopefully in 2008 to twice yearly.

The First Annual Conference bore the title "The Law of Professional Team Sports". Much has changed since and Chris Davies' contribution "Draft Systems in Professional Team Sports and Restraint of Trade" covers the challenge to Rugby League's proposed draft in the early 1990's - a challenge that was successful - and compares it with the likelihood that the Australian Football League's (Australian Rules) draft system will continue to be able to flourish. Australia has 4 competing codes of football - Rugby League, Rugby Union, Australian Rules and the international football known in Australia as Soccer - all with different rules relating to transfer, and non really effected by outside influence as occurs in Europe.

Deborah Healey and David Thorpe together with Pam Stewart provided two excellent articles that look at Australian torts law as it relates to sport as a result of dramatic statutory change in personal

The German and International Sports Law Research Unit

On 24 April 2002, the law department of the University of Erlangen-Nuremberg passed a resolution setting up a research unit on German and international sports law. The research unit functions as an adjunct of the Institute for Law and Technology (www.irut.de) and the chair for civil law, commercial law, and law of technology.

The unit's establishment came as a resounding acknowledgment of the energetic work carried on in the field of sports law by the Institute for Law and Technology, in particular its director, Professor Dr. Klaus Vieweg, and some of his research assistants and PhD students, over a period of years. After completing both a law and a sports degree in Münster, Klaus Vieweg wrote his postdoctoral thesis (Habilitationsschrift) on German and international sports organizations - thus becoming the first German scholar to publish a postdoctoral thesis on a sports law topic. Following his appointment to the chair in Erlangen, Professor Vieweg continued to specialize in sports law. Along with commercial law and the law governing clubs and associations, sports law now forms one of the Institute's main research interests. Up to now, six staff members have successfully completed doctoral dissertations in the area of sports law: Isolde Hannamann ("Kartellverbot und Verhaltenskoordinationen im Sport"), Christian Paul ("Grenzwerte im Doping"), Frank Oschütz ("Sportschiedsgerichtsbarkeit"), Magdalena Kedzior ("Gerichtliche Überprüfung von Vereinsstrafen am Beispiel von Sportverbänden im deutschen und polnischen Rechtssystem"), Simon Weiler ("Mehrfachbeteiligungen an Sportkapitalgesellschaften - Verbote von 'Multi-Club Shareholding' und deren Grenzen aus Sicht europäischen Rechts unter besonderer Berücksichtigung des Profifußballs in Deutschland"), and Fabian

injury law over the past several years. Deborah's work looks at Warnings and Exclusions Post Personal Responsibility, and David & Pam seek to define what exactly is "dangerous sporting activity".

If there is to be any criticism of the Journal then it may be that these two contributions cover a similar topic, though in different ways. No doubt this is something that the editorial committee will look at in future issues.

Simon Johnson, a winner of the prestigious ANZSLA Paul Trisley award in 2005, looked at player agents and conflicts of interest, the lack of statutory control, and the need control and enforce the accreditation and activities of sports agent by regulation.

Within two days of the launch "The Australian" national newspaper wrote that "Death was the only reality likely to change the culture of drinking in sport." The excessive use of alcohol has been a hot topic of conversation during the last couple of years in Australian sport.

It was probably good timing therefore that Mel Mallam invited discussion of this current problem in Australian sport in her commentary on "Two of Australia's Greatest Consuming Passions, Alcohol and Sport, and the Regulation of the Relationship Between Them."

The Australian and New Zealand Sports Law Journal (ANZSLJ) will be an excellent addition to the library of those interested in sports law.

Details regarding subscriptions can be found at the ANZSLA website www.anzsla.com.au/anzslj/ or from the Executive Manager at anzsla@anzsla.com.au, telephone +61(0)2 9398 9559.

*Brian Doyle**

* Consultant, Turnbull Hill Lawyers,
Charlestown, Australia.

Schmidt („Electronic and Mobile Commerce im Bundesligafußball - Rechtsfragen der Vermarktungsinstrumente im Zusammenhang mit dem Aufbau und der Führung einer Marke im Bundesligafußball").

In 2000/01, a study group on the "Legal Comparison and Harmonization of Doping Rules" - chaired by Professor Vieweg and conducted in cooperation with the T.M.C. Asser Institute for International Law (The Hague), the Max Planck Institute for Foreign and International Criminal Law (Freiburg i.B.), and Anglia Polytechnic University (Chelmsford) - was set up at the request of the European Commission. Professor Vieweg also co-edits two series - "Beiträge zum Sportrecht" and "Recht und Sport" - as well as of the journal "Zeitschrift für Sport und Recht (SpzRt)", which make important contributions to ongoing sports law research; as do regular interuniversity conferences on sports law, the contributions to which have been published in three separate volumes of proceedings entitled "Spektrum des Sportrechts", "Perspektiven des Sportrechts"; and "Prisma des Sportrechts" respectively. As Vice-President of both the German Sports Law Association (Deutsche Vereinigung für Sportrecht - DVSR - formerly: Konstanzer Arbeitskreis für Sportrecht) and the International Association of Sports Law (IASL), Professor Vieweg is a key figure among national and international sports lawyers.

Currently, research at the unit is focussed on preparing a section on Germany for the International Sports Law Encyclopedia and on setting up a sports law data bank.

*Klaus Vieweg**

* Klaus.vieweg@irut.de; Irut@irut.de

University of Johannesburg Centre for Sport Law



1. Introduction

In 2000, the Faculty of Law at the Rand Afrikaans University in Johannesburg began to consider the establishment of a centre that could conduct research into the relatively new terrain of sports law. The timing was perfect, as the Centre for Sport Law had hardly been established, when the worst scandal to hit South African sport burst onto the front pages of newspapers as the captain of the national cricket team admitted to match-fixing and other irregular dealings.

In 2005, the Rand Afrikaans University was one of three institutions that merged to form the new University of Johannesburg. The Faculty of Law with all its research centres were now part of the larger institution.

In the six years since its inception, the University of Johannesburg Centre for Sport Law has already established an international reputation as the leading institution in South Africa for research into sport law, education of lawyers and sports administrators in the principles of sport law and providing legal advice to sports bodies.

Prof Steve Cornelius (UJ Department of Private Law) is the Director of the Centre. He is assisted in the management of the Centre by Prof Paul Singh (UJ Department of Sports and Movement Studies), Mr Siphon Nkosi (UJ Department of Private Law) and Mr Johan van Gaalen (Van Gaalen Attorneys).

2. International Relations

The Centre sought from the outset to establish contacts with similar bodies in other countries. Through the work of Prof Cornelius and Prof Singh, the Centre managed to establish invaluable relations with the Sports Law Research Centre at the TMC Asser Institute in The Hague, the Sports Law Research Unit at Anglia Ruskin University in the United Kingdom, Ithaca College, New York and the National Sports Law Centre at Marquette University, Milwaukee.

3. Sports Law Association of South Africa

The Centre joined forces with academics from the Universities of Pretoria, Cape Town and the Western Cape, as well as lawyers involved in the practise of sports law, to form the Sports Law Association of South Africa (SLASA). During the meeting, Prof Cornelius was elected to the first Executive Committee of SLASA. In 2006, Prof Cornelius stepped down from this position and Mr van Gaalen was elected in his place, again highlighting the central role which the Centre has played in the establishment of SLASA.

4. Education

The Centre has, in collaboration with the UJ Faculty of Law and other interested parties, developed a certificate program to educate attorneys, sport administrators, agents and other interested parties in sport law. The course is presented over one year on a part-time basis. The Certificate in Sport Law is accredited by the South African Qualifications Authority and consists of various modules which investigate the legal framework within which sporting activities take place in South Africa and abroad. The course seeks to provide learners with a basic understanding of applicable legal theory and the ability thereafter to deal with the legal problems involved in the important practical situations they may encounter in their professional capacity. Apart from practising lawyers, the course has been attended by sports administrators of the Blue Bulls Rugby Union, Golden Lions Rugby Union, Kaizer Chiefs Football Club, Orlando Pirates Football Club, Lions Cricket Union and the Cricket Umpires' Association, to mention a few.

In addition, the Centre provides the opportunity for interested learners to pursue postgraduate Masters and Doctoral studies on topics relating to sport law. A favourable exchange rate makes it extreme-

ly inexpensive to pursue postgraduate studies through the University of Johannesburg and, as an added advantage, there is no specific residency requirement, which means that costs relating to travelling and accommodation can be kept to a minimum.

The Centre is also involved in programs presented by other universities. Prof Cornelius and Prof Singh have presented lectures at sports law programs conducted by the Universities of Pretoria and Cape Town. In addition, Prof Cornelius and Prof Singh have presented lectures at the LLM in Sports Law program conducted by Anglia Ruskin University in the United Kingdom, while Prof Singh has also lectured at Griffith University in Australia. Prof Cornelius has lectured at the TMC Asser Institute in The Hague and the WRJ Mulier Institute in Den Bosch, Netherlands, Marquette University in Milwaukee, Ithaca College, New York and Robert Gordon University in Aberdeen, Scotland.

The Centre has further contributed to public awareness of sports law through interviews on national, commercial and satellite television networks, radio stations, newspapers and other periodicals.

5. Research

The Centre released its first publication during 2002 - a book entitled *Introduction to Sport Contracts in South Africa* which was authored by Prof Cornelius. The aim of the book was to provide sports administrators who have little knowledge of the law, with a simple and easy-to-understand reference guide that explains the general principles of the law of contract within the context of sport. Prof Cornelius has, together with Ms Rochelle le Roux from the University of Cape Town, produced a book on *The Right to Participate* to which Prof Cornelius has also contributed a chapter. He also contributed chapters to Panagiotopoulos *Sports Law: Implementation and the Olympic Games 2005* Ant N Sakkoulas Publishers, Athens and was an editorial assistant for Blackshaw, Siekmann and Soek *The Court of Arbitration for Sport 1994 to 2004* 2005 TMC Asser Press. Prof Cornelius and Prof Singh also contributed a significant part to *Introduction to Sport Law in South Africa*, prepared under the editorship of Prof Rian Cloete from the University of Pretoria and published by Lexis-Nexus Butterworths in 2005.

Apart from the books, Prof Cornelius, Prof Singh and Mr Nkosi have published various articles in leading South African and international journals, including the *International Sports Law Journal* and the *International Sports Law Review Pandektis*. Both Prof Cornelius and Prof Singh are also on the Editorial Advisory Board of the *International Sports Law Journal* and the *International Sports Law Review Pandektis*. The two of them, together with Mr Nkosi and Mr van Gaalen, have also presented numerous papers at international conferences on sport law held in Johannesburg, Cape Town, Brisbane (Australia), The Hague (Netherlands), Milwaukee (United States), Athens and Thessalonica (Greece), Preston (United Kingdom) and Budapest (Hungary).

6. Legal Assistance

The Centre provided legal advice on various matters to the South African Sports Commission and made submissions to Parliament concerning stadium safety and other legislative measures relating to sport. Mr van Gaalen dealt with issues regarding Ballroom Dancing in South Africa. A serious rift occurred between the amateur and professional arms of Ballroom Dancing, which threatened the unity of the sport. Mr van Gaalen has also effectively become the legal counsel for the Golden Lions Rugby Union, Ellispark Stadium (Pty) Ltd and the Football Players' Association. In consultation with Prof Cornelius, he provided legal assistance in matters ranging from players' contracts and contracts for the lease of hospitality suites to sponsorship disputes and advertising contracts. During this time, Mr van Gaalen played a key role in negotiations that persuaded former Springbok captain, André Vos, to extend his contract with the Golden Lions until the end of the 2002 rugby season.

7. Foreign Visitors

During September 2002, the Centre was visited by the leading

Australian expert on sport law, Mr Andy Gibson, Senior Lecturer in Mercantile Law and Sport Law at Griffith University, Brisbane. Mr Gibson presented a seminar on "Public Liability of Sports Bodies". In February 2003, Mr Janwillem Soek, Senior Research Fellow at the International Sports Law Research Centre of the TMC Asser Institute, The Hague visited the Centre and presented a seminar on "The Legal Nature of Doping Control". In 2004, Dr Dave McArdle, Senior Lecturer at Robert Gordon University, Aberdeen, Scotland, visited the centre and presented a seminar on "Sex and Gender Discrimination in Sport".

In November 2005, the Centre hosted the 11th Congress of the International Association of Sports Law at UJ. The theme for the Congress was "Fighting Abuse in Sport" and it focussed on issues such as child abuse, discrimination, drug abuse, gambling and other forms

University of Pretoria



Centre

The mission of the Sports Law Centre, University of Pretoria is to provide a centre of excellence by providing high quality services,

research and products to the sporting world (sport federations and associations, the professional sports industry, organisations, professional athletes, etc.)

For this purpose the Sports Law Centre, the Highperformancecentre(tm) and the University of Pretoria have reached an agreement of cooperation related to sports law.

The institutions aim to cooperate and coordinate their activities in order to develop and promote a better understanding of sports law and to promote its advancement and ethical practice.

In 2006, the Sports Law Centre and the world renowned ASSER International Sports Law Centre, The Hague, Netherlands concluded an agreement of cooperation in international sports law.

Services

The Sports Law Centre provides advice and assistance across the full spectrum of sports law, including:

- negotiating and drafting of contracts;
- dispute resolution;
- negotiating and documenting sponsorship and endorsement agreements;
- evaluation and exploitation of commercial opportunities;
- representation agreements (agency);
- protection of intellectual property rights;
- participation contracts with sports federations and athletes;
- risk management and compliance;
- drafting and amending constitutions and internal rules;
- competition rules and technical matters;
- representation in any dispute/disciplinary proceedings;
- doping;
- risk management, liabilities, waivers and disclaimers;
- good corporate governance;
- employment issues.

Other services

We can provide legal opinions on most matters, conduct research for you on any area of law and we can provide in-house training or workshops on any of the above fields for your members or staff.

Education

Sports Law 420 (SRR 420) is offered as an elective for final year LLB students at the University of Pretoria. The subject has grown immensely since its inception in 2000 and between 100 - 150 students register for this course every year, making it the most popular LLB elective.

of abuse that seem to plague the world of sport today. The Congress was attended by delegates representing 27 countries from every continent with the exception of Antarctica.

8. Conclusion

The Centre aims to be the foremost institution for research of sport law in Africa. To this end, it will continue to promote research and education in sport law. It will also nurture existing relations and develop new relations with similar institutions in other countries.

Steve Cornelius*

* Prof. S.J. Cornelius, Director of the Centre for Sport Law, Department of Private Law, Faculty of Law, University

of Johannesburg, South Africa, e-mail: scornelius@uj.ac.za.

The Sports Law Centre hosts an intensive two day programme twice a year and lectures are given by leading sports law experts. The programme is aimed at not only legal practitioners, but also anyone working in the area

A research LLM in Sports Law is offered through the Faculty of Law, University of Pretoria with Prof Rian Cloete as the study leader.

Our team

Directors

Rian Cloete BLC LLB (UP) LLD (UNISA)

Rian is a law professor at the University of Pretoria, serves on the Executive Committee of the Sports Law Association of South Africa and is a member of the Advisory Board of the International Sports Law Journal. Rian advises a number of clients in the sports industry and has a particular interest in intellectual property and negotiating player contracts. He writes extensively in the fields of sports law, property law and professional conduct and ethics. Rian is the co-author and managing editor of the latest book entitled *Introduction to Sports Law in South Africa*. He is an admitted attorney and Director of the School for Legal Practice.

Brandon Foot LLB (UP)

Brandon is an experienced attorney and senior director at Solomon Nicolson Rein & Verster Inc. Brandon is the former President of the Northerns Cricket Union and Chairman of Titans Cricket (Pty) Ltd. He has extensive experience in sports administration, was involved in the 2003 Cricket World Cup and advises various high profile professional sportsmen. Brandon also teaches Sports Law at the University of Pretoria and writes a weekly sports law column in the *Pretoria News* daily newspaper.

Consulting members

Mr Justice Mahomed Jajbhay LLB LLM (Wits)

The Honourable Mr Justice Mahomed Jajbhay (Witwatersrand Local Division of the High Court of South Africa) is an extraordinary professor in the Law Faculty of the University of Pretoria. He is also a former Chairman of the Gauteng Cricket Board and the General Council of the United Cricket Board of SA. Judge Jajbhay is a Constitutional Law expert who has advised many sporting federations on constitutional and other matters.

Oregan Hoskins

Regan is an experienced attorney and is the President of the South African Rugby Union (SARU) and has extensive sports administration and sports law experience.

Contact us: Prof Rian Cloete
Phone 012 420 3198
Mobile 083 292 1644
E-mail: rian.cloete@up.ac.za

Faculty of Law, University of Cape Town



Professional Education Project

Certificate in Sports Law 27-30 March 2007

The Professional Education Project of the Faculty of Law, UCT, is pleased to once again offer a course, leading to the Certificate in Sports Law.

About the course

The course focuses on the emerging administrative, management and legal issues in sport to which athletes, coaches, managers and lawyers are exposed.

Topics include:

- Legal regulation of sport
- Issues affecting the integrity of sport, including doping control,
- Employment issues
- Transfer regulations and transfer fees
- Intellectual property rights in sport
- Negotiating, drafting and administering sports contracts
- Sponsorship and endorsement
- Discrimination and transformation in sport
- Risk, event and crowd management
- Children in sport
- Sport and community development.

British Association for Sport and Law (BASL): Sport and the Law Journal

Over the last thirteen years it has grown into a highly respected Journal in the emerging discipline of Sports Law. The Editor and Editorial board welcome articles from sports law practitioners and academics on any issues relevant to UK sports law. The Journal particularly welcomes papers from post-graduate students (and indeed outstanding papers from under-graduate students) studying either on taught or research-based Sports Law related degrees.

Benefits of Membership of BASL

- Access to resources and networking opportunities of prestigious professional organisation
- Receipt of the industry-acclaimed *Sport and the Law Journal* published in printable electronic form three times a year with updates on sports law issues, key developments in the sports industry, sports law reports and articles by sports lawyers, academics and industry experts.
- Members can attend the BASL Annual Conference each autumn at a substantially reduced rate.
- Members receive free invitations to BASL seminars during the year

King's College

University of London

Sports Law PG CERT

This taught programme is provided by the School of Law.

Purpose

For any graduate, whether a law graduate or not, with an interest in sport and the law. Provides an introduction to the main ways in which sport and law interact, in domestic UK and EU law.

Professional/vocational links/accreditations

Law Society CPD points.

Who should attend

Anyone involved in any aspect of professional and amateur sport, including school and tertiary sport, sport promotion and sponsorship and the management, financing and administration of sport.

Format

Once again facilitated by sports law academic and Associate Professor at the UCT Law Faculty Rochelle Le Roux, the course is intensive, highly practical, and includes lectures, workshops and panel discussions. Participants may make use of the extensive law library facilities.

Course fee

R 6000, 00 (VAT-exempt).

The fee includes course notes, lunches and refreshments, as well as access to the Law Faculty's extremely comprehensive library during the session.

Participants on the course are responsible for their own travel and accommodation expenses.

Closing date for registration and payment

Tuesday the 20th of March 2007

Registration and enquiries

Please contact Irèna Wasserfall at the Professional Education Project: Telephone 021- 650 5621; Fax 021- 650 5662; e-mail irena.wasserfall@law.uct.ac.za

See also the Law Faculty Website www.uct.ac.za/law

focusing on sports law issues with leading lawyers and key industry speakers, and to networking evenings held in London and other venues throughout the UK (which have included Manchester, Leeds and Glasgow in the recent past).

- Academics and students are eligible for a reduced membership fee.
- Corporate members have the opportunity to host seminars and networking evenings.

Contact Information

Membership Enquiries

Lorraine Stylianou
School of Law
King's College London
Strand
London WC2R 2LS
Tel: +44 (0) 20 7848 2434
Email: basl@kcl.ac.uk

Sport and the Law Journal

Editor: Simon Gardiner
Email: s.gardiner@leedsmet.ac.uk

Programme description

Looks at: constitutional framework of the sports sector; the commercialisation of sport; issues for individual sportsmen and women; European law and sport; comparative sports law.

Programme format and assessment

One evening class per week; one essay to be submitted in April and examination in May.

Student destinations

Academic careers, careers in legal practice and in sports administration. Some sportsmen and women also take the programme.

Funding

Self-funded.

Application procedure

Applications can be submitted from 1 October 2006. You must submit original transcripts of your previous degree(s), or of results to date if the degree is yet to be completed, and two academic references. Employment references will only be accepted if you graduated prior to or during 2002.

Applications should be sent to the Sports Law Administrator. Applications are processed in order of receipt Applications are consid-

Depaul Journal of Sports Law & Contemporary Issues (Depaul University College of Law)

The Journal of Sports Law & Contemporary Problems seeks to investigate the intersection between law and sports with a focus on today's most important sports law issues. Our mission is to educate our readers about the various legal issues surrounding the sports industry and to discuss the contemporary problems that result. The Journal strives to seek out and publish high quality materials and to attain a respected position amongst the established literature of DePaul academia.

Current News

- In the past, the Journal of Sports law & Comtemporary Problems has been published in a CD-ROM format. In the Spring of 2007, the Journal will publish its first issue in print.

About Us

The Journal of Sports Law & Contemporary Problems seeks to investigate the intersection between law and sports with a focus on today's most important sports law issues. Our mission is to educate our readers about the various legal issues surrounding the sports industry and to discuss the contemporary problems that result. The Journal strives to seek out and publish high quality materials and to attain a respected position amongst the established literature of DePaul academia.

In addition to our publications, the Journal hosts an annual symposium each spring for sports professionals and enthusiasts. Our panelists discuss their experiences and explore various sports law issues. Previous symposium guests have included an owner of the Chicago Cubs, an Executive Vice President for the Detroit Lions, an in-house counsel for the Chicago White Sox, and sports agents from the National Basketball Association and National Football League. The symposium also serves as a great networking forum for those interested in becoming part of the industry.

On behalf of the Editorial Board, writing staff and faculty, welcome to the DePaul Journal of Sports Law and Contemporary Problems!

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- Michael Cassel
- Michelle Duff
- David Franklin
- Derrick Haddox
- Colin Laitner
- Tyler Manic
- Libby McNarry

ered by the Programme Director and we aim to reply within four weeks. Incomplete applications will not be processed until all the required documentation has been submitted.

Contact for further information

PG Cert Sports Law Administrator, tel 020 7848 2923, fax 020 7848 2912.

-
- Brian Molloy
 - John-Michael Porretta
 - Michael Pullos
 - Michael Silverman
 - Kimberly Trebon

Submit an Article

Articles submitted for publication to the Journal of Sports Law & Contemporary Problems must be typed and double spaced with footnotes. The citations must conform to The Bluebook: A Uniform System of Citation (17th ed. 2000), copyright by the Columbia, Harvard and University of Pennsylvania Law Reviews and the Yale Law Journal.

Each submission must consist of the following:

1. A hard copy of the article, in the aforementioned format, and a current copy of the author's resume.
2. A copy of the article, in MS Word format, on a floppy disk or CD.

The foregoing items may be sent to:

Editor-in-Chief
DePaul University College of Law
Journal of Sports Law & Contemporary Problems
25 East Jackson Boulevard, Room 713
Chicago, Illinois 60604

Please note that you may also submit a copy of the article via e-mail to sportslawjournal@depaul.edu, however, a hard copy and the floppy disk or CD must still be furnished to the Journal.

Subscriptions

Membership to the Journal provides access to a variety of materials for the sports law professional or enthusiast.

For an annual fee of \$50.00, members receive the following:

- Two issues, now in print, containing articles, case notes and comments discussing recent and interesting sports law issues.
- A 25% discounted admission to the Annual Sports Law Symposium.

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Telephone: 312-362-5420
Facsimile: 312-362-5448
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Seton Hall Journal of Sport Law (Seton Hall University School of Law)

History of the journal:

The journal began publication of Volume 1 in 1991 as the Seton Hall Journal of Sport Law. Beginning with Volume 14, the journal became the Seton Hall Journal of Sports and Entertainment Law.

Subscriptions:

The Seton Hall Journal of Sports and Entertainment Law is edited and produced by the students of Seton Hall University School of Law. The price of a subscription is \$30.00 per year. Subscriptions will be renewed unless notice of cancellation is received. Subscription inquiries should be addressed to:

Managing Editor
Seton Hall Journal of Sports and Entertainment Law
Seton Hall University School of Law
One Newark Center, Newark NJ 07102

Contact information:

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Managing Editor: Eric DiNapoli
Outside Articles Editor: Paul Werner
Notes and Comments Editor: Krystal Conway
Symposium Editor: Sara Kimball

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The Board of Editors welcomes submissions in the area of sports or entertainment law for publication. Our policies are as follows:

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Journal of Sports and Entertainment Law
Seton Hall University School of Law
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Expedited review:

If another journal has offered to publish your manuscript, please call the Journal Suite at (973) 642-8239 to request an expedited review. Please include the following information: the author's name, the title

of the manuscript, a contact phone number, a contact e-mail address, the journal making the offer, and the deadline for the expedited review to be completed.

Selection criteria:

The Journal endeavors to publish articles making a significant and original contribution to the legal field. Submissions must be focused on either sports law or entertainment law. Our goal is to establish a dialogue between the legal, educational, and professional community and the sports and entertainment related industries. Since our editorial process gives great deference to authors, articles should be well written and the legal arguments must be complete at the time of submission.

Manuscripts should be word-processed or typed, and must use traditional footnotes. Manuscripts must have citations consistent with the requirements of *The Bluebook: A Uniform System of Citation* (17th ed. 2000).

Unsolicited manuscripts cannot be returned unless a self-addressed, postage-paid envelope is submitted with the manuscript.

Editing process:

The Journal seeks to preserve the authors "voice" and legal argument in each publication. We will not replace the author's vision with our own. Consequently, after a substantial editing process for spelling, grammar, and citation form, the Journal will return a "redlined" copy of the manuscript to the author to show all of the suggested changes. In addition, the Journal will provide substantive comments and questions. The Journal's comments are only suggestions, and the author's judgment will be respected throughout the publication process.

CITE AS:

Volumes 1-13: ____ Seton Hall J. Sport L. ____
Volumes 14-: ____ Seton Hall J. Sports and Ent. L. ____

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As required by Title IX of the Educational Amendments of 1972 (45 C.F.R. § 86), Seton Hall School of Law does not discriminate on the basis of sex in admission to or employment in the educational programs and activities which it operates. Inquiries concerning Title IX may be directed to: Kathleen M. Boozang, Seton Hall School of Law, One Newark Center, Newark, New Jersey 07102. Telephone (973) 642-8501.

Texas Entertainment and Sports Law Journal

The Entertainment and Sports Law Section is a voluntary organization within the State Bar of Texas and consists of more than 500 licensed attorneys throughout the state who practice entertainment and sports law. Section members represent a wide variety of clients including employers, employees and entertainment and sports organizations, in both the private and public sectors.

The purpose of the Entertainment and Sports Law Section is to promote and enhance the practice of law by all lawyers who specialize or have an interest in entertainment and sports law.

Twice each year, the section publishes the Texas Entertainment and Sports Law Journal. The Journal contains a report from the Chair on current Section activities. It also contains concise summaries, with commentary by the editor, on recent Texas state and federal court decisions involving significant entertainment and sports law issues. The Section also sponsors an Annual Entertainment Law Institute, our continuing legal education program which brings together the top practitioners in the country.

A Brief History of the Entertainment & Sports Law Section

By Robert R. Carter, Jr.
Chair, 2000-2001

In the late 1980's, attorneys Mike Tolleson of Austin and Chuck Pauley of Dallas were serving on the Law and the Arts Committee of the State Bar. "I suggested to Chuck that he and I should consider forming a Section of the Bar for entertainment lawyers," recalls Tolleson. "I thought there were about 30 lawyers around the state doing enough entertainment work to be interested and we didn't know how many were doing sports work. I anticipated a small club of lawyers that could benefit from having this area of practice legitimized through State Bar recognition." Pauley drafted a letter to the State Bar Board of Directors and he and Tolleson followed the procedures required by the Bar to obtain permission to launch a new Section. Once permission was granted, they announced an organizational meeting to be held at the State Bar Convention in San Antonio on June 30, 1989. Mike chaired the meeting. Seventy-five lawyers joined as dues paying members.

The first Council meeting was held in Austin on September 22, 1989. Mike Tolleson was appointed as Chair of the Section, Chuck Pauley was Chair-Elect, Thomas Redwine was Secretary and Marinelle S. Hernlund was Treasurer. The initial Council consisted of Linda B. Cates, Ron Conover, Sylvester R. Jaime, William E. Black,

Mark W. Patterson Jeffrey W. Storie, Judge Dan Downey, Jerry Lastelick and Warren Weir. Ronald Kaiser was named as the initial Journal Editor.

A membership survey conducted during 1989 identified the following areas of interest

Entertainment

- Music 50
- Film 42
- TV 39
- Publishing 10
- Art 2
- Theatre 2

Sports

- Football 45
- Basketball 43
- Baseball 37
- Golf 6
- Soccer 2

The first issue of the Entertainment & Sports Law Journal was published in December of 1989. By the end of that year, the Section had grown to 381 members.

The Section commenced providing seminars for its members in 1990 with the first entertainment seminar, developed and coordinated by Mike Tolleson, held in Austin in April, 1990. "One model I had for the seminar was the annual entertainment law program produced by the University of Southern California which I considered to be one of the best two-day programs in the country. I thought we could and should start our own annual event here and that it would be more cost efficient to bring L.A. and N.Y. lawyers here to speak than to fly our

Texas Review of Entertainment and Sports Law

ISSN: 1533-1903

www.utexas.edu/law/journals/tresl/

New rates and increased frequency beginning with V.5:1-2 (2003-2004)

It is with great pride and excitement that we announce the availability of our *Texas Review of Entertainment & Sports Law* ("TRESL"). With the TRESL mission statement as our guide-to "chronicle, comment on, and perhaps influence the shape of the law that impacts the entertainment and sports industries, both in Texas and throughout the United States"-we have endeavored to compile an informative and compelling collection of articles by active attorneys, distinguished professors, and our talented law students.

Originally a supplement to a publication of the Texas Bar Association, the journal commenced nationwide publication in 2000, producing one issue per volume/year. Beginning with Volume 5, TRESL will publish two issues per year, Fall and Spring.

The first volume of the *Review* contains articles commenting on the fast-pace, diverse legal issues that characterize the entertainment and sports industries. For example, Volume One contains commentary on immigration as it relates to professional athletes, as well as an article on a unique, "right of publicity" case in California. Furthermore, not only does TRESL report on existing law but the *Review* also explores new avenues of growth for the law. Consequently, we have included an article on trade dress protection of fashion designs which advances a novel and compelling argument. Subsequent volumes have also provided these and other contemporary topics affecting all in the sports and entertainment industry. We

audience there." The result, the Entertainment Law Institute, was an \$800 per person program for \$265 and without the travel costs.

The first sports law seminar was held in October, 1990, in Houston and was coordinated by Sylvester R. Jaime and Steven Ellinger.

By 1995, the Section had swelled to 578 members. At that time, the composition of the members, by address, showed that most members were from Dallas, Houston, and Austin. Still, a growing number of members were coming from all across Texas. In 1995, the Section membership reached 612, which was a high water mark. Over the years, the goals and objectives of the Section have remained constant. Through networking and continuing education, the Section provides a support system to assist its members in developing and maintaining their practice in the fields of entertainment and sports. The Section continues to publish the Entertainment and Sports Law Journal, now in its 36th issue (12 under Ronald Kaiser as Editor and 24 while Sylvester R. Jaime has been Editor). The Section has sponsored or co-sponsored an entertainment law seminar every year since 1990. The Section has also sponsored or co-sponsored six (6) sports law seminars over the years, with the first telephone sports law seminar held in March, 2004. The Section has provided speakers at each annual meeting of the State Bar since 1990. With a new and improved website under construction, the Section continues to look for ways to serve its members, now numbering over 500 from all parts of the state. As charter councilmember Sylvester Jamie observes, "Although the membership fee has increased from \$20.00 in 1989 to \$30.00 in 2004, the Section still continues to be one of the best bargains of the Texas State Bar."

are accepting articles, notes, comments and book reviews for future volumes.

We hope to continue to advance and grow in our chosen field during the coming volumes and would like to take this opportunity to invite you to join us in this valuable endeavor.

Publication Information

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Tulane University School of Law: Sports Law Programme

The Tulane Law School Sports Law program provides students with the background necessary to understand and handle problems unique to the sports industry.

A certificate is offered in sports law. Certificate requirements include successful completion of all first-year courses, plus the following: Business Enterprises I, Antitrust, Labor Law, Income Tax, Intellectual Property, Sports Law I, Sports Law II, and three credits selected from among the following: Negotiation & Mediation Advocacy; Mediation; Alternative Dispute Resolution; or any other course in the area of dispute resolution or negotiation approved by the director of the program.

In addition to the certificate program, Tulane offers its students the opportunity to participate on the staff of The Sports Lawyers Journal, which is financed by the national Sports Lawyers Association. Professor Gary Roberts, Director of Tulane's sports law program, is an officer and director of The Sports Lawyers Association, and editor of

The Sports Lawyers Journal (Tulane University School of Law)

Introduction

Tulane University School of Law offers students the unique opportunity to specialize in Sports Law during their legal education. Perhaps this devotion to the industry is why, when the Sports Lawyers Association decided to publish an annual legal journal, it chose Tulane Law students to produce and edit it.

History of the Journal

The *Sports Lawyers Journal* is a national legal journal edited by Tulane Law students and published by the Sports Lawyers Association (SLA). Every member of the SLA, currently over 1000 practicing lawyers, professors, law students, and other professionals, receives the publication annually. Since the *Journal* is composed of articles authored by American, Canadian, and European law students, it provides a unique view of sports issues and an unparalleled opportunity for students to have their works published *and read!*

First published in 1993, the *Journal* has enjoyed impressive success as the most widely read legal sports journal in the country. Under the guidance of Professor Gary Roberts, Tulane Law students are selected for staff membership each year based on their performance in a writing competition open to second-year and third-year students.

Articles for Submission

The *Journal* welcomes articles for consideration from law students attending or having graduated from any law school regardless of location.

The requirements for consideration are:

1. The paper should be principally authored or co-authored by a student or students while enrolled in law school;
2. the paper should be no longer than 40 pages of double-spaced text, though longer works will be considered (excluding footnotes or endnotes); and
3. the paper must be on a topic that has some direct contemporary relevance to the sports industry.

Villanova Sports & Entertainment Law Journal (Villanova University School of Law)

Overview

The Villanova Sports and Entertainment Law Journal is a national legal periodical published and edited twice per year by a staff of stu-

dents chosen for membership based on their performance in an Open-Writing Competition.

The *Sports Lawyer*, a bimonthly newsletter-journal with wide circulation among the nation's sports lawyers. Students may write short articles or assist in editing.

Tulane has an active student-run Sports Law Society that regularly meets with important sports figures to discuss legal issues, and often sponsors public programs involving leading sports attorneys and business leaders.

Tulane's Moot Court Board hosts the annual Mardi Gras National Moot Court Competition, based on a contemporary legal problem confronting the sports industry.

In addition to enrolling in the basic sports law courses, students have the opportunity to work with faculty as research assistants or to pursue directed research on a specific area of the law as it applies to sports.

Tulane University
6823 St. Charles Avenue
New Orleans, LA 70118
pr@tulane.edu

Please send submissions to the following address:

Senior Articles Editor
Sports Lawyers Journal
Tulane University School of Law
6329 Freret Street
New Orleans, LA 70118

If you have any questions about the journal or requirements for submission, you may call Professor Roberts at (504) 862-8826, fax him at (504) 862-8855, or e-mail him at groberts@law.tulane.edu.

Editor in Chief for the next Volume is Adam Dunlop and he can be reached at adunlop@law.tulane.edu or (504) 865-5922.

Please submit articles to: Lauren Faust, lfaust@law.tulane.edu or Jaime Webb, jwebb@law.tulane.edu.

Subscription Information

Requests for subscriptions to the *Sports Lawyers Journal* should be directed to the Sports Lawyers Association. Membership includes the annual edition of the *Journal*, the monthly newsletter published by the SLA entitled the *Sports Lawyer*, a membership directory, and the opportunity to attend the annual Sports Lawyers Conference (which also qualifies for Continuing Legal Education (CLE) credits).

Please note that while requests for subscriptions that are sent to Tulane Law School will certainly be forwarded to the SLA, it only delays the process and it is in your best interest to send inquiries directly to the SLA.

Or Contact:

Sports Lawyers Association
12100 Sunset Hills Rd. Suite 130
Reston, VA 20190-5202
(703) 437-4377
(703) 435-4390 Fax
info@sportslaw.org
Or Visit the Sports Lawyers Association web site at www.sportslaw.org.

well as addresses the future of law. Past volumes have included articles on copyright infringement, ERISA, gender equity, antitrust, collective bargaining, and regulation of indecent speech.

The Journal formed its staff in the fall of 1993 under the guidance of former Associate Dean Robert Garbarino. The Journal published its first volume in 1994 as the Villanova Sports & Entertainment Law Forum after receiving provisional approval from the law school faculty. In June 1995, the law school faculty granted the Forum approval as a permanent journal. In recognition of the faculty approval, the Board of Editors changed the name of Forum to the Journal.

The Journal welcomes submissions of articles for consideration from lawyers, practitioners, or others in the sports and entertainment fields. Publication does not indicate that the views expressed are adopted by the journal.

Except as otherwise expressly provided, the author of each article has granted permission for copies of that article to be made for classroom use in a nationally accredited law school that:

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The Journal's citation conform to A Uniform System of Citation (16th ed. 1996), copyrighted by the Columbia, Harvard and University of Pennsylvania Law Review and the Yale Law Journal.

Submissions

Author interested in submitting manuscripts of articles for publication should contact the Villanova Sports & Entertainment Law Journal. The Journal accepts submissions year-round. There is no formal deadline for publication in a given issue, but decisions for the winter issue are generally made by early August and for the Spring issue by late December.

Manuscripts should be typed, double spaced, and in duplicate. Unpublished manuscripts will be returned to the author only if accompanied by return postage.

Please send manuscripts to:

Managing Editor of Outside Articles
Villanova Sports and Entertainment Law Journal
299 North Spring Mill Road
Villanova University School of Law
Villanova, Pa 19085

You may send submission requests to the journal at this address or email submissions to sports@law.villanova.edu.

You may also contact the journal office at (610) 519-7604 or email the staff at sports@law.villanova.edu

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F O R T H C O M I N G

Player's Agents Worldwide: Legal Aspects

**Robert Siekmann, Richard Parrish, Roberto Branco Martins
and Janwillem Sock (editors)**
ASSER International Sports Law Centre

*With a Foreword by Roger Blanpain, Professor in Labour Law,
Universities of Leuven (Belgium) and Tilburg (The Netherlands),
and Honorary President of FIFA.*

Publicly, at least, there appears to be a strong collective will within football to clean up the game, to make the work of players' agents more transparent and to allow a greater share of the game's profits to stay within the game. Privately, there seems to be unease that current agent regulation is out of step with football industry norms and that if the sector is to operate effectively, practices which are prohibited by the rules should in fact be tolerated. Here lies the problem. Stringent agent regulation may well look impressive but over-regulation will merely compound the problem of non-compliance and a lack of transparency. Finding the balance which not only addresses the problems facing football and satisfies the supporters and other interested stakeholders but which also satisfies the requirements of national, EU and international law is just one of the many challenges facing football's governing bodies.

What are players' agents? Why should they be regulated? How should they be regulated? These three apparently simple questions have been tackled throughout this book. The first question appears straightforward as agents perform similar functions throughout the world. However, as the contributions in the book reveal, the manner in which agents operate varies. The questions of why and how to regulate again reveals common themes but also considerable variations in patterns of regulation. In this connection, there are, in effect, three tiers of agent regulation: international law, national law and the law of the sports associations.

This book covers the legal regulations governing players' agents in forty countries around the world, representing the major footballing constituencies including Argentina, Brazil, Mexico and Russia as well as the "Big Five" in Europe. Written by acknowledged experts, it provides a very useful and informative comparative survey. Indeed, this is a book, which all those involved in the administration of football clubs, particularly, coaches and managers, as well as players' agents themselves, and commercial, financial and legal advisers, can do hardly do without, as it will provide them with a constant and useful source of reference.

Expected to appear in June 2007

2007. ISBN 9789067042451, ca. 300 pp., hardcover, ca. € 175,00

www.asserpress.nl

Player's Agents Worldwide: Legal Aspects - Robert Siekmann, Richard Parrish, Roberto Branco Martins and Janwillem Sock (eds) - expected to appear in June 2007

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T · M · C · A S S E R P R E S S

European Sports Law *Collected Papers*

by

Stephen Weatherill

With a Foreword by Maître Jean-Louis Dupont, Avocat, Belgium

European Sports Law: Collected Papers contains the collected works (1989-2006) of Stephen WEATHERILL, Jacques Delors Professor of European Community Law, Somerville College, University of Oxford, United Kingdom, with an extensive introduction on the background and rationale for the selected papers. WEATHERILL is a leading academic and author on the subject of European Union law and professional sport. His work is of the highest academic standard and practice-oriented at the same time, which has a strong impact on major court cases and the development of international sports law in general.

This book is a reference tool for all those professionally involved (academics, practitioners, researchers, advisers, administrators, marketers and broadcasters) in the field of international sport and the challenges that the interface between European law and sport provides in daily life; increasingly important now that sport is big business, accounting for two per cent of the combined GNP of the enlarged European Union of twenty-seven Member States.

The book appears in the ASSER International Sports Law Series, under the editorship of Dr. Robert SEYMANN and Dr. Janwillem SNOOK.

www.asserpress.nl/cata/weatherill/ra.htm

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SPORT AND THE LAW - THE 2007 CONFERENCE

The Sixth Annual Sport And The Law Conference

Wednesday 16 May 2007

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Conference Chairman - Ian Blackshaw -
Asser International Sports Law Centre, The Hague

Conference Contents

The WADA Code - Past, Presence And Future
Speaker - Mark Agate - Spring Law Limited

This presentation will deal with:

- the remit of WADA - what is WADA meant to do and why.
- WADA's effectiveness over varying geographical and sporting areas - particularly a comparison of the European and North American Sports Models and how different sports 'interpret' the Code via a look at some case law.
- WADA's standing, how well received is WADA's intervention and who's support does WADA need to be effective.
- alternatives to WADA, it's success in combating anti-doping and, as a result, its 'presence' and usefulness.
- the path ahead and the future of WADA.

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The Regulation Of Sports Bodies Following The ECJ Decision In Meca-Medina

Speaker - Ian Blackshaw - Asser International Sports Law Centre, The Hague

This presentation will deal with:

- The legal basis of EU Regulation of Sport.
- The Nice Declaration on Sport.
- The proposed Sport Article in the draft EU Constitutional Treaty.
- The autonomy of Sports Bodies and so-called 'Sports Association' Law.
- The 'Specificity' of Sport.
- The issues raised in Meca-Medina and the rulings of the Commission, the CFI and the ECJ.
- The practical implications for National and International Sports Bodies.

Effective Reputation And Brand Protection

Speaker - Jonathan Coad - Swan Turton

Sports brands are now amongst the most valuable in the world. The sums attracted by advertising, sponsorship etc mean therefore that they are well worth investing money to protect. There are plenty of predators out there who would rob you of their value. The media (and in particular the tabloid press) trades the reputation and privacy of high profile individuals for its own profile. Every brand of real value will also have parasites who seek illegitimately to profit from the goodwill in that brand. This talk shows you what steps you can take to prevent this.

Sporting Goods And Services: The Free Movement Of Goods And Services In The EC

Speaker - Robert Deacon - 11 Stone Buildings

This presentation will deal with:

- The impact of the four fundamental freedoms of the EC - the elimination of barriers to free movement of goods, persons, services and capital.
- The balance to be struck between restriction on imports and exports and IP rights.
- The development of the principle of exhaustion of rights.
- Price differentials in different member states.
- Parallel importing.
- Contractual control of subsequent resale.
- Repackaging and subsequent commercialisation of products.
- Goods marketed outside the EEA.

Restraint Of Trade In Sport - An Update

Speaker - Elizabeth Mehdevy - Wheelers Solicitors

This session will look at the principle and application in sport. In particular:

- The principle of restraint of trade.
- The test in Nordenfelt v Maxim Nordenfelt Guns.
- Application to sports governing bodies.
- Examination of recent cases.
- Where are we now?

Legal Restrictions On Sports Marketing

Speaker - James Russell - Spring Law Limited

This presentation will deal with how the law restricts sports marketing (such as advertising and sponsorship), with particular reference to:

- Existing restrictions - such as tobacco advertising and sponsorship bans; Olympic and Paralympic symbol protection; mobile marketing .
- Proposed restrictions - such as gambling advertising on children's clothing; food and drink TV advertising to children.
- Potential restrictions - such as alcohol advertising and sponsorship bans; other food and drink advertising to children.

Conference Speakers

Mark Agate - Spring Law Limited

Mark trained at City firm Allen & Overy, where he worked on numerous corporate, commercial and banking matters, and has completed a Post Graduate Certificate in Sports Law at King's College, London. After qualifying, Mark worked in-house for a national governing body, the Tennis & Rackets Association, and advised them during negotiations with the Lawn Tennis Association over the high profile sale of The Queen's Club, their anti-doping policy, sponsorship, intellectual property and broadcasting rights, World Championship guidelines and rules and regulations of the game. Mark has particular knowledge of the WADA code and disciplinary matters.

Ian Blackshaw - Asser International Sports Law Centre, The Hague

Ian Blackshaw is an International Sports Lawyer and holds a number of Visiting Professorships at UK and European Universities. He is a prolific author of articles and books on Sports Law and the Contributing Editor of The International Sports Law Journal, published by the prestigious TMC Asser Instituut in The Hague, where he is an Honorary Fellow. He is also a member of the UK Sports Dispute Resolution Panel, London; the Court of Arbitration for Sport, Lausanne, Switzerland; and the WIPO Arbitration and Mediation Center, Geneva, Switzerland.

Jonathan Coad - Swan Turton

Jonathan Coad is head of litigation at specialist media entertainment firm, Swan Turton. He is also a director and co-founder of the International Format Lawyers Association. He specialises in the protection of brand and reputation for high profile individuals and corporations. He has acted for sports stars ranging from Formula 1, the Premiership, international sports management, and world number one tennis stars on press and brand protection issues.

Robert Deacon - 11 Stone Buildings

Robert Deacon is a specialist business lawyer whose practice focuses on commercial and chancery litigation and advisory work covering contract, sale of goods, partnership, construction, banking and guarantees, restraint of trade and fraud & asset tracing. He also deals with a large number of professional negligence claims. Robert has particular expertise in intellectual property, media & entertainment and IT including copyright, trade marks, trade libel, defamation, telecoms & e-commerce and sports litigation. He is known for his hands-on approach and is an experienced advocate.

Elizabeth Mehdevy - Wheelers Solicitors

Having spent a number of years working with Clarke Willmott's sports unit, Elizabeth now deals with all aspects of sports and commercial litigation at Wheelers Solicitors. Elizabeth has experience of dealing with a number of high-profile and high-value disputes. Her experience includes acting for motor racing teams and owners, rugby clubs and football clubs in contractual disputes; all aspects of High Court litigation including obtaining injunctions in relation to sporting events; regulatory matters before the FA and Football League.

In addition, Elizabeth deals with advertising work, advising agencies on UK and Pan-European promotional campaigns.

James Russell - Spring Law Limited

James joined Spring Law from Sydney law firm Surry Partners, where he was a partner and where he undertook both commercial and contentious work heading up the firm's Litigation, Employment and Sports & Entertainment groups. For several years, James acted for Frontiers Group Australasia, part of the London based Frontiers Group - an international sports, entertainment and media business - for whom he advised on sports and entertainment related issues. He has extensive experience in the sports, entertainment, marketing and technology sectors and his clients have included advertising agencies, sports management, marketing, event promotion and technology firms. James is a dual qualified lawyer in Australia and the UK.

Conference Timings.

Registration for the conference will be between 9.30 - 9.45 a.m. The conference will commence at 9.45 a.m. and will last until 5.30p.m. The conference presentation will last for 6 hours. In addition, there will be one break for tea/coffee in the morning, a lunch break, and one break for tea/coffee in the afternoon. Refreshments and lunch are included in the conference fee.

The Conference Objectives.

The conference is aimed at lawyers, accountants, sports agents, clubs, sports associations, sports journalists, radio and television presenters and broadcasters. The objective of the conference is to consider in detail recent important changes in sport and the law.

TERMS AND CONDITIONS.

1. Payment of the conference fee is due with the booking form.
2. A booked place is transferable between individuals at any time before the conference provided written notice is given to London Legal Training ("LLT") of the name and address of the delegate who was to have attended the conference and the name and address of the delegate who will be attending instead.
3. Written notice must be given to LLT if a delegate wishes to cancel the booking. A refund less a 20% administration fee will be made if notice of cancellation is received by LLT in writing by 5.30pm. on Wednesday 2 May 2007. After this date no refunds will be made. A substitute delegate may attend at no extra charge provided written notice is given to LLT of the name and address of the delegate who was to have attended the conference and the name and address of the delegate who will be attending instead.
4. LLT reserves the right to cancel the conference and will in such an event make a full refund of any booking fee. No liability is assumed by LLT or the proprietor of LLT, N. C. Lipton, for changes in the programme date, content, speaker(s) and venue.
5. Conference material will be handed out on the day of the conference.
6. The speakers at the conference are not authorized to advise on specific client related matters under any circumstances. Any comments made by the speaker(s) which may relate to client matters are expressions of his/her opinion or suggestions only and must not be construed or relied upon as advice.
7. The material for the conference has been designed as an integral part of the presentation(s) by the speaker(s) solely for the benefit of delegates attending the conference. The material does not necessarily stand on its own and is not intended to be relied upon for giving specific advice. To the extent permitted by law, neither LLT nor the proprietor of LLT, N. C. Lipton, nor the speaker(s) at the conference will be liable by reason of breach of contract, negligence or otherwise for any loss or consequential loss occasioned to any person acting or refraining from acting in reliance upon the conference material or presentation of the conference or, except to the extent that any such loss does not exceed the price of the conference, arising from or connected with any error or omission in the conference material or presentation of the conference. Consequential loss means any loss of anticipated profits, damage to reputation or goodwill, loss of expected future business, damages, costs or expenses payable to any third party or any other indirect losses.
8. No part of the conference material may be reproduced in any form without the prior written permission of LLT.
9. Audio and audio visual recording is not permitted at the conference.
10. Delegates attend the conference at their own risk. Neither LLT nor the proprietor of LLT, N. C. Lipton nor the speaker(s) at the conference accept responsibility or liability for any injury, illness or otherwise which may be attributable to the facilities or services provided at the conference venue.

London Legal Training can be contacted at: 9 Cygnet Close, Northwood, Middlesex, HA6 2SX, or telephone 01923 840586 or email nigel@londonlegaltraining.co.uk
www.londonlegaltraining.co.uk

BOOKING FORM.

PLEASE PRINT YOUR DETAILS. PLEASE PHOTOCOPY THIS BOOKING FORM FOR ADDITIONAL DELEGATES.

Conference Title: SPORT AND THE LAW - THE 2007 CONFERENCE -
The Sixth Annual Sport And The Law Conference - Wednesday 16 May 2007.

DELEGATE NAME: _____

POSITION: _____

FIRM'S NAME AND ADDRESS: _____

DX NUMBER: _____ E-MAIL: _____ TELEPHONE: _____ FAX: _____

DIETARY REQUIREMENTS: _____

Please enclose a cheque for £395.00 per delegate, or a cheque for £365.00 per delegate if booking by Wednesday 2 May, for the conference payable to LONDON LEGAL TRAINING and send it with this booking form to: LONDON LEGAL TRAINING, 9 CYGNET CLOSE, NORTHWOOD, MIDDLESEX, HA6 2SX. Discounts available for multiple bookings. Please telephone for details.

Please note that London Legal Training is not registered for VAT. The conference fee does not include any VAT nor is VAT payable in addition to the £395.00 or £365.00 per delegate conference fee.

If you are unable to attend the conference but would like the conference documentation please send a cheque for £100.00 (no VAT) for each set of documentation required to London Legal Training together with your name and address. The documentation will be sent out shortly after the conference.

Occasionally London Legal Training's mailing list will be made available for its' own and other appropriate organizations' mailings. Please tick here if you do not want to receive such material.