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White Paper on Sport

Webster Case

WADA Code

FIFA Dispute Resolution
Chamber

Football Hooliganism

Olympic Games, China
and Human Rights

European Club
Association

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In this ISLJ issue's lead article Weatherill examines the European Commission's White Paper on Sport in the perspective of the "Better Regulation" debate that is currently underway throughout Europe. The next three articles by Blackshaw, De Weger and Soek respectively, critically discuss the CAS award in the Webster case of January last where it was examined under what conditions a professional football player may terminate his contract after what is known as the protected period. De Weger is also the author of the latest book to appear in the Asser International Sports Law Series entitled "The Jurisprudence of the FIFA Dispute Resolution Chamber" (T.M.C. Asser Press). Following up on Soek's analysis in the previous issue of ISLJ of the way in which the "just cause" concept is applied in the case law of the FIFA Dispute Resolution Chamber, Bakker now adds a further analytical paper on the DRC's jurisprudence regarding the training compensation system under the FIFA Status and Transfer Regulations. In November 2007, WADA adopted some substantial amendments to the WADA Code, and in this issue of ISLJ Marshall and Hale take a closer look at the new document which will be operational by January 2009. Teitler and Ram then take this analysis as their starting point for offering additional insights and opinions on the new Code and the way in which this set of rules will work out in practice. Coenen subsequently discusses the jurisprudence of CAS in football hooliganism cases, thereby focusing on the strict liability of clubs-for-their-fans issue, after which we have included the core chapter on UK international banning orders from Stott and Pearson's recent book on "Football Hooliganism". Finally, Siekmann deals with "China, Olympic Games and Human Rights" against the background of previous international sports boycotts, and presents some ideas on the possible participation of the newly established European Club Association (ECA) in a Social Dialogue Committee in the European professional football sector.

The ASSER International Sports Law Centre has just completed an EU-co-financed Study into the identification of themes and issues which can be dealt with in a Social Dialogue in the European professional football sector (DG Employment and Social Affairs). A proposal for a similar research project regarding professional cycling in Europe has recently been submitted to the European Commission, given that AIGCP and IPCT (teams) and CPA (riders) in October 2007 jointly requested the European Commission to establish a Social Dialogue in this sport sector.

Within the European Commission's TAIEX instrument's framework (DG Enlargement) an Asser/Edge Hill team of speakers participated in workshops on the impact of the EU *acquis* on sport - in Kiev (Ukraine), November 2007 and Tirana (Albania), this April.

Finally, we extend a heartfelt welcome to our dear colleagues Michelle Colucci, Boris Kolev, Michel Marmayou and Andras Nemes as new members of ISLJ's Advisory Board.

The Editors

The White Paper on Sport as an Exercise in 'Better Regulation'

by Stephen Weatherill*

I Better Regulation

The quest for 'Better Regulation' has been a major preoccupation of the European Commission in recent years. The campaign possesses its own web site, which helpfully collects relevant documentation and reveals three priorities (which do not concern the Commission alone): promoting simplification, reduction of administrative burdens and impact assessment as tools of better regulation, working more closely with Member States to ensure that principles of better regulation are applied consistently throughout the EU, and reinforcing dialogue between stakeholders and regulators at EU and national level.¹

Throughout Europe an emphasis on 'Better Regulation' is hard to miss.² There may still be vestiges of left/right political cleavages about the strength of the case for public intervention in markets but there is a broad level of agreement on the need to select smarter regulatory techniques.³ Some of the debate has been shallow, more of it has been tendentious. No one, after all, would advocate 'Worse Regulation'. And yet even though some of the relevant documentation discloses fine aspirations but relatively few concrete achievements⁴, there lies at the core of the EU 'Better Regulation' agenda an earnest and pressing desire to improve the EU's performance as a regulator. And that *matters*. It has been increasingly common at national level in recent years to emphasise the need to scrutinise with care the costs of regulatory intervention, but it is in relative terms *more* important at EU level that systematic assessment of the costs and benefits of regulation is undertaken. This is because while States have at their disposal a range of techniques for achieving chosen policies - from regulation to taxation, subsidies to sophisticated patterns of welfare provision, across a wide range of available instruments and policies - the EU operates *primarily* by regulation. The EU is a creature with a relatively small budget but a very broad rule-making power.⁵ Its characteristic *modus operandi*, as a regulator which is then dependent for policy implementation on choices made at national level, makes it vital that the quality of its regulatory performance be judged and, where possible, improved.

Admittedly, knee-jerk political reaction frequently trumps cool appraisal of costs and benefits. Just as at national level one may be rather sceptical whether the 'Better Regulation' agenda, and associated elements such as *ex ante* impact assessment applicable to particular proposals, has really been sufficiently powerful to jolt some of the assumptions of (regulatory) politics-as-usual⁶, so too at EU level the track record of 'Better Regulation' is not unequivocally successful. The EU needs to consider where and how to regulate, which suggest a need for careful diagnosis of the problem accompanied by clear-sighted and realistic appraisal of the costs and benefits of possible

solutions. Active consultation of affected parties is an essential element in this. It needs to address matters of legal competence and it needs to comply with conditions that govern the legality of the exercise of a competence, most prominent among them the principles of subsidiarity and proportionality. Better regulation in the EU is inextricably linked with the question of vertical distribution of powers - which level of governance should do what and, if there is to be centralisation, at what level of intensity and/ or exclusivity.⁷ The EU must select between available regulatory instruments, binding or non-binding, soft or hard, and it must pay due attention to *ex post facto* appraisal and to the importance of monitoring adequate implementation of the rules at national level (or, in many Member States, at sub-national level). And in some circumstances it must take into account the place of private actors too. 'Co-regulation' has become a fashionable slogan. Most daunting of all, the EU must keep things simple.

It is doubtless implausible to suppose that the Commission, or the EU more generally (comprising relevant national and EU actors), will succeed in meeting this challenging agenda without attracting criticism, but it is vital that the effort be made. At bottom this is a matter of legitimacy. The poorer the job the EU does as a regulator, the weaker is its claim to be an effective collective problem-solver acting on behalf of the Member States. And - a concern of particular pertinence when applied to the Commission - the less effective the discharge of the tasks assigned to it under the Treaty, the more troubling becomes the absence of orthodox chains of democratic accountability. Put another way, the Commission (in particular) needs to secure legitimation by delivering results, because it cannot do so by claiming representative credentials.⁸

The discourse of 'Better Regulation' infuses the Lisbon process of economic reform in the EU, initiated at the 2000 Lisbon European Council and presented as a means to project the EU to the top of the world's economies judged by competitive and dynamic knowledge-based qualities. 'Better Regulation' also drives sector-specific regulatory innovation and revision such as the 'Lamfalussy process', embraced as the means to advance integration in financial services but unavoidably involving important commitments to allocate responsibility for key regulatory choices at EU level.⁹ The Commission's recent reform initiatives in the field of contract law are explicitly linked to the 'Better Regulation' agenda.¹⁰ And amid this cascade of regulatory reform some legislative proposals (but not many) have been noisily withdrawn by the Commission.¹¹

It is the purpose of this paper to show how 'Better Regulation' has now come to sport, under the momentum of the Commission's *White Paper on Sport* released in the summer of 2007.¹² The very fact that a

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1 See http://ec.europa.eu/governance/better_regulation/index_en.htm.

2 Cf Weatherill (ed), *Better Regulation* (Oxford: Hart Publishing, 2007); Radaelli and De Francesco (eds), *Regulatory Quality in Europe* (Manchester: Manchester University Press, 2007).

3 See e.g. Ogas, *Regulation* (Oxford: Hart Publishing, 2004); Baldwin and Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford: OUP, 1999); Hood, Rothstein and Baldwin, *The*

Government of Risk: Understanding Risk Regulation Regimes (Oxford: OUP, 2004).

4 See e.g. Commission Report, 'Better Lawmaking 2005', COM (2006) 289, 13 June 2006; Commission Report, 'Better Lawmaking 2006', COM (2007) 286, 6 June 2007.

5 Cf. e.g. Moravcsik, 'The European Constitutional Compromise and the neo-functional legacy' (2005) 12 *Journal of European Public Policy* 349.

6 Cf. e.g. Ambler and Chittenden, *Deregulation or Déjà vu? UK Deregulation Initiatives 1987/2006*, British Chambers of Commerce Report, January 2007.

7 This is by no means an issue exclusive to

the EU: see e.g. Halberstam, 'Of Power and Responsibility: the Political Morality of Federal states' (2004) 90 *Virginia Law Rev* 731.

8 Cf. the Commission's own White Paper on European Governance, COM (2001) 428. For a critical examination of the debate about legitimacy see Menon and Weatherill, 'Transnational Legitimacy in a Globalising World: how the European Union rescues its States', forthcoming in *West European Politics*.

9 Cf. Moloney, 'Innovation and risk in EC financial market regulation: new instruments of financial market intervention and the Committee of European Securities Regulators' (2007) 32 *ELRev*

627. See also contributions by Moloney, Welch, and Payne in Weatherill note 2 above.

10 *European Contract Law and the revision of the acquis: the way forward*, COM (2004) 651, 11 October 2004; *Green Paper on the Review of the Consumer Acquis*, COM (2006) 744, 8 February 2007.

11 E.g. 'Withdrawal of Commission Proposals Following Screening for their General Relevance, their Impact on Competitiveness and other Aspects' (2006) OJ C64/3.

12 White Paper on Sport, COM (2007) 391, 11 July 2007, available via http://ec.europa.eu/sport/index_en.html.

13 SEC (2007) 932, 11 July 2007, available

White Paper has been prepared meets some of the dictates of 'Better Regulation' for it promotes transparency in policy formulation. And the accompanying *Impact Assessment* prepared by the Commission is designed to provide a basis for assessing the costs and benefits of EU regulatory choices.¹³ Indeed there is an explicit if passing reference in the Impact Assessment to the EU's general commitment to 'better regulation'.¹⁴ But this paper's concern is broader - and it offers a largely favourable verdict on the White Paper. The Commission has in this document demonstrated a welcome degree of regulatory humility. 'Better Regulation' properly involves finding the right place and method to regulate a particular activity (if there is to be regulation at all). It is by no means clear that the EU is always the right place. But it is troublingly common to find the EU's institutions reluctant to recognise the limits of their own legal competence, their material resources and their basic expertise. The White Paper appreciates such limits. It sets out a case for EU intervention in sport where this is necessary and helpful, but it accepts that much sporting activity is not usefully the subject of elaborate EU supervision, and it instead recognises the proper role of other public and private actors. And - contrary to the complaints loudly and frequently expressed by those involved in the governance of sport - the Commission is by no means ignorant or dismissive of the value in appropriate circumstances of *sporting autonomy*. The White Paper on Sport, then, is an exercise in 'Better Regulation'.

II The constitutional context

A brief reminder of the constitutional context within which an EU policy on sport has evolved is appropriate, for it provides a frame within which to understand the good sense of much of the caution and modesty which marks the Commission's 2007 White Paper. Article 5(1) EC stipulates that the EC shall act within the limits of the powers conferred upon it by the Treaty. It is equipped with no explicit powers in the field of sport. More than that: the EC Treaty does not mention sport at all. But *ab initio* in *Walrave and Koch*¹⁵ the Court rejected a line of reasoning that would have rigidly separated sports governance from EC law. 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. So the EC's 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, and also the basic prohibition against nationality-based discrimination), but it is denied any specific legislative competence in the field of sport. But the Court has never applied EC law to sport as if it were merely a normal industry. Instead a more creative approach has been adopted, requiring a significant investment of resources in making sense of the intersection between the demands of EC law and the aspirations of sport.

The story of the manner in which first the Court and more recently the Commission has developed EC law in its application to sport is a complex though intriguing one. It reflects the need to allow a *conditional* autonomy under EC law to sporting practices - an autonomy *conditional* on respect for the core norms of EC law. The matter has been addressed in full elsewhere.¹⁶ In short, however, the core of the challenge is well captured by two observations made by the Court in its famous *Bosman* ruling.¹⁷

First, the Court declared 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.' (para 106)

The Court, while finding that the particular practices impugned in *Bosman* fell foul of EC law because they did not adequately contribute to these legitimate aims, showed itself receptive to embrace of the special features of sport. So sport's distinctive concerns are *not* explicitly recognised by the Treaty but they are drawn in to the assessment of sport's compliance with the rules of EC trade law (in *casu*, *free movement*) by a European Court anxious to identify what is *legitimate* in the special circumstances of professional sport.

Second, the Court added remarks in the *Bosman* ruling about 'the difficulty of severing the economic aspects from the sporting aspects of football' (para 76). Quite so! This is *extremely* difficult. The vast majority of rules in sport also exert an economic impact, and it is that economic impact which triggers the application of the rules of the EC Treaty. Few sporting rules will not also have economic implications. The implication is that sporting practices will commonly fall within the scope of application of the EC Treaty, especially in the context of professional sport, which then makes all the more important the choices made about what is treated as a *legitimate* sporting practice.

The case law of the Court and the practice of the Commission is rich and revealing. It cannot be examined in full here.¹⁸ Typically sporting bodies seek to argue for a generous interpretation of the scope of the 'sporting rule' which is wholly untouched by the EC Treaty, and, if the matter is judged to fall within the scope of the Treaty, they then seek to defend their practices as necessary to run their sport effectively. It is for the Court (or in appropriate cases the Commission) to consider the strength of these claims, and in doing so the EU institutions reach their own conclusions on the nature of sports governance - conclusions which are frequently (though not invariably) less persuaded by the need for sporting autonomy than is urged by governing bodies.

So, for example, *Deliège* concerned selection of individual athletes (*in casu*, judokas) for international competition.¹⁹ Participation was not open. One had to be chosen by the national federation. If one was not chosen, one's economic interests would be damaged. Could EC law be used to attack the selection decision? This was a classic case which brought the basic organisational structure of sport into contact with the economic interests of participants. The Court stated that selection rules 'inevitably have the effect of limiting the number of participants in a tournament' but that 'such a limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted'.²⁰ Accordingly the rules did not in themselves constitute a restriction on the freedom to provide services prohibited by Article 49. So a detrimental effect felt by an individual sportsman does not mean that rules are *incompatible* with EC law. The *Deliège* judgment is respectful of sporting autonomy, but according to reasoning which treats EC law and 'internal' sports law as potentially overlapping.

The application of the Treaty competition rules to sport was a matter carefully avoided by the Court in *Bosman* itself. But the Commission has adopted a functionally comparable approach in its application of Article 81 to sport. In *Champions League* it accepted that agreeing fixtures in a league would not be a 'restriction' on competition, but rather a process essential to its effective organisation. However, by contrast, an agreement to sell rights to broadcast matches in common is not essential to the league's functioning, because individual selling by clubs is perfectly possible (though doubtless less convenient and lucrative). So collective selling *is* a restriction on competition within the meaning of Article 81(1) and it damages the economic interests of, in particular, broadcasters denied a market populated by competing individual sellers. So an agreement to sell rights in common can stand only if exempted according to the orthodox crite-

like the White Paper itself *via* http://ec.europa.eu/sport/index_en.html. For general discussion of the value of impact assessment at EU level see the contributions of Chittenden, Ambler and Deming Xiao & Meuwese to Weatherill note 2 above.

14 Para. 5-4.

15 Case 36/74 [1974] ECR 1405.

16 See e.g. Parrish, *Sports Law and Policy in the European Union* (Manchester: Manchester University Press, 2003); Greenfield and Osborn (eds), *Law and Sport in Contemporary Society* (London: Frank Cass Publishing, 2000); Weatherill, *European Sports Law: Collected Papers* (The Hague: T M C

Asser Press, 2007); Szyssczak, 'Is Sport special?', Ch. 1 in Bogusz, Cygan, and Szyssczak (eds), *The Regulation of Sport in the European Union* (Cheltenham: Edward Elgar Publishing, 2007); Van den Bogaert and Vermeersch, 'Sport and the EC Treaty: a Tale of Uneasy Bedfellows' (2006) 31 ELRev 821.

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

18 See note 16 above. Parrish and Miettinen provide a systematic recent treatment in *The Sporting Exception in European Law* (The Hague: T M C Asser Press, 2008).

19 Cases C-51/96 & C-191/97 *Deliège v Ligue de Judo* [2000] ECR I-2549.

20 Para. 64 of the judgment.

ria set out in Article 81(3).²¹ The Commission also took account of sport's peculiar economics in its *ENIC/UEFA* decision²², in which it concluded that rules forbidding multiple ownership of football clubs suppressed demand but were indispensable to the maintenance of a credible competition marked by uncertainty as to the outcome of all matches. A competition's basic character would be shattered were consumers to suspect the clubs were not true rivals. The principal message here is that sporting practices typically have an economic effect and that accordingly they cannot be sealed off from the expectations of EC law. However, within the area of overlap between EC law and 'internal' sports law there is room for recognition of the features of sport which may differ from 'normal' industries.

There is an EC 'policy on sport' to be discerned here, albeit that its character is influenced by the eccentric development generated by the Treaty's absence of any sports-specific material and the essentially incremental nature of litigation and complaint-handling. Formally the EC's 'policy' involves a batch of decisions determining whether or not particular challenged practices comply with the EC Treaty. One can discern thematic principles binding together the decisional practice - respect for fair play, credible competition, national representative teams, and so on - but the EU is not competent to mandate by legislation the structure of sports governance in Europe.

The precise legal basis underpinning the Court's approach has long been rather murky. What is this 'sporting exception'? Does it mean that a practice falls outwith the scope of the Treaty altogether? Or is that the rules have an economic effect and fall within the scope of the Treaty but are not condemned by it because they also have virtuous non-economic (sporting) effects? The European Court in the summer of 2006 brought a welcome degree of analytical clarity to the matter.²³ In *Meca-Medina and Majcen v Commission* 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 of the Commission's decision.²⁴ So did the ECJ.²⁵ But whereas the CFI attempted to insist that anti-doping rules concern exclusively non-economic aspects of sport, designed to preserve 'noble competition'²⁶, 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'.²⁷ 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'.²⁸ A practice may be of a sporting nature - and perhaps even 'purely sporting' in *intent* - but it falls to be tested against the demands of EC trade law where it exerts economic effects. But, just as in *Bosman*, the Court in *Meca-Medina* did not abandon its thematically consistent readiness to ensure that 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 adverse effect of penalties on athletes' freedom of action must be considered to be inherent in the anti-doping rules. The rules challenged in *Bosman* were not in the Court's view necessary to protect sport's legitimate concerns but in *Meca-Medina* the Court concluded that the sport's governing body was entitled to maintain its rules. It had not been shown that the rules concerning the definition of an offence or the severity of the penalties imposed went beyond what was necessary for the organisation of the sport.

In *Meca-Medina* the Court took 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

falling within the scope of the Treaty must be tolerated in a particular case? 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'.²⁹ This is a statement of the *conditional autonomy* of sports federations under EC law.

This, then, is the constitutional background to the Commission's White Paper of 2007. The EC has no formal legislative competence in the area of sport and its 'policy' is predominantly shaped as a result of the accidents of litigation and the choices made in the application of the Treaty's free movement and competition rules, which, though creatively interpreted with reference to the legitimate interest of sport, are not *on their face* in any sophisticated sense attuned to the needs of sport. And in so far as *Meca-Medina* now requires a case-by-case inspection of the compatibility of sporting practices with EC trade law rather than a general appeal to the 'purely sporting' nature of a rule³⁰ one must reckon with the fear of intransparency and unpredictability in the application of the law to sport. Indeed this is one basis for criticism of the judgment which has been seized on by those close to sports governing bodies.³¹ Moreover, at a general and more overtly political level, the practice of the EU's political and judicial institutions is regularly the subject of heavy criticism from those engaged in sports governance who allege a failure to grasp the true and specific nature of sport. This is the more general context within which *Meca-Medina* has been attacked for stripping away some of the autonomy to which sports governing bodies regularly lay claim as necessary and appropriate. Such rebukes may be fair, they may be unfair - but the essential *contestability* of the practice of EU intervention in sport, allied to the deficiencies and constitutional restraint embedded in the Treaty itself, is plain. So too is the magnitude of the sums of money at stake. The Commission, in preparing its White Paper on Sport, had plenty of challenges to meet.

III The White Paper on Sport

The White Paper was published in July 2007.³² It is presented as the product of extensive consultation, and it is accompanied by an *Action Plan*, a *Staff Working Document* and an *Impact Assessment*. The White Paper itself is 20 pages long (the other documents are longer) and it is separated into *The Societal Role of Sport*, *The Economic Dimension of Sport* and *The Organisation of Sport*, before providing lines to follow up. Its intention is to offer a comprehensive account of the EU's approach.

The White Paper is pitched in terms which are deferential to the value of sites for the regulation of sport other than the EU in general

21 Decision 2003/778 *Champions League* [2003] O.J. L291/25, paras. 125-131. Exemption pursuant to Art 81(3) was granted on the facts. See Weatherill, 'The sale of rights to broadcast sporting events under EC law' [2006] 3 / 4 *The International Sports Law Journal* 3.
22 COMP 37.806 ENIC/UEFA, IP/02/942, 27 June 2002.
23 For extended analysis see Parrish and Miettinen, *The Sporting Exception in European Law*, note 18 above; also Weatherill, 'On overlapping legal orders: what is the 'purely sporting rule'?', Ch. 3 in Bogusz, Cygan, and Szyszczak (eds), *The Regulation of Sport in the European Union* (Cheltenham: Edward Elgar Publishing, 2007).
24 Case T-313/02 [2004] ECR II-3291.
25 Case C-519/04 P [2006] ECR I-6991.
26 Para. 49 CFI.
27 Para. 27 ECJ.
28 Para. 28 ECJ.
29 Para. 47 ECJ.
30 See Weatherill, 'Anti-doping revisited - the demise of the rule of 'purely sporting interest'' [2006] *European Competition Law Review* 645; M. Wathélet, 'L'arrêt

Meca-Medina et Majcen: plus qu'un coup dans l'eau' 2006/41 *Revue de Jurisprudence de Liège, Mon et Bruxelles* 1799; Parrish and Miettinen note 18 above; Auneau, 'Jurisprudence, Note' (2007) 43 RTDE 361; Rincon, 'EC Competition and Internal Market Law: on the existence of a Sporting Exemption and its withdrawal' (2007) 3 *Journal of Contemporary European Research* 224; also Wathélet, 'Sport Governance and EU Legal Order' (The 'Wathélet Report') 2007/3-4 *The International Sports Law Journal* 3.
31 See e.g. Infantino [Director of Legal Affairs at UEFA], *Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?* UEFA paper 02/10/06, available at http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf; Zylberstein, 'Collision entre idéaux sportifs et contingences économiques dans l'arrêt *Meca-Medina*' CDE 2007/1-2 218.
32 COM (2007) 391, available via http://ec.europa.eu/sport/index_en.html.
33 On which see generally e.g. Scott and

and the Commission in particular. The Commission does not claim that the EU has primary responsibility for sport. That, following the Nice Declaration, lies with sporting organisations and the Member States (p.1 of the White Paper).

The White Paper's examination of *The Societal Role of Sport* begins with treatment of the public health advantages of physical exercise. There is not much the EU can contribute here. Its legal competence is thin, its material resources few and its expertise in the field questionable. The Commission merely encourages the exchange of good practice, addressing both Member States and sport organisations. Similarly in the matter of doping. This practice is doubtless a bad thing but the Commission contents itself with encouraging action against doping by Member State law enforcement agencies and sport organisations. It also urges better co-ordination at international level, referring explicitly (para 2.2 of the White Paper) to the contributions to be expected from the Council of Europe, WADA and UNESCO. Sport's role in education and training should be promoted but here too the EC's competence to act is limited and the Commission avoids making any grand claims. So too in the matter of promoting volunteering and active citizenship and using sport to improve social inclusion, integration and equal opportunities. In the latter case the Commission refers to use of sport as a tool and indicator in the pursuit of the Open Method of Co-Ordination on social protection and social inclusion. But in embracing this modern 'soft' form of governance³³ the Commission conspicuously avoids making any commitment to proposing more ambitious binding forms of lawmaking. This is simply not its job in this sector. The Commission also expresses support for strengthening the prevention of and fight against racism and violence, but stresses the need for dialogue between Member States, international organisations, law enforcement services and other stakeholders such as supporters' organisations and local authorities. It urges exchange of best practice. The remaining dimensions of *The Societal Role of Sport* are sharing values with other parts of the world and supporting sustainable development, and the treatment of these matters conforms to the thematically consistent pattern of commitment to work with other relevant public and private actors at national and international level.

The section in the White Paper entitled *The Economic Dimension of Sport* is much shorter. It begins by connecting sport's economic development to the Lisbon agenda of economic reform. It then promises to seek to develop a European statistical method for measuring the economic impact of sport. This is presented as central to 'moving towards evidence-based policies'. Then the White Paper addresses the matter of putting public funding for sport on a more secure footing, making particular reference to the need to support grassroots sport. But the source of such funding is envisaged as the Member States, with the Commission's sole comment on an EU contribution restricted to the possibility of concessions to sport under the VAT regime established by Directive 2006/112.

The Commission then turns in the White Paper to *The Organisation of Sport*. This begins with reference to the 'European Model of Sport'. But immediately the Commission seeks to fend off accusations that it is aggressively promoting a particular normative preference. It 'considers that certain values and traditions of European sport should be promoted'. But it accepts that there are 'diversities and complexities' in European sport, and that 'it is unrealistic to try to define a unified model of organisation of sport in Europe' (p.12). Fears that the Commission has ambitions to impose a single regulatory paradigm on sport(s) are addressed head-on here, and happily so. The more aggressive search for common concepts or principles which marked the Commission's Helsinki Report on Sport, issued in 1999 and considered further below³⁴ has been noticeably toned down.

The 2007 White Paper identifies challenges in the future governance of sport in Europe. It commits itself to 'play a role in encouraging the sharing of best practice in sport governance'. And it aims to develop a common set of principles of good governance, 'such as transparency, democracy, accountability and representation of stakeholders (associations, federations, players, clubs, leagues, supporters, etc.)' (p.12). There are here echoes of the Nice Declaration. However,

it also 'acknowledges the autonomy of sporting organisations and representative structures (such as leagues)' (p.13). The Commission seeks to limit its role to dialogue and facilitation, while of course expecting that EU law be observed. So it considers 'governance is mainly the responsibility of sports governing bodies and, to some extent, the Member States and social partners' (p.13); and that 'self-regulation respectful of good governance principles' will address most challenges (also p.13). So the Commission's starting-point is relatively modest and deferential.

It then proceeds to pay rhetorical respect to the 'specificity' of sport. The detailed legal analysis is reserved for the accompanying (and much longer) *Staff Working Document*³⁵ but the White Paper makes the claim that the courts and the Commission have recognised and taken into account sport's 'specificity' (p.13), albeit that this cannot justify a general exemption from the application of EU law. One case is identified explicitly: the ruling of summer 2006 in *Meca-Medina*.³⁶ This 'dismissed the notion of purely sporting rules as irrelevant for the purposes of the applicability of EU competition rules to the sport sector' (p.14). The Commission explains that because the approach of the Court requires that the individual features of each sporting rule be assessed in order to determine whether there is compliance with EC law this does not permit the formulation of general guidelines on the application of competition law to sport. Here too, then, the White Paper eschews grand solutions.

The White Paper then briefly mentions the application of EC law to nationality-based discrimination, to transfers, to players' agents (where it notes that there have been calls for an EU legislative initiatives but simply promises to carry out an impact assessment to evaluate whether action at EU level is necessary), protection of minors, corruption, licensing systems for clubs and the media (where the Commission recommends to sport organisation to pay due attention to the creation and maintenance of solidarity mechanisms). The Commission is humble. It does not pretend that it has all the answers, nor that the EU is eager to grasp an interventionist role. This is appropriately cautious regulatory planning.

As mentioned, more detailed legal analysis is supplied in the *Staff Working Document* which accompanies the White Paper. It goes beyond the scope of this paper to examine this at any length. Suffice it to say, however, that the *Staff Working Document* presents a convincing explanation of how EC trade law has been interpreted to absorb respect for the legitimate 'special' features of sport (and *en passant* contradicts the aggressive depiction of an EC legal order which takes inadequate account of sport's legitimate claims to autonomy contained in the so-called Independent European Sport Review - the 'Arnaut Report'³⁷ - published in October 2006 and fatally flawed in law by (*inter alia*) its reliance on the CFI's decision in *Meca-Medina* to the neglect of the ECJ's³⁸ and its consequent legally unsound embrace of the notion of the 'purely sporting rule').³⁹

Intended to improve transparency, the *Staff Working Document*'s expanded discussion of the current state of the law and of outstanding questions, including substantial Annexes dealing with *Sport and EU Competition Rules* and *Sport and Internal Market Freedoms*, is faithful to that found in the White Paper proper. It is anxious to state the limits of EC competence - both legally and in terms of available resources and expertise. And it places great emphasis on the role of the many other public and private, national and international bodies and actors with a stake in the governance of sport. It identifies as key fea-

De Burca (eds), *Law and New Governance in the EU and US* (Oxford: Hart, 2006).

34 COM (1999) 644 and/2.

35 Pages 35-40, and see also the extended treatment in the Annexes.

36 Case C-519/04P note 25 above.

37 *Independent European Sport Review*, available at www.independentfootballreview.com.

38 The Arnaut Report is stated to have been prepared with the advice of José

Luis da Cruz Vilaca. It seems implausible that such a distinguished jurist could have approved the final text of the Report.

39 The White Paper largely ignores *Arnaut* - see only a bland reference in fn. 7 on p.13 - while the *Staff Working Document* shows little enthusiasm for it (e.g. at page 28 it dismisses the recommendation that sport enjoy exemption from the state aid rules).

40 See Case C-243/06 *Oulmers/ Charleroi*,

tures of the 'specificity of sport' matters including interdependence between competing adversaries, uncertainty as to result, the pyramid structure (though the core point here is the 'importance of the freedom of internal organisation of sport associations' rather than the virtue of the pyramid as such), and sport's educational, public health, social, cultural and recreational functions. And *Meca-Medina* holds that the qualification of a rule as 'purely sporting' is not sufficient to remove the athlete or the sport association adopting the rule from the scope of the Treaty competition rules. A case-by-case analysis is therefore required. Sport's specificity becomes part of the assessment of the conformity of the rule with EC law, and the *Staff Working Document* is bullish about the adequacy of EC law's respect for necessary sporting values. Moreover it is stated that the judgment in *Meca-Medina* confirms that it is not feasible to provide an exhaustive list of rules which do or do not breach the Treaty. A general exemption is 'neither possible nor warranted' (p.69; see also p.78). Three particularly intriguing pending issues are identified: FIFA's player release rules⁴⁰, the UEFA rule on home-grown players and salary caps. The reader will be disappointed but not surprised that the Commission chooses to remain tight-lipped. Mention of these intriguing issues is very brief (pp.76-77).

IV Assessment

Elsewhere I have criticised the Commission for assuming there is a single phenomenon of 'sport', when in fact there are distinct features and distinct issues, requiring different regulatory responses; and I have also expressed concern about the occasionally over-ambitious claims made about the EU's virtues as a regulator and policy-maker in this area.⁴¹ Admirably, the 2007 White Paper is not tainted by over-homogenisation of the phenomenon of 'sport', nor by inflated claims about the EU's regulatory competence. It is a nuanced document worthy of the label 'Better Regulation'. The background which informs my approval of the White Paper needs to be set out.

In its Helsinki Report on Sport, published in 1999⁴², the Commission sketched its view of the role of a *European Sports Model*. This model possesses a number of features, most prominently grouped around the contrasts drawn with North American sports practice.⁴³ The Helsinki Report's general tone was directed at safeguarding current sports structures in Europe and on maintaining the social function of sport within the Community's law and policy framework. So it began with the ambitious assertion that it 'gives pointers for reconciling the economic dimension of sport with its popular, educational, social and cultural dimensions.' This is immediately unsettling. There are awkward questions about whether one can plausibly aim to achieve such a reconciliation, given that 'sport' embraces such a wide range of phenomena, from a jog in the park to a multi-million dollar Grand Prix. Does this not defeat any attempt to construct a single 'policy' on sport? The Helsinki Report expressed concern that commercial forces in sport are increasingly endangering the social function of sport. But this supposed conflict needs more careful explanation than the Commission provided in 1999. Professional sport has little to do with the social function of sport mentioned in the Helsinki Report. Conversely recreational sport normally has no economic motivation. It is far from clear that what is at stake here is a tension within 'sport'; it may more plausibly simply involve two quite distinct types of activity that happen to fall under the very loose and wide label of 'sport'. Moreover, there are still more awkward questions about whether it is any business of the Commission in particular or the EU in general to wade into these deep waters. Where is the competence in law? Where are the material resources and the necessary professional expertise? The risk is that the EU strains its own legitimacy by taking on tasks it is ill-suited to discharge. True, the Commission's vision in the Helsinki Report for the protection of the *European Sport Model* involves consultation between interested levels of governance - sports governing bodies, Member States, European institutions. A partnership is presented as the way forward. But there is a whiff of over-ambition in sketching the EU's ability to add value to the regulatory landscape.

That same uneasy sense of inflated self-perception occasionally

touches individual decisions adopted by the Commission in the field of sport. A revealing example is provided by the Commission's 2001 Decision concerning UEFA's rules permitting national football associations to prohibit the broadcasting of football matches within their territory during a two-and-a-half hour period corresponding to the normal time at which fixtures are scheduled in the relevant country. This, one would suppose, impedes the commercial freedom of broadcasters to conclude deals to show matches at designated 'blocked' times, but it serves the end of sustaining a lively atmosphere in stadia by encouraging spectators to attend matches 'live' rather than merely switch on the television. The Commission concluded that the rules fell outwith the scope of application of Article 81 EC. In the Press Release concerning this matter Mr Monti, at the time the responsible Commissioner, was quoted as observing that the decision 'reflects the Commission's respect of the specific characteristics of sport and of its cultural and social function'.⁴⁴ However, the text of the formal Decision published by the Commission reveals a different, narrower story.⁴⁵ The Decision is in fact based on routine market analysis. The Commission finds that the UEFA rules do not appreciably restrict competition within the meaning of Article 81(i) EC.⁴⁶ It explicitly states that it therefore need not assess the extent to which the televising of football exerts a negative impact on attendance at matches.⁴⁷ The Decision is, admittedly, built on appreciation of the specific nature of the market for rights to broadcast football matches, but Mr Monti exaggerates by claiming that it reflects the Commission's respect for sport's 'cultural and social function'. Here one may suppose the Commission is seeking to build up credit for itself in the face of allegations that its application of EC trade law is liable to destroy the foundations of sport. But one may wonder whether the Commission is storing up trouble for itself in making extravagant claims about its competence to cater for cultural and social matters which do not correspond to the reality of the EC Treaty's much more limited mandate.

By welcome contrast the 2007 White Paper on Sport is, in general, careful not to make inflated claims about the EU's role in matters of sports governance. It avoids any suggestion that the EU has the legal competence, material resources and basic expertise to act as a primary site for solving problems that confront sport today. Its sober depiction of the state of EU law shows how sport, a sector of considerable economic significance, cannot enjoy immunity from the EC Treaty, but it also carefully sustains the argument that the 'special' features of sport can be and are accommodated within the interpretation and application of EC trade law. This, as explained above, amounts to an EC 'policy' (of sorts) which is sensitive to the needs of sporting bodies albeit without purporting to establish binding legislative standards.

True, the Commission in 2007 cannot resist claiming that sport 'generates important values such as team spirit, solidarity, tolerance and fair play, contributing to personal development and fulfilment' (p.1 of the White Paper). Perhaps it does - and of course sports politicians commonly make much of such claims - but this is remote from much of the nature and purpose of modern professional sport.

referred to the European Court by Tribunal de Commerce de Charleroi in May 2006, and still pending. For background see Weatherill, 'Is the Pyramid Compatible with EC Law?' 2005/3-4 *The International Sports Law Journal* 3.
 41 E.g. in 'Sport as Culture in European Community Law', Ch. 4, pp.113 - 152, in Craufurd Smith (ed), *Culture in European Union Law* (Oxford: Oxford University Press, 2004); also in "Fair Play Please!": Recent Developments in the Application of EC Law to Sport" (2003) 40 CMLRev 51.
 42 COM (1999) 644 and/2. For comment see Weatherill, 'The Helsinki Report on Sport' (2000) 25 ELRev 282.
 43 Cf Weatherill, 'Resisting the Pressures of

Americanization: the influence of European Community Law on the European Sport Model', pp.155-181, in Greenfield and Osborn note 16 above; Halgreen, *European Sports Law: a Comparative Analysis of the European and American Models of Sport* (Copenhagen: Forlaget Thomson, 2004).
 44 IP/01/583, 20 April 2001.
 45 Comm. Dec. 2001/478 OJ 2001 L171/12.
 46 Paras. 49-61 of the Decision. The Commission will monitor change in market structure, particularly in the wake of what is called at the time the "Internet revolution", para. 56.

Generally, however, the 2007 White Paper avoids making exaggerated claims about the benevolent impact of sport on society. Indeed the very structure of the White Paper, in particular its separation of the treatment of *The Societal Role of Sport* and of *The Economic Dimension of Sport*, demonstrates a concern to reflect the varied nature of 'sport'. And at page 11 the Commission explicitly points out that for all the economic significance of sport 'the vast majority of sporting activities takes place in non-profit structures'. In the *Staff Working Document* the section on *the Organisation of Sport* (pp.40 et seq.) begins with some general remarks about the European Model of Sport, and the Helsinki Report, but quickly expresses scepticism about the generality of apparent common features. Promotion and relegation have been identified as characteristically European - or, at least, as characteristically non-American - but even here the 2007 White Paper is cautious. The practice of promotion and relegation is anyway limited to a certain category of sports - team sport - and even here licensing systems, involving pre-conditions that must be met by participants, may militate against the vision of European leagues founded on open competition and unconditional promotion based on merit. The Commission has now become overtly receptive to the reality of diversity in governance arrangements in European sport, and this leads it to state it will not apply general rules to all European sports (p.42). The mood has changed, happily so.

Most of all, the Commission's acceptance that the *European Model of Sport* cannot operate as one-size-fits-all template shows a welcome regard for the need to regulate with sensitivity. Sport is fun, lots of people are interested in sport, sport improves health if one plays it rather than simply watches it, sport generates vast amounts of money. But these are all very different phenomena and good regulation needs to pin down where and why to intervene (if at all) while paying attention to such prevailing differences. The Commission's 2007 White Paper is responsibly humble in setting out what the EU might be expected to achieve in the many areas in which sport presents challenges for public and private actors in Europe and beyond. And it is scrupulously aware of the legitimate role to be played in sports governance by other public and private, national and international actors.

V Conclusion

The Commission's 2007 White Paper on Sport will not satisfy everyone. The generous statements that 'governance is mainly the responsibility of sports governing bodies and, to some extent, the Member States and social partners' and that 'self-regulation respectful of good governance principles' will address most challenges (p.13) are presented alongside a very brief comment that EU law must be observed. Sports bodies will retort that this is precisely the problem: how, they argue, can one meaningfully claim that the EU privileges self-regulation in sport while simultaneously insisting on the priority of its unpredictable and intrusive legal rules which, moreover, are not attuned to the special demands of sport? Sports bodies will certainly not be convinced by the insistence in the *Staff Working Document* that *Meca-Medina* contributes to legal certainty.⁴⁸ And, though I am in

general impressed by the quality of the legal analysis presented in the White Paper and its supporting documents, there are admittedly issues over which it glosses a shade sketchily and which may yet prove to be flashpoints. For example, the survey of the case law in the *Staff Working Document* includes an apparent assumption that *Meca-Medina* applies to the fundamental freedoms as much as to competition law (pp.101, 104). This is subject to much more cautious comment at p.70 and though I believe it to be correct⁴⁹, it cannot be taken for granted on the existing state of the law. It is for sure a point on which sports bodies will be tempted to dwell in future in order to confine the impact of *Meca-Medina*. In general, then, the White Paper will not be well received by those eager for more autonomy for sports governance, nor by those eager for generous treatment under the law of the commercial opportunities which modern professional sport presents. Sepp Blatter and Jacques Rogge sprinted into the attack in 2007. Plainly it was never likely that the White Paper would be well received in such circles.⁵⁰ It is furthermore admittedly possible that the Commission will be tempted to adopt a less measured approach to its regulatory conduct in future. The White Paper may reveal impressive humility, but will its style be followed faithfully in practice? This will need to be monitored and any gulf between promise and practice will provide a basis for legitimate criticism.

Overall, however, I approve of the White Paper as a case study in commitment to 'Better Regulation' in the European Union. It provides a sober appreciation of the issues. It places the possible value of a role for the EU in the matter of sports governance within a context which pays due respect to the legitimate role to be played by other public and private, national and international actors, including governing bodies in sport themselves. EC trade law is *not* impervious to the legitimate demands of sporting federations. Just as the Court in *Meca-Medina* refused to rule out in principle the subjection of governing bodies to EC law but scrupulously avoided addressing detailed practical questions about precisely how long a doping ban should last, so too the Commission in its 2007 White Paper sketches where EC law touches sport but is not at all anxious to dictate how sports shall be governed. It looks at the several facets of sport, ranging from keeping fit in the local park to driving fast cars for huge salaries, and it does not try to impose a single model on European sport. It does not strain at the margins of the EC's legal competence but instead avoids promises which the EU is not equipped to keep. And it gets the law right.

47 Para. 59.

48 E.g. pages 35, 37.

49 Weatherill, 'On overlapping legal orders: what is the 'purely sporting rule'?', Ch. 3 in Bogusz, Cygan, and Szyszczak (eds), *The Regulation of Sport in the European Union* (Cheltenham: Edward Elgar Publishing, 2007), at pages 57-64. Cf most recently Case C-438/05 *Viking Line*

judgment of 11 December 2007, para 53 of the judgment.

50 Cf e.g. Cuendet, 'The EU Commission's White Paper on Sport: An official coherent, yet debated entrance of the Commission in the Sports Arena', Special Addendum to 2007/3-4 *The International Sports Law Journal*.

Football World Cup 2010 in South Africa

In The Hague, on 1 November 2007 Professor Steve Cornelius, Director of the Centre for Sports Law of the University of Johannesburg delivered the Seventh Asser International Sports Law Lecture on "The Organisational and Legal Aspects of the World Championship 2010 in South Africa".

The EU Commission's White Paper on Sport: An Official Coherent, Yet Debated Entrance of the Commission in the Sports Arena*

by Sophie Cuendet**

On 11 July 2007, the European Commission adopted the White Paper on Sport¹, its first comprehensive initiative on sport². The White Paper is the result of a long consultation process of all sports stakeholders, including 17 Directorates General of the European Commission. It is the first political initiative of the EU that addresses sport globally and recognizes the horizontal nature of sport policy, which shall be taken into account in the application of other EU policies. This notably contrasts with the in so far ad hoc regulatory approach in which European institutions analysed in economic terms whether the rules adopted by sports governing bodies were in line with EU law.

While they acknowledged the presence of some positive elements, numbers of sports stakeholders have expressed their disappointment with the conclusions of the White Paper as well as the proposed actions identified in the Action Plan Pierre de Coubertin³. Early October 2007, the Commission convened a conference to discuss the paper and the proposed structured dialogue with the sports stakeholders and to allow them to add to the Commission's proposals. The present contribution aims at giving an update on the current status of the White Paper in the light of the most recent developments.

I. A global approach: an ambitious challenge

With the White Paper, the Commission has taken the option of a comprehensive approach, considering sport in its different dimensions and focussing on non-regulatory topics. The Commission chose this option in order to take account of several factors:

- the appropriateness of a political response that respects the legal context (thereby referring to the absence of a specific legal competence for sport in the Treaty and the correlative need for the Commission to respect the Member States' initiatives and responsibilities for sporting matters), the subsidiarity and proportionality principles (see art. 5 § 2 and 3 of the Treaty) as well as the autonomy of sport;
- the fact that sport has a horizontal dimension which interacts with various EU policy areas - hence the need for a broad initiative that builds on a mix of soft-law and soft-policy instruments;
- the fact that the sport sector represents a plethora of organisations and structures - hence the need to cover sport in a wider sense.

The Commission also considered that the White Paper approach would enshrine concrete proposals for actions for follow-up without putting too strong focus on a single dimension of sport, namely the economic dimension of professional sport. This approach would also take into account the solidarity links inherent in the way in which sport is organised in Europe - from the grassroots to the top, thus respecting one of the key characteristics of the European Model of Sport.

This global approach however proves to be quite an ambitious challenge in view of the multiplicity of actors and the variety of issues to be addressed, as well as of the need to match the numerous and often diverging interests. While the global approach has in general been welcomed as the first step of the EU comprehensive initiative on sport⁴, numerous sports stakeholders have pointed out that some of the identified threats and challenges do not generally apply to all sports, nor to all dimensions of sport (in particular professional sport vs. grassroots sport). The fight against racism and violence at sports events is for example an important threat at collective sports grounds (especially at football competitions), but very less likely at individual sports venues (such as tennis, equestrian or motor race events). On the other hand, the transfer of players or the players' agents issues are very significant in professional sports but hardly in grassroots sports. Following the sports stakeholders' calls, the Commission agreed at its

early October conference that the second step dialogue needs to be envisaged from a specific point of view, while also maintaining the generality. Specific themes and groups of interests shall therefore be added to the initially proposed "single sport", "country" and Olympic and Paralympic perspectives⁵.

II. The White Paper's three dimensions

II.1 Societal role

In the White Paper's first section, the Commission recognises sport "as one of the areas of human activity that most concern and bring together the citizens of the European Union", regardless of age or social origin. In consideration of these virtues, the Commission acknowledges the societal role of sport, the importance of which should be taken into account horizontally in the application of other EU policies, namely in the public health, education and training, social inclusion, external relations and environmental policies. The White Paper enhances the values of sport such as the principles of fair-play, compliance with the rules of the game, solidarity, discipline and tolerance as well as its functions of integration and active citizenship. It further recommends that it shall be practised in a healthy environment (fight against doping, racism and violence, protection of the environment).

As far as the fight against doping is concerned, it is worth noting that the Commission considers (in view of the multiplicity of actors and the unsystematic distribution of responsibilities) that its action in this field should only complement the one of existing actors. While the Commission presents itself as a sole facilitator between those actors, it nonetheless calls on actors with a responsibility for public health to take the health-hazard aspects of doping into account in their public health and drug policies. We believe to perceive that the Commission thereby subtly acknowledges the limits of private anti-doping regulations⁶ and that it supports the emergence of complementary public state actions, which could be more effective in the fight against doping⁷. It can however be regretted that the Commission does not consider taking actions at EU level⁸, as despite the increased controls and all the measures already in place, doping in sport continues to raise more problems than solutions. In particular, the ways in which more effective policies may be developed to tackle

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- 1 The White Paper and its accompanying documents can be downloaded on the website of the Sports Unit of DG Culture, Education and Youth: http://ec.europa.eu/sport/index_en.html.
- 2 "Commission adopts White Paper on Sport", Press Release IP/07/1066.
- 3 See the IOC-FIFA Joint Declaration, the IRB Statement and the Statement of the European Team Sports - EU White Paper on Sport: Much work remains to be done, Press Releases 11/07/2007.
- 4 IOC/FIFA LOC-FIFA Joint Declaration - EU White Paper on Sport: Much work remains to be done, Press release 11/07/2007.
- 5 See Impact Assessment, p. 58.
- 6 By way of comparison, in the chapter relating to the fight against corruption,

the Commission expressly recognizes that "the sports sector cannot tackle the problem alone" (see p. 52 of the accompanying document "The EU and Sport: Background and Context").

- 7 Recent cases have shown the effectiveness of public state law and investigation means and measures, as for example the case Puerto in Spain, the case Festina in France or the case Marion Jones in the USA. Moreover, the interest of public state law is that its investigation means and measures permit to broaden the inquiry to the athlete's circle. See in this respect the interview of Jacques Rogge "Pour Jacques Rogge, la multiplication des affaires de dopage 'décrédibilise' le sport", in *Le Monde*, 15.10.2007.
- 8 On the basis of article 152 of the Treaty and as also requested by the European Parliament Resolution of the European Parliament on combating doping in sport, 14 April 2005, OJ C 33, E/590, 2006.

the problem would require focusing in a deeper way on the causes of doping, and not primarily on its consequences. In this light, the essential question that remains unanswered is: why do the athletes take doping substances? Is it for psychological reasons and self-pride to be the best in their field? Or is it for economic reasons to earn enough money whilst playing sport to support the rest of their lives? Or is it because they encounter (unreasonable) pressure of the people around them (one could think of their coaches, managers, agents, doctors, clubs, sponsors etc.) who also have financial stake in their performances and success? Whatever the answer may be, the Commission should probably take the lead to promote and organise concrete dialogue with the other stakeholders on these questions⁹.

II.2 Economic dimension

The White Paper recognises in its second section the macro-economic impact of sport and its capacity to contribute to the Lisbon objectives of growth and job creation. The Commission is however of the view that the visibility of the economic contributions of the sports sector is very limited. It therefore proposes to develop a European statistical method in order to measure sport's direct and indirect contributions, which would provide a sound knowledge base from which potential policy actions could be envisaged in the future¹⁰.

The Commission also announces that it will carry out an independent study on the financing of grassroots sport and sport for all in the Member States from both private and public sources, and on the impact of on-going changes in this area (namely taking into consideration the intended liberalization of the state-run or state-licensing gambling or lottery services). The idea is to maintain and develop a sustainable financing model for giving long-term support to (grassroots) sports organisations.

Interesting to note is that the Commission acknowledges the importance of the private financing of sport and seems to be willing to favour such financing, namely through the defence of possibilities of reduced VAT rates for sport. The Commission also recognizes sponsorship as playing a major role in the development of sport, most significantly in professional sport, but also in the grassroots sector. The Commission points out that the economic interests of sport need to be taken into account when new policies with an impact on sponsoring are designed¹¹, notwithstanding that these interests need to be balanced against considerations of public health, as well as social and ethical considerations. As far as ambush marketing control is concerned, the Commission notes the growing interest from event organisers to governments to introduce specific anti-ambush laws. While it does not expressly exclude EU action, it however requests that any Internal Market problem relating to sponsorship be addressed in the context of the Commission's policy on Commercial Communications.

II.3 The organisation (and governance) of sport

This section of the White Paper is by far the one that has most caused a lot of ink to flow, as it tackles the issues closest to the hearts of sports

governing bodies and in particular the EU intervention in fields which the sports governing bodies consider to fall under their sole prerogative.

a) The autonomy of sporting organisations¹²

The Commission first acknowledges the autonomy of sporting organisations and representative structures, including those of the leagues, and recognises that governance is mainly the responsibility of sports governing bodies and, to some extent, the Member States and social partners. It also indicates that it is determined to help to develop a set of principles for good governance in sport, such as transparency, democracy, accountability, and representation of stakeholders (associations, federations, players, clubs, leagues, supporters etc.) and to play a role in encouraging the sharing of best practices in sport governance¹³. In the accompanying documents, the Commission further defines the sports organisations' autonomy, declaring that "the autonomy of sport organisations needs to be recognised and protected, within a framework that ensures the implementation of good governance principles such as democracy, transparency and accountability. On this basis, self-regulation shall be encouraged, provided that EU law is respected in areas such as free movement, non-discrimination and competition"¹⁴. As confirmed by Mr Pierre Mairesse¹⁵ at the early October Commission conference, the Commission's position is that the sporting organisations enjoy autonomy to the extent that they respect (i) good governance principles and (ii) EU law. In other words, although equivocally suggested, the Commission does not intend to recognise full autonomy to sporting organisations, but rather a "limited", "supervised" or "conditional" autonomy¹⁶. While the Commission privileges and promotes the view that most sport challenges shall be addressed through self-regulation, it nonetheless reserves itself the right to review the conformity of these self-regulation with the above-mentioned principles. As already identified in the former practice of the EU institutions, the Commission can thus be seen as acting as "a supranational sports regulator - not in the sense of establishing a legislative framework for sport, but as a clearing-house for sport rules"¹⁷. Viewed from a positive angle, "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"¹⁸.

b) Sport specificity¹⁹

On the other hand, the Commission clearly confirms that sport activity is subject to the application of EU law and that Competition and Internal Market provisions apply to sport in so far as it constitutes an economic activity. As pointed out by the Commission, sport is further subject to other important aspects of EU law, such as the prohibition of discrimination on grounds of nationality, provisions regarding the citizenship of the union and equality between men and women. While the specificity of European sport (approached both through the prisms of the specificity of sporting activities²⁰ and the specificity

⁹ See also on this topic Kustec-Lipicer S., *Doping in sport and the EU*, in Sport & EU Newsletter, Issue 3, August 2007.

¹⁰ One can mention in this respect the study of the Swiss Federal Sports Office on the economic impact of the Swiss sports system ("Retombées économiques et développement durable du système sportif suisse"), which has been published on 11 October 2007. This study suggests that in 2005 the sports economy generated CHF 15.1 billion turnover and a value-added of CHF 8 billion, accounting for 1,8 % of the Swiss GDP, as well as 80 300 employments corresponding to 2,5% of the employment sector growth. Sports tourism is identified as the largest contributor. The study can be downloaded (in German, or a French summary) at the following address: <http://www.baspo.admin.ch/internet/bas>

[po/fr/home/medienservice/iimportance.html](http://fr/home/medienservice/iimportance.html).

¹¹ In its recent follow-up to the Green Paper on Commercial Communications in Internal Market, the Commission and the expert Group concluded that there was no need for harmonization of differing national regulations on sponsorship services related to particular products and on TV sponsorship (See pp 31-32 of the accompanying document "The EU and Sport: Background and Context").

¹² The sporting movement defines the concept of autonomy as "the idea that sport, as a civil society movement that emerged on the margins of public authorities' regulation, should remain self-governed by the structures and bodies that have done so over the years, with minimal intrusions by public authorities", Christophe De Kepper, cited in Garcia B., *From reg-*

ulation to governance and representation: agenda-setting and the EU's involvement in sport, in Entertainment and Sports Law Journal, Vol. 5, 2007, § 31.

¹³ Despite the resolutions taken by the sport movement at the 2001 Conference on Governance and Sport, the Commission points out that good governance remains an issue. The "Conference Report & Conclusions" can be downloaded at the following address: <http://www.governance-in-sport.com/>.

¹⁴ "The EU and Sport: Background and Context", p. 41.

¹⁵ Director of DG Culture, Education and Youth.

¹⁶ On the concept of "limited or supervised autonomy" see Gardiner S./James M./O'Leary J./Welch R. (...), *Sports Law*, Sydney/London, Cavendish Publishing

2006 (Third Edition), p. 170 and the references.

¹⁷ Parrish R., *Sports law and policy in the European Union*, Manchester, Manchester Univ. Press 2003, p. 219.

¹⁸ Weatherill S., *European Sports Law*, T.M.C. Asser Press 2007, p. 5.

¹⁹ "Sports organisations are still up to produce a clear definition of what the specificity of sport is. Very broadly speaking, the so-called specificity of sport can be understood as the inherent characteristics of sport, both as a social and economic activity, which can justify a tailored application of EU law and policies. The most common example is that of the necessity of balanced competitions, as recognized by the ECJ in *Bosman*", in Garcia B., *op.cit.* fn. § 31 and the references.

²⁰ Such as separate competitions for men and women, limitations on the number

of the sport structure²¹) will continue to be recognised, the Commission considers that it cannot be construed as to justify a general exemption from the application of EU law.

As far as European competition law is concerned and in line with the ECJ *Meca-Medina* ruling²², the Commission confirms the dismissal of the notion of “purely sporting rules” as irrelevant to question the applicability of EU competition rules to the sport rules. It also reiterates the need of an assessment of the sporting rules²³ on a case-by-case basis²⁴ pursuant to a three steps methodology: (i) the overall context in which the rule was adopted or produces its effect, and its objectives, (ii) whether the restrictions caused by the rule are inherent in the pursuit of the objectives, and (iii) whether the rule is proportionate in light of the objective pursued. The Commission nevertheless reminds that the case law of the European courts and decisions of the Commission²⁵ provide guidance (although the Commission stressed they do not constitute guidelines) on how EU law applies to sport.

III. Stakeholders' position

III.1 The “legal certainty” issue

The conclusions of the Commission have given rise to strong protests and opposition by numerous sports federations. Even before the official release of the White Paper, FIFA's President Sepp Blatter has warned of war with EU over sports reforms and called that the European politicians leave sport in peace. He asked IOC's President Jacques Rogge to “take the reins so that Brussels does not present an irreversible document”. The latter declared that he fully agreed and added “We will fight together”²⁶. In their subsequent joint statement²⁷, echoed by the European Team Sports and later by the International Rugby Board, governing sporting bodies pointed out that they are committed to the promotion of the key features of the European sports model²⁸ and that they would like to see the Commission work alongside them to defend and nurture this model of sport. In particular, they lamented that the White Paper would not give “concrete expression to the Nice Declaration including providing sport with a more stable legal environment for the future, fully recognising both the autonomy and specificity of sport as well as the central role and independence of the sports federations (governing bodies) in organising, regulating and promoting their respective sports”. They declared that they will continue to work with the EU Member States, the European Parliament and the Commission, “in order to ensure the appropriate inclusion of sport in the Reform Treaty and any other relevant European regulatory initiatives”.

At the early October Commission conference, UEFA, FIA as well as other governing bodies joined these view, repeatedly calling for an end to “legal uncertainty” which they believe is threatening the future organisation of sport in the EU and for a return to the conclusions of the Nice Declaration, which they claim better recognised the specificity of sport. The EPFL adopted a more moderate position: it welcomed the Commission's promotion of sporting bodies' self-regulation as well as the limits set to their autonomy in terms of good governance principles and conformity to EU law, and called for accrued openness, democracy, transparency and representation of the leagues in the governing bodies. It however alleged that the case-by-case approach leaves too much room for legal uncertainty and claimed that the Commission would define a framework that clearly sets the limits of EU law. The G-14 for its part took a firmer view and opposed that the European institutions' intervention in sport has been limited to cases where EU law was breached and thus marginal. It supported the view that there is no need for further legal certainty, as it already exists, and that the governing bodies' call in this respect “has no other objectives than to remove the regulatory activity of international federations from the scope of European law, which would set a dangerous precedent”²⁹. The G-14 also stressed that it is important to remember that international federations are not public sector organisations; rather they are private entities often based outside the EU and who in addition to their regulatory activity, are ever-growing, major commercial actors in the fields they regulate. The FIFPro joined the G-14 and declared to dread the recognition of the sport specificity as defined by the sports governing bodies fearing that international fed-

erations could breach EU labour law provisions with complete immunity.

III.2 The sporting organisation's autonomy

IOC and FIFA additionally claimed that the White Paper is “structured in full contradiction with the actual architecture of the Olympic movement, ignoring in particular the regulatory competences of the International Federations and the division of responsibilities between the latter and their European Confederations (...)”³⁰ These concerns are directed against the White Paper conclusion that recognises the autonomy of sporting organisations and representative structures, such as the leagues. This position has also been supported by the International Hockey Federation and the European Swimming Federation, who indicated at the early October conference that the recognition of the autonomy of the leagues is not compatible with the European model of sport³¹ and that more weight shall be given to the federations.

While the sports governing bodies' monopolistic position is (to some extent) necessary to ensure the coherent running of the sporting movement and of the sport they represent, we believe that good governance principles, notably representation of stakeholders, democracy and transparency certainly can provide adequate tools to reconcile on the one hand the interests of the governing bodies and the ones of the sport they represent and, on the other hand, those of the other representative structures, such as the leagues or clubs.

IV. Proposed measures

The specific activities foreseen in the Action Plan Pierre de Coubertin constitute a mix of soft-law instruments containing new measures while also building on existing policies and actions. They take the form of studies and surveys, platforms and networks, political cooperation and structured dialogue, recommendations and the mobilisation of programmes as well as other financial instruments.

In the absence of a specific legal competence for sport in the Treaty, the White Paper's avowed purposes are:

- to give strategic orientation on the role of sport in Europe,
- to encourage debate on specific problems,
- to enhance the visibility of sport in EU policy-making, to raise awareness of the needs and specificities of the sector, and
- to identify the appropriate level of further action at EU level.

At first glance, one could join the statements of the sports governing bodies by saying that the proposed instruments seem to be inadequate to prove real effectiveness. In this perspective, it has first to be reminded that EU has for the time being no specific competence in the field of sport in the Treaty, which also explains the modesty of the proposed set of actions.

The governing bodies' position on the lack of effectiveness of the

of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions, see the White Paper p. 13.

21 Including notably the autonomy and diversity of sports organisations, a pyramid structure of competitions from grassroots to elite level and operators, the organisation of sport on a national basis, and the principle of a single federation per sport, see the White Paper p. 13.

22 Case C-519/04, ECR 2006 Page I-06991.

23 Provided that the sports association that adopted the rule is to be considered as an “undertaking” or an “association of undertakings”.

24 As opposed to general guidelines on the application of competition law to the sport sector.

25 An extensive and detailed overview of which is attached in Annex 1 to the accompanying document “The EU and

Sport: Background and Context”

26 “Soccer-FIFA's Blatter warns of war with EU over sports reforms”, Reuters 5/07/2007.

27 See fn n° 4.

28 Namely the protection of fair and open competition, the promotion of athlete and player education and training, the maintenance of competitive balance and the need to protect the integrity of their respective sports, to which the International Rugby Board added the mutual dependency and solidarity at all levels of sport.

29 Clubs joint letter to EU Governments regarding Reform Treaty (co-signed by Euroleague basketball and Group Club Handball), 08/10/2007, which can be downloaded at the following address: www.g14.com.

30 IOC/FIFA IOC-FIFA Joint Declaration - EU White Paper on Sport: Much work remains to be done, Press release 11/07/2007.

proposed measures is all the more surprising since they vehemently claim on the other hand the recognition of their full autonomy, which could hardly be reconciled with more coercive actions from the EU.

Further, the latest developments also prove that the comprehensive structured dialogue already bears some fruits. On 12 October 2007, UEFA and FIFPro indeed signed a "historic"³² memorandum of understanding³³, which aims at reinforcing their cooperation and dialogue on the major issues in football today and develops contract minimum requirements for European Professional Football Players. UEFA and FIFPro declared to be "convinced of the need to find, within the football family, especially in Europe, solutions to the challenges currently facing the various parties in football, whether UEFA, the Associations, leagues, clubs or players, as well as structures and mechanisms to allow crucial dialogue between all these parties". If this memorandum integrates a strong message from the football world that it intends to find solutions on its own - at the exclusion of public interference³⁴ - it does on the other hand encouragingly incorporate the good governance principles promoted by the White Paper.

V. Update on the Reform Treaty

In conclusion to the White Paper, the Commission indicated that the White Paper had taken full advantage of the possibilities offered by the current Treaties and left the door open to return to the sport issue and indicate further steps if the Reform Treaty gives it new powers.

At its early October conference, Commissioner Ján Figel confirmed that the Draft Reform Treaty that will be submitted to the vote at the IGC in Lisbon end of October 2007 includes references to sport (article 6 lit. e and article 149)³⁵.

Generally unhappy with the conclusions of the White Paper, sports governing bodies have since then been actively lobbying in favour of the creation of a legal basis for sport in the EU Reform Treaty, hoping that it would better address the needs of sport and secure their interests³⁶. The IOC, acting on behalf of the Olympic Movement, recently supported that the organisation is hopeful that this text, which clearly refers to the autonomy of sport, will make its way into the Treaty. "The responsibility sport has in society and the autonomy with which it regulates itself are central to its credibility and legitimacy", said IOC President Jacques Rogge. "Autonomy thus means preserving the values of sport and the existing structures through which it has developed in Europe and around the world. Sport can play its unique role thanks to its autonomy, and this role would be seriously compromised if sport-governing bodies are subject to public interference. Therefore the IOC and the sports movement as a whole hope that this aspect will be taken into consideration", he added.

On 25 September 2007, UEFA's President Michel Platini had also written to heads of European governments expressing his concern that the development of European football is seriously threatened by what he calls 'the malign and ever-present influence of money'³⁷. "It is a sobering thought that this distortion of sporting values is not generating an appropriate response from our European institutions, which obstinately refuse to recognise the special nature of sport and the need for sporting rules which ensure the fairness and balance of competitions," said Mr Platini. The UEFA President called for sport to be given more discerning treatment at European level, taking its unique aspects into consideration. The specific nature of sport, he added, is not protected. The article on sport in the forthcoming EU Reform Treaty, Mr Platini emphasised, "does not go far enough to protect football from the rampant commercialism which assails it on all sides". The answering letter of the G-14 dated 2 October 2007³⁸ backed the current legal system which effectively makes sports answerable to general principles or national and European law.

The proposed insertion of sport in the Reform Treaty is based on the text that was originally proposed for insertion in the Draft Treaty Constitution, if approved, the Reform Treaty would provide the necessary legal and financial basis for the further development of a coherent sports policy. It would comprise general and high profile goals such as the development of the European dimension in sport, the promotion of fairness and openness in sporting competitions and cooperation between sports bodies, and the protection of and moral

integrity of sportsmen and sportswomen. It is worth pointing out that the envisaged text only mentions that the Union shall take "account of its specific nature, its structures based on voluntary activity and its social and educational function". Contrary to what the federations may wish, this particular clause will not go any further in the recognition of their autonomy and specificity and is certainly not going to reverse the conclusions of the White Paper. The EU would only be obliged to take into account the specific nature of sport in its policies. The evasive formulation of this provision could however give rise to a lot of controversy and risk of being invoked and interpreted inappropriately³⁹.

VI. Conclusion

The reasons of EU institutions' growing attention and intervention in the sport sector lies in the fact that sports governing bodies have evolved from non-profit associations regulating and governing the practice of their sports to commercially orientated bodies with huge profit possibilities. In this context, it has become increasingly necessary to be able to assess whether these monopolistic bodies can still be trusted to continue to be the "custodians" of their sport and essentially be self-policing⁴⁰. As mentioned by Stephen Weatherill⁴¹, we agree that "the issue at bottom is one of governance: the tension that runs through the sports pyramid structure is created by the conflict of interest held by the governing bodies. While the pyramid makes obvious sense as a mean to arrange decision-making on the rules of the game, it is more controversial in so far as commercially sensitive decisions emerge from the process".

We are of the view that the White Paper has addressed these concerns in a balanced way, recognizing on the one hand that self-regulation shall continue to be the norm, while clearly pointing out on the other hand that good governance principles and EU law are to be considered as inherent limits to the autonomy of sporting bodies. However, we agree with the sporting bodies that the proposed case-by-case approach could be improved, especially with respect to the application of the proportionality test, which could lead to inconsistent judgements and harm the needs of legal certainty.

Together with the Commission, we believe that certain issues could be better addressed from a European perspective, such as the players' agents concerns, the fight against corruption or the protection of minors, as these issues are affecting sport at local, national and European levels. We conversely regret the timid position of the Commission on the fight against doping.

The Commission will certainly still face a lot of challenges and opposition in implementing the White Paper, namely due to the fact that numbers of issues that it is addressing have a broader impact than the EU borders. In this context, the Commission shall probably also give some concern to the call of European federations to be considered as the Commission's primary interlocutors.

In consideration of the latest developments and the probable insertion of sport in the Reform Treaty, and although there is obviously still a lot of work to be done, we believe that the White Paper will continue proving that the Commission made the right choice in

31 As federations represent both the professional and grassroots sport as opposed to professional leagues.

32 See AFP 12/10/2007, UEFA and footballers' union sign 'historic' agreement.

33 Which can be downloaded at the following address: www.fifpro.org.

34 The parties namely recognise "the specificity of sport, the autonomy of federations and the fact that football is best served by the existing football family structures (although the balance of representativeness of key stakeholders within those structures can be developed further)".

35 The text of the Draft Reformed Treaty is available at the following address: http://www.consilium.europa.eu/cms3_fo/

[showPage.asp?id=1317&lang=en&mode=g](http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1317&lang=en&mode=g)

36 "IOC optimistic about seeing article on sport strengthened in the EU Reform Treaty", Press Release 5/10/2007.

37 A summary of the letter can be downloaded at the following address: <http://www.uefa.com/news/newsid=590357.printer.htm>.

38 *Op.cit.* fn 29.

39 Also see on this issue, Van Den Bogaert S./Vermeersch A., *Sport and the EC Treaty: a tale of uneasy bedfellows*, in *European Law Review*, 12/2006. 2006/6, pp. 821-840, sp. 839.

40 Gardiner S./James M./O'Leary J./Welch R. (...), *op.cit.* fn 16, p. 38.

41 Weatherill S., *op.cit.* fn 18, p. 11.

choosing a political and non-binding instrument, as well as soft-law measures. It is already certain that the White Paper has favoured a large scale debate that will permit the definition and adoption of well-balanced solutions and compromises necessary to preserve the European Model of Sport.

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International Workshop on The White Paper on Sport
TMC Asser Institute, The Hague
Friday February 22nd 2008



Morning The Social and Economic Function of Sport	Afternoon The Organisation of Sport
<p>9.30-10.00: Welcome: The White Paper on Sport Robert Siekmann (TMC Asser Institute) and Richard Parrish (Edge Hill University)</p> <p>10.00-10.30: Age Discrimination in Sport David McArdle (University of Stirling)</p> <p>10.30-11.00: Sport and Social Inclusion in the EU Andy Smith and Chris Platts (University of Chester)</p> <p>11.00-11.30: Refreshments</p> <p>11.30-12.00: Ticketing in Sport Guy Osborn (University of Westminster)</p> <p>12.00-12.30: Public Order & Sport Mark James (University of Salford) and Geoff Pearson (University of Liverpool)</p> <p>12.30-1.30: Lunch taken at the Institute</p>	<p>1.30-2.00: Media Rights Andrea Pinna (University of Rotterdam)</p> <p>2.00-2.30: Nationality, Identity and Social Inclusion Jack Anderson (Queen's University, Belfast).</p> <p>2.30-3.00: Home-grown Players Stefaan van Den Bogaert (University of Maastricht)</p> <p>3.00-3.30: Refreshments</p> <p>3.30-4.00 Players' Agents Steven Jellinghaus (University of Tilburg)</p> <p>4.00-4.30: Meca-Medina and Competition Law Marjan Olfers (TMC Asser Institute)</p> <p>4.30-5.00: Social Dialogue in Sport Frank Hendrickx (University of Tilburg)</p> <p>5.00-6.00: Reception</p>

The organisers, the TMC Asser Institute and Edge Hill University, wish to acknowledge the generous support of The British Council - NWO Partnership Programme in Science. If you would like to attend this workshop please contact Richard Parrish (parrishr@edgehill.ac.uk).

Introduction

On 30 January 2008, the Court of Arbitration for Sport (CAS) rendered its judgment in what is commonly referred to as the “Webster case.” This case revolves around the question of the amount of the compensation that the player Webster must pay to his former club, Heart of Midlothian F.C. (hereinafter “Hearts”) for breaching his contract with that Scottish club prematurely and unilaterally after the expiry of the Protected Period.

In an extensively argued decision, CAS reached the conclusion that Webster must pay the residual value of the contract (between Webster and Hearts) as compensation. The judgment stated that in the course of the session, the parties reached agreement on the amount of that residual value: £ 150,000.

Principally, CAS considered that Article 17 of the FIFA Regulations for the Status and Transfer of Players (hereinafter the “FIFA Regulations”), under which Webster breached his contract, is not an exception to the main rule that contracts may not be unilaterally terminated, and therefore cannot be seen as a provision allowing a club or a player to unilaterally terminate a contract, without grounds, whether during or after the Protected Period. Termination of a contract under Article 17 can be seen as wrongful breach of contract, and as such Webster must pay compensation to Hearts.

On the issue of the determination of the amount of the compensation for breach of contract, CAS considers that priority must be given to the provisions in that area in the contract in question. If the contract has no provisions in that area (which was the case with Webster’s contract), the amount of the compensation must be determined based on the criteria in Article 17 of the FIFA Regulations, which refer to the law of the country in question, the specificity of the sport and other criteria, with the most important factors being the player’s remaining salary under the existing contract, the transfer sum that the player’s old club may have to pay (spread out over the entire term of the contract) and whether the breach of contract was within or after the Protected Period.

CAS considers that which of these aspects must be considered in the specific case in the determination of the amount of the compen-

sation to be paid depends on the circumstances of the breach (during or after the Protected Period, breach by club or by player).

CAS is of the opinion that the protection that clubs enjoy during the Protected Period (severe penalties on breach by the players) entitles the players to some degree of protection after the Protected Period. In CAS’s view, if the compensation for breach to be paid after the Protected Period were to be punitive in nature or result in a financial benefit to the club, this would be a violation of that protection. The compensation for breach after the Protected Period must be the same for both players and clubs, and must be set on the basis of criteria that lead to this equality of compensation.

With this in mind, CAS considers that the determination of the amount of the compensation to be paid by Webster cannot be based on any hypothetical value of the player on the transfer market (club’s loss of profit), nor can it take into account the player’s transfer value, for the reason that either one would enrich the club and express a punitive measure against the player. In its judgment CAS determines that independently of such considerations there is no economic, moral or legal justification for a club to demand the market value of the player as loss of profit.

Finally, CAS considers that the value of the contract between Webster and his new club (Wigan Athletic) is irrelevant to the determination of the amount of the compensation to be paid, being that the only relevant factor is the value of the contract breached by Webster.

CAS concludes by determining that the compensation to be paid by Webster to Hearts must be the remaining value of Webster’s contract with Hearts. If a club prematurely terminates a temporary contract with a player, it must generally pay that player the remaining salary under that contract, and so in view of the consideration that after the Protected Period the compensation upon breach must be the same for both club and player, this rule must be applied in the event of termination by a player.

The Editors

The CAS Appeal Decision in the Andrew Webster Case

by Ian Blackshaw*

Introductory

Since FIFA, the world governing body of football, joined the Court of Arbitration for Sport (CAS) in 2002, the word bad of CAS has increased exponentially with football-related disputes of various kinds being referred to it - not least transfer disputes. Most of these cases are appeals from decisions rendered by the FIFA Dispute Resolution Chamber (DRC). One such recent appeal to CAS, which raised a number of interesting points of sports law, concerned the case of Andrew Webster, a twenty-five year old professional football player, currently on loan to Glasgow Rangers, after having been transferred from Heart of Midlothian (Hearts) to Wigan Athletic football club (CAS 2007/A/1298,1299 & 1230). The Award in this CAS appeal was handed down on 30 January, 2008 and published on the CAS official website (www.tas-cas.org).

In dealing with all appeals, CAS rehears the case *de novo* pursuant to the provisions of Art. R57 of the CAS Code of Sports-related Arbitration (2004 Edition), which provides that:

“The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.”

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In other words, the CAS acts as a revising body (rather like a court of cassation) and, as such, is often referred to as the ‘Supreme Court for World Sport’.

The present dispute arose out of the unilateral termination, without just cause, of Webster’s contract of employment with Hearts 26 May 2006. The background leading up to this termination is described in section D (‘The Origin of the Dispute’) (paras. 8-36) of the CAS Award. Hearts claimed compensation for unjustified breach of contract by Webster under the provisions of Article 17 of the FIFA Regulations for the Status and Transfer of Players (December 2004, edition) (referred to in the CAS Award and also hereafter as ‘the FIFA Status Regulations’) and the DRC awarded them the sum of £625,000 on 4 April, 2007. The parties appealed to CAS.

Article 17 of the FIFA Status Regulations

The main issue, amongst several subsidiary ones, including applicable law questions (the Panel deciding that Swiss Law applied rather than Scottish Law, on which point, see later), to be decided by CAS was the amount of compensation to be awarded to Hearts pursuant to the provisions of Article 17 of the FIFA Status Regulations, which provide as follows:

“Article 17 Consequences of Terminating a Contract Without Just Cause The following provisions apply if a contract is terminated without just cause:

1. In all cases, the party in breach shall pay compensation. Subject to the provisions of Art. 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the

law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period.

2. Entitlement to compensation cannot be assigned to a third party. If a Professional is required to pay compensation, the Professional and his New Club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.
3. In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the Protected Period. This sanction shall be a restriction of four months on his eligibility to play in Official Matches. In the case of aggravating circumstances, the restriction shall last six months. In all cases, these sporting sanctions shall take effect from the start of the following Season of the New Club. Unilateral breach without just cause or sporting just cause after the Protected Period will not result in sporting sanctions. Disciplinary measures may, however, be imposed outside of the Protected Period for failure to give due notice of termination (i.e. within fifteen days following the last match of the Season). The Protected Period starts again when, while renewing the contract, the duration of the previous contract is extended.

The Ratio Decidendi of the Award

The interpretation by the CAS and the application of these provisions to the present case are set Out in section C ('Merits of the Appeals') (paras. 125-154) of the CAS Award, which, in view of their importance, are set out *in extenso* as follows:

"b) Level of Compensation Owed by Hearts

iii. The Interpretation and Application of Article 17 of the FIFA Status Regulations

125. ... the Panel shall now analyse the factors to be taken into consideration according to the wording of article 17 of the FIFA Status Regulations when determining the level of compensation. Article 17(1) refers to three categories of factor, which the Panel shall examine in turn: the law of the country concerned, the specificity of sport and any other objective criteria (followed by a list of examples).
126. With respect to the law of the country concerned and as indicated earlier, the Panel considers that it is Scottish law but that the Panel has the discretion to decide whether or not any provisions of Scottish law should be applied in determining the level of compensation.
127. The Panel finds there are several reasons not to apply the rules of Scottish law invoked by Hearts.
128. One reason is that Hearts is relying on general rules and principles of Scottish law on damages for breach of contract, i.e. on provisions of Scottish law that are neither specific to the termination of employment contracts nor to sport or football, while article 17 of the FIFA Status Regulations was adopted precisely with the goal of finding in particular special solutions for the determination of compensation payable by football players and clubs who unilaterally terminate their contracts without cause. In other words, it is important to bear in mind that it is because employment contracts for football players are atypical, i.e. require that the particularities of the football labour market and the organization of the sport be accounted for, that article 17 was adopted. At the same time, footballers' contracts remain more akin to employment contracts (and are generally characterized as such under national laws), than to some form of commercial contract to which general rules on damage are applicable.
129. The Panel therefore sees no reason to renounce application of the specific solutions and criteria laid down in article 17 of the FIFA Status Regulations in favour of general rules on contract damages. On the contrary, the fact that several of the applicable choice-of-law rules (article 60§2 of the FIFA Statutes and

art. R58 of the CAS Code) underline the primary application of the regulations chosen by the parties, that article 17(1) itself refers to the specificity of sport and that it is in the interest of football that solutions to compensation be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country, are all factors that reinforce the Panel's opinion that in this case it is not appropriate to apply the general principles of Scottish law on damages for breach of contract invoked by Hearts.

130. Consequently, in determining the level of compensation, the Panel will not rely on Scottish law.
131. With respect to the "specificity of sport", article 17(1) of the FIFA Status Regulations stipulates that it shall be taken into consideration, without however providing any indication as to the content of such concept.
132. In light of the history of article 17, the Panel finds that the specificity of sport is a reference to the goal of finding particular solutions for the football world which enable those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players, on the other hand, i.e. to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of clubs and players.
133. Therefore the Panel shall bear that balance in mind when proceeding to an examination of the other criteria for compensation listed in article 17.
134. With regard to the other criteria for determining compensation, article 17(1) leaves a substantial degree of discretion to the deciding authority to account for the circumstances of the case, since after stipulating that compensation may be calculated on the basis of "*any other objective criteria*", it provides that "*These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the breach falls within a Protected Period*".
135. In that relation it is noteworthy that independently from the specificities of a given case, the criteria listed in article 17 need to cope with a number of categories of cases, notably those where unilateral termination occurs inside the protected period as distinct from those where it occurs outside such period and those cases where unilateral termination is by the Player as distinct from those where termination is by the Club. It is therefore logical that article 17(1) includes a broad range of criteria, many of which cannot in good sense be combined, and some of which may be appropriate to apply to one category of case and inappropriate to apply in another,
136. Furthermore, in seeking to balance appropriately the interests of clubs and players for the good of the game, it is necessary to bear in mind that because article 17 of the FIFA Status Regulations applies to the unilateral termination of contracts both by players and by clubs, the system of compensation provided by article 17 must be interpreted and applied in a manner which avoids favouring clubs over players or vice versa.
137. In the foregoing context, the Panel finds it appropriate to consider that the clubs particular need for contract stability is specifically and adequately addressed by means of the *Protected Period* and the provisions designed to enforce it, which comprise the basic period of protection as defined in paragraph 7 of the "Definitions" contained in the FIFA Status Regulations, the automatic renewal of that period upon the contract being extended (article 17(3), last sentence) and the relatively severe sanctions that can be imposed in case of disrespect for the Protected Period (article 17(3)); such stability being further enhanced for clubs and players alike by article

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The Jurisprudence of the FIFA Dispute Resolution Chamber

by

Frans de Weger

With a Foreword by Michel ZEN RUFFINEN, Attorney at Law and former FIFA General Secretary and Head of the FIFA Legal Division

In 2001 FIFA established a Dispute Resolution Chamber for the purpose of resolving disputes regarding the international status and transfer of players. The DRC has since then developed into a major and influential alternative resolution body, with an impressive and ever increasing caseload. In this book the most important decisions of the DRC are published in their full text and analysed. The relevant judicial aspects in relation to the DRC are addressed, as well as the different categories of disputes, *inter alia*, the termination of employment contracts, the amount of compensation and the sporting sanctions. From the case law of the DRC a so-called *Lex Sportiva* is developing which will help to guide all those with a sporting and financial interest in professional football, such as lawyers, agents, managers and administrators, but also researchers and academics.

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- 16 of the FIFA Status Regulations, which entirely prohibits unilateral termination during the course of a Season.
138. The clubs' special interest having been recognized and protected in such regulatory manner, the Panel finds that, beyond the Protected Period and subject to the parties' contractual stipulations, compensation for unilateral termination without cause should not be punitive or lead to enrichment and should be calculated on the basis of criteria that tend to ensure clubs and players are put on equal footing in terms of the compensation they can claim or are required to pay. In addition, it is in the interest of the football world that the criteria applicable in a given type of situation and therefore the method of calculation of the compensation be as predictable as possible.
139. Accordingly, the Panel deems that in the present case the alleged estimated value of the Player on the transfer market, upon which Hearts is basing its main claim (£4 million), by alternatively claiming such amount as lost profit or as the replacement value of the Player, cannot come into consideration when determining compensation on the basis of article 17(1) of the FIFA Status Regulations because any such form of compensation was clearly not agreed upon contractually and to impose it by regulation would simultaneously cause the Club to be enriched and be punitive vis-à-vis the Player.
140. Indeed, in this case the Player was initially purchased by the Club for an amount of £75'000 whereas it is today claiming a market value of £4 million. This means that independently from the question of amortization of the initial purchase amount, that the Panel shall deal with below, the Club is claiming to be entitled to a profit of at least £3,9 million on the sole premise that it trained and educated the Player.
141. In any event, subject to it being validly agreed by an enforceable contract, the Panel finds there is no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit.
142. From an economic perspective there is no reason to believe that a player's value on the market owes more to training by a club than to a player's own efforts, discipline and natural talent. An empirical study might even demonstrate the contrary, i.e. that a talented and hardworking player tends to fare well, stand out and succeed independently from the exact type of training he receives, whereas an untalented and/or lazy player will be less successful no matter what the environment. Also market value could stem in part from charisma and personal marketing. In any case, it is clear that a club cannot simply assume it is the only source of success of a player and thus claim his entire market value, particularly without bringing any proof (which would be very difficult) of its paramount role in the player's success leading to his market value. In this case, Hearts have underlined the Player's success and alleged his market value but have brought no evidence that the Club entirely or even predominantly generated the alleged market value in question through its training and education.
143. In addition from an economic and moral point of view, it would be difficult to assume a club could be deemed the source of appreciation in market value of a player while never be deemed responsible for the depreciation in value. Consequently, if the approach relied on by Hearts were followed, players should be entitled to claim for example that they are owed compensation for their alleged decrease in market value caused by such matters as being kept on the bench for too long or having an incompetent trainer, etc. Obviously, such a system would be unworkable and would not serve the good of the football.
144. From a regulatory standpoint, to allow clubs to claim the market value of players as lost profit under article 17 of the FIFA Status Regulations would not make sense and would amount to double counting, since, as mentioned earlier, article 20 and annex already provide for a system of compensation to clubs for the training and education of players, and it is not by chance that such compensation is not based on the player's market value but on demonstrable investment made and costs incurred by the club.
145. Moreover, since a club's possible entitlement to the transfer or market value of players is entirely absent from the criteria of compensation listed in article 17(1) and there is no reference to any such form of compensation in favour of Hearts in the Player's employment contract, to apply such criteria and thereby imply it into the contract would contradict both the principle of fairness and the principle of certainty.
146. Finally, because of the potentially high amounts of compensation involved, giving clubs a regulatory right to the market value of players and allowing lost profits to be claimed in such manner would in effect bring the system partially back to the pre-Bosman days when players' freedom of movement was unduly hindered by transfer fees and their careers and well-being could be seriously affected by them becoming pawns in the hands of their clubs and a vector through which clubs could reap considerable benefits without sharing the profit or taking corresponding risks. In view of the text and the history of article 17(1) of the FIFA Status Regulations, allowing any form of compensation that could have such an effect would clearly be anachronistic and legally unsound.
147. For the above reasons, the Panel finds that Hearts is not entitled to claim any part of the Player's alleged market value as lost profit or on any other ground and that as a result its corresponding claim for £4 million must be rejected.
148. Neither can Hearts claim the right to reimbursement of any portion of the fee of £75'000 initially paid by it to purchase the Player from his former club, since according to the criteria laid down in article 17(1) in this respect, which the Panel finds reasonable, that fee must be deemed amortised over the term of the contract, and in this case the Player remained with the club for a longer period in total than the initially agreed fixed term of four years.
149. In addition, the Panel is not convinced that beyond the Protected Period it is admissible for a club to reclaim a portion of the engagement fee as compensation for unilateral termination unless such form of compensation is stipulated in the employment contract, since contractual fairness would tend to require that upon accepting his employment a player be fully aware of the financial engagements he has undertaken and the way in which they can affect his future movements. In other words, if a club expects an engagement fee to be proportionately reimbursable beyond the Protected Period - which is a matter that cannot be implied - there should be a negotiation and a meeting of the minds on the subject.
150. Among the other criteria of compensation referred to in article 17(1), the Panel considers that the remuneration and benefits due to the Player under his new contract is not the most appropriate criterion on which to rely in cases involving unilateral termination by the Player beyond the Protected Period, because rather than focusing on the content of the employment contract which has been breached, it is linked to the Player's future financial situation and is potentially punitive.
151. Instead the Panel finds it more appropriate to take account of the fact that under a fixed term employment contract of this nature both parties (club and player) have a similar interest and expectation that the term of the contract will be respected, subject to termination by mutual consent. Thus, just as the Player would be entitled in principle to the outstanding remuneration due until expiry of the term of the contract in case of unilateral termination by the club [subject it may be, to mitigation of loss], the club should be entitled to receive an equivalent amount in case of termination by the Player. This criterion also has the advantage of indirectly accounting for the value of the Player, since the level of his remuneration will normally bear some correlation to his value as a Player. Thus a Player receiving very high remuneration (and thereby being

able to expect high remuneration in case of a change of club) will have a correspondingly high amount of compensation to pay even if he terminates his contract outside the Protected Period, and the earlier such termination occurs the higher will be the total amount of compensation owed.

152. For the above reasons, the Panel finds that Heart's claim of £330,524 based on the difference between the value of the old and new contract must be rejected and that the most appropriate criteria of article 17(1) to apply in determining the level of compensation owed to Hearts by the Player is the remuneration remaining due to the Player under the employment contract upon its date of termination, which the parties have referred to as the residual value of the contract.
153. Consequently and because the parties have agreed that such residual value represents an amount of £1 50,000, the Panel considers the foregoing amount to be due to Hearts as full compensation under article 17(1) of the FIFA Status Regulations for the Player's termination of his contract.
154. Having determined that Hearts is entitled to such amount as fair and adequate compensation for the Player's unilateral termination of his employment contract and since the criteria listed in article 17(1) are not designed to be cumulative *per se*, the Panel sees no reason to award any other amount as an additional head of damage."

Comments on the Award

It seems to me, from a review of the above reasoning, that, in determining the compensation to be paid in the instant case, the CAS Panel has largely relied on the following two principles: the wide discretion allowed to the deciding authority to assess the compensation in the event of a dispute (interpreting the criteria mentioned in article 17(1) of the FIFA Status Regulations as not being exhaustive but merely illustrative because of the preceding words "in particular"); and the 'specificity of sport' concept as applied to football and its own *sui generis* characteristics and dynamics. In doing so, the Panel has also introduced and been influenced by general principles of fairness and equality of treatment to both sides, justifying that approach with references to what may or may not be for the good of football (shades of the FIFA motto: 'for the good of the game'). See para. 132 of the Award:

"In light of the history of article 17, the Panel finds that the specificity of sport is a reference to the goal of finding particular solutions for the football world which enable those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players, on the other hand, i.e. to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of clubs and players."

See also para. 136 of the Award:

"... in seeking to balance appropriately the interests of clubs and players for the good of the game, it is necessary to bear in mind that because article 17 of the FIFA Status Regulations applies to the unilateral termination of contracts both by players and by clubs, the system of compensation provided by article 17 must be interpreted and applied in a manner which avoids favouring clubs over players or vice versa."

And see further the remarks in para. 138 of the Award:

"... compensation for unilateral termination without cause should not be punitive or lead to enrichment and should be calculated on the basis of criteria that tend to ensure clubs and players are put on equal footing in terms of the compensation they can claim or are required to pay. In addition, it is in the interest of the football world that the criteria applicable in a given type of situation and therefore the method of calculation of the compensation be as predictable as possible."

The Panel also deftly avoided the application of Scottish Law as well

as general principles of the assessment of damages for breach of contract, including the doctrine of '*restitutio in integrum*', by praying in aid the specificity of football. See para. 128 of the Award:

"Hearts is relying on general rules and principles of Scottish law on damages for breach of contract, i.e. on provisions of Scottish law that are neither specific to the termination of employment contracts nor to sport or football, while article 17 of the FIFA Status Regulations was adopted precisely with the goal of finding in particular special solutions for the determination of compensation payable by football players and clubs who unilaterally terminate their contracts without cause."

Even though the Panel then goes on in the same para. of the Award to characterize player contracts as being like employment contracts:

"... it is important to bear in mind that it is because employment contracts for football players are atypical, i.e. require that the particularities of the football labour market and the organization of the sport be accounted for, that article 17 was adopted."

But that is where the similarity ends, and also, with it, the normal principle of calculating damages for breach of contract, namely, that the claimant should be awarded a sum of money that would put him in the same financial position he would have enjoyed had the contract been properly performed. In the event, and relying on the 'specificity of sport' principle as applied to football, the Panel decided that the proper compensation to be awarded in the instant case was the 'residual value' of the player's contract. See para. 151 of the Award:

"... the Panel finds it more appropriate to take account of the fact that under a fixed term employment contract of this nature both parties (club and player) have a similar interest and expectation that the term of the contract will be respected, subject to termination by mutual consent. Thus, just as the Player would be entitled in principle to the outstanding remuneration due until expiry of the term of the contract in case of unilateral termination by the club [subject it may be, to mitigation of loss], the club should be entitled to receive an equivalent amount in case of termination by the Player."

And goes on in the same para. of the Award to justify this approach in the following terms:

"This criterion also has the advantage of indirectly accounting for the value of the Player, since the level of his remuneration will normally bear some correlation to his value as a Player. Thus a Player receiving very high remuneration (and thereby being able to expect high remuneration in case of a change of club) will have a correspondingly high amount of compensation to pay even if he terminates his contract outside the Protected Period, and the earlier such termination occurs the higher will be the total amount of compensation owed."

I must say, however, leaving logic aside, because in pure logic the equal treatment argument of player and club follows, I find this approach may produce a strange result, because the losses of both sides are not necessarily the same in all cases. Even though the members of the Panel are at pains to establish a general principle which can be applied in all cases with the resulting legal certainty - a laudable objective. However, for example, the club may have to replace the player, who has unilaterally breached his contract before it has run its agreed course, with a player of equivalent sporting ability and standing, who may cost the club more than the original player. Indeed, article 17(1) also provides for the application of "other objective criteria" in assessing compensation, so surely an additional cost for hiring another equivalent player to play for the club for what is left to run on the original player's contract is an objective factor that should be taken into account in assessing the proper compensation to be paid to the club. However, I suppose that this curious result can be put down to the Byzantine peculiarities of football finances! But, in any case, the Panel seized on the fact that both parties to the present dispute agreed on the amount of the 'residual value' of the player's contract and so, it would appear, that justice was done.

Be that as it may, clearly, if clubs and players wish to claim for more than the so-called 'residual value' of the contract, as defined above, such as the market value of the player, they will need to include express provisions to that effect in their contracts of employment, as article 17 of the FIFA Status Regulations expressly provides that the criteria for assessing compensation for breach of contract by either side set out in sub-clause 1 are subject to whatever else may be expressly included in the player's contract. Likewise, the same principle also applies to the recovery of so-called 'engagement fees'.

The Webster Case: Justified Panic as there was after Bosman?

by Frans de Weger*

As we know, the notorious *Bosman* case had a major impact on the international football world and can be regarded as one of the most important sports cases in history.¹ In it the European Court of Justice stressed in 1995 that transfer compensation to be paid by a club for a player who had ended his contractual relationship with his former club was not permitted, violating the free movement of people within the European Union. This was a serious shock to the international football world. Clubs faced particular difficulties after the *Bosman* case, in that they had to prevent players reaching the end of their contracts and then running off freely. The clubs had to invent legal constructions to maintain a stronger hold on their players. So they began negotiating contracts for longer periods, and were tempted to draft contract clauses allowing them to secure compensation for their losses.² Another method the clubs invented after *Bosman* was to insert clauses whereby they unilaterally reserved the right to extend the agreement, the so-called unilateral extension option. This unilateral extension option is now generally a standard feature of player contracts.

The Court of Arbitration for Sport (CAS) recently ruled the so-called '*Webster case*'.³ Here the CAS decided that the player was permitted to terminate his employment contract unilaterally after the so-called '*protected period*'.⁴ The CAS also decided that as a result of his termination after the protected period, player *Webster* only had to pay the remaining value of his contract to his former club as compensation. The football world again reacted with panic. FIFA was also highly dismayed at the CAS decision, stating that this verdict in the player's favour would have far-reaching and damaging effects on the game as a whole.⁵ The important question now is whether it will indeed be another landmark judgment in the world of sports law. In other words, does this mean that every player who terminates his employment contract after the protected period only has to pay the remaining value of his contract as compensation? Or more importantly, will clubs once more face serious difficulties, given that players might be entitled to terminate their contracts unilaterally after this protected period? Let us begin with the facts of the case.

Conclusion

The CAS Award in *Webster* certainly provides a comprehensive and careful review of the general principles to be followed in interpreting the provisions in article 17 of the FIFA Status Regulations for determining the *quantum* of compensation to be paid for the unjustified breach of a player's contract of employment, whether this occurs within or outside the 'protected period'. And for that reason may be welcomed. But whether or to what extent this Award will contribute to the developing *lex sportiva* of the CAS, irrespective of the fact that, in theory, each CAS Panel is not obliged to follow previous Panel decisions in similar cases (*stare decisis*), remains to be seen.

Scottish international Andrew *Webster* was a player with Heart of Midlothian. In 2006 he was relegated to the bench after a conflict with club owner Vladimir Romanov. This motivated *Webster* to terminate his contract. He did it outside the protected period, so that no sporting sanctions would be imposed.⁶ Then he signed a new contract with Wigan Athletic. But Heart of Midlothian did not agree to the termination and refused to cooperate in the transfer to Wigan Athletic. *Webster* thus appealed to FIFA, asking for a provisional registration for his new club; this was allowed by the PSC's Single Judge. Now the dispute was only about the amount of compensation. Heart of Midlothian claimed a market value of GBP 5,000,000. The DRC believed that the player had terminated his contract outside the protected period - a highly important element in establishing the compensation amount.⁷ The DRC decided it was undeniable that the unilateral termination had occurred after three seasons, i.e., after the protected period and within 15 days of the season's last match. It referred to the maintenance of contractual stability, which represents the backbone of the agreement between FIFA/UEFA and the European Commission signed in March 2001. In this decision, the DRC referred to Article 17 Paragraph 1 of the Regulations for the Status and Transfer for Players (RSPT), edition 2005, which provides the key to assessing the amount of compensation due by a player to a club.⁸ Here it states that compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of the sport and other objective criteria such as the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club and whether the breach falls within the protected period. In this case the remaining value of the player's employment contract was EUR 199,976. But the DRC again emphasised that he could not terminate his contract by simply paying his club the remaining value of his contract, citing article 17 mentioned above. Besides his basic salary, the player also received a number of appearance bonuses and the former transfer compensation of EUR 75,000 also had to be taken into consideration, as well as the five seasons the player had spent with his club, the DRC stated. It noted another crucial factor to be taken into account: the way in which his club had contributed to the

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1 Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman Royal Club liégeois SA v. Jean-Marc Bosman. SA d'Economic Mixte Sportive de l'Union Sportive du Littoral de Dunkerque, Union Royale Belge des Sociétés de Football Association ASBL, Union des Associations Européennes de Football Union des Association Européennes de Football v. Jean-Marc Bosman*, judgment of 15 December 1995, [1995] ECR I-4837. See Aaron Wise and Bruce S. Meyer, *International Sports Law and Business*, Vol. 2, The Hague, Kluwer Law

International 1997) p. 1104/1105. See also Lars Halgreen, '*The European Regulation of Sport*', 3/4 ISLJ (2005) p. 47.

According to Halgreen there was an unmistakable feeling among sports associations that they were beyond legal control.
2 Stephen Weatherill, *European Sports Law*, p. 67.
3 CAS 2007/A/1298 "*Wigan Athletic FC v Heart of Midlothian*". CAS 2007/A/1299 "*Heart of Midlothian v Webster & Wigan Athletic FC*". CAS 2007/A/1300 "*Webster v Heart of Midlothian*".
4 A club and a player entering into an agreement should in principle respect and honour the contractual obligations during

the term of the contract, also known as the principle of *pacta sunt servanda*. FIFA therefore introduced the so-called '*protected period*', which was meant to safeguard the maintenance of contractual stability. The protected period is the period of three entire seasons or three years, whichever comes first, following the entry into force, if such contract was concluded prior to the professional's 28th birthday. If the professional's contract was concluded after his 28th birthday, the protected period is two seasons or two years. FIFA intended to protect a certain period of the contract by discouraging players and clubs from terminating the contract during the protected period. FIFA believed that unilateral termination of a contract without a

justified reason, especially during the protected period, had to be vehemently discouraged. See FIFA Commentary, explanation Art. 13, p. 38.

5 See FIFA website: <http://www.fifa.com/aboutfifa/federation/releases/newsid=682195.html>.

6 For example, if a 24-year-old player signs his first contract and unilaterally terminates it two years later, one can speak of a termination within the protected period. He will then not only be subjected to sporting sanctions, but the amount of compensation will also be relatively high. If the player unilaterally terminated his contract four years after signing the contract, he will not be subjected to sporting sanctions and the amount of compensa-

player's steady improvement. These considerations together produced the conclusion that *Webster* should pay his former club GBP 625,000.⁹ Finally the DRC's statement also emphasised that the player was ineligible to participate in any official football match for two weeks from the beginning of the following national league championship for which he was registered, for failing to give Heart of Midlothian due notice of termination.¹⁰

But *Webster* disputed the DRC's 4 April 2007 decision and appealed to the Court of Arbitration (CAS) in Lausanne, Switzerland.¹¹ He believed the compensation amount to be excessive. He also thought it wrong that the DRC had imposed a two-week playing ban as it was disproportionate to the four-day delay in the service of the player's notice. The CAS decided as follows.¹² On the appeal concerning the two weeks' ineligibility as a disciplinary measure, it ruled that it had no jurisdiction to entertain an appeal against that part.¹³ It also concluded that the DRC had failed to meet the requirements of article 13.4 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber which provides that the decisions of the DRC must contain '*reasons for its findings*'. The CAS was of the opinion that in this case the DRC had failed to meet the requirements of FIFA Rules article 13.4, since although the DRC decision does discuss some of the criteria in article 17 of the RSTP, edition 2005, for determining the level of compensation owed, in the final analysis the CAS felt it was impossible to understand from reading the decision, what weight was given to what criteria in determining the quantum. In other words, there was no indication of the method of calculation used by the DRC to arrive at the amount of GBP 625,000. In line with the DRC the CAS also referred to article 17 of the RSTP, edition 2005, for determining the level of compensation owed. Heart of Midlothian claimed the market value of the player as lost profit in the amount of GBP 4 million. The Panel was unequivocal. It decided there was no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit. In this the CAS believed it would be difficult to assume a club could be deemed the source of appreciation in a player's market value while never being deemed to be responsible for a depreciation in value. The Panel also considered that the remuneration and benefits due to the player under his new contract is not the most appropriate criterion on which to rely in cases involving unilateral termination by the player beyond the protected period, because rather than focusing on the content of the employment contract which has been breached, it is linked to the player's future financial situation and is potentially punitive. The Panel found that Hearts' claim of GBP 330,524 based on the difference between

the value of the old and new contract must be rejected, and that the most appropriate criteria of article 17 of the RSTP edition 2005 to apply in determining the level of compensation owed to Hearts by the player, is the remuneration remaining due to the player under the employment contract upon its date of termination, which the parties have referred to as the residual value of the contract. Finally the CAS notes that the residual value represents an amount of GBP 150,000. The Panel thus considered this amount to be due to Hearts as full compensation under article 17 of the RSTP, edition 2005, for the player's termination of his contract. Finally it ruled that the DRC decision was invalid and concluded that the appealed decision of the DRC decision of 4 April 2007 was set aside.¹⁴

The *Webster* case indeed has similarities with *Bosman*. In both cases FIFA was corrected from outside the football world with respect to the functioning of its transfer system.¹⁵ Also just as after *Bosman*, clubs are again obliged to respond to the new situation and have to produce new judicial solutions for the current situation to exercise a legal hold on their players. But although the CAS decided that *Webster* was entitled to terminate his contract unilaterally after the protected period, I do not believe it can be concluded beyond dispute that the remaining value is the only decisive criterion in all other future cases before the CAS. It must be sincerely wondered whether the CAS was empowered to decide as it did. I believe that some unanswered questions are still open which can and should give rise to the suspicion that the remaining value is not the only criterion for determining the amount of compensation to be paid by the player.

First it is important to determine whether the CAS was authorised to set aside the relevant national law so easily. As mentioned in article 17 of the RSTP, edition 2005, compensation for breach shall be calculated with due consideration of (amongst others) the law of the country concerned.¹⁶ The CAS decided in this case that the laws of the country concerned were FIFA Regulations, Swiss law and Scottish law - Scottish law, since Scotland has the closest connection with the contractual dispute. Scotland is the country where the employment contract was signed and performed and where the club claiming compensation (Hearts) and the player were domiciled at the time of signature and termination.¹⁷ Heart of Midlothian claimed that the particular remedies existing for breach of contract under Scottish law are based on the principle of *restitution in integrum*, which attempts to return the injured party to the position he would have been in had the breach not occurred. The club also pointed out that under Scottish law, damages for loss of profit pursuant to breach of contract are recoverable. The Panel considered that Scottish law was applicable, but at the same time pointed out that it does have the discretion to

tion will decrease substantially.

7 There are many similarities with the *Mexès* case. However, the fact that Webster's termination occurred outside the protected period was crucially important for the DRC. The compensation he had to pay was GBP 625,000 while the compensation due by Mexès to his club was EUR 7,000,000. Because of this difference, it is obviously very important whether the termination by the player takes place inside or outside the protected period. See DRC 23 June 2005, no. 65503. See also CAS 2005/A/916, *AS Roma v. FIFA*.

8 The FIFA Executive Committee approved a number of additions and amendments to certain provisions of the Regulations on the Status and Transfer of Players at its meeting on 29 October 2007. These new Regulations came into force on 1 January 2008. The RSTP edition 2005 is applicable to the matter at hand.

9 There are many similarities with the *Mexès* case. However, the fact that Webster's termination occurred outside the protected period was crucially important for the DRC. The compensation to

be paid by Webster was GBP 625,000 while the compensation due by Mexès to his club was EUR 7,000,000. Because of this difference, it obviously is very important whether the termination by the player takes place inside or outside the protected period.

10 DRC 4 April 2007, no. 47936. In the revised RSTP, edition 2008, the deadline for giving due notice of a termination of contract is stated in Art. 17 Para. 3. This seems to be corrected after Webster. In the former 2005 edition it was stated that disciplinary measures may only be imposed outside the protected period for failure to give notice of termination within 15 days of the last official match of the season of the club with which the player is registered.

The 2008 edition now has inserted (in brackets) after the official match of the season: '*including national cups*'. Webster was initially of the opinion that the last league match had to include the Scottish FA Cup Final.

11 Wigan Athletic and Heart of Midlothian also appealed to the CAS each for their own reasons.

12 One can say that the CAS provides the need for a specialised body to resolve sporting disputes outside the normal court system. Ian S. Blackshaw, Robert C.R. Siekmann, Janwillem Soek (eds.), *The Court of Arbitration for Sport 1984-2004* (The Hague, T.M.C. Asser Institute 2006).

13 In that respect it is important to be aware of the fact that CAS does not deal with appeals arising from: (a) violation of the Laws of the Game; (b) suspensions of up to four matches or up to three months; and (c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of the association or confederation may be made. FIFA Statutes, Art. 60 Para 3.

14 Wigan Athletic was jointly and severally liable with Andrew Webster to pay Heart of Midlothian the amount of GBP 150,000 with interest at 5% from 1 July 2006.

15 The *Bosman* case was ruled by the European Court of Justice and the Webster case was ruled by the CAS. FIFA has recognised CAS since December 2002 for resolving disputes between

FIFA, members, confederations, leagues, clubs, players, officials and licensed match agents and players' agents. FIFA Statutes, Art. 59 Para. 1. See also Circular 827 dated 10 December 2002. Initially FIFA put forward the International Chamber for Football Arbitration (CIAF) as the competent body to decide in appeal. This was blocked for financial and time reasons.

16 This can also be derived from article R58 of the Statutes of the Bodies Working for the Settlement of Sports-related Disputes (CAS Statutes) in which it is stated that the Panel decides the dispute according to (amongst others) the rules of law the application of which the Panel deems appropriate. According to article 187 of the Swiss Private International Law (PILact) the arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.

17 See also FIFA Commentary, explanation Art. 17 RSTP under 1, sub 2, p. 47, which also states that the laws of the

decide whether or not any provisions of Scottish law should be applied in determining the level of compensation.¹⁸ Finally, the CAS did not rely on any provisions of Scottish law in determining the level of compensation.

Following the CAS decision in the *Webster* case the circumstances under which this discretion exists were absolutely unclear. Although the CAS is permitted to deviate from national law, in my opinion it too easily set aside all provisions of Scottish law which were raised by Hearts.¹⁹ The CAS is right when it says that it is in the interest of football that solutions to compensation must be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country.²⁰ However this does not mean that the Panel is always free to determine under what circumstances national law is applicable and prevails. I believe the CAS should provide judicial handholds in order to impart more legal certainty on this point.

This area of tension between RSTP rules and national laws has always been a hot topic following earlier CAS and DRC decisions. The eternal question is: what law prevails where there is inconsistency? According to several CAS and DRC decisions, RSTP rules sometimes prevail over national law. One might generally say that, according to CAS and DRC decisions, a divergence is justified where there is inconsistency in so far as national law is not mandatory and in so far as RSTP rules pursue a legitimate objective.²¹ I believe the CAS was authorised to set aside Scottish law to the extent that it concerned provisions which were not mandatory, and to the extent that this deviation pursued a legitimate objective. For example, in its '*PSV/Leandro do Bomfim*' decision, the CAS stated that PSV had not demonstrated that Dutch law or any other law applicable to the 2001 contract or to the merits of the dispute submitted to FIFA and objections to decisions issued by its bodies, would prohibit Leandro from being transferred from PSV to a foreign club.²² In other words, if PSV had been able to underline that according to mandatory national law, Leandro should be prohibited from transferring from PSV to a foreign club, then this mandatory national law would prevail. In line with the Leandro case, one can say that the RSTP rules might prevail in so far as the national law is not mandatory. It is outside the scope of this article to discuss whether certain provisions of Scottish law are mandatory, but in any event the CAS set aside national law too easily by simply stating that the Panel '*will not rely on Scottish law*'.²³ In my opinion the CAS was permitted to set aside Scottish law, but it had to examine whether certain provisions were mandatory. Secondly, one might seriously wonder whether CAS's divergence pursued a legitimate objective. One might say, given that the CAS underlined it as an important factor in deciding not to follow Scottish law, that it is in football's interest that compensation solutions be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country.²⁴ This is right in my opinion,

but, as noted above, it can be seriously wondered whether the CAS's divergence pursued a legitimate objective. For example, in the procedure brought before the CAS between '*Acuña and Cádiz v. FIFA and the Asociación Paraguaya de Fútbol*', the Panel decided that the contested FIFA rules limiting the international transfer of players under the age of 18 did not violate any mandatory principle of public policy ('ordre public') under Swiss law or any other national or international law, in so far as they pursue a legitimate objective, namely the protection of young players from international transfers which could disrupt their lives, particularly if, as often happens, their football career eventually fails or fails to have the expected success. Accordingly the Panel considered that FIFA rules on the protection of minors were valid.²⁵ The protection of minors is such an extremely important point for FIFA that they believe that the RSTP should take priority over certain national laws. In my opinion it is defensible that to the extent that these rules pursue a legitimate objective, for example protecting players under the age of 18 from being excluded from making an international transfer, as well as the restriction on the maximum length of three years of their employment contracts, that the rules of FIFA prevail above national laws. But is the transfer compensation so important that CAS was entitled to set aside Scottish law? I believe this goes too far, because transfer compensation is not such a vital point for FIFA that the CAS is not justified in diverging from relevant national law. The CAS also set aside Scottish law too easily at this point. The CAS therefore reached the conclusion too easily that the remaining value is the only element.

Another important factor in proclaiming that the remaining value should not be the only decisive element in establishing the amount of compensation, is of more material existence. Wigan and *Webster* claimed it was Hearts that treated the player unfairly and that the CAS had to regard this as a material factor when determining the sum of compensation due to Hearts. In the *Webster* case the Panel also examined the existence of any aggravating factors. But it was not convinced that the concept of aggravating factors or of contributory negligence are legally relevant or applicable to the calculation. In the *Webster* case the CAS decided that this legal question can be left open because the Panel found there was no sufficient evidence that either party (Hearts or the player) in fact had ill intentions or had misbehaved in their attitude regarding each other.²⁶ I would say that it is legally relevant whether aggravating circumstances exist. I believe that if a player is relegated to the bench if he does not want to extend his contract, this is legally relevant since the club then partially waives its rights to claim a substantial compensation sum at a later stage.²⁷ This would also benefit football because clubs will be more reluctant to consign a player to the bench should he not cooperate with an extension of his contract, given that this could now have an impact on potential transfer compensation. It is common practice in the inter-

country where the club is domiciled are relevant.

¹⁸ See grounds for the decision no. 126.

¹⁹ According to Dutch labour law, parties cannot unilaterally terminate a contract for a definite period of time, unless this is provided for in the contract. Webster unilaterally terminated his contract (for a definite period of time) after the protected period without having a written unilateral clause in his contract. For that reason it can be said that the Webster termination is not in line with Dutch law. However, premature termination of a contract for a definite period of time without being provided with a unilateral termination clause, does not affect the validity of the termination, but leads to the result that the party who terminated the contract will be liable for damages. It can therefore be concluded that contracts for a definite period can be terminated by either party, but that the termination will result in an issue of damage liability.

In the Webster case, he still had to pay compensation for his termination. It is thus a too-strict interpretation to underline that the Webster case at this point is not in line with Dutch national law.

²⁰ See also CAS 2005/A/983 & 984 "*Club Atletico Penarol v Carlos Heber Bueno Suarez and Christian Gabriel Rodriguez Barotti & Paris Saint Germain*", as was referred to by Webster. In this case it was considered that the principle of the universal application of FIFA rules - or any other international federation - meets the requirements of rationality, safety and legal predictability.

²¹ See the following decisions in which this area of tension surfaces. CAS 2003/O/530 "*AJ Auxerre v. Valencia and M. Sissoko*", decision of 27 August 2004. CAS 2005/A/835 & 942, "*PSV N.V. v. FIFA & Federação Portuguesa de Futebol*" and "*PSV N.V. v. Leandro do Bomfim & FIFA*", decision of 3 February 2006. CAS 2005/A/955, "*Cádiz C.F., SAD v. FIFA*

and *Asociación Paraguaya de Fútbol*" and CAS 2005/A/956, "*Carlos Javier Acuña Caballero v. FIFA and Asociación Paraguaya de Fútbol*".

²² CAS 2005/A/835 & 942, "*PSV N.V. v. FIFA & Federação Portuguesa de Futebol*" and "*PSV N.V. v. Leandro do Bomfim & FIFA*", decision of 3 February 2006.

²³ See grounds for the decision no. 130.

²⁴ See grounds for the decision no. 64 which refers to the decision CAS 2005/983 & 984 between "*Club Atletico Penarol v Carlos Heber Bueno Suarez and Christian Gabriel Rodriguez Barotti & Paris Saint Germain*".

²⁵ CAS 2005/A/955, "*Cádiz C.F., SAD v. FIFA and Asociación Paraguaya de Fútbol*" and CAS 2005/A/956, "*Carlos Javier Acuña Caballero v. FIFA and Asociación Paraguaya de Fútbol*".

²⁶ See grounds for the decision no. 110.

²⁷ I see a parallel with a club's right to receive training compensation. Within the EU/EEA there is an (extra) exception that

if the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. See also Circular 769 dated 24 August 2001. Moreover, it is a prerequisite that the former club then offers the player a contract in writing via registered mail at least 60 days before the expiry of his current contract. See RSTP, edition 2005, Annex 4, Art. 6 Para. 3. It is important that this offer is at least of equivalent value to the current contract. In the event that the former club does not offer the player a contract and it did not fulfil the aforementioned requirement with respect to the '60 days term', this leads to a situation where the former club with which the player was registered loses its entitlement to training compensation. See RSTP, edition 2005, Annex 4, Art. 6 Para. 3. In my opinion a club should lose a substantial part of the compensation should the player be put on the bench to force him to sign.

national football world that clubs force players to extend their contracts. Players unwilling to extend are often excluded from matches, find themselves demoted to the 'C' squad and see their value as a player decline - so they often sign.²⁸ As we saw with Hearts' majority shareholder Romanev, *Webster* too was relegated to the bench and was forced by his club to sign. I believe clubs should be punished for this inappropriate behaviour, resulting in them partially waiving their rights to claim substantial compensation at a later stage. Apart from this more moral viewpoint, it can be concluded that the remaining value might not, and should not, be the only decisive element where there are aggravating circumstances. It is not unlikely that in other future cases before the CAS, the Panel will decide that the existence of aggravating circumstances might be legally relevant for the transfer compensation. If that should be the case, this could (and must) exercise an effect on the compensation amount.

For reasons above one could say that it cannot be decided definitively that the remaining value of the player's contract is the decisive element in any event. From a more formal point of view, it is rather remarkable that the CAS sets aside relevant provisions of national law so easily. But a more material factor also plays an important role since aggravating circumstances could be legally relevant in order to either raise or lower transfer compensation in other future cases. I believe it should even be logical that we leave the question open as to whether the remaining value is the only criterion, since the DRC states in several decisions that the list of article 17 is not exhaustive, and that each request for termination has to be assessed on a case-by-case basis. In other words, the particularities of each claim for compensation in other future cases still need to be examined, to establish the compensation amount. Each breach of contract request for compensation has to be assessed on a case-by-case basis, leaving the deciding body the facility to decide *ex aequo et bono* where appropriate. One can therefore say that it cannot be undisputed that the remaining value is the only criterion. But even if we assume that in terms of this decision, all other players only have to pay the remaining value of their contract should there be a unilateral termination after the protected period, the clubs still have sufficient legal constructions to avoid the potentially negative aspects of the *Webster* case as recently ruled by the CAS.

As mentioned earlier, football clubs again have to respond to the new situation just as after *Bosman*. At that time a method invented by the clubs was to insert clauses in the players' contracts whereby the clubs reserved the right to extend the agreement unilaterally, the so-called unilateral extension option. In my opinion the unilateral extension option would also help the clubs after the *Webster* case. As provided for in article 17 paragraph 3 of the RSTP 2005, the protected period recommences when, while renewing the contract, the duration of the previous contract is extended. If the clubs conclude contracts

in future for a period for two (or three) years with a unilateral extension option of two more years, then the protected period will recommence after two years, resulting in the player being prevented from unilaterally terminating his contract.²⁹ But it is important to be aware of the fact that deploying the unilateral option is rather problematic in the international football world. Unfortunately this discussion falls outside the scope of this article, but for the clubs it is important to be aware of this issue so as to insert legally binding options and thereby avoid the negative results of *Webster*.³⁰

Another solution to avoid the potentially negative aspects of the *Webster* case has been offered by the CAS itself in its decision. The Panel refers to article 17 which also provides that the amount of compensation 'may be stipulated in the contract or agreed between the parties'.³¹ In this case the CAS established that the parties did not invoke any provisions in the contract with respect to the assessment of the level of compensation. But in the contract, parties are entitled to stipulate the amount the player will pay as compensation after the protected period, or even after one year, on unilaterally terminating the contract.³² This is the 'buyout clause'.³³ According to FIFA such a clause in the employment contract is valid.³⁴ The advantage of the buyout clause is that the parties agree the amount mutually at the very beginning and record this in the player's employment contract. By paying this amount to the club, the player is entitled to terminate the employment contract unilaterally. With this buyout clause, the club agrees to grant the player the opportunity to terminate the contract at any time and without a valid reason. But more importantly, clubs will not run the risk that their player leaves them for the remaining value of his contract should he unilaterally terminate his contract after the protected period.

Ultimately we might conclude that although the CAS decided that *Webster* was entitled to terminate his contract unilaterally after the protected period, and as a result only had to pay the remaining value of his contract, it cannot and should not be presumed beyond doubt that the remaining value is the only decisive criterion in all other future cases. We are still left with some unanswered questions, giving rise to the suspicion that the remaining value should not be the only criterion in determining the compensation amount. I believe the CAS was only authorised to set aside Scottish law for example, to the extent that it concerned provisions which were not mandatory and to the extent that this deviation pursued a legitimate objective. In future cases the existence of aggravating circumstances could also be decided to be legally relevant. In my opinion a club's potential misbehaviour should in any event be legally relevant, since the club then partially waives its rights to claim a substantial compensation sum at a later stage. Moreover, each request for termination has to be assessed on a case-by-case basis. Notwithstanding the above, even if we assume that the *Webster* case means that all other players only have to pay the remaining value of their contract if there is a unilateral termination after the protected period, the clubs still have sufficient legal constructions to avoid the potentially negative aspects. The unilateral extension option and the buyout clause will be of great future assistance to clubs. So although the *Webster* case has its judicial particularities, the international football world does not have to descend into a post-*Bosman*-type panic after all.

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28 Roger Blanpain, *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law*, p. XV.

29 According to the FIFA Commentary, the parties then aim at longer contractual stability. See FIFA Commentary, explanation Art. 17, under footnote 87, p. 50.

30 In a decision of 12 January 2007, the DRC states the criteria under which circumstances a unilateral extension option in favour of the club is valid. See DRC 12 January 2007 (not published). As to the validity of the club's option to unilaterally renew the employment contract, reference was made here to two decisions of the CAS of 12 July 2006, which were considered as leading cases within the subject of unilateral options for the extension of employment contracts signed between players and clubs. See CAS 2005/A/983 & 984, "*Penarol v. Bueno Suarez, Rodriguez Barrotti and Paris Saint-Germain*", decision of 12 July 2006. See for an extended review regard-

ing the unilateral extension option Wolfgang Portmann: "*Unilateral option clauses in footballers' contracts of employment*", (2007) I.S.L.R. Portmann discusses amongst others the relevant points which have to be observed as a result of which it is to be assumed that the substance of the unilateral option will meet the requirements of substantive Swiss law, amongst others.

31 See grounds for the decision no. 121.

32 RSTP, edition 2005, Art. 17 Para. 2.

33 FIFA Commentary, explanation Art. 17 RSTP under 1 sub 3, p. 47. In that respect, it is important to know that on the one hand, the sports legislation of certain countries such as Spain (*Real Decreto 1006*) made it compulsory for a buyout clause to be included in contracts. On the other, there are countries that cannot include the buyout clause in their contracts as it is not compatible with mandatory labour law.

34 FIFA Commentary, explanation Art. 17 under footnote 76, p. 47.

ADAPTATION OF DOPING REGULATIONS TO NEW WADA STANDARD

The expert team of the ASSER International Sports Law Centre, The Hague, The Netherlands is prepared to revise the doping rules and regulations of national and international sports organisations, associations and federations in order that these be adapted to the new WADA Code which is obligatory for organisations before 1 January 2009.

Please contact Dr Robert Siekmann, project manager, via www.sportslaw.nl for further information.

The Prize for Freedom of Movement: The Webster Case

by Janwillem Soek*

Introduction

Eighteen-year-old Andy Webster moved from Arbroath club to Heart of Midlothian PLC (Hearts), both Scottish clubs, for a transfer compensation of € 75,000. Webster's employment contract was due to run from 31 March 2001 to 30 June 2005. Halfway through this term, he signed a new contract with Hearts on 1 July 2003, to run until 30 June 2007. Webster had developed into an important player in Hearts' first eleven and in the Scottish national team. It was appealing for Hearts to bind the player to it for a longer term. In April 2005, the club made an offer to Webster - with improved terms - to play for the club for two extra seasons. No agreement was reached however. Hearts made several more offers, but they were all rejected by the player one by one. During this period, Hearts did not field Webster in a variety of matches, which led the player to believe that the club was attempting to put pressure on him through tactical considerations, to accede to the club's proposals. The relationship between the club and the player soured still further and reached its nadir following utterances against Webster in the media by the most important shareholder. Incensed at these remarks, Webster approached the Scottish Professional Footballer's Association (SPFA), which advised him to lodge a claim on the basis of clause 18 of his employment contract¹. Webster notified the club in writing that he wished to terminate his employment contract on the basis of "just cause". He argued that the club had defaulted on its obligations towards him, and that a "fundamental breakdown in trust" justified his position. In response, Hearts indicated that they had lodged a case with the Scottish Premier League Board. For Webster, this entailed the danger of a long-running procedure, making it impossible for him to sign a contract with another club for the 2006/2007 season. Webster opted for a different route: dismissal no longer based on "just cause", but dismissal without "just cause" based on art. 17 of the FIFA Regulations for the Status and Transfer of Players 2005 ("Regulations").² In July 2006, Webster's business manager sent a fax to 50 clubs stating that Webster had ended his contract with Hearts, and that this termination meant he would only have to pay € 200,000 compensation to Hearts. On 9 August 2006, Webster signed a three-year contract with the English club Wigan Athletic AFC. The English football association asked the Scottish association to forward the player's international transfer certificate. The Scottish association refused compliance in writing, because Webster was still under contract to Hearts. On 18 August 2006, Wigan approached FIFA and requested that they approve Webster's provisional registration. On 28 August, the Scottish association notified FIFA that they could not comply with the request. On 31 August, the Single Judge of the Player's Status Committee approved the provisional registration with immediate effect.³

Hearts submitted the case to the FIFA Dispute Resolution Chamber (DRC) and claimed judgment against Webster to pay €

5,027,311 in compensation, Webster's exclusion from official matches for two months and, finally, payment of compensation by Wigan and a ban against the club registering any new players during one registration period.

What criteria are considered in determining compensation in the case of a unilateral employment contract termination without "just cause"? Art. 17(1) of the Regulations states on this:

*"In all cases, the party in breach shall pay compensation. Subject to the provisions of Art. 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period."*⁴

In the Bosman judgment, the European Court of Justice had established that a player whose contract has been completed in accordance with the contractual provisions is free to sign a contract with another club of his choice in an EU member state. The club employer may not hinder the player's negotiating freedom in any way. Since the Bosman judgment, clubs can no longer demand transfer compensation on completion of the employment contract.⁵ Football club managers have attempted to bind valuable players to them for an extended period by signing agreements covering a long term.⁶ They were prepared to release a player before the end of a contract's term for substantial transfer fees. With the implementation of the 2001 Regulations, FIFA introduced a maximum term of five years.⁷ In the Bosman judgment, it was not established whether the freedom of movement guaranteed in art. 39 of the EC treaty allowed a player to terminate an ongoing employment contract unilaterally and to enter into a contract with another club. The story of Nicolas Anelka is well known: in the summer of 1999, he no longer wished to play for Arsenal although his contract still had four years to run. Anelka wanted to be transferred to Lazio Roma. This transfer did not go ahead because Arsenal was not prepared to let the player go and Lazio was not prepared to pay the exorbitant transfer fee which Arsenal asked.⁸ That was in 1999. No rule can currently be found in the Regulations which makes it impossible for a player to unilaterally terminate his contract prematurely. In favour of "contractual stability", or in other words to compel some respect for a contract and prevent clubs being in a constant state of uncertainty about which players are still in their service, FIFA drew up various rules which were intended to make unbridled "contract jumping" unattractive. In the first place, these are the provisions involving the "protected period".⁹ Employment contracts for players younger than 28 entail a protected period of three years, and for players older than 28 there is a two-year protected period.¹⁰ Should a player terminate his contract without valid reasons within the protected period, then in terms of art. 17(1) and (3) of the Regulations he is

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1 The clause reads: "If the Club intentionally fails to fulfil the terms and conditions of this Agreement the Player may, on giving fourteen days' written notice to the Club, terminate this Agreement."

2 The FIFA Regulations for the Status and Transfer of Players 2008 have not been amended on this point.

3 See art. 23(3) and Annex 3 of the Regulations 2005. Hearts could have lodged an appeal with the CAS against the decision of the Single Judge, on the grounds of art. 23(3).

4 "[...] although the RSTP [the

Regulations], edition 2005, provide us with the elements that are decisive for determining the amount of compensation, it is still difficult to derive the more specific elements and factors from [...] decisions [of the DRC] to determine the amount of compensation. Regarding the exact amount of compensation, it must be noted that the amount explicitly depends on the merits of the case and its particularities," according to Frans De Weger, "The Jurisprudence of the FIFA Dispute Resolution Chamber", 2008 T.M.C. Asser Press, The Hague, 2008, p. 106. On p. 110 he writes that "[I]t is often presumed by parties that only the so-called 'residual value' of the contract is the decisive element in order to deter-

mine the exact amount of compensation".

5 The value of Webster would be reduced to zero one year following the ending of his contract, thus if he would have served out his contract with Hearts, as a result of the Bosman case.

6 At present the term of an agreement in accordance with Art. 18(1) of the Regulations of 2005 is at least one year and no more than five years.

7 Art. 4(2) of the Regulations 2001.

8 According to Andrew Caiger and John O'Leary, "The End of the Affair: the Anelka Doctrine - the Problem of Contract Stability in English professional football", in A. Caiger and S. Gardiner (eds.); professional sport in the EU, Regulation and Re-regulation, T.M.C.

Asser Press, The Hague 2000, p. 197 et seq..

9 "The need to maintain contractual stability in football is defended by the governing bodies with reference to the need to preserve the regularity, proper functioning and competitive balance of competitions, to allow clubs to build squads, to facilitate supporters' identification with teams and to provide employment stability for players", according to Richard Parrish and Samuli Miettinen: "The Sporting Exception in European Law", T.M.C. Asser Press, The Hague 2008, p. 184.

required to pay compensation (a buy-out price) and sporting sanctions can be imposed on him. In terms of art. 17(1), unilateral severance of the contract without valid reasons after the expiry of the period “only” obliges the player to pay compensation. Contract freedom allows the parties to include a “buy-out” clause in their contract. Such a clause can stipulate the amount of compensation a player must pay to the club in the case of a unilateral contract termination. The player is then entitled to end his contract unilaterally upon payment of the stipulated amount in compensation. “With this buy-out clause, the parties agree to give the player the opportunity to cancel the contract at any moment and without a valid reason, i.e. also during the protected period, and as such, no sporting sanction may be imposed on the player as a result of the premature termination”.¹¹ Although such a clause entails some uncertainty for the club as to whether the player is still in service, on the other hand it offers certainty about the amount of compensation. If no prior arrangements have been made about this, on ending the contract there is little certainty about the extent of the compensation based on the Regulations. “There are no real criteria upon which we can determine how the compensation will be calculated, if it is not provided in the contract,” according to Drolet.¹² Art. 17(1) of the Regulations of 2005 only provides that the compensation must be calculated with observance of the applicable national law, the specificity of the sport and all objective criteria relevant *in casu*. A complexity of factors presents itself in calculating the compensation Webster should pay to Hearts. Considering the individual factors could lead to a variety of outcomes. Hearts estimated the compensation at some € 5 million while Webster’s calculation came to € 200,000.

The verdict of the Dispute Resolution Chamber

In its decision of 4 April 2007,¹³ the DRC concluded that Webster had terminated his employment contract with Hearts unilaterally, outside the “protected period”. The DRC set the residual value of the contract at € 199,976. The DRC then considered that Webster would have earned € 10,000 per week at Wigan. It also noted that Hearts should have paid transfer compensation to the Arbroath club. This amount should have been settled during the term of the employment contract. It was also of significance that Webster still had to serve one more year with Hearts. The five seasons in which Webster had been under contract to Hearts should also have played a role in determining the compensation. Another crucial factor, according to the DRC, was that Hearts had contributed to the player’s development to a significant degree. Webster had thus grown into a “high profile footballer” who had aroused interest from leading clubs. The DRC considered that “[S]uch a stance demonstrates the real interest the club had always had in the service of the player”. Limiting the compensation to the residual value of the employment contract was not in accordance with the DRC’s jurisprudence. Such a limitation, the DRC felt, would undermine the principle of the “maintenance of contractual stability” and reduce it to merely a formula. The DRC believed this would not fulfil the legitimate right of the injured party to receive compensation.

As a general rule, the DRC considers that a player cannot buy his way out of an employment contract at any desired time or under any circumstances, simply by paying the residual value of the contract. In light of all the circumstances advanced and after careful analysis of the submitted documentation, and on the basis of the details of the case, the DRC decided that Webster had to pay Hearts compensation of € 625,000. The DRC arrived at this amount by taking the residual value of Webster’s contracted salary in his first year with Wigan, and multiplying this by a coefficient of 1.5. The DRC made Wigan severally and jointly liable for this amount with the player.

The employment contract included a clause involving the unilateral dissolution of the contract. On the basis of this clause, Webster could end his contract after the last match of the Scottish season “on giving fourteen days’ written notice to the club”. Given that Webster was in default by not having notified Hearts of his decision to end the contract within the required period, he was also prohibited from participation in the two first official matches in the new season.

Neither Hearts, nor Webster or Wigan was satisfied with the foundations on which the DRC had calculated the transfer compensation and, separately from the DRC’s judgment, they lodged an appeal with the Court of Arbitration for Sport (CAS).¹⁴ The parties agreed that the same panel would be appointed to decide the three appeals in a single arbitral award.

The verdict of the Court of Arbitration for Sport

Wigan had argued that the DRC had operated in contravention of art. 13, paragraph 4 under f of the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber (DRC) (the Rules)¹⁵ by invoking the criteria of art. 17(1) of the Regulations in an inadequate manner when making its compensation calculation. The CAS also shared this opinion, given its consideration that:

*“[...] in the final analysis it is impossible to understand from reading the decision what weight was given to what criteria in determining the quantum, i.e. there is no indication of the method and figures used by the DRC to arrive at the amount of £ 625,000, or in other words what the figure consists of.”*¹⁶

The CAS rejected the DRC decision and produced a new decision on the basis of R57 of the CAS Code¹⁷.

The CAS stated first that unilateral termination of a contract must be viewed as a breach of contract, which must be linked to the payment of compensation to the aggrieved party. Based on contract freedom, parties are in principle bound by what is stipulated in the employment contract. Given however that there was no stipulation in the contract about any compensation to be paid on terminating the contract, in determining the extent of the compensation the CAS had to turn to the relevant provisions of art. 17(1) of the Regulations. The core of the case hinged on an interpretation of that article.

In deciding the extent of the compensation on the grounds of art. 17, the CAS believed that the “training compensation” should not be involved, given that the compensation is arranged in detail in another part of the Regulations. In other words: the costs that Hearts had invested in training and developing Webster did not fall under the factors summed up in art. 17(1) and were therefore not to be considered in the first instance.

In determining the extent of the compensation, the CAS had to analyse the three categories in which art. 17(1) distinguishes the factors. These categories are: “the law of the country concerned, the specificity of sport and any other objective criteria”.

Art. 17(1) states in the first place that the “compensation for breach shall be calculated with due consideration for the law of the country concerned”. Given that the contract was signed in Scotland and was established there for execution, and that the club claiming compensation was based in that country and that the player was resident there at the time of signing and terminating the contract, it designated Scottish law as “the law of the country concerned”. However, reference to “the law of the country concerned” did not entail, in the opinion of the CAS, that art. 17(1) involved a law choice clause. It must be

10 In § 7 of the Definitions of the Regulations the “protected period” is defined as “a period of three entire Seasons or three years, whichever comes first, following the entry into force of a contract, if such contract was concluded prior to the 28th birthday of the Professional, or to a period of two entire Seasons or two years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28th birthday of the Professional.”

11 According to explanation (3) with art. 17 of the Regulations.

12 Jean-Christian Drolet: “Extra Time: Are the New FIFA Transfer Rules Doomed?” in: *The International Sports Law Journal* 2006/1-2, p. 71.

13 DRC 4 April 2007, no. 47936.

14 CAS 2007/A/1298 Wigan Athletic FC v. Heart of Midlothian; CAS 2007/A/1299 Heart of Midlothian v. Webster & Wigan Athletic FC; CAS 2007/A/1300 Webster v. Heart of Midlothian.

15 Article 13 - Decisions [...], 4. Written decisions shall contain at least the following: [...] f. the reasons for the findings; [...].

16 Reason 100.

17 Code of Sports-related Arbitration, R57: “The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged [...]”

observed that the extract only stipulated “that such law is among the different elements to be taken into consideration in assessing the level of compensation”.¹⁸ This interpretation leads to the compensation not having to be calculated on the basis of Scottish law. The provisions in Scottish legislation adduced by Hearts involving the settlement of damages, arising from a contract, did not take precedence in any way above the other elements named in art. 17(1), the CAS believed. The CAS rejected Hearts’ appeal based on the general rules and principles of Scottish law on the matter of damage through breach of contract. It considered that the rules and principles:

*“are neither specific to the termination of employment contracts nor to sport or football, while article 17 of the FIFA Status Regulations was adopted precisely with the goal of finding in particular special solutions for the determination of compensation payable by football players and clubs who unilaterally terminate their contracts without cause. In other words, it is important to bear in mind that it is because employment contracts for football players are atypical, i.e. require that the particularities of the football labour market and the organisation of the sport be accounted for, that article 17 was adopted.”*¹⁹

Another factor in art. 17(1), which had to be taken into consideration in determining compensation, was the “specificity of sport”. But the problem which occurs with this concept, however, is that no indication regarding its content whatsoever is included in the Regulations. The CAS believed that:

*“the specificity of sport is a reference to the goal of finding particular solutions for the football world which enable those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players, on the other hand, i.e. to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of clubs and players.”*²⁰

The CAS should take due cognisance of this balance up to the moment that it reached the other objective criteria which art. 17(1) meant to play a role in determining the compensation.

The CAS believed that the need for “contract stability” was sufficiently secured by means of the “protected period” and the provisions in the Regulations with which contract parties could be forced to honour this period. In the last sentence of art. 17(3), a player who terminates his contract unilaterally outside the “protected period” is not only obliged to pay compensation, but can also have sporting sanctions imposed on him, if he was in default in not notifying the club of the decision sufficiently “(i.e. within fifteen days following the last match of the Season)”. Introducing this period was intended to introduce stability. Drafters of the Regulations attempted to increase the stability with art. 16. In this article it is in fact stipulated that “[A] contract cannot be unilaterally terminated during the course of a Season.” This provision applies to both clubs and players. The CAS believes that after expiry of the “protected period” and depending on the provisions in the employment contract, compensation for the unilateral breach should neither function as punishment nor lead to enrichment. The compensation must be calculated on the basis of criteria which respect the rights of both parties involved. In the interests of the football world, the method by which compensation is calculated must be as predictable as possible.

Hearts believed Webster’s value on the transfer market to be € 4 million. The CAS did not consider such amounts as lost profit or money to be claimed as the player’s replacement value, within the context of art. 17(1). Such a form of compensation was certainly not established contractually between the parties. Its recognition would enrich the club while at the same time being a punishment to the player. Even if it had been established contractually that the player’s market value could be claimable as lost profit in the form of compensation, no moral or judicial justification would be present for this, the CAS believed. A club cannot justify that training and instructing a player would be the only source of the player’s success, on the basis of which they would have the right to demand his entire market value. Should it be allowed that a player’s market value could be claimed as

lost profit on the basis of art. 17, this would then lead to double counting. The compensation which can be claimed on the basis of the costs the club incurs for training and instructing a player is regulated separately in art. 20 of the Regulations. The club must however be able to demonstrate the costs. Training compensation is certainly not based on the player’s market value. The CAS also considered that:

*“Since a club’s possible entitlement to the transfer or market value of players is entirely absent from the criteria of compensation listed in article 17(1) and there is no reference to any such form of compensation in favour of Hearts in the Player’s employment contract, to apply such criteria and thereby imply it into the contract would contradict both the principle of fairness and the principle of certainty.”*²¹

If clubs are given the right to claim the market value of players in the form of compensation, that would partially return the entire system of transfer compensations to the pre-Bosman period. The CAS rejected Hearts’ demand for payment of € 4 million in compensation.

The CAS also dismissed Hearts’ subsidiary demand for repayment of the € 75,000 it had paid to the Arbroath club. In the opinion of the CAS, this amount should have been settled during the term of its contract with Webster.

The CAS also considered that the remuneration and benefits to which a player is entitled in terms of his new contract, were also not the most suitable criterion a club can invoke in issues involving unilateral termination after expiry of the protected period,

*“because rather than focusing on the content of the employment contract which has been breached, it is linked to the Player’s future financial situation and is potentially punitive.”*²²

Just as in the instance where a club prematurely terminates the contract unilaterally and the player is entitled to receive his salary until the end of his contract term, the club is also justified in receiving an equivalent amount should the player break his contract, according to the CAS. Following on this, the CAS considered that:

*“[T]his criterion also has the advantage of indirectly accounting for the value of the Player, since the level of his remuneration will normally bear some correlation to his value as a Player. Thus a Player receiving very high remuneration (and thereby being able to expect high remuneration in case of a change of club) will have a correspondingly high amount of compensation to pay even if he terminates his contract outside the Protected Period, and the earlier such termination occurs the higher will be the total amount of compensation owed.”*²³

The CAS believed the most suitable criterion from art. 17(1) for determining the extent of compensation to be the amount of remuneration to which Webster would have been entitled between the time that he broke his contract and the time at which the contract should have ended: the residual value of the contract. In the case under consideration, this was set at € 150,000. Given that the criteria of art. 17(1) are not cumulative *per se*, the CAS saw no reason to add any other amount to that amount as an extra item of loss. On the basis of art. 17(2) of the Regulations, the CAS held Wigan severally and jointly liable with Webster for the determined amount of compensation.²⁴

Comments:

Terminating a contract with or without “just cause”

In terms of art. 13 of the Regulations 2005, an employment contract

¹⁸ Reason 87.

¹⁹ Reason 128.

²⁰ Reason 132.

²¹ Reason 145.

²² Reason 150.

²³ Reason 151.

²⁴ “The decision which CAS took [...] is very damaging for football and a Pyrrhic victory for those players and their agents, who toy with the idea of rescinding contracts before they have been fulfilled. [...] CAS did not properly take into consideration the specificity of sport

as required by art. 17 par. 1 [...]”, according to FIFA President Blatter in The Times of 1 February 2008. An exaggerated reaction from a sports manager afraid that he would lose control, because “[...] what can be perceived as the right to contract-jump is expressly recognised by the FIFA transfer rules”, according to Simon Gardiner and Roger Welch, “The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules “The Beautiful Game”?, in: ESLJ 2007, Vol. 5, no. 1, p. 4.

between a professional footballer and a club may in principle only be terminated at the end of the agreed duration, or by means of a mutual agreement. The purpose of this principle is that when a player and a club opt to enter into an employment relationship, they will respect the contract. Unilateral termination of a contract without a valid reason should be definitively discouraged. Honouring the contract is nevertheless not a principle which cannot be evaded. Although art. 16 provides that “[A] contract cannot be unilaterally terminated during the course of a Season”, art. 14 at the same time provides that a contract may be terminated prematurely by one of the parties - without any consequences - if a valid reason, or just cause, can be offered. Art. 14 must be regarded as a *lex specialis* with respect to art. 16. “It represents the only situation in which either party is entitled to unilaterally terminate the contract at any time, i.e. also during the course of a season”, according to the explanation with art. 16.

The SPFA advised Webster to terminate his employment contract for just cause on the grounds of clause 18. Given the deteriorated situation with Hearts, which was caused to a large extent through the agency of Hearts’ majority shareholder, Webster had sufficient arguments to take this step. On the basis of art. 14, such a dismissal would not produce any financial or sporting sanctions. At the beginning of May 2006, Webster notified the club in writing of the termination of his contract with the statement that “he believed the club had failed in its duties towards him and that a fundamental breakdown in trust justified his action.” Webster was thus able to end his contract unilaterally for just cause within the season, and could seek a new (foreign) employer. Once he had found one, the Single Judge of the Player’s Status Committee approved the provisional registration. After Webster’s departure, Hearts would have been able to contest the just cause through the DRC and to claim compensation.

It is unclear why the SPFA advised Webster - after Hearts had submitted the case to the Scottish Premier League Board - in consequence of the termination for just cause, to end his contract without just cause on the grounds of art. 17 of the Regulations. In the CAS decision, one reads that Webster, “realising that the appeal procedure triggered by Hearts could result in a protracted dispute that might prevent him from securing a contract with another club in time for the 2006/2007 season”, took the decision to follow the alternative route suggested by the SPFA. Webster notified the club of this at the end of May 2006.

Webster left Hearts and joined Wigan in August 2006. In November 2006, Hearts submitted a claim for compensation to the DRC on the grounds of breach of contract. Hearts would also have undertaken this action had Webster ended his contract at the beginning of May 2006 for just cause. In that instance, too, a protracted dispute would not have prevented him from finding another club in time for the next season.

In the worst-case scenario, the DRC would have reached the ultimate conclusion that Webster had ended his contract without just cause and would be obliged to pay compensation. The omens at the start of May 2006 did not hint at this.

In the Regulations system, a player cannot invoke argumentation along the lines of both “with just cause” and “without just cause”. The player has to make a choice. This makes the system rigid to a certain extent. In a procedure concentrated on art. 17(1), the DRC has no opportunity to investigate whether there is any possibility of a lack of just cause, although there are many indications towards this. Should a player have ended his contract for just cause, but under the pressure of circumstances he feels obliged to omit the just cause, the case which follows automatically heads in the direction of determining the compensation he must pay. It is argued that the DRC should not be quite so passively constituted and that it should have discretionary authority, should there be sufficient indications for this, to conclude that a player had just cause to end his contract. This would prevent a club which has a debt arising from the departure of a player also obtaining damages.

The role of the Single Judge of the Players’ Status Committee
Annex 3 of the Regulations 2005 provides rules applying in the case of

a transfer of a player between national associations. The basic assumption is that each national association must be in possession of the International Transfer Certificate (ITC) of each professional footballer who plays for a club falling under the association. Once a player moves from a club in country A, the new club in country B will request its national association to register the player within a registration period. The player is not entitled to play for club B until the ITC has been submitted by association A to association B. Association B requests issuance of the ITC by association A by the final day of the registration period at the latest (the “ITC Request”). Association A will ask both club A and the player to confirm, first, that their employment contract has ended, second that they have agreed a premature termination of the contract or, third, that a dispute about the contract exists. Within seven days, association A must either hand over the ITC or must notify association B that the employment contract has not ended or that there is no mutual agreement about premature termination of the contract. Should association B not have received an answer from association A within 30 days, association B will register the player provisionally. The Player’ Status Committee can annul the provisional registration within one year, if association A provides valid reasons why it has not responded to the request from association B. If association A does not respond within a year then the registration becomes definite. Association A will not issue an ITC if there is an employment dispute between the player and club A. In such an instance, parties can approach FIFA in terms of art. 22 of the Regulations 2005. Art. 23(3) states that the Single Judge of the Players’ Status Committee is empowered to issue decisions concerning issuing a provisional ITC. All parties must be heard in the procedure before the arbiter. This decision can be appealed through the CAS.

A player who terminates his contract unilaterally in the interim may not simply play for a foreign club. For this it is necessary that the ITC be transferred from the one national association to the other. Should the former association refuse to issue the ITC, because the term of the contract between the player and his old club has not yet lapsed, the intervention of the Single Judge is of considerable significance. In the explanation with art. 2 of Annex 3 of the Regulations it is stated that “[T]he Single Judge will be asked to pronounce on the provisional registration for the new club after having considered whether the provisional registration is useful to protect the player from irreparable harm, the likelihood of success of the player on the merits of the claim and whether the interests of the player outweigh those of the opposite party (so-called balance of convenience of interests). If these conditions are met, the Single Judge will authorise the new association to register the player for the new club provisionally. Should, on the other hand, the conditions not be met or should the evaluation of the Single Judge not yet enable the responsibilities to be ascertained in a provisional manner, the Single Judge will not give provisional authorisation and the DRC will have to pronounce itself first on the substance of the matter.”

Webster chose the route of art. 17(1) to avoid the “protracted dispute” which might lie in wait if he ended his contract for just cause. Such a delay would deprive him of the opportunity to join a new employer for the next season. The premature unilateral termination of his contract with Hearts could have been a reason for the Single Judge to refuse provisional registration with his new club. For reasons which are not known, the Single Judge did not take this route. In the DRC decision it is only remarked that “the Single Judge of the Players’ Status Committee authorised the [English] Football Association to provisionally register [Webster] with its affiliated club [Wigan] with immediate effect”.

Calculating the compensation in accordance with one objective criterion

Webster had to find a new club before the end of the next registration period. To achieve this objective, he adopted the SPFA’s suggestion and left Hearts “without just cause”. Art. 17(1) of the Regulations 2005 stipulates that a player who breaches a contract must pay compensation. The stipulation then indicates the criteria which must be considered to establish the extent of the compensation. Webster’s business manager had calculated the compensation at just £ 200,000. This was

not an amount Hearts had in mind. The club estimated Webster's value together with all the costs they had incurred for the player, at £ 5 million, which is what they wished to have as compensation. The DRC noted that the series of criteria listed in art. 17(1) is not exhaustive. Each request for compensation must be assessed on a case-by-case basis. This presented the DRC with the opportunity, when it arose, to take an *ex aequo et bono* decision. Not only did the DRC panel members take the criteria listed in art. 17(1) into consideration, but they also involved "their specific knowledge of the world of football, as well as [...] the experience the Chamber itself has gained throughout the years". Based on art. 17(1) of the Regulations, the DRC arrived at a figure of £ 625,000. In determining this amount, the DRC took into consideration the residual value of the employment contract, a number of "appearance bonuses" the player received and the transfer compensation the club would have had to pay. The number of seasons the player had appeared for the club was also considered, as was the fact that the club had contributed to the player's improvement, and the player's salary with his new club. The DRC declared "that as a general rule, a player cannot, at any time and under any circumstances, 'buy out' an employment contract by simply paying his club the residual value of his contract". The CAS was not interested in any such general rule. The CAS ignored the criteria the DRC had taken into account, and focused solely on the residual value of the employment contract, which it valued at £ 150,000 with interest from the day the contract's termination took effect.²⁵

Only one criterion applies to establishing compensation: the residual value of the contract. This is an exceptionally objective criterion; it is also a criterion which lacks any logical substantiation. After all, where is the logic in a club being able to demand double the salary amount if a player departs prematurely, an amount that it no longer needs to pay out? The residual value amount is entirely separate from the nominal loss a club suffers through a player's departure.²⁶

Consequences of the CAS decision for the solidarity mechanism

According to art. 21 of the Regulations, clubs which contributed to a player's training and instruction between his 13th and 23rd birthday receive part of the compensation, if the player is transferred before the end of his contract. This mechanism is elaborated further in Annex 5 of the Regulations. The provisions covering the solidarity mechanism only apply in the case of international transfers. Large transfer sums provide clubs, including amateur ones, which have contributed to a player's training and instruction, with significant amounts of extra income. The mechanism kicks in repeatedly during a player's entire career when he is transferred to a foreign club within the term of a contract. "The solidarity contribution has proven to be an efficient means to support grassroots football in particular."²⁷

Should compensation be reduced to only the contract's residual value, this would have a major impact on the solidarity mechanism anchored in the Regulations.

The strict liability of the new club

Art. 17(2) of the Regulations stipulates that, when a player has to pay compensation, "his new club shall be jointly and severally liable for its payment". Such a rule can be appreciated if the new club has had a share in the player departing from his old club, but if the new club has had no hand in that departure, as in the Webster case, then the rule is devoid of any logic.²⁸ In the Commentary,²⁹ one finds no reasoning for such a situation. It only repeats what the rule stipulates: "The new club will be responsible, together with the player, for paying compensation to the former club, regardless of any involvement or inducement to breach of contract." The CAS agreed with Wigan that the club had had no involvement whatsoever in Webster's decision. Contrary to the interpretation of art. 17(1), the CAS maintained a literal interpretation of the application of art. 17(2). The liability of the new club must be understood as "a form of strict liability". But why? Because such liability "is aimed at avoiding any debate and difficulties of proof regarding the possible involvement of the new club in a player's decision to terminate his former contract." This is not in

the least convincing after it had first been confirmed that Wigan had no involvement whatever in Webster's decision to leave Hearts.

In practising sports law, the "strict liability" principle is used to avoid "hassles" about questions of proof. There are any number of examples. Feyenoord was held liable for the conduct of supporters abroad on the grounds of strict liability³⁰; the sports personality accused of drug use is not given the opportunity to show that he or she is not liable, or is liable to a reduced degree, on the grounds of strict liability³¹; a club is not accorded the opportunity to show that it had nothing to do with a player ending his contract on the grounds of strict liability. By using strict liability, the relationship between the parties is brought into imbalance in a dispute. It is high time sports law accepts that guilt and intent must be proved, even if this entails "debate and difficulties". In order to raise sports law to a greater degree of maturity, within the domain of the law one should no longer be able to hide behind the shield of strict liability. The CAS could make a substantial contribution to such maturing.

In conclusion

It is theoretically possible that, in the future, the CAS will reach a different decision in a case where the facts coincide with those in the Webster case. The CAS procedural rules do not recognise any *stare decisis*, or in other words: each new CAS panel is not bound by decisions of previous panels. In the series of drug-use decisions from the CAS, with regard to strict liability one panel used entirely different reasoning to that of previous panels.³² It is not excluded that when it comes to determining compensation, a future panel may operate from different starting points than those used by the panel in the Webster case. It is also possible that in the future a judge may force the CAS to select other starting points. Given that the CAS is the highest body in the administration of sporting law, the DRC will however need to abide by the outcomes of the Webster case until any such reversal. Based on the Webster decision, only one criterion applies in determining the extent of compensation in the case of any unilateral termination of a player's employment contract prematurely: the time remaining on the existing contract. The other "objective criteria" in art. 17(1) of the Regulations have been made subordinate by the CAS, if not placed beyond consideration.

Under pressure from the decision in the Webster case, the duration or term of employment contracts will in future be equivalent to protected periods. Longer contracts will not yield the clubs sufficient financial benefits. The clubs will attempt to retain their valuable players for longer terms by tempting them to extend their contracts in the interim. Each time a contract is extended, the duration of the protected period begins anew. The clubs may sell players during the protected period, but players may only end their contracts unilaterally during this period if they pay compensation and put up with a sporting sanction. On this point, the balance between clubs and players is not in equilibrium. It is in the interest of players that they include a buy-out clause in their contracts. Judging by the explanation with art. 17 of the Regulations, after paying the agreed compensation players may terminate their contracts unilaterally during the protected period without any sporting sanction being able to be imposed on them.

25 This is still a substantial amount if one considers that if the procedure had involved termination on the basis of "just cause", then no compensation whatsoever could have been claimed.

26 The question is whether in determining the compensation amount, the CAS implicitly considered that the inducement to Webster's departure lay with Hearts and that Webster in essence had "just cause" to end his contract.

27 According to the explanation with art. 1 of Annex 5 of the Regulations.

28 According to Janwillem Soek: "Termination of International Employment Agreements and the 'Just Cause' Concept in the Case Law of the

FIFA Dispute Resolution Chamber", in ISLJ 2007/3-4, p. 45.

29 Commentary on the Regulations for the Status and Transfer of Players, p. 47, fn. 77.

30 CAS 2007/A/1217, Feyenoord Rotterdam v. UEFA, reason 11.21: "Due to the strict liability rule [of Article 6 para. 1 of the UEFA Disciplinary Regulations] the Club is responsible for its supporters' behaviour."

31 According to Janwillem Soek: "The Strict Liability Principle and the Human Rights of Athletes in Doping Cases", T.M.C. Asser Press, The Hague 2006.

32 CAS 2000/317, Aanes v. FILA.

The Training Compensation System

by Mark Bakker*

1. Introduction

Football clubs became obliged to pay training compensation with the introduction of the FIFA Regulations for the Status and Transfer of Players in 2001. The basic rule is that a club owes compensation to all clubs which contributed to a player's training if that player signs his first contract as a professional before his 23rd birthday, or if the player transfers before his 23rd birthday. The Regulations were amended in 2005. Several modifications were made but the training compensation itself remained in existence.

The Dispute Resolution Chamber (DRC) is the organ charged with issuing decisions in the case of disputes involving training compensation. The DRC has issued a number of such decisions in this area in the interim. A discussion follows below on how the training compensation system works, based on the FIFA Regulations for the Status and Transfer of Players and the DRC's decisions. It will focus to a large extent on cases where compensation is due and calculation of the extent of this amount. These themes will be addressed after discussing the DRC's working methods.

2. The Dispute Resolution Chamber

In each case, the Dispute Resolution Chamber first determines whether it is competent to issue a decision. This occurs on the basis of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (DRC) and the Regulations for the Status and Transfer of Players.¹ It is also determined which version of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (DRC) applies.² The DRC is empowered to issue a decision in the case of a dispute about training compensation between clubs which belong to different football associations.³

Should it be confirmed that the DRC is indeed the correct body, it is then determined which version of the Regulations for the Status and Transfer of Players applies. A new version of these regulations came into effect on 1 July 2005. The regulations of 2001 apply to issues submitted to FIFA before this date. The regulations of 2005 apply in all other cases.⁴ Several amended articles apply from 1 January 2008, but the articles involving training compensation have not been amended.⁵

The DRC issues decisions based on the facts and evidence provided.⁶ Any party deriving a right from an alleged fact shall carry the burden of proof.⁷ Appeals against DRC decisions can be submitted to the Court of Arbitration for Sport (CAS).⁸

3. When is there an entitlement to training compensation?

3.1 National

FIFA regulations cover training compensation in international cases. These generally concern a club which must pay compensation to a

club which is a member of a different football association. The rules governing national transfers are drawn up by the national football associations. These rules must however be approved by FIFA.⁹ In the Netherlands, the KNVB regulates the training compensation due in national transfers in the Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution [*Reglement overschrijvingsbepalingen algemeen, opleidingsvergoedingen en solidariteitsbijdrage*].

3.1.1 The KNVB and the Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution

The Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution were established during the KNVB association's meeting on 15 June 1987. Amongst other things, these regulations cover training compensation which must be paid by a club which is a member of the KNVB to other clubs which are also members of the KNVB. According to this regulation, training compensation is due to the clubs for which the player is authorised to play during his training period if a player is younger than 22 and has played in five binding matches of the first eleven of a professional football club, or if a player younger than 22 has signed a player's contract with a professional football club.¹⁰ A professional football club is obliged to notify the KNVB in writing that an amateur player has played for the fifth time in a binding match of its first eleven, or that he has signed a player's contract with it for the first time. This notification must occur within 14 days after the fifth match or the signing of the player's contract.¹¹ The professional football club which is due to pay training compensation must pay such compensation within 30 days after a player has signed a contract. This term must also be taken into account if a player has appeared in the fifth binding match.¹² If a professional football club does not pay the training compensation within 30 days, then the KNVB pays the rightful club(s) on first request, and the KNVB then has a claim on the professional football club. The request must be submitted in writing to the association, specifying the grounds on which the claim is based.¹³

3.1.2 The KNVB and training pool regulations

Alongside the Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution, there are also training pool regulations [*pool reglement opleidingen*]. The 'pool' is a fund created by the KNVB intended to compensate the training costs of a professional football club if a young player in training is transferred from a professional football club to another professional football club. Article 1 paragraph 1 of the regulation stipulates that only professional football clubs may claim pool compensation.

A professional football club can claim pool compensation for a player it has trained if this player is transferred to another professional foot-

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1 Each case begins as follows: first, the chamber analysed whether it was competent to deal with the matter at hand. In this respect, it referred to art. 18 par. 2 and 3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (DRC).

2 Art. 18 par. 2 and 3 of the Rules Governing the Procedures of the Players'

Status Committee and the Dispute Resolution Chamber (DRC)

3 Art. 22 (d) and art. 24 of the Regulations for the Status and Transfer of Players, edition 2005 and art. 42 (i) (b) (iv) Regulations for the Status and Transfer of Players, edition 2001

4 Art. 26 (1) and art. 26 (2) of the Regulations for the Status and Transfer of Players, edition 2005

5 Art. 29 (2) of the Regulations for the Status and Transfer of Players, edition 2008

6 DRC 115134 of 2 November 2005

7 Art. 12 par. 3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (DRC)

8 Art. 24 (2) of the Regulations for the Status and Transfer of Players, edition 2005

9 Art. 1 (1) and art 1 (2) of the Regulations for the Status and Transfer of Players, edition 2005 and Preamble (1) and (3) of the Regulations for the Status and Transfer of Players, edition 2001

10 Art. 3, art. 12 (1) and art. 12 (2) Regulations on General Transfer

Provisions, Training Compensation and Solidarity Contribution

11 Art. 12 (4) Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution

12 Art. 13 (1) Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution

13 Art. 13 (2) Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution

ball club, the player is an active amateur and plays in the A-, B-, C- or D-youth of the relevant professional football club.

In addition the professional football club claiming pool compensation for a player must have notified the relevant player in writing by no later than 1 May of the calendar year that he may again participate in the club's youth training.¹⁴ A copy of this written notification also needs to be submitted to the KNVB no later than 7 May of the same calendar year.

Pool compensations are separate from training compensations that are due on the basis of the Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution. The pool regulations in fact state that, if a club has obtained pool compensation for a player, this club no longer has any right to training compensation for that player.¹⁵ Any possible entitlement to training compensation by amateur clubs on the basis of the Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution is not affected by this.¹⁶ It will be discussed later that compensation based on the pool regulations is higher than compensation based on the Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution.

3.2 International

The FIFA Regulations and decisions by the DRC cover training compensation in international cases. Training compensation in international situations will also be considered below. First, the focus will be on instances where training compensation is due to clubs which have contributed to a player's training. Here the FIFA Regulations of 2001 and 2005 are unequivocal. Training compensation is payable when a player signs his first contract as a professional before the end of the season of his 23rd birthday. Compensation must also be paid for each international transfer the player makes before the end of the season of his 23rd birthday. This applies both to a transfer while there is an ongoing contract, and to a transfer on conclusion of the player's employment contract.¹⁷

A player's former club has no right to any training compensation if that club has terminated the contract with the player without just cause.¹⁸ Nor is there any entitlement to compensation if the player moves to a club from category 4 (amateur level).¹⁹ The rules of 2001 provide an exception to this if the player acquires non-amateur status again within three years.²⁰ The rules of 2005 stipulate the term as 30 months.²¹

The 2005 rules also provide that the player's new club must have paid the training compensation to all clubs which have a right to it, within 30 days following registration with the new football association.²² This rule also stipulates that if a link between the player and any of the clubs that trained him cannot be established, or if those clubs do not make themselves known within 18 months of the player's first registration as a professional, the training compensation shall be paid to the association(s) of the country (or countries) where the professional was trained.²³ The 2001 rules set the term at two years.²⁴ The compensation must be used by the football association for developing youth football.

3.3 The first contract as a professional

Training compensation must therefore be paid if a player signs a contract as a professional before the end of the season of his 23rd birthday. But when is there in fact such an employment contract? Where is the line between an amateur and a professional?

Article 2 of the FIFA rules of 2001 and 2005 stipulates that a professional has a written contract with a club. He will in fact be paid more than the amount of the actual expenditure for his football activities. The rules of 2001 provide that travel and hotel expenses incurred through involvement in a match and the costs of a player's equipment, insurance and training may be reimbursed without jeopardising a player's amateur status.

The DRC had to reach a decision in a case where a 'scholarship agreement' was involved. According to this agreement, the player received around EUR 500 a month in the first season, EUR 560 in the second and EUR 710 in the third. Travel expenses were also reim-

bursed. The DRC considered that the player received remuneration which exceeded the expenses incurred under article 2. It was also considered that the criteria of this article were conclusive in a case where it had to be determined whether the status was amateur or professional. The legal nature or naming of the agreement is not important here. This is confirmed by the Court of Arbitration for Sport.²⁵ In this instance, the player with the 'scholarship agreement' was regarded as a professional. Because he had signed his contract as a professional, training compensation had to be paid.²⁶

In another case, a player with a 'scholarship agreement' was indeed regarded as an amateur. In terms of this agreement, housing expenses were paid, as well as travel and living expenses incurred by the player arising from his training. The DRC considered that the nature of a contract between a player and a club is established by the relevant football association. In this instance, the player was registered as an amateur. It was also considered that the autonomy of the football association should be respected, so that the status of registration with the association is decisive should it have to be determined whether the conditions for receiving training compensation have been met. In this instance the status was thus amateur. This meant that no first contract as a professional had been created, so that no training compensation was due.²⁷

The next case deals with an 'amateur sport agreement'. According to this agreement, transportation, apartment and nutrition expenses were reimbursed. The player also received a monthly amount of HUF 57,000. The minimum wage in Hungary is HUF 62,500. The DRC considered that a player should not be regarded as amateur if he has a written contract on the basis of which he receives remuneration which exceeds the actual expenses incurred as a result of his football activities. It was concluded that just such a situation existed here. There was thus a contract as a professional, so that training compensation had to be paid.²⁸

Another case involved a contract without a monthly salary, but with bonuses which would be paid per match played. However, the relevant player never played a match in the club's A-team. The DRC concluded that, in formal terms, the player was a professional, but that de facto he was an amateur because he had never received remuneration. The player had therefore not received any remuneration which was greater than the actual expenses incurred because of his football activities. In this case no training compensation was thus due.²⁹

The next case involves a player with a contract as a professional. The player was also registered as a professional with the Greek football association. In fact, he never played a match for a non-amateur team. The DRC decided here that the player should be regarded as a professional. Because an employment contract had been signed, the claimant club had the right to training compensation.³⁰

Another case dealt with the status of an 'aspirant contract'. According to this contract, living and educational costs would be reimbursed. A cash

14 Art. 2 Training Pool Regulations and art. 48 Regulations on Paid Football [Reglement Betaald Voetbal]

15 Art. 2 (2) Training Pool Regulations

16 Art. 2 (4) Training Pool Regulations

17 Art. 20 of the Regulations for the Status and Transfer of Players, edition 2005 and art. 5 (2) of the Regulations Governing the Application of the Regulations for the Status and Transfer of Players, edition 2001

18 Art. 2 (i) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005 and art. 5 (3) (b) of the Regulations Governing the Application of the Regulations for the Status and Transfer of Players, edition 2001

19 Art. 2 (ii) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005 and art. 5 (3) (a) of the Regulations Governing the Application of the Regulations for the Status and

Transfer of Players, edition 2001

20 Art. 5 (3) (a) Regulations Governing the Application of the Regulations for the Status and Transfer of Players, edition 2001 and DRC 65362 of 1 June 2005

21 Art. 3 (2) Regulations for the Status and Transfer of Players, edition 2005

22 Art. 3 (2) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005

23 Art. 3 (3) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005

24 Art. 19 of the Regulations for the Status and Transfer of Players, edition 2001

25 TAS 2005/A/383

26 DRC 86137 of 17 August 2006

27 DRC 75142 of 28 July 2005

28 DRC 26286A of 21 February 2006 and DRC 26286B of 21 February 2006

29 DRC 26135 of 21 February 2006

30 DRC 11324 of 2 November 2005

sum of EUR 15,240 would also be paid as compensation for expenses the player's parents incurred. Travel and living expenses would also be reimbursed should he be visited by his parents. The DRC considered that some of the abovementioned financial obligations, such as reimbursement for expenses the parents incurred, exceeded the expenses actually incurred in terms of article 2 of the FIFA Regulations. Here too the status was that of a professional, so that training compensation was due.³¹

In conclusion it can be stated that the most important consideration of the DRC is the following:

*'The chamber emphasised that a player shall be regarded as non-amateur if he has a written employment contract based on which he receives remuneration in excess of the expenses effectively incurred for his football activity'*³²

3.4 Subsequent transfers

The right to training compensation exists, alongside the case where a first contract is signed as a professional, if a professional transfers before the end of the season of his 23rd birthday between two clubs belonging to different football associations. It is not important whether this transfer occurs during or after expiry of the contract.³³ An entitlement to compensation thus also arises if a professional leaves a club and signs a contract with another club some time later.³⁴

In FIFA circular no. 826 (31 October 2002) it was decided that in the case of a subsequent transfer, only the previous club of the player would have a right to training compensation, and that all other former clubs would not. This was confirmed by the DRC.³⁵ This rule remains in force following the introduction of the FIFA Regulations for the Status and Transfer of Players of 2005.³⁶

3.5 Agreements which exclude training compensation

In some instances, agreements are signed covering training compensation between the clubs, the player and the manager. The instances in which the entitlement to training compensation can be negated through an agreement will be discussed below.

In the cases handled by the DRC, the issue is consistently that of a player's former club demanding training compensation from the new club. The DRC had to reach a decision in a case where an agreement had been signed between a player and his new club. According to this agreement, the player was responsible for claims involving training compensation. The agreement also stated that the player and his former clubs could not claim any training compensation, and legal procedures were excluded. However the former club had not signed this agreement. The DRC thus considered that the agreement was not relevant in the case between the new and the former clubs. In this instance the former club enjoyed the normal right to training compensation.³⁷

An agreement where a player, his manager and the new club agreed that the player and manager should bear responsibility for any compensation covering training, was also deemed not to be relevant in a case between the new and former clubs. Here too it was decided that, because the former club was not party to the agreement, this former club retained its normal right to training compensation.³⁸

The following case covers an agreement between a player and his former club. It was agreed that the club did not have to pay the salary arrears. The respondent maintained that as a consequence, it was also stipulated that the club would not demand any transfer sum or training compensation from the new club. The claimant believed that the player was free and out of contract, but that the right to training compensation continued to exist. The DRC determined that the agreement between the player and his former club could not exclude the right to training compensation.³⁹

The right to training compensation can however be excluded in an agreement between the player's former and new clubs. A document in which the former club waives claims against a new club involving a specific player, must be regarded as a statement of renunciation of training compensation. In this instance the right to training compensation thus lapses.⁴⁰

The following situation concerns a confirmation from the former club to the player's representative which states that the contract is

ending and that no transfer sum is claimed. The DRC decided that this document only excluded a transfer sum, but that training compensation still had to be paid.⁴¹

In this case the issue is an agreement between a player and his former club. In this agreement the player states that he will not claim compensation from this club. The player also declares that his new club has confirmed that it will also not make any claim. It was also confirmed that the international transfer certificate was provided without any demand for compensation. The new club did not intend paying training compensation and appealed on the following three main points. First, the player was free to sign for the new club. The next point concerned the abovementioned declarations by the player. The final point involved delivery of the international transfer certificate without any objections. The DRC decided that these reasons were entirely irrelevant given that the issue was the payment of training compensation. The DRC stated that the obligation to pay this compensation existed purely between clubs. Footballers play no direct role in this. The fact that the international transfer certificate was handed over to the football association without any objections did not imply that the player's former club waived training compensation. Training compensation thus had to be paid.⁴²

Finally, there was a case in which the new club stated it had agreed with the former club that training compensation would be waived. However, it was agreed that the former club would participate in the financial reward once the player was transferred to a third club.

The DRC decided that the new club was unable to provide adequate proof of this, so that the normal training compensation had to be paid.⁴³

It can be determined from the above that the right to training compensation can be excluded if the player's former and new club agree. Agreements between the new club or the former club and the player (and manager) cannot exclude training compensation. The DRC then also determined the following:

*'The Chamber stated that training compensation is a right or an obligation, depending on each particular case, only between clubs. Moreover, players do not have any direct role to play in this specific topic.'*⁴⁴

3.6 No (new) contract offer within the European Union

For a transfer within the European Union, the general rule is that no compensation is due if the club which provided the relevant player's training does not offer this player a contract.⁴⁵ This also applies if no new contract is offered which is at least of an equivalent value to the previous contract.⁴⁶ The regulations of 2005 also stipulate that the new contract must be offered in writing and by registered mail at least 60 days before expiry of the old one. The rule that no training compensation is due to a club which does not offer a player a contract, does not affect the rights of any possible former clubs.⁴⁷ What requirements the DRC lays down in terms of the abovementioned regulation, will be discussed below.

31 DRC 25633a of 4 February 2005 and DRC 25633b of 4 February 2005
 32 DRC 26286A of 21 February 2006 and DRC 26286B of 21 February 2006
 33 ART. 20 and art. 2 sub ii Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005 and art. 15 Regulations for the Status and Transfer of Players, edition 2001
 34 DRC 36645 of 23 March 2006
 35 DRC 46146B of 27 April 2006, DRC 26135 of 21 February 2006, DRC 74353 of 22 July 2004 (FC Twente/Schalke 04 - Simon Czommer)
 36 Art. 3 (1) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005
 37 DRC 86130A of 17 August 2006 (Berliner Athletik Klub/Club Aydinspor - Kemel Akar) and DRC 86130B of 17 August 2006 (Türkiyemspor Berlin/Club Aydinspor - Kemel Akar)
 38 DRC 46146A of 27 April 2006

39 DRC 113377 of 2 November 2005
 40 DRC 25528A of 4 February 2005
 41 DRC 114461 of 9 November 2004. This decision was confirmed by the CAS in Arbitration CAS 2005/A/811 Galatasaray SK v/ MSV Duisburg GmbH & Co. KgaA, award of 19 December 2005
 42 DRC 114642 of 9 November 2004
 43 DRC 114346 of 9 November 2004
 44 DRC 114642 of 9 November 2004
 45 Art. 6 (3) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005 and art. 5 (5) Regulations Governing the Application of the Regulations for the Status and Transfer of Players, edition 2001
 46 See 2 and circular no. 769 and FIFA Commentary on the Regulations for the Status and Transfer of Players
 47 Art. 6 (3) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005 and art. 5 (5) Regulations Governing the Application of the

The regulations above apply if a player of an EU club is moving to a club of another EU football association. Whether such player holds the nationality of an EU country is not relevant here.⁴⁸

Should no (new) contract be offered, the right to training compensation thus lapses.⁴⁹ The point is that the contract is offered. Whether it is ultimately accepted is not of importance. In this way, FC Twente had the right to EUR 460,000 in training compensation after the departure of Simon Cziommer to Schalke 04. Twente had offered Cziommer a new contract, but he declined it.⁵⁰

When both parties agree to the termination of an employment contract, the right to training compensation lapses. This is because no new contract is offered in such a case. The right to compensation also lapses if termination occurs to enable the player to transfer to another club, because the condition is not met that a new contract must be offered. The established jurisprudence of the DRC is that a club which ends the employment agreement with a player is not actually seeking to retain the services of the player and has thus foregone its entitlement to training compensation.⁵¹

In the next case, the consideration which follows is important: 'In this context, the members of the Chamber pointed out that, so as to transfer the player B to the club C, the club A required the player's consent to the transfer as well as to the termination of the contractual relationship binding him to club A. Essentially, and by putting an end to the contractual engagement with the player, club A failed to meet the requirements of Art. 5.5 of the application regulations. In essence, the members of the Chamber maintained that a club willing to transfer a young player to another club is not actually seeking to retain the services of the latter and has thus forgone its entitlement to training compensation, as specified under the aforementioned Art. 5.5. It would thus go against the mentioned principles of the regulations to award training compensation to a club of the EU/EEA area transferring a player to another EU/EEA club during the course of an ongoing contractual relationship. The chamber concluded that the jurisprudence developed with respect to article 5.5 of the Application Regulations and the aforementioned circular letter applies directly to the case at hand.'⁵²

The right to training compensation also lapses, according to the DRC, if an amateur player is not offered a contract. That article 6 paragraph 3 of Annex 4 of the Regulations of 2005 refers to a contract offer within 60 days before the expiry of the current contract has no bearing here. In the following case, the claimant club appealed on the basis of this wording. The DRC considered that the spirit and the intent of article 6 paragraph 3 of Annex 4 is to penalise clubs which are clearly not interested in the services of a player as a professional. It is not important whether the club must make a contractual offer for the first time, or a renewed offer in light of the expiry of the old contract. It is the intention of the sentence where the claimant in this case intended to indicate a time limit within which the club already had a contract with the player and had to make a new offer. This sentence cannot be explained in such a way that the right to training compensation lapses if an amateur player is involved.⁵³

In a case before the Court of Arbitration of Sport (ADO / Newcastle - Tim Krul) it was determined that clubs which provide training to players within the EU must offer contracts to amateur players to maintain the right to training compensation, unless a 'bona fide and genuine interest' is shown to retain an amateur player. This means that a club must be able to demonstrate that it wants to retain the relevant player, for example by producing positive evaluation reports and written declarations to the player that he may continue to be part of the club's youth training. A contract offer is therefore then not necessary. If no 'bona fide and genuine interest' is demonstrated, in terms of this decision the right to training compensation lapses if the player signs a first contract as a professional with another club.

According to a recent CAS decision, the obligation to offer a new contract only applies if there is a contractual relationship between the player and the club. According to this decision, amateur players do not have to be offered a new contract to retain the right to training compensation. This CAS decision contradicts former cases. Further jurisprudence must be awaited for more clarity in terms of the obligation to offer a contract to amateur players.⁵⁴

To comply with the conditions of article 6 (3) Annex 4 of the Regulations for the Status and Transfer of Players, there must be a written contractual offer. If there are only vague negotiations about a possible contract, then this condition has not been fulfilled and there will be no right to compensation.⁵⁵

The DRC had to reach a decision in a case where the former club did not offer a player a new contract for economic reasons. There were no underlying sporting reasons, only a financial one because a non-EU salary had to be paid. A second reason for not offering a new contract was because the player wanted to continue his career elsewhere. The DRC considered that these reasons did not hinder the club from offering a new contract. The club had the opportunity to offer a new contract, and the abovementioned arguments did not detract from this, according to the DRC. In this instance, the former club did not therefore obtain training compensation.⁵⁶

The consistent jurisprudence of the DRC indicates that if the former club, which contributed to the player's training, is unable to prove that it offered the player a new contract before expiry of the old one, it has no right to any training compensation from the player's new club.

In the following case, the former club could not prove that it had made a new offer. That the former club had not asked for the return of the international transfer certificate after the loan period with another club had finished, although there was still a contract for four months, also did not count in this club's favour. The DRC maintained that this demonstrated a lack of interest in continuing the collaboration. The reasons the former club advanced for not requesting the return of the transfer certificate involved the alleged trials and a training camp with the national team which the player had covered. The DRC considered that such activities may take place, wherever the player may be registered. In this case, it was thus not proved that a new contract offer had been made, so that the right to training compensation lapsed.⁵⁷

The DRC also had to produce a decision in a case where a club lost its professional status. This meant all players were freed from all contractual obligations and the club was no longer in a position to enter into employment contracts. The DRC considered that the intention of the regulations in not awarding training compensation should a (new) contract not be offered was not to stand in the way of the player's professional career. A club which does not offer a player a new contract may not receive training compensation. In this instance, the club was certainly not in a position to offer a new contract. The DRC considered that a club losing its professional status could not of itself justify an exception to this regulation. In this case, the DRC in fact decided that this would be unjust now that the club had no direct influence on the situation. In this instance, the club retained the right to training compensation.⁵⁸

In conclusion, it can be stated that clubs lose the right to training compensation if they do not make a (new) contract offer. Clubs which claim compensation must demonstrate that they have made an offer. In the case of terminating the employment contract by mutual agreement, the right to training compensation lapses, even if this occurs to enable the player to move to another club. The DRC also states the following:

*'In essence, the members of the Chamber maintained that a club willing to transfer a young player to another club is not actually seeking to retain the services of the latter and has thus forgone its entitlement to training compensation.'*⁵⁹

Regulations for the Status and Transfer of Players, edition 2001
48 DRC 26562 of 21 February 2006
49 DRC 114549 of 9 November 2004
50 DRC 74353 of 22 July 2004 (FC Twente/Schalke 04 - Simon Cziommer). This was also the case in DRC 75942 of 28 July 2005
51 DRC 26595 of 21 February 2006 and DRC 114363 of 9 November 2004

52 DRC 114312 of 9 November 2004
53 DRC 461185 of 27 April 2006
54 Arbitration CAS 2006/A/1177 Aston Villa FC v/ B93 Copenhagen, award of 28 May 2007; FBO Voetbalzaken no. 13, 'Nader Belicht'
55 DRC 461185 of 27 April 2006
56 DRC 36410 of 23 March 2006
57 DRC 16253 of 12 January 2006
58 DRC 34054 of 23 March 2004

3.7 Prescription

The DRC does not handle cases where more than two years have elapsed from the event giving rise to the dispute.⁶⁰

In a case where a player signed his first professional contract on 27 July 2001 and a claim was submitted to FIFA on 2 February 2006, compensation could no longer be awarded. The DRC emphasised that it is the claimant's responsibility to follow the player's sporting career in case it intends to claim for any payment due on the basis of the player's transfer to other clubs.⁶¹

In the following case, a contract was signed by a player and his new club on 30 June 2002. A club other than the claimant party in this case submitted a claim to FIFA in January 2003. A list was produced of all the clubs which had contributed to the relevant player's training, including the claimant club in this case. On 15 March 2005, this club submitted an individual and formal claim. At this date however more than two years had passed since the date when the facts leading to the dispute arose, in this instance the signing of the contract on 30 June 2002. The DRC considered that a distinction needed to be drawn between an individual claim and a list of clubs submitted by another club. Such a list could not be regarded as an official claim for training compensation. In this case, no compensation was thus awarded.⁶²

4. How is the extent of training compensation determined?

4.1 National

It earlier became apparent that the rules covering training compensation in national cases are drawn up by the national football associations. This also means that the extent of the training compensation within the Netherlands is set by the KNVB. The rules governing calculation of compensation can also be found in the Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution.

4.1.1 The Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution

In calculating training compensation for situations within the Netherlands, the training period may be a maximum of twelve years. The period up to and including the association year in which a player reaches the age of nine, counts here as one training year. For the period which follows, each association year up to and including the association year in which the player turns 20, also counts as one training year.⁶³ The extent of training compensation due to a club is EUR 1,250 per training year that the player has been registered with the relevant club as a player entitled to play.

If the player has been entitled to play for more than one club in a training year, the relevant clubs have a right to training compensation in proportion to the number of months the player was entitled to play for them.⁶⁴ The amount due per training year is reviewed every five years, starting from 1 July 2009, in accordance with the consumer price index, the so-called CPI for all households, published annually by the Central Statistical Bureau, over five years. The reference date is taken to be 1 January of the first year of the most recent five-year period.⁶⁵

4.1.2 The training pool regulations

The extent of pool compensation to be received by a professional football club is determined by the number of training years of the

player in question with the relevant professional football club, multiplied by a fixed amount of training costs to be determined by KNVB annually. Up to and including 31 July 2008, the training costs have been set at EUR 11,344.50 per training year.

4.2 International

It also became apparent earlier that FIFA draws up the rules governing training compensation in international situations. The DRC, too, only decides in international situations. Where training compensation is referred to below, this concerns instances where a club is owed compensation by a club from another football association.

4.3 Division into categories

The extent of the training compensation to which a club is entitled after contributing to a player's training, is determined using the FIFA Regulations for the Status and Transfer of Players.

According to these rules, a player's training and education takes place between the ages of 12 and 23. In principle, training compensation shall be payable up to the age of 23 for the training which has taken place up to the age of 21, unless it is clear that a player's training had already ended before 21. In this last instance, a club is entitled to training compensation up to the end of the season in which the player turned 23, but calculating the amount due will be based on the years between 12 and the age at which training was actually completed.⁶⁶

To calculate the extent of training compensation, each football association needs to divide its clubs into a maximum of four categories, which accord with the clubs' financial investment in their players' training. The training costs associated with the categories are published on the FIFA website at the end of each calendar year. The training costs are thus established for each category, and are equivalent to the amount needed to train one player for one year, multiplied by an average 'player factor'. The 'player factor' is the ratio between the number of players needed to be trained to produce one professional.⁶⁷ Below is one such summary of the training costs per category.⁶⁸

4.4 Not within the European Union

The extent of training compensation in a transfer between two clubs from different football associations within the European Union is calculated differently than the compensation in a transfer between two

59 DRC 26595 of 21 February 2006, DRC 114363 of 9 November 2004, DRC 114312 of 9 November 2004

60 Art. 25 (5) of the Regulations for the Status and Transfer of Players, edition 2005 and art. 44 of the Regulations for the Status and Transfer of Players, edition 2001

61 DRC 86119 of 17 August 2006

62 DRC 16432 of 12 January 2006

63 Art. 11 of the Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution

64 Art. 12 (3) (a) of the Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution

65 Art. 12 (3) (b) of the Regulations on General Transfer Provisions, Training Compensation and Solidarity Contribution

66 Art. 1 (1) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005 and art. 13 of the Regulations for the Status and Transfer of Players, edition 2001

67 Art. 4 Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005 and art. 6 of the Regulations Governing the Application of the Regulations for the Status and Transfer of Players, edition 2001

68 Training costs and categorisation of clubs for the year 2005

69 Art 7 (1) Regulations Governing the

Confederation	Category I	Category II	Category III	Category IV
AFC		USD 40,000	USD 10,000	USD 2,000
CAF		USD 30,000	USD 10,000	USD 2,000
CONCACAF		USD 40,000	USD 10,000	USD 2,000
CONMBOL	USD 50,000	USD 30,000	USD 10,000	USD 2,000
OFC		USD 30,000	USD 10,000	USD 2,000
UEFA	EUR 90,000	EUR 60,000	EUR 30,000	EUR 10,000

clubs from different football associations which are not both based in the European Union. Calculating training compensation in cases which do not occur within the European Union will be covered first. In this calculation of the extent of the training compensation, the rules of 2001 and 2005 differ.

4.4.1 The rules of 2001

According to the 2001 rules, training compensation must be calculated on the basis of the category of the club which provided the training.⁶⁹ From the regulations of 2001 and circular no. 769 (24 August 2001), which explain the main points of the 2001 FIFA regulations, it appears that compensation must be based on the costs of the football association of the new club.⁷⁰ This means that the compensation must be calculated by noting the category of the former club. The amount must then be taken which applies to this category in the football association of the new club. This is the training compensation for one year. If this amount is multiplied by the number of training years, the training compensation due is produced. This system of calculation was confirmed by the DRC.⁷¹ The following was then also stated:

It was recalled that, outside the EU/EEA area, compensation for training is based on the training and education costs of the country of the new club but taking the category of the club which had effectively trained the player.⁷²

To prevent the training compensation of very young players becoming unrealistically high, the amounts for the period of the seasons where players are between the ages of 12 and 15 are always calculated based on category 4.⁷³

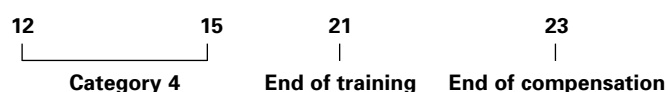
The following case concerned the transfer of a player from a Croatian club to a Hungarian one (thus not within the EU). Between 1994 and 2002, the player had played for the Croatian club during eight seasons. He was 13 during the start of his first season and turned 21 in his last season. The calculation was carried out on the basis of the costs of the new club, in this instance the Hungarian one. The Hungarian football association is a member of UEFA. For the first two seasons, which were based on category 4, EUR 10,000 per season (category 4, UEFA) had to be paid. The Croatian club belonged to category 3; the Hungarian one to category 2. Because the FIFA rules of 2001 stipulate that the category of the former club must be taken into account, category 3 applied. A sum of EUR 30,000 per season (category 3, UEFA) was therefore due for the last six seasons. The total training compensation was thus EUR 200,000 (2 x EUR 10,000 + 6 x EUR 30,000).⁷⁴

4.4.2 The rules of 2005

According to the 2005 rules, training compensation must be calculated by taking the costs which would have been incurred by the new club if it had trained the relevant player itself.⁷⁵ This means that the compensation would be based on both the category and the costs of the new club. Here the rules of 2001 and 2005 differ. According to the 2001 rules, the category of the former club must be used, while the 2005 rules specify the category of the new club. Both rules indicate that, in calculating the training compensation, the costs of the association of the new club must be used. Should the 2005 rules apply, the DRC issues decisions based on the abovementioned calculation system.⁷⁶ The 2005 rules also stipulate that compensation for the seasons played by players between the ages of 12 and 15 be based on category 4.⁷⁷

In the next case, German club Turkiyemspor Berlin was entitled to training compensation for player Kemal Akar, who signed his first professional contract with the Turkish Club Aydınspor. Turkey does not belong to the EU. For training Akar between the ages of 17 and 18, the entitlement was to compensation for the period of one year and nine months. The player's new club, Club Aydınspor, belonged to category 4 and was an UEFA member. This meant that EUR 10,000 was due per year. Because the player had been trained for one year and nine months, the total training compensation was EUR 17,500.⁷⁸

The compensation was calculated as follows:



Training costs of the football association of the new club (from the category of the old club [2001 rules] or from the category of the new club [2005 rules]) x years of training = training compensation.

4.5 Within the European Union

Other rules apply to international transfers which occur within the European Union. The 2001 and 2005 rules are however unequivocal here. The special rules for players who move from a club of a football association within the EU to another club of a football association within the EU came about following discussions between FIFA, UEFA and the European Commission in March 2001.⁷⁹ If a player in such a situation moves from a club of a lower category to one with a higher category, the calculation must be based on the average of the costs of the two clubs.⁸⁰ If a player moves from a club of a higher category to one of a lower category, the costs of the club from the lower category must be used.⁸¹ Should a player move between two clubs of the same category, then of course that category applies. Also within the EU the compensation for seasons played between the ages of 12 and 15 are based on category 4.

In the next case, a player appeared for a European club during the season in which he turned 16. Later he signed his first professional contract with another European club. His new club belonged to category 2, while his former one was category 3. The amount applicable to category 2 in Europe is EUR 60,000, while the amount for category 3 is EUR 30,000. Because the transfer was from a club with a lower category to a club with a higher one, the average had to be taken. This meant that training compensation of EUR 45,000 was due.

4.6 The Dispute Resolution Chamber is restricted to the claim

The DRC cannot award higher training compensation than that which is claimed or demanded. It often appears from the DRC's jurisprudence that the claim is too low. Although there may actually have been an entitlement to greater compensation, in such instances only the claimed amount may be met.⁸²

In such cases the DRC has stated the following:

'According to the principle 'ne eat iudex ultra petitum partium' the Dispute Resolution Chamber cannot award more than the amounts claimed by the claimant.⁸³

Application of the Regulations for the Status and Transfer of Players, edition 2001
 70 Art. 7 (3) Regulations Governing the Application of the Regulations for the Status and Transfer of Players, edition 2001
 71 DRC 95622 of 23 September 2005, DRC 45172 of 12 April 2005, DRC 25715c of 4 February 2005, DRC 25313 of 4 February 2005, DRC 25715 of 4 February 2005, DRC 114296 of 9 November 2004 (Kyoto Purple Sanga/PSV - Ji-sung Park), DRC 114527 of 26 November 2004, DRC 34-181102krt of 24 March 2004, DRC 1487 of 15 January 2004
 72 DRC 95622 of 23 September 2005
 73 Art 7 (2) Regulations Governing the Application of the Regulations for the Status and Transfer of Players, edition 2001
 74 DRC 34-181102krt of 24 March 2004
 75 Art. 5 (i) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005
 76 DRC 86130A of 17 August 2006 (Berliner Athletik Klub/Club Aydınspor - Kemal Akar) and DRC 86130B of 17

August 2006 (Turkiyemspor Berlin/Club Aydınspor - Kemal Akar)
 77 Art. 5 (3) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005
 78 DRC 86130B of 17 August 2006 (Turkiyemspor Berlin/Club Aydınspor - Kemal Akar)
 79 FIFA Commentary on the Regulations for the Status and Transfer of Players p. 124
 80 Art. 6 (a) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005 and art. 4 (a) of the Regulations Governing the Application of the Regulations for the Status and Transfer of Players, edition 2001
 81 Art. 6 (b) Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005 and art. 4 (b) of the Regulations Governing the Application of the Regulations for the Status and Transfer of Players, edition 2001
 82 DRC 46146a of 27 April 2006, DRC 361037 of 23 March 2006, DRC 26286A of 21 February 2006, DRC 26286B of 21 February 2006, DRC 65362 of 1 June 2005, DRC 114346 of 9 November 2004
 83 DRC 361037 of 23 March 2006

4.7 Claims other than the indicative amounts

It can be determined from circular no. 826 (31 October 2002), which comprises an explanation of the 2001 rules, that any party which believes calculation on the basis of the indicative amounts to be disproportionate, may submit this to the DRC. In special circumstances, the DRC can adapt the amounts to a specific situation. It has occurred several times that clubs appeal using this provision. However the DRC has never granted such an appeal.

In a case where a demand was submitted which was higher than the relevant indicative amount, the DRC ruled that a club which appealed against the training compensation based on the indicative amounts, producing concrete documents such as invoices, training centre costs, budgets etc., must prove that this compensation is disproportionate. Given the lack of evidentiary material in this case, an appeal was still made on the indicative amounts. The DRC indicated that in taking this decision, it followed the jurisprudence of the CAS in similar cases.⁸⁴

In a case where a lower training compensation was offered than the compensation based on the indicative amounts, the DRC decided that the indicative amounts had to be followed.⁸⁵

That a player has played as an amateur for a club for some time is not a special circumstance which justifies an adjustment of the indicative amount. This was determined in the case in which FC Twente claimed compensation from Schalke 04 for having trained Simon Cziommer.⁸⁶

A case also occurred where higher compensation was claimed because of an agreement with the player which stated that the right to sell the player would continue in existence following expiry of the contract. According to the claimant club, the compensation was also to have been based on the market value. The DRC did not take these arguments into consideration because they went against the spirit of the rules and were not related to the relevant player's training compensation. Neither had the claimant club produced any relevant evidentiary material to justify a higher compensation.⁸⁷

It was also decided in a number of other cases that the amount claimed was excessive. The indicative amounts were again applied.⁸⁸

From the decisions covered above, it appears that compensation other than the indicative amounts is not readily accepted. An important passage from the DRC's jurisprudence is the following:

*'The members observed that whenever particular circumstances are given, the Dispute Resolution Chamber may adjust the amounts for the training compensation so as to reflect the specific situation of a case. Any adjustments to the training fee as mentioned in art. 42.1(b)(iv) of the FIFA Regulations may only be based on criteria established by the applicable rules and regulations and may be proven on the basis of concrete evidentiary documents, such as invoices, costs of training centres, budgets, etcetera.'*⁸⁹

4.8 Training compensation for the period that the player is actually being trained - loan of players

From the DRC's jurisprudence it is apparent that training compensation is only awarded for the period of time during which a player had in fact been trained by the club claiming payment of such compensation.⁹⁰ The Court of Arbitration for Sport confirmed this view by stating that in calculating the compensation, only the exact period during which the player was actually being trained by a club could be taken into consideration.⁹¹ This means that training compensation must not simply be calculated across complete seasons. The above means that a club is not entitled to training compensation for the period of time where a player was on loan at another club.⁹² But a club that has accepted a player on a loan basis is indeed entitled to this compensation. The DRC decided this in a case where AC Milan released Mohammed Aliyu Datti on loan. Siena received this player on loan for one season. After Datti's transfer to Standard Liège, Siena claimed training compensation of EUR 60,000. The DRC decided that the nature of the registration is not relevant. Whether there is a definitive or temporary contract is not an issue here, now that the question is whether there is an entitlement to training compensation for the period that the player was actually undergoing training with the club. In this instance Siena was thus entitled to EUR 60,000.⁹³

The conclusion is that entitlement to training compensation only exists for the period that a player is actually being trained by a club. If a player is on loan at another club, that is not the case. Should a player be hosted on loan, then training is actually taking place. The DRC's decisions always rest on the statement below:

*'In this respect, the members referred to the well-established jurisprudence of the DRC, which had been confirmed by the CAS, according to which a club is only entitled to receive training compensation for the period of time during which a player had in fact been trained by the club claiming payment of such compensation.'*⁹⁴

4.9 Ending of training before the age of 21

According to FIFA rules, training a player occurs until the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. In that case, calculating the training compensation is based on the period of training up to the age at which the training had actually been completed. But just when is there such an ending of training before the age of 21? Here too considerable jurisprudence has been created by the Dispute Resolution Chamber and the Court of Arbitration for Sport.

In the case of the Japanese Kyoto Purple Sanga against PSV about training compensation for Ji-sung Park, PSV appealed on the grounds of ending training before the age of 21. The argument was that Park was already playing for the South Korean national team in the world championship. However, the DRC believed that the Japanese club had actually provided Park's training. The world championship was also held after Park's 21st birthday. The DRC also indicated that PSV had not submitted any evidentiary material which supported its contentions. The DRC noted that the party arguing that a player's training had ended before the age of 21 was required to prove this on the basis of evidentiary material. PSV was thus obliged to pay the training compensation calculated on the basis of the entire time that Park was under contract with Kyoto Purple Sanga.⁹⁵

The DRC indicates that the period of training to be taken into account shall only be reduced if it is *evident* that the player has terminated his training before the age of 21. The burden of proof lies with the respondent. This was confirmed in the PSV case mentioned earlier, and in the following case.

In this case, the argument put forward for ending training was that the relevant player had already played a considerable amount of matches for the senior team of the claimant. The claimant did indeed concede that this was the result of exceptional circumstances such as injuries and the suspension of established players. The claimant justified itself further by suggesting that it was precisely its intention to avail itself of the services of a young inexperienced player.

To justify application of the relevant exception, the DRC emphasised that, in every case, more than one indication must exist for the earlier ending of a player's training. In this case the DRC also believed that ending the training had not occurred before the age of 21. The claimant club would therefore have to comply with training compensation calculated over the period up to and including the season of the player's 21st birthday.⁹⁶

Again in the case of Simon Cziommer mentioned earlier, Schalke

84 DRC 65234 of 1 June 2005 and CAS 2004/A1560: a club claiming that training compensation calculated on the basis of the indicative amount is disproportionate bears the burden of proof. This club has to present concrete evidence in the form of documents such as invoices, costs of training centre, budgets, etc. Only economic aspects are relevant in this respect. See also DRC 75942 of 28 July 2005

85 DRC 25313 of 4 February 2005

86 DRC 74353 of 22 July 2004 (FC Twente/Schalke 04 - Simon Cziommer)

87 DRC 34368 of 24 March 2004

88 DRC 14-150302vhm of 15 January 2004 and DRC 7472B of 22 July 2004

89 DRC 74353 of 22 July 2004 (FC Twente/Schalke 04 - Simon Cziommer)

90 DRC 36928 of 23 March 2006, DRC 26562 of 21 February 2006, DRC 34368 of 24 March 2004

91 CAS 2004/A1560

92 DRC 26562 of 21 February 2006 and DRC 34368 of 24 March 2004

93 DRC 36928 of 23 March 2006 (Siena/Standard Liège - Mohammed Aliyu Datti)

94 DRC 26562 of 21 February 2006

95 DRC 114296 of 9 November 2004

(Kyoto Purple Sanga/PSV - Ji-sung Park)

96 DRC 26562 of 21 February 2006

04 appealed on the grounds of ending training before his 21ST birthday. Schalke 04 indicated that Cziommer had been fielded regularly (15 times) by FC Twente during the 2000/2001 season in the first eleven, in which he had scored three times. The German club also argued that Cziommer at that time had many years as a professional behind him, so that he could be regarded as an extremely successful player. The DRC agreed with Schalke 04. It was decided that no training compensation was due for the 2001/2002 period. The total amount thus became EUR 460,000 instead of EUR 550,000.⁹⁷

In a case mentioned earlier, the Belgian Standard Liège appealed on grounds of ending the training of Mohammed Aliyu Datti before he had reached the age of 21. Siena, which was then playing in the Italian Serie B, did not agree. The Italian club maintained that Datti, who was on loan from AC Milan, had not played regularly in the Serie A. He had only appeared in the Serie B and could therefore, according to Siena, not be regarded as a particularly successful player. He was also transferred on loan to gain experience. The DRC noted that it appeared from the loan period that Datti had not yet completed his training. He went to a smaller club in Italy to gain experience and to be fielded regularly. Standard Liège had also not produced written evidence to substantiate its contention. Training compensation was thus awarded in this case, calculated over the period up to 21.⁹⁸

The Court of Arbitration for Sport has also made several pronouncements in this respect. In the first instance covered here, at issue was a player who signed his first contract as a professional when he was 17. In his first season as a professional he played 15 times for the first eleven. At that time he was noted for his good technical skills and speed. The CAS therefore reached the conclusion that the player had already ended his training period before his second season as a professional, at the age of 18.⁹⁹

The next CAS case deals with a player who was described by the club which had provided his training as the most talented player who played at all ages at the highest level in the country of the training club and in the national teams at all ages. For the four-year loan of the player at the age of 18, a six-figure USD sum was paid for each year. The CAS ruled that training had been ended at the age of 17.¹⁰⁰

It is evident from the above that training a player ends before the age of 21, if this clearly appears to be the case. The burden of proof lies with the club which suggests that this is the case. An important statement from the DRC is the following:

*'The Chamber emphasised that, in any case, more than just one indication to the possible earlier termination of the training period needs to exist in order to justify the application of the relevant exception.'*¹⁰¹

4.10 Beginning training after the age of 12

If a player is registered with a club and thus begins his training after the age of 12, then the date of this registration is crucial in determining the training period.¹⁰²

4.11 The start and end of the season

The Regulations for the Status and Transfer of Players indicate that the training period starts at the beginning of the season in which the player reaches the age of 12, and ends at the end of the season of his 21ST birthday.¹⁰³ The training period does not therefore occur between a player's 12TH and 21ST birthday, but from the season of the 12TH birthday to the end of the season in which he turns 21.¹⁰⁴ If a player has a birthday between two seasons, his age is deemed to have been achieved in the season following this birthday.¹⁰⁵

There was a case involving a player who turned 21 on 8 April 2004. His former Swedish club had trained him from 24 August to 10 November 2004. Because the player was already 21 when he signed for the Swedish club, his new Portuguese club believed that no compensation was due. The season in Sweden began on 3 April 2004. The DRC decided that the player turned 21 in the season in which he appeared for the Swedish club. Because the training period lasts until the end of the season in which a player turns 21, in this case the Swedish club was entitled to training compensation for the period of three months when the player's training had taken place.¹⁰⁶

In the next case, it was argued by a player's new club that training

compensation only needed to be paid for the period up to the player's 21ST birthday. The DRC indicated that when calculating the compensation, the entire season in which a player turned 21 had to be taken into consideration.¹⁰⁷

The articles which form the basis of calculating training compensation for the seasons between a player's 12TH and 15TH birthday (based on category 4) have already been discussed. In a case where a player began the 2000/2001 season at the age of 15 and turned 16 in that season, the DRC decided in fact that category 4 was not applicable for this season.¹⁰⁸

5. Conclusion

It is apparent that the national football associations regulate training compensation in national instances. According to the KNVB rules, training compensation of EUR 1,250 per training year is due if a player younger than 22 signs a contract with a professional football club, or if a player below 22 appears in five binding matches of a professional football club's first eleven. FIFA regulates training compensation in international cases. According to the Regulations for the Status and Transfer of Players, training compensation is due if a player signs his first contract as a professional before the end of the season of his 23RD birthday. A contract as a professional exists if a player has a written contract with a club on the basis of which he receives a higher amount than the amount of the actual expenditure for his football activities. Compensation must also be paid with each international transfer a professional makes before the end of the season of his 23RD birthday. The right to training compensation can be excluded if agreed to between a player's former and new club. This cannot be achieved in agreements between the new club or the former club and the player (and manager). In situations which occur within the EU, clubs lose the right to training compensation if they do not offer a (new) contract. The right to compensation also lapses where an employment contract is terminated by mutual agreement.

If two years have passed from the time that the right to training compensation arose, this compensation is no longer awarded by the DRC.

According to FIFA regulations, training compensation is due for the period covering the age of 12 of the player to the end of the season of his 21ST birthday, unless it is clear that the training period had already ended before this time.

To calculate the extent of the training compensation, all clubs have been divided into categories. The rules for calculating the compensation differ between situations in the EU and those outside it. For situations which do not occur within the EU, the rules of 2001 and 2005 differ. If the 2001 rules apply, the training compensation is calculated on the basis of the former club's category and the costs of the football association of the new club. If the 2005 rules apply, the category of the new club and the costs of the football association of the new club apply. Should a player within the EU move to a club from a lower category to one of a higher category, the calculation must be based on the average of the costs of the two clubs. If a player within the EU moves from a club of a higher category to one of a lower category, the costs of the club from the lower category must be used.

The DRC cannot award higher compensation than the claimed amount. If a club demands that the training compensation not be based on the indicative amounts, this must be justified on the basis of

97 DRC 74353 of 22 July 2004 (FC Twente/Schalke 04 - Simon Cziommer)

98 DRC 36928 of 23 March 2006 (Siena/Standard Liège - Mohammed Aliyu Datti)

99 CAS 2003/O/527

100 CAS/2004/594

101 DRC 26562 of 21 February 2006

102 FIFA Commentary on the Regulations for the Status and Transfer of Players, p. 112

103 Art. 5 (1) of the Regulations Governing the Application of the Regulations for

the Status and Transfer of Players, edition 2001 and art. 3 (1) and art 5 (2) of Annex 4 of the Regulations for the Status and Transfer of Players, edition 2005

104 DRC 86130A of 17 August 2006 (Berliner Athletik Klub/Club Aydinspor - Kemel Akar)

105 Art. 7 of the Regulations for the Status and Transfer of Players, edition 2005

106 DRC 36645 of 23 March 2006

107 DRC 26562 of 21 February 2006

108 DRC 75942 of 28 July 2005

financial documentation. However, such a demand is not readily granted.

There is only entitlement to compensation for the period that a player is actually being trained. A club is not entitled to training com-

penation for the period of time where a player was on loan at another club. A club that has accepted a player on a loan basis is entitled to this compensation.

Will The New WADA Code Plug All The Gaps? Will There Be By-Catch?

by John Marshall and Amy Catherine Hale*

A. Introduction

1. The World Anti-Doping Agency, WADA adopted substantial amendments to the WADA Code (“the Code”) at its conference in Spain in mid November 2007. This paper looks at the new amendments which will be operational by 1 January 2009.
2. Before examining the changes to rules designed to catch drug cheats, it may prove interesting to reflect on what is meant by a drug cheat. Is a drug cheat:
 - (a) Someone who gains an advantage over fellow Athletes¹ by use of a substance/method which is illegal because of the health risks associated with its use?; or
 - (b) Someone who is in breach of the rules made by WADA?²

B. WADA and the Code

(1) Background

3. The World Anti-Doping Agency (“WADA”) was established in November 1999 in Switzerland. On 5 March 2003 WADA adopted a document entitled the ‘World Anti-Doping Code’ (“the Code”). The Code envisaged that WADA would become the world’s peak anti-doping body and that each international sporting federation (“IF”) would be a Signatory to the Code. The Code also envisaged gaining worldwide acceptance by each National Anti-Doping Organisation (“NADO”) signing the Code. That has come to pass.
4. The Code seeks to harmonise anti-doping rules and principles on a worldwide basis. It does this by having three elements being the Code itself, “International Standards” adopted by WADA and “Models of Best Practice”. Of the International Standards the most important is the WADA Prohibited List.

(2) Impact

5. The impact of the Code and the WADA Prohibited List has been profound for the following reasons:
 - (a) most national governments support the Code and the WADA Prohibited List;
 - (b) the National Anti-Doping Organisations (“NADOs”) of most

- countries have become Signatories to the Code and have implemented WADA’s objectives³;
 - (c) most international sporting federations have adopted the Code which has had the consequence that national sporting federations affiliated with the international bodies (e.g. athletics) were required to comply with the Code and the WADA Prohibited List; and
 - (d) most national sporting federations have adopted WADA compliant Anti-Doping Policies (“ADPs”).
6. Changes to the Code will affect all athletes and virtually all sporting organisations.

C. The Changes

7. There are an enormous number of changes.⁴ It is not possible to discuss them all or even to classify them all. For instance:
 - (a) There are changes which fix obvious gaps.⁵
 - (b) There are changes which clarify areas where doubt has been expressed⁶ or to confirm the result of particular CAS decisions⁷.
 - (c) There are changes which will assist in harmonisation: “all provisions are now mandatory in substance and must be followed”: 2nd para of the Introduction.
 - (d) There is a new statement of Athlete responsibility which bolsters the strict liability principle underlying the Code: a new part to Art 2⁸ and new Art 2.2.1⁹.
 - (e) There are several changes which introduce greater flexibility in sanctions: see from para 9 below.
 - (f) There will be mandatory provisional suspension for a positive ‘A’ Sample: new Art 7.5.1 - see from para 37 below.
 - (g) Mandatory whereabouts requirements will be introduced: change to Art 2.4 - see from para 20 below.
 - (h) A new concept of an “Atypical Finding” will be introduced: replacement Art 7.3 - see from para 33 below. Centrebet is not issuing odds that this was prompted by the Ian Thorpe debacle.

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1 Terms written in italics have a defined meaning in the Code.

2 There are, of course, further alternatives based on the two above but with subtle differences. For example one variation recognises the difficulty in proving intention so, in effect, deems intention to gain an advantage by the circumstance that a Sample taken In-Competition contains a Prohibited Substance and calls this ‘strict liability’.

3 E.g. the Australian Sports Anti-Doping Authority (“ASADA”) was established for this purpose.

4 The extent of the changes can be seen from the mark up version which has all changes from the existing Code shown in tracking. This was available at http://www.wada-ama.org/rtecontent/document/WADA_Code_2007_Redline_3.0_to_2003.pdf at the time of preparing this paper.

5 Examples are:

- Art 2.2 which makes it clear that Use only applies to an Athlete;
- The amendment to Art 2.6 means the ADRV of Possession will now apply to stimulants or other In-Competition banned substances if possessed In-Competition; so Athletes in the Olympic village cannot any longer possess stimulants;

• A new last para of Art 4.4 (belatedly) gives an Athlete a defence if there is a TUE in place;

• There is an improved definition of In-Competition, which now is workable in all situations.

6 Amendment to Art 4.4 clarifies which TUEC has jurisdiction to issue TUEs. Amendment to Art 10.10.1 makes it clear an Athlete cannot train whilst under sanction.

7 Eg the addition to the comment to Art 4.2.1 confirms the result in the case of rugby player Wendell Sailor who tested positive for cocaine residues from mid-week Use: “Out-of-Competition ‘Use’ (Article 2.2) of a substance which is only

prohibited In-Competition is not an anti-doping rule violation unless an Adverse Analytical Finding for the substance or its Metabolites is reported for a Sample collected In-Competition (Article 2.1).”

8 “Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.”

9 “2.2.1 It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body.”

- (i) There is to be a new sanction for breaching an existing sanction: new Art 10.10.2 - see from para 39 below.
- (j) There will be sanctions for teams, not just individuals: new Art 11.2 - see from para 41 below.
- (k) There are new appeals: amendment to Art 13.2 and new Art 13.3 - see from para 43 below.
8. This paper will examine those which seem to be more important. The most important, which is dealt with first, is the increased flexibility.
- D. Harmonisation with Flexibility**
9. The goal of harmonisation resulted in the original Code being a one size fits all set of rules that lacked flexibility. The most significant area of rigidity was the mandatory minimum 2 year suspension with limited defences and virtually no discretion in sentencing.¹⁰ The lack of discretion was strongly opposed by sports which had sophisticated ADPs and experienced tribunals pre WADA.
10. That has been addressed and is best explained by the comment to Article 4.2.2:
 “[Comment to Article 4.2.2: In drafting the Code there was considerable stakeholder debate over the appropriate balance between inflexible sanctions which promote harmonization in the application of the rules and more flexible sanctions which better take into consideration the circumstances of each individual case. This balance continued to be discussed in various CAS decisions interpreting the Code. After three years experience with the Code, the strong consensus of stakeholders is that while the occurrence of an anti-doping rule violation under Articles 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers) and 2.2 (Use of a Prohibited Substance or Prohibited Method) should still be based on the principle of strict liability, the Code sanctions should be made more flexible where the Athlete or other Person can clearly demonstrate that he or she did not intend to enhance sport performance. The change to Article 4.2 and related changes to Article 10 provide this additional flexibility for violations involving many Prohibited Substances. The rules set forth in Article 10.5 would remain the only basis for eliminating or reducing a sanction involving anabolic steroids, hormones, certain stimulants identified on the Prohibited List, or Prohibited Methods.]”
11. This is a very important change and one that is definitely in the right direction.
12. The change will be implemented primarily by a new Art 4.2.2 which deals with Specified Substances and makes all substances Specified Substances with these exceptions
 “... the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List
 ...”
13. Specified Substances will be sanctioned differently pursuant to new Art 10.4:
 “10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances
 Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete’s sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:
 First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years’ Ineligibility.
 To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Athlete or other Person’s degree of fault shall be the criteria considered in assessing any reduction of the period of Ineligibility.”
14. The effect is that for many substances there will be a discretion that can be applied so as to achieve an appropriate sanction. A clear example where this will make an important difference is that the well regarded international Australian footballer Stan Lazaridis almost certainly would not have received his 12 month suspension for use of finasteride.
15. As to so called ‘party’ drugs, much will depend on which stimulants will be ‘so identified’ on the Prohibited List in 2009. See from para 50 below.
16. Other measures to increase flexibility are:
- (a) Amendment to Articles 10.3.1 and 10.5.2 which widen the application of the ‘No Significant Fault or Negligence’ defence to all ADRVs.
- (b) Amendment to Article 10.5.3 which widens the application of a reduction for Substantial Assistance.
- (c) New Articles 10.5.4 and 10.9.2 which provide that admissions may be rewarded with a reduction up to 50% in certain limited circumstances.
- (d) Amendment to Article 10.2 by which the standard two year ban is made subject to Articles 10.4, 10.5 and 10.6.
- (e) New Art 10.5.5 which explains how the various potential reductions can work in combination to produce a maximum reduction no lower than 1/4 of the otherwise applicable sanction.
- (f) New Art 10.6 which allows for an increased sanction where there are aggravating circumstances.
- (g) New Art 10.7 which sets out a table that is designed to provide a commonsense way of dealing with multiple violations or second violations.¹¹
17. Another very significant change that will increase flexibility is the new definition of Athlete. All international-level and national-level competitors will be subject to all aspects of the Code, but there is this qualification:
 “Specific national rules may be established for Doping Control for noninternational-level or national-level competitors without being in conflict with the Code.”
18. It is clear that this means not all aspects of the Code will need to be applied below international-level and national-level competitors and that at least these two instanced aspects may be excluded:
- (a) TUEs (presumably in lieu a letter from the prescribing doctor would be enough, at least for some substances); and
- (b) The requirement for whereabouts information.
- What is not clear is whether the fact the exceptions must be in “national rules” means the NADO will have to do this at a national level or whether national federations can do it themselves.¹²
19. There are at least two remaining areas of inflexibility (which could and should have been fixed):
- (a) Art 10.4 should also apply to the ADRV of administration. There seems no good reason why it does not and must be regarded as a gap created by oversight. It is just not fair (in any sense) for Athletes to have defences which are not available to support persons in exactly the same set of circumstances.
- (b) Art 10.1.1 should be enabled if Art 10.4 applies.
- E. Whereabouts Requirements**
20. Art 2.4 has been rewritten as follows:
 “2.4 Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period as deter-

10 The hair medication (finasteride) cases of Lund and Lazaridis illustrate this. In each case the decision was regretted: CAS in Lund saying it had “heavy heart”.

11 Although the table gives some flexibility more would have been better.
 12 The better view is national federations can do it themselves as that is in keeping with the aim of increased flexibility in this area.

mined by Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an antidoping rule violation.”

21. The sanction for breach will be “at a minimum one (1) year and at a maximum two (2) years based on the Athlete’s degree of fault” per amended Art 10.3.3.
22. This is a significant change. Previously there had to be “reasonable rules” and there was a 3 month sanction. In place of what a sport considered to be reasonable rules there is to be mandatory compliance with the many pages of whereabouts requirements set out in the current draft ‘version 3.0 October 2007’ WADA ‘International Standard for Testing’ (“IST”): see part II at pages 35-78 of that standard.
23. These requirements are onerous and involve a quarterly ‘Whereabouts Filing’. If a Whereabouts Filing is not lodged properly and accurately that amounts to a ‘Filing Failure’. To be compliant each quarterly Whereabouts Filing of an Athlete must
 - (a) Identify “where he/she will be living, training and competing during that quarter, so that he/she can be located for Testing at any time during that quarter”: per IST 11.1.3. This includes
 - (i) “the full address of each place where the Athlete will be residing (e.g. home, temporary lodgings, hotel, etc)”: per IST 11.3.1.d;
 - (ii) “the name and address of each location where the Athlete will train, work or conduct any other regular activity (eg school) during the following quarter”: per IST 11.3.1.e;
 - (iii) “the Athlete’s competition schedule for the following quarter, including the name and address of each location where the Athlete is scheduled to compete during the quarter and the date(s) on which he/she is scheduled to compete at such location(s)”: per IST 11.3.1.f;
 - (b) Provide a 60 min time slot everyday as follows “one specific location and one specific 60-minute time-slot during the day where the Athlete will be available and accessible for Testing at that location”: per IST 11.3.2; and (c) Contain “specific confirmation ... of the Athlete’s consent to the sharing of his or her Athlete Whereabouts Filing with other Anti-Doping Organizations having authority to Test him/her”: per IST 11.3.1.
- (c) See also para 29 below.
24. If the Athlete is not where he/she is supposed to be during the 60 minute slot that will be a ‘Missed Test’ by reason of IST 11.4.2. A Missed Test does not require that the Athlete be told of the appointment. If the Athlete had been told that alone would be an ADRV of refusal under Art 2.3.
25. Filing Failures and Missed Tests are generically called ‘Whereabouts Failures’. Three Whereabouts Failures in a rolling 18 months will be an ADRV under new Code Art 2.4.
26. To understand what this means for an Athlete try putting yourself in the boots of footballer Steven Gerrard: he is not likely to know from week to week if Liverpool will have him play EPL, Euro football, FA Cup qualifiers or Carling (League) Cup matches or whether the England team will need his services as vice captain.¹³
27. It has been suggested by one well placed and well informed sports official that an Athlete in a professional team sport would just not be able to comply with these whereabouts requirements and sports would face the likelihood of losing star athletes for 12 months for failing to provide information in circumstances where they cannot reasonably be expected to comply with the onerous requirements of the IST.
28. In order to better understand why WADA wants this data and whether the time and effort for Athletes to provide it and ADOs to check it is worthwhile, it would have been helpful to be given information as to:
 - (a) why a test on a half hour’s notice by telephone will be ineffective,
 - (b) how often ADOs actually do use the data to carry out no advance notice tests (which could not be carried out without the extensive data), and

- (c) how successful those tests have been in catching cheats.

WADA should publish this information or else accept its onerous requirements are not justifiable.

F. Privacy?

29. Relevant to the matter in para E.23(c) above, is new provision before Art 1:

“Each Signatory shall establish rules and procedures to ensure that all Athletes or other Persons under the authority of the Signatory and its member organizations consent to the dissemination of their private data as required or authorized by the Code ...”
30. No doubt this is to allow, per new Art 14.6, ADOs to “collect, store, process or disclose personal information relating to Athletes...”
31. Given the serious breaches of confidentiality that occurred within WADA affiliated organisations in the Ian Thorpe matter (and it was not ASADA who leaked), an Athlete may not wish to consent to personal information about his/her movements (eg under IST 11.3.1.c) being shared among WADA affiliated organisations. The information could also relate to medical conditions which are the basis of a TUE.
32. To require consent to information being shared as a condition of future participation is harsh indeed. Women tennis stars have been known to attract stalkers. Think how information as to the movements of an Athlete, if not guaranteed to be secure, could lead to very unfortunate consequences. WADA cannot guarantee security. WADA has not uncovered the culprit(s) in the Thorpe leak (assuming WADA investigated the matter). WADA has not created a sanction for where a sports official is proved to have leaked information. It would be a simple matter to draft an ADRV to deal with leaking confidential information not authorised by the Code. The sanction could be a 2 year suspension and a compensation payment to the Athlete of set general damages of say USD 20,000.¹⁴ Such provisions would likely prevent leaks in the future. One wonders whether WADA really thought this one through.

G. Atypical Findings

33. There is now a new concept, an Atypical Finding, which is defined as a report in relation to the analysis of a Sample “which requires further investigation”.
34. It no doubt arises as a result of the difficulty in interpreting results that show elevated levels of naturally produced substances, eg testosterone. Quite probably the publicly leaked circumstances relating to the Ian Thorpe test result has led to the proposed amendments.
35. An Atypical Finding is to be handled in accordance with rewritten Art 7.3:

“7.3 Review of Atypical Findings
As provided in the International Standards, ... the Anti-Doping Organization shall conduct the required investigation. After the investigation is completed, the Athlete and other Anti-Doping Organizations identified in Article 14.1.2 shall be notified whether or not the Atypical Finding will be brought forward as an Adverse Analytical Finding. The Athlete shall be notified as provided in Article 7.2.
7.3.1 The Anti-Doping Organization will not provide notice of an Atypical Finding until it has completed its investigation and decided whether it will bring the Atypical Finding forward as an Adverse Analytical Finding unless one of the following circumstances exist: ...”
36. This is a sensible procedure and compliance with it likely would have prevented the leak in the Ian Thorpe matter because ASADA would never have had to report to external bodies until it completed its investigation: see new Art 7.3.1.

¹³ Query whether an Athlete would be better off with a mobile phone that had a GPS locator in it.

¹⁴ Together with any special damages that could be proved.

H. Provisional Suspension after A Sample

37. New Art 7.5.1 requires that rules be created to ensure that Athletes are suspended provisionally upon the result of the A Sample:
“7.5.1 Mandatory Provisional Suspension after A Sample Adverse Analytical Finding.
Signatories shall adopt rules ... providing that when an Adverse Analytical Finding is received for a Prohibited Substance, other than a Specified Substance, a Provisional Suspension shall be imposed promptly after the review and notification described in Articles 7.1 and 7.2.”
38. The purpose is to prevent an Athlete from competing where there is a high probability that the Athlete will ultimately be suspended.

I. Breach of a Sanction

39. New Art 10.10.2 is to deal with athletes who breach a sanction. What happens is the sanction restarts from the date of the breach.
“10.10.2 Violation of the Prohibition of Participation During Ineligibility.
Where an Athlete or other Person who has been declared Ineligible violates the prohibition against participation during Ineligibility described in Article 10.10.1, the results of such participation shall be Disqualified and the period of Ineligibility which was originally imposed shall start over again as of the date of the violation. The new period of Ineligibility may be reduced under Article 10.5.2 if the Athlete or other Person establishes he or she bears No Significant Fault or Negligence for violating the prohibition against participation. The determination of whether an Athlete or other Person has violated the prohibition against participation, and whether a reduction under Article 10.5.2 is appropriate, shall be made by the Anti-Doping Organization whose results management led to the imposition of the initial period of Ineligibility.”
40. Whilst there should be a deterrent to an athlete breaching a sanction, the automatic restarting from the date of the breach could operate harshly. It certainly operates arbitrarily: a violation in week 1 of a 2 year ban will be virtually unpunished yet the same violation in the last week of a 2 year ban will attract a further 2 year ban. There is no “fairness and equality” in this, contrary to the statement of the primary purpose of the Code at the outset of the Code.

J. Sanctions on Teams

41. Article 11.2 will be amended as follows:
“11.2 Consequences for Team Sports.
If *more than two members* of a team in a Team Sport are found to have committed an anti-doping rule violation during an Event Period, the ruling body of the Event shall impose an *appropriate sanction* on the team (e.g., loss of points, Disqualification from a Competition or Event, or other sanction) in addition to any Consequences imposed upon the individual Athlete(s) committing the antidoping rule violation.”
(italics added)
42. This means that sports will have to devise some rules providing appropriate sanctions. Possible rules are as follows:
11.2.1. If more than two Athletes in a team are found to have committed an Anti-Doping Rule Violation during an Event, the team may be subject to disqualification or other disciplinary action as set out below.
11.2.2. If it is established that three or more Athletes in the same team have committed More Serious ADRVs in respect of the same Competition in the one Event, the ruling body has a discretion to impose a sanction on the team, which sanction may include:
(a) as the usual minimum (unless there is a good reason not to¹⁵), loss of competition points in respect that particular Competition if that particular Competition was in the equivalent of a round robin phase, or
(b) cancellation of the result of that particular Competition, if that particular Competition was during a knock-out phase (eg quarter final).
11.2.3. If it is established that four or more Athletes in the same

team have committed More Serious ADRVs in respect of the same Event, the ruling body has a discretion to impose a sanction on the team, which sanction may include:

- (a) as the usual minimum (unless there is a good reason not to¹⁶), loss of competition points equal to the number of Athletes found to have committed More Serious ADRVs multiplied by what would be earned in a win in a single Competition in that Event¹⁷, and
(b) in a most extreme case, disqualification from the Event.
11.2.4. In exercising the discretion, the ruling body may have regard to such factors as it considers appropriate but shall at least have regard to the total number of Athletes comprising the team. This is because it is necessary to consider the ramifications to innocent Athletes in the team of any sanction; thus a high proportion of innocent Athletes in the team will militate in favour of a lower team sanction (and vice versa).
11.2.5. Before a sanction can be imposed on a team under the above rules, the ruling body must afford the team natural justice and at a minimum must
(a) afford the team a hearing that accords with the principles in Art 8 of the Code (adapted to the extent necessary to accommodate the fact that it is a team sanction hearing and not a hearing of an ADRV against an individual)
(b) afford the team a right of appeal; and
(c) comply with appropriate procedural rules of the ruling body relating to team sanctions.

In the absence of existing procedural rules the procedural rules of the relevant International Federation (and failing that CAS) shall be deemed to apply *mutatis mutandis*.

11.2.6. In this Article ‘More Serious ADRV’ - means an ADRV where the period of Ineligibility actually imposed was longer than one year.

K. New Rights of Appeal

43. There are new rights of appeal which essentially give greater rights to WADA and International Federations at the expense of NADOs and Athletes.
44. Amendment to Art 13.2 creates these two new rights to appeal from “a decision by an Anti-Doping Organization not to bring forward an Adverse Analytical Finding or an Atypical Finding as an anti-doping rule violation” or “a decision not to go forward with an anti-doping rule violation after an investigation under Article 7.4”
45. There is also new Art 13.3:
13.3 Failure to Render a Timely Decision by an Anti-Doping Organization
Where, in a particular case, an Anti-Doping Organization fails to render a decision with respect to whether an anti-doping rule violation was committed within a reasonable deadline set by WADA, WADA may elect to appeal directly to CAS as if the Anti-Doping Organization had rendered a decision finding no anti-doping rule violation. If the CAS panel determines that an anti-doping rule violation was committed and that WADA acted reasonably in electing to appeal directly to CAS, then WADA’s costs and attorneys fees in prosecuting the appeal shall be reimbursed to WADA by the Anti-Doping Organization.
46. These are essentially appeals from the results management decision of an ADO not to take a matter further, eg because of lack of evidence. There is no equivalent appeal known to the general law. It is far from clear how those appeals will operate, what standard of proof would be involved¹⁸ and whether the Athlete will need to be a party.

15 A good reason possibly might be that the Athletes were only substitutes and played a very minimal part in the Competition.

16 A good reason possibly might be in say a basketball Event (that takes place over a season made up of matches over many

months) say 2 ADRVs were in the early matches and the 3rd ADRV was in the final ie the last match of the Event.

17 So if say 4 Athletes were involved and a win was worth 2 points there would be a loss of 4 x 2 = 8 points.

47. These appeals potentially apply at every step of the results management process.
- For example, if at any step in the process the ADO formed an opinion that it would not take the next step because of insufficient evidence (or that the latest evidence received negated any ADRV) there could be an appeal available to an International Federation or WADA.
48. The form of relief that CAS could award in relation to a successful appeal is unclear but presumably some order in the nature of mandamus would be needed so as to compel an ADO to assert that an anti-doping violation has been committed.
49. It is suggested that a better rule would have been for an International Federation or WADA to have the ability to itself prosecute an allegation.

L. 'Party', 'Recreational' or 'Illicit' Drugs

50. Almost every substance on the Prohibited List is illegal in most countries without a prescription, so the term 'illicit' is not helpful in distinguishing what drugs one is talking about. The term 'party drug' is not much better. What is usually meant are stimulants (eg 'ecstasy' and cocaine) used other than to enhance sport performance and not on race/match day. The issue really is the 'recreational' use of drugs, not the use of 'recreational' drugs.
51. With these drugs the Code still sits on the fence. They are prohibited but only In-Competition. This means possession and use of these not on race/match days is not prohibited. The new Code is only concerned with the use of stimulants for performance enhancement. The performance enhancing characteristics of stimulants generally has resulted in them being included in the WADA Prohibited List and Samples which are collected In-Competition are analysed for traces of stimulants. WADA explains the position this way in the new comment to Art 4.2.1 of the Code: "Out-of-Competition "Use" (Article 2.2) of a substance which is only prohibited In-Competition is not an anti-doping rule violation unless an Adverse Analytical Finding for the substance or its Metabolites is reported for a Sample collected In-Competition (Article 2.1)."
52. Thus (at least by implication), so far as WADA is concerned 'recreational' use by Athletes of stimulants to get 'high', ie as 'party drugs' is a matter for others to regulate.
53. However, there is a glitch. Because the analysis carried out by WADA laboratories is for traces of Metabolites, residual fragments of molecules that a human body has processed can be detected for at least several hours and sometimes more than a week after use, depending on the drug and the human involved. Until a better means of analysis is developed, use not in connection with a Competition will be caught as the tests presently available cannot determine how far back in time an Athlete used the substance.
54. This means that the 'recreational' use of a stimulant may be caught and punished as if it was an attempt to use the stimulant for performance enhancement to cheat fellow Athletes. The reason is that presence of Metabolites is equally consistent with cheating as it is with recent partying. This leads to a type of by-catch. The rationale is that if WADA let Athletes get off if they said "sorry I partied

with that stuff yesterday", every guilty Athlete could use the same excuse. WADA must regard it as better that guilty Athletes are able to be caught and punished even if some non-cheats are too, because even if not cheats, they have disregarded sports rules and engaged in criminal activity.¹⁹

55. There is a second glitch. Whilst stimulants generally can be used for performance enhancement²⁰, two particular stimulants, cocaine and 'ecstasy', are misused antisocially by the general population and also by Athletes²¹. There is debate about the performance enhancement abilities of cocaine²² and 'ecstasy'. By reason of their chemical properties they would appear to be capable of being used for performance enhancement. There are also anecdotal reports of such use.
56. The properties of cocaine are such that it is more likely to be detectable longer than other stimulants hence more likely to lead to by-catch. One suspects that the high profile cocaine cases of international rugby player Wendell Sailor and tennis great Mats Wilander were by-catch.
57. The problem is that by inclusion of these particular substances in the WADA Prohibited List the potential to catch their 'recreational' use is high. Hence the debate rightly becomes whether the consequential by-catch can be justified for these substances, given the lack of hard evidence of actual use for performance enhancement.
58. WADA has created a means to lessen the impact for these substances from 1 January 2009 as WADA will then have the ability to treat them as Specified Substances with the potential for a lesser sanction as low as a warning. Whether WADA does so will not be known until publication of the 2009 List in late 2008.

M. Conclusion

59. The effect of the Code, its endorsement by the Paris UNESCO Convention of October 2005, the subsequent governmental ratifications, the web²³ of interlocking identical contacts created²⁴, all with mutual recognition provisions²⁵ and all enforced through arbitration by CAS, has been to create a close replica of a law made by a sovereign parliament binding on its subjects²⁶ that is enforced by a supreme court.
60. For this reason the significance of the Code has grown and now the changes to it must be carefully considered.
61. Most of the earlier gaps have been plugged²⁷ and the new flexibility is to be applauded, but there are new areas that will be created where compliance with the Code will be difficult and costly.
62. Returning to the question posed in para 2 above, the first alternative (a) is supported by sound reasoning based on catching cheats and to level the playing field. To compete at the top level Athletes should not have to risk their health to beat a lesser Athlete prepared to take substances that can seriously affect health when used for performance enhancement. In this respect it is akin to grand prix race cars having some safety features even though the extra weight will slow the car down. Unless mandated some drivers would take the risk, win most every race and mean other drivers would be forced out of the sport or give in to the safety risk. No one wants Athletes (young or old) to be faced with the analogous choice in relation to drugs that are illegal because they are harmful.²⁸

18 Art 3.1 cannot operate to assist given its terms.

19 So this type of by-catch is (by implication) not deserving of release if it means losing the whole catch.

20 As to amphetamines see Avois et al British Journal of Sports Medicine 2006; 40.

21 Mostly football and tennis players (perhaps because of the cost) but there are no doubt others who have not been caught.

22 Again see Avois et al British Journal of Sports Medicine 2006; 40.

23 The term web is used because it is more than a hub and spoke arrangement. WADA is certainly the hub of a wheel

with spokes going to each Signatory but there is more because each spoke is joined by a contractual term requiring mutual recognition.

24 The contracts are in the form of Anti-Doping Policies which must be agreed to by Athletes and others: see new Art 20.3.3, 20.3.5 and 20.4.5.

25 Code Art 15.4.

26 The subjects are virtually all Athletes and sporting bodies.

27 One not fixed is the very short 21 day time limit for an Athlete to appeal. It should be extended and also should not run until the Athlete is furnished with a written statement of reasons and notification of appeal rights including the time limit for pursuing those rights. This is one of the subjects of a separate article:

Unilateral Unappealable Doping Sanctions by the author and Ms Amy Catherine Hale published [2007] ISLR 39.

28 In this regard certain comments, that perhaps Athletes should be allowed to take steroids, published in the wake of the Marion Jones admission if not tongue in cheek to provoke debate were ill considered. It would be wrong for sports to approve use of steroids as it would involve a breach of the criminal law by Athletes and health risks. Given steroids are male hormones, can it be seriously

suggested that young female Athletes should be permitted to use them? They are drugs that alter a fundamental difference between men and women. The performance enhancement capability of their use by women is massive: no clean female Athlete would stand a chance. Female swimmers and runners outside the top 100 can become world beaters on stanozolol. In a sport like swimming, where many female swimmers are minors, open slather on drugs would force them to give up as never being competitive or choose to take male hormones and become criminals in the process. This must be loudly denounced.

63. On the other hand, alternative (b) in para 2 above, apart from being circular, can lead to real difficulties if the rules are complicated and impractical to comply with.
64. The Code's net is cast so wide and has such tight mesh that many athletes and support people will be caught who are not cheats, have not gained an advantage but are just bad at paperwork (and paperwork is not why most athletes choose a sporting career). That some morally innocent athletes have been and will continue to be caught by this system seems (at least implicitly) to be treated by WADA as an acceptable level of by-catch in the fight against doping. But why is any level of by-catch acceptable? And why

- should by-catch be acceptable if better drafting could avoid it?
65. That morally innocent athletes have been caught by this system is an undeniable fact. That morally innocent athletes will continue to be caught by this system seems inevitable.
66. What is also clear is that more cheats will be caught as a result of the new Code. That is provided that not too much time, effort and expense is wasted on checking how well athletes fill in forms and chasing down athletes for substances that many astute medical advisors believe should not be on the list.

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Analyzing the New World Anti-Doping Code: A Different Perspective

by **Steven Teitler and Herman Ram***

I - Introduction

Observations regarding the World Anti-Doping Code can often be divided in two distinct categories. On the one hand, there are those that defend the doping regulations, stressing the necessity of the described elements of the anti-doping programs and policies. On the other hand are those observations that detail the unfairness of these programs and policies, or the Code's disregard for the privacy and other interests of (professional) athletes.

Marshall and Hale have written a more neutral analysis of the provisions in the new, 2009 Code, pointing out the major changes and offering a critical view to various aspects of the 2009 Code. Our contribution will take the analysis and views of Marshall and Hale as a starting point, offering additional insights and opinions concerning the 2009 Code and the way this set of rules will work out in practice.

II - Who are cheats?

1. Doping is a many-sided phenomenon. This also applies to anti-doping rule violations. The Code distinguishes eight different kinds of violations, but it will come as no surprise that per violation a wide range of variation exists on how these violations may actually take place. This is especially true when it comes to use of prohibited substances:

- An athlete may for instance use a prohibited substance for therapeutic reasons, but without the required Therapeutic Use Exemptions (TUE).
- Another athlete may enter into a sophisticated doping program, using several drugs, following a well prepared scheme which is designed to avoid being caught, with the help of a number of people who provide the necessary knowledge and facilities.
- Another athlete may act on his own, by purchasing a prohibited substance without any outside help or knowledge, while being keenly aware of the nature of his actions.
- Yet another athlete may look for something extra by using supplements, without being aware of the possible risks involved or even checking whether or not any of the contents are mentioned on the Prohibited List.
- A fifth athlete may buy a nutritional supplement, read carefully what ingredients it contains, double check with the manufacturer and his federation that indeed no prohibited substances are mentioned or included, and still be faced with an adverse analytical finding due to contamination.
- A sixth athlete may abuse the asthma medication for which he has received a TUE for performance enhancing purposes.

- A seventh athlete may take a few puffs of marijuana during a party, with no intention of gaining any performance enhancing advantage and without ever being aware that his behaviour involves the use of a prohibited substance.

2. The sports community, the press and the general public make distinctions between these different kinds of violations (to which more examples could easily be added). Some of these violations are not always seen as doping or as abuse of substances with the intent to gain an advantage over other athletes. Consequently, opinions may vary about how the different violations as described above should be treated. Usually there are rather strong feelings about the penalties that should (or should not) follow such behaviour. To many, at least one or two of our imaginary seven athletes should not be considered cheats, and should therefore not be punished.

3. However, for the understanding of how the Code works, it is fundamental to recognize that it intends and is designed to catch all the athletes that are mentioned in our examples. As the intention of the Code is to 'catch them all', all these athletes are considered to be cheats and should be punished. Under the Code, there is no such thing as a 'by-catch'. In our opinion, this basic principle has to be acknowledged in any discussion about the Code. Therefore, our article is based on the idea that under the Code, there is no by-catch and in this respect our opinions are clearly different from the approach that Marshall and Hale have chosen.

4. Of course, once this basic principle is acknowledged, there are numerous questions that should be asked and addressed, with one of the most important questions being: Is it relevant to the Code that the use of any prohibited substance or method was intentional, and if this distinction is indeed relevant, how does the Code deal with this issue? And a directly related important question is: Is performance enhancement in the Code a central characteristic of doping or is it not? Marshall and Hale¹ have focussed on these issues as well, analyzing the way that the Code deals with 'recreational use'. But by describing something that they call 'by-catch of morally innocent cheats', the authors reach different conclusions than we do. The assessment of other issues, for instance the question whether or not the 2009 Code is more flexible than the 2003 Code, is dependent on the fundamen-

* Manager Legal Affairs and CEO Anti-Doping Authority the Netherlands respectively. This is a personal view of the authors.

¹ Hereafter referred to as "the authors".

tal approach that is chosen, and the opinions of the authors may therefore differ from ours.

III - Recreational use

1. The question whether or not the World Anti-Doping Agency (WADA) and the Code deal with the use of 'recreational drugs' or the 'recreational use' of (certain) drugs highlights one of the most fundamental issues of the fight against doping. This issue centres around the question which substances and methods should be included on WADA's Prohibited List. No topic, maybe with the exception of sanctions, has been the subject of more debate within the world of anti-doping.

2. First of all, the Code does not use terminology like 'recreational use' or 'recreational drugs'. There is only one official Prohibited List which declares substances to be prohibited. In addition, there is a group of specified substances, and that's it. So far, it appears to be clear and simple. So, why are things not as simple as they appear to be:

- a. Some substances on the Prohibited List have a different status than others;²
- b. There is much debate about whether some substances belong on the List, because their ability to enhance sport performance is questioned;
- c. Some substances that WADA considers prohibited, are not actually included on the List, yet lead to the standard sanctions when they are detected in the athlete's body.³

In article 4.3.1, the Code establishes three criteria for including a substance or method on the Prohibited List: (i) potential health risk, (ii) performance enhancing potential, and (iii) violation of the "spirit of sport". The Code then adds a fourth criterion in the following article (article 4.3.2): The masking potential of a substance or method. In a previous article (article 4.2), an additional insight can be found. This article describes performance enhancing potential and the potential as a masking agent as the key factors in any evaluation for including a substance or method on the List. The comments to this article refer to the premise that there are certain agents that no one that considers himself an athlete should use. In summary, one can conclude that the criteria of the List are in itself quite clear, but that there is an ongoing debate about how these criteria should be interpreted, applied and prioritised.⁴

3. The fact that there is no mention of either 'recreational drugs' or 'recreational use', does not mean that they are not an issue in the world of anti-doping. On the contrary, they are the subject of continuing discussions between governments, International Federations, national anti-doping organizations (NADOs) and WADA. Opinions vary greatly in this regard:

- a. Some are in favour of removing all recreational drugs from the Prohibited List, because their use is not sport related, and the sports organizations should therefore not want to regulate their use.
- b. Some feel that recreational drugs should be treated the same as steroids (for instance from a formal standpoint, but also from a social, moral and an athletes-as-role-models point of view).
- c. Some argue that all substances should not only be treated equally, but should also be prohibited both in and out of competition. Their view is that training, especially in team sports, also has a competitive element. Hence, why should some substances only be considered performance enhancing in competition (and consequently only be prohibited in competition).
- d. Others have the stance that only substances that are performance enhancing should be included on the list.

There has been no agreement on this subject, nor on the List criteria as mentioned above. The Code currently presents a compromise between the stakeholders. Views may vary from country to country, between International Federations (IFs) and NADOs, but also between NADOs, governments, etc. amongst themselves.

4. The Code purposely stays away from the discussion about whether drugs are recreational drugs, and whether or not they are

used for recreational purposes. Instead, it focuses on the bottom line: Does the presence, use, possession, administration, etc. of a substance or method constitute an anti-doping rule violation or not. In this sense, the authors' statement that as far as WADA is concerned, the use of stimulants as 'party drugs' is left to others to regulate, is not accurate. It disregards the fact that the reason that any athlete has, or claims to have, for the use of doping is hardly relevant in terms of the determination whether an anti-doping rule violation occurred. If an athlete can prove that he has not taken a substance with the intention of enhancing his performance, he will - under the strict liability rule - still be guilty of having violated anti-doping rules.

5. Only after the anti-doping rule violation has been established, do the rules allow the particular circumstances of the case to be taken into account. It is at this point that the time of use, possession, etc. (namely, in or out of competition, in other words the possible recreational element) and the nature of the use come forward. In this regard, the Code indeed applies to recreational use and/or recreational drugs. The Code has, through the rules of specified substances, created a different status for this kind of substances, for purposes of establishing (i.e. reducing) the period of ineligibility that is to be imposed.

6. The complex set of rules and criteria that determine the makeup of the Prohibited List also has consequences on the authors' question regarding what is meant by a drug cheat.

IV - By-catch of morally innocent cheats?

1. The authors describe the Code as rules that are "designed to catch drugs cheats". They continue by posing an interesting question: "What is meant by a drugs cheat?"

2. A year ago, then WADA president Dick Pound offered the following view to the cheat/drug cheat discussion: "The overwhelming majority of doping cases are planned and deliberate, and are carried out with the full knowledge that it is cheating, with the specific objective of gaining an unfair advantage over other competitors".⁵ Interestingly enough, WADA testing statistics at that time showed that the majority of the positive results in fact involved specified substances.⁶

3. The authors rightly point out that the 2009 Code places more emphasis on the issue whether or not an athlete (or other person) intended to enhance his sport performance. Widening the scope of application of the specified substances rule to all substances except anabolic agents, hormones and a restricted amount of stimulants and hormone antagonists and modulators, certainly seems to indicate that WADA's view of "drug cheats" is leaning more towards athletes (and others) who use, administer, etc. prohibited substances for performance enhancing purposes. Considering Pound's statement, this development appears to indicate a significant change from the past.

4. It is however important to note that this increased emphasis on whether or not an athlete's sport performance was enhanced, only applies to the persecution process. It does not apply to the Prohibited List, because:

a. Three of the four criteria for including a substance or method on WADA's Prohibited List do not include performance enhancement as a factor⁷; and

b. The lack of performance enhancement is at the core of the "elimination or reduction of the period of ineligibility for specified substances under specific substances" rule.⁸

Therefore, substances do not need to have performance enhancing

2 This applies not only to the in/out of competition element and the specified substances group, but also to the threshold substances, and the different procedures regarding application for a therapeutic use exemption, and the introduction of the "atypical finding" in the 2009 Code.

3 See paragraph IX.

4 Take nicotine for example: Nicotine is unhealthy, it enhances the sport performance (especially in mind sports), and since it is related to smoking it also

falls in the "spirit of sport" category. Despite qualifying for all three criteria, nicotine is not included on the Prohibited List.

5 WADA 2006 Annual Report.

6 Test results indicated a large amount of adverse analytical findings for anabolic agents. However, more than half of these findings were elevated T/E ratios that were not declared actual positive results.

7 The four criteria are, in short: (1) health risk, (2) performance enhancement, (3) spirit of sport, (4) masking potential.

potential in order to be included on the List, and the intention of enhancing the sport performance is only discussed in the process of determining if a period of ineligibility should be imposed (and if so, how long).⁹

5. The complexity of (i) the way the Prohibited List is comprised, (ii) the application of the specified substances rule, and (iii) distinguishing between intentional cheating and inadvertent use, is also reflected in the decisions of disciplinary bodies and arbitration panels in doping cases.

- a. Some disciplinary committees will focus only on the List. In a recent case, a Spanish football (soccer) player was suspended for two years, despite the fact that the substance at hand (finasteride) was declared a specified substance by the time the decision was rendered. In similar cases, disciplinary committees took this change in status concerning finasteride into account by taking a more lenient approach to this kind of positive cases.
- b. In various cases the panels have placed the fact that the athlete violated the rules at the centre of their deliberations, also in case of specified substances. Even though there was no intention to enhance the sport performance, the deliberate use of a prohibited substance justified the imposition of a period of ineligibility, according to these panels.
- c. Possibly depending on the background of the members of the disciplinary committee panel, the focus of the decision can in some cases almost solely be on the question whether any performance enhancement was intended. In these cases, athletes have then received a warning and a reprimand for a positive test involving a specified substances like cannabis, sometimes without actually having to establish on a balance of probabilities that their use was not intended to gain a performance advantage. A mere statement that they used the substance at a party was sufficient.
- d. Panels often wrestle with the issue of how to 'classify' an athlete who has tested positive, because it is so difficult to establish the exact circumstances of a specific case. This can especially be the case when athletes test positive for substances that are not expressly mentioned on the Prohibited List.¹⁰

6. As explained in paragraph II.1, according to the Code no such thing as a by-catch exists. The Code does not differentiate between various kinds of cheats. All adverse analytical findings are intended and should be treated (persecuted) as legitimate anti-doping rule violations. If one looks at how the rules are interpreted and applied, it becomes clear that in the view of many hearing panels there actually is a phenomenon that can be called a "by catch", even though panels hesitate to go into this kind of deliberation. Here is an example of how a CAS panels tries to come to grips with a case it considers a by-catch:

"But the problem with any "one size fits all" solution is that there are inevitably going to be instances in which the one size does not fit all...It is argued by some that this is an inevitable result of the need to wage a remorseless war against doping in sport, and that in any war there will be the occasional innocent victim".¹¹

WADA obviously does not want to create or contribute to a discussion whether some substances or some cases involving inadvertent use, should be considered a by-catch in the fight against doping in sports. Considering the lack of consensus concerning the Prohibited List, it will not be possible to define which substances or cases should be called by-catch. And since WADA and the Code have been established to achieve harmonization in the field of anti-doping policies, any formal approach towards formulating which doping cases constitute a possible by-catch is out of the question.

7. The inability to reach an agreement on which substances should be considered more important or more serious as doping agents, has led to the situation that all substances and methods should in principle be treated the same. It is our belief that this is exactly why WADA retained the rule that the in-competition detection of any substance or method in connection with a competition leads to the automatic disqualification of all individual results obtained in said competition, also in case of a specified substance violation where the athlete established that he did not intend to enhance his sport performance.

8. The inability to get a clear read on which athletes are "intentional cheaters" and which athletes are "innocent victims" has created the strict liability rule. As far as establishing an anti-doping rule violation is concerned the strict liability rule has not been the subject of discussion, at least not among anti-doping organizations. However, WADA has sought to increase the focus on distinguishing between the different kinds of cheaters by:

- a. Remodelling the specified substances rule;
- b. Widening the scope of application of this rule to more substances;
- c. Applying the no (significant) fault or negligence to all anti-doping rule violations except article 2.4;¹² and
- d. The new article on aggravating circumstances (article 10.6 of the 2009 Code).

9. An area that has not been addressed in the 2009 Code is the test result management and persecution of cases where (i) because of the circumstances, such as the substance involved or the timing of the adverse analytical finding, it (ii) is unlikely that any period of ineligibility will be imposed. These kind of cases may under the 2009 Code still be treated the same way as cases involving steroid or EPO users. Despite their likely outcome, these cases will still have to go through the entire test result management process and hearing process (including public disclosure) at a significant expense: Possibly disproportionate impact for the athlete, as well as claiming a significant amount of anti-doping organization's resources. Resources that many feel should be directed at different areas of fight against doping.

V - Additional flexibility

1. The authors argue that in the 2003 Code there was not enough discretion, citing the standard two year sanction and the lack of defence options for the athlete, as the main culprits. Even though there is truth in this statement, little or no complaints were ever made regarding the discretion that this version of the Code allowed in sanctioning the use of specified substances. As mentioned before, the majority of positive tests involve specified substances, which according to the 2003 Code *"are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be abused as doping agents"*. The 2003 Code also mentions the term 'inadvertent use' in this context.¹³

2. The authors explain that the effect of the changes in the Code is that *"for many substances there will be a discretion that can be applied as to achieve an appropriate sanction"*. With *"many substances"* the authors refer to the increase in the number of specified substances. Since the 2003 Code already contains a system concerning specified substances that provides substantial discretion, it would have been more accurate if the authors had stated that the 2009 Code does not increase the discretion itself, but applies this discretion to a significantly increased amount of prohibited substances.

3. The authors do not include the important clarification that the 2009 Code has actually introduced additional criteria for the reduction of a sanction for the use of a specified substance, which will quite possibly make it more difficult for athletes to see the period of ineligibility reduced.

4. Since WADA was not satisfied with the 'liberal' manner in which some disciplinary bodies applied the specified substances rule, some new elements are introduced in the 2009 Code. The 2003 Code's only requirement to get the standard two year sanction reduced in case of a specified substance, is that the athlete has to establish *"that the use of such a substance was not intended to enhance sport performance"*. The 2009 Code introduces two additional provisions:

8 This is the header of article 10.4 of the 2009 Code.

9 This discretion only applies to specified substances.

10 For instance: CAS 2005/A/726 Calle Williams v/IOC, CAS 2005/A/834 Dubin, Österreichischer Behindertensportverband & Austrian Paralympic Committee v/IPC.

11 CAS 2006/A/1025 Mariano Puerta v/ITF (consideration II.7.18).

12 Article 2.4 of the 2009 Code concerns the failure to file required whereabouts information and missed tests.

13 2003 Code article 10.3, including the comment.

- a. "The athlete has to establish how the specified substance entered his body"; and
- b. "The athlete's degree of fault shall be the criteria considered in assessing any reduction of the period of ineligibility".¹⁴

Ad a: WADA felt that athletes could often get away with making little or no statements about their positive test, and thus leaving disciplinary bodies (i) in the blind about what actually happened regarding the ingestion of the specified substance, and thereby (ii) in a difficult situation concerning the evaluation of the facts (i.e. establishing whether or not there was any intention to enhance the sport performance). In the 2009 Code, WADA has decided to put more pressure on the athletes (and other persons accused of committing an anti-doping rule violation) by introducing this new element to article 10.4, and even more by introducing the new article 3.2.4.¹⁵

Ad b: The second new element was introduced to emphasize the caution that should be applied by every professional or elite athlete. This caution has been described in various CAS decisions (mostly concerning the use of nutritional supplements), and the new Code has translated this in the standard phrase "the expected standard of behavior".¹⁶

Both additional provisions may prove to be significant hurdles for the athlete.

5. Especially in a case of contaminated nutritional supplements or a case concerning a recreational drug, athletes will face an uphill battle when trying to establish the source of their adverse analytical finding.

In these cases an athlete may not be able to offer any more evidence than his own word or statement.¹⁷ The ensuing question then is whether the athlete has established how the substance entered his body in the view of the hearing body. This will depend on how the hearing body interprets article 3.1 of the Code on burdens and standards of proof. Regarding establishing how the specified substance entered an athlete's body, article 3.1 requires the proof on a balance of probabilities.¹⁸ Nonetheless, hearing bodies may have varying opinions on how an athlete should fulfil his burden of proof. An interesting example of this is the second Mariano Puerta case¹⁹, even though that did not involve a substance that was specified at the time. In the first instance, the ITF tribunal ruled that Puerta did not meet the requirements of proof, and therefore ruled that he had not established how the substance entered his body. Consequently, the tribunal could not apply the "no (significant) fault or negligence rule".²⁰ However, in the appeal before CAS, the panel found that Puerta had in fact, on a balance of probability, established how the substance entered his body.²¹ This was a key factor in the reduced sanction that was ultimately imposed.

6. The trick concerning the application of the reduction of sanctions in cases of the use (presence) or possession of specified substances, is that if an athlete cannot establish how the substance entered his body (obviously a situation that is by no means far fetched when contaminated nutritional substances or so called party-drugs are involved), the 'specified substance regime' does not apply, and instead the standard two year period of ineligibility will be imposed.²² In short, whether or not an athlete has any chance of successfully calling upon the option of the reduction of the standard two year sanction, will often depend on whether the disciplinary body is willing to believe the athlete's (side of the) story.

The 2009 Code makes a special point of noting that specified sub-

stances "are not necessarily less serious agents for purposes of sports doping... for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility under Article 10.6".²³ This last point presents a rather scary scenario for athletes who cannot provide evidence regarding the origin of their positive test.

7. After the athlete has established the source of the adverse analytical finding, as well as the fact that he did not intend to gain a performance advantage, "the athlete's or other persons degree of fault shall then be the criteria considered in assessing any reduction of the period of ineligibility".²⁴

The wording "any reduction" suggests a restrictive application of any sanction reduction under article 10.4 of the 2009 Code. Combine this with the increase of the maximum ineligibility period in case of a first offence from one to two years, and one could wonder whether the position of the athlete has improved all that much. After all, by establishing how the prohibited substance entered his body, the athlete will in all likelihood admit to acting with some degree of fault. It is even possible that tribunals - from 2009 on - will impose periods of ineligibility that are closer to the one year period that has more or less become the standard for doping cases not involving specified substances in cases where the athlete established that he acted without significant fault or negligence (where at the moment, sanctions for specified substances are more in the warning to two month ineligibility range).

8. Regarding additional discretion in the 2009 Code when non-specified substances are involved, the conclusion is that the increased flexibility in part is attributable to applying the existing options for discretion to more anti-doping rule violations.

The existing system itself increases flexibility by expanding the reduction for substantial assistance, and including the possibility of reduction in case of a (timely) admission by the athlete. Important note: The article that has been applied the most in case of any reduction (article 10.5.2: No significant fault or negligence) has in fact not been changed.

9. The question can be asked whether the "morally innocent athlete", as described by the authors, is better off in the 2009 Code. We refer here to the CAS decision involving the American athlete Torri Edwards.²⁵ This case involved one isolated case of inadvertent use in which the athlete undeniably was negligent, although with very innocent and limited (if any) consequences as far as unfair competitive advantage is concerned. The panel argued in her case that it was "satisfied that she (Edwards) has conducted herself with honesty, integrity and character and that she has not sought to gain any improper advantage or to "cheat" in any way". This conclusion did not help Edwards, who received a two year suspension. As far as non-specified substances are concerned, the improved discretion under the 2009 Code will not help an athlete in a case like Torri Edwards, hence such an outcome will still be possible.

10. The fact that in the past as well as the present, several disciplinary bodies (mostly on the national level) have not applied the rules properly, has contributed to the current setting, where the Code does not allow the disciplinary bodies the discretion they could or perhaps should have. Due to the amount of decisions with an outcome that was not Code-compliant, WADA has felt it was necessary - also in the 2009 Code - to limit the discretion by establishing fixed or minimum sanctions, and to install some boundaries for evaluating and weighing exceptional circumstances. The side effect of these restrictions can be

14 Under the 2003 Code, some panels have used the degree of fault or negligence as a criterion, others have not.

15 Which allows a tribunal to draw an inference adverse to the athlete or other person in case that athlete or person refuses to appear at a hearing and refuses to answer questions from the tribunal or anti-doping organization.

16 See the comments to article 10.4 and 10.5.

17 WADA accredited laboratories do not

usually analyse supplements for athletes who are involved in a doping case. Moreover, labs will need an unopened supplement from the same production batch in order to make any reliable kind of statement about contamination. Athletes usually cannot meet these requirements. When party-drugs are involved, athletes may not be able to find any (reliable) witnesses of their drug use.

18 See the comment to article 10.4 of the 2009 Code.

19 In 2003 tennis player Mariano Puerta tested positive for clenbuterol. In 2005, Puerta tested positive for ephedrine.

20 Article 10.5 of the Code is only applicable in cases where the athlete can establish how the substance entered his body.

21 CAS 2006/A/1025 Mariano Puerta v/ITF (consideration 11.3.8).

22 Unless the athlete can establish that there was no (significant) fault or negligence on his part, which (if one looks at CAS case law) will be difficult when the ath-

letes attributes his positive finding to either contaminated nutritional supplements or party-drugs. It is important to note here that 10.5 only applies to specified substances when 10.4 does not apply (see comment to article 10.5). Hence, articles 10.4 and 10.5 cannot be applied at the same time to a case involving specified substances.

23 Comment to article 10.4.

24 Article 10.4 of the 2009 Code.

25 CAS arbitration N° CAS OG 04/003.

that capable, qualified and experienced disciplinary committees, panels or arbitrators may find themselves in a situation where they cannot come to a decision that takes all circumstances into account.

11. Another area of additional flexibility as detailed by the authors, is the definition of “athlete” and the possible consequences for TUEs. The changes to the definition of athletes provide flexibility towards the application of anti-doping policies to athletes who compete at a lower level. It is important to note here, that the 2003 Code did already, through article 4.4 on TUEs and the International Standard for Testing, allow some flexibility in this regard.²⁶ Several NADOs have already - to varying degrees - established specific TUE rules for lower or recreational level athletes.²⁷

12. Regarding TUEs, the authors correctly point out that not all aspects of the Code need to be applied to lower level athletes. Their assumption that for some substances a letter from the prescribing doctor might be enough in the future, is not further substantiated and appears to be without merit. Until now, there has been no indication from WADA that a return to the past is at all likely in this regard.²⁸ The first draft of the revised International Standard for Therapeutic Use Exemptions contained some significant changes from the current procedures, but no indication was found that a departure from the current system of approval of therapeutic use is imminent.²⁹ The TUE procedures for lower level athletes may be altered, but will not go so far that they will allow a step away from the level of harmonization that has been established relating to TUEs.

13. The additional flexibility resulting from the new definition of “athlete” applies to athletes who are neither international or national level athletes.³⁰ Hence, there will be no consequences of this change for elite athletes. The improved flexibility will mainly benefit those NADOs that are required, for instance by law, to also direct the doping control part of their anti-doping policies to recreational level athletes.

VI - Breach of a sanction³¹

1. The authors claim that the new rule to automatically restart the sanction from the date of the breach could operate harshly, and that there is a lack of fairness and equality in this: *“It certainly operates arbitrarily: a violation in week 1 of a 2 year ban will be virtually unpunished yet the same violation in the last week of a 2 year ban will attract a further 2 year ban”*.

One could take a different approach to this reasoning, by arguing that a less serious penalty for a breach of a sanction after a larger part of the period of ineligibility has passed, would lead to an increase in the number of violations.

2. Several points could be raised concerning the meaning and application of this new sanction, because it also applies to participating in competitions that have no relationship whatsoever with the Code or the Olympic Movement: *“No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity... in Competitions authorized or organized by any professional league or any international- or national -level Event organization”*.³²

a. In this regard, one could raise the issue whether anti-doping organizations can or should assume a role in which athletes are penalized for participating in sporting activities that do not fall within the scope or authority of these anti-doping organizations. Normally, the scope of the statutes of anti-doping organizations³³ is directed inwards: It applies to members, participants as well as individuals and legal entities with whom a contractual or other legally binding relationship has been established (which could be International and National Federations, regional federations, athletes, local teams, etc.). One could argue that once that relationship has ended, the member, participant, etc. operates outside the statutory scope of the anti-doping organization, and therefore is no longer subject to the rules of the anti-doping organization. That would mean that his actions cannot lead to a penalty of the organization he is no longer associated with.

Of course this is different when an athlete is still a member of his national federation or has other legal ties to the anti-doping rules of an anti-doping organization. When this is the case, he should abide

by the applicable rules. However, article 10.10.2 does not make any distinction in this regard. That is why one can argue that individuals that are no longer part of the Olympic Movement or formally subject to the rules of a signatory to the Code, should be able to participate in activities outside of the Olympic Movement.

b. It is important to note here that as long as the athlete or other person does not breach the imposed period of ineligibility by participating in a competition organized under the auspices of his (inter)national federation or any signatory to the Code, he cannot and did not participate in any capacity in any sport, competition or event that can in any way be part of or associated with the Olympic Movement, which in essence means that (i) the sanction is still very much effective and intact, and he (ii) complied with the sanction to the extent that he did not (further) disturb the level playing field or engage in any actions that are unfair under the same set of rules that are based on the Code.

c. One has to take into account here that participating in another³⁴ league or competition is not by itself unethical or against the spirit of sport, nor does it imply that the athlete concerned is using prohibited substances or involved in any other anti-doping rule violation. Participation in sports is usually seen as something positive.

d. Another issue is that the athlete (or other person) does not receive any credit for the period of the suspension that he has actually served (since he was actually ineligible, hence not able to continue to compete or engage in activity as he was before his period of ineligibility commenced).

e. To punish an athlete again, for engaging in conduct that does not necessarily indicate or involve any kind of foul play or improper or undesirable behavior, needs careful consideration. Instead of an automatic sanction, it might have been beneficial to create an option of review for these kind of cases, where a tribunal evaluates the facts and the circumstances, before imposing any sanctions.

f. The 2009 Code could also have established the rule that any period of ineligibility will be suspended for the time that an athlete competes in competitions organized by any professional league or (inter)national level event organizations. This alternative would reach the same effect, yet seem less harsh.

VII - No more gaps

The authors pose the question whether the 2009 Code has plugged all the gaps. Unfortunately, they do not further address this specific issue in their article. We are of the opinion that it would be unrealistic to assume that the 2009 Code will plug all the gaps, if only for the reason that the process of revising the Code was not per se directed at plugging any existing gaps. A more realistic - and from a practical point of view equally interesting - question is whether the 2009 Code will provide solutions for the problems that have risen during the last years. We will discuss some of these issues.

VIII - Privacy

1. Regarding privacy, WADA has recently made strides as far as data protection is concerned. Over the years, the protection of personal

²⁶ IST article 4.3 (Registered Testing Pool), article 4.5 (Test Distribution Planning).

²⁷ These rules could for instance allow the retroactive approval of the therapeutic use of a prohibited substance, based on the requirements and criteria in the TUE Standard.

²⁸ In the era before the Code, the acceptance of doctors notes was common practice in doping regulations.

²⁹ The TUE Standard contains standard and abbreviated procedures (only for certain substances) for the approval of therapeutic use of prohibited substances. The standard procedure involves an evaluation and approval process, carried out by a TUE committee. This process is different for the abbreviated procedures. However, in these cases therapeutic use

still has to be reported through required forms, is still evaluated based on the TUE Standard and results in an approval form. There is a possibility that the abbreviated procedure may be dropped in favour of the standard procedure being carried out retroactively for these substances.

³⁰ The last draft version of the 2009 Code applied the flexibility also to “national level athletes”. However, this conflicted with other sections of the definition and apparently was an omission, because WADA changed it in the final version.

³¹ Article 10.10.2 of the 2009 Code.

³² Article 10.10.1 of the 2009 Code.

³³ For instance: International Federations, NADOs, National Olympic Committees and major event organizers.

information has been one of the most overlooked key areas in anti-doping. Even though the testing of urine and blood samples leads to anti-doping organizations collecting large amounts of (medical and thus sensitive) information, and the TUE process obviously does as well, data protection and the possible risks involved (when not offering proper safeguards) never garnered much interest. Despite national and international law dictating them to do otherwise, some anti-doping organizations saw no problem in making sensitive personal data publicly available.

2. WADA has addressed this issue in general terms in article 14.6 of the 2009 Code, but most improvements will be produced by the new International Standard on the Protection of (Data) Privacy that WADA is currently drafting. This standard will provide the much needed increase of the protection of athletes' data and raise it to a level that is close to the one prescribed in the Directive of the European Union on this subject.³⁵ Although it will take time for anti-doping organizations to fully comply with this standard, WADA should receive credit for undertaking the development of such a mandatory international standard.

3. However, WADA's endeavours regarding data protection will not stop another developing discussion on the privacy subject, namely the influence that the new whereabouts and missed test rules will bring to bear on an athlete's personal life and control (or restrict) his freedom of movement.³⁶

IX - Open List

1. Common sense would have an athlete assume that those substances mentioned on the Prohibited List are prohibited, whereas those substances not included on the Prohibited List are not prohibited. Unfortunately for athletes, (their) life is not that simple. A closer look at the List reveals that some categories of substances are followed by the phrase: "*and other substances with (a) similar chemical structure or similar biological effect(s)*".³⁷ This phrase has, or is intended to have, the effect that all substances with either a similar chemical structure or a similar biological effect should in fact be considered prohibited as if they were actually specifically mentioned (included) in the Prohibited List. These kind of (prohibited) substances are often dubbed "related substances".

2. The relevance of and need for a provision on the list that it includes related substances, is:

- a. The wish not to exclude any newly developed substances from the Prohibited List. The prime example here is THG, also known as 'The Clear', made famous by the BALCO scandal (and athletes like Tim Montgomery, Dwain Chambers, among others). The 'open' element basically provides a safety net against those who try to beat the system by developing new performance enhancing substances or methods, and new masking agents;
- b. The fact that it is difficult to include a limitative list of all possible substances per category on the Prohibited List. The List only includes the most relevant substances per category. The main example here is Modafinil (and the American athlete Kelli White).³⁸

3. Although these are plausible arguments for the 'open' element of the List, and some major doping scandals have been based on this "related substance" clause, they do not automatically negate the significant side-effect of this clause: 'Catching' athletes who did not and could not know that they were ingesting or using a substance that WADA considered part of the Prohibited List. There is a legitimate question about whether an athlete can be penalized for ingesting a substance that neither he nor his NADO nor his National Federation knows is prohibited. This question deals with a basic principle of law: There has to be a clearly established rule before there can be a violation. The principle can be found in national constitutions and international (human rights) conventions.

4. Another downside of this 'open' element is that athletes are actually more punished for using a nutritional supplement (which turned out to be contaminated with a related substance) than for using a prohibited substance. The use of supplements itself does not constitute an anti-doping rule violation. However, between WADA's stance that

related substances should be treated as if they are expressly mentioned on the Prohibited List, and CAS case law that using supplements equals not applying proper caution (and thus negligent behavior³⁹), the discussion about legality gets lost, and those unknown related substances lead to a standard sanction when they are ingested via the use of a nutritional supplement.

5. The way the "related substances" clause works in practice, is the following. WADA establishes and updates a list of substances that, per category, have a similar chemical structure or similar biological effect(s), and distributes this list among the WADA accredited labs.⁴⁰ This list is not an official part of the Prohibited List, and WADA does not communicate it to all anti-doping organizations. It is not clear whether all WADA accredited laboratories screen samples taken from athletes for all the substances on this unofficial list. Case law actually points out that when labs find a related substance, they often first ask WADA if the detected substance is really prohibited.

The strange reality that athletes are thus faced with, is that they are persecuted for the ingestion or use of a substance that their governing body (which can be either the International Federation, the NADO or their National Federation) did not know is prohibited.⁴¹ Even more so, based on this premise, the lab authorized by the anti-doping organization to scan samples for prohibited substances is not even sure about the status of these "related substances". Nonetheless, the strict liability principle is fully applied, also to these cases.

6. Despite the issue with the legality of the "related substances" clause, this clause seems justified in cases where an athlete is acting with intent, willingly searching for unmentioned substances that will have the same performance enhancing effect as a substance expressly mentioned on the List. However, when such intent can not be established, or is obviously absent, the question is not only whether the substance is in fact prohibited (from a legality point of view), but also whether an athlete can be held accountable for ingesting such a substance. Even if the substance is (i) declared prohibited and (ii) the strict liability rule is upheld, still (iii) the athlete could be considered to have acted without fault or negligence.⁴² Curiously enough, concerning related substances, case law does not always attempt to distinguish between athletes acting with intent, and those who did not. Only one CAS decision is known where the "related substances" clause itself is discussed.⁴³

To summarize, it seems opportune to combine the "and other substances" provision with:

- a. More clarity and transparency concerning the process of designating a substance as "related";
- b. More and better communication about these substances to athletes and anti-doping organizations;
- c. A more exhaustive list of prohibited substances, including all the "related substances" that are already so designated by WADA.

34 With which we refer to leagues or events that are not part of the Olympic Movement and/or do not operate under the rules of the Code.

35 Directive 95/46/EC of the European Union and of the Council on the protection of individuals with regard to processing of personal data and on the free movement of such data.

36 The current International Standard for Testing is undergoing major changes, and will include a comprehensive and detailed system on gathering whereabouts information and registering filing failures and missed tests.

37 Or the reference: "including but not limited to".

38 Legislation on illicit drugs may contain wording that is more or less comparable to the "other substances" wording on the Prohibited List. However, the wording and application is more restrictive (i.e. directed at the chemical structure and at people that act with intent).

39 Unless the athlete meets certain requirements: CAS 2005/A/847 Hans Knauss v/FIS.

40 The term "apparently" is used, because there is no formal rule on how the "related substances" clause is applied. Rather our description is based on WADA statements in relevant CAS-decisions.

41 WADA in fact confirmed this conclusion by stating in the Dubin case (CAS 2005/A/834) that: "The substance is clearly indicated as (a) prohibited substance by several anti-doping agencies and international federations" (our emphasis).

42 Although in that case, no period of ineligibility would be imposed (or below a year), it would still lead to disqualification of individual results, and mean that the athlete committed an anti-doping rule violation.

43 CAS 2005/A/726 Calle Williams v/IOC.

X - New rights of appeal

1. The authors state that *“there are new rights of appeal which essentially give greater rights to WADA and International Federations at the expense of NADOs and Athletes”*. However, they do not explain how or why the changes to the appeal section of the 2009 Code improve the possibilities for IFs and decrease them for NADOs. Perhaps the authors are referring to the comment to article 13.3, which explains:

“Nothing in this Article prohibits an International Federation from also having rules which authorize it to assume jurisdiction for matters in which the results management performed by one of its National Federations has been inappropriately delayed”.

What is clear, is that WADA obtains far greater powers in the new Code, at the expense of ADOs. Since IFs are also ADOs, in theory the position of the IFs is also affected by the increased powers of WADA. But of course, as has always been the case, IFs have greater rights than National Federations (NFs) based on their authority over the member national federations. This was already the case under the 2003 Code, and is actually not affected by the revision of the Code.

2. The different roles and responsibilities between IFs and NADOs have been the subject of much debate over the years. NADOs may on the national level have a position similar to the one IFs have on the international level. This means that NFs sometimes at the same time have to comply with the rules of both their NADO and their IF. In cases that differences exist between these rules, there is a potential problem. Various NADOs have argued that when such cases involve doping issues, the Code gives more rights to IFs, and that in this sense the Code protects the position of the IF at the expense of the NADO. In this sense, it has been argued that the Code establishes two types of ADOs, and assigns a different (lower) status to NADOs.

3. It is important to note here that the Code contains a provision that is supposed to ensure that signatories to the Code recognize and respect each others decisions when these comply with the Code:

“Subject to the right to appeal provided in Article 13, Testing, therapeutic use exemptions and hearing results or other final adjudications of any Signatory which are consistent with the Code and are within that Signatory’s authority, shall be recognized and respected by all other Signatories” (article 15.4.1).

Such a provision is important in order for the Code to fulfil its purpose: Harmonization.⁴⁴

4. However, several IFs have not incorporated this provision in their anti-doping regulations. While others do, they do not apply it to decisions taken on the national level. Of course, article 15.4.1 applies to signatories only, and because NFs are not signatories to the Code, decisions by NFs will never be applicable to mutual recognition based on article 15.4.1. This is different for NADOs, as they are signatories to the Code. However, considering the IF-NF relationship, and how the authority is distributed in that relationship, it will not come as a surprise that IFs are not eager to being forced to recognize any decisions taken on the national level (by NADOs or by NFs). Their position as the governing body in a specific sport will always make the mandatory application of mutual recognition under the Code difficult for IFs.

5. Concerning mutual recognition, WADA gives TUEs a special status. Despite the fact that one of the main objectives of the Code is to establish harmonization, WADA has basically abandoned this objective when it comes to TUEs:

- a. WADA allows each ADO to establish additional requirements for TUE applications, meaning that even within a sport different rules apply to the same athlete depending on whether he applies to his NADO or his IF for a TUE;
- b. TUEs granted by NADOs are not subject to article 15.4.1, even when they are granted in compliance with the Code and the TUE Standard.

Now, we understand that IFs may have strong reservations concerning handing over the final ‘say so’ in TUE matters (that possibly directly relate to IF competition) to the NADOs. But for WADA to confirm this reluctance in the 2009 Code, despite the detrimental effect it will have on harmonization, is remarkable.

6. WADA explains this special status by claiming that NADOs do not have authority (jurisdiction) to grant TUEs to international level athletes. We feel this explanation is too simplistic and does not take the provisions of the Code into account.

- a. The Code’s definition of international level athlete is: *“Athletes designated by one or more International Federations as being within the Registered Testing Pool for an International Federation”*. The issue here is that many IFs have either not established any registered testing pool (RTP), or have included only a very limited amount of athletes in their RTP. This means that the majority of the athletes that compete at the international level, will still only be included in the national RTP, as established by their respective NADOs.
- b. Athletes that are only included in the national RTP, fall under the NADO’s authority, and can consequently obtain a TUE from their NADO, in accordance with the TUE provisions established by the 2009 Code: *“Each National Anti-Doping Organization shall ensure, for all Athletes within its jurisdiction that have not been included in an International Federation Registered Testing Pool, that a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption”*.⁴⁵
- c. If we then return our focus to article 15.4.1 on mutual recognition, we find that: *“therapeutic use exemptions...of any Signatory which are consistent with the Code and are within that Signatory’s authority, shall be recognized and respected by all other Signatories”*. As (i) NADOs are signatories and (ii) athletes who are only included in the NADO’s RTP fall under that NADO’s authority, there can be no question or confusion about the fact that IFs have to recognize TUEs granted by NADOs to these athletes.
- d. The complexity starts when one looks at the Code’s provisions for TUEs for international level athletes: *“Each International Federation shall ensure, for International-Level Athletes or any other Athlete who is entered in an International Event, that a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption”*.

This section indicates that the IFs’ scope of responsibility is wider than merely the international level athletes (meaning athletes in the IF’s RTP). This scope applies also to athletes that participate in IF competitions. When we take this into account, WADA’s comment to article 15.4.1⁴⁶ is meant to explain that (i) NADOs do not have authority to grant TUEs to athlete that participate in IF competitions and/or (ii) that national TUEs are not valid in international competition.⁴⁷

e. However, in this regard WADA overlooks the fact that the NADO section in article 4.4 of the 2009 Code establishes the authority of NADOs to grant TUEs to all athletes *“that have not been included in an International Federation Registered Testing Pool”*. This authority is not limited by participation of athletes in international events. This section of the Code creates an overlap in authority between IFs and NADOs:

- IFs have authority to grant TUEs to (i) athletes who are included in their RTP, and (ii) athletes who are entered in an international event (but are not part of the IF’s RTP);
- NADOs have authority to grant TUEs to all athletes who are not included in the RTP of any IF.

⁴⁴ According to the introduction of the Code: *“To ensure harmonized, coordinated and effective anti-doping programs”*.

⁴⁵ Article 4.4 of the 2009 Code.

⁴⁶ There has in the past been some confusion in the interpretation of this Article with regard to therapeutic use exemptions. Unless provided otherwise by the rules of an International Federation or an agreement with an International

Federation, National Anti-Doping Organizations do not have “authority” to grant therapeutic use exemptions to International-Level Athletes.

⁴⁷ The section of article 4.4 that applies to IFs could have been clarified by adding the reference “are scheduled to participate in an international event”, because that is how this article is applied in practice by IFs.

f. The conclusion can therefore only be that the authority of NADOs to grant TUEs to athletes in their RTP, is limited to those athletes that are not included in the RTP of any IF. This is however the only limitation established by the Code. Only athletes expressly included in an IF's RTP fall outside of the authority of NADOs. Once an athlete is not included in the IF's RTP, the authority of a NADO concerning TUEs is *not* limited by the participation of an athlete in an international event. Hence, participation in international events does not affect the NADO's authority to grant TUEs. As this authority is then in force also when an athlete participates in

an IF competition, article 15.4.1 is fully applicable and the national TUE of such a participant should be recognized and respected by the IF.

g. Of course, IFs can easily sidestep this issue by establishing the rule in their regulations that all athletes that are participating or scheduled to participate in an IF competition are part of the IF's RTP for this duration. Some IFs have already taken this approach. The consequence of such an approach is that IFs then have exclusive jurisdiction over these athletes when it comes to TUEs.

The International Sports Law Journal



Doping As a Crime?

The Policy Issue Concerning the Choice of Method to Deal with Doping

by Julia Völlmecke*

I. Introduction

Doping in sports has become popular within the past few years. The Tour de France scandals in 1998 and recently in 2007 or the BALCO affair in 2003¹ are only a handful of examples of how doping infractions seriously hit the news' headlines. More and more athletes are going to use performance enhancing drugs. Doping seems to have become an integral characteristic of sports competitions, despite the diverse side-effects the use of prohibited substances may have.

Fortunately, governments seem to have recognised the alarming development of doping cases. The USA, for example, used to be very reluctant in restricting domestic professional sports by imposing drug laws to sports.² To ensure a sustainable successful economy, the government deferred decision-making to private organisations. Since government regulation was seen as potentially profit limiting, restrictions should only have been imposed if necessary.³ The attitude changed significantly when steroids in sports became a national issue and began to make headlines in the news on a regular basis.⁴ Most importantly, the US government recognised the effect steroid use can have on youths and amateur athletes⁵ and now sees regulation as a necessary step to address the issue. The Clean Sports Act of 2005 has been introduced to keep teenagers and youths away from performance enhancing drugs by eliminating their use by professionals in the US.⁶ The bill provides for the uniform adoption by the four major American sports leagues of rules similar to the strict Olympic enhancement policies in order to eradicate steroid and enhancement use in competitive professional athletics.⁷ Some European countries also have implemented anti-doping laws including criminal provisions to combat doping infractions. France, Spain, Belgium and Italy are only a few countries to mention here.⁸

Switzerland, for example, adopted a dual doping sanction system where sanctions can be imposed by sports governing organisations or by public authorities.⁹ The Federal Act on the Advancement of Sports

of 2002 provides criminal sanctions in order to expand the sanctions of sports organisations.

This year, Germany finally introduced an Anti-Doping Law. The government recognised that doping tends to destroy ethical-moral values of the sports world and took it as its obligation to protect society's health.¹⁰ Since 66 percent of all adults living in Germany participate in sports regularly and see professional athletes as their heroes, politicians assumed that the fight against doping would have a positive effect on society's health.¹¹ Whether the new Anti-Doping Law can be seen as innovative in the fight against doping is still contested. Opponents still question whether the government should get involved in the combat against doping and face the difficulties the introduction of such legislation entails.

The policy issue concerning the choice of method to deal with doping is not over yet.

II. The Situation in Germany

In Germany, both the sport itself and the state are dealing with doping. Whilst the sport and its authorities are primarily controlling and sanctioning athletes, the state is more reluctant in regulating doping issues. This might have changed within the past few years.

The state has become seriously concerned about the increase of doping incidents.

Consequently, it has been thinking of extending its legal provisions to profoundly regulate anti-doping violations. By this time, the State is already processing a so called Anti-Doping Law¹² which expands existing regulations.

Before the new law was introduced by the German government, the debate of whether to interfere in sports regulations through governmental legislation, and criminal sanctions in particular, had been broad and controversial. Since the new Anti-Doping Law is not satisfying for many opponents, the discussion is still ongoing.

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1 For the whole story see Mark Fainaru-Wada and Lance Williams *Game of Shadows, Barry Bonds, BALCO and the Steroids Scandal that Rocked Professional Sports* (Gotham Books, New York/USA, 2006).

2 Colin Leitner "Steroids and Drug Enhancements in Sports: The Real Problem and the Real Solution" (2006) 3 DePaul J Sports L. & Contemp Probs 192, 204.

3 Ibid.

4 Ibid.

5 Ibid 210.

6 Ibid 212.

7 Ibid.

8 See Rainer T Cherkeh and Carsten

Momsen "Doping als Wettbewerbsverzerrung? - Möglichkeiten der Strafrechtlichen Erfassung des Dopings unter besonderer Berücksichtigung der Schädigung von Mitbewerbern" NJW 2001 Heft 24, 1747.

9 Christoph Gasser and Eva Schweizer "Switzerland: Doping Sanctions System" ISLR 2005, 4 (NOV), 94.

10 Entwurf eines Gesetzes zur Verbesserung

der Bekämpfung des Dopings im Sport (30.05.2007) Deutscher Bundestag, <http://dip.bundestag.de/brd/2007/0223-07.pdf> > (at 13 September 2007).

11 Ibid.

12 Entwurf eines Gesetzes zur Verbesserung der Bekämpfung des Dopings im Sport, above n 10.

A The Debate
1 The pro arguments

The supporting arguments primarily consider the doped athlete as being a delinquent rather than a victim. They refrain from protecting an athlete using prohibited substances and encourage the government to get involved with the doping issue. One of the biggest doping scandals in Germany is a good example with which to show the impact doping can have upon the sporting community. In the 1980s, the East German government was behind a doping scandal involving nearly 10,000 athletes.¹³ The government implemented "State Plan 14.25", a secret initiative to develop sports nationwide by providing steroid pills to coaches. The coaches then gave the pills to unknowing athletes in their daily dose of vitamins.¹⁴ The athletes were also given testosterone injections under the premise that the injections were "vitamin cocktails".¹⁵ A similar scandal happened in 2003 in the USA. The Bay Area Laboratory Co-Operative (BALCO) supplied some of America's top track and field athletes with tetrahydrogestrinone (THG). THG was only identified after a prominent coach came forward and sent a syringe containing the drug to the USADA.¹⁶ The USADA then developed a test for detecting the substance.¹⁷ However, during the Sydney Olympic Games the international sporting community faced the shock of having a new undetectable drug in use without any means of testing for the substance.¹⁸ Hence, the BALCO scandal illustrates how athletes can cleverly circumvent testing standards and procedures, while anti-doping agencies struggle to maintain accuracy and credibility in the system.¹⁹ In addition, the 1998 Tour de France marked the eruption of a major scandal in cycling, revealing that doping was widespread within the cycling world at the elite level. This scandal was the driving force behind the creation of the World Anti-Doping Agency²⁰ and, unfortunately, repeated similarly this year.

The doping scandals indicate that the sports world needs assistance from the state. It seems as if the sports governing bodies are unable to regulate doping in sport and as if the current anti-doping framework is ineffective. The application of criminal law on doping infractions could be a way to protect the individuals as well as the society from harm.²¹ It is argued that state coercion, in terms of criminal sanctions, is an appropriate method to avoid serious threat to society's welfare, integrity and existence.²² The adoption of such legislation is intended to reflect the important role sport plays in society and citizens' lives.²³ People like sport, they play sport and they regard sport as one of the most important elements of pedagogic development.²⁴ Sport promotes values that society creates and wishes to safeguard. Such values are known as health, honesty, fairness and fitness. It is submitted that doping in sport threatens all these values.²⁵ Doping is deemed to be unhealthy. Doping is cheating and yet immoral.²⁶ The methods used for cheating have become more and more innovative and have reached epidemic proportions.²⁷ Doping therefore is of public interest and demands a public rather than a private response.²⁸ It is argued that the application of criminal law has a moral element in its enforcement²⁹ and that "(...) it is in the public's best interests to invoke the law and protect sport from the disintegration it faces posed by an uncontrollable degree of cheating"³⁰. It is submitted that the application of criminal law on doping infractions fills up the elements currently missing in the sporting bodies' regulatory framework, such as

certainty, consistency and transparency³¹. A criminal framework is supposed to function as the protection of athletes' health as well as the protection of the social and cultural role of sports, the "fair-play" principle, the genuineness of the results, as well as a means of general and specific prevention³².

Moreover, both the increase of doping infractions and technologically undetected substances invite for criminally organised networks of pharmaceutical trading. During recent years, the misuse of steroid anabolic in Germany has significantly increased in the field of fitness and body building³³. This has led to an organised criminal network where it is necessary to implement criminal investigation methods and deterrent sentences to solve the problem³⁴. This is true for leisure sports level as well as for professional sports.

Hence, since the doped athlete is part of a network around him, the sports world is in need of the state's assistance. The state has to implement new laws in order to enforce methods, which the sports world does not cover³⁵. It is submitted that by means of creating new legal provisions, the state is supposed to assist the sports world in an effective way³⁶. An anti-doping law would offer new ways of criminal investigations and measures. Public prosecutors and judges would be able to order searches, seizures and interceptions of telecommunications³⁷. This would lead to improved methods for clarifying doping infractions. Therefore, the doped athlete needs to become subject of a criminal accusation in order to become the centre of any investigation³⁸. Once this is legally permitted (by an anti-doping law), the doped athlete is not immune from prosecution anymore. It is argued that a doped athlete facing a criminal procedure is likely to cooperate with the authorities.

Certainly, he or she would cooperate in order to prove innocence³⁹. An incentive for cooperation would also be the fear of ending up incarcerated at the end of the trial. Also, the threat of costly legal proceedings can be intimidating enough to cooperate. This is also a factor not unknown to those who have an economic or other interest in having the accused athlete continue in competition⁴⁰.

Likewise, the international anti-doping network seems to lack certain methods to efficiently and fairly combat doping. The fight against doping is the number one priority for the International Olympic Committee (IOC). It follows a 'zero-tolerance' policy where violations of anti-doping rules automatically lead to disqualification of the individual result obtained in the competition, including forfeiture of medals, points or prizes⁴¹.

Similar provisions can be found in the WADA-Code where most first anti-doping violations carry a mandatory period of ineligibility of two years and a second violation results in lifetime ineligibility⁴². Both the IOC and the WADA follow the 'strict liability' rule in its regulatory frameworks where fault is not considered in determining a violation.

Both authorities refrain from imposing criminal liability, although they emphasise their 'zero-tolerance' policy. However, the strict liability rule is likely in some sense to be unfair in an individual case where, eg, the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she is not responsible. It is then hard for the athlete to prove his or her innocence. Nonetheless, the rules of the competition will not be altered to undo the unfairness. Therefore,

13 Karen Helmstaedt *History of Doping: Acceptance Tinged with Fear*, ASCA Online Articles <http://www.swimming-coach.org/articles/9904/9904-6.htm> (at 17 September 2007).
14 Ibid.
15 Ibid.
16 Jessica K Foschi "A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport" 16 *Duke J Comp & Int'l L* 457, 470.
17 Ibid.
18 Ibid.
19 Ibid 471.
20 World Anti-Doping Agency WADA *History* <http://www.wadaama.org/en/dynamic.ch2?pageCategory.id=311> (at 17 September 2007).
21 Gregory Ioannidis "Legal Regulation of Doping in Sport and the Application of Criminal Law on Doping Infractions: Can a Coercive Response be Justified" *ISLR* 2006, 1 (May), 29.
22 Ibid 38.
23 Ibid 34.
24 Ibid.
25 Ibid 33.
26 Ibid.
27 Ibid.
28 Ibid 30.
29 Ibid.
30 Ibid 34.

31 Ibid 29.
32 Ibid.
33 Thomas Röwekamp "Bekämpfung des Doping mittels eines Anti-Doping-Gesetzes?: Pro" *ZRP* 2006 Heft 7, 239.
34 Ibid.
35 Thomas Bach "Bekämpfung des Doping mittels eines Anti-Doping-Gesetzes?: Contra" *ZRP* 2006 Heft 7, 239.
36 Ibid.
37 Christian Krähe "Anti-Doping-Gesetz - Pro und Contra; Contra: Argumente gegen ein Anti-Doping-Gesetz" *SpuRt* 5/2006, 194.
38 Clemens Prokop "Anti-Doping-Gesetz - Pro und Contra, Pro: Argumente für ein

Anti-Doping-Gesetz" *SpuRt* 5/2006, 192, 193.
39 Ibid.
40 Richard W Pound "The World Anti Doping Agency: An Experiment in International Law" *ISLR* 2002, 2 (JUL), 53, 58.
41 International Olympic Committee, *Anti-Doping Rules Applicable to the XX Olympic Winter Games in Turin 2006* http://multimedia.olympic.org/pdf/en_report_1018.pdf (at 18 September 2007), at 14.
42 World Anti-Doping Agency, *World Anti-Doping Code*, art. 10.2 (2003) <http://www.wadaama>.

it is submitted that the IOC and the WADA in particular have the responsibility to protect innocent athletes from false positives⁴³. This could be achieved if these anti-doping authorities were to move towards a practice of considering all the facts and circumstances on a case-by-case basis and giving each athlete a fair and real opportunity to prove their innocence⁴⁴. This is the way in which a criminal procedure in Germany would be realised, and it is another indication that the anti-doping regulatory framework needs to be controlled by other authorities. As such, some European countries have already implemented anti-doping laws⁴⁵.

Finally, the importance of sports competitions, and their commercial backgrounds and investigations in particular, welcome an improved criminal legal system⁴⁶. If doping affairs are not punished by criminal sanctions, they will jeopardise the moral-ethic function of the sport in general⁴⁷. An anti-doping law would be able to forestall such a situation. It would also lead to new and improved cooperation between the state and the sports world and the fight against doping would become more efficient⁴⁸.

As a result, antagonists welcome an anti-doping law but also consider cooperation between the sports world and the German government as helpful in order to fight against doping efficiently.

2 *The contra arguments*

The arguments against the introduction of an anti-doping law doubt that the government should get involved in the issue of doping. They focus on the difficulties such legislation would create. In particular, they primarily doubt that it is possible and reasonable to introduce such a new law under the German system. Whilst some arguments question whether it is legally permitted to introduce an Anti-Doping Law with respect to constitutional difficulties, other opinions concentrate to a greater extent on procedural difficulties which are likely to occur once an Anti-Doping Law is adopted.

(a) *Constitutional difficulties*

Although the German government is allowed to create new criminal sanctions⁴⁹, the fact that it is not obliged to criminally sanction athletes using prohibited substances is supposed to cause a barrier. Article 1 of the Basic Law of the Federal Republic of Germany⁵⁰ does not impose the duty upon the State to protect an athlete against risking their own health. This is confirmed through article 2 of the Basic Law of the Federal Republic of Germany. It protects the general freedom of action which includes the right to choose a riskfilled life in terms of health concerns⁵¹. Everyone has the right to choose a healthy life or to risk health by using dangerous doping substances. To oblige the state to interrupt in this field would change the constitutional understanding of both article 1 and 2 of the Basic Law of the Federal Republic of Germany⁵² and would infringe the liberal attitude towards life.

Article 103 (2) of the Basic Law of the Federal Republic of Germany is seen to be another problem. An implemented law needs to be defined adequately and, even more importantly, the premises of the penalties need to be transparent. In Germany, the legislator is not allowed to let other authorities decide which actions are to be sanctioned⁵³. However, the "doping lists" which define and list all prohibited substances and methods are a product of the World Anti Doping Agency (WADA) which the National Doping Agency (NADA) and the national sports unions have adopted and implemented in their

regulations⁵⁴. The state would have to refer to these authorities to be able to define what actions are prohibited. This is not allowed⁵⁵. Additionally, it is doubtful whether, by means of referring to the doping lists, a new law would always be accurate. Because of the rapid invention of new doping substances, WADA's doping list necessarily changes often.

Consequently, the German legislator would always have to renew the new law in order to keep the law presentable and up to date with the newest research findings in the doping field⁵⁶.

Furthermore, the sports unions have already adopted regulations that prohibit anti-doping violations in order to protect the sports ethos. According to article 9 (i) of the Basic Law of the Federal Republic of Germany, the sports unions are constitutionally protected and are therefore independent. The state is not allowed to interfere with the sports regulations.

It is a legitimate and intended dichotomy between the state and the sports world. Although the state supports the sports world in many ways, such as supporting the sports unions and clubs on a monetary basis; supporting the sports unions by organising international competitions; protecting competitions by providing sufficient security measures; et cetera, it is intended that the government should only assist and support the sports authorities when it is inevitable. This is, a fortiori, the case when it comes to regulatory issues. The autonomy of the sports world is tied with the subsidiary of government interference.

Therefore, although the sports ethos is a considerable and noteworthy issue to protect, article 9 of the Basic Law of the Federal Republic of Germany does not allow the state to regulate the issue for the sports unions.

Additionally, the anti-doping policies and measures of the sports unions indicate that they are more efficient than an anti-doping law would be. The system of controlling antidoping violations starts world wide. Since the International Olympic Committee called for a World Conference on Doping in Sport in 1999 to combat the phenomenon of doping in sports, the World Anti-Doping Agency (WADA) was created. WADA implements and oversees the Anti-Doping Programme which consists of the Code, International Standards (including the Prohibited List, Testing Standards, Laboratory Standards, Standards for Therapeutic Use Exemptions), and Models of Best Practice. Since WADA's formation, virtually every sporting organisation in the world has accepted the Code⁵⁷. All athletes wishing to take part in a competition have to agree with the sports unions' regulations which themselves reflect the Code. They agree with all control measures provided in the WADA anti-doping regulations. These measures, provided in article 6 of the WADACode, are efficient and force the sports unions as well as the arbitration courts to react quickly⁵⁸. Also, the rules provided in the WADA-Code are not compatible with the German regulations. It begins with the Code's "strict liability rule" provided in article 2.1 of the Code where a positive analysis of a doping control sample automatically leads to the athlete's liability of an anti-doping violation. "However, the athlete then has the possibility to avoid or reduce sanctions if the athlete can demonstrate that he or she was not at fault or significant fault."⁵⁹ Though, there has not been an athlete yet who was successful in proving their innocence⁶⁰. What's more, the provision is contrary to the German legal understanding of criminal liabilities. In Germany, an accused (athlete) is innocent until the state has proven his guilt. This

http://rtecontent/document/code_v3.pdf
(at 18 September 2007).

43 Foschi, above n 16, 485.

44 Ibid.

45 See Cherkeh and Momsen above n 8, 1747.

46 Ibid 1746.

47 Ibid.

48 Prokop, above n 38, 193.

49 Walter Dury "Kann das Strafrecht die Doping-Seuche ausröten?" SpuRt 4/2005, 137, 138.

50 The English version of the "Grundgesetz

der Bundesrepublik Deutschland" is available under German Law Journal <http://www.iuscomp.org/gla/statutes/GG.htm> (at 30 November 2006); the German full text version is available under Deutscher Bundestag http://www.bundestag.de/parlament/funktion/gesetze/gg_aug2006.pdf (at 30 November 2006).

51 Although the interpretation of article 2 of the Basic Law of the Federal Republic of Germany allows for contrary opinion, the valuation above is supposed to reflect best

what the legislator aimed to protect, see Udo Steiner "Verfassungsfragen des Sports" NJW 1991 Heft 43, 2729, 2734.

52 Martin Nolte *Sport und Recht: Ein Lehrbuch zum internationalen, europäischen und deutschen Sportrecht* (Hofmann Verlag, Schorndorf, 2004) Nationales Sportrecht, 226.

53 Ibid.

54 Christian Krähe, above n 37, 194; the

WADA-Code is implemented in Germany through the National Anti Doping Agency (NADA); a good abstract

of the implementation of the WADA-Code offers Christian Weber "Die Sportsschiedsgerichtsbarkeit nach dem World Anti-Doping Code und ihre Umsetzung in Deutschland" SchiedsVZ 2004 Heft 4, 193.

55 Krähe, above n 37, 194.

56 Dury, above n 49, 138.

57 Foschi, above n 16, 462.

58 Dury, above n 49, 139.

59 Ibid.

fundamental rule, known as “in dubio pro reo”, is expressed in different regulations and in connection with criminal liability it shifts the burden of proof upon the state’s authorities⁶¹. Hence, the “strict liability rule” of the WADA-Code is not allowed in the German criminal legal system. Furthermore, it will be questionable whether a positive analysis of a doping sample can be used in an official criminal procedure. Because the athlete has to assist the laboratories in order to get tested, this cooperation resembles much of a “self-accusation”. With regard to criminal procedures, an obligation to do anything which might prove your own guilt is not allowed in Germany⁶². Therefore, a positively tested analysis can hardly be used as evidence in order to prove the athlete’s criminal liability. Additionally, the A- and B-samples regularly offer binding results for the athlete. Once the whole procedure of the doping control has been validated, there will not be the possibility for the athlete to ask for a third “C”- sample. Also, the athlete will not be allowed to offer counter evidence by introducing DNA-expertise which could prove that the used samples were not their samples⁶³. That means the WADA-Code remarkably shortens the athlete’s possibilities of any counter evidences. This is not compatible with the German legal understanding of defence in a criminal procedure. Apart from that, criminal sanctions provided in a new anti-doping law will not be able to discourage the athlete from using prohibited substances. They will not function as a good deterrence⁶⁴. Athletes who were doping themselves for the first time will have to expect a monetary fine rather than imprisonment⁶⁵. In contrary to this, the WADA-Code provides much harsher sanctions. In accordance to Article 10 of the Code, athletes have to fear the disqualification of their results as well as a two years’ ineligibility for the first violation. For the second anti-doping violation they even have to fear lifetime ineligibility. These provisions are suitable enough to function as deterrence. Also, they constitute a better respect for the treatment of a sports career because the bans provided in the WADA-Code sensibly influence an athlete’s future career. According to this, sports disciplinary sanctions seriously affect an athlete’s career whereas sanctions such as custodial sentences will rarely be achieved.

Finally, the nature of the current anti-doping framework of sports governing bodies is of a disciplinary character. If an athlete desires to participate in competition, he has to accept the regulatory framework of his governing body. This, in a sense, creates a contractual relationship between the two parties⁶⁶. Both parties are bound by the terms of the antidoping regulatory framework, and the athlete has to submit to its terms. Consequently, the athlete agrees to submit to referential authority⁶⁷. If this authority and its regulatory framework insofar are not followed, the athlete is subject to disciplinary sanctions. This is enough to indicate the private nature of doping⁶⁸ which automatically excludes any governmental involvement. Following these considerations, it is only natural that opponents consider the mechanisms sports governing bodies are able to use as sufficient enough to combat against doping⁶⁹.

As a result, the implementation of an anti-doping law is difficult and faces serious constitutional difficulties.

(b) Procedural difficulties

Procedural inadequacies support the difficulties in adopting an anti-doping law.

Once an athlete is accused of doping infractions, a criminal procedure may begin. In these proceedings the accused does not only have the right to refuse saying anything about the action that brought him before court, he even has the right to lie⁷⁰. The legally justified refusal to cooperate with the public prosecutors or the judges makes it difficult for the relevant authorities to find out the truth and it complicates any criminal investigations.

Antagonists presume that an anti-doping law would interfere with the sports tribunals’ jurisdiction. German judgments need to be enforced. The verdict itself is only a part of the whole procedure of judgment enforcement. Additionally, the international enforceability of German district court’s judgments is hard to realise⁷¹. But, decisions of sports tribunals can be applied internationally without any enforcement procedure⁷². It would complicate the whole procedure if

an athlete is found guilty by a sports tribunal in accordance with the “strict liability rule”, but the criminal court, on the one side, would have to find him innocent because it could not collect enough evidence to prove the accused guilty and therefore had to apply the rule of “in dubio pro reo”⁷³. This would lead to contradictions between the two decisions and would have a negative impact on the whole procedure and its credibility. Moreover, it is questionable whether it is valid to firstly reach decision by a sports tribunal and then finding a following judgment by a criminal court. The aspect of double jeopardy or “ne bis in idem”, prohibiting to punish a person twice for the same action, could be a justified *bauk*⁷⁴.

Apart from that, it is doubtful whether an anti-doping law would lead to adequate judgments. The judges sitting in the criminal courts are not specialised in doping issues or any sports issues as such⁷⁵. However, the “judges” in the sports tribunals and courts are well specialised in the sports field. Furthermore, all decisions of the sports tribunals can only be appealed before the Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland⁷⁶. In spite of this, Germany offers the possibility of two appeals against a district court’s judgment. That means it would take more time to reach a verdict than it would take before the CAS. During this time of procedure, the athlete could still take part in further competitions which obviously would not lead to a clarified situation.

Additionally, the local public prosecutor’s offices are overloaded with loads of cases which make it impossible for the public prosecutors to concentrate on doping cases within a short period of time⁷⁷. This also supports that a long period of time passes by until the final verdict is reached.

3 The new Anti-Doping Law

The German government introduced a new Anti-Doping legislation which is still in process and not enacted yet. Basically, the new law amends existing provisions of the Medicinal Products Act and those of the Law of Germany’s Federal Criminal Police Office⁷⁸ and is not meant to represent an independent law.

The aims of the Anti-Doping Law are clear and well formulated. The new legislation has been created to effectively combat against criminally organised networks on a national and international basis. Furthermore, it has developed auxiliary provisions to criminalise those athletes who are possessing significant amounts of dangerous doping substances.

Additionally, the legislation has recognised provisions reaching for preventive measures.

By renewing the provisions of the Federal Criminal Police Office Law, the government developed a mechanism by which the Federal Criminal Police Office is entrusted with police tasks. Section 4 (1) of the Federal Criminal Police Office Law entrusts the Federal Criminal Police Office to work against unlawful trade of pharmaceuticals. The subject matter jurisdiction of the Criminal Police Office is supposed

60 Karsten Mertens “Jan Ullrich und die Unschuldsvermutung: Die Verteidigungsstrategie des Radprofis aus juristischer Sicht” *SpuRt* 5/2006, 177, 179.

61 *Ibid* 177.

62 Dury, above n 49, 139.

63 *Ibid*.

64 *Ibid* 140.

65 *Ibid*.

66 Ioannidis, above n 21, 31.

67 *Ibid*.

68 *Ibid*.

69 Johannes Horst and Constanze Jacobs “Arbeits- und Verbandsrechtliche Konsequenzen des Dopings” *RdA* 2003 Heft 04, 215.

70 Krähe, above n 37, 194.

71 Bach, above n 35, 239.

72 Dury, above n 49, 140.

73 Krähe, above n 37, 194.

74 Martin Heger “Zur Strafbarkeit von Doping im Sport” *JA* 2003 Heft 1, 76, 83.

75 Dury, above n 49, 140.

76 *Ibid*; a good survey about the CAS offers Simon Gardiner et al *Sports Law* (Third Edition, Cavendish Publishing Limited, Sydney/London, 2006), section 2, chapter 6, 232; the CAS is also known as TAS (Tribunal Arbitral du Sport); see www.tas-cas.org.

77 Walter Seitz “Hexenjagd auf Dopingsünder? - Ein bundeseinheitliches Schiedsgericht für Sportdopingsachen muss her!” *NJW* 2002 Heft 39, 2838, 2839.

78 For the official translation of the Bundeskriminalamt see its English homepage at [Bundeskriminalamt](http://www.bka.de/) <http://www.bka.de/> (at 13 September 2007).

to battle the international trading of medicinal products. In order to support this aim, the Federal Criminal Police Office is obliged to work together closely with specialised foreign investigation bureaus.

The Medicinal Products Act takes the development of the Federal Criminal Police Office Law into account by introducing and aggravating those sanctions connected with the possession of significant amounts of prohibited substances. Because of the huge dimension of doping nowadays, the government considers the aggravation of these sanctions as necessary in order to fight against criminal behaviour. The alterations of ss 6 (a) and 95 of the Medicinal Products Act take this into account. Additionally, by renewing ss 4 and 6 of the Act, the government sought to implement provisions sanctioning blood doping and providing the obligation to add a warning notice concerning prohibited doping substances to every patient information leaflet. The latter provisions are meant to protect the athletes from using prohibited substances as well as to forestall the athlete's defence of nescience.

The German government introduced the new legislation because it has primarily found the need for action in two ways. Firstly, it finds it necessary to combat the criminally organised networks. In order to do so, the government implemented provisions offering rigorous ranges of sentences. They are meant to function as a deterrent. The government has also recognised that the doping network is often based on international networks.

Therefore, it finds it necessary to work together with international investigation bureaus.

Additionally, the new provisions criminalising the possession of significant amounts of prohibited substances are supposed to successfully work against the circulation of dangerous doping substances. Secondly, the new law aims for preventive measures in order to brighten the athletes of the consequences being faced with when using prohibited substances. Hence, by introducing the new law, the German government sees it as her task to provide regulations in order to make government interference possible.

Although the new Anti-Doping Law is recognised as a useful step towards the fight against doping in Germany, there are still deviating opinions. One of politics most striking arguments against the new Anti-Doping legislation criticises the fact that the law still does not criminalise the doped athlete. Opponents censure that the law rather resembles minor changes of existing provisions than severely endeavours to act against athletes using prohibited substances. Other antagonists seriously condemn the new law by means of its failure to provide sufficient specification and transparency⁷⁹. In terms of constitutional correctness the new law lacks the necessary precision and cannot therefore follow the rules of article 103 (2) of the Basic Law of the Federal Republic of Germany⁸⁰. Firstly, the provisions of s 95 and s 6 of the Medicinal Products Act do not clarify which prohibited substances are meant⁸¹. Although these sections refer to existing lists of prohibited substances, those lists change according to the latest developments in economy and technology⁸². Therefore, it remains unclear which lists or supplements of prohibited substances are meant to be the basis for criminal sanctions⁸³. Secondly, s 4 of the Medicinal Products Act does not sufficiently clarify what is actually meant when blood is supposed to be the basic substance for blood doping. Although WADA's list of prohibited substances recognises blood doping as a prohibited method by means of either using blood injections themselves or by using pharmaceutical products resulting in the

increase of oxygen transfer, section 4 does not differentiate between the two methods⁸⁴. The different possibilities of interpreting s 4 do not clarify whether blood doping by means of blood injections is meant to be covered by the provision⁸⁵.

4 Result

Following the discussion above, Germany's new Anti-Doping Law is a bit of a surprise.

Although many opponents worked against the introduction of such legislation, the government implemented it. This reflects the policy in Germany. Most of the politicians regard it necessary to combat the doping problem by means of implementing a new regulatory framework. Therefore, already existing provisions were altered and expanded in order to fight against doping effectively. However, the government has declined to introduce new provisions criminalising the doped athlete. Although the new law now punishes those persons possessing a significant amount of prohibited doping substances, it does not provide a mechanism to sanction the use of prohibited substances. The reason why the government refused to develop such provisions can be drawn from two aspects.

Firstly, the government recognised the procedural difficulties once an athlete is part of a criminal procedure. The athlete's right of a denial of evidence and the predicted procedure ending up with monetary penalties most of the times are but two reasons to mention here.

Secondly, the government emphasised that it sees the essence of the fight against doping in regulating the unlawful circulation of prohibited pharmaceuticals as well as in the suppression of criminally organised trading networks. The sanctioning of the doped athlete himself has not been its primary concern.

Anti-doping laws of other European countries also failed in providing efficient and transparent provisions to fight against doping. In Italy⁸⁶, for example, politicians had to admit that the Anti-Doping Law has not been successful⁸⁷. This can be drawn from the law itself. Provisions lack precise wordings and it is not clear what the law really aims at⁸⁸. Since the law mentions three different aims which it is supposed to protect legally⁸⁹, it fails in providing transparent guidance. The Italian government has already recognised the weaknesses of the Anti-Doping Law and plans to revise the law⁹⁰. Italian politicians are planning to shift the jurisdiction over the sanctioning of doped athletes back to the sports governing bodies⁹¹. Following this attempt, Italian's anti-doping policy would subscribe itself to the IOC's policy emphasising that doping infractions are a matter for sports governing authorities⁹². Switzerland, for example, is faced with similar difficulties and developments, although it still has a dual doping sanction system⁹³. The Federal Act on the Advancement of Sports of 2002 is applicable to everyone, offences are investigated by criminal prosecutors and its sanctions range from imprisonment to a monetary fine⁹⁴.

However, the application of the law is limited by the required intention to commit the violation of the law for the purpose of doping and within regulated competition sports⁹⁵.

The requirements of an athlete's intention to commit the violation of law for the purpose of doping are supposed to demonstrate a problem for the prosecution. Although substantial amounts of prohibited substances may be detected, most of time the intention and the use in regulated competition sports cannot be proven⁹⁶. Furthermore, the Act does not declare the presence of prohibited substances in an ath-

79 Markus Parzeller and Christine Rüdiger "Blutdoping: Unbestimmte Regelungen im Arzneimittelgesetz" *Zeitschrift für Rechtspolitik* (ZRP) 2007 Heft 5, 137.

80 Ibid.

81 Ibid 139.

82 Ibid.

83 Ibid.

84 Ibid 139.

85 Ibid.

86 *Disciplina della tutela sanitaria delle attività sportive e della lotta contro il doping*;

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87 "Sportpolitik: Italien will Anti-Doping-Gesetz revidieren" *Die Welt* (27 November 2006) <http://www.welt.de/data/2006/11/27/1126602.html> (at 07 December 2006).

88 Manfred Maiwald "Probleme der Strafbarkeit des Doping im Sport - am Beispiel des Italienischen Antidoping-

Gesetzes" *Festschrift für Karl Heinz Gössel zum 70. Geburtstag* (am 16. Oktober 2002) (Dieter Dölling and Volker Erb (eds), CF Müller Verlag, Heidelberg), 399, 404.

89 Maiwald, above n 88, 414, 400: the heading of the law and its preamble mention different aims.

90 *Die Welt*, above n 87.

91 Ibid.

92 Ibid.

93 See Gasser and Schweizer, above n 9, 94:

There are two categories of doping sanctions: (1) those imposed by bodies of sports organisations, and (2) those imposed by public authorities.

Depending on the offence committed, an athlete may be sanctioned by one authority or both.

94 Ibid.

95 Ibid.

96 Gasser and Schweizer, above n 9, 94. A survey among the prosecution officers of the Swiss cantons showed that the prob-

lete's body, the use of a prohibited substances or method by an athlete, or the possession of prohibited substances as punishable⁹⁷. In sum, the limitation of scope of the criminal provision in the Federal Act has led to few convictions. Also, it has led to various discussions among lawyers and politicians whether to extend the criminal provisions to athletes using doping on themselves⁹⁸. This was denied.

B Criminal Provisions

Prior to the introduction of the new Anti-Doping Law, the discussion in Germany mostly focused on whether to regulate anti-doping violations by introducing new or expanding existing criminal provisions. Although the new law does not offer new provisions criminalising the doped athlete, it is interesting to have a closer look upon the Criminal Code since it offers the most important provisions to regulate anti-doping infractions.

These provisions are not abolished by the introduction of the new Anti-Doping Law. Also, other regulations exist which may be considered when regulating anti-doping violations.

1 The Criminal Code

Although the German Criminal Code offers provisions for sanctioning doping infractions, the doped athlete barely has to fear any punishments. The focus in the Criminal Code lies upon the persons behind the athlete using prohibited substances. Hence, provisions criminalising the doped athlete hardly exist.

(a) Crimes against life and bodily integrity

It is supposed that doping regularly harms the integrity of the athlete's body. Therefore, the athlete's medication with doping substances by doctors or coaches often results in a violation of section 223 of the Criminal Code⁹⁹. Doping might even be sanctioned with murder according to s 211 of the Criminal Code, if doping medications result in the athlete's death. However, it is unlikely that s 211 will be fulfilled. Section 211 requires causality between the medication of the doping substance and the athlete's death. Since it usually takes a long time until the athlete's death takes place, the causal chain is unlikely to be proven¹⁰⁰. Additionally, section 211 will not be realised if the athlete knew how risky the medication could be. Finally, it is unlikely that the doctor or coach who is treating the athlete with risky substances has intended to actually kill the athlete.

(b) Fraud

The negative impact doping is likely to create upon competitions may justify the realisation of fraud¹⁰¹.

The disadvantage the organiser of a sports event has to face if an athlete was doped may realise section 263 of the Criminal Code. Since the doped athlete taking part in a competition submitted himself under the anti-doping regulations, the cheating may cause harm to the sports governing authority¹⁰². In case the doped athlete wins the competition, the sports event organiser wrongfully pays him the trophy money. This could be a financial disadvantage for the organiser because the prize money is not meant for an athlete who has violated the anti-doping regulations. However, such a disadvantage does not exist. The organiser is obliged to pay the trophy money, either to the 'clean' or to the doped athlete. He loses the prize money in both cases¹⁰³.

Yet, the disadvantage of the doped athlete's competitors may violate section 263. In case the doped athlete was disqualified, the second ('clean') winner has the right to demand the prize money. Nonetheless, he or she may not claim the money because of the unawareness of the faulty result¹⁰⁴. This could resemble a financial disadvantage. However, this is rejected. The person who is cheating (here the doped athlete) and the person who is obliged to pay the prize money (here the sports event manager) are not one and the same person. In such a constellation, fraud is not realised under the German Criminal Code¹⁰⁵.

Another violation of fraud might exist in connection with the audience of the competition.

The audience who has paid an entry fee for watching a sports competition has the right to expect the following competition is obeying the anti-doping regulations¹⁰⁶. If the doped "winner" of the event gets disqualified, the audience might have the right to claim back the entry fees they have already paid¹⁰⁷. However, the disqualification of the doped athlete leads to a valid competition according to the anti-doping regulations, excluding any related claims of the audience. Section 263 is not violated.

The athlete's sponsors may claim a violation of section 263. A sponsorship is based on the athlete's personal capacities. If the athlete was doped when he or she signed the contract, the athlete's doped performance abilities form the basis of the sponsorship, and the sponsors expect him or her to show these abilities¹⁰⁸. If the athlete stopped using doping substances afterwards, he or she would not be able to show the same personal performance anymore. The athlete would be cheating beyond his personal abilities which were the reason for the sponsors to offer him a contract¹⁰⁹. A fraud is therefore realised and is also acknowledged the other way round¹¹⁰.

As a result, section 263 is only realised by cheating against the sponsorship.

(c) Crimes against competition

Section 298 of the Criminal Code is protecting competition and may sanction a doped athlete. A doped athlete could be liable under s 298 because their aim is to influence the outcome of a sports competition by medicating themselves with doping preparations.

However, the main idea of s 298 is to protect the commercial and economic side of competition in general, rather than to protect the competition in sports¹¹¹. Therefore, the competition in the sports area is not meant to fall under the terms of s 298 and hence inhibits the athlete's liability.

As a result, it is only section 263 of the Criminal Code sanctioning a doping infraction by disadvantaging the athlete's sponsors.

2 Other provisions

Sections 4 and 6 of the Law against unfair competition are punishing unfair competition practices. Although this law is protecting fair competition, it is argued that it does not cover the competition taking place in a sports event. It is only the commercial and economic competition which is meant to be protected by this law¹¹². Hence, it does not cover any doping violations in sports.

The assistance to any doping measures is punished by the Medicinal Products Act¹¹³. Section 6 (a) of the Act prohibits, for the purpose of doping, the placing on the market, the prescribing and

lem to prove to commit an anti-doping violation is one of the reasons why there have not been many criminal convictions based on the Federal Act on the Advancement of Sports, see *ibid*.

97 *Ibid* 95.

98 *Ibid* 95.

99 For the translation of the German Criminal Code see German Law Journal <http://www.iuscomp.org/gla/statutes/StGB.htm> (at 29 November 2006). All German versions of the laws used in this paper can be seen on Bundesministerium der Justiz

<http://www.bundesrecht.juris.de/aktuell.html> > (at 29 November 2006).

100 Heger, above n 74, 77.

101 For the translation of s 263 of the Criminal Code see German Law Journal <http://www.iuscomp.org/gla/statutes/StGB.htm#263> > (at 29 November 2006).

102 Heger, above n 74, 80.

103 Heger, above n 74, 81.

104 Cherkeh and Momsen, above n 8, 1749.

105 *Ibid*.

106 Heger, above n 74, 82.

107 *Ibid*.

108 Cherkeh and Momsen, above n 8, 1748.

109 *Ibid* 1749.

110 *Ibid*.

111 *Ibid*.

112 *Ibid* 1750. Ulrich Fischer "Unlauterer Wettbewerb durch Doping im Europäischen Profisport?" *EuZW* 2002 Heft 10, 297, however, argues that the sport has to be equally treated with any other commercial action. He approves section 1 of the law to be the adequate norm to sanctioning the competitive behaviour of doped athletes, *ibid*, 300.

113 For the translation of the German word "Arzneimittelgesetz" see *Kassenärztliche*

Bundesvereinigung <http://www.ebm2000plus.de/service/wortwahl.asp> > (at 29 November 2006); English version for the Arzneimittelgesetz available under Bundesministerium für Gesundheit [http://www.bmg.bund.de/cdn_040/nn_617002/SharedDocs/Download/EN/Health/AMGpdf,templateId=raw,property=publicationFile.e.pdf/AMG-pdf.pdf](http://www.bmg.bund.de/cdn_040/nn_617002/SharedDocs/Download/EN/Health/AMGpdf/templateId=raw,property=publicationFile.e.pdf/AMG-pdf.pdf) > (at 30 November 2006).

administering of medical products to others. Section 95 (1) cl (2a) sanctions the intended violation of this doping-prohibition.

3 Result

Although the German legal system offers ways to sanction doping infractions, the provisions struggle to succeed in punishing involved people, not to forget that the doped athlete remains immune to any punishment. Therefore, the new Anti-Doping Law was developed to fill in this gap and to expand the provisions of the Medicinal Products Act which have been inventive already but rarely successful¹¹⁴.

III. Conclusion

The new Anti-Doping Law in Germany may be seen as an innovative step towards the fight against doping. Certainly, its aims and intentions recognise the immense dimension doping has reached within the sports world. Provisions which entrust police work with more power on a national and international basis and those that intend to combat against criminally organised networks seem to be helpful in the fight against doping. Apart from that, the new legislation resembles no more than a failed attempt to get governmentally involved in doping affairs.

There are more than two reasons to support this statement. Firstly, antagonists also wished to see the doped athlete criminalised which has not been adopted in the new law. This may be seen as a failure, but also considers the dichotomy between the state and the sports world. The sports world tends to support the existing divisions of work and resists the idea of criminalising the doped athlete. Although sports organisations see the need to work together with governments to fight against doping efficiently, they respect the different responsibilities of each party¹¹⁵. Governments are deemed to support the efforts of sports organisations' anti-doping activities¹¹⁶. With the implementation of WADA, governments agreed to operate *through* this organisation which is to be appreciated.

Secondly, and probably the most important reason to work against an Anti-Doping Law is that the development of doping infractions has become very serious. Athletes seem to push themselves as far as they can in order to become 'the best'. "A good effort is not admirable compared to a winning or record-breaking effort."¹¹⁷ Nations encourage athletes to triumph in international competitions because winning medals is a symbol of both national pride and superiority over other nations¹¹⁸. Victorious athletes are seen as national heroes and are sometimes rewarded as such¹¹⁹. Unfortunately, the potential of benefits of performance enhancing drugs outweigh any negative aspects of its use. Let us consider, for example, genetic doping. Gene therapy treats diseases by replacing, manipulating or supplementing non-functional genes¹²⁰. Scientifically, it involves injecting synthetic genes into muscle cells where they become indistinguishable from the receiver's DNA¹²¹. Gene therapy has evolved significantly in recent years, but is very early in development and highly experimental¹²². The science is still immature in its application to humans, potential adverse effects are unknown¹²³. However, a German case in 2006 suggests that some athletes are already engaged in genetic doping and WADA suggests that it will be used within the future¹²⁴. The German running coach, Thomas Springstein, was convicted of doping charges and was also suspected of being involved in genetic doping¹²⁵. The case rose suspicions about whether genetic doping took place at the 2006 Torino Olympics, which began a few weeks after evidence was presented in the Springstein case¹²⁶. The problem with genetic doping is that it is not very complicated to perform and could be easily duplicated¹²⁷. Current technology does not detect genetic doping in humans since it is nearly indistinguishable from naturally occurring genes¹²⁸. Hence, genetic doping causes technical and legal difficulties at the same time. Once the athlete is genetically doped, the effects of such a procedure are present for the rest of the athlete's life¹²⁹. Since genetic doping is permanent, an anti-doping law will not be the right answer to combat its use.

Rather, it is assumed here, that the sports world and governments should work together closely in order to develop new mechanisms to fight problems such as genetic doping. The help of governments is

primarily seen in providing sports organisations with money in order to support substantial research into detection methods and new testing technology.

WADA's Monitoring Program¹³⁰ to detect patterns of misuse should also be encouraged.

An anti-doping law, concentrating primarily on prosecution than prevention, is not the right way to support an efficient fight against doping. Overly strict prohibitions and penalties may only create other problems of its own, and are supposed to hinder the development of sports and professional athletes by chilling innovation. The question of how to punish the doped athlete should not be oversized since it is only one module of the whole fight against doping in sports. This might also follow the desires of the sports world. As the German ice hockey player Daniel Kreutzer said: "A successful combat against doping may never be achieved. Though, it is important to recognise every single possibility to solve the problem. Improved routine doping controls and educational advertising of dangerous side-effects of doping substances may improve the fight against doping."¹³¹

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Lex Sportiva And Lex Mercatoria

by Boris Kolev*

The idea about the emergence of “world law” is recently gaining popularity within the legal science. A definition of the term “world law” is given by Harold Berman - a prominent professor from Harvard University and currently a chairman of the World Law Institute of the Emory University in Atlanta, Georgia. According to Berman by “world law” is meant the common features of the legal systems of the world, and especially the body of customary law that is gradually being created by the people of the world in their transnational inter-relationships. Included are many aspects of world economic law, such as bankers’ letters of credit, negotiable instruments, and documentary trade terms. Included also *inter alia* is the world sports law enforced by the Court of Arbitration of Sport in Lausanne, Switzerland, and emerged in result of the uniform application and interpretation of legal rules in sport due to the activity of CAS.¹

The world sports law, currently referred to as *Lex Sportiva*, is deemed to be an autonomous body of rules having anational character. The concept of *Lex Sportiva* draws an analogy with the concept of *Lex Mercatoria* (the law merchant) as an anational legal system. This article makes a comparison between the historical developments of *Lex Mercatoria* as presented in the book of Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, on the one hand, and *Lex Sportiva*, on the other hand. This comparison is considered, in author’s opinion, very useful for illustration of the legal situation, in which sport has found itself to be nowadays, could provide some clues for the future of the sport governance and could be helpful for the analysis of the alternative models of the future legal development in sport.

Some similarities in the genesis of *Lex Mercatoria* and *Lex Sportiva* may be outlined:

1. The formative period of *Lex Mercatoria* was according to Berman the late eleventh and twelfth centuries². Necessary condition precedent for its development was the formation of a merchant class, a community of merchants, which number significantly grew during the said centuries. *From the second half of 20th century onward due to factors like development of television and other broadcasting means and the followed commercialization of sport, the latter was transformed from one purely leisure and recreational activity into professional activity capable to provide enough funds for the living of its practitioners. In result, a large number of professional sportsmen emerged and is still growing. Consolidation of the sport movement worldwide made for the formation of a community - the world community of sportsmen.*
2. “Initial development of law merchant was left largely, though not entirely, to the merchant themselves, who organized international fairs and markets, formed mercantile courts, and established mercantile offices in the new urban communities that were springing up throughout western Europe.”³ *The initial development of international sports law is also attributed to the rules created by sport federations, formed by sportsmen and sport clubs and enjoying the autonomy of sport. Member associations of FIFA, for instance, are more than member of the United Nations as FIFA officials usually boast. The consolidated sport movement established in 1984 their own institution to settle the sport related disputes - the based in Luisanna, Switzerland Court of Arbitration for Sport. However, with the commercialization of sport, sport was necessary to fall within some form of legal scrutiny to guarantee the fair result of the application of sporting rules in the cases where these rules trigger economic implications.*
3. Uniformity of *Lex Mercatoria* across the countries was not achieved at once but was part of a gradual process. As Berman put it, however, “the differences among countries and localities in the law and custom applicable to mercantile transactions were differences of detail or in the words of William Mitchell citing also by Berman “everywhere the leading principles and the most important rules were the same, or tended to become the same”⁴. *The current situa-*

tion in football within the EU very much resembles the process towards uniformity of Lex Mercatoria across the then countries. Number of states adopted interventionist approach sometimes complying and sometimes conflicting the sport rules developed by FIFA and national associations. Whether the differences are of detail should be judged on a case by case basis.

4. In addition to the discriminatory treatment under local laws Berman indicates as a fear experienced by the merchants at that time the “rapacity” of local taxing authorities towards them⁵. *Nowadays, the right of the states to levy taxes at their discretion is undisputable and its limits are specified through bilateral and multilateral agreements between states. Fear of heavy taxation of the income from sporting activity is still among the considerations, which players take into account while choosing their clubs.*
5. In the formative era of *Lex Mercatoria* the system of law merchant co-existed with the system of canon law, the law of the church. Canon law provided for ecclesiastical jurisdiction in certain matters including mercantile cases, which met the opposition of merchants. As an example of this resistance was the decree issued in 1369 by the Doge and Council of Alderman of the city of Genoa imposing a substantial fine on any person who had recourse to an ecclesiastical or other court claiming incompatibility of certain conduct with canon law. Despite of the claims of the church to have jurisdiction over mercantile cases it did not deny merchants their relative autonomy⁶. *Likewise, the system of Lex Sportiva coexists with the system of the EU law. The EU law claims its right to intervene in sport when matters such as mobility and competition are involved. During long period of time sport world was resisting any involvement of the EU law and the law in general in sport issues and athletes used to be threaten with punishment if decide to refer to the ordinary courts. Recently in football, although officially recourse to court system was not denied, in practice the same result was achieved through influence over players. After starting the battle against the transfer system in football, neither club wanted to establish any contacts with Jean-Marc Bosman, who was for the whole world of football at that time a sort of “persona non grata”. If similar measures of influence do not produce the desired effect, there is still an option available - football officials could buy off the interest in the potential lawsuit so that the claim is never tried before a court. Football rulers further rely on their own dispute settlement mechanisms including recourse to CAS in order to keep the relationships in football beyond the scope of any publicly made law either national or supranational. Recently, after failure of the idea to establish a court of arbitration for football, UEFA decided to accept the jurisdiction of CAS on civil law disputes and to avoid recourse to ordinary courts of law this way.*⁸
6. Principles and concepts of the canon law supported by the new at that time Romanist legal science were taken over with some modifications by the mercantile law⁹. *Similarly nowadays, CAS relies on the principles and concepts developed by the European Court of Justice in sport related cases as well as on the general principles and concepts developed by the contemporary legal science.*
7. Merchants as members of the church were subject to the canon law,

* The author is Co-chairman of the NGO Bulgarian Legal Society, which conducts research on the rights of sportsmen.

1 Harold J. Berman, Epilogue: An Ecumenical Christian Jurisprudence, Internet Publication, available at the time of writing at <http://www.argobooks.org/berman/ecumenical-christian-jurisprudence.html>, abstract.
2 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press 1983, p. 332
3 Id, at 340
4 Id, at 343
5 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press 1983, p. 343
6 Id, at 345
7 Judgment in Bosman concludes in para. 37 that Mr. Bosman has been boycotted by all the European clubs which might have engaged him;
8 Article 56 (2) UEFA Statutes;
9 Id, at 339

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but as members of the mercantile community they were further subject to the law merchant. In case of conflict between the two bodies of law it was not clear which would prevail and only time could mediate the conflict¹⁰. *Nowadays, sportsmen are subject to the EU law while moving from one Member state to another and sport associations and clubs as undertakings are subject to competition rules. At the same time they are subject to Lex Sportiva represented by the regulations and jurisprudence of sporting governing and dispute settlement bodies. It is still not clear in case of conflict which rules will prevail. Especially as regards the rules of competition certain exemption is given for the rules of purely sport interest but the borderline with the economic rule is still vague and only time will show which rules will pass successfully the EU law scrutiny.*

8. Commercial courts included special courts of markets and fairs consisted of judges elected among the members of the market or fair. The procedure was marked by speed and informality and justice was to be done while the merchants' feet were still dusty. Further, the court was to be ruled by equity with giving a right of a merchant to be heard, professional lawyers were generally excluded and also technical legal argumentation was frowned upon¹¹. *During the modern Olympic Games a special ad hoc division of CAS operates, which is obliged to decide the disputes in extremely short time limits like, for instance, before the next stage of the competition or in other words from day to day. Members of this division of CAS might be also persons with high reputation in the sport world and sportsmen involved can be heard. The need for timely recovery of justice in sport is in paradoxical discrepancy vis-vis the duration of the procedure before the Court of Justice where sometimes the issuance of the decision takes around two years.*¹²
9. The participation of merchants in the resolution of mercantile disputes was seen by Berman not only as reflection of the principle of abstract justice, a legal ideal, contributing to the equitable solution of individual commercial cases, but also in negative aspect since it "helped to insulate commercial law from ecclesiastical, royal and even urban control and to preserve mercantile privileges"¹³. *Participatory adjudication of contemporary individual sport cases reveals the same negative aspect since it prevents sportsmen from having their disputes decided by national courts and thus preserves the privileged status of sport as occupation in comparison with other professions. On the other hand, exactly as in the case of mercantile law, this is also aspect of the relative autonomy of sport.*

The parallel between the formations of *Lex Mercatoria* and *Lex Sportiva* further shows some very important differences, as set out below:

1. The most important such difference lays in the moral, in the conscience of the then merchants and the present football rulers. As Berman stated "from the church's point of view, the law developed by the merchants to regulate their own interrelationships, the *Lex Mercatoria*, was supposed to reflect, not contradict, the canon law"¹⁴. Although merchants did disagree with that position of the church it was also indisputable from merchant's point of view that merchants were subordinated to the church in matters of moral. No such moral and conscience could be found in the rulers of the contemporary football as the most illustrative example of the contemporary sport. These rulers consider themselves to be above law and they do not respect any influence including such coming from judges.
2. Merchants were independent individuals united in a guild to protect their common interests. In the commercialized sport today and in particular in football, such common interest cannot be found. On the contrary, different and conflicting interests do exist - these are the interests of sport governing bodies, sponsors, media and broadcasters, sporting clubs and sportsmen. Such areas of conflicts are, for example: release of the players for international matches - between the clubs and UEFA and FIFA; transfer system - between the clubs and the players; overburdened calendar of international and domestic football matches - between the players, on the one hand, and the governing bodies and sponsors, on the other hand;

blocked hours for football transmissions - between national federations and TV broadcasters etc. In this complex situation rules in sport have to be drafted by an independent organization without financial interests, however, such organization does not exist in practice for the time being. That is why football players and clubs do not have any other remedies against the governing bodies in case of a conflicting rule affecting pervasively their interests instead of resorting to the national and supranational laws. With respect to *Lex Mercatoria* Berman stressed that "the integrity of the new system of mercantile law, that is, the structural coherence of its principles, concepts, rules, and procedures, derived primarily from the integrity and structural coherence of the mercantile community whose law it was"¹⁵. Although sportsmen formed a community, in fact, their voice is still not heard in the rule-making process. In other words *Lex Sportiva* cannot achieve the structural coherence, of which Berman spoke in the context of *Lex Mercatoria*, unless the rule-making in sport becomes a result of a transparent and democratic process representing, safeguarding and balancing the interests of all stakeholders.

3. *Lex Mercatoria* was a customary law "approved by the authority of all kingdoms and commonwealths and not a law established by the sovereignty of any prince."¹⁶ *Lex Sportiva* is a transnational law which is not approved by national states similarly to the EU law in order to have supremacy over national laws. From the point of view of national laws the rules of international sport organizations are rules established on the basis of freedom of association and therefore, constitute association law subordinated to the national law. This is the basic reason why national football authorities have found themselves in a "legal jungle" as to which acts they have to apply - the law of international federations, national law or the EU law.¹⁷ CAS is not internationally recognized court, but simply arbitration system for dispute settlement, which awards are subject to the conditions for recognition and enforcement of arbitral awards. The matter is further complicated when the state apply interventionist approach and regulate sport in a diverse way.
4. One particularly important aspect of *Lex Sportiva* is vested in the fact that sportsmen are in most of the cases employees. Many national laws preclude labour disputes from being resolved by way of arbitration. The reason is that employees as the weaker party would not be at equal footing with the other party to the arbitration proceedings. Arbitration as a dispute resolution method is suitable in disputes between independent and equal positioned litigants such as independent merchants. *Lex Sportiva* is probably the first law which is trying to withdraw one typical relationship of subordination from the jurisdiction of the national state and regulate it differently.

The comparison of the historical development of *lex mercatoria* with the now arising *lex sportiva* might provide some clues as regards the future development of sports law and the harmonization of its principles world wide similarly to the uniformity achieved as regards the sporting rules of the "world" games as for example is football.

Many of the doctrines and principles of mercantile law are universally recognized and today constitute a part of the domestic law of every nation-state. Berman indicates as examples the rule that a negotiable bill of lading is a document of title through whose transfer the

¹⁰ Id, at 345

¹¹ Id, at 346-347

¹² For instance the judgment of ECJ on the claim lodged by the Belgian club Sharleroi challenging the FIFA system for releasing players for participation in international matches is expected in 20 months starting at the time of writing of this paper.

¹³ Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, p. 348

¹⁴ Id, at 339

¹⁵ Id, at 354

¹⁶ Gerard Malynes, *Consuetudo vel Lex Mercatoria*, or the Ancient Law Merchant (London, 1622), from the Preface, "To the Courteous Reader." as cited by Harold Berman, *Law and Revolution*;

¹⁷ The expression "legal jungle" is used by Roberto Branco Martins in the Report on the Social Dialogue in European Football;

risk of loss or damage to goods in transit can be shifted to subpurchasers; or that a banker's letter of credit gives an exporter an absolute right of payment by the confirming bank upon his presentation of the appropriate shipping and other commercial documents¹⁸. Further, Berman speaks of a world law of mercantile transactions "derived from the historically developing customs of the transnational community of merchants, bankers, carriers, underwriters, and their lawyers, who for centuries have constituted a world community of "friendly strangers," as Lon L. Fuller called them, held together by common traditions and common trust"¹⁹. Indeed, today's world community of merchants possesses its own law - *Lex Mercatoria* and their own arbitral courts to decide the disputes arisen within that community. In practice, disputes do not reach the national courts any longer.

Belonging to the international business community today's merchants consciously and voluntarily accept and observe the rules created by that community.

Many authors including Berman have supported the opinion that the rules of *Lex Mercatoria* may be applied only through the rules of national law, although *Lex Mercatoria* is "more than merely factual identity or uniformity between national systems"²⁰. In France, for instance, Code of Civil Procedure provided that in arbitrations involving the interests of international commerce, the arbitrators apply the rules of law chosen by the parties and in case of absence of such a choice they may apply the rules they consider appropriate.²¹ During the draft of the Swiss Law on Conflict of Laws the majority of the drafters agreed that *Lex Mercatoria* may be applied as a law with which the dispute has the closest connection²².

In principal, arbitral tribunals could apply *Lex Mercatoria* in two ways, 1. either through application of a national law (whether explicitly chosen by the parties or on the basis of the conflict of laws rule), which has incorporated *Lex Mercatoria* or 2. through application of *Lex Mercatoria* itself as happened in the case Norsolor S.A. v. Pabalk for instance where "the arbitrators have applied the law designated by the conflict of laws rule, which they deemed appropriate, namely, the general principles of obligations generally applicable to international commerce"²³. Such general principles as good faith and commercial reasonableness are considered part of *Lex Mercatoria*. However, if *Lex Mercatoria* is not recognized as an autonomous body of law under the national law, arbitrators could be deemed of acting *ex aequo et bono* without authorization by the parties and the awards are threaten to be set aside.

National law and national courts still plays very important role in the process of the enforcement of awards which applied the rules of *Lex Mercatoria*²⁴. It has to be possible for the national court to apply *Lex Mercatoria* as an independent body of law by virtue of choice of law clause in the contract concluded by the parties. It is indispensable in this respect that the national law and legal theory must recognize *Lex Mercatoria* as an autonomous body of law, which is not always the case.

Sports law is highly potential to become a world law similarly to mercantile law. The universally accepted rules of more than 200 games and universally accepted principles governing competitions at world level, significance of sport for demonstration of individual and national values, globalization of sport, are part of the conditions precedent for this to happen. However, the comparison with *Lex Mercatoria* reveals some important differences which might be relevant for the future development of sports law as a world law.

A statement saying that the community of merchants is held

together by common traditions and common trust does not seem to be applicable to contemporary sport, which, especially in recent years, departs from the Corinthian values of playing a game because of the love to that game. Nowadays, the result of the competition does not have only sport implications but further determines who is going to get better sponsor. Commercialization of sport invoked the need for protection of different and very often conflicting interests of the stakeholders in sport. Sport federations are often criticised for pursuing their own commercial interests without taking into account and sometimes even in detriment of the interests of sportsmen. FIFPRO, the international trade union of professional football players, for instance, suspects that football rulers misuse their personal contacts with politicians to maintain the sometimes illegal rules drafted by the football governing bodies in detriment of players²⁵. The current relations in sport are everything else but relations of trust.

However, exactly in the view of the conflicting interests in sport the role of CAS is very important and the consistent resolving of the disputes might significantly contribute to the idea for the creation of an independent body of law capable to restore and maintain justice in sport. Evidence of the increasing role of CAS are the more frequent use of arbitration clauses in the contracts between sponsors, federations and clubs²⁶ the trend for increasing the volume of cases reaching CAS and the number of sport federations admitting the authority of CAS to resolve the disputes in their particular sports.

On the other hand, CAS cannot make up for the missing democracy and transparency in the activity of sport federations. The big problem in sport is exactly the absence of a good and democratic governance which to give credibility and fairness to sport regulations and to defend the idea for full autonomy of sport. CAS is an institution for settlement of civil law disputes, however, it is not an administrative or constitutional court, before which provisions of sport regulations could be challenged on the ground of contradiction with acts staying higher in the hierarchy of the legal instruments. Furthermore, CAS is not entitled to review the substance of the decision-making process but only the procedure and the power of the particular bodies to pass the decision in issue. Although CAS has a lot of common characteristics with international court it is not a court. An opinion has been expressed that "CAS could develop into an instrument of "constitutional" review and standard-setting in the realm of international sports law"²⁷; however, this is still not the case and the regulations of sport associations may be scrutinized on the basis of national laws. The incentive for clubs and sportsmen to refer their cases to the courts as well as their mistrust and suspicion to the federations will remain present until their interests are adequately safeguarded through their participation in the decision-making process especially as regards matters of primary concern for them. The lack of democratic rule-making process and credibility in respect of the actions of sport governing bodies further handicaps the possibilities for recognition of *Lex Sportiva* by the national laws of the states.

Another difference with *Lex Mercatoria* is the fact that CAS cannot apply *Lex Sportiva* through the application of the national law of a particular state as could be the case with *Lex Mercatoria* due to the fact that national laws usually have not incorporated *Lex Sportiva*. Very often, certain cases would have diametrically opposite outcome under national laws in comparison with their potential outcome under the law of international sport federations based on the principle of freedom of association due to conflicting provisions of national sports or employment laws. *Lex Sportiva* may apply to relations in sport also as

18 Harold J. Berman, Epilogue: An Ecumenical Christian Jurisprudence, Internet Publication, available at the time of writing at <http://www.argobooks.org/berman/ecumenical-christian-jurisprudence.html>

19 Id;

20 F. De Ly, International Business Law and Lex Mercatoria, Elsevier Science Publishers B.V. 1992, p. 246 referring to H. Berman, C. Kaufman, The law of

international commercial transactions (lex mercatoria), p. 273

21 Id, at 249

22 Id, at 251

23 Norsolor S.A. (France) v. Pabalk Ticaret Sirketi S.A. (Turkey), Tribunal de grande instance of Paris, March 4 1981, Cour d'appelle of Paris, December 15, 1981 and November 19, 1982, Cour de cassation, October 9, 1984.

24 See Filip De Ly, International Business

Law and Lex Mercatoria, Elsevier Science Publishers B.V. 1992, p.214

25 Such an opinion was expressed by Theo van Seggelen from FIFPro at the 6th Asser-Clingendael International Sports Lecture held at the Clingingendael Institute in the Hague on 6 June 2006

26 Ian S. Blackshaw, Robert C.R. Siekmann, Janwillem Soek (eds) The Court of Arbitration for Sport 1984 - 2004, TMC Asser Press 2006, page 30; Bruno

Simma, article The Court of Arbitration for Sport

27 Ian S. Blackshaw, Robert C.R. Siekmann, Janwillem Soek (eds) The Court of Arbitration for Sport 1984 - 2004, TMC Asser Press 2006, page 26; Bruno Simma, article The Court of Arbitration for Sport

28 Mayer, Pierre, Mandatory Rules of Law in International Arbitration, 2 Arb. Int'l. 274 (1986) at 275

an autonomous body of law, which is to be recognized as such by national laws, however, this is still not the case either. A review of modern court practices would show a third option for enforcement of *Lex Sportiva* - if the rules of *Lex Sportiva* constitute mandatory rules reflecting a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.²⁸

However, being a private arbitration system and not a universally recognized court including by the EU Member States by virtue of an international treaty the CAS awards will be subject to enforcement proceedings in the countries where the enforcement is sought and, therefore, their conformity with the public policy and mandatory rules in operation in such countries will be reviewed by the national courts. In countries like Bulgaria and Hungary, for example, employment related disputes are not subject to arbitration at all and national courts have exclusive jurisdiction over employment disputes. It is true that FIFA ensures the compliance of the parties with the award not through the assistance of national courts but rather through

threatening the parties with disciplinary sanctions. The latter, however, together with the already mentioned deficits of *Lex Sportiva* as a concept, as well as the mandatory reference to arbitration of players and clubs imposed through the by-laws of their federations, could threaten the recognition of CAS as a valid arbitration system and do not in any manner contribute to the idea of an objective, just, transparent, self-integrated and universally accepted international sports law or *Lex Sportiva*.

Future changes in the global governance of sport making it more democratic and transparent, future changes in the attitude of sport rulers admitting that they are subject to the law to the very same extent as any other individuals and legal entities, the inevitable, in case of absence of the first two, interaction between sports law and the legal systems of the national laws and the supranational EU law, as well as the future development of the CAS jurisprudence are the conditions needed for crystallization, promotion and recognition of the international sports law as a world law with its own universally harmonized and world valid provisions.

The International Sports Law Journal



The Regulatory Impact of Community Legislation on Sport

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Country presentation by:

Ms. Violeta Shqevi, Director of Sports, Ministry of Tourism, Culture, Youth and Sports.

Mr. Michael Trinker, EU-Office of Sports, Brussels

09:30

The European Union and Sport:

Is Sport "Special" in EU Law and Policy?

Mr. Robert Siekmann, Director of the ASSER International Sports Law Centre, The Netherlands

10:15

White Paper on Sport and current developments

Commission White Paper on Sport (2007); Current developments

Mr. Michael Trinker, EU-Office of Sports, Brussels

10:45

Coffee break

11:00

Mutual recognition of diplomas - Directive 2005/36/EC and its implication on sport as a profession

Mr. Thierry Zintz, European Observatory of Sport and Employment, Belgium

11:45

Key principles of Community law and enforcement of the rights as regards sport - Impact of EU primary and secondary legislation as regards sport - United Kingdom experience - Selected cases

Mr. Richard PARRISH, Director of the Centre for Sports Law Research, Edge Hill University, United Kingdom

The Sporting Exception in European Union Law

Mr. Samuli MIETTINEN, Deputy Director of the Centre for Sports Law Research, Edge Hill University, United Kingdom

13:00

Lunch

14:30

Free movement of workers and regulation 1612/68 - Austrian experience

Mr. Oliver RÖPKE, Austrian Trade Union Federation

15:15

The social dialogue in the sport sector and the project "Row the Boat"

Mrs. Emilie COCONNIER

EASE Policy Officer and Co-ordinator of the RBT Project

16:00

Coffee break

16:15

EU-Media rights and sport - EU Competition rules

Mr. Matieu Fonteneau, EASE

17:00

Combating Transnational Football Hooliganism in Europe

UEFA, Council of Europe, European Union and UK Experience

Mr. Robert Siekmann, Director of the ASSER International Sports Law Centre, The Netherlands

17:30

Discussion

18:00

Conclusions

Closing of the Seminar

True Supporters, Strict Liability, and Feyenoord: The Problem of Fan-Related Violence in Soccer

by Peter Coenen*

Introduction

This year being a Feyenoord supporter is fun again. With the addition of some key players and the contracting of a new coach, Feyenoord is slowly trying to forget about a dramatic 2006/2007 season. Struggles in the front office, meager results and to make matters worse, supporter violence led to a dramatic 2006/2007 season for the club. A match in the French city of Nancy on November 30, 2006 ended in complete pandemonium, with scenes of fan violence broadcast all over the news throughout the whole of Europe. This ultimately led to the club being suspended from European football for the rest of the season, adding to an already woeful season for the club.

Something has to be done. There is no place for violence in sports, and particularly not in professional football, where it has evolved into a huge problem. It gives the whole of professional football a bad reputation. Whilst living in the United States, the only time anything would be said about football (soccer, over there) would be when there had been another major outbreak of violence somewhere in Europe or elsewhere. This is damaging for our beloved game as such and should be eradicated.

In the last year, it seems that the problem of football (and sports) related violence has intensified again in places all over the world and in Europe, which is the focus of this article. During a European Qualifier between Denmark and Sweden on June 2, 2007, the referee gave a red card to one of the Danish players and a penalty kick to Sweden. With a score of 3-3 in the 89th minute of the game and qualification for the European Championship in Austria and Switzerland possibly on the line, a Danish fan stormed the field and attacked the referee. Luckily, the attacker was grabbed by Danish players, but not before he had reached the referee and tried to hit him. After this incident, the referee had to postpone the game and left Denmark awaiting a UEFA decision. UEFA's Control and Disciplinary Body in its decision awarded the game to Sweden, gave the Danish football association a fine and ruled that the next four home games were to be played at least 250 kilometers from Copenhagen. One of these four games will have to be played without any spectators. The Danish football association has appealed this decision of the UEFA Control and Disciplinary Body, a verdict that was later eased a little on appeal.

In Italy, during riots at a match between professional football clubs Catania and Palermo on February 2, 2007, a police officer was killed by a blow to the head from a supporter. Following this tragic event all games for the upcoming weekend were cancelled. For the remainder of the season, clubs were ordered to play their games without supporters, unless their stadiums were modified so as to guarantee the safety of the spectators. Some stadiums were already deemed safe, but in the stadiums that were deemed unsafe, this incident led to a rule which forced these stadiums to comply with the new requirements. After a couple weeks, all stadiums were deemed safe and 'life as normal' continued.

In Greece, the government suspended all professional sports for two weeks after a major riot at a volleyball match between rivals Panathinaikos Athens and Olympiakos Piraeus caused the death of a supporter. These clubs are involved in a number of sports, but draw the majority of their supporters from their football teams. After these incidents, the Greek government outlawed a number of supporters' clubs and stated that they would come up with new legislation to fight hooliganism. But competitions resumed soon after this incident. These are just a few examples of sports related instances of violence in the last year and unfortunately, they are not unique. These violent incidents have left press and policymakers screaming for drastic measures. Some measures are rapidly implemented, but in a few weeks, competitions usually resume and with it, violence as well.

This case review deals with an award from the Court of Arbitration for Sports (CAS) that confirmed the exclusion of Dutch team Feyenoord from the UEFA Cup, following riots instigated by Feyenoord supporters at the UEFA Cup match between the club and the French team AS Nancy. The legal issue in this award is whether a club has strict liability for the acts of people associated with that club, even if that club does not want to recognize these individuals as supporters of their team. Feyenoord tried to argue against UEFA's strict liability rule with regard to supporter misconduct. The strict liability rule states that a club is responsible for the conduct of their supporters, regardless of whether the club itself is at fault. Feyenoord tried to argue that their exclusion from the UEFA Cup tournament was unjustified since the supporters that were responsible for the misconduct in Nancy were not supporters of their team. Feyenoord argued that these individuals had just come to Nancy to misbehave and were not connected legally to the team itself. In the end, CAS denied Feyenoord's appeal.

What happened that day in Nancy?

Feyenoord Rotterdam is a professional football club based in the Dutch harbor city of Rotterdam. The club has a rich history, having won numerous national and international prizes. Being one of the traditional 'big three' teams in the Netherlands, the club has a large fan base at home and abroad. The club's motto is '*geen woorden maar daden*', which translates as 'no words, but deeds'. This reflects the origin of the club, being founded by hard-working laborers in the city's harbor. It also reflects the no-nonsense style of football favored by the supporters.

Feyenoord is also known for its devoted and die-hard fan base. Most of these fans are great supporters who never cause any problems for the club, but a small portion of these supporters have exhibited a tendency towards violent behavior. This development can be traced back to 1974 when Feyenoord won the UEFA Cup against the London team Tottenham Hotspur. More importantly for this review, that match signified the introduction of hooliganism into Dutch football. Before and during the match, Tottenham supporters fought with Feyenoord fans and police. Since this incident, a number of Feyenoord fans have built up quite a reputation for violence throughout the Netherlands and Europe, being involved in numerous incidents during games of the club.

On November 30, 2006, Feyenoord was scheduled to play an away game against French team AS Nancy - Lorraine (hereafter AS Nancy), as part of the group phase of the 2006/2007 UEFA Cup tournament. UEFA is the "umbrella" European Football Association, which organizes among others, the Champions League and the UEFA Cup Tournament. On November 2, 2006, officials of Feyenoord and the Dutch police met with officials from AS Nancy and the city of Nancy in preparation for the game. As a result of this meeting, Feyenoord received about 1400 tickets for the game.

On November 27, 2006, Feyenoord warned AS Nancy that the number of supporters traveling to Nancy for the game would far exceed the number of tickets allocated to them. A lot of fans who did not have tickets for the game would still make the trip to the French city. Feyenoord also informed AS Nancy that about 400 tickets, allo-

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cated to AS Nancy and bought at the stadium, had been purchased by supporters who could be linked to the Rotterdam side, outside the realm of the normal away ticketing system. In most cases, Feyenoord tries to regulate the allocation of tickets for away games so they can ensure that tickets for these games do not end up in the hands of people they do not know, or even in the hands of known troublemakers. Because these tickets had been allocated to AS Nancy, Feyenoord had no information on who exactly bought these 400 tickets, but they feared these tickets had indeed come into the hands of known hooligans. The 'supporters', who bought these tickets outside the normal away ticketing system, would end up in sections with supporters of AS Nancy. Under these circumstances, it was likely that a large number of known troublemakers would end up in the stadium, mixing amongst the supporters of the other team.

On November 28, 2006, AS Nancy acknowledged that tickets had been sold to Dutch supporters outside Feyenoord's away-ticketing system. AS Nancy stated this information had been known since November 20th, and that it had taken a number of measures to avoid problems during the game. Police would check the tickets of fans coming to watch the game at the stadium entrance and would direct any Feyenoord supporters to the away sections; an extra 100 stewards were designated to the match, thus bringing the number of stewards to 400; a police force of about 300 officers was designated to patrol the match; the away sections of the stadium were to be isolated from the sections in which the supporters of the home side would watch the game; and a special entrance to the stadium would be created for supporters of the Dutch club.

Unfortunately these measures proved to be insufficient. Feyenoord supporters were present long before the match started in the city centre of Nancy. Amongst them were a number of people who had stadium bans in the Netherlands. Fearing destruction or riots, several bars and restaurants closed at the sight of the large numbers of football fans. Fans roamed the city centre, looking for something to do. Riots broke out in the city centre of Nancy hours before the match was even supposed to start. Police moved the troublemakers from the city centre towards the stadium and opened the doors to the sections reserved for the away supporters to all Feyenoord supporters, with or without tickets. The police attempted to isolate the troublemakers within the confines of the stadium, rather than let them roam free in the city centre. This decision had to be made on short notice by the chief of police of Nancy, motivated by the immediate need to halt the riots, without consulting Feyenoord representatives or UEFA delegates in Nancy. The consequence of this decision was that the rioters and other supporters who did not have a ticket were driven into a section of the stadium immediately adjacent to the regular away section. The hooligans quickly tore down the fence between their section and the regular away section and mixed with the Feyenoord supporters who had received their tickets through Feyenoord's normal ticketing system for away games. As the match progressed, the riots continued within the stadium. The police finally used tear gas to stop the rioting in the stands. The game had to be interrupted for about half an hour because of the effects of the tear gas on the players, referees and fans.

After the match had ended and the dust had cleared, the fans, media, players and staff of Feyenoord braced themselves for UEFA's response to the riots in Nancy. The UEFA Control and Disciplinary Body came with a ruling on 7 December 2006. Feyenoord was to pay a 200,000 CHF fine and the two next games of Feyenoord in any of the European cup competitions needed to be played without any supporters present. However, this order was deferred for a probationary period of three years. UEFA appealed this decision on 13 December 2006, asking for a more severe punishment for Feyenoord. Even though this penalty was not as severe as some around the Rotterdam club might have feared, Feyenoord decided to also appeal the decision of the Control and Disciplinary Body on 11 January 2007, asking for annulment of the decision and an acquittal for the Rotterdam club.

After a hearing was held on 19 January 2007, the UEFA Appeals Body returned on January 25TH, 2007, with an even harsher verdict this time, excluding Feyenoord from the 2006/2007 UEFA Cup tournament and setting the fine at 100,000 CHF. The team's worst fears

had materialized. The decision of the UEFA Appeals Body was felt to be too harsh by the Rotterdam team, and Feyenoord decided to file an appeal against this decision with the Court of Arbitration for Sports (hereafter CAS) on 26 January 2007.

CAS is the highest appeals institution with whom an appeal was possible against the ruling of the UEFA Appeals Body. CAS is an independent arbitration body set up to arbitrate and/or mediate sports related disputes and its arbitrators are generally considered to be high level jurists. CAS also has a good reputation in the sports community, dealing with a lot of doping issues and arbitrating on a lot of cases concerning transfer fees in (international) soccer. UEFA has recognized the power of CAS to be an arbitrator of last instance on disciplinary matters concerning UEFA and another party.

CAS upholds UEFA's punishment¹

Feyenoord, in its submission to CAS, contended that *the club* is not to blame for the riots in Nancy. It had warned AS Nancy about the risks of selling tickets freely around their stadium and that a large group of potential troublemakers (whether with or without tickets) were traveling to Nancy. Feyenoord further criticized the decision of the chief of police to give all supporters access to the stadium, with or without tickets. Finally, Feyenoord criticized the decision to place its rogue supporters in sections of the stadium adjacent to the sections of the stadium in which the 'official' Feyenoord supporters were seated, thus giving these hooligans the opportunity to mix with the fans that had bought a ticket for the game directly from Feyenoord, a perpetually volatile situation because this way it was impossible for the police and stewards to distinguish between 'good' fans and 'bad' fans.

Furthermore, Feyenoord claimed that the troublemakers were not supporters of the club under the definition given to the term supporters by UEFA. These troublemakers did not buy their tickets through Feyenoord, did not travel to the stadium under the guidance of Feyenoord, could not be identified from their appearance as Feyenoord fans, and some of them even had a stadium ban in the Netherlands. Feyenoord argued that nothing distinguishes these individuals as being Feyenoord fans and therefore Feyenoord cannot be held responsible for the behavior of these individuals. Finally, the team complained about the proportionality of the sanction of the UEFA Appeals Body. The punishment received means that Feyenoord will miss out on a lot of income that could have been generated in the following round(s) of the UEFA Cup tournament.

UEFA responded to Feyenoord's contentions, saying that it is not a question of who is at fault for the behavior of the supporters. Feyenoord is responsible for the behavior of its supporters, irrespective of what the club may have done to either prevent or encourage this behavior. The rule is strict liability for a club regarding the behavior of its supporters. This also means that the warnings and measures taken by Feyenoord are irrelevant to the liability question.

With regard to the definition of the term supporter, UEFA stated that there is no clear definition of who is a supporter of a club. UEFA stated that the term supporter is "not linked only to race, nationality of the place of residence of the individual, nor is it linked to a contract which an individual has concluded with the national association or the club in purchasing a ticket". UEFA then concluded that "there is no distinction between official and unofficial supporters of a team".

CAS started its deliberations by stating it has competence to deal with this case and that the rules applicable to this dispute are the relevant UEFA rules and regulations. CAS then ruled that "disciplinary law implemented in [UEFA's] regulations and directives is essentially a tool which allows UEFA to create order within the organization and to assert statutory standards of conduct through sanctions imposed by specific bodies and to ensure their appropriate execution". CAS goes on to conclude that Feyenoord is subject to UEFA's rules and regulations and more specifically the ones upon which the decision by the UEFA Appeals Body is based.

¹ Feyenoord Rotterdam v. UEFA, CAS 2007/A/1217 of 20 April 2007. On CAS, see Matthieu Reeb, *The Role and*

Functions of the Court of Arbitration for Sport (CAS), ISLJ 2002/2, p. 21 et seq..

CAS points at article 6 of UEFA Disciplinary Regulations, which provide that:

1. *Member associations and clubs are responsible for the conduct of their players, officials, members, supporters and any other persons exercising a function at a match at the request of the association or club.*
2. *The host association or club is responsible for the order and security both inside and around the stadium, before, during and after the match. It is liable for incidents of any kind, and can be rendered subject to disciplinary measures and bound to observe directives.”*

CAS pointed out that, according to this article, Feyenoord has strict liability for the behavior of its supporters. The point of contention that remained, then, was which persons can be defined as being a supporter. CAS noted that UEFA intentionally did not define the term supporter. UEFA did not specify the term supporter in terms of race, nationality, place of residence of the individual, or whether that person has a contract with a club or association by buying a ticket for a certain game. Defining the term supporter would alleviate clubs of responsibilities for supporters it does not want to recognize for legal purposes. The disciplinary sanctions of UEFA would in such a case apply only to supporters the club want them to apply to, while this could have never been the purpose of UEFA.

CAS went on to state that by leaving the term supporter undefined, the reasonable and objective observer could determine someone is a supporter of a club. Determinants that can help the reasonable and objective observer come to this conclusion are the behavior of the individuals concerned and where they are located in the stadium and their vicinity. CAS went on to point to their prior case law, in which they considered that article 6 Disciplinary Regulations was perfectly valid. CAS especially points to one case, *PSV Eindhoven v. UEFA*, CAS 2002/A/423 of 3 June 2003. In that case, PSV was punished for racist behavior by its supporters directed towards players of the opponent in a match in the Champions League tournament.

In this case CAS stated in relation to rule 6 paragraph 1 Disciplinary Regulations as follows:

“According to this provision UEFA members and clubs are responsible for any breach of the UEFA Regulations committed by any of those persons. There is therefore no doubt that, under this rule, member associations and clubs bear strict responsibility for the actions of third parties, who are nonetheless specifically identified. This rule leaves absolutely no room for maneuver as far as its application is concerned. UEFA member associations and football clubs are responsible, even if they are not at fault, for the improper conduct of their supporters...”

CAS further acknowledged that by penalizing the clubs, UEFA in essence aims to penalize the supporters for their conduct. UEFA does not have a direct way of penalizing individual supporters and therefore focuses all measures on the one body they do have authority over - the teams. UEFA in this way tries to indirectly achieve its goal of controlling the behavior of certain (groups of) supporters by penalizing the club these fans support. The objective of article 6, then, with regard to the behavior of supporters is to deter and prevent violent conduct, not to penalize clubs for wrongdoings. The strict liability rule makes sense in this context given that the goal is to prevent the violent acts of the supporters, so it does not matter what actions the club itself took.

CAS went on to conclude that the supporters responsible for the problems surrounding the match between AS Nancy and Feyenoord could be identified as Feyenoord supporters and therefore the strict liability rule applied. The fact that Feyenoord took measures to prevent any disorder does not alter the liability of the club for the behavior of its supporters. The fact that there may have been errors in the way AS Nancy handled ticket sales, the way the French police handled the situation by giving the troublemakers access to the stadium and enabling them to mix with the ‘official’ Feyenoord supporters, was all held to be irrelevant for this case. Feyenoord is liable for the conduct of its fans under article 6 paragraph 1 Disciplinary Regulations. This

needs to be distinguished from the liability the home team possibly has under article 6 paragraph 2 of the Disciplinary Regulations as the host and the organizer of the match.

Feyenoord further appealed to CAS on the severity of the penalty. However, CAS first stated that according to article 14 Disciplinary Regulations, disqualification from the UEFA Cup competition could be used as a possible penalty for violation of the Disciplinary Regulations. CAS went on to assess Feyenoord’s claim that disqualification would be disproportionate to the offence committed. CAS stated that according to its case law, a “sanction imposed must not be evidently and grossly disproportionate to the offence.” CAS came to the conclusion that UEFA was allowed to impose the heavy sanction of disqualification. In reaching this conclusion it took into account that the behavior of the fans, (e.g. breaking a wall inside the stadium to reach the supporters of the opposing team, throwing projectiles towards individuals) could have been considered as serious offences by the UEFA Appeals Body. Furthermore, Feyenoord was a multiple offender with regard to supporter misconduct. UEFA regards recidivism as an aggravating factor in its Disciplinary Regulations. Over the past five years there have been 12 disciplinary cases against Feyenoord for supporter misconduct. Finally, a disqualification ensures that in the further course of the UEFA Cup season, there would not be any further incidents of supporter misconduct of Feyenoord’s supporters. On these grounds, CAS ruled that the sanction imposed by the UEFA Appeals Body was not disproportionate to the offences committed.

A strong signal?

In its ruling that was upheld by CAS, the UEFA Appeals Body gave a strong signal to clubs whose supporters are repeatedly involved in violence. UEFA handed down a rigorous penalty and excluded Feyenoord from further participation in the UEFA Cup tournament for the season.

Ironically, this prevented Feyenoord from playing Tottenham Hotspur in the next round of the UEFA Cup, a clash that in 1974 began the tradition of hooliganism a part of the supporters of the Rotterdam club is now known for. Even though Feyenoord tried to distance itself from these hooligans, UEFA was able to apply their rule of strict liability to them for the behavior of their supporters. UEFA punished Feyenoord for the behavior of a small portion of its supporters in Nancy — supporters, many of whom are not allowed inside a stadium in the Netherlands. Of course, not all Feyenoord supporters are hooligans and therefore the club’s argument that these people do not belong to their club holds some merit. These hooligans do make up only a small portion of the otherwise great supporters of the Rotterdam team. And these hooligans do spoil it for all the good supporters. But the fact remains that Feyenoord is the connecting factor among these hooligans and they take the games of the Rotterdam club as an excuse to start their mayhem. No respectable club wants to be associated with such fans. This does not mean, however, that a club should not have to assume liability over the behavior of these supporters.

Hooligans linked to Feyenoord have been involved in numerous incidents over the previous European seasons and therefore the club was already on notice with UEFA. There had been twelve previous disciplinary cases involving supporter misconduct in the last five years against the Rotterdam team, so it came as no surprise that UEFA handed down such a harsh penalty. The only surprise might have been that the initial penalty against Feyenoord was as mild as it was. In its reasoning with regard to the sanctions, CAS states that this punishment will have the effect of eradicating any further incidents with Feyenoord’s supporters during the present UEFA Cup season. It is hard to argue with this, but will it also have the effect of preventing incidents from happening in the future?

From the way the question is formulated, the reader may think the answer would be no, but this is only partially true. Sending a strong message might have a deterrent effect for the future. Next time supporters might consider that their club will be excluded from European football before they start rioting. It could help. But a strong signal in one, individual instance is not enough to ‘eradicate hooliganism’, as CAS stated in its award. Strong punishments will only have a notice-

able effect if they are handed out consequently and in a consistent manner. It took UEFA twelve instances of supporter related misconduct to issue such a strong penalty against Feyenoord. There have been numerous problems with the fans of the English and German national teams at international games, including at the European and World Championships. To date, the English and German national teams have not been ruled out of any tournaments. In the Champions League last season, there were incidents involving supporters of English side Manchester United in France (Lille) as well as in Italy (Rome) and Manchester United was not excluded from the Champions League. Many more examples of clubs with a record of violence can be shown, where UEFA has not handed out strong penalties.

Action taken by UEFA might have a noticeable effect in preventing further incidents, but UEFA alone cannot tackle the problem of hooliganism. In this instance, would it have made a difference if AS Nancy and Feyenoord had better regulated the sale of tickets for the game? Would it have mattered if there was a place where all Feyenoord fans could have gathered before the game, a place that had provided them with some recreation, some food and drinks? Would it have made a difference if there was a law in the Netherlands that required fans with a stadium ban to report to their local police office during the game? It can be speculated that such measures would have prevented the riots from happening. What we do know is what happened without these measures.

Does this mean that Feyenoord should not have been punished for

the conduct of its supporters in Nancy? No. It means that UEFA took a strong stand against supporter violence. This must be applauded. But it also means that if UEFA wants to hand out stricter penalties for supporter misconduct, it should be consistent. A zero tolerance policy will only work if clubs and supporters know beforehand what the consequences of their behavior will be and if UEFA enforces this policy, regardless of the name or the status of the club (or country) involved.

I would propose an examination of future UEFA penalties for uniformity. Deterrence is a goal that can only be achieved with a heavy hand and patience. If UEFA were to hand out similar punishments for offences in the future, it would signal a determined shift towards zero tolerance. If, however, future penalties for similar offences are not punished equally or similarly, the case of Feyenoord may simply go down in the books as an idiosyncrasy - an aberration. This would actually frustrate the goal of preventing supporter violence.

UEFA President Michel Platini, in a reaction to the judgment, said: "I am very happy with the decision of CAS to uphold the UEFA Appeals Body judgment. This sends out a strong message that acts of violence by fans within the game will be heavily dealt with and punished by the relevant authorities. Recent tragic incidents have shown that we must work together to eradicate all forms of hooliganism or violence from our game." These are fierce words from the new UEFA President. Hopefully this means that in the future *all* clubs (or national teams) whose supporters misbehave will be punished. The International Sports Law Journal



The Evolution and Effectiveness of Football Banning Orders*

by Clifford Stott and Geoff Pearson**

Framing the banning order debate

As we have seen, the disorder in Marseille and Charleroi brought the debate about hooliganism by English fans abroad back to the front pages of the newspapers - and to the front benches of the House of Commons. However, the rhetoric had not evolved at all from that of the late 1980s, following the disorder in Germany and Sweden. No one appeared ready to tackle what, for us, was the central issue: why was it that some England away matches would pass off peacefully, while others resulted in major disorder? Why was it that England fans were involved in a large-scale riot in Marseille at the 1998 World Cup, but that the same fans did not fight at the following match in Toulouse? How could sixty thousand Manchester United fans, including many identified by the police as 'troublemakers', descend on Barcelona in 1999 with barely a single arrest?

In short, our contention is that, despite its widespread popularity the theory that wide-scale disorder was caused by individuals who travelled with the intention of 'kicking it off' could not explain the wildly different outcomes when large numbers of English football supporters followed their team in Europe. But despite its limitations as a theory, it was this account that still dominated media and political debates about the subject. Most significantly, it was felt that if the hooligans could be identified and prevented from travelling, then the problem could be solved. The argument that removing known troublemakers from a crowd would stop hooliganism was the same proposal that gained popularity in the late 1980s, and led to the introduction of the National Identity Card Scheme in Part One of the Football Spectators Act 1989.¹ The ID Card Scheme was conceived and introduced as an attempt by the then Conservative government to 'break the link' between football and hooliganism, by excluding hooligans from all football grounds in the UK (although the scheme was never actually implemented).

Attempts to ban fans by the football authorities

Football banning orders in their current form arise from legislation (the Football Spectators Act 1989, as amended by the Football [Disorder] Act 2000) but the idea of excluding those identified as troublemakers from matches, or from travelling to a country hosting a match, is not a new one. The first attempts to ban English supporters from travelling abroad came from the football clubs and authorities themselves, following notable early incidents of disorder involving Manchester United supporters at St. Etienne and Tottenham Hotspur fans in Rotterdam. Manchester United, for example, banned its own supporters from attending European away ties in the early 1980s, although Buford documents that many United fans travelled to a key 1984 European Cup-Winners' Cup tie in Turin anyway.² Following Heysel, of course, the ultimate sanction was imposed when all English clubs were banned from European club competitions by UEFA. However, given that it was only club sides that faced the ban, many fans simply started to follow the national side abroad instead. During this time, the Football Association also made attempts to stop England fans travelling - for example, by refusing to take up their ticket allocation for a key World Cup qualifier in Sweden in 1989. The

* With permission taken from Dr Clifford Stott and Dr Geoff Pearson: Football "Hooliganism" - Policing and the War on the "English Disease", Pennant Books, 2007, pp. 168-201 (Chapter Eight).

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1 See sections one to seven. Most legislation from the late 1980s onwards can now be found on the www.opsi.gov.uk website. Finding older legislation still requires a trip to the local university law library.

2 Buford, B., *Among the Thugs*, 1995, London: Mandarin, pp.35-106.

subsequent disorder that occurred was almost certainly escalated by the confusion and frustration among those hundreds of England fans who travelled anyway, to try to gain entry to the ground without official tickets.

So attempts by clubs and governing bodies to stop English fans travelling were largely unsuccessful at tackling the English disease. The simple fact is that fans were willing to travel to matches without tickets, independently of their club or the FA, the clubs and authorities having no legal power to prevent them travelling or even attending games. Furthermore, there is evidence to suggest these bans may even have exacerbated trouble, with fans purchasing tickets for the home sections of foreign grounds in the absence of an official away allocation, or 'mobbing up' and marching to the ground in the often quite valid hope that the authorities may allow them entry to avoid disorder (as occurred in Sweden, 1989).

Restriction orders for those convicted of football-related offences

The failure of the Football Association to prevent England supporters travelling to Sweden, combined with the subsequent disorder and outrageous exaggeration of incidents by the media, finally led to a situation in which legislative action was taken. At the time of the disorder in Gothenburg, the Football Spectators Act 1989 was progressing through Parliament, proposing a National ID Card Scheme for all football spectators, the creation of a Football Licensing Authority and, in part two of the bill, the introduction of a legislative power called a 'restriction order'. Part two of the act (which, as we will see, has since been amended on a number of occasions) applied only to football matches played outside England and Wales:³

Restriction Orders (on Conviction of a Relevant Offence)

Section 15

- (1) A court by or before which a person is convicted of a relevant offence or, if a person convicted of such an offence is committed to it to be dealt with, the Crown Court on dealing with him for the offence, may make a restriction order in relation to him.
 - (2) *No restriction order may be made unless the court is satisfied that making such an order in relation to the accused would help to prevent violence or disorder at or in connection with designated football matches.*
 - (3) *A restriction order may only be made - in addition to a sentence imposed in respect of the offence of which the accused is (or was) convicted; or in addition to a probation order*
 - ...
 - (5) *A restriction order shall specify the police station in England or Wales at which the person subject to the order is to report initially.*
- (c) Crown Copyright 1989

In layman's terms, the new legislation therefore allowed a court sentencing someone convicted of a relevant (i.e. football-related) offence to be served with a court order in addition to their criminal sentence, requiring them to report to their local police station when an English team was playing abroad. In theory this would prevent them from travelling abroad to watch their team and becoming involved in disorder. However, the court could only serve the individual with such an order if it was satisfied the restriction was necessary to prevent disorder at football matches. Restriction orders would last for five years if the defendant was imprisoned for the offence, or two years for non-custodial offences.⁴ Should the individual served with the order fail to report to the police station (without reasonable excuse), they would be committing a criminal offence, and could be imprisoned for a month.⁵

In the absence of a legal definition of 'football hooliganism', the legislation included a definition of football-related offences based on that used in the Public Order Act 1986, for the purposes of imposing exclusion orders.⁶ This definition includes 'football-specific' crimes such as drink offences under the Sporting Events (Control of Alcohol etc.) Act 1985, along with more generic offences such as disorderly behaviour under the Public Order Act, and other offences of violence or disorder which occur at a football match, or on the journey to or

from during the "period relevant to a designated football match".⁷ This period begins two hours before the start (or advertised start) of a match, and ends one hour after the end.⁸ In layman's terms, this means that a person who is at a match, or travelling to a match, and commits an offence of, for example, threatening behaviour, they have committed a 'football-related' offence and, if found guilty could have a restriction order imposed on them in addition to their sentence. However, if a supporter was not going to a game, and instead ended up fighting with a rival supporter in their local pub whilst watching the game on television, they could not be served with a banning order despite the fact that their offence was to all intents and purposes connected with football.

The legislation was widely heralded as an important tool in the 'battle' against hooligans travelling abroad. However, five years after the act was introduced, a major incident of disorder at an Eire v England friendly in Dublin caused widespread criticism of how it was being implemented. The incident was blamed on groups of known troublemakers, and, in the aftermath, the Football Intelligence Unit revealed it was aware of groups of hooligans travelling with this intent. However, it was subsequently revealed that only two fans in the UK were subject to restriction orders at the relevant time. This was due to an apparent reluctance on the part of magistrates and judges to impose the orders, due to the onus placed on them by section 15(2) to be confident that it would actually reduce the likelihood of future disorder abroad. Two years later, when Italian riot police baton-charged England fans at a World Cup qualifier in Rome, the number of fans banned had only risen to nine (contrasting sharply with the estimated four hundred fans subject to domestic exclusion orders under the 1986 Public Order Act).

As we have already noted, the disorder in Rome in 1997 should not be understood as an incidence of hooliganism. Nonetheless, the revelation that, of the thousands convicted of football-related offences, only nine fans had been banned from travelling to the game, led to a media inquest. Subsequently, Home Secretary Jack Straw admitted, "Restriction orders haven't really worked."⁹ As a result, in December 1997, guidelines were issued by the Home Office to the courts, 'reminding' them of their powers to impose restriction orders upon those convicted of football-related offences in the run-up to France98. The guidelines, criticised at the time by the FSA as unworkable, essentially put pressure on magistrates and led to orders being imposed as a matter of course, regardless of whether the defendant showed any intention of attending France98, never mind causing trouble there. Subsequently, the number of restriction orders soared, from ten between 1990 and December 1997 to seventy by the start of the World Cup in June 1998.

Furthermore, there was concern that this policy may have been seen as strictly short-term in light of the forthcoming World Cup. Therefore, on 1 June 1998, the UK government entered into a bilateral agreement with the French authorities, whereby those England fans convicted of football-related offences in France during the World Cup could be brought before a British magistrate to have a restriction order imposed. This policy was, however, an embarrassing disaster for the government. As we have detailed, the major incidents of rioting at France98 did not occur on journeys to or from the matches (despite the French authorities identifying auto-route service Stations as likely locations for hooliganism), nor on entry or exit from the stadiums. One riot in Marseille occurred the day before an England match, rather than within the required two hours. In other words, the legal definition of what constituted a 'football-related' offence did not correspond with what actually happened in France, and so almost all of those arrested could not have restriction orders imposed upon them.

3 Section 14. The 1986 Public Order Act already provided courts with the power to ban spectators from matches in England and Wales (section 30).
4 Section 16(1).
5 Section 16(4)-(5). This was extended to six months by the Crime and Disorder Act 1998, section 84 (which also made

the breach of an order an arrestable offence).
6 Section 31.
7 Football Spectators Act 1989, schedule one.
8 Section 1(8).
9 *The Guardian*, 22 October 1997.



☘ Program of the Conference

November the 13th

Arrival of participants
20:00 – Welcome reception

November the 14th

8:30 – 10:00 Registration of participants
10:00- 11:30 Official opening of the Conference
Key note speakers lecture - first part
11:30 – 12:00 Coffee break
12:00 – 13:30

Key note speakers lecture – second part
13:30 – 14:30 Lunch
15:00 – 17:00 Sections and poster section
18:00 – Dinner & social / cultural program

November the 15th

9:00 – 10:30 Sections
10:30 – 12:00 Workshop
12:30 – 14:00 Lunch and Closing Ceremony
Optional Program
Departure of participants



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REGISTRATION FEE (includes attendance to conference, coffee break, lunches, cocktails, conference dinner and accommodation for 2 nights)	200 €	230 €
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ACCOMPANYING PERSON	100 €	130 €

Most importantly of all, however, was that despite a record number of restriction orders being imposed prior to the tournament, and virtually all these served with them staying within the UK, disorder involving English supporters still occurred, and was arguably as serious as it ever had been. And there was little, if any, evidence that those who did violate their restriction orders to attend were involved in the disorder at Marseille. This realisation should have seen a fundamental reassessment of measures used to control English supporters abroad, and an acknowledgement that banning hooligans may not be the answer to the problem. Instead, as we have seen, it merely encouraged the media, politicians and football authorities to press for more bans, and more restrictive legislation.

Extra-legal bans for 'known troublemakers'

Even before the 1998 World Cup had kicked off (in more ways than one), a new legal weapon was proposed in the battle against the English Disease. As a response to three incidents of football-related disorder (including one fatality) in March 1998, and with the World Cup in France imminent, it was announced that FIFA would be calling for a ban on all England supporters without official match tickets leaving the United Kingdom. Quite how the UK authorities would be able to determine who was a football fan, and who was going away on holiday or on business was never explained, but this did not prevent media support. Harry Harris in the *Mirror*, for example, argued, "If anyone tells me that this is a restriction on civil liberties, they should go to France. Where our country will be disgraced." The disgraceful behaviour to which he referred included fans "baring their backsides ... the Union Jacks and the T-shirts ... the drunkenness ... the foul language."¹⁰ But despite these pockets of support, such a blanket ban would have been impossible, as it breached European Union laws and required 'justifying' under the legal principle of proportionality (to which we will return later). It is certainly unlikely that the EU courts would have considered mooning, waving Union Jacks, wearing T-shirts, being drunk or swearing as serious enough threats to overturn a fundamental civil liberty such as freedom of movement.

Such an attempt to prevent all ticketless fans travelling was, of course, never pursued, but both UK and French authorities did attempt to identify 'known troublemakers' who had not been served with restriction orders, and to try to prevent them attending the tournament. Following the riots in Marseille, the French Government enacted emergency legislation to allow police to expel any fans *suspected* of being in the country to cause trouble. Such expulsions did not require any evidence of participation in violence at the World Cup, or an intention to cause future violence. Indeed, it was reported that one fan was expelled purely because of a single previous football-related conviction, in 1981, when he was seventeen.¹¹ Then, prior to England's final group game (against Colombia), it was announced that three hundred and sixty-three English supporters had been refused entry to France on the basis of intelligence from the National Criminal Intelligence Service. This tactic of blacklisting was used during both France98 and Euro2000 (as well as games in between) to turn back those filed by the RU as 'hooligans' at ports and airports.¹² These moves indicated the start of a new phase based on the tactic of preventing 'hooligans' leaving the country when English teams were playing abroad.

The failure of the Football Spectators Act to prevent rioting at France98 was perceived to stem from the inability of authorities to charge more of those causing disorder with football-related offences, thereby allowing them to be served with restriction orders. The solution to disorder abroad was therefore seen to be in the ability to impose restriction orders upon 'hooligans' *who had not been convicted of any offence*. Even as the World Cup was progressing, the Home Secretary announced the government were looking into the possibility of introducing 'football behaviour orders' to prevent 'suspected troublemakers' travelling to matches, regardless of whether or not they had actually been convicted of a football-related offence. On 27 November 1998, a consultation document was released proposing new laws to combat football-related disorder. Most notable was a law to allow courts the power to issue 'international banning orders' of up to

ten years, whereby those banned would have to hand over their passports to police whenever England played abroad. Central to the proposed measures was the idea that bans could be based purely on information supplied by football intelligence officers from the constabulary in which the suspect normally resided.

The proposal (which received all-party support) was highly controversial on civil libertarian grounds. First, it went against the rule-of-law principle that no citizen should be punished without following due process (if we consider the removal of a passport to be a punishment). Second, it could infringe Article Six of the European Convention of Human Rights (not to be confused with the European Union, the Convention was drafted by the Council of Europe following the Second World War), which states that a criminal penalty should only be imposed if the court follows the correct legal procedure - i.e. finding the individual guilty beyond reasonable doubt in the criminal courts. Finally restricting the freedom of EU citizens to move between member states could also breach the EU Treaty. The fact that such a fundamental infringement of human and European rights was proposed indicated again the importance of hooliganism on the political agenda, and the continuing media moral panic whenever disorder involving English fans was reported. It also demonstrated that tactics for controlling the English Disease had not progressed from the idea that rioting abroad was caused by fans predisposed to hooliganism, despite evidence from France98 that policing and group-level interactions played a pivotal role in determining whether rioting would occur.

Banning orders 'on complaint'

The legal move towards banning orders without conviction was actually started by a private member's bill, rather than government intervention. The Football (Offences and Disorder) Bill 1999 made a number of proposals to increase the power of restriction orders by amending the Football Spectators Act. A number of changes to the scheme were enacted as a result of the bill. First, restriction orders were renamed 'international banning orders'.¹³ Second, those served with international banning orders could now have their passports confiscated for a 'control period' starting five days before a match abroad was due to be played.¹⁴ Third, it extended the duration of a banning order to a maximum of ten years for anyone given a custodial sentence and five for a non-custodial, and introduced a minimum duration for the orders of six and three years respectively.¹⁵ Fourth, as a direct result of the timing of the first Marseille riot, it extended the definition of the 'relevant period' to determine whether an offence could be considered football-related from two hours before a match to twenty-four hours before or after.¹⁶ Finally, it also tried to increase the number of orders by forcing magistrates who did not impose an order to explain in open court why they did not think it would reduce disorder in the future.¹⁷

However, the most significant proposal in the bill was that it would allow magistrates to impose banning orders on those who had not been convicted of an offence. Instead, it intended that orders could be imposed upon those whom the police believed, on a balance of probabilities (i.e. it was 'more likely than not'), had contributed to football-related disorder in the past and were likely to do so in the future. Constitutionally this was highly controversial, and as it was merely a

10 March 31 1998.

11 The Times. June 26 1998.

12 For Euro2000, the names of five hundred fans served with banning orders (the vast majority purely domestic), five hundred fans with previous football-related convictions and a further two hundred on whom the FIU had 'good intelligence' were passed to Dutch and Belgian authorities (*Hansard*, Commons, 19 June 2000, column 37). See Pearson, G., 'Legitimate Targets? The Civil Liberties of Football Fans', *Journal of Civil Liberties* volume four number one,

March 1999, pp. 28-47, for an analysis of the 'extra-legal' powers used at France98.

13 The 'international' aspect of this was removed by the Football [Disorder] Act 2000, which amalgamated international and domestic orders.

14 Section 3(5)(b) of the 1999 Act. This was extended to ten days for the 2006 World Cup by the Football Spectators (2006 World Cup Control Period) Order 2006.

15 Section 4(1).

16 Section 2(3).

17 Section 1(1).

private member's bill it was feared that the inevitable opposition would delay it to such an extent that it would run out of parliamentary time. As a result, this aspect was dropped from the bill, the rest of which became law as the Football (Offences and Disorder) Act 1999.

But this was not the end of the issue, and it was clear that the New Labour government had significant sympathy with the proposal for banning suspected hooligans. At committee stage for the 1999 act, Kate Hoey MP (then Under-Secretary of State for the Home Office) stated, "The power to make banning orders in respect of people without conviction is necessary ... the government will want to return to the matter, because from football intelligence we know that some people commit offences or are involved in organising violence but cleverly manage not to be where they may be arrested. We need to find a way of dealing with these people?"

The political will of New Labour for this type of hybrid law¹⁸ has also been demonstrated by their introduction of sex offender orders, drink behaviour orders, terrorist control orders and, probably most famous of all, antisocial behaviour orders (ASBOs). The following year, when English supporters were involved in highly publicised disorder in Charleroi at Euro2000 detailed in the previous chapter, the government introduced banning orders for fans who had not been convicted. At the time of the disorder in Belgium, only one hundred and six fans were serving international banning orders (contrasting with four hundred and fifty-four serving domestic banning orders). Furthermore, whilst the German authorities turned back large numbers of 'suspected hooligans' trying to enter Belgium, this type of police intervention was not considered consistent with the UK's rule of law¹⁹ (although a blacklist of 'known hooligans' was forwarded to the Belgian and Dutch authorities, presumably in the hope they would turn back the suspects at the borders).

Within a month of the disorder at Charleroi, and the arrest of nine hundred and sixty-five English supporters in Belgium, the government had tabled what was to become the Football (Disorder) Act 2000, a piece of legislation that merged domestic and international banning orders and, pivotally, allowed magistrates to impose banning orders upon those suspected of football-related disorder even if they had not been convicted of a football-related offence. "We need legislation to prevent individuals who have a demonstrable propensity for violence and disorder from inflicting further suffering on host populations and on their fellow supporters," asserted then Home Secretary Jack Straw,²⁰ introducing the bill. Lord Bassam introduced the bill to the House of Lords in a similar fashion:

*"The need for new powers to prevent the hooliganism of many English supporters abroad has become apparent as a result of the Euro2000 experience. This brought home the fact that there is a large swathe of English fans, typically male, white and aged twenty to thirty-five who, although not convicted of football-related offences, or perhaps not even known as football hooligans, are capable of violence and disorder when supporting England abroad."*²¹

Schedule One of the Football (Disorder) Act 2000 makes substantial amendments to both Part Two and Schedule One of the Football Spectators Act 1989 and is summarised below, verbatim, from the relevant 14B section of the act to which it is commonly referred:²²

Banning Orders on Complaint:

Section 14B

- (1) An application for a banning order in respect of any person may be made by the chief officer of police for the area in which the person resides or appears to reside, if it appears to the officer that the condition in subsection (2) below is met.
- (2) That condition is that time respondent has at any time caused or contributed to any violence or disorder in the United Kingdom or elsewhere.
- (3) The application is to be made by complaint to a magistrates' court.
- (4) If (a) it is proved on the application that the condition in subsection (2) above is met, and (b) the court is satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any

regulated football matches, the court must make a banning order in respect of the respondent.

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Therefore, in addition to the continuation of banning orders for those convicted of football-related offences (now section 14A of the amended Football Spectators Act), the Football (Disorder) Act gave magistrates the additional power to impose a banning order of between two and three years (the maximum duration is currently five years following the Violent Crime Reduction Act 2006²³) as a result of an application by the police in the name of the chief constable. This application would be successful if the magistrate considered that the defendant had at any time caused or contributed to violence or disorder (regardless of whether it was connected to football or not) and if s/he considered an order would be likely to reduce disorder at football matches in the future. Furthermore, magistrates did not have to be convinced as to the criminal standard of proof (beyond reasonable doubt) on either of these tests. Instead, the Home Office intended that they could apply the significantly lower civil standard of proof (a balance of probabilities) and could take into account issues such as "any decision of a court or tribunal outside the United Kingdom," "deportation or exclusion from a country outside the United Kingdom," "removal or exclusion from premises used for playing football matches, whether in the United Kingdom or elsewhere," and "conduct recorded on video or by any other means."²⁴

Under the amended section 14G, for both banning orders on conviction (section 14A) and banning orders on complaint (section 14B), the court could impose any additional conditions upon the individual that it sees fit (for example exclusion zones). This means that in addition to not being allowed to enter football grounds and having to surrender a passport when a specified English team are playing abroad, a fan may also be prevented from entering the city centre and the area around the ground when their team are playing. Indeed, such is the power of this piece of legislation that it is technically possible to place a suspected hooligan under house arrest for the duration of an international tournament.²⁵ However, observations at the Greater Manchester courts carried out in 2006 revealed that the following conditions are attached as *standard* to every banning order given to Manchester United supporters:

1. They are not permitted to enter any football stadiums in England and Wales where a designated football match is taking place.²⁶ This includes all games in which the England and Wales national teams are playing and all games where at least one of the teams is a member of the FA Premier League, Football League, Football Conference (including the North and South divisions) or the League of Wales.
2. When a football match is played outside England and Wales involving England, Wales or an English club side they must report to the local police station at the time of the game and/or surrender their passport at least five days in advance of the game.
3. They are not permitted to enter Manchester city centre or within a one-mile radius of Manchester United's ground on Saturdays or Sundays between noon and midnight when United are playing at home (or between 4pm and midnight for evening matches).

¹⁸ The term 'hybrid law' refers to a law that is a cross between criminal and civil legal procedures, typically by imposing quasi-criminal restrictions upon suspects but using a less stringent civil procedure. See Pearson, G.. 'Hybrid Law and Human Rights: Quasi-Criminal Banning and Behaviour Orders in the Appeal Courts, July 2006. *Liverpool Law Review* volume three number six.

¹⁹ *Hansard*, Lords, 20 July 2000, column 1225.

²⁰ *Hansard*, Commons, 13 July 2000, column 1183.

²¹ *Hansard*, House of Lords, 20 July 2000, column 1185.

²² The section numbers above therefore refer to the Football Spectators Act (Amended), not the Football Disorder Act. In section 14B cases, the term 'respondent' is used instead of 'defendant'.

²³ Schedule three.

²⁴ Section 14(c)(4).

²⁵ Although the debates surrounding terrorist control orders suggest this would be unlikely to survive judicial scrutiny.

²⁶ Currently matches are 'designated' for the purposes of the act by a statutory instrument known as the Football Spectators Prescription Order 2006.

4. They must not attend or travel to any place where the English national team is playing during the control period around a designated match.

The 2000 Act also gives an additional power to UK officers patrolling ports and airports during the control period for a match abroad.²⁷ The act allows a police officer to detain an individual if he has reasonable grounds for suspecting that “making a banning order in his case would help to prevent violence or disorder at or in connection with any regulated football matches.”²⁸ The individual can then be held in custody for up to six hours and prevented from leaving the country until a banning order hearing takes place.²⁹

Potential legal problems with banning orders on complaint

When they were introduced, civil liberties groups (most notably Liberty) expressed serious concern about banning orders on complaint (commonly referred to as 14Bs). Their concern was that they were effectively punishing an individual who had not been convicted of a criminal offence, in contravention of one of the key principles of the rule of law raising the question of whether section 14B banning orders were therefore illegal. The starting point for this debate is, as any A-level politics student will tell you, that the Football (Disorder) Act 2000 is primary legislation introduced by the legally elected government, and cannot therefore be challenged by the courts. However, there are two important caveats to this: First, UK legislation must adhere to European Union law (providing, for example, free movement of EU citizens between member states); if it does not, then it can be challenged and overturned in the courts.³⁰ Second, UK legislation should adhere to the principles of the European Convention of Human Rights, which the UK ratified in 1953, providing such rights as that to liberty (article five) and to a fair trial (article six) to all UK citizens. Furthermore, the 1998 Human Rights Act requires British courts to interpret legislation in a manner consistent with the rights defined by the convention, to some extent incorporating it directly into the English legal system.

In 2001, both of these routes for challenging the new legislation were followed when two Derby County fans, Carl Gough and Gary Smith, appealed against the imposition of section 14B banning orders following a successful application by the Chief Constable of Derbyshire.³¹ After an unsuccessful challenge in the High Court,³² the Gough case eventually reached the Court of Appeal in 2002.³³ The first route taken by Gough and Smith as appellants was to argue that the banning orders constituted a criminal penalty as the confiscation of passports and curtailment of freedom of movement acted as a punishment. The appellants argued that, as such, banning orders should only be imposed following a criminal procedure, rather than the civil procedure under which they had been imposed. Article six of the Convention of Human Rights states that UK citizens have to be tried under 2 legal procedure that corresponds correctly with the outcome of the case, i.e. a criminal procedure for the imposition of a criminal penalty. The major differences between the procedures were, first, the standard of proof (“beyond reasonable doubt” for the criminal procedure, but only “on a balance of probabilities” for the civil procedure), and second, the rules regarding admissibility of evidence (stricter in criminal procedure). They argued that, had the court followed the criminal procedure, then key evidence that led to their banning orders would not have been admissible and the police would have had difficulty proving beyond reasonable doubt that the respondents³⁴ (a) had been involved in previous incidents of disorder; (b) would do so again in the future.

The Court of Appeal, however, rejected these arguments and ruled that a section 14B order was not a criminal penalty because its purpose was preventative, not punitive. In other words, the conditions were not imposed to punish the individual in the manner of a criminal sentence, but to prevent future incidents of disorder - therefore, the court ruled, the correct procedure had been followed and article six had not been infringed. Whether this decision was correct or not is a matter for debate. The reasoning used in previous European Court of Human Rights cases repeatedly states that a court should not

look merely at the form of the law, but at the actual effect. Football banning orders certainly have a preventative rather than punitive *intention*, but their *effect* upon individuals is undoubtedly punitive, a fact acknowledged by the court. To further confuse matters, Lord Phillips, the lead judge in the Court of Appeal case, stated that, because of the serious impact of the orders upon the freedom of the individual, the courts should actually apply a higher standard of proof than in normal civil cases:

*“While technically the civil standard of proof applies, that standard is flexible and must reflect the consequences that will follow if the case for the banning order is made out. This should lead the magistrates to apply an exacting standard of proof that will, in practice, be hard to distinguish from the criminal standard.”*³⁵

However, as we will see in the following section, whether magistrates are doing any more than paying lip-service to this is questionable.

The second route taken by Gough and Smith was to claim that the confiscation of passports breached the EU law that provides citizens with the right to leave their own member state. The court determined, correctly, that there was no absolute right to leave a member state or travel across EU borders, and that governments could restrict movement for genuine public policy reasons (e.g. national security or public health). However, the law states that this restriction on movement must be a *proportionate* response to the public policy initiative, so the question was whether banning orders (in particular, the condition allowing the confiscation of passports) were an appropriate and balanced response to the problem of football crowd disorder involving English fans abroad. The court adopted a strict test to determine this question,³⁶ and had to consider the following points:

Is the legislative objective (reducing crowd disorder abroad) sufficiently important to justify limiting a fundamental right (the right to leave the UK)?

Are the measures designed to meet the legislative objective (i.e. the confiscation of a passport) rationally connected to it?

Are the means used to impair the right or freedom no more than is necessary to accomplish the objective? (This is known as the ‘least restrictive alternative’ test.)

In other words, while restrictions on movement were seen as infringing liberties, these could be acceptable if the infringement actually dealt with an otherwise intractable and serious social problem. However, having identified the test (in our opinion correctly), the Court of Appeal failed to rigorously apply it, relying upon statements by the Home Office as to the severity of ‘hooliganism’ abroad (citing in particular Charleroi and Brussels) and simply accepting that the confiscation of passports was proportionate. But let us do what the court failed to, and apply this test to football banning orders - bearing in mind what we know about the role of the media in constructing the phenomenon of hooliganism, and the reasons why large-scale disorder occurs (and does not occur) involving England fans abroad:³⁷

- 1) Is the problem of football hooliganism abroad sufficiently serious to require the removal of the right to leave the UK of citizens not

27 Under the amended Section 21A.

28 Section 21A(1)(b).

29 Due to its controversial content, the act initially contained a ‘sunset clause’ that was firstly extended by the Football (Disorder) (Amendment) Act 2002, and then abolished by section 52(1) of the Violent Crime Reduction Act 2006. (Section three of the act also finally removed the National Football ID Card proposed by the 1989 Football Spectators Act) Schedule three of the 2006 act also allows the prosecution to appeal against a court’s failure to impose a banning order on conviction (the amended section 15A(5A)), and permits the British Transport Police and the Crown Prosecution Service to apply for a banning order on complaint.

30 It is a well-established rule that, where domestic law and EU law clash, it is domestic law that must be changed.

31 For a case review, see Pearson, G., ‘A Cure Worse Than the Disease? Reflections on *Gough and Smith v. Chief Constable of Derbyshire*’, *Entertainment Law*, Summer 2002, volume one number two, pp.92-102.

32 *Gough and another v. Chief Constable of Derbyshire*, 2001, 3 CMLR 29.

33 *Gough and Smith v. Chief Constable of Derbyshire*, 2002, GB 1213.

34 In section 14B cases, the term respondent is used instead of ‘defendant’.

35 Paragraph 90.

36 Taken from the case of *de Freitas v. Permanent Secretary of Ministry of Agriculture*, 1999, 1 AC 69.

found guilty of a criminal offence? This is debatable; as we have seen, the media has played an important part in exaggerating the role of hooligans and the scale and seriousness of many 'riots'. Certainly the arguments accepted by the court in the *Gough* case as to the seriousness of hooliganism abroad are not convincing. Reference was made to the nine hundred and sixty-five English supporters arrested in Belgium, but not to the fact that only one of these was actually charged with and convicted of an offence (which, if we remember Dave from the previous chapter, was in itself open to considerable doubt). No reference was made to the lack of violence in the Netherlands, or the role of policing and group interaction. The High Court judge who rejected the original appeal described hooliganism as "evil", a "rising spectre", "a shame and a menace" and a "sickening ill",³⁸ terms more akin to a tabloid editorial than a serious attempt to apply a strict legal test.

2) Is the power to remove passports rationally connected with the objective of reducing hooliganism abroad? In other words, does the removal of passports from *suspected* hooligans reduce disorder? The courts in *Gough* merely assumed that removing passports from suspected hooligans would reduce disorder, but at no stage did they consider if this was actually the case. Ironically, an analysis of the high number of arrests in Belgium at Euro2000, which were used to justify the Football (Disorder) Act, suggests it does not. As was explained by Home Secretary Jack Straw during the second reading of the bill:

*"Few of the one thousand football hooligans known to NCIS were involved [in the disorder in Brussels and Charleroi]. It is a sobering thought that only thirty of the nine hundred and sixty-five arrests of people from England during Euro 2000 were of people known to NCIS - an agency which dedicates a significant proportion of its time and expertise to monitoring the activities of football hooligans."*³⁹

So ninety-seven percent of those arrested in Belgium during Euro2000 were not 'known hooligans', and those hooligans that did travel were typically *not* identified as involved in the disorder! This suggests very strongly indeed that *even if* the Football (Disorder) Act had existed prior to the tournament, it would have had little if any significant impact because the fans prevented from travelling would not have been the ones typically involved. In the light of this, it becomes increasingly difficult to argue in legal terms that the second test is satisfied. The statistics are startling, demonstrating that disorder was clearly not the outcome of hooligans travelling to cause trouble, and providing clear support for our arguments about the underlying situational causes of rioting involving English supporters abroad.

On a final point relating directly to confiscation of the appellants' passports, it was accepted in court that *Gough* had never travelled abroad with England, and had no intention of doing so. Why then was it necessary to confiscate his passport, and how could it be justified legally? Regarding Smith, the court noted that he had travelled with England to Charleroi in 2000; his profile recorded that he had been corralled by Belgian police following the disorder, one of a thousand such England fans. However, although this was used to suggest a banning order was necessary, as we have consistently noted the vast majority of those corralled fans had not been involved in any disorder - not least the two authors of this book.

3) Are there other ways to solve the problem, less restrictive of the rights of UK citizens not convicted of a criminal offence? We will argue that the answer is a resounding 'yes', and will present further evidence to that effect. Even if the first two legs of the test are considered to have been met (and we have cast considerable doubts upon the second one), our research suggests that a much more effective solution exists in the form of alternative policing strategies. Furthermore, we would argue that these strategies actually *increase* the rights and freedoms of supporters, resulting in their legitimate expectations to support their team being more readily met, rather than curtailed.

Far from being merely an obscure legal test, our view is that the test of proportionality applied in *Gough* is a very useful tool for assessing methods used to try to tackle the English Disease abroad. Had the Court of Appeal actually followed it, then we contend that *Gough* and *Smith* should have had their 14B banning orders revoked; after

all, this would not have stopped them being prosecuted in a criminal court for a football-related offence that might result in a 14A order being imposed upon them. Instead, the court allowed a significant infringement of civil liberties to occur that not only followed the agenda set by media and government, but reinforced the theory that the only way to reduce disorder involving English fans abroad was to identify and control 'hooligans'.

Banning orders on complaint: how the current scheme works

In the following section, we will look at a number of recent cases to assess (a) whether the legal tests identified by the Court of Appeal in *Gough* are actually being applied; and (b) whether the banning orders are effective at reducing football disorder involving English fans abroad. As we have seen, the two questions are related, particularly with regard to the test of proportionality discussed above (which should be applied to any infringement of EU law, and which has also been used in some European Court of Human Rights cases). If we are analysing whether 14B orders are legally proportionate, we need to ask whether the condition of removing passports actually reduces disorder abroad and whether alternative means could have the same effect. To reiterate: If section 14B orders are not effective, or if less restrictive alternative methods could have the same effect, then this aspect of the Football (Disorder) Act 2000 would be technically illegal under EU law.

The manner in which football banning orders on complaint are imposed is via a six-stage process:

- 1) The police authority in question (usually the constabulary in which the suspect normally resides, but now the British Transport Police [BTP] and the Crown Prosecution Service [CPS] can also apply) identifies a problem with football-related disorder and makes a bid to the Home Office for funds to resource the obtaining of banning orders against the perpetrators.
- 2) Police 'spotters' are deployed at football matches to identify the 'risk supporters' (this term appears to have replaced 'hooligan' and 'prominent' in the police vocabulary when referring to supporters who actively seek to become involved in football-related disorder). When deployed domestically, they are in uniform and often carry handheld camcorders to gather evidence. These spotters identify the suspects (often through use of stop and search powers)⁴⁰ and compile profiles on them, identifying incidents when they have been involved in or otherwise associated with disorder. These profiles are typically made up of traditional handwritten police logs, and also video footage.
- 3) When sufficient evidence has been gathered, the relevant force's Chief Constable (or the BTP or CPS) will make an application (or 'complaint') to the magistrates' court, requesting a 14B banning order be served on the individual.
- 4) A hearing will be held at the magistrates' court in which evidence will be provided to the presiding magistrate by the police force's solicitor, and the respondent will have the opportunity to defend himself. This court case is held under the civil court procedure; at the end of the hearing, the magistrate will determine whether to impose a banning order or not - both sides now have the opportunity to appeal the decision).
- 5) If a banning order is imposed, the police will request the conditions to be applied (see above for the standard conditions applied to all Trafford Magistrates' Court FBOs). All standard 14B orders will include the requirement for the respondent to surrender his passport when specified English teams play abroad.

37 Further analysis of this can be found in Pearson, G., 'Qualifying for Europe? The Legitimacy of Football Banning Orders "on Complaint" under the Principle of Proportionality', *Entertainment and Sports Law Journal*, September 2005, volume three number one. (www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume3/number1/pearson/), and

Stott, C. and Pearson, G., 'Football Banning Orders, Proportionality and Public Order', *Howard Journal of Criminal Justice*, July 2006, volume 45 number three, pp.241-254.

38 Paragraphs one and 81.

39 *Hansard*, Commons, 13 July 2000, column 1181.

40 Under section 60 of the Criminal Justice and Public Order Act 1994.

6) The United Kingdom Football Policing Unit (UKFPU, which subsumed the Football Banning Order Authority) will then govern the banning order until its expiration. The UKFPU will issue notices to the respondent when, for example, a passport needs to be surrendered, and will also deal with requests by the respondent to vary the conditions (if for example, they need their passport for work or a holiday, or need to enter an excluded zone for a legitimate reason). In our experience, the UKFPU is reasonably flexible when dealing with these requests, which are often granted.

Section 143 banning orders in the courts

In the build-up to the 2006 World Cup, the authors carried out a study into the use of banning orders on complaint, focussing particularly on whether the correct legal tests from *Gough* were being applied and what conditions were attached to the orders. The research was carried out with Dr Mark James, a senior lecturer from the University of Salford whose expertise in criminal law and procedure proved highly valuable. The focus of the study was (a) the legality under EU and European Court of Human Rights law of the court procedure and (b) the likely effectiveness of the bans on the forthcoming World Cup. Information was gathered from court observations of fifty-five applications for 14A orders (on conviction) and seven civil applications under 14B. The observations took place at Trafford Magistrates' Court and Manchester Crown Court between February and May 2006, in the build-up to the World Cup in Germany when applications for banning orders were reaching their peak. These observations were supplemented by informal interviews with football intelligence officers, the Crown Prosecution Service, court clerks, defence counsel and respondents/defendants (both in Manchester and at the World Cup). The results of this study⁴¹ demonstrated that serious problems exist in the procedure followed to grant 14B orders, and in the effectiveness of the average order in preventing disorder involving English fans abroad.

Is the correct standard of proof being followed by the courts?

The outcome of the Court of Appeal ruling in *Gough* regarding the standard of proof was that, when determining if a 14B order should be imposed, the courts should apply a standard of proof that was "hard to distinguish from the criminal standard". This standard should be applied to the two questions the court has to ask: (a) has the respondent caused violence or disorder in the UK in the past, and (b) will a banning order reduce disorder in the future? Applying this higher standard of proof (akin to 'beyond reasonable doubt') in theory should provide quite a check on applications for 14B orders, as the original intention of the government was that the standard of proof for both tests should be the basic civil standard (in other words is it 'more likely than not' that the respondent has committed the act/will cause disorder in the future?). Our findings were that magistrates appeared to have been briefed on the judgment.⁴² Furthermore, in most of the cases observed, the first leg of the test was easily made out as the respondents typically possessed at least one previous public order or breach of the peace conviction - although the focus for question (a) was still typically on the content of the profiles, rather than previous convictions.

However, closer analysis of the evidence relied upon revealed that in many cases this was not being practically applied. For example, in one case,⁴³ a football intelligence officer alleged that the respondent, a man named Davies, had been picked out front police video footage during an occurrence of disorder known as the 'Deansgate Incident'. This occurred before an England v. Wales Euro2004 qualifier at Old Trafford, when a group of Manchester United supporters charged towards a group of Wigan Athletic supporters gathered on the Deansgate Road in Manchester city centre. The image on the video was blurred, Davies denied he was present, and, after examining the footage, the presiding judge also failed to positively identify him. Furthermore, police officers on the ground at the time did not identify the respondent as part of the Manchester United group; therefore the only evidence that he was the individual in the blurred video image came from the (retrospective) opinion of the football intelli-

gence officer. It had not been proven on a balance of probabilities, never mind the standard approaching 'beyond reasonable doubt', but this did not stop the magistrate accepting the evidence, which then went on to play a crucial role in the judgment.

Another feature of the cases came from the reliance upon evidence that was often little more than guilt by association - which should not be admissible in either criminal or civil trials. In other words, there were instances where the respondent was identified as being in a group of supporters, some of whom caused violence or disorder, and, even though lie was not himself identified as being involved, this was sometimes accepted as pivotal evidence from the Deansgate and Dry Bar incidents in applications for 14B orders. One example came from another incident in which the respondent in the previous case was alleged to have been involved: The 'Dry Bar Incident' occurred when unidentified individuals in a crowd of Manchester United supporters walked past a bar where some Manchester City supporters were drinking, throwing one glass and one bottle at the bar. After being identified by football intelligence officers, Davies admitted his presence in this group but denied lie was involved in the missile throwing. The officers accepted in court that they could not identify the culprits, but the mere presence of Davies in this group was accepted as evidence that he was a hooligan. He received the maximum three-year banning order, the evidence from the Deansgate and Dry Bar leading the judge to believe the respondent would contribute to disorder in the future. But there was no relative certainty even on a balance of probabilities, that Davies was the individual in the video footage of the Deansgate Incident, nor was evidence put forward that he had been involved in the disorder outside the Dry Bar. The case indicated to us that the higher standard of proof required ('approaching beyond reasonable doubt') following the Court of Appeal's decision in *Gough/Smith* was not being followed.

Another example of guilt by association arose from what was referred to as the 'Oxford Road Incident'. This incident occurred when Manchester United supporters were trying to board the train to Liverpool for an FA Cup tie with Everton in 2005. The following version of events was accepted by both parties and the court: A group of approximately ninety fans, about half of whom the police had identified as 'risk supporters', arrived at Manchester Piccadilly station but were refused access by Greater Manchester Police. The police escorted them instead onto a platform at Manchester Oxford Road station and instructed them to wait there for the Liverpool train. As they waited, a train carrying approximately three hundred Leeds United supporters (including risk supporters), travelling to another match, arrived at the adjoining platform and attacked the Manchester United supporters with bottles. Video footage shown in court demonstrated incontrovertibly that the Leeds supporters were the aggressors, and that the vast majority (if not all) of the United fans were unaware of what was about to occur and who was on the train. However, the footage showed a brief surge by some of the United supporters towards the train after they had come under attack. This was used to prove that a number of respondents were involved in incidents of disorder because they had been on the platform at the relevant time, and because some of the crowd had surged towards the train under a high degree of provocation. In four cases we observed, this guilt by association was used to try and demonstrate that an FBO was required, despite the fact that neither the officers present nor the video evidence identified the respondents as having surged towards the train themselves. And in any case, the fans were only present on the platform because they had been forced there under police escort after seeking to board their train elsewhere.

⁴¹ The findings from which are published in full in 'Football Banning Orders: Analysing Their Use in Court', James, M. and Pearson, G., *The Journal of Criminal Law*, 2006, volume 70, number six, pp.509-530.

⁴² In *Chief Constable of Greater Manchester v. Riley* (14 February 2006, Trafford

Magistrates' Court), for example, the presiding judge noted that because of the 'restriction on liberty' that an order would result in, he was obliged to "apply a high civil standard" of proof.

⁴³ *Chief Constable of Greater Manchester v. Davies*, 16/2/06. Trafford Magistrates' Court.

From our observations, applications by the police for both section 14A and B orders typically started with the listing of occasions in which the respondent was identified in groups of risk supporters, even where these groups were not being disorderly. For example, in the case of *Chief Constable of Greater Manchester v. Clarke*,⁴⁴ the police solicitor opened by noting that between 2003 and 2005 the respondent had been “observed on twenty-five occasions in large groups of risk supporters” (in this case such a listing was completely unnecessary, as video evidence used later clearly showed the respondent had been actively involved in quite serious disorder). The cases observed illustrated that this type of evidence alone would not always be accepted, but in the case of *Chief Constable of Greater Manchester v. Riley* the judge ruled that guilt by association was enough to prove the respondent was likely to contribute to football-related violence in the future, even if it went no further than proving his “presence and tacit support” for groups involved in past disorder.⁴⁵ On one bizarre occasion this guilt by association became cumulative: After Clarke’s presence in a group had been used to justify a 14B order imposed against him, this was then used as evidence to justify the same order being imposed upon Riley on the basis that he had been associating with someone who was now subject to a banning order!

Section 14B(4)(b) of the amended Football Spectators Act requires the court to be satisfied beyond reasonable doubt that the imposition of a banning order on complaint will help to prevent future incidents of football-related disorder. However, in none of the cases we observed did the court seek such a high level of proof. Instead, evidence put before the court that an individual was likely to cause future disorder was usually indistinguishable from that used to prove involvement in past disorder, focussing purely on the respondent’s predisposition to violence. As we will see, the assumption made by the courts - that all those found to have been involved in disorder on the domestic scene need to be banned from attending matches abroad - is often misleading.

Are the appropriate conditions being applied to individual Banning Orders?

The legal problems relating to whether the correct standard of proof is being applied was only one finding of our research that caused concern. Other findings suggested that 14B orders often appeared more punitive than preventative, and as a result may not be as effective at preventing future disorder abroad as was commonly thought. According to Lord Phillips at the Court of Appeal hearing of *Gough*,⁴⁶ in order to satisfy’ the requirements of proportionality each respondent’s order had to receive individual consideration. Regarding legal costs, we were surprised at the high amounts awarded against respondents upon imposition of an order, typically of either £ 800 if they did not contest the order, rising to £ 1,447 if they (unsuccessfully) contested it. Obviously this provides a great incentive for respondents to accept the imposition of banning orders: costs of up to £ 1,447 can appear indistinguishable from (and are often greater than) a fine for being found guilty of a criminal offence. So this difference also casts doubt on the claim in *Gough* that 14B orders are purely preventative rather than punitive, which prevented the appellants successfully claiming the 14B court procedure breached their right to a fair trial under article six of the European Convention of Human Rights.

The next problem we identified arose in relation to the length of the orders. If, as was claimed by Lord Phillips in *Gough*, football banning orders are purely preventative, then the length of an individual order should be determined by the seriousness of the individual’s threat to public order at future matches. This did not happen in any of the cases we observed, and the length of the orders imposed under either of sections 14A or 14B were at no stage objectively justified. Instead, the court merely imposed either the maximum or minimum possible: for 14A orders (on conviction), although sentences ranged from one hundred and sixty hours of community service to eighteen months in prison for one defendant, the minimum three-year order was imposed on all defendants receiving a non-custodial sentence, and either the minimum of six years or the maximum of ten years on all those given custodial sentences.

At the time of our observations, the minimum length for a 14B order was two years and the maximum three,⁴⁷ and again there was no objective justification of the length of bans. If the respondent unsuccessfully contested the order they received a maximum three-year ban; if however, they accepted the imposition of the order, the ban was merely two years. Although the police requested the maximum ban in each of these cases, it was often reduced in the light of what was in effect a guilty plea (this phrase was even mistakenly used by defence counsel at one stage). In practical terms, the policy meant those who were suspected of more serious offences got shorter bans than those against whom the allegations were less serious and/or the evidence weaker. Interviews with some of the respondents revealed this was because those facing serious allegations supported by strong evidence knew there was no point contesting the order, as they were likely to lose. In the case of Clarke, for example, video footage showed him in a group of supporters charging at rival supporters, on one occasion with his face covered in a seeming attempt to disguise himself from the police. However, despite the seriousness of the allegations and the weight of the evidence against him, Clarke only received the minimum two-year order.

Conversely, those against whom the evidence was weaker, often because they had been accused of less serious offences, were more likely to contest the order and receive a longer ban if unsuccessful. In the case of *Davies*, the evidence was considerably less substantial, with only two brief sightings accepted as relevant. But when Davies’s challenging of the poor quality evidence failed, he was effectively penalised by the maximum three-year ban. However, on the balance of the evidence shown in court, Clarke appeared far more likely to contribute to future football-related disorder than Davies. Instead of justifying the length of the orders in terms of preventing future disorder, a one-year discount was used as an inducement to the respondents to encourage them not to contest the applications and a maximum length ban was imposed as a punishment for those who did not comply.

Finally we looked at whether the conditions attached to individual banning orders were being objectively justified. Again, we saw little evidence that appropriate conditions were attached to specific respondents in order to reduce risk. For both 14A and 14B orders, the police⁴⁸ requested and received all the standard conditions. Most notably for our purposes, the requirement that passports be surrendered during the control period around England matches was attached to all banning orders we saw imposed. However, in many cases there was no evidence that this was necessary, and in some cases strong evidence was put forward by the defence as to why the respondent would *not* be travelling with England anyway. In *Clarke*, the respondent was banned from travelling abroad with the English national team despite the fact that he was Scottish, and a supporter of Scotland’s national team;⁴⁹ similarly, the respondent in *Davies* supported Wales.⁵⁰ Most clearly of all, in the case of *Chief Constable of Greater v. Fielding*,⁵¹ the police accepted that the respondent had never travelled abroad following England, and had a holiday in Spain pre-booked during the time of the World Cup. However, Fielding was still required to surrender his passport during the control period for the World Cup in Germany!⁵² The risk posed by these three respondents to England matches abroad was very low, but the condition was applied regardless. The police solicitor’s contention, in one case, that

44 14 February 2006, Trafford Magistrates’ Court.

45 14 February 2006, Trafford Magistrates’ Court.

46 Paragraph 60.

47 Following the Violent Crime Reduction Act 2006, the maximum is now five years.

48 Or Crown Prosecution Service, in the case of 14A.

49 At the time the legislation had not been introduced in Scotland, so Clarke could

travel abroad to watch Scotland, but not England.

50 His order would prevent him watching the Welsh national team (as the Football Spectators Act applies to England and Wales), but he was also banned from attending the 2006 World Cup because of England’s involvement in it.

51 15 February 2006, Trafford Magistrates’ Court.

52 Although it was likely the UKFPU would waive this, as they often do, in order to allow him to take his holiday.

the domestic ban might save the respondent enough money to encourage him to travel abroad with England for the first time was a huge leap of the imagination, which could certainly not be proven to anything like beyond reasonable doubt.

Once again it is difficult, based on these findings, to agree with the Court of Appeal's decision in *Gough* that banning orders are purely preventative, and that therefore the use of a civil court procedure is justifiable under article six of the ECHR. Furthermore, it led to a misleading set of figures being produced by the Home Office regarding the three thousand 'known hooligans' prevented from attending the 2006 World Cup: From the sample of cases we witnessed, it would appear that many of these fans would not have travelled to the World Cup anyway. Many had their passports confiscated unnecessarily because they did not support England, or did not travel abroad to support England, would be on a holiday elsewhere at the time of the World Cup, did not wish to leave the country, or sometimes did not even possess a passport. Our own observations were reinforced when it emerged from a conversation with a UK Officer at the World Cup in Frankfurt that, of the three hundred banned supporters who had not surrendered their passports at the start of the control period, over two hundred had failed to do so because they did not actually own a passport.

Are opportunities for criminal charges being missed?

One final problem with 14B banning orders is whether they can obscure the possibility of obtaining criminal charges against those involved in football-related disorder. Returning to the case of *Clarke*, the respondent was identified in video footage as part of a group charging at a group of rival supporters. Why then was he only served with a minimum two-year banning order, rather than charged with a public order offence (which, if he was found guilty could lead to a longer banning order under 14A)? Similarly in the case of *Davies*, the defence counsel pointed out that, if the police could prove it was the respondent in the 'Deansgate Incident' video, they would be likely to bring a successful prosecution. Why then did the police not search the defendant's house for the clothing seen in the video? Possible explanations for the decision not to charge the respondents with criminal offences lie in the longer time it would take to secure a conviction, which may have meant a banning order could not be secured for the World Cup. But since neither respondent even supported England, was this necessary? If individuals are rampaging through the country in gangs, causing disorder at and around football matches under the watchful eye of football intelligence spotters, why is evidence not put before the criminal courts to secure a conviction and punish them for their crimes?

It is important at this stage to make three important qualifications:

First, we are not assessing the effectiveness of football banning orders on domestic hooliganism. In fact, we would readily accept that banning orders have an important role to play in controlling the activities of the hooligan firms that attend matches with the intention of confronting their rivals. Second, we are not necessarily criticising banning orders imposed *as part of a criminal sentence* following a successful conviction of a football-related offence. It would seem sensible, where an individual has been found guilty of a violent act at a football match, and where it looks likely this pattern of behaviour may be repeated in the future, that a ban from attending or travelling to matches should form part of the sentence. Finally, we are not criticising the role of the UK police in the imposition of Section 14B orders. The UK's legal system works on an adversarial basis, and it is expected that the police authorities have a duty to do everything in their power to reduce crime and disorder. It is not the duty of executive bodies such as the police to check the exercise of their own powers, but it is the duty of government to impose useful and legitimate laws, and the duty of the judiciary to ensure that these laws comply with constitutional and EU law and ratified human rights legislation. We would, however, question the emphasis given to the control of hooligans as the best method of preventing violence involving English fans abroad. Moreover, we should be careful about the extent to which we bend and break important legal protections in order to pursue this

aim. The section 14B order is a step too far, in our view. Instead of relying on this controversial and flawed legislative provision, we should be asking what else needs to be done to tackle the problem.

As we have seen from earlier chapters, the media's response to incidents has been to blame the cause of major disorder on hooligans who travel in order to cause trouble, and the solution was therefore to find a way of stopping these 'mindless thugs' from travelling. Ironically, when banning orders on complaint were discussed in the late 1990s, these thugs suddenly metamorphosed into criminal masterminds able to spark disorder without leaving sufficient evidence to allow police to pursue a criminal conviction and corresponding restriction order. In reality whilst section 14B orders were sold to Parliament as a way to control the 'Category C' hooligans, our observations suggest that it is those who the police label 'Category B' fans who have typically been subject to the orders.⁵³

As we have seen, it is debatable as to whether banning orders on complaint are legal under either the European Convention of Human Rights or the EU Treaty, but a failure to rigorously apply the doctrine of proportionality has resulted in the current law persisting, with only lip-service paid to the requirement for an increased standard of proof resulting from the Court of Appeal's ruling in *Gough*. The argument that the orders are preventative and not punitive does not stand up to an analysis of the length of individual orders, or the conditions attached to them; nor does it acknowledge the very serious restrictions on liberty (not to mention financial costs) imposed on respondents. Moreover, our own application of the three-stage test of proportionality identified in *Gough* suggests not only that section 14B orders may not be legitimate, but that their impact on reducing disorder abroad is minimal. Ultimately, section 14B orders *cannot* be justified as proportionate.

The second leg of the proportionality test requires us to ask how effective section 14B orders are. Evidence from Euro2000 reveals their existence would not have prevented the disorder in Brussels or Charleroi, as ninety-seven percent of those arrested were unknown to police, and the Football Intelligence Unit acknowledged that few of their 'known troublemakers' were involved in the disorder. Similar findings arose from the disorder in Marseille at France98. Furthermore, our court observations suggested that many of those prevented from travelling abroad by banning orders would not have travelled anyway. Finally, we would contend that typical disorder involving English supporters abroad is not caused by known troublemakers but by failures in policing strategies and crowd management. As we will see, the 2006 World Cup saw significant (if under-reported) disorder, in spite of the high numbers of banning orders. Our observations at this and other tournaments also bring us to the conclusion that there is a 'least restrictive alternative' to banning orders, this being to address the styles of policing that English fans meet when they travel abroad. Once again, the Football (Disorder) Act runs into rocky waters when assessed against the doctrine of proportionality.

Once again we want to stress that we are not claiming that banning orders should have no place in strategies to reduce football disorder (particularly domestically) - for us it is a question of emphasis. The banning order is an extremely limited and short-term strategy, and it is difficult to prove that the FBO on complaint has any significant effect on disorder whatsoever, making it unjustifiable in a legal sense. The FBO system operates thanks to the government spending millions of pounds ensuring that portfolios on 'known hooligans' are developed by police forces. But the pressure that those forces subsequently come under to meet their targets can lead to situations where individuals are banned without any clear evidence that they should be. Their heralding by government and media as the answer to foot-

⁵³ In England and Wales the vast majority of fans are understood as category A, whereby they pose no particular risk to public order. Category B fans are seen to pose a risk since they are believed to welcome opportunities to engage in hooliganism, but do not seek to actively organise these incidents. But it is category

C fans who are seen as posing the highest risk, since they are understood to organise and actively seek out opportunities for disorder. Consequently, policing operations often specifically allocate operational units to locate category B and C fans, in order to deploy other police resources in their vicinity.

ball violence abroad is misleading, serving only to rationalise this contentious legal power and the severe restrictions upon individuals who have not been found guilty of a relevant offence. Our research suggests that the real long-term solution to the English Disease lies not in the imposition of FBOs but in addressing the tactics adopted by police forces when dealing with increasing numbers of travelling English football supporters who have a tendency to engage in the

kinds of boorish, drunken, anti-social activity we can see in the average city centre on the average weekend. Football Banning Orders are not the answer to the problem of English fans becoming involved in disorder abroad. Their existence is a result simply of the wrong questions being asked both before and following disorder at Euro2000. If we want the real answer to the problem, we have to ask the right questions in the first place.

The International Sports Law Journal

The Employment Bond in the Area of Sports

by José María Sabat Martínez*

1- Introduction

This paper seeks to highlight the solutions offered by Argentine courts in cases of disputes on whether athletes, referees or coaches are subject to the rules governing the employment contract.

It is clear that both amateurs and professionals perform a determined activity or discipline from the time they become sportsmen. That conduct can be qualified as an employment relationship. This will imply the need to differentiate this concept from that of the employment contract, and to define the assumptions that govern this matter and the characteristics inherent to the relationship of dependency.

Subsequently, the fundamental differences between amateur and professional sportsmen will be discussed and the issues debated will be described. To do this, a classification will be made of the different types of subordination under the employment contract.

2- Employment contract and relationship

To familiarise ourselves with the subject, we will begin with an elementary distinction between employment law, insofar as it refers to the employment contract, and the employment relationship.

The employment contract is defined in Art. 21 of the Employment Contract Act (hereinafter, LCT), which provides that “An employment contract shall exist, irrespective of its form or denomination, whenever a natural person undertakes to perform acts, execute works, or provide services to another and reporting thereto, for a determined or undetermined period of time, in exchange for the payment of remuneration...”

Here, doctrine understands that the essential characteristic of the employment contract is the relationship of dependency. This is defined as “The legal situation in which the worker must agree that his will is replaced by that of the employer, insofar as performance of the relationship, and this attributes the power of management to the employer and the duty of obedience to the worker”¹

Accordingly, the employment contract is characterised by subordination of the employee, which includes three aspects a) economic b) technical c) legal.

Economic subordination implies that remuneration represents the livelihood of the worker. Legal subordination is determined by the power of management and organisation. This indicates the duties to be performed, while technical reporting determines that it is the employer who will issue guidelines for the performance of duties. Legal and technical reporting must not be confused, according to Pozzo², quoting Borsi and Pergolesi, because the power of management is one thing, consisting in determining the time, the place and modus operandi, and determination of the content of each individual service provision is another.

The contract is different from the employment relationship, which is composed of the service provision itself. This is why the employment relationship is the object of an employment contract. The employment relationship is defined in Art. 22 LCT “An employment relationship will exist when a person perform acts, executes works or provides service to another, and dependent on the former, voluntarily and in exchange for a remuneration, irrespective of the act on which it is based”.

In an employment relationship, the existence of an employment contract is presumed, as provided in Art. 23 LCT “the fact of service provision presumes the existence of an employment contract, unless the circumstances, relationships or causes on which it is based evidence otherwise. This presumption will also apply when non-labour related figures are used to characterise the employment contract and insofar as circumstances do not qualify the employer as a service provider”

We should also bear in mind the provisions of Art. 115 LCT, which provides that “Work shall not be presumed to be gratuitous”

How are these provisions articulated? This is clearly explained by Martínez Vivot³, who says that whoever pretends that a relationship does not constitute an employment contract to avert its legal consequences “must duly prove and evidence this, and accredit the circumstances, relationships or causes on which it is based and that are not included in outside labour law”

At the same time, according to López, Centeno and Fernández Madrid⁴, although gratuity is not presumed, there are circumstances that exclude onerousness, among which are amateur sports.

This criterion has been accepted by jurisprudence, whereby “relationships exist that coincide externally with those inherent to a subordinate contract but which, inasmuch as there are characteristics that exclude their onerousness (e.g.: family business, charity, amateur, training, etc.), are not typical of an employment contract”⁵. That verdict transcribes the opinion of Vázquez Vialard⁶, in the sense that “in practice, situations arise that are similar to regulated employment and

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1 CNTrab. Chamber VI, Nov. 29 985 “Gómez Mario D. vs Naranjo Roberto C.”

2 Pozzo, Juan D. “Derecho del Trabajo”, Ediar, Buenos Aires, 1948, T.1, Page 463.

3 Martínez Vivot, Julio J. “Elementos del Derecho del Trabajo y de la Seguridad Social” 5th updated and extended edition, Astrea, Buenos Aires, 1996, Page 101.

4 López, Justo; Centeno, Norberto O.; Fernández Madrid, Juan Carlos “Ley de Contrato de Trabajo Comentada”, 2nd updated edition, Contabilidad Moderna, Buenos Aires, 1987, T.1, Page 269/270.

5 Nan, Matías F. c. Fundación Universidad Católica Argentina Santa María de los Buenos Aires” DJ 9/8/2006, LL 2006-D, 717).

6 Vázquez Vialard, Antonio (Dir.) “Tratado de Derecho del Trabajo”, T. 3, Page 443.

which, however, based on the cause that led to the relationship whereby the parties are bound, attributes them a non-employment nature”.

3- Different types of sportsmen

The amateur sportsman is one who performs his activity for the love of sport, i.e., in a totally disinterested manner, without expecting any remuneration in exchange. On the other hand, a professional sportsman is one who acts professionally for profit, seeking to obtain an economic gain for his performance, and that remuneration is part of his income.

Among professionals we can find those subject to an employment contract and, at the same time, those whose activity is governed by the rules of common law (e.g., under a service hiring contract).

In the latter case, the service provision will presume the existence of an employment contract, based on the assumption made in Art. 23 LCT, which can only be discredited if an allegation is made to the contrary.

In the case of footballers, plenary jurisprudence has said that “The professional football player, and the enterprise that uses his services, are bound under an employment contract”⁷, and it cannot therefore be considered that there is any bond other than employment in these cases.

The case of football referees is different. In this regard, it has been discussed whether service hiring contracts entered into between the Argentine Football Association and referees, with the expectation that they would be acknowledged this possibility under a collective bargaining agreement, were valid, or whether, on the contrary, this was an employment fraud, addressed at avoiding the application of rules on the employment contract.

Some verdicts accepted the validity of this form of contracting. Thus, for example, it was said that “within the scope of the Argentine Football Association, two types of bond with referees coexist: some have a relationship of dependency and, therefore, enjoy all benefits that derive from the rules on employment law - job security, unpaid leave for non-culpable illness, work accident cover, annual paid holidays, complementary annual salary, employer’s contributions to social security and welfare institutions - and others have a bond governed by the rules of common law, who do not enjoy those benefits, with the exception of a higher remuneration for each match refereed, as can be deduced from clauses six and twelve of the contract provided hereto as a separate exhibit (this chamber in “Ronzitti Cesáreo vs Asociación de Fútbol Argentino on Dismissal” SD 84.478 of 30/12/02 and “Cavagnaro Miguel Ángel vs Asociación de Fútbol Argentino on Dismissal” SD 85.626 of 26/2/04).”⁸

A contrary position, with which the undersigned agrees, was accepted in the case of “Moscoso Rafael Eduardo vs Asociación del Fútbol Argentino on Dismissal”⁹. The court said that irrespective of the qualification given to the contract, what matters is the true situation created. It went on to say that the performance of work for remuneration leads to presumption of the existence of an employment contract, as provided in Art. 23 LCT, and that that presumption is reinforced in this case by the fact that there is no difference whatsoever between referees with a formal relationship of dependency and others who do not have that relationship.

The resolution added that although the bargaining agreement in force authorised the definition of bonds other than the relationship of dependency, that rule would be inoperative because it provided less favourable conditions for the dependent than the general rule and offered the employer the possibility to completely dismiss the application of all public order-related employment regulations. This would contradict Art. 7 of Act 14250, which sets for their hierarchical superiority of the law over the bargaining agreement, which cannot amend the law to the detriment of the worker.

With regard to the amateur sphere, a distinction must be made between the federated payer and the mere amateur. The federated player is one who plays demandingly, assiduously and within the framework of an organisation that regulates competencies, while the mere amateur does not fulfil these characteristics.

It is important to stress that the amateur character does not exclude

the possibility that the player will receive allowances to cover expenses or grants for training. The sums thus received are intended to promote the practice and development of sports, and to prevent top competition only being attainable by the wealthy.

Sports grants were characterised in “Club Atlético OSN vs Berman Andrés on Contract performance”¹⁰, where it was said that “grant contracts, given their nature, shall be understood to be intended for those who require particular skills and the party granting them shall have the possibility to offer training in exchange for the payment of an allocation or incentive to meet the expenses of bursaries, that are not considered remuneration. The grant is intended to meet expenses incurred by the player to practice basketball in the club (...) and that is why we understand that this is not an employment relationship”, and the verdict goes on to add that any performance of acts, execution of works or service provision in exchange for the payment of remuneration implies an employment contract, which requires that one party reports to another, which means the existence of a relationship of authority between them.

The CSJN has addressed this matter, stating that grants are intended to encourage access to sport, and that subsidies are customary in the amateur sphere, which has legal autonomy, governed by federative customs and within the framework of Argentine civil law. The Supreme Court has also said that restitution is present in numerous activities outside the employment contract and that it is normal for subsidies to respond to the characteristics of athletes and for their amount to be congruent with the higher intensity of training¹¹.

If a grant or allowance is applied for, if the sportsman denies that it has that characteristic but, on the contrary, that it is a concealed remuneration, he must therefore prove the concurrence of defect in intention when applying for the grant.¹²

4- Issues discussed

As we said in the introduction, we will now mention some of the issues discussed, which will be set forth based on the different forms of subordination inherent to the employment contract.

4.1 Economic subordination

First of all, we would say that amateur activity is different from that performed by a sportsman as a means of earning his livelihood. It must be practised separately from his habitual job, and not as an integral part thereof.

Accordingly, it was understood that there was no economic subordination in a case where a referee did not receive any consideration for twelve months, given that this evidenced that it was not his habitual means of livelihood, added to which was the fact that the claimant had a remunerated activity other than refereeing, and that he should have paid duties and social contributions in order to be included in the payroll of referees¹³.

On the contrary, in “Rivas Mario A. c vs Club Atlético San Telmo Sociedad Civil”¹⁴, it was considered that this was an employment contract given that the players had agreed with the managers upon an individual and personal sum and that default on their obligations would imply penalties such as loss of income. It was also said that gratuitous work was not presumed and that the absence of a written contract did not exclude application of Act 20160 (footballers’ charter).

Similarly, in the case of “Lerose Claudio Fabián vs Club Atlético Excursionistas Asociación Civil on Dismissal”¹⁵ the existence was acknowledged of an employment contract based on the fact that the

7 CNTrab., plenary, 15/10/1969, “Ruiz, Silvio R. vs Club Atlético Platense”, LL 136, 440.

8 CNTrab. Sala III, 30/10/2007 “D’Angola Domingo Rafael vs Asociación del Fútbol Argentino s/ Despido” eDial.

9 CNTrab, Chamber V, 27/11/2006.

10 CNCiv., Chamber B, April 2006, eDial-AA3514.

11 CSJN, 4/7/2003 “Traiber Carlos Daniel

vs Club Atlético River Plate Asociación Civil” eDial AA1A8A.

12 CNTrab., Chamber II, 28/4/2003 “Turzi Gerardo Damián vs Club de Amigos Asociación Civil on Dismissal”.

13 CNTrab., Chamber III, 18/5/2005, “Sardi Julio César vs Federación Metropolitana de Handball” Cuadernos de Derecho Deportivo N° 6/7, Page 318.

14 LL 1992-D, 211.

15 CNTRab, Chamber I, 22/3/1993.

presumed allowances were four times higher than the Minimum, Living and Mobile Wage, as it included the same adjustment clauses, the absence of expense receipts and the receipt of bonuses, which are considered a part of remuneration in the rules that regulate the activity of professional footballers.

In another verdict¹⁶, a minority vote also accepted that this was a salary and not an allowance, based on the sum paid and the regularity of its payment.

The issue was also discussed of whether the payment of allowances by the respondent, the absence of expense receipts, can be considered as proof of the existence of an employment contract.

Bearing in mind the provisions of Art. 106 LCT, whereby “allowances shall be considered remuneration, with the exception of the part actually spent and accredited with receipts, unless otherwise provided in professional statutes and collective bargaining agreements”.

Some verdicts have accepted that the absence of expense receipts is sufficient evidence to accredit an employment relationship: “the affirmations whereby players received allowances are not backed in any way, and it has not been evidenced, even by an accounting expert, that receipts for those allowances were recorded.”¹⁷

A different appreciation was accepted in “Turzi Gerardo Damián vs Club de Amigos Asociación Civil on Dismissal”¹⁸, in which the Court said that, if the existence of an employment relationship was dismissed, the provisions of Art. 106 LCT are irrelevant.

It was also discussed whether there can be an economic subordination when the presumed employers are civil non-profit-making associations.

Here, it was said¹⁹ that notwithstanding the existence of an employment contract, the fact that the employer pursued profit-related aims, by virtue of Art. 5 of the LCT (“For the purposes of this Act, “enterprise” shall be the organisation that is instrumental in personal, material or intangible means, ordered by management to obtain economic or profit-related purposes...”), added to which is the fact that gratuitous work is not presumed.

Coincidentally, Humberto A. Podetti, in his opinion as General Employment Procurator to the plenary “Ruiz, Silvio R. vs Club Atlético Platense”²⁰ said that the enterprise, albeit non-profit-making, exploits sport with that intention and, quoting Cabrera Bazan, that it can be considered as an enterprise at least from the employment perspective. He also recalls what was said by Benito Pérez, to wit, that the affirmation that clubs are non-profit-making enterprises is not convincing, because in addition to sporting success, they seek to attract the public to witness the sporting event, thus obtaining significant proceeds. He also mentions Spota’s opinion, inasmuch as clubs assume the legal status of businessmen vis-à-vis spectators.

In the same way, it has been said that the professional quality of a sportsman cannot be subject to the discretion of the club, but will result from the performance of conditions deriving from the common employment system and the particular statutes that may apply²¹.

On the other hand, it has been said that, in the case of an amateur enterprise, the profit-making purpose can be seen, given that relatively small funds are handled, which are generally insufficient to sustain that sporting activity²².

That criterion seems to be adopted by the CSJN, in “Traiber”²³ where it is said that it is relevant to analyse whether the sporting activity is performed in the amateur sphere, whether it is a deficient practice, that must be subsidised by other club activities, as well as the analysis of the relative economic impact on sponsoring and television broadcasting contracts.

There is a similar problem in cases where the club or association statutes expressly forbid sportsmen to perform for remuneration.

Should a similar situation arise, it could be understood that the sportsman, as a member of the club or association, has voluntarily accepted the obligations and conditions set forth in the respective statutes, which he would subsequently be unable to challenge inasmuch as he would be contradicting a prior own act.

But from another perspective, the possibility would exist whereby that affiliation was not voluntarily but conditional, given that if the

sportsman did not accept the regulations is possibilities to access top competition would be limited.

At the same time, we would be facing an employment contract with a forbidden object, in the terms of Art. 40 LCT (“the object shall be deemed forbidden when legal or regulatory rules have forbidden the employment of determined persons or in determined tasks, seasons or conditions. Prohibition of the object of the contract is always addressed at the worker”), bearing in mind that in such cases nullity does not affect the worker, who remains able to claim the rights to which he is entitled, in which event statutory rules could not be opposed against the sportsman.

Among the verdicts that do not accept the employment relationship based on that circumstance, we can find the following:

“At the same time, we can stress the fact that the Argentine Football Association forbids the formalisation of remunerated contracts with players does not represent an obstacle to acceptance of the employment bond”.²⁴

Similarly, the minority vote of Dr Corach in “Pérez Rodríguez Mariano Federico Miguel vs Club Atlético River Plate Asociación Civil on Dismissal”²⁵ states that acceptance of the statutes by the sportsman cannot be deemed binding: “Conditional acceptance of the Regulation and the Statute of the Metropolitan Volleyball Association curtails his free election and he cannot therefore consider a free and mutual relationship”.

That criterion is not unanimous in jurisprudence.

Thus, it was said that “the amateur sports relationship arose from the mutual and free wish expressed between the parties” given that “no evidence was provided in the proceedings to accredit the defect of will that was timidly mentioned”²⁶

The binding nature of the statutes in this regard was also accepted in “Quaini, Guillermo vs Club Atlético Vélez Sarsfield Asociación Civil on Dismissal”²⁷ and in “Turzi Gerardo Damián vs Club de Amigos Asociación Civil on Dismissal”²⁸, where it was also said that if it was intended to invoke non-opposability of the statutes, this should be done in the claim because otherwise, it would represent an extemporaneous challenge.

In one way or another, the CSJN said in “Traiber” in “Aballay Oscar Enrique vs Federación Regional de Básquetbol de Capital Federal”²⁹ that the judgment issued could not fail to analyse the possible statutory prohibition on professional practice, otherwise it would incur in a case of arbitrary judgment.

It should also be studied whether there can be economic subordination in the event that a sportsman has income other than the allowances paid by the club. It is important to bear in mind that the statutes of enterprises that purport to be amateurs usually impose on sportsmen the need to have an extra-sports economic activity.

It is worth mentioning a verdict that dismissed the possibility that dependent work exists in these cases:

“The remuneration paid is not strictly for living expenses but essen-

16 “CNTrab. Chamber X, 19/5/2004 “Pérez Rodríguez, Mariano Federico Miguel vs Club Atlético River Plate Asociación Civil on Dismissal” eDial AA21F8.

17 CNTrab, Chamber IX, 27/04/2006 “Rodríguez, Jorge Alberto et al vs C.M. Fútbol S.A. et al on Dismissal”, eDial - AA352F.

18 CNTrab., Chamber II, 28/4/2003.

19 C3aLabParana, Chamber I “Rosas Marcelo C. vs Club Atlético Patronato Juventud Católica” LLLitoral 1998-1, 790.

20 CNTrab., in plenary, 15/10/1969, LL 136, 440.

21 “Lerose, Claudio Fabián vs Club Atlético Excursionistas Asociación Civil on Dismissal”, CNTrab, Chamber I, 22/3/1993.

22 SC Mendoza, Chamber II, 8/2/2005

“Perugini, Eduardo H. vs Liga Mendocina de Fútbol” LL Online.

23 CSJN, 4/7/2003 “Traiber Carlos Daniel vs Club Atlético River Plate Asociación Civil” eDial AA1A8A.

24 CNTrab, Chamber IX -27/04/2006 “Rodríguez, Jorge Alberto et al vs C.M. Fútbol S.A. et al on Dismissal”, eDial - AA352F.

25 “Pérez Rodríguez Mariano Federico Miguel vs Club Atlético River Plate Asociación Civil on Dismissal”, CNTrab. Chamber X, 19/5/2004, eDial AA21F8.

26 “Pérez Rodríguez Mariano Federico Miguel vs Club Atlético River Plate Asociación Civil on Dismissal”, CNTrab. Chamber X, 19/5/2004, eDial AA21F8.

27 CNTrab. Chamber VII, 18/2/2004.

28 CNTrab., Chamber II, 28/4/2003.

29 CSJN, 30 April 1996.

tially a mere acknowledgment of the time dedicated to that activity (...) there are no employees whose sole and principal livelihood is refereeing. This is merely circumstantial, and absolutely complementary vis-à-vis a normal *modus vivendi* that is generally obtained from another job. The economic reasons for the relationship are diluted for both parties in the profit-making aim of the enterprise and the exclusivity of livelihood and sustenance for the referee”.³⁰

From another perspective, it could be said that the sportsman begins to turn professional from the time allowances become earnings, albeit in the form of a complementary income. According to Dr Guibourg, (in a dissident vote) “if a sportsman had to be compensated for lost working hours, for example, this would be equivalent to replacing one job by another. Were remuneration to be accepted as another means of livelihood of the sportsman, this would be tantamount to contracting a part-time job. It is one thing for the sportsman not to incur work-related expenses (which ceases to be an exception to the principle whereby everyone pays the cost of his own training sessions) and quite another for sport to leave the sportsman with a more or less systematic and permanent economic difference”³¹

Here, the Supreme Court has said that the requirement that weighs over the sportsman with his own means of subsistence must necessarily be analysed by judges unless they wish to issue an arbitrary judgment.³²

We must also say that some verdicts³³ have said that there can be no economic subordination in those cases where a sportsman, to perform his activity, must pay a duty, a qualifying licence or an examination fee. According to the Supreme Court in “Aballay”, that fact should not be underestimated.

4.2 Technical subordination

Two issues arise here. The first is whether a sportsman’s autonomy to specifically perform his activity is contradictory to the notion of dependent work. And the second consists in determining whether subjection to a sports regulation implies the existence of this type of subordination. Regarding the first issue, it is evident that in the case of referees, technical managers or sportsmen, technical dependence must be attenuated, based on the specialisation required for those activities.

Thus, it has been said that:

“It is obvious that the technical characteristic of the claimant in respect of the respondent is attenuated because, coincidentally, given the technical specialisation of the claimant -albeit an amateur- is that he was contracted. Accordingly, the fact that García did not receive instructions from the Management Committee of the Club was not opposed to the relationship of dependence, because the latter had control and could make all general organisational provisions for the activity”.³⁴

With regard to the second issue, it was decided that if the referee had to observe a regulation, this did not imply technical subordination: “Submission to that regulation cannot be compared with technical subordination because this is exclusively a regulatory framework for the activity but does not allow the enterprise to issue instructions, guidelines or orders to the referee once he has agreed to act in a boxing event, unlike what occurs in an employment contract whereby, in addition to observing the regulatory rules that may exist, there is a specific hierarchical control by the principal over the dependent”³⁵

4.3 Legal subordination

First of all, we must say that the CSJN, in the “Traiber” case already mentioned, said that the ties between the sportsman and the club are only acceptable in a context of strict volition, and are unacceptable in the framework of contractual imposition inasmuch as they would represent a true *jus corpore*.

We can only disagree with that criterion, which is totally alien to the way professional sport is practised nowadays. Were we to accept that criterion, this would imply no less than the unlawfulness of all sports contracts.

The argument given by the Court was effectively refuted by Dr López in his vote in the plenary “Ruiz, Silvio R. vs Club Atlético Platense”. There, he said that “the discipline accepted by an amateur payer is not “the result of a contractual imposition”, but “Discipline is precisely a contractual obligation. He does not perform his sports activity as an amateur, nor as a club member or supporter, but is hired to do so” and “If that contractual submission were constitutionally unacceptable (Art. 15, National Constitution), this would simply mean that the contract whereby this existed would be unlawful, and I do not assert this personally but as a hypothesis. Hence (...) only by arguing the unlawfulness of the obligatory relationship can it be denied that this is an employment relationship, based precisely on the extreme subordination imposed on professional players.”

The next issue entails deciding whether sport practiced by an athlete and the duties accessory thereto (training, wearing a uniform, obeying the orders of the coach, observing pre-established timetables) does or does not imply the existence of an employment contract.

We can find an affirmative response in “Rosas Marcelo C. vs Club Atlético Patronato Juventud Católica”³⁶ where it was considered that determined duties that only existed in the claimant’s mind were characteristic obligations of the employment contract. Among these were:

- 1- That the services provided as technical manager with the undertaking to create competitive teams this represented for the aims of the club, committed to the practice of sport (concordantly, in “García, Juan vs Club Sportivo Talleres”³⁷, it was said that subordination could be verified from the time the claimant, with his activity, made it possible for the respondent to achieve its objective insofar as participation in football, and that he performed duties for an external organisation, placing his energy at the service of that club objective.)
- 2- That to do so, he had to observe a series of obligations, to which he dedicated hours and days of training.
- 3- That he had to report on his management to the corresponding sub-committee.
- 4- That he had to explain his absences from practices and matches.

Using a similar criterion, in “Rivas Mario A. vs Club Atlético San Telmo Sociedad Civil”³⁸ the following facts were considered relevant evidence of the existence of an employment bond:

- a) That footballers were exclusively bound towards the club as they were registered in the AFA as members thereof .
- b) The obligation to attend training sessions.
- c) That this was a personal and infungible service provision.
- d) Independently of the characterisation made in Act 20160 of a professional footballer, there may be situations in which amateur players, when receiving remuneration and being subject to the disciplinary and hierarchical power of the enterprise to which they belong, may be qualified as workers.

That type of reasoning is not unanimously accepted by jurisprudence.

In “Sardi vs Federación Metropolitana de Handball”³⁹, quoting De Bianchetti, it was said that amateur sports activity shows characteristics in common with professional practice. In both fields, we can find a personal and infungible service provision, in which the sportsman voluntarily submits to a sports regulation, and to the disciplinary power of the club and federation in question. Given the very nature

30 SC Mendoza, Chamber II, 8/2/2005 “Perugini, Eduardo H. vs Liga Mendocina de Fútbol” LL Online.

31 “Escola, Norberto Carlos vs Federación Regional de Básquetbol de Capital Federal on Dismissal”. CNTrab., Chamber III, 31/3/2004, Cuadernos de Derecho Deportivo N° 4/5. Page 284.

32 See verdicts on “Traiber” and “Aballay” quoted above.

33 See Escola, Norberto Carlos vs Federación Regional de Básquetbol de Capital Federal on Dismissal”. CNTrab.,

Chamber III, 31/3/2004, Cuadernos de Derecho Deportivo N° 4/5. Page 284.

34 “García, Juan vs Club Sportivo Talleres”LLC 1995, 1030.

35 “Ilvento, Raúl Alberto vs Federación Argentina de Box Asociación Civil et al on Dismissal”, CNTRab., Chamber X, 12/7/2006, eLDial -AA371B

36 LLLitoral 1998-1, 79

37 LLC 1995, 1030

38 LL 1992-D, 211

39 CNTrab., Chamber III, 18/5/2005, Cuadernos de Derecho Deportivo N° 6/7, Page 318.

of the activity, both the amateur and the professional are obliged to train and to be at the disposal of the club, and this availability can be construed as the authority of the sports enterprise to determine the time, form and place where the player is to perform his activity. It would also lend a touch of exclusivity, given that the player, as a matter of loyalty, could not play for any other club. The verdict also mentions that other common characteristics would arise from the need to attend perfecting courses (the verdict refers to a referee), medical examinations, wear a uniform, observe regulations. It concludes by saying that those circumstances are not *per se* indicative of the existence of an employment contract, but are typical of the sports activity and its organisation.

In another antecedent, it was said that if a player receives a grant from the club, whereby he must attend training sessions, wear the apparel provided by the club and obey the orders of the coach, it can be said that this conduct corresponds to a trainee⁴⁰

Referring again to what the CSJN decided in “Traiber”, it was emphasised that the subjection that results from registration in the federation and incorporation in a federated enterprise, the requirements for timetables, place, practice conditions, exclusivity in representation of a club and the obligation for medical examinations, are imposed for the sake of order and scheduling, and are similar in all sports disciplines.

Regarding the existence of disciplinary tribunals, it has been said that their existence does not represent proof of an employment bond, inasmuch as it only penalises infringements of a sports regulation and not default on the orders of a superior, in the same way as an employment contract.⁴¹

It was also said⁴² in a minority vote that the disciplinary system, inasmuch as it authorised the coach to discount a part of sums received as allowances from those who were absent from a training session or who failed to observe timetables, implied proof of the existence of a relationship of dependency, given that those authorities exceed the fair limits to be observed by the majority of coaches in any sports discipline. Meanwhile, the majority vote indicated that the coach's authority to control attendance was no more than a logical

consequence of the importance of training sessions to achieve and maintain a high sporting level.

Another issue arises in cases where the bond between the sportsman and the club was not registered at the pertinent association. It was said that such a situation could have the pertinent sporting consequences, but this did not hamper the existence of an employment bond.⁴³

We will refer below to some cases in which the existence of an employment bond was dismissed.

It was considered that there was no subordination in the case of a referee who, although designated by a committee to perform his duties, was not obliged to accept the designation, and was not compelled to act at all events for which he had been selected, and it was thus accredited that the referee reserved administration of his own time, which is not typical of an employment contract.⁴⁴

The existence of an employment bond was also dismissed in a case where, during the life of the presumed employment contract, the player performed for other clubs in Italy, Greece and Brazil⁴⁵. In that case, it was added that that the issue should not be analysed from the individual situation of each player, but using the generic modality in which a determined sport was played was the determining factor, as well as the content of the legal rules by which it is regulated. It also asserted that all sports activity is, in essence amateur, and professionalism is an exception.

40 “Turzi Gerardo Damián vs Club de Amigos Asociación Civil on Dismissal” CNTrab., Chamber II, 28/4/2003

41 “Ilvento, Raúl Alberto vs Federación Argentina de Box Asociación Civil et al on Dismissal”, CNTRab., Chamber X, 12/7/2006, eIDial -AA371B

42 CNTrab. Chamber X, 19/5/2004 “Pérez Rodríguez, Mariano Federico Miguel vs Club Atlético River Plate Asociación Civil on Dismissal” eIDial AA21F8

43 “Lerose, Claudio Fabián vs Club Atlético

Excursionistas Asociación Civil on Dismissal” CNTrab., Chamber I, 22/3/1993

44 “Ilvento, Raúl Alberto vs Federación Argentina de Box Asociación Civil et al on Dismissal”, CNTRab., Chamber X, 12/7/2006, eIDial -AA371B

45 “Quaini, Guillermo vs Club Atlético Vélez Sarsfield Asociación Civil on Dismissal” CNTrab. Chamber VII, 18/2/2004

ANNOUNCEMENT

ISLJ welcomes Andy Gray to its Advisory Board

Andy Gray is a very experienced sports lawyer and acts as in-house Head of Legal Affairs to the UK sports governing bodies for swimming, British Swimming and Amateur Swimming Association. In addition he has academic/training interests in sports law and is Head of the newly established Sports Law Unit at Leicester De Montfort Law School. He also acts as Sports Regulatory Consultant to Brabners Chaffe Street, Solicitors whose clients include world and UK domestic governing bodies.

He advises on a broad range of commercial, disciplinary and regulatory issues with both a national and international dimension, with a particular interest in sports governance, doping control and child protection. He has been involved in design and delivery of the new leading edge LLM in Sports Law and Practice (by distance learning) programme at Leicester De Montfort Law School.

The course which is now recruiting for its second cohort (September 08 intake) enables students to study from amongst the following modules

The Sports Regulatory Regime and Sports Rights
Sports Governance
Representing the Athlete/Player
Event Management
The Sports Participant and the Courts
Commercial Aspects of Sport
Sport and Ethics (Advanced)
Sport Broadcasting and New Media

Professor Ian Blackshaw, Contributing Editor of the ISLJ and Honorary Fellow of the TMC Asser Instituut has joined the Unit as International Consultant and will be working with Andy Gray in the development of the LLM programme.

The Olympics, China and Human Rights*

by Robert Siekmann**

Introduction

Just as in 1978, when two well-known Dutch cabaret performers were the first to call for a boycott by the Dutch national football team of the FIFA World Cup held in Argentina, the present discussion about a possible boycott of the upcoming Olympic Games in Beijing was also initiated by a cabaret artist interested in football. In both cases, human rights violations by the host nation are taken as an argument in favour of a sports boycott. In the case of China, the issues specifically include use of the death penalty, the torture of prisoners, administrative detention, the violation of the freedom of speech (including freedom of the press) and religious freedom, the violation of minority rights and the intimidation and arrest of human rights activists. In addition, critics denounce the expropriation of land to free up space for the construction of facilities for the Games without offering satisfactory compensation. They also condemn the policy of the People's Republic with respect to Africa, pointing towards the Chinese support for the regime in Sudan (the Darfur question). The recent developments in Tibet, however (the protest demonstration and their violent suppression), formed the incidents that truly brought the debate about a possible boycott of the Olympic Games to the fore.

What does a comparison of "China" and the case history and possible precedents from the past teach us with regard to international sports boycotts? Who can take action in this context; and in which way; taking which action? What is possible, what is allowed? What is reasonable? To answer these questions, I will pass the various possible international and national actors/stakeholders in revue, starting with the United Nations, the European Union and the Dutch government on the one hand, the IOC, the Dutch National Olympic Committee (NOC*NSF) and the individual Dutch Olympic competitor (athlete) on the other. Of course, China's responses will also be included in this summary.

United Nations

Statements made by the Security Council offer no foundation for a (binding) collective sports boycott. There is no case of a military intervention in Tibet. Tibet is a part of China, not an independent state; it is not a member of the UN and is not recognized as such by the international community. In other words, non-intervention in a state's internal affairs should be the primary aim, unless the Security Council were to qualify China's actions in Tibet at the very least as a threat to international peace and security, in accordance with Chapter VII of the UN Charter. This, however, is purely theoretical - an unreal conjecture. There is nothing that would suggest such a decision being reached. Indeed, "Tibet" is not on the Security Council's agenda. Furthermore, as a permanent member of this body, China would veto any resolution in this direction.

The violation of human rights in China is even less likely to inspire a UN boycott. According to the annual report dealing with human rights violations throughout the world (2007 edition), the United States no longer considers China one of the worst offenders in the area of human rights. While the situation is bad, some progress is being made, and there have been various major legal reforms. At present, the People's Republic falls under the category of authoritarian regimes that are experiencing economic reforms and rapid social reforms, but are not yet implementing democratic political reforms. However, according to human rights organisations like Amnesty International, things have actually worsened in the run-up to the Olympic Games.

UN Secretary General Ban Ki-moon has expressed his concern

about the violence in Tibet, and called on China to practice restraint in this area. As has the US Secretary of State Condoleezza Rice, who has urged China to speak with the Dalai Lama, the Tibetan spiritual leader and political leader-in-exile, in order to arrive at a peaceful solution for the Tibet question. The Chinese Premier Wen Jiabao and the Dalai Lama have expressed their willingness to enter into dialogue under certain conditions. Speaking to the United States Congress in October 1987, the Dalai Lama had already dropped his demand for independence for Tibet (trading separation for more autonomy and a stop to "cultural genocide"). The Dalai Lama does not begrudge China its Olympic Games and is consequently opposed to a sports boycott.

The current debate completely ignores United Nations Resolution 62/4, adopted by the General Assembly on 16 November 2007. This resolution, which deals with the Olympic Truce during the Games in Beijing² appears to offer a sports-related handle - for diplomatic actions at any rate that focus specifically on the situation in Tibet. This resolution also refers to the "harmonious development of society" as one of the official objectives of the Chinese Olympiad, applauds the decision of the IOC to mobilise international sports organisations and the National Olympic Committees to undertake concrete actions at the local, national, regional and global levels to promote and strengthen "a culture of peace and harmony based on the spirit of the Olympic Truce" and calls on all member states to cooperate with the IOC to use sport as an instrument to promote peace, dialogue and reconciliation in areas of conflict during and after the period of the Games. And finally, the UN Secretary General is also asked in general terms to take action in the context of this resolution. China, however, is of the opinion that it is the Dalai Lama who has disrupted "the harmony between peaceable nations" in this Olympic year!

European Union

The European Union has expressed its concerns about the situation in Tibet. It would be possible in principle to organise a sports boycott in response to human rights violations in China. In all fairness this would be a disproportionate reaction, however, because there has been no sudden escalation of such violations recently. "Tibet" is a different matter. It is currently being discussed whether the heads of state and government leaders of the EU member states should boycott the opening ceremony of the Games. France in particular (Sarkozy) has not ruled out this gesture in protest of the Chinese actions in Tibet.

The Netherlands

The Dutch Ministers of Foreign Affairs and Health, Welfare and Sports have expressed their concern about the situation in Tibet to their Chinese counterparts, using both "silent diplomacy" and other channels. In practical terms, this means that the Netherlands is following the same route as the European Union and the United

* This paper was presented on 26 March 2008 at Radboud University Nijmegen during a conference organised by the European Law Students' Association (ELSA).

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1 Reference is also made to the section "History" in this issue for my article "De sportboycot van Nigeria: sport, poli-

tiek en mensenrechten" ("The sports boycott of Nigeria: sports, politics and human rights") in *Internationale Spectator* (1998) pp. 400-405, which is published in an English version for the first time.

2 Reference is made to the text of the Resolutions dealing with the Olympic Truce in the section "Documentation" in this issue.

Nations. The crown prince, Willem-Alexander, who is also a member of the IOC and who operates under ministerial responsibility, expressed his concern on the website of the Dutch Royal Family about the developments in Tibet. In the prince's opinion, parties should strive for a peaceful solution that is characterised by respect for human rights and that takes the position of all communities into account.

IOC

According to the Olympic Charter (see "Fundamental Principles of Olympism"), one of sport's purposes is to promote a peaceful society concerned with the preservation of human dignity. In this context, one can also turn to the aforementioned UN Resolution 62/4, which also refers to a decision made by the IOC regarding this matter. This justifies a public statement by IOC President Jacques Rogge, who expressed his serious concern about the situation in Tibet. He has also announced his intention to engage in "silent diplomacy" in order to improve the human rights situation in China. The IOC is not the UN of sports, however: "If we start involving ourselves in politics, we will impede all the people of the world in coming together through sport," Rogge explained.

According to the Chinese government, people and organisations who take the Olympic Games as an opportunity to criticise the human rights situation in China are violating the Olympic Charter, which demands that the Games will not be used for political purposes.

NOC*NSF

On 14 March 2008, the NOC*NSF issued an official Statement regarding Beijing 2008 (for the full text, please refer to Annex I). The Olympic Games are also a platform for debate that is utilised by all sorts of non-sports-related parties in the run-up to the event, leading to public discussions about China that focus among others on political issues and human rights. The NOC*NSF itself also participates in such debates when they focus on sports. According to the Statement, "various athletes, coaches and administrators will be making their own comments about China. These statements are strictly in a private capacity and are evidence of these individuals' personal social involvement." In this context, one can also consider the coach of the national swimming team, Jacco Verhaeren, and his pupil, triple Olympic swimming champion Pieter Van den Hoogenband, who appealed to the IOC to speak out on the human rights situation in China, as the individual athletes should not be burdened with the political discussions. Furthermore, the NOC*NSF Statement also says that in their own field, sports can make a difference, for instance with respect to labour conditions in the manufacture of the clothing and shoes worn by the Dutch Olympic Team (the "Clean Clothes Campaign" combating child labour).

Erica Terpstra, President of the NOC*NSF, has stated that sport should not be politicised. Nevertheless, sport does not exist in a vacuum either; it is an integral part of society. In that context, she considers it pure gain that the Olympic Games have generated so much interest in the human rights situation in China (she made this statement during the public roundtable conference dealing with "China, the Olympic Games and human rights", which the Ministry of Foreign Affairs organised in The Hague on 17 January 2008). On a later occasion, the NOC*NSF President called on China to arrive at a quick, peaceful solution to the situation in Tibet, but added that everyone needed to leave the athletes alone - it is up to the political establishment to take up a position.

In 1982, the Netherlands Sports Federation (Nederlandse Sport Federatie (NSF)), the predecessor of the NOC*NSF, issued the document *Uitgangspunten sport en politiek* ("Principles with respect to Sports and Politics"), which was intended to serve as the basis for the organisation's dialogue with the Dutch government about possible sports boycotts etc. (for the full text, please refer to Annex II). This document is no longer effective. Nevertheless, it is interesting to assess the NOC*NSF's current position against these Principles. One of the assumptions of the former document was that the main issue would be sport-related contacts with countries with a "controversial regime",

with particular emphasis on countries involved in military aggression (for example, the sport boycotts of the "small" Yugoslavia, and the Moscow Olympics of 1980) or in serious and systematic human rights violations (for instance, the sport boycotts of South Africa and Nigeria). Preferably, the situation should also include a negative ruling by an international political institution like the United Nations. Do such criteria also apply to China with respect to its actions in Tibet and internal human rights violations? Tibet: there is no case of aggression (see above). Human rights: this criterion does not apply either (China has not been condemned by either the United Nations or the European Union on these points).

Individual athlete

The Olympic Rules explicitly prohibit wearing politically charged symbols during the Games themselves or on Olympic locations (so no political statements; no Dalai Lama armbands). We can refer here to the "Black Power" salute made by the African American athletes on the podium during the Olympic Games in Mexico in 1968, which focused attention on the race problem in the US. The complete text of Rule 51 of the Olympic Charter states: "No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas."

In contrast with the other National Olympic Committees, the NOC*NSF does not impose any additional restrictions on the participants' freedom of speech. The participants are allowed to speak out both before, during and after the Games. The NOC*NSF allows the participants to express their personal opinions in interviews and weblogs. The athletes commit themselves in advance to respecting the Olympic Rules (which are in place throughout their appointment). Any athletes not adhering to the Olympic Charter can be suspended for the rest of the Games. These agreements have been set down in the standard contract that each Dutch Olympic athlete enters into with the NOC*NSF.

In response to written questions submitted by the Dutch parliament, the Ministers of Foreign Affairs and of Health, Welfare and Sports have stated in this context that while freedom of speech is universal, Dutch citizens will in principle have to adhere to the laws and regulations of the People's Republic during their stay on Chinese soil.

In closing

At this point in time, a sport boycott of China on the occasion of the upcoming Olympic Games cannot be considered a viable option. There is no support whatsoever for such a measure within the international community. Indeed, there are virtually no points of departure (precedents) to be found in this area in historic cases of sport boycotts up to this point. While sports and politics cannot be taken as fully separate entities, in terms of international relations, the two do have separate responsibilities. There are no "athletic" reasons to boycott Beijing 2008. In the case of the sport boycott of South Africa, for instance, the situation was quite different, because like any other community in that country, the South African athletic community could not disentangle itself from the consequences of apartheid as an explicitly codified system of racial segregation and discrimination. If politicians wish to take action in non-sports-related cases, however, they will have to use the legal instruments and other means that are at their disposal on their own authority, without relying - or indeed being allowed to rely - on the cooperation of the athletic community. Naturally, such cooperation can be expected if the regular or trade boycott has a general status and as such automatically encapsulates sports activities.

Sports should not be an excuse for politics, should not be elevated to the position of policy spearhead. The "specificity of sport" in this area indicates precisely that sports have an emphatically non-political purpose. In democratic societies, this specific quality of sport (its autonomy) should enjoy maximum safeguarding by public authorities. In the case of China, statements made by our politicians and diplomats - whether or not expressed in public - would appear to be the only realistic option open to us to promote human rights in the context of the Beijing Olympiad. A "political" boycott of the Games'

opening ceremony by heads of state and government leaders could be a fitting gesture to spherically denounce the present situation in Tibet.

Annex 1

Statement NOC*NSF Beijing 2008

This year, the Netherlands will be taking part in the Summer Olympic Games and the Summer Paralympics, which will both be held in China. The Olympics are the most glorious event in international sports. Dutch athletes and coaches and a large proportion of the Dutch public are eagerly looking forward to the Games.

The NOC*NSF is responsible for sending out the Olympic and Paralympic Teams. The NOC was set up for this purpose in 1912. We are proud of this core task and we prepare ourselves as thoroughly as possible - a process of years in which we are supported by the Dutch government - to give the best possible performance during each new edition of the Games. Our aim is to earn the Netherlands a place among the top 10 (Olympics) and 25 (Paralympics) countries in the respective national rankings.

In 2001, Beijing was awarded this year's Games on the basis of the strong quality of its sport bid. For the Chinese, hosting the 2008 Games entails development in a wide range of areas. In the area of sports, the IOC oversees the arrangements, to ensure that the athletes in 2008 will be able to achieve maximum performance under optimum circumstances.

The Olympic Games are not only the largest multi-sports event in the world. For over a century, the Games have also helped different cultures to get to know one another better. The 2008 Games will be taking place in a country that has a rich diversity of cultures, both in the past and today.

Public debate

China is 'unfamiliar', and for many outsiders it is still unknown ground. There is widespread interest in the country as a result of the 2008 Olympics, and the event features prominently in many people's agendas. The Games are also a platform for debate that has been utilised by a variety of non-sports-related parties in the run-up to the event. Both in the Netherlands and abroad, this edition of the Games has given rise to a public debate about China. This debate centres on political issues, human rights, economic developments, the Chinese culture, norms and values, the environment, education, sports, etc.

The NOC*NSF is aware of the issues existing beyond the realm of sports and welcomes public debate about China. The NOC*NSF itself participates in such debates where they focus on sports, the preparations for the Games and our delegation. On what happens on the field, in the hall, on the road, in the arena, on the track or in the pool.

Various athletes, coaches and administrators will be making their own comments about China. These statements are strictly in a private capacity and are evidence of these individuals' personal social involvement.

Social effects

Sports are all about the participation in and organisation of athletic activities. Sports have an influence within their own domain. Sports can also make a difference within their sphere of influence, for instance with regard to labour conditions in the manufacture of the clothing and shoes worn by the Dutch Team. Sports are also responsible for the participants' adherence to the rules and for honouring values such as mutual respect, solidarity and fair play within the sporting activity.

Outside its domain, sports have various valuable effects that derive from their practice and organisation. In the Netherlands, for example, sectors like health, integration and education all benefit from sports, which make ongoing investment in sports a very rewarding policy.

The 2008 Games will also have social effects. What the consequences of the Olympics for developments in China will be is difficult to determine at this stage, because such processes often take years to run their course.

In 2008, the Netherlands will be participating in the Games, which

without a doubt will once again be impressive, challenging and innovative. Despite the great differences between our various societies, the rules on the field are the same for everyone. Athletes practice sports. With each other and against each other. That's what makes sports so great and so unique.

Annex 2

NSF "Basic Principles Concerning Sport and Politics"

1. International sports organisations promote human contacts - irrespective of race or religion - which transcend political borders. The world of sport enables representatives from all countries to meet one another to an extent which is hardly ever achieved outside sport. This may be regarded as a valuable tool in our struggle for more understanding among nations. However, it can be argued that large-scale international sporting events that attract spectators worldwide can easily become a target for nationalist tendencies and political interests. They can be used for purposes of prestige by the organising countries, and this can cause considerable tension, particularly if it happens in countries with a controversial regime.
2. It is appropriate within relations in the Netherlands that political bodies create conditions in which sports organisations can exercise responsibility in fulfilling their sporting functions. When fulfilling such functions, these sports organisations must give an account of the responsibility arising from the relationship between society and the world of sport. At international level it is appropriate that political bodies that bear national responsibility express an opinion concerning conduct in the field of sport, for example. With due regard for personal responsibility concerning sport, this opinion could imply that a certain course of action should not be pursued.
3. Generally speaking, it is acknowledged that certain actions cannot be enforced by international political bodies. International sports organisations, on the other hand, generally have the option of sanctions, which can serve to influence certain conduct on the part of their members.
4. The Dutch government and/or parliament may consider it desirable to express the opinion that representatives of Dutch sports organisations should refrain from taking part in actions of a political nature when participating in international sporting events.

As a last resort, the Dutch government and/or parliament may consider it desirable to express the opinion that representatives of Dutch sports organisations should refrain from exposing themselves to political use and should refrain from participating in certain sporting events. These statements will carry more weight for sport if the government and/or parliament:

- argue(s) convincingly that the sportsmen and sportswomen are being used for political purposes outside the Netherlands;
 - demonstrate(s) a certain political consistency partly based on a wide political majority; concur(s) with the opinion of an international political body;
- indicate(s) whether any resources are being utilised to achieve the political objective, and if so, which resources are employed herein;
- has/have tested the efficacy of the measure; taking due account of the sportsmen's and sportswomen's interests and of the obligations arising from membership in an international sports organisation and of any other obligations which have meanwhile been assumed. In the case of European and World Championships, Olympic Games and the necessary qualifying rounds, these obligations will be greater than in the case of friendly competitions.
5. The Dutch sports organisations will hold consultations at NSF level on future international sports meetings. Measures must also be taken to enable consultations to be held in good time between organised sport and the government (Ministry of Culture, Recreation and Social Services and Ministry of Foreign Affairs). These consultations can prevent the parties concerned from presenting each other with *faits accomplis*. A structure will (gradually) have to be found for both types of consultation.

6. These consultations must be conducted solely in the case of sporting contacts in and with countries with a controversial regime. Such countries can be divided into the following categories:
 - a. countries which carry out acts of military aggression against other countries;
 - b. countries subjected to a general international boycott;
 - c. countries where serious and systematic human rights violations occur;
- d. countries in which the universality principle is not enforced (e.g. refusing visas to potential participants).
7. During the ultimate decision-making, in which the relevant sports organisation's responsibility and the Dutch citizens' individual responsibility are respected, the arguments from the consultations held will be taken into consideration.

May 1982
The International Sports Law Journal

The Societal Role of Sport

by Jack Anderson*

Introduction

I would like to thank the organisers, and in particular Dr Richard Parrish of Edge Hill University, for this opportunity. My remarks follow the established pattern of this workshop by opening with some general observations on the White Paper and then moving towards the specific remit of my commentary: that of the societal role of sport. My comments will focus on the social and cultural aspects of recreational sport rather than the economic and legal aspects of elite, professional sport. The emphasis will be on the manner in which the White Paper might, in the true spirit of Pierre de Coubertin, facilitate greater levels of active participation in sport thus reversing recent trends, which are indicating a regrettable tendency towards the "passive consumption" of sport.

1. General Remarks on the White Paper on Sport

Commenting on "The Helsinki Report on Sport",¹ Professor Stephen Weatherill remarked that it represented an important attempt by the EC Commission to step beyond "accidents of litigation" and instead shape a framework for understanding how, why and, most importantly, WHEN, EC law applied to sport.² In other words, a core aim of the Helsinki Report was to help clarify EC law's application to sport. In that, Weatherill declared, the Report was not unsuccessful, particularly in its attempt to separate out the categories of sporting practice that are outside the reach of EC law (such as the purely sporting rules) from those which are within the scope (though not necessarily incompatible with) EC law.³ I agree that the Helsinki Report was a helpful starting point. The Helsinki Report was also a considered one, as illustrated by the observation that the fundamental freedoms guaranteed by the EC Treaty do not generally conflict with the regulatory measures of sports associations, provided that those internal measures can be objectively justified, and are seen in operation to be non-discriminatory, necessary and proportionate.⁴

From that observation, it can be implied that where a "sporting" breach of EC law arises there remains, on a case-by-case basis, the need to conduct a detailed examination of the extent to which the sporting practices at issue are supported and underwritten by the principles of objective justification, non-discrimination, necessity and proportionality. It is argued that the major criticism of the White Paper on Sport is that it is little more than a restatement of the Helsinki Report. In other words, can it be said that the debate on EC law's application to sport, or more specifically, the Commission's analysis of that debate, has evolved to any recognisable degree since 1999? To be fair to the Commission, the *Staff Working Document*, which accompanies the White Paper, provides a welcome and thorough collation of the extant legal analysis on the applicability of EC law to sport.⁵ Nevertheless, in a broader, policy sense, it appears that EU sports law remains overly dependent on "accidents of litigation", as evidenced most recently by *Meca Medina and Majcen v Commission*.⁶

More specifically, the Commission's observations in the White Paper as to the "specificity of sport" are disappointingly vague and, at times, rather glib. For instance, it is stated at section 4.1:

"The case law of the European court and the decisions of the European Commission show that the specificity of sport has been recognised and taken into account. They also provide guidance on how EU law applies to sport. In line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law."

This paragraph provokes three points of discussion. Firstly, the view that ECJ case law and decisions of the Commission provide guidance on how EU law applies to sport is a somewhat ambitious one. Guidance does not equate to clarity, and what remains outstanding is clarity as to when EC law applies to sport. In fact, one of the features of the *Meca Medina* litigation was the marked divergence of opinion (dare one say, confusion!) inherent in the Commission's, the Court of First Instance's and the ECJ's perspective as to when the rules of a sports body can be seen in a "purely sporting interest" light or when should they be clouded by their "economic effect".⁸ Moreover, the observation by the Commission that the "specificity of sport" will continue to be recognised should read more fully to include "on a case-by-case basis". It is contended that that incremental approach might be appropriate in a purely common-law jurisdiction but in practice it will lead only to the piecemeal and irregular development of European sports law.⁹

Third, the sentiment that existing case law cannot be interpreted so as to justify a general exemption from the application of EU law might be true of itself but the impression is that this is a bit of a sleight of hand by the Commission. The Commission is, in effect, dismissing an application that has not been submitted *i.e.*, not even the

* School of Law, Queen's University Belfast, United Kingdom. This paper was presented at the International Workshop on the European Commission's White Paper on Sport, organised by Edge Hill University, United Kingdom and the ASSER International Sports Law Centre, The Hague, The Netherlands, and supported by The British Council - NWO Partnership Programme in Science, The Hague, 22 February 2007.

- 1 Report from the EC Commission to the European Council, "The Helsinki Report on Sport" (Brussels, 10 December 1999, Com(1999) 644 final).
- 2 S Weatherill, "The Helsinki Report on Sport" (2000) 25 *European Law Review* 282.
- 3 S Weatherill, "European Sports Law: Collected Papers" (2007) 1-2 *International Sports Law Journal* 33 at p.35. This article serves as an introduction to the contents of S Weatherill, *European Sports Law: Collected Papers*

(The Hague: TMC Asser Press, 2007).

- 4 The Helsinki Report, above at note 1, at para.4.2.3.
- 5 EC Commission Staff Working Document, "The EU and Sport: Background and Context" (Brussels, 11 July 2007, SEC(2007) 935), at Annex I (Sport and EU Competition Rules) and at Annex II (Sport and Internal Market Freedoms).
- 6 Case C-519/04P [2006] ECR I-6991.
- 7 EC Commission, "White Paper on Sport" (Brussels, 11 July 2007, Com(2007) 391 final), at para.4.1.
- 8 Note S Weatherill, "Anti-doping Revisited: The Demise of 'Purely Sporting Interest?'" (2006) 27 *European Competition Law Review* 645, and, more generally, E Szyszczak, "Competition and Sport" (2007) 32 *European Law Review* 95 and A Vermeersch, "All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport" (2007) 3 *Journal of Contemporary European Research* 238.



Beiträge zum Sportrecht

Herausgegeben von Kristian Kühl, Udo Steiner und Klaus Vieweg

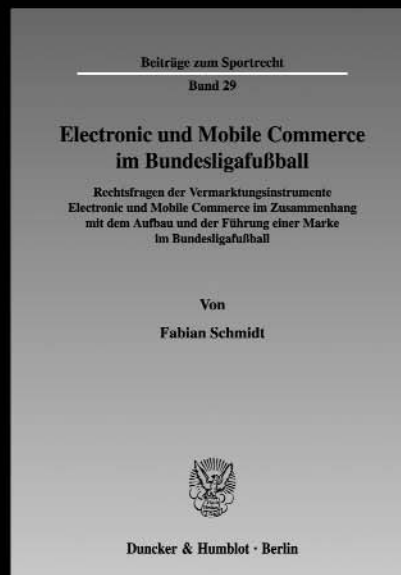
Band 29

Fabian Schmidt

Electronic und Mobile Commerce im Bundesligafußball

Rechtsfragen der Vermarktungsinstrumente
Electronic und Mobile Commerce im Zusammen-
hang mit dem Aufbau und der Führung einer
Marke im Bundesligafußball

Abb.; 355 S. 2007 <978-3-428-12365-0> € 72,-



Football is a Business – Europäische Spitzenclubs wie Real Madrid oder Manchester United haben diese Zeichen der Zeit einer Kommerzialisierung und Professionalisierung des Fußballsports erkannt und nutzen die Medien Internet und Mobilfunk, um die jeweilige Marke weiter auf- und auszubauen, da nur eine starke Marke einen hohen Marktwert bei Sponsoring, Merchandising und beim Verkauf von TV-Rechten verspricht.

Fabian Schmidt stellt erstmals umfassend die Rechtsprobleme dar, die mit der Nutzung von Internet und Mobilfunk im Rahmen des strategischen Markenauf- und -ausbaus im Fußballsport verbunden sind. Eingegangen wird dabei beispielsweise auf die Problematik der Sportwetten im Internet bzw. die mit Klingeltönen und Handy-Logos verbundenen Rechtsprobleme.

Insgesamt werden zahlreiche Rechtsprobleme aus dem (europäischen) Kartell-, Wettbewerbs- und Urheberrecht aufgezeigt, die es zu beachten gilt.

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Beiträge zum Sportrecht

Herausgegeben von Kristian Kühl, Udo Steiner und Klaus Vieweg

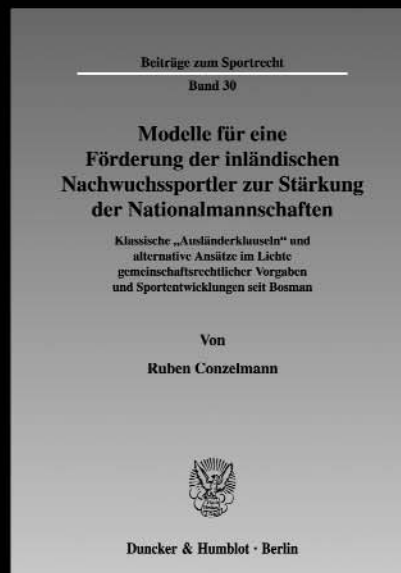
Band 30

Ruben Conzelmann

Modelle für eine Förderung der inländischen Nachwuchssportler zur Stärkung der Nationalmannschaften

Klassische „Ausländerklauseln“ und alternative Ansätze im Lichte gemeinschaftsrechtlicher Vorgaben und Sportentwicklungen seit Bosman

Abb.; 290 S. 2008 <978-3-428-12661-3> € 98,-



Auch Jahre nach „Bosman“ hat die Diskussion um sog. Ausländerklauseln nicht an Aktualität verloren. In einem empirischen Teil stellt Ruben Conzelmann zunächst Sportentwicklungen seit „Bosman“ am Beispiel des Fußballsports dar und erörtert diese. Sodann werden vier Modelle für eine Nachwuchsförderung vorgestellt und auf ihre Vereinbarkeit mit dem Gemeinschaftsrecht untersucht. Im Mittelpunkt der Untersuchung stehen sog. *Mindestkontingente* für einheimische Nachwuchssportler. Ausgangspunkt der Begutachtung ist die bisherige Sportrechtsprechung des EuGH, die stellenweise behutsam weiterentwickelt wird. Gemeinschaftsrechtliche Konfliktlagen tun sich erwartungsgemäß bei den EG-vertraglichen Diskriminierungsverboten und dem Kartellrecht auf.

Im Ergebnis sind moderat bemessene Mindestkontingente im Profisportbereich als gemeinschaftsrechtlich *zulässig* zu bewerten. Die Europäische Kommission und das Europäische Parlament haben in neueren Arbeitspapieren Verständnis dafür signalisiert, dass Sportverbände Maßnahmen der Nachwuchs- und Nationalmannschaftsförderung ergreifen. Rechtlich sind diese Anliegen der Sportverbände in der als Gemeinschaftsgrundrecht gesicherten Vereinigungsfreiheit zu verorten. In jüngeren Entscheidungen des EuGH ist zudem eine stärkere Betonung der Grundrechte im Verhältnis zu den Grundfreiheiten zu beobachten gewesen. Auf der Rechtfertigungsebene wird deutlich, dass sogar der hinsichtlich der Staatsangehörigkeit differenzierende Charakter von Mindestkontingenten ihrer Rechtmäßigkeit nicht entgegensteht.

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most belligerent of sporting organisations, such as UEFA, are credibly seeking a general exemption from the norms of EC law. Admittedly, that “all or nothing” approach has long been part of UEFA’s negotiating stance with the Commission but in reality it is little more than that - a negotiating tactic.¹⁰ UEFA’s legal representatives are cognisant of the fact that there is little chance that an industry as determinedly commercialised, as elite professional sport, will be permitted to operate outside the fundamental freedoms of the EC Treaty.¹¹

What the leading sporting organisations *are* seeking is that the Commission makes some attempt to provide an identifiable and consistent rationale upon which EC law can, in a general sense, be reconciled with the peculiarities of sport. For instance, how can football be permitted in a non-discriminatory and proportionate way to pursue policies such as home-grown player quotas; the enhanced regulation of football agents; collective TV bargaining etc, notwithstanding the scope of the relevant fundamental freedoms of the EC Treaty. The absence of such a rationale, and the present reliance upon the case-by-case approach, is the source of much frustration.¹² That very point - *despite the White Paper there is still a lack of legal certainty* - was made most recently by UEFA’s Director of Communications and Public Affairs (Gaillard), by the General Manager of the European Professional Football League (Macedo de Medeiros) and by the European Parliament’s rapporteur on professional football (Belet) at a European Commission-sponsored conference on the White Paper held in Brussels on 8/9 October 2007.¹³

2. The Future of the White Paper on Sport

Flowing from that general introduction, I wish to make three further points. The first two of which can be dealt with quickly, and concern issues surrounding the influence that the White Paper might have on the development of EU sports law. The outstanding point is has a more specific remit - that of the societal role of sport.

The Competency Lacuna

The first point, and again in a spirit of fairness towards the Commission, is the observation that there is a significant lacuna in the debate on EU sports law - and that is, the lack of constitutional competency. The EC Treaty makes no mention of sport, and read in conjunction with the limitations set out in Article 5(1) of the EC Treaty, this means that the “agenda setting” model for sport in the EU has often been diffused into policy areas such as culture, youth, education and public health to the detriment of substantive, effective and doctrinal legal principle.¹⁴ Of course, since 1974 the ECJ has held that where the organisation or operation of sport constitutes an “economic activity” within the meaning of Article 2 of the EC Treaty, it will fall within the parameters of Community law.¹⁵ The “birth” and subsequent evolution of contemporary EU sports law and policy lies in such landmark judgments.¹⁶ Nevertheless, despite that case law; despite its consequent precedent and principles as to the compliance of sport with the demands of Community law on free movement,

competition law etc; there is no doubt that “sport and the EC Treaty” remains “a tale of uneasy bedfellows”.¹⁷

In addition, it remains uncertain as to how useful the (supporting and complementary competency) references to sport proposed by the (Reform) Treaty of Lisbon will be for the future coherency of EU sports law and policy.¹⁸ On ratification, Article 165(1) of the Treaty on the Functioning of the European Treaty will read: “The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.” This “promotion” is complimented by Article 165(2) TFEU, which notes that Union action shall be aimed at “developing the European dimension to sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.”

The proposed Article 165 contains much that is of symbolic merit especially in its treatment of sport as an official Union policy.¹⁹ Nevertheless, as van den Bogaert and Vermeersch have identified correctly in their discussion of the parallel provision of the ill-fated Treaty establishing a Constitution for Europe, the provision is unlikely to live up to its laudable objectives.²⁰ The Union’s institutions have been granted limited powers only “in order to contribute to the achievement” of the Reform Treaty’s sporting objectives, notably “incentive measures”, which exclude any harmonisation of the laws and regulations of the Member States, and the express limitation of the Council to the adoption of recommendations.²¹ In sum, the issue of competence is *the* underlying weakness in this debate in the development of EU sports law and, in terms of jurisprudential development, it appears that in the short term at least, the development of EU sports law will continue to be determined by “accidents of litigation”.²² In this light, the immediate future of this topic is likely to be shaped by the debate as to whether *Meca Medina* provides a sound legal platform on which to build a coherent Community policy on sport.²³

Careful What You Wish For

The second point that I wish to make is a somewhat controversial one, and one that might spark some debate. What if sports organisations, such as UEFA, succeeded in lobbying for exemptions from EC law - might it be a case of “careful what you wish for”? There is an argument - made provocatively in an editorial in *The Financial Times* (below) - that the market forces and contractual freedoms unleashed in the post-*Bosman* era have been for the betterment of the European football industry.

“When is competition bad for competition? When it’s commercial competition between football clubs. That, at least, is the instinctive reaction of Europe’s sports ministers, who have been clamouring for football’s governing bodies, Uefa and Fifa, to be allowed to run football without interference from pesky know-nothings such as the courts and the competition policy authorities.

At the heart of this debate are the merits of the “European” model

9 For a broader interdisciplinary perspective on the inconsistency of the European Union’s approach to the regulation of sport, see B Bogusz, A Cygan and E Szyszczak (eds), *The Regulation of Sport in the European Union* (Cheltenham: Edward Elgar, 2007).

10 For a review of UEFA’s “relationship” with the Commission, note B García, “UEFA and the European Union: From Confrontation to Co-operation” 3 *Journal of Contemporary European Research* 202.

11 For a comprehensive review of this topic, note R Parrish and S Miettinen, *The Sporting Exception in European Union Law* (The Hague: TMC Asser Press, 2008).

12 As acknowledged by the Commission in its Staff Working Document, “Executive

Summary of the Impact Assessment of the White Paper on Sport” (Brussels, 11 July 2007, SEC(2007) 936), at p.2.

13 Conference report available at: http://ec.europa.eu/sport/whatsup/d_15982_white_paper_conference-report.pdf (last accessed on 10 March 2008).

14 Note R Parrish, “The Birth of EU Sports Law” (2003) 2 *Entertainment Law* 20; R Parrish, “The Politics of Sport Regulation in the EU” (2003) 10 *Journal of European Public Policy* 246; and, more recently, B García, “From Regulation to Governance and Representation: Agenda Setting and the EU’s Involvement in Sport” (2007) 5 *Entertainment and Sports Law Journal* 1, Online, available at: <http://go.warwick.ac.uk/eslj/issues/volume5/number1/garcia/> (last accessed on 11 March 2008).

15 Case 36/74, *Walrave and Koch v UCI* [1974] ECR 1405, at para.4.

16 That “evolutionary process” is reviewed by R Parrish, *Sports Law and Policy in the European Union* (Manchester: Manchester University Press, 2003). See also the essays in A Caiger and S Gardiner (eds), *Professional Sports in the EU: Regulation and Re-regulation* (The Hague: TMC Asser Press, 2000), and the legal and policy documents collated by R Siekmann and J Soek (eds), *The European Union and Sport: Legal and Policy Documents* (The Hague: TMC Asser Press, 2005).

17 S van de Bogaert and A Vermeersch, “Sport and the EC Treaty: A Tale of Uneasy Bedfellows” (2006) 31 *European Law Review* 821.

18 Article 124 of the Reform Treaty amend-

ing Art 149 EC Treaty.

19 A deficiency that has long stunted the growth of this topic, see S Weatherill, “Fair Play Please! Recent Developments in the Application of EC Law to Sport” (2003) 40 *Common Market Law Review* 51.

20 Van de Bogaert and Vermeersch, above at note 17, at pp.838-840 discussing Art III-282 of the Constitutional Treaty.

21 Article 165(4) TFEU. Note the prescient comments by D Bailey, “The Pathway to a Stable European Legal System for Sport” (2008) 15(1) *Sports Law Administration & Practice* 3.

22 Note S Weatherill, “The White Paper on Sport as an Exercise in ‘Better Regulation’” (2008) 1-2 *International Sports Law Journal* (forthcoming).

23 Note the analysis above at note 8.

of sport versus the “American” model. Confusingly, the “American” model consists of sports leagues with powerful unions, privileged incumbents, salary caps and little openness to new entrants. The “European” model involves global competition, free entry and superstar salaries for the best players. Even more confusingly, sports ministers seem determined to preserve this competitive model with a dollop of *dirigisme*.

The European Commission will soon make its views clear with a white paper on sport. That is no bad thing; sport, especially football, has been plagued with uncertainty over when competition law overrides the authority of sporting bodies and when it does not. But the Commission should not pay too much attention to sports ministers’ demands for wide-ranging exemptions from EU competition law.

The ministers commissioned an independent review, published last year, which fretted about market forces. The theory goes like this: market forces are bad for football because rich clubs hire too many foreigners and win too often, leaving fans unhappy. The solutions are said to be more redistribution of cash from rich to poor, and a compulsion to hire lots of local players.

The European Commission should take all this with a pinch of salt. Regulatory clarity would be good. So would better regulation of football agents. But market forces seem to be serving football very well.

Money and talent is indeed concentrated in the hands of a few clubs, but those who oppose such trends need to make a stronger case. Results remain unpredictable; the Premier League has had three champions in four years. It is true that the big clubs reliably do well, but that is no bad thing; since there are more fans of Manchester United than of Manchester City, the total happiness of fans probably is increased if United win more often. Traditionalists will moan, but new fans in Asia will be celebrating. And if upsets became too common, they would not be upsets.

In any case, unpredictable results are not the only good in sport; our clashes between mediocrities are no less dour if the teams are evenly matched. Excellent play is valued by football’s growing fan base and it is something that the top teams are able to offer. European football, especially the English Premier League, operates in a global market for attention and it is beating the competition handily. This is no time to start scoring own goals.²⁴

There is not enough time in this brief paper to confront all of the issues raised in the above editorial.²⁵ It suffices to state that it suggests that the case made forcefully in the Independent European Sport Review of 2006 - that football should be allowed govern itself - is not as altruistically minded for the sport as whole as might first appear.²⁶ It might even be the case that the review’s biased view of the ineptness and inappropriateness of EC law’s application to sport, which in any event is dated and flawed by its reliance on the CFI’s approach in *Meca-Medina*, could be interpreted as largely being self-serving to the administrative and financial benefit of Uefa and the sport’s leading clubs.²⁷

In example, there is no doubt that the agreement in January 2008 between Fifa/Uefa and the G14/ECA, with respect to compensating clubs for players on international duty,²⁸ will negate much of the impact of the *Oulmers/Charleroi* litigation.²⁹ But might it also be a sign that the relevant parties have seen the benefits of enhanced cooperation?³⁰ Imagine a scenario where that level of cooperation is underpinned by exemptions from EC law. Would then, and without the

mediating force of EC competition law, labour law etc, “social dialogue” soon and opportunistically transform itself collective bargaining? Would, as stated in the above *FT* piece, the existing European sports model slide into a restrictive American sports model of “powerful unions, privileged incumbents, salary caps and limited, franchise-dependent entry”? And would this be a good thing for European sport? Professor Stephen Weatherill has made this point with far more intellectual rigour as far back as 2000, and it remains of interest.³¹

3. Specific Remarks on the White Paper: The Societal Role of Sport

The etymology of the word “sport” is located in the notion of providing a “diversion” from the travails of everyday life.³² Nowadays, and in terms of contemporary social policy, sport is seen as a mechanism of combating a range of social ills from obesity to bigotry. I argue that sport’s role as some sort of societal “Good Samaritan” is prone to much hyperbole and exaggeration, as can be illustrated, unfortunately, by reference to section 2 of the White Paper. That criticism apart, sections 3 and 4 of the White Paper go on to demonstrate a welcome, if implied, understanding of the most formidable challenge facing modern sport - that of falling rates of active participation and volunteerism in local sport. In brief, it is through local, participatory sport, and not through the “corporate social responsibility” of the professional sports industry, that the societal role of sport is seen at its best.

Section 2 of the White Paper

Section 2 of the White Paper is entitled “The Societal Role of Sport”; a theme that in its various educational, public health and social inclusion manifestations has been much beloved by the Commission.³³ Although the underlying sincerity of the Commission’s approach is clear from the accompanying *Staff Working Document*, the overly verbose nature of this section of the White Paper is somewhat off putting. For instance, section 2 of the White Paper opens by stating that the societal role of sport has the potential to strengthen the Union’s external relations. What proposals are offered in realization of this ambitious aspiration? The answer in section 2.7 of the White Paper is rather underwhelming: “When addressing sport in its development policies, the EU will make its best effort to *create synergies* (?) with existing programmes of the United Nations, Member States, local authorities and private bodies.”³⁴ Continuing on this theme, it appears that, thanks to sport, citizens of the European Union are going to become thinner (section 2.1); realise the benefits of lifelong learning (section 2.3); become more active citizens (section 2.4); engage in inter-cultural dialogue (section 2.5); eradicate racism and xenophobia (section 2.6), and become more environmentally conscious (section 2.8). On a more serious note, it is suggested that all the above grandiloquence does is reveal a fundamental weakness in the Commission’s approach to the societal role of sport - that of overburdening sport with social, cultural even political ambitions that it cannot possibly realise.³⁵ In fact, it could be argued that the examples of pre-Belfast Agreement Northern Ireland and apartheid South Africa demonstrate that on issues such as identity, social inclusion and tolerance, sporting associations and movements often maintain, even aggravate, existing levels of tension and misunderstanding.³⁶

Sections 3 and 4 of the White Paper

24 “Leader: The Special Ones”, *The Financial Times*, 12 May 2007.

25 For a more considered approach note “The Wathlet Report” commissioned by the ASSER International Sports Law Centre, and summarised by M Wathlet, “Sport Governance and the EU Legal Order: Present and Future” (2007) 3-4 *International Sports Law Journal* 3.

26 The “Arnaut Report” is available at: <http://www.independentfootballreview.com> (last accessed on 11 March 2008). For a critical overview, see S Miettinen, “The ‘Independent European Sport Review’” (2006) 3-4 *International Sports Law*

Journal 57.

27 Note especially paras.3.49-3.51 and paras.3.88-3.96 of the Arnaut Report, *ibid*.

28 For a brief, contemporaneous account, see R Hughes, “A ceasefire, at least, in the soccer kings’ war” *The International Herald Tribune*, 18 January 2008.

29 Case C-243/06, Reference for a preliminary ruling from the Tribunal de commerce de Charleroi lodged on 30 May 2006 - SA Sporting du Pays de Charleroi, G-14 Groupment des clubs de football européens v Fédération internationale de football association (Fifa).

30 The effusiveness of Uefa’s response to the G14/ECA deal is telling. Note Uefa President Michel Platini’s comments entitled, “European football the winner” available at <http://www.uefa.com/uefa/keytopics/kind=64/newsid=668008.html> (last accessed on 10 March 2008).

31 S. Weatherill, “Resisting the Pressures of ‘Americanization’: The Influence of the European Community Law on the ‘European Sport Model’” in S Greenfield and G Osborn (eds), *Law and Sport in Contemporary Society* (London: Frank Cass, 2000) at p.155 *et seq*.

32 For a lively, journalistic account of the “importance” of sport, by the chief sportswriter of *The Times*, see S Barnes, *The Meaning of Sport* (London: Short Books, 2007).

33 Note sport’s role in promoting “A People’s Europe” as mentioned by the Adonnino Committee Report, Com (84) 446 final. This general thematic approach to sport’s societal role is also prominent in the Council of Europe’s approach to sport; see generally R Siekmann and J Soek (eds), *The Council of Europe and Sport: Basic Documents* (The Hague: TMC Asser Press, 2007).

To be fair to the Commission, they have seen the futility of referring to the organisation of sport in Europe as a pyramid of interests - the so-call "European Sports Model".³⁷ Section 4 of the White Paper opens with a welcome recognition that any vertical solidarity between recreational sport (the foundation of the pyramid) and professional sport (at its apex) is somewhat artificial. There is no single, homogeneous "European Sports Model" and the legal, social, economic and political needs of "grassroots" sport are very different, and need to be distinguished, from the commercial realities of elitist professional sport.

Of related interest, is the reference in section 3.1 of the White Paper to "moving towards evidence-based sport policies". Principally, this is concerned with initiating various statistical reviews of the economic impact of sport, with presumed emphasis on the professional sports industry. Of equal interest is the effort to collate information on non-economic or "recreational" aspects of sport such as participation rates, data on volunteering etc. A review of this nature was conducted in Ireland in 2005 by the government-funded Economic and Social Research Institute.³⁸ The analysis was done mainly with a view to establishing sport's influence in the promotion of what is called "social capital", which the report defines as the "practices and conventions that promote social contact between people, enhances interpersonal trust, and supports a shared acceptance of norms and values in society."³⁹ In summative interpretation of the findings, it was found that the role that local sporting activities and clubs have had in contributing to levels of social capital in Ireland has long been undervalued. Moreover, and in line with previous research, it was found that sport was the most outstanding arena or source for volunteering in Irish society. In sum, and on foot of this research, it has been recommended that at a policy level the Irish government should ensure that its investment strategy for recreational sport should allow for the personal infrastructure of sport (the funding and legislative protection of

volunteers) as much as it does for its capital investment in the physical infrastructure of Irish sport.⁴⁰

Conclusion

Finally, there is no doubt that interest in sport in EU Member States such as Ireland remains at a high level. Nevertheless, the *consumption of sport* (the purchase of TV sports packages, club merchandising etc) should not be confused with *participation in sport*.⁴¹ In Ireland, it is noteworthy that the rate of participation in sport has been falling in socially deprived and disadvantaged (mainly urban) areas. Placed in the context of contemporary Irish sports policy, that has meant that public spending in sport has been seen as regressive in nature with the less well-off effectively subsidising the sporting activities and facilities of the better-off.⁴² This is a fundamental point. It might not, in terms of the EU sports law, be a very sexy (or complex) point when compared to collective TV bargaining rights, the regulation of football agents etc., but I hope that one of the initiatives that might follow from the White Paper's "Pierre de Coubertin Action Plan" is a greater commitment to targeted EU funding of community projects in socially deprived areas.⁴³

On a technical legalistic level, it is important to note that this level of support for "grassroots" sport would be boosted by the ratification of the (Reform) Treaty of Lisbon because through the proposed Article 165 TFEU direct budgetary support for sport would (at last) have a formal legal basis.⁴⁴ At an altogether more practical level, it is my view that the provision of all-weather pitches, clubhouses and sports equipment for deprived localities is more attuned to Pierre de Coubertin's original objectives for the enjoyment of sport than the sprawling, bloated mess that is contemporary "Olympian" professional sport.

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³⁴ See also Article 165(3) TFEU.

³⁵ See further S Weatherill, "Sport as Culture in European Community Law" in R Craufurd Smith (ed), *Culture in European Union Law* (Oxford: Oxford University Press, 2004) at p.113 *et seq.*

³⁶ For Northern Ireland, see J Sugden and A Bairner, *Sport, Sectarianism and Society in a Divided Ireland* (London: Leicester University Press, 1993) and M Cronin, *Sport and Nationalism in Ireland* (Dublin: Four Courts Press, 1999). For South Africa, see, for example, M Bose, *Sporting Colours: Sport and Politics in South Africa* (London: Robson, 1994) and, more generally, M Marqusee,

Anyone but England: Cricket and the National Malaise (London: Verso, 1984).

³⁷ See previously, EC Commission Consultation Document of Directorate-General X, "The European Model of Sport" (September 1998), available at: http://ec.europa.eu/sport/action_sports/historique/docs/doc_consult_en.pdf (last accessed on 13 March 2008).

³⁸ L Delaney and T Fahey, *Social and Economic Value of Sport in Ireland* (Dublin: ESRI, 2005). The general purpose of the report was to enhance knowledge of the socio-economic dimensions of sport in Ireland with a view to informing public policy. For access to this and relat-

ed reports, please search the "publications" section of <http://www.esri.ie>.

³⁹ The most celebrated critique of "social capital" can be found in R Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York, Simon & Schuster, 2000).

⁴⁰ See P Lunn, *Ballpark Figures: Key Research for Irish Sports Policy* (Dublin: ESRI, 2007).

⁴¹ In Ireland, note the reports by T Fahey, L Delaney and B Gannon, *School Children and Sport in Ireland* (Dublin: ESRI, 2005) and T Fahey, R Layte and B Gannon, *Sports Participation and Health Among Adults in Ireland* (Dublin: ESRI, 2004).

⁴² See P Lunn, *Fair Play? Sport and Social Disadvantage in Ireland* (Dublin: ESRI, 2007).

⁴³ EC Commission Staff Working Document, "Action Plan 'Pierre de Coubertin'" (Brussels, 11 July 2007, SEC(2007) 934), at section B.2.

⁴⁴ Note the discussion by W Tokarski *et al* (eds), *Two Players, One Goal? Sport in the European Union* (Oxford: Meyer & Meyer Sport, 2004) at p.64 with reference (in sport) to the Eurathlon programme and (in law) to Case C-106/96, *UK v Commission* [1998] ECR I-2729.



International Sports Law Seminar

organised by the Netherlands Patent Office and the ASSER International Sports Law Centre
Tuesday 10 June 2008, kick-off: 14.00 hours

"WIPO Mediation and Arbitration of Sports Disputes"

speakers: Ignacio de Castro, Deputy Director, WIPO Arbitration and Mediation Center, Geneva, Switzerland
Mr Willem Hoorneman, CMS Derks Star Busmann, Utrecht
Prof. Ian Blackshaw, Member of the WIPO Arbitration and Mediation Center
moderator: Dr Robert Siekmann, ASSER International Sports Law Centre, The Hague
venue: Octrooicentrum Nederland, Rijswijk

The Position of the Players' Agent in European Law after the White Paper on Sport

by Steven Jellinghaus*

Introduction

This article discusses the position of the players' agent in European law. The reason to do so is the White Paper on Sports that has been drawn up by the European Commission.¹ In section 4.4. of this White Paper specific attention has been devoted to the position of players' agents. There the following remark is made:

The development of a truly European market for players and the rise in the level of players' salaries in some sports has resulted in an increase in the activities of players' agents. In an increasingly complex legal environment, many players (but also sport clubs) ask for the services of agents to negotiate and sign contracts.

There are reports of bad practices in the activities of some agents which have resulted in instances of corruption, money laundering and exploitation of underage players. These practices are damaging for sport in general and raise serious governance questions. The health and security of players, particularly minors, has to be protected and criminal activities fought against.

Moreover, agents are subject to differing regulations in different Member States. Some Member States have introduced specific legislation on players' agents while in others the applicable law is the general law regarding employment agencies, but with references to players' agents. Moreover, some international federations (FIFA, FIBA) have introduced their own regulations.

For these reasons, repeated calls have been made on the EU to regulate the activity of players' agents through an EU legislative initiative.

(41) The Commission will carry out an impact assessment to provide a clear overview of the activities of players' agents in the EU and an evaluation of whether action at EU level is necessary, which will also analyse the different possible options.

Below the phenomenon of players' agents is observed in more detail from a European perspective.

A brief look at the past

Employment service is a phenomenon that has existed for centuries.² In the fourteenth century for instance, bye-laws already referred to intermediaries who assisted employers who were looking for employees.³ Next, the guild systems evolved, and they too, had a role in the provision of employment services. In the fifteenth century this resulted in, among other things, labour exchanges. Throughout the centuries employment services developed into a proliferation of regulations, sometimes with good intentions, but in many other cases this attracted dubious characters, who intended to earn their money from this employment service at the detriment of others. This development resulted in the governments taking control of the regulation of employment service around 1900. In most cases employment service was regarded a public responsibility, and in many cases private employment service was only allowed if one had a licence.

International developments

It is not surprising that the International Labour Organization already became involved in employment service at an early stage. One can especially think of the ILO convention C34 (Shelved) Fee-Charging Employment Agencies Convention of 1933, which - briefly - required a system of licences. In 1948 this was extended by means of the convention according to which the government was required to see to free public employment service.⁴ After that, in 1997 the C181 Private Employment Agencies Convention was created. This latter convention intended to review the convention of 1949, and it abandoned the licence system. The idea of protection, however, remained a matter of regulation.

The C181 Convention allows private employment service under certain circumstances. In those cases however, the private employment service provider is not permitted to charge any costs, neither direct nor indirect, to the employee.⁵

It is relevant that the Convention 96 has been ratified in Europe by France, Ireland, Luxembourg, Malta, Poland and Turkey. Convention 181 has been ratified by countries such as Albania, Belgium, Bulgaria, the Czech Republic, Finland, Georgia, Hungary, Italy, the Netherlands, Portugal and Spain.

When it comes to the matter of private employment service, little has been achieved in European law. Important conventions such as the European Social Manifesto do not provide for a protection of the employee in this field, unless one would make the connection with the notion of protection with regard to exploitation and slavery. In the field of European Directives there is little movement, too. The so-called Directive on Posting merely addresses the question which law should be declared applicable to the employment contract. Requirements as to the contents have not been defined.⁶

The players' agent

Until today the players' agent has not been regulated in European law. In that connection the first question that needs to be addressed, is what a players' agent in fact is. It is remarkable that the White Paper is silent about that. In the past Richard Parish tried to find a definition for the phenomenon.⁷ In the end he did not arrive at a well-defined description. He follows the direction of the definition of the notion 'agent' as used in the various regulations. There, an agent is an intermediary who brings supply and demand together for a fee. Essential in this is that this definition uses an intermediary. However, we also see a different phenomenon, which is the so-called business manager. That is the person who supports an athlete in his business affairs in connection with his performance as an athlete. That goes beyond merely bringing together supply and demand.

If we look at the definition as used by FIFA, we see the following wording⁸:

"Players' agent: a natural person who, for a fee, introduces players to clubs with a view to negotiating or renegotiating an employment contract or introduces two clubs to one another with a view to concluding a transfer agreement, in compliance with the provisions set forth in these regulations."

In this definition we see that in the view of FIFA the players' agent limits himself to bringing together the player and the club.

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1 White Paper on Sports, Brussels 11 July 2007, COM (2007) 391 def.
2 Cf. also J. van Drongelen and W.J.P.M. Fase, "De Wet allocatie arbeidskrachten door intermediairs", Zutphen 2005.
3 A.N. Molenaar, "Arbeidsrecht, Eerste

deel Algemeen gedeelte", Zwolle 1953, page 53.

4 C88 Employment Service Convention. Reviewed in 1948 by C96. An official recommendation also applies to the C181 convention, R188 Private Employment Agencies Recommendation, 1997. The recommendation operationalises the notion of protection.

5 Cf. article 7 paragraph 1 C181.

6 Directive 96/71/EG dated 16 December 1996 on the posting of workers in the framework of the provision of services (PbEG 1997, L 18).

7 Richard Parish, Regulating Players' agents: a global perspective, in R.C.R. Stekman c.s., Players' agents worldwide, legal aspects, T.M.C. Asser Press, p. 1-3.

8 Player Agents Regulations 2008, definitions.

I think that we should not address the question as to what a players' agent actually is. In fact this question is not relevant. The question should be: is there a need for regulation, and if so, what should it entail?

Above we have seen that employment service caused excesses which required regulation. Around 1900 the government intervened, and the International Labour Organization also acknowledged the importance of regulation.

European dimension

That suppression may be the case in sports, is evident. It is possible that abuse occurs, just as it was the case in Europe in the beginning of the past century.⁹ In the White Paper the European Commission mentions that players' agents are guilty of corruption, money laundering, and exploitation of (underage) players.

For the European Union the Lisbon Treaty opens the opportunity to become actively involved in sports. In my opinion the text of the White Paper should be interpreted against that background. The key question there in my view is whether a specific problem exists, and whether this requires European legislation.

At the moment there are detailed regulations. The main focus of those regulations is of course the prevention of child labour. But employment service is also regulated by the ILO. We have noticed that a large number of European countries have also ratified this treaty. The result of this is that one cannot ask for a fee for providing this employment service. The difference between Convention 96 and 181 is mainly the opening of the market of employment service. A new regulation would cause tension between both.

Is there a difference between employment service and sports mediation in this connection? That brings us to e.g. the difference between professional and amateur sports. The laws on employment service especially apply to those athletes who are active under an employment contract. And this now, would require additional regulation. This problem can also be seen in "branches of trade" other than sports. Are sports different in that sense? That has been under discussion in European law for decades. Think for instance of the entertainment industry, children on pop stages or acting in plays. In that connection sports are not special, and this is often regulated. An example is the ban on child labour or the regulation of work hours. If that regulation would not be effective, there would be more reason to modify the enforcement, rather than creating new regulations.

Another important distinction can be made between team sports and individual sports. In the latter case a players' agent is more like an intermediary who ensures the contacts between the athlete and the sports event. That is quite different in character and therefore, will have to be regulated in a different way. The athlete namely, is not employed, but works as an independent individual (whether or not with the status of an amateur).

The next question is what should be considered a "sport". A correct definition will be relevant when formulating regulations. In my view not just every activity should be considered a sport. But when regulating and preventing exploitation is the issue, I would opt for a broad definition of the notion of "sport", and in view of the above it may be necessary to refer to the entertainment industry.

By extension of this issue one should wonder to which extent this matter should or should not be seen to by the (inter)national sports associations. In the absence of international regulations they are the very entities able to prevent any excesses and to sanction them by means of association law and disciplinary regulations. In that case there would be the additional advantage that these sports associations are not bound by the borders of the European Union for the regulations to be formulated, because obviously those will form a legal barrier. The European Union can only prescribe applicable legislation within its own territory. And it is generally known that sports travel across those borders. An illustration of this is that Russia is considered a part of Europe in case of European championships, although Russia is not a member of the European Union. And the same goes for other European countries. And in this connection we should not forget Switzerland either, the host of the European Football Championships,

but not a member of the European Union, whereas many international sports associations have their home base in that country.

Any regulations provided by international associations will have to fit the framework of European law. According to case law, European law always applies in case of an economic activity.¹⁰ In the past this caused a number of proceedings on the merits of some cases. One of those is the Piau-case.¹¹ In this case the question was whether the FIFA-rules for players' agents did not conform with European regulations. This system assumes that there should be a licensed players' agent. In this case the European Commission had dismissed a complaint brought by Laurent Piau. The court of first instance ruled that there had not been a contravention of European law. Competition rules apply to FIFA. The required licence is an obstruction for entering the profession of a players' agent, and necessarily affects competition. However, the licence system is acceptable to the extent that the provision of article 81 paragraph 3 EU has been met. In view of the current situation, in which players' agents exercise their profession, the licence system may very well be eligible for an exemption. The mechanism creates a selection on the basis of quality, which is in accordance with the double objective to guarantee the professional development of the profession, and the protection of the athletes. This is not a case of a restriction based on quantity. According to the court of first instance this was a case of a restriction based on quality, which was justified under the present circumstances. It had not become evident that this situation involved misuse of a dominant position.

The appeal court ruled that the appeal was in part inadmissible, and in part apparently unfounded. The consideration was that the court of first instance did not pass an incorrect judgment by ruling that the competition law of article 82 EU was not violated, and that an exemption as provided by article 81 paragraph 3 EU applied.

Looking for the Holy Grail?

The conclusion should be that - before forming a real opinion on the players' agent - it is necessary that the European Commission puts the problem on the map first. For is there a actually a problem at all? The Piau-case has at least put the players' agent in the sport of football on the (political) agenda. But we must conclude that the football world has regulated this matter for itself. The players' agent must be licensed, and it is generally known that the exam to obtain the licence is not simple at all. As far as exploitation of children is concerned that is also covered by the regulations of FIFA.¹² From my own experience I know that FIFA strictly enforces those rules. So is there a need for further regulation?

Not for the football world in any case. The question presents itself, if this problem also occurs in other sports. And whether the present regulations in connection with employment service and child labour do not rule this out already. The investigation announced in the White Paper seems a prudent initiative in my opinion. But of course there are a number of questions which the European Commission will have to answer:

- What is sport?
- What is meant by players' agents? Does that also cover business managers?
- What does one wish to achieve with any regulation and how should it be enforced?

9 Cf. Richard Parish, *Regulating Players' agents: a global perspective*, in R.C.R. Siekmann c.s., *Players' agents worldwide, legal aspects*, T.M.C. Asser Press, p. 3-5.

10 Established case law since *Walrave Koch Case 36/74*, 1974, ECR 1405.

11 ECJ 23 February 2006, Case T-193/02, Jur EG 2005, p. II-0029, no. 8. For a discussion of that Cf. e.g. Roberto Branco Martins, *The Laurent Piau case of the ECJ on the status of players' agents*, A.P.L. Vermeersch, Piau t. "Commissie: sportieve competitie eindigt op 0-1", NTER 2005, p. 101-106, E.M.H. Loozen, "Zelfreguleren door en

voor vrije beroepen: toch meer liever geen algemeen belang", rule of reason, NTER 2007, p. 153-162, D. Waalbroek & P. Ibanez Colombo, *Case C-171/05 P. Laurent Piau Order of the Court of Justice (Third Chamber) of 23 February 2006*, ECR I-37, common market law review, New York December 2006, volume 43, iss. 6, p. 1743-1756. Also Cf. Court of first instance 26 January 2005, also published in JIN 2005/175 with a note by Jellinghaus.

12 For this specifically Cf. article 19 *Regulations on the Status and Transfer of Players 2008*

- Is there a need for regulation if it becomes clear that sports associations see to that themselves, such as in football?
- Perhaps the problem should be connected to the entire entertainment industry.

I am always naturally wary of regulation. I cannot get away from the impression that this is a case of a political agenda. For now I assume that the problems are not too serious, and that the (international)

associations are quite capable of managing them themselves. Any problems may occur in the grey zone, such as the position of shady business managers and individuals who try to find loopholes in regulations. But the latter cannot be prevented by regulation. We do see, however, that a proper transfer system would help. Perhaps this is in fact the solution to the problem, if that problem exists in the first place.

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From Case-By-Case to a General Playbook!

by Marjan Olfers*

1. According to the European Court of Justice's ruling in the *Meca Medina* case, the regulatory aspects of sports subject to review against competition law can only be evaluated on a *case-by-case* basis. In that decision, the European Court of Justice dismissed the concept of "pure sporting rules" as irrelevant to the question of whether EU competition laws apply to sports.

2. In *Meca Medina*, the European Court of Justice acknowledged that the specific nature of sports must be taken into account, in that competition-restricting effects inherent in the organisation of competitive sporting events do not conflict with the rules of EU competition so long as those effects are proportionate to the legitimate and purely sporting interest being pursued thereby, meaning that the specific elements of each individual case must be considered. Accordingly, following from this decision in the Sports White Book the European Commission *cannot formulate any general guidelines for the application of competition law in the sports sector*.

This is nonsense, the idea of pure sporting rules, or "sports-inherent" rules must (!) be the guideline for competition law. More to the point, if there is any immunity under application of the free movement rule due to the "sports-specificity" of the rule, then in my opinion, the inevitable consequence is that this *rules out* unfair restriction of competition under Article 81, EC Treaty, *as well as* abuse of an economically dominant position under Article 82, EC Treaty, and that the sporting rule rather *promotes* competition, is efficient, and as such is entirely legitimate. General guidelines can very well be formulated for the sports sector. If we cannot make application of the law any gentler on the sporting sector, shouldn't we at least try to simplify that application?

A. Try to follow the sport-specific rules and distantiolate from non-economic grounds within the review framework.

3. In the *Donà*, *Delière* and *Lehtonen* cases, in which sporting rules such as nationality clauses, selection criteria and transfer periods were reviewed against free movement, the European Court of Justice indicated that the system/practice does not fall under the scope of the free movement provisions if there are *non-economic grounds* relating to the *specific nature and context* of [these] competitions, and by which consequently the main concern is sports for sports' sake. For nationality clauses in the event of national competitions, the ECJ rules that "these provisions (Articles 7, 48 through 51 or 59 through 66 (old) of the Treaty) were not incompatible with rules or practice excluding foreign players from participation in *certain* matches for reasons of a non-economic nature, which related to the *particular nature and context* of such matches and were thus of sporting interest only, as is, for example, the case between national teams of various countries; this restriction of the scope of the relevant provisions must, however, be restricted to its actual objective;"¹

4. The Court of First Instance in the *Meca Medina* matter assumed *convergence* between free movement and competition law. Any time *non-economic motives or the non-economic nature* of sports legislation come into play, the Court of First Instance ruled, there is immunity from the application of both the rules of free movement and the rules of competition. "...That pure sporting regulations do not fall under economic activity, which, according to the opinion of the ECJ, means that they are not covered by the scope of Articles 39 and 49, EC Treaty, therefore also means that they are not covered under the economic competition relationships, so likewise are not covered by the scope of Articles 81 and 82, EC Treaty."² In other words, in the view of the Court of First Instance, the immunity for certain sporting rules from application of free movement also applies to the application of competition law.

5. In the application of free movement, the ECJ did not acquit itself particularly well by looking for the legal basis for potential immunity of sporting rules in *non-economic* grounds. Any spectator sport inherently combines athletic and economic grounds. To name one example, we have economic reasons to thank for the tie-break rule in tennis, i.e., to make the game more attractive to the spectators. But this is still a game-specific rule, something the judiciary need not concern itself with.

6. In cases involving an economic activity, i.e. sports falling under the scope of the EC Treaty (*Walrave and Koch*), the only possible interpretation is that the rules generate economic effects and rest (at least in part) on economic motivations. Nationality clauses and selection criteria impede the player in areas such as the free performance of his services, but these rules are still declared sport-inherent by the ECJ, based on non-economic grounds, and are therefore declared immune.

7. In the case *Meca Medina*, the ECJ considers that if it is assumed that the sporting rule does not restrict free movement because it is an issue that relates only to the sport and as such does not fall under the economic activity, this does not necessarily mean that the sporting

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1 ECJ, 14 July 1976, matter C-13/76, *Donà*, Jur. p. 1333.
2 Court of First Instance, 30 September 2004, T313/02, *Meca-Medina*, Jur. 2004, p. II-3291. See others on this matter, such as Stephen Weatherill, Anti-doping and EC law, E.C.L.R. 2005, p. 416-421. See also Ian Blackshaw, Doping is a sporting, not an economic matter, in *The International Sports Law Journal*, 2005/3-4, p. 51.
3 ECJ, 18 July 2006, *Meca-Medina*, C-519/04, Jur. 2006, p. I-06991, paragraph 33.

activity falls outside of the scope of Articles 81 and 82, EC Treaty, and that it likewise cannot be derived from this assumption that the sporting rule does not meet the specific conditions of the provisions on competition.

8. After all, in paragraph 31 of the *Meca Medina* decision, the ECJ considers that “even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity (*Walrave and Koch*, as well as *Donà*), that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those articles.” A review against the competition law provisions is a review of the question of whether there is an undertaking and whether the rules restrict competition (Article 81, EC Treaty), and whether the undertaking is abusing its dominant position.

9. Here the ECJ explicitly rejects the review as developed under the freedom of movement concerning sporting rules, and in so doing puts the previously assumed convergence between freedom of movement and competition law to rest.

10. The ECJ is correct that the sporting activity does not necessarily fall outside of the scope of Articles 81 and 82, EC Treaty. Sports involving an economic activity are governed by the EC Treaty, and so the sporting activity is therefore open to a review against the principles of competition law. Articles 81 and 82, EC Treaty are, of course, concerned with the actions of undertakings. In situations involving the offer of a service, this will also meet the definition of an undertaking as a requirement for the application of the provisions of competition law. The ECJ also states that this does not necessarily lead to the conclusion that the sporting rule does *not* fulfil the specific conditions of the provisions of competition law. This is not correct. In cases involving an economic sporting activity, the sport-specific rule can never fulfil the conditions!

11. The issue is the basis for the immunity. If the ECJ wishes to arrive at a simple yet unambiguously and rationally explainable application, then the ECJ must seek the basis for an immunity in the sport-specific characteristics, that is, the characteristics inherent to the sport, without which the sport could not exist in any organised context.

12. If the immunity actually lies in the fact that the sporting rule in question, such as nationality clauses for national competitions, selection criteria and transfer periods, concern the sport as such, then it is *not* the non-economic reasons that determine the actual basis for an immunity, but the sport-specific nature.

B. Assume convergence between freedom of movement and competition law

13. Cases involving sport-specificity under the freedom of movement via the basis of the sport-specificity must by definition also be immune under competition law.

14. In *Bosman*, *Deliège* and *Lehtonen*, the ECJ did not further address the applicability of the rules of competition in the application of free movement and the created immunities for nationality clauses in national competitions, selection criteria and transfer periods, even though those cases explicitly appealed to the rules of competition.

FIFA Regulations for the Status and Transfer of Players Amended

On 1 January 2008 a new edition of the FIFA Regulations for the Status and Transfer of Players entered into force. In addition to purely linguistic alterations the new Regulations also encompass some new provisions. These provisions are primarily a codification of jurisprudence from the FIFA Dispute Resolution Chamber, the Players' Status Committee and the Court of Arbitration for Sports. The FIFA hopes to increase legal certainty by ensuring that the jurisprudence is more strongly represented in the Regulations.

Article 18b of the new Regulations is remarkable. This article regards the prohibition against clubs concluding contracts that enable third parties to exercise influence on the independence of clubs and the decisions taken by the club concerning the transfer of players.

15. This is particularly curious because in *Meca Medina*, the ECJ ruled that the Court of First Instance had wrongly neglected to conduct a review against competition law. The Court of First Instance should have reviewed the anti-doping rules at issue in *Meca Medina* against the specific conditions for the application of Articles 81 and 82, EC Treaty.³ Why then, did the ECJ not review nationality clauses, selection criteria and transfer periods against competition law? Following *Meca Medina*, the ECJ therefore made an error of law and should have reviewed these rules against competition law.

16. It is much easier to assume convergence between types of provisions and unnecessary to conduct a review against competition law. In that case, a sport-specific rule falling under the freedom movement is automatically an efficient action when reviewed against competition law.

C. Competition law need not intervene in sport-specific rules

17. If the basis relates to the sport-specific nature of the rule, then the sporting rule is inherently necessary and proportionate, and answers to a sport-specific objective. In competition law terms, this is a rule concerning competitive activity in the market that the undertaking can therefore justify under normal market conditions. This activity corresponds to the normal competition linked to the performance of the club or athlete. This is because it is plausible that the sporting rule is a necessity for the sport to exist in an organised form, and will accordingly only stimulate, rather than frustrate, mutual rivalry between clubs and persons. This type of sporting rule contributes to an efficient organisation of the sport, and competition law need not intervene.

18. The competition review is not only unnecessary, but in *Meca Medina* actually goes much too far. The ECJ yielded to the temptation to make a pronouncement on the fairness of the anti-doping rules, leaving the door open to the review of all manners of “unreasonable behaviour” of the sports association. In the review, the ECJ even concerns itself with the question of whether the sporting rule might be “excessive” in terms of the threshold of a banned substance and the amount of the penalties. But here it is the ECJ itself that is engaging in “excessive” behaviour by doing so. Competition law is inherently concerned with economics, not fairness!

19. It would have been enough to establish that a standard (anti-doping rules) had been violated, by which the violation was determined objectively, transparently and in a non-discriminatory manner by the association, and then to review whether the punitive measure prompted by the violation of that standard and the punitive measure was determined as objectively, non-discriminatory and transparently as possible and whether there were adequate safeguards for an athlete to oppose the measure imposed. But a review against competition law is in no way relevant to any of this!

The foregoing shows that there are many indications that the legal review should be simplified and a rational, clear framework should be established. I challenge the European Institutions.

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Pursuant to article 17 paragraph 3 a player who wishes to unilaterally terminate his employment contract outside the protected period should notify his club of this within 15 days following the final official match of the season. Contrary to the 2005 Regulations, in the new Regulations cup competition matches are also deemed to be official matches as provided for in article 17 paragraph 3. Therefore, if in a specific country the cup final is played after the final competition match, the term of 15 days does not commence until after the cup final.

Finally, in the new Regulations the FIFA Dispute Resolution Chamber is explicitly authorised in respect of disputes concerning a solidarity contribution between two clubs from the same country, if the transfer underlying the dispute is an international transfer (between two clubs from different countries).

Some Thoughts about the European Club Association's Possible Participation in a Social Dialogue in the European Professional Football Sector

by Robert Siekmann

In his article *Is the Pyramid Compatible with EC Law?* on the then pending *Charleroi/Oulmers* case regarding player release for international representative competition in football Professor Weatherill (University of Oxford) - in the context of stakeholder representation within international football governance - made the case for the establishment of a committee in which relevant stakeholders have a genuine ability to influence decisions having a direct impact on their activities.¹ Parrish and Miettinen (Edge Hill University's Centre for Sports Law Research) state that Weatherill's prescience on the question of stakeholder representation was demonstrated by two developments in the summer of 2007.² In July, the European Commission published the White Paper on Sport in which it called for the development of a common set of principles for good governance in sport such as transparency, democracy, accountability and representation of stakeholders.³ In June, UEFA, the governing body of European football, approved the establishment of the Professional Football Strategy Council which includes amongst its membership representatives of the Association of European Professional Football Leagues (EPFL), representatives of the European Club Forum whose members represent the interests of the clubs participating in the UEFA competitions⁴, and representatives of FIFPro (Division Europe) who represent professional players in Europe. According to Parrish and Miettinen, the establishment of the Professional Football Strategy Council was a significant move and was motivated by two factors. First, UEFA hoped that by addressing G-14's criticisms over stakeholder representation in the governance of football, they could placate some of the more moderate G-14 members. By causing a split in the G-14, UEFA hoped that the organisation disbanded and withdrew its challenge in *Charleroi/Oulmers*.⁵ The move also responded to the themes contained in the Nice Declaration⁶ and the Arnaut Report⁷, both of which recommended that UEFA afford stakeholders sufficient representation with their structures. UEFA's second motivation involves pre-empting the possible threat of social dialogue taking place between the EPFL and FIFPro within the context of the EC Treaty and outside the formal regulatory structure of UEFA. UEFA's new committee could be interpreted as a means of internalizing social dialogue under UEFA's oversight.

In FIFA House in Zurich, Switzerland, on 15 January last FIFA, the world governing body of football, UEFA and a number of top European clubs signed a letter of intent, which started a new chapter in the relations between the governing bodies and the clubs. The development was very much in line with the sporting and political philosophy of FIFA President Joseph Blatter and UEFA President Michel Platini, who seek to involve all key stakeholders in the decision-making processes of football and to find workable solutions within the football family itself. The European clubs shared this philosophy. The representatives of the organizations present agreed on

the intention to regulate their future relationship with a number of actions. These were to include the planned evolution of the European Club Forum into the European Club Association (ECA), the formal signing of a memorandum of understanding with UEFA and subsequently the dissolution of the G-14 with the withdrawal of its claims in court. As part of the planned moves, UEFA and FIFA would enter into a series of commitments including financial contributions for player participation in European Championships and World Cups, subject to the approval of their respective bodies.

In the House of European Football in Nyon, Switzerland, on 21 January last, at a meeting of the European Club Forum ECA was created on the proposal of UEFA and a Memorandum of Understanding was signed between the newly-formed ECA and UEFA. The creation of ECA paved the way for harmony to return to football between the governing bodies and the clubs. The signing of the Memorandum of Understanding meant that UEFA officially recognised the ECA as the sole body representing the interests of clubs at European level and the ECA recognized UEFA as the governing body of football at European level, and FIFA as the governing body of football at worldwide level.

The ECA, as an independent autonomous body representing the European clubs, is drawn from all of UEFA's 53 member associations. The ECA shall in principle be composed of 103 clubs with the precise number of clubs from each member association to be established every two years at the end of the UEFA season on the basis of the then current UEFA ranking position of its member associations according to the following principle: Association ranking position: 1-3, 4-6, 7-15, 16-26, 27-53 / Number of clubs: 5, 4, 3, 2, 1 respectively.

One of the objectives of the ECA is "to represent the interests of the clubs as employers in Europe including in the social dialogue process and to act as a social partner where appropriate" (Article 2 (c) of the Statutes). The question then is whether ECA would meet the criteria for being admitted to a Social Dialogue Committee to be established under the EC Treaty (Article 136 et seq.) and for which EPFL (employers) and FIFPro (employees) presently are the obvious social partner organisations. In my *Study into the Possible Participation of EPFL and G-14 in a Social Dialogue in the European Professional Football Sector*⁸ I reached the conclusion that the EPFL is "very" representative, but not independent. It may still be concluded that under the present circumstances (EPFL now having 22 national Premier Leagues amongst its membership) the EPFL is "as much as possible" represented in the current 27 EU Member States. Although "independence" is not an official, explicit criterion for admissibility to European Social Dialogue, on the basis of the fundamental consideration that in a democratic society social partner organisations should be independent from national governments, I argued that a similar conclusion would in principle apply to the issue of

independence at European level. In the football industry this would imply the requirement of independence of social partner organisations in relation to national and international governing bodies (FA's, UEFA and FIFA) in social dialogue matters. Now looking to the ECA, one may conclude that it is very representative in Europe (even far beyond the territory of the EU) and that it is independent (see *supra*). However, in contrast to the EPFL ECA does not fulfill the criterion that a social partner organization at European level should consist of organisations which are themselves an integral and recognized part of Member States' social partner structures and with the capacity to negotiate agreements. EPFL represents national Leagues, so it represents clubs indirectly, whereas ECA represents clubs directly. Generally speaking, clubs as a category in fact are "double-represented" by EPFL and ECA at European level.

In October 2007, the Association Internationale des Groupes Cyclistes Professionnels (AIGCP), International Professional Cycling Teams (IPCT) and Cyclistes Professionnels Associés (CPA) announced

1 The International Sports Law Journal 2005/3-4, p. 3 et seq.; reprinted in his "European Sports Law: Collected Papers", T.M.C. Asser Press, The Hague 2007, p. 259 et seq.

2 "The Sporting Exception in European Union Law", T.M.C. Asser Press, The Hague 008, p. 226.

3 Commission of the European Communities, White Paper on Sport, COM(2007) 391 final, p. 12.

4 The European Club Forum was set up in 2002 as the body to reinforce dialogue between UEFA and Europe's major clubs. It was composed of 102 members, plus clubs with sporting merit, representing a corresponding number of

European top-division clubs. The European Club Forum had the status of an UEFA Expert Panel

5 G-14, representing finally 18 top European clubs, was established in 2000 as a European Economic Interest Grouping (EEIG) under EC Council Regulation No. 2137/85.

6 Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, Annex IV to the Treaty of Nice.

7 Independent European Sport Review, October 2006.

8 The International Sports Law Journal 2006/3-4, p. 69 et seq.

that they had jointly requested the European Commission to establish a Social Dialogue Committee in this sector. AIGCP, IPCT (both employers' organisations) and CPA (employees) stated that they were convinced that this Social Dialogue, under the umbrella of the European Commission will be a good tool to renew and modernise professional cycling and its governance. The relationship between AIGCP and IPCT is cooperative, AIGCP being the general "umbrella" organization of professional cycling teams in Europe (cf., ECA in professional football) and IPCT being the elite one, consisting of Pro Tour teams only (cf., G-14 in professional football).⁹ Both organizations don't comply with the official requirement that European social partner organisations should be composed of national social partner organisations. In contrast to professional football (cf., EPFL), national organisations of professional cycling teams do not exist.

In the Commission Staff Working Document "The EU and Sport: Background and Context", an accompanying document to the White Paper on Sport¹⁰ the following is stated: "In line with the principle of autonomy, the social partners can choose if and when to address a

joint request to set up a sectoral social dialogue committee to the Commission. The Commission will examine any request according to the conditions laid out above. Taking into account the specificity of the sport structure, social partner organisations could identify relevant third bodies that they want to invite to take part in their social dialogue as observers. It should be kept in mind that a European social dialogue is, above all, a bi-partite dialogue between social partners. It is difficult to predetermine the form social dialogue in the sport sector should take. The Commission will examine any request to set up a sectoral social dialogue committee in a pragmatic manner." So, apart from the positions of EPFL and ECA, UEFA (and FIFA) as the governing bodies of the game could be invited by social partner organizations in professional football to participate with observer status in a future Social Dialogue Committee.

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⁹ IPCT like G-14 is a EEIG.

¹⁰ SEC(2007) 935, p. 62.



European Football Agents Association Wants to End Malpractice in the (International) Transfer of Players

by **Roberto Branco Martins***

The number of players' agents has grown explosively since the Bosman case. The huge circulation of money and players' ever-increasing wages can mean it is a simple step to accuse agents of being involved in malpractice and criminal activities. The recently established European Football Agents Association believes that the current system of regulation does not halt transfer-related problems. The participation of players' agents in regulating their profession is a prerequisite for avoiding unprofessional conduct.

The definitive emancipation of footballers came about in the wake of the Bosman case. The activities of players' agents were augmented in direct relation to the players' renewed status. The considerable circulation of money in the international football world, and more specifically the players' wages, led to players' agents being linked to malpractice. Various reports and the media portray players' agents as questionable individuals involved in trafficking young players, money laundering, corruption and other serious criminal activities. World football's governing body FIFA announced it would curb such activities, issuing regulations governing the activities of players' agents. The third version of these regulations came into force on 1 January 2008.

The aim of these regulations is to safeguard professionalism, to protect players in their short careers and to guarantee transparency of payment methods and fees. FIFA introduced several rigorous articles in their new regulations to achieve this aim. Since 1 January 2008 licences are no longer valid indefinitely. After five years the players' agent will need to undergo a new examination to retain his licence and to continue exercising his profession. The severity of this rule is apparent. Without a licence an agent is unable to represent players, so not only does his business run a serious risk, but assisting players would become more difficult. Other agents will be tempted to pursue his players should an agent lose his licence. Contracts between agents and players will contain clauses for unilateral breach where the agent fails his exam. These are just a few of the obvious difficulties arising from these regulations. But such consequences will not end malpractice definitively; on the contrary, the malpractice environment is both created and worsened. The re-examination is far too rigorous in relation to its aim. A form of permanent education would better serve the

purpose of guaranteeing professionalism and knowledge of developments than a once-off 'check' every five years with the danger of closing your business if you fail the test.

These regulations would be more readily acceptable to agents if they produced uniformity and protected the profession and professional activities. But the inclusion of an article on 'exempt individuals' means the regulations only affect licensed agents negatively. Unlicensed agents can use lawyers to legalise their activities. Unlicensed agents may carry out their profession with impunity and clubs are allowed to work with them freely, categorising some of their activities as 'scouting' or 'consultancy'. When the moment arrives for concrete negotiations, the unlicensed agent simply 'buys' the lawyer's signature. Many individuals operate these practices, the main advantage being that they do not fall under FIFA jurisdiction and are therefore completely free in their activities. These agents are thus able to propagate those malpractices, and because they are invisible it is the identifiable group of agents - those who do hold a licence - who are held responsible for these malpractices. This negative image affects all licensed agents.

Is FIFA allowed to draft these regulations? This is a commonly heard question. It becomes increasingly clear at the individual state level, that FIFA as a sport-governing body lacks the public authority to exercise such legislative powers. The activities of players' agents may be characterised as the provision of employment market services; the agent is an intermediary in contacts between clubs and players, aimed at concluding a contract. In the vast majority of cases (93% of all EU agents,) these activities are governed by national laws relating to job placement, or international treaties such as the ILO convention on private employment agencies. These laws and acts prevail over FIFA regulations and create a vacuum in the regulation of agents; where there is a discrepancy between FIFA regulations and these laws, the FIFA regulations are set aside, creating unfair access to the European football market for those citizens of countries with a less rigorous method of regulating the profession.

Is there a solution? There does not seem to be a clear-cut answer, but establishing the European Football Agents Association is a first step, in the realisation that the problem is shared by all those with a stake in football, so all parties involved need to cooperate. There is a

* General manager of EFFA.

need for a solid, enforceable legal basis to interpret the current FIFA regulations, and to include more far-reaching articles where necessary, producing practical and efficient regulation guidelines. The aims of the European Football Agents Association (EFAA) may be described by noting that it has been formed to maintain, and where necessary, to introduce, a high standard of professionalism, clarity and regulatory control in the profession of players' agents within the football family.

The EFAA is recognised by the European Commission and its national members are part of the national football structures. The EFAA seeks to participate in the sound regulation of agents and to combat corruption and criminal activities in sport.

The EFAA wishes to stress the importance of its role in the (self-) regulation of agents and professional football in general, within the boundaries of European Law. Efficient and enforceable regulation is only achievable with the support, participation and consent of the organised collective of players' agents, in a spirit of transparency and collaboration with all football's relevant stakeholders.

Concrete regulatory elements are the introduction of a type of permanent education, and setting limits on the admissibility of exempt individuals. Payment methods and the international introduction of clearing houses for international transfers may also be discussed. But the most important element is acceptance by football's stakeholders that agents must participate in all this. Agents are not seeking to end regulation; on the contrary, the EFAA needs to serve as a bridge for the regulation of agents, to be in accordance with legal practice and enforceable regulations.

The EFAA currently has seven members in the most important EU football countries. As EFAA members may only be national agents associations, an important EFAA activity is assisting national agent groups to organise. Serious EFAA expansion is to be expected in the near future. Individual countries' football structures welcome the cooperation and a channelled agents' voice. The EFAA includes this goal in its aim as an organisation:

“OBJECTIVES

Article 2

1. The objectives of the Association are:

to bring together all national players' agent Associations that are active in Europe and that possess the status of a legal entity;

to look after the interests of these national players' agents Associations and their Members, the Fédération Internationale de Football Associations (FIFA) licensed players' agents, by representing and improving their general position within Europe;

to support and encourage FIFA-licensed players' agents in Europe, wherever necessary, in establishing their national players' agents Association.

2 The Association tries to achieve these objectives inter alia by:

promoting the cooperation, amicable relations and unity of the Member Associations and their Members, the FIFA-licensed players' agents;

aiding the exchange of information between the Member Associations and supplying information about developments that are important to the collective and individual position of the Member Associations in Europe;

promoting the interests of the Member Associations while considering the collective affairs important for said Associations in the fields of economics, social economics and employment law;

promoting and improving the interests of players' agents in possession of a FIFA licence, in all its aspects while safeguarding the general interests of the Member Associations;

promoting the co-operation, intermediary activities and relations among organisations, sports institutions, professional football clubs or any other entities and the individual Member Associations, in particular in the field of management, consultancy and all forms of employment in the professional sector of football;

concluding collective agreements;

all other lawful and permitted means that may be conducive to the objectives.

3. The Association shall be a not-for-profit organisation.”

The International Sports Law Journal

FIFA Players' Agents Regulations amended

The new FIFA Players' Agents Regulations came into effect on January 1 of this year. FIFA intends these amended regulations to provide more control over the activities of players' agents, including provisions which are also binding at the national level. The new regulations are also aimed at limiting the activities of unlicensed players' agents.

FIFA has delegated a variety of duties and powers involving players' agents to the national associations. These national associations are required to implement the amended regulations in their own rules by December 31, 2009 at the latest, with the exception of the amended provisions on obtaining and losing the players' agent licence which has to be implemented immediately.

Intrinsically, the new regulations contain a number of notable changes to the previous regulations (March 2001). One important change is that a players' agent licence issued under the new regulations will have a validity of five years, where the former regulations

allowed indefinite validity. On expiry of this five-year term the players' agent must undergo a new examination. Should he or she not pass this exam, the licence's validity will be suspended until the examination is passed.

Another important amendment is that if nothing has been agreed between a player and the player's agent about the extent of the remuneration to which the agent is entitled, the agent may claim 3% of the player's basic income (including signing fee). The former regulations stipulated that the agent had a right to 5% in such instances.

Article 29 paragraph 1 of the new regulations stipulates emphatically that no remuneration whatsoever which is paid as a result of a player's transfer to another club, may be paid either partially or fully to a player's agent by the new club. Amongst other things this provision covers a ban on the new club paying (part of) a transfer fee, training fee and/or solidarity fee to a player's agent.



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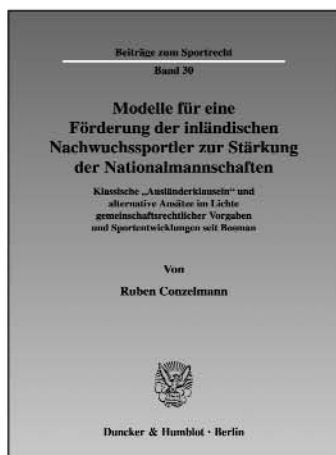
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Is the Professional Athlete's Right to Privacy Being Tacitly Ignored?*

by Janwillem Soek

Should a professional athlete put up with out-of-competition doping controls? One may question whether exceptions are permissible for professional athletes with regard to the right to privacy that is guaranteed in human rights treaties.

What is the legal basis for out-of-competition doping controls?

In February 1999, at the end of the first World Conference on Doping in Sport attended by representatives from the sports organisations and governments from many countries, a motion to set up the World Anti-Doping Agency (WADA) was adopted. This organisation subsequently drew up the World Anti-Doping Code (WADC), which now forms the basis of the doping regulations of almost all sports organisations. As governments cannot be legally bound by a non-governmental document like the WADC, it was agreed that a convention would be drawn up under the auspices of UNESCO in order to allow the governments to formally ratify the WADA and the WADC. On 19 October 2005, during a General Conference of UNESCO, the International Convention against Doping in Sport was adopted. The WADC is incorporated in that convention. On 1 February 2007, the convention came into effect in 30 countries - including the Netherlands. Pursuant to Article 15.2 of the Code, the WADA, the IOC, the national sports federation of the athlete and the doping organisation of the country in which the athlete resides can perform out-of-competition doping controls on the athlete for the use of drugs. Article 14.3 of the code stipulates that athletes who are nominated for such testing are required to inform the anti-doping bodies about their current and future whereabouts, the 'whereabouts information'. The WADA tells the reader of its website that "Because out-of-competition tests can be conducted anytime, anywhere and without notice to athletes, they are the most effective means of deterrence and detection of doping and are an important step in strengthening athlete and public confidence in doping-free sport."

Human rights

The countries which ratified the UNESCO convention allowed private anti-doping organisations to invade the lives of their subjects anytime, anywhere and without notice. To what extent does this far-reaching authority relate to Article 8 of the European Human Rights Convention? Section 1 of that article stipulates that "Everyone has the right to respect for his private and family life, his home and his correspondence". Section 2 adds that "There shall be no interference by a public authority with the exercise of this right except such as is in

accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The right to privacy can only be suspended under very specific conditions and then only when it is in accordance with a law and is necessary in a democratic society. With some good will, a violation as described in Article 15.2 WADC can be justified on the basis of the protection of health or morals or for the protection of the rights and freedoms of others. However, any discussion is purely academic because violating the privacy of persons pursuant to Article 8 (2) is only reserved to "a public authority". An anti-doping organisation is a private company and not "a public authority". It is not clear why national governments could have accepted provisions in the WADC which are in conflict with the Human Rights Treaty.

Pursuant to 8(2), a government can force persons on its territory to relinquish certain human rights for a certain time. Pursuant to this provision, this weapon is not granted to an association, such as a sports organisation. Yet the WADC approved by the governments does force athletes to relinquish their right to privacy.

An elite cyclist under contract may only practise his profession, i.e. participate in competitions, if he has a licence from the UCI or from his national association. The licence is only granted if the athlete declares irrevocably that he will undergo any anti-doping test according to the provisions in the sports regulations, so also out-of-competition doping controls "conducted anytime, anywhere, and without notice". Obtaining a licence is not voluntary; on the contrary, without a licence the cyclist cannot practise his profession and as an employer cannot be expected to employ a cyclist who cannot practise his profession, his days as a professional cyclist are numbered. When applying for a licence, the cyclist faces a dilemma. Relinquishing his right to privacy, gives him the right to work; choosing the principle of right to privacy means relinquishing his right to work.

Although sport emerged from the same civilization as the one which produced the Human Rights Treaty, it is apparently difficult for the sport movement to give human rights their due place in the statutes and regulations. Doping may be considered "the scourge of sport", but it cannot be tackled by violating provisions in international treaties, even if the various governments tacitly allow it.

* Previously published in World Sports Law Report, January 2008, p. 3.

The Legal Basis of the Olympic Charter*

by Alexandre Mestre**

If it is true that, in Sport, there is no event more universal than the Olympic Games, it is no less true that, in Sports Law, there is no text more universal than the Olympic Charter.

The existence of rules was already fundamental to the Olympic Games in ancient times, whether to establish who could take part in or be present at the Games, or in order to govern the conduct of training and the technical details of the competitions. The Olympic Truce already included the idea that, at least during the Games, it is the Olympic rules and principles, whether written or unwritten, which must prevail.

The rules governing the Olympic Games in the Modern Era were not however a priority for Baron Pierre de Coubertin, so that, it is only in 1908, i.e. 14 years after the creation of the International Olympic Committee (IOC) that internal regulations were drafted: the "IOC Directory". Moreover, they merely established basic principles regard-

* Previously published in World Sports Law Report, November 2007, pp. 6-7.

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ing the appointment of members of the IOC and the periodic organisation of the Games. The Directory made no provision concerning the selection of organising cities or the criteria applicable to the inclusion of a particular sport in the Olympic Programme.

The growth of the Olympic Games and of the IOC itself compelled an evolution from utopia to pragmatism, with the gradual emergence of so-called Olympic Law, the apex of which was to be occupied by the Olympic Charter, the founding text and fundamental source of the law of the IOC. This was already the position in 1924, although the Olympic Charter was then scattered between various texts. It is only in 1978 that the Olympic Charter was compiled in a specific document.

The concept and scope of the Olympic Charter is clear from its introduction, which states that its purpose is “(...) *the codification of the Fundamental Principles of Olympism, Rules and Bye-Laws adopted by the International Olympic Committee (IOC). It governs the organisation, action and operation of the Olympic Movement and sets forth the conditions for the celebration of the Olympic Games.*”

The functions of the Olympic Charter are essentially threefold: (i) it is the fundamental basic document of the Olympic Movement, with a legal status, which approximates that of a constitution; (ii) it defines the rights and obligations of the component parts of the Olympic Movement, with a legal status which is similar to a contract; and (iii) it is the founding document of the IOC (i.e. its byelaws governing its internal organisation - composition; membership rules; governing bodies, etc.)

As far as its structure is concerned, the Olympic Charter, in force as from 7 July 2007, currently amounts to 61 rules - the substantive provisions. These 61 Rules are to be read in conjunction with 31 byelaws, which explain or annotate those rules which may give rise to difficulties or which are particularly terse.

So far as the content is concerned, the Olympic Charter is a heterogeneous legal text, which combines general principles with more technical rules and enshrines both coercive rules and mere standards of conduct. The Olympic Charter is both comprehensive and complex and it enshrines executive powers (e.g. the procedure for the selection of a Games organising city); legislative powers (e.g. the requirements for the alteration of the rules) and judicial powers (e.g. the disciplinary mechanisms with regard to breaches of the Charter, the rules and the byelaws). The Olympic Charter has been carefully drafted, and pays great attention to detail - nothing escapes its scope, not even the Games Protocol. It is also noteworthy that, notwithstanding some rigidity in its amendment procedures, the content of the Olympic Charter is dynamic and has evolved over time, e.g. the removal of the amateur status requirement and the addition of subject matters such as the environment and “governance”.

It is the force and transcendence of the Olympic Charter over the

entire sporting universe (and more) which we wish to stress in this text. It is indeed amazing that a document issued by a Swiss private corporation has assumed all the features of an international treaty!

The Olympic Charter is a universal text, not because of its legal nature but, rather, because of an extra legal aspect - its moral authority, based on the social, economic and sporting significance of the Olympic Games. The Olympic Charter binding because it is voluntarily accepted, or recognised, by those to whom it is addressed, and comprise a wide-ranging community: private individuals, organisations of various types and others (e.g. States and international sporting federations).

This moral authority alone explains why a Californian court expressed reservations when upholding a state law in relation to the Olympic Charter (1984), or the fact that the EU Council of Ministers adopted legislation “(...) *taking the obligations arising from the Olympic Charter into consideration*” (2003), or the fact that, in Turkey, the “Olympic Law” transposes the Olympic Charter into internal Turkish law, or the fact that the basic laws of sport in force in countries such as Portugal, Spain or France, transpose the rules regarding the protection of the Olympic symbols, which are enshrined in the Charter. Even more noteworthy is the fact that States are formally subject to the primacy of the *Lex Olympica* and to the *ius stipulandi* of the IOC, when bidding for the organization of the Olympic Games.

In this regard, two important decisions of the Court of Arbitration for Sport in Lausanne (which is also under the auspices of the IOC), are particularly striking. They provide that the Olympic Charter “(...) *is hierarchically the supreme corpus of rules, which governs the activities of the IOC*” (the *Beckie Scott* judgment, 2003), in which its rules operate as a true reference standard, which can only be derogated from by more restrictive provisions (the *Nabokov* judgment, 2002). The byelaws of international sporting federations or the World Antidoping Code are good practical examples of this principle.

It follows from all of the above that the Olympic Charter is an atypical legal instrument, but is also unique, powerful, universal and inspiring, all which can also be said of the Olympic Games ...

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The International Sports Law Journal



On 30 May 2008 the Second International Scientific Practical Conference on “Sports Law: Prospects of Development” was organised by the Moscow State Academy of Law in cooperation with The Football Association of Russia, the Russian Olympic Committee, the Sports and Youth Committee of the Russian Federation Council, the Russian Association for Labour Law and Social Security Law, and the Russian Sports Law Association. Dr Robert Siekmann represented the ASSER International Sports Law Centre at this Conference as a key-note speaker. The picture shows the Luzhniki Stadium in Moscow, where the 2008 Champions League Final took place one week before the Conference.

The Court of Arbitration for Sport: Provisional and Conservatory Measures

Introductory Remarks

Sport is now a global business worth more than 3% of world trade. In the enlarged European Union, now comprising 27 Member States, it accounts for more than 2% of their combined Gross National Product. It is hardly surprising, therefore, that sports disputes are on the increase. And, like other industries, the settlement of sports disputes by alternative dispute resolution (ADR) processes is also on the ascendancy, including mediation¹. In other words, without resort to the Courts.

This is not only because litigation is slow, expensive, arcane and unpredictable; but there are also special reasons peculiar to the sporting world. Sports persons and bodies prefer not 'to wash their dirty sports linen in public' but settle their disputes 'within the family of sport'. In other words, amongst others who understand the special characteristics and dynamics of sport, which require quick and informal settlement procedures. This is especially true of selection disputes. In general, parties involved in sports disputes cannot afford to wait months - or even years - to settle their disputes through the Courts, by the sporting and/or business opportunity lost! Traditional arbitration also now suffers from the same ills, having become procedurally complex, inflexible, costly and lengthy.

However, due to the foresight of the former President of the International Olympic Committee (IOC), Juan Antonio Samaranch, a special body for settling all kinds of sports-related disputes, called the Court of Arbitration for Sport (CAS)², was set up with the intention of making the CAS 'the supreme court of world sport'. That was in 1983. A year later, the CAS opened its doors for business. During the last twenty-five years, the CAS has lived up to the expectations of its founders and is proving to be a popular³, fair, effective, relatively inexpensive, confidential and quick forum for the settlement of sports disputes.

The procedure to be followed in CAS Arbitration cases is set out in the Code of Sports-related Arbitration, the latest edition of which dates from January 2004. And the applicable law for determining the dispute is Swiss law, unless the parties agree on another law. The parties may also authorise the CAS to decide the dispute 'ex aequo et bono'.

The CAS handles a variety of sports-related disputes and is the 'final court of appeal' in doping cases under the World Anti Doping Code. It also offers mediation services and 'Advisory Opinions' - a species of 'expert determination' as used in international commerce, but with one important difference: CAS 'Advisory Opinions' are non-binding. Despite this, however, they are a relatively quick and inexpensive way of clarifying legal issues and thus avoiding expensive and lengthy litigation in the ordinary Courts.

The CAS also offers so-called 'Provisional and Conservatory Measures', which are the subject of this article and a recent CAS

Award in a leading football case, both of which will now be reviewed and examined.

CAS Provisional and Conservatory Measures

Article R37 of the CAS Code of Sports-related Arbitration (3rd edition, January 2004) empowers the CAS to offer the parties in dispute certain protective measures (known as 'provisional or conservatory measures') within a very short timeframe. However, no party may apply for such measures "before the request for arbitration or the statement of appeal, which implies the exhaustion of internal remedies, has been filed with the CAS."

If an application for provisional measures is filed, the opponent is given ten days in which to respond or within a shorter time limit where the circumstances of the case so require. In cases of 'utmost urgency', the CAS may issue an order on "mere presentation of the application, provided that the opponent is heard subsequently."⁴

Added to which, article R44.4 of the Code provides for expedited measures to be ordered by the CAS, with the consent of the parties. This is a measure which is very valuable in relation to sporting disputes, where deadlines and time pressures often apply. For example, a sports person or a team who has been denied eligibility to compete in a particular sporting event, which is soon to take place, need to have their dispute settled very quickly, if the possibility of competing is to remain open and not lost through any delay.

Again, article R48 of the Code also allows a party to obtain a 'stay of execution' of the decision appealed against, provided a request to that effect is made at the time of filing the statement of appeal with the CAS and also reasons are given in support of such request. This measure is particularly apposite in appeals against suspensions for doping offences. But it has also been invoked in a variety of other cases, including a decision to have a football match played on neutral territory to avoid a risk of terrorism in the host club's country. If the request is not made at the time of filing the appeal, it is lost; the assumption being that there is no urgency; otherwise this would have been pleaded at the outset.

Article R37 of the Code does not specify or limit the kinds of preliminary measures that the CAS Arbitrators can issue in a given case. But traditionally in arbitral proceedings, these measures tend to fall into three categories:

- measures to facilitate the proceedings, such as orders to safeguard vital evidence;
- measures aimed at preserving the *status quo* during the proceedings, such as those that preserve the object of the proceedings; and
- measures that safeguard the future enforceability of the decision, such as those concerning property.

For example, in the infamous so-called 'Skategate' case during the 2002 Salt Lake City Winter Games, an order was imposed on the judges not to leave the Olympic village before the CAS Ad Hoc Division had investigated the circumstances in which the disputed medal had been awarded. Again, orders have been made in doping cases to preserve samples taken during a disputed doping control.

However, preliminary measures can never exceed the object of the dispute. Thus, such measures cannot be issued against anyone who is not a party to the dispute; or anyone else who is not bound by the arbitration agreement signed by the applicant seeking the preliminary measures.

Furthermore, under the terms of article R37 of the Code, in appeal proceedings, the parties by agreeing to the CAS Procedural Rules "waive their rights to request such measures from state authorities." In other words from the local courts. However, such implied waiver does not apply to parties in cases under the CAS ordinary arbitration pro-

¹ See 'Mediating Sports Disputes - National and International Perspectives' by Ian S. Blackshaw 2002 TMC Asser Press The Hague, The Netherlands (ISBN 90-6704-146-7). See also Chapter 6: 'Alternative Dispute Mechanisms in Sport' by Ian Blackshaw at pp. 229-268 in 'Sports Law' by Simon Gardiner, Mark James, John O'Leary, Roger Welch, Ian Blackshaw, Simon Boyes and Andrew Caiger, Third Edition 2006 Cavendish Publishing London, UK (ISBN 13: 978-1-859-41894-9)

² See 'The Court of Arbitration for Sport 1984-2004' Ian S Blackshaw, Robert C R Siekmann and Janwillem Soek (Editors), 2006 TMC Asser Press The Hague, The Netherlands (ISBN 90-6704-204-8).

³ According to Matthieu Reeb, CAS Secretary General, writing in the 'CAS NewsLetter' of March 2005, "more and more people are taking their disputes to the Court of Arbitration for Sport without a second thought. It is true that the number of cases was expected to rise, especially since FIFA decided to allow appeals to the CAS in 2002. However, rather than a linear increase, the number of cases registered by the CAS has exploded...." The increase in the number of cases being referred to the CAS continues a phenomenal pace, particularly due to football related cases.

⁴ Article R37, para. 3 of the Code of Sports-related Arbitration.

cedure (para. 2). Thus, in such proceedings, the parties can apply for similar measures from the competent local courts.

Again, under article R37, provisional and conservatory measures may be made conditional on the provision of security by the party seeking them (para. 4). Such security is often a financial guarantee to be given by the applicant seeking such measures against any possible loss suffered by the party subject to the restraining measures in case the applicant is not ultimately successful in the proceedings. This happens in civil litigation quite often when an interim injunction is awarded by the court.

The criteria for granting CAS preliminary measures are not stated in article R37 of the Code, but are spelled out in the equivalent article dealing with the granting of such measures by the CAS Ad Hoc Division operating at the Olympic Games. This is article 14 of the Arbitration Rules for the Olympic Games; and provides, in paragraph 2, that, when deciding whether to award any preliminary relief, the following considerations shall be taken into account:

- whether the relief is necessary to protect the applicant from irreparable harm;
- the likelihood of success on the merits of the claim; and
- whether the interest of the applicant outweighs those of the opponent or other members of the Olympic Community.

It is not clear whether these considerations are cumulative or alternative, but, in practice, CAS Arbitrators have wide powers in relation to procedural matters. Also, reference may be made to the following view, with which the writer would entirely agree, expressed by an Ad Hoc Panel sitting at the Salt Lake City Winter Olympics:

*“... each of these considerations is relevant, but that any of them may be decisive on the facts of a particular case.”*⁵

In other words, CAS Arbitrators must take all the circumstances of the particular case into account, including the above criteria, when deciding whether or not to grant any preliminary relief.

We will now take a look at a recent CAS case involving a request for provisional measures, which illustrates and applies the above general principles. The case involved a dispute between two leading Greek football clubs and the Greek Football Association, The Hellenic Football Federation (“HFF”) (also referred to later in the article as “Respondent 2”).

Apollon Kalamarias FC v/ HFF & Olympiacos FC Case⁶

The text of the CAS Award in this Case, which was rendered on 21 April, 2008, is set out in the Appendix to this article, and the facts of the case are as follows:

On 3 February 2008, Apollon played an official football match against Olympiacos, during which it fielded the player Roman Wallner (“the Player”). Following this match, Olympiacos filed a complaint, claiming that the Player was ineligible to play in the match, because he had already played in official matches for two other football clubs during the same season, namely for Falkirk FC (in Scotland’s Premier League) and Hamilton Academical FC (in Scotland’s First Division).

Following the complaint filed by Olympiacos, the Disciplinary Committee of the Super League decided that the Player had been indeed ineligible to play, annulled the result of the match, and ordered that the match be replayed.

Apollon and Olympiacos both appealed the decision before the Appeal Committee of the HFF (“the Appeal Committee”). On 5 March 2008, the Appeal Committee issued a decision (“the Decision”) whereby it dismissed Apollon’s appeal, decided that the result of the match should be 3-0 in favour of Olympiacos and deducted one point from Apollon’s standing. The Decision, without the reasons, was notified to the Appellant on 6 March 2008. On 20 March 2008, Apollon appealed this decision to the Court of

Arbitration for Sport and also subsequently filed a request for provisional and conservatory measures. Its statement of appeal included the following prayer for relief:

“WE REQUEST FROM YOUR COURT

To accept this recourse.

To annul and reverse the number 57/5-3-2008 decision by the Hellenic Federation Appeal Committee.

To reject the objection of the club of Olympiacos Piraeus against the validil), of the match played between our teams on 2-3-2008 for irregular participation of the player ROMAN WALLNER on the above grounds.”

On 31 March 2008, the Appellant filed a request for provisional and conservatory measures (the “Request”). In the Request, the Appellant pointed out that the Decision was attracting media attention. It also stressed that the HFF had not yet provided the reasons for the Decision and submitted that such delay was a breach of established principles of natural justice and due process. According to the Appellant, the Decision is “erroneous or procedurally incorrect”. In this respect, the Appellant contends that the HFF “failed to consider in an appropriate manner the current regulatory framework, with the result to misdirect itself and reach an erroneous and unfair result”. In addition, the Appellant stated that information and documents were “missing from the investigation, or there was a blatant omission, on behalf of Respondent 2, to consider them”.

The Appellant requested the Panel to order the disclosure of the following documents and information:

- The reason(s) for the Decision;
- The transcripts of the minutes of the proceedings before the Disciplinary Committee of the Super League and the Appeal Committee of the HFF;
- The document identifying receipt of the International Transfer Certificate (“ITC”) of the Player;
- A written explanation by the HFF outlining the reasons for submitting the ITC late and allowing at the same time the Player to participate in the match which gave rise to this arbitration;
- The ITC and the Player’s passport.

The Appellant explained that these documents and this information are in the direct control of the HFF, or could become available to it. In addition, the Appellant contended that they are relevant to the issues in dispute.

The Appellant requested the Panel to grant the following Interim Measures:

The Appellant requested the Panel to “order Respondent 2 and the Organising Body of the Hellenic League, called “Super League”, to restore the 4 point deficit back to the Appellant, and construe the Super League Standings Table accordingly and with immediate effect”. In addition, the Appellant requested the Panel to order the HFF to comply with paragraph 20.3 of the Regulations of Professional Matches of the HFF and, as a consequence, to order the HFF and the Super League not to validate the Super League Standings Table pending the outcome of these proceedings.

The arguments of the Appellant and the counter-arguments of the Respondent are set out in the text of the Award which appears in the Appendix to this article.

The CAS dismissed the request for provisional measures and some comments on this ruling now follow.

Some Comments on the Apollon Case

As mentioned above, all such cases of provisional and conservatory measures depend upon the particular facts and circumstances of each case. And that is certainly true in the Apollon case. Likewise, each case requires a balancing of conflicting interests between the parties in deciding whether or not to grant the provisional and conservatory measures, which is a matter of fact; and this seems to be the determining factor in each case, and, again, was certainly true in the Apollon case.

⁵ CAS JO-SLC 02/004, COA v ISU, CAS 6 CAS 2008/A/11525 21 April, 2008. Digest III, pp. 592 & 593.

The CAS Panel dealt with the balance of interests' principle in the Apollon case in paragraphs 76-79 of the Award, holding that more harm would be suffered by the Respondent and other Greek teams if the provisional measures were granted than by the Appellant if they were not granted:

- “76. According to CAS jurisprudence, the potential harm to which the Appellant would be subject if the provisional measures are not granted must appear to outweigh the interest of the Respondents or third parties to the status quo.*
- 77. The Appellant did not specifically address this issue in its Request.*
- 78. The Panel considers that the risk of harm caused to the Appellant if the measures are not granted is limited (see above, section 8(b)). On the contrary, ordering a modification of the Super League standings as a provisional and conservatory measure might harm Olympiacos, as well the HFF and other Greek teams, since this could directly affect their capacity to play in next years European competitions.*
- 79. As a consequence, the interest of the Appellant in obtaining the measures (which, as already set out above, would not change the Appellant's position regarding relegation) does not outweigh the interests of the Respondents.”*

Furthermore, the CAS Panel also took a very pragmatic approach by pointing out that, even if the provisional measures sought by the Appellant were granted, by restoring the points deducted, this would not make any difference to their actual relegation position in the Super League. The Panel expressed this point in paragraph 75 of the Award in the following terms:

- “75. Based on elements of the matter, and in particular the undisputed fact that the Apollon would be relegated even if the measures requested were granted, the Panel considers that the Appellant has not brought prima facie evidence of a risk of irreparable harm.”*

This approach by the Panel, one of whose members is an English Solicitor, reflects the position under 'the Law of Equity' under English

Law, where all provisional and conservatory measures (so-called 'interlocutory' or 'preliminary' relief) are within the discretion of the Court and not, therefore, automatically granted, but must be shown to be appropriate in all the circumstances of each case. For as one of the so-called 'Maxims of Equity' states: 'Equity does nothing in vain'!

It is also interesting and surprising to note that the Appellant's lawyer did not adduce any *prima facie* evidence of the risk of irreparable harm to the Appellant, which is a basic requirement under CAS jurisprudence in provisional and conservatory measures cases (see paragraphs 76 and 77 of the Award cited above).

In the view of the author of this article, the ruling in the Apollon case is in line with decisions in previous CAS preliminary measures' cases and seems to be fair and logical in the particular circumstances. It is understood that the main Appeal will go ahead and it will be interesting to see the outcome of it, in due course. However, I think the Appellant's lawyer may have an uphill battle in winning the case, because, in some respects, the ruling on preliminary measures may perhaps be viewed as a ruling on the merits of the main appeal case itself.

Conclusion

It is clear that the CAS during its twenty-five years of existence has been successful in being able to grant parties very valuable, relevant and generally effective kinds of final relief in a wide range of sports-related disputes, as well as interim protection and relief, where appropriate, at an early stage in the proceedings. Such preliminary measures are particularly apposite in relation to sport and its special characteristics and dynamics, where parties in dispute are often faced by sporting deadlines, particularly in eligibility and selection disputes. Such measures are extremely useful to the international sporting community as they ensure that fairness - an essential element in sport - and justice are not only done - but, as rulings in preliminary measures cases are published, also seen to be done - both on and off the field of play.

The International Sports Law Journal

Two Stripes and You Are Out?

The long-awaited Preliminary Ruling by the Court of First Instance of the European Court of Justice (ECJ) (C-102/07) in the Adidas 'three stripes' trademark case was rendered on 10 April, 2008. The case concerned the extent of the legal protection under Trademark Law within the European Union afforded to the three vertical stripes on sports and leisure goods produced and sold by Adidas. The facts of this case are as follows:

The Parent Company of the Adidas Group, Adidas AG, is the proprietor of a figurative trademark composed of three vertical, parallel stripes of equal width that feature on the sides of sports and leisure garments in a colour which contrasts with the basic colour of those garments. Its Subsidiary Company, Adidas Benelux BV, holds an exclusive licence, granted by Adidas AG, to use this mark on garments marketed in the Benelux countries.

Marca Mode, C&A, H&M and Vendex are competitors of Adidas, who also market sports garments featuring two parallel stripes, the colour of which contrasts with the basic colour of those garments.

Adidas took the competitors to Court in The Netherlands claiming the right to prohibit the use by any third party of an identical or similar sign which would cause confusion in the market place. Marca Mode and the other defendants to these proceedings, however, claimed that they are free to place two stripes on their sports and leisure garments for decorative purposes. Their defence was based on the so-called requirement of availability, namely that stripes and simple stripe motifs are signs which must remain available to all and,

therefore, they did not need the consent of Adidas to use the two-stripe motif on their garments.

Adidas won at first instance; were overruled on appeal; and the case finally came, on a point of law, before The Supreme Court of the Netherlands (Hoge Raad der Nederlanden), which sought clarification from the ECJ on the main point at issue, namely, whether the requirement of availability is an assessment criterion for the purposes of defining the scope of the exclusive rights enjoyed by the owner of a particular trademark.

The Court ruled, first, that the requirement of availability of certain signs is not one of the relevant factors to be taken into account in the assessment of the likelihood of confusion. The answer to the question as to whether there is that likelihood must be based on the public's perception of the goods covered by the mark of the proprietor on the one hand and the goods covered by the sign used by the third party on the other. The national court must determine whether the average consumer may be mistaken as to the origin of sports and leisure garments featuring stripe motifs in the same places and with the same characteristics as the stripes motif of Adidas, except for the fact that the competitors' motif consists of two rather than three stripes.

Secondly, the Court turned its attention to the specific protection granted to trademarks with a reputation. It noted that the implementation of that protection does not require the existence of a likelihood of confusion between the sign and the mark. The mere fact that the

relevant section of the public establishes a link between the two is sufficient. Since the requirement of availability is extraneous both to the assessment of the degree of similarity between the mark with a reputation and the sign used by the third party and to the link which may be made by the relevant public between that mark and the sign, it cannot constitute a relevant factor for determining whether the use of the sign takes unfair advantage of the repute of the mark.

Finally, the Court stated that, even though the proprietor of a trademark cannot prohibit a third party from using descriptive indications in accordance with honest practices, the requirement of availability does not constitute, in any circumstances, an independent limitation on the effects of the trademark. In order for a third party to be able to plead the limitations of the effects of a trademark contained in the EU Directive on Trademarks (First Council Directive 89/104

/EEC, 21 December, 1988) and to rely on the requirement of availability, the indication used by it must relate to one of the characteristics of the goods. The purely decorative nature of the two-stripe sign pleaded by the defendants does not give any indication concerning one of the characteristics of the goods, such as kind, quality, quantity, intended purpose, geographical origin, size and price.

In the light of the ECJ Preliminary Ruling, it is now up to The Netherlands Supreme Court to finally decide the case. In view of the final point made by the ECJ as noted above, which recognizes and attempts to reconcile the apparent conflict between the exclusivity of trademarks rights and the freedom of movement of goods within a single European market, it looks as though it is a case of two stripes and you are out and Adidas will ultimately triumph in these protracted legal proceedings!

The International Sports Law Journal

Can Dwain Chambers Successfully Challenge the Life Time Ban on Competing in the Olympics Imposed on Him For a Doping Offence?

Introductory

British Sprinter Dwain Chambers was suspended in 2003 from competition for two years by the International Association of Athletics Federations (IAAF) after testing positive for the banned steroid THB. Having served his ban, this elite athlete has returned to competition and now has his sights set on competing in the Olympics - the pinnacle of every sports person's career and dream. See the author's related article entitled, 'Dwain Chambers and his Quest for Rehabilitation'. But Chambers faces an uphill task in achieving his dream. Because under the rules of the British Olympic Association (BOA), any athlete who is banned for a doping offence by his/her sports governing body is also banned for life from competing in the Olympics. The only way he can do so is to successfully challenge this ban in the Courts and get it overturned. But this is easier said than done. There are a number of legal hurdles to be overcome.

The General Attitude of the English Courts to Sports Disputes

In England, there is a long established legal tradition that the Courts do not generally intervene in sports disputes. They prefer to leave matters to be settled by the sports bodies themselves, considering them to be in the words of Vice Chancellor Megarry in the case of *McInnes v. Onslow-Fane* ([1978] 1 WLR 1520, at p 1535) "..... far better fitted to judge than courts." And, Lord Denning MR went further and expressed the point in the following succinct and characteristic way in *Enderby Town Football Club Ltd v. Football Association Ltd* ([1971] 1 Ch 591, at p 605): "..... justice can often be done in domestic tribunals better by a good layman than a bad lawyer." However, the English Courts will intervene when there has been a breach of the rules of natural justice (*Revie v. Football Association*, The Times, 19 December 1979) and also in cases of 'restraint of trade', where livelihoods are at stake (*Greig v. Insole*, [1978] 3 All ER 449).

Incidentally, a similar situation obtains in the United States (see *Harding v United States Figure Skating Association* [1994] 851 F Supp 1476).

The 'Restraint of Trade' Doctrine

What is meant by a 'restraint of trade'?

A 'restraint of trade' is a restriction that prevents a person from earning his/her living and is generally void. This doctrine in its current form evolved during the late 19th and early 20th centuries when the Courts began to pursue a general policy of enforcing the right of every person to work and offer their services without any restriction.

Lord Macnaghten expressed the doctrine in the case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co Ltd* ([1894] AC 535, at p 565) in the following terms:

"The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty in action in trading, and all restraints in themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and indeed, it is the only justification, if the restriction is reasonable reasonable that is, in the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

It will be seen from the above judicial statement of the Common Law doctrine of 'restraint of trade' that Chambers will need to satisfy the High Court that the lifetime ban imposed on him by the BOA is unreasonable; does not serve any purpose/interest meriting protection; and is contrary to the public interest.

Examining these elements in turn. For a first doping offence, for which the offender has served his time of two years out of competition, a life time ban *prima facie* is disproportionate. In other words is excessive and, therefore, unreasonable. So far so good for Chambers.

But in reviewing the other two legal requirements, Chambers, in my view, would appear to have some possibly insurmountable difficulties in persuading the Court to hold that the life time ban is an unreasonable 'restraint of trade'. Why? Because, the aim of doping controls and restrictions is to rid sport of drugs and to keep sport 'clean' in a health sense. This is the interest to be protected and there is also a further interest to be safeguarded, namely, to provide a 'level playing field' for the other competitors in the same event who are not using banned substances to enhance their sporting performance. A sporting consideration. In addition, the public interest, which is generally regarded as a 'fluid concept' and also a discretionary one, also demands that sport be drugs free and drugs cheats should be punished and deterred. There is also judicial precedent in support of this point of view, which will now be reviewed.

Some Previous Court Decisions

In the celebrated case of *Gasser v. Stinson* ([1988] unreported, 15 June (QBD)), Sandra Gasser, a Swiss athlete, who was given an automatic ban for testing positive for a banned substance found in her urine, challenged the rules of the IAAF, claiming that the rules were in unreasonable 'restraint of trade'. Under these rules, an athlete was not permitted to try to establish innocence, even in mitigation. This meant that a finding of 'guilt' had the effect of resulting in a mandatory suspension of a fixed term and this she claimed to be unreasonable and unjustifiable. In turn, she argued, that an athlete found

'guilty' and punished accordingly could, in fact, be 'morally innocent', in the sense that the athlete concerned had not intentionally or knowingly taken a banned substance. So, to treat those who were 'morally innocent' in the same manner as those who had knowingly cheated, she further argued, was unreasonable. However, the Court agreed with the claimant that the rules were restrictive, but also held that they were 'reasonable'. The Court accepted the IAAF argument that the difficulty of proving 'moral innocence' would open the floodgates to such claims and attempts thereby to thwart drugs cheats would prove to be useless. In other words, general penalties for doping offences could be justified on the ground of the important - one might say overriding - need to eliminate drug taking in sport. This, of course, is the basis for the concept of 'strict liability' in doping cases. Incidentally, it is interesting to note that a Swiss Court actually accepted Sandra Gasser's claim to 'moral innocence' and, as such, refused to uphold a ban imposed on her by her national sports governing body.

Furthermore, the attitude of the English Courts to accept sports governing bodies' needs to fight the oft-described 'war against drugs' by all possible means is also reflected in the subsequent case of *Wilander v. Tobin* ([1997] 2 Lloyd's Rep 293). In that case, two tennis professionals, Matts Wilander and Karel Novacek, unsuccessfully challenged a similar rule of the International Tennis Federation. Lord Woolf, the former Lord Chief Justice, pointed out in the Court of Appeal the limits of the 'restraint of trade' doctrine in a sporting context in the following terms:

"The history of these proceedings discloses that the claimants have taken

point after point with a view to defeating domestic disciplinary proceedings which in relation to sporting activities should be as uncomplicated as possible. While the courts must be vigilant to protect genuine rights of sportsmen in the position of the claimants, they must be equally vigilant in preventing the courts' procedures from being used unjustifiably to render perfectly sensible and fair procedures inoperable."

Again, the above extract from the Appeal Court's judgement also clearly confirms the general reluctance of the English Courts to intervene in sports disputes, leaving them, wherever possible, to be settled extra-judicially by the sports governing bodies themselves.

Conclusion

Although judicial precedent would appear to be against Dwain Chambers successfully challenging and overturning the BOA life time ban imposed on him, it may be argued that the disproportionate penalty could be the deciding factor. Because, in all 'restraint of trade' cases, the English Courts have to perform a delicate balancing act between on the one hand upholding the right of an individual to work and earn his/her living and respecting the public interest on the other. Whilst not condoning drugs cheats, surely an offender, like any other offender, who has served his time, should be given the opportunity of rehabilitation after a certain period of time? In that way, the competing rights of the individual and the public interest, it is submitted, may be reconciled. In any case, it will be interesting to see whether Chambers actually challenges the ban, and, if so, what arguments he uses in support of his claim and also the final outcome in the Courts.

The International Sports Law Journal

Jail Players Who Commit Dangerous Tackles

In a wide-ranging interview published in *The Times* on 7 March, 2007, Sepp Blatter, the President of FIFA, the world governing body of football, called for life bans and criminal sanctions to be imposed on players guilty of dangerous tackles. In other words, not only should such conduct be dealt with under the 'Laws of the Game' resulting in sporting sanctions, but should also be the subject of prosecutions under the Criminal Law. For, as Blatter pointed out: "Attacking somebody is criminal, whether it happens on a football pitch or elsewhere." Adding: "It is a crime and should be treated as such." These suggestions follow closely on the heels of the spectacular tackle suffered by the Arsenal player, Eduardo da Silva, which resulted in a fractured left fibula and dislocated ankle.

Blatter is quite right to call for such measures and his remarks, in fact, reflect the general principle that sport should not be a licence to commit thuggery as recognised in the English criminal case of *R v. Lloyd* ([1989], 11 Cr App R (S) 36). Such tackles may constitute, at Common Law, an assault. And the general aims of the law of assault is to protect people from being caused unnecessary harm and also to deter others from causing criminal injury in the future. Most sports include safety rules designed to avoid players suffering injury. But when players go beyond the accepted norms and culture enshrined in a particular sport to cause injury to other players, the Criminal Law steps in to provide the ultimate sanction (see *R v. Billingham* [1978], Crim LR553). And rightly so. As Dr Mark James, an expert on the interface between the Criminal Law and Sport, points out in Chapter 15 on 'The Criminal Law and Participator Violence' in '*Sports Law*' by Gardiner, James, O'Leary, Welch, Blackshaw, Boyes and Caiger, Cavendish Publishing, London, Third Edition, 2006: "... the law has both an actual and a symbolic role to play; to punish those who cause injury and to be seen to be enforcing the aims of the criminal law." Indeed, there is a public interest dimension to be served. Of course, the injured player can also bring a legal action for damages in the Civil Courts. In such cases, the standard of proof that applies is the lower one of 'on a balance of probabilities'. On the other hand, if criminal charges are to be preferred - in either a private or a public prosecution - the standard of proof is higher, namely: 'beyond reasonable

doubt'.

A crime needs two elements: the wrongful act ('*actus reus*'); and the intention to commit that act ('*mens rea*'). So, any prosecutor trying to put a dangerous tackler behind bars will be faced with the task of proving both, but especially the criminal intent, which may prove difficult, according to the circumstances of the particular case. The offender may, for instance, claim that it was an accident and, therefore, unintentional. Rather than having to prove merely negligence, which is necessary in civil cases where a player sues for damages, the prosecution would have to prove that the tackler set out to injure his opponent. Yet proving intent may not be as difficult as it may appear. Nowadays, there is a lot of electronic evidence to show exactly what happened. And that kind of evidence is admissible, in my view. Or, again, a fellow player might have heard something: like, 'I'll get you'; or words to that effect, which tend to show intent. Such a witness statement is certainly admissible.

Generally speaking, the police or prosecuting authorities, who have a discretion in the matter, tend to leave all but the most serious incidents to be dealt with by the football authorities under their disciplinary rules. However, if, for example, someone gets killed, the police would be bound to intervene.

Two past cases involving dangerous tackles may be cited to illustrate their treatment under Scottish and English Criminal Law. Duncan Ferguson, the former Scotland forward, was jailed in 1994 for head-butting an opponent on the pitch while playing for Rangers. Whilst Greater Manchester Police investigated Ben Thatcher's challenge on Pedro Mendes in August 2006, but no criminal charges were brought. In that case, Mendes, the Portsmouth midfield player, woke up in hospital and was monitored by brain specialists after Thatcher, playing for Manchester City, struck him on the head with his elbow in a late challenge. The matter was left to be dealt with by the football authorities and Thatcher was banned for eight matches by the English FA. If Sepp Blatter gets his way - and one may add that he usually does - such a case involving serious injury under any new rules that may be introduced would - and, indeed, in my opinion, should - result in a life-time ban.

Sepp Blatter's call to see players, who commit dangerous tackles, prosecuted is not just a headline-grabbing gimmick or a far-fetched flight of fancy, but a serious matter that makes a lot of sense and needs careful consideration. Especially nowadays when not only is sporting

pride at stake, but so also is serious money. This puts a lot of pressure on managers and coaches to win at any cost. As such, Blatter's move should be warmly welcomed by players and fans alike.

The International Sports Law Journal

English Premier League Record Transfer Fees: For the Good of the Game?

Football is not only the world's favourite sport, it is also the most lucrative one. Globally, worth billions of dollars! And of all the Leagues around the world, the English Premier League (EPL) is by far the most popular and also the most financially successful, with a total wage bill which has now topped £1 billion. The financial wealth and spending power of the EPL is certainly borne out by figures recently released concerning the amount spent by EPL Clubs on players during the January 2008 transfer window, which, according to Alex Ferguson of Manchester United, the world's richest club, is not necessarily the best time of the year to buy new players. According to Deloitte's, the well-known accountants and financial services firm, who, amongst other things, monitor football finances, the amount spent by EPL Clubs on transfers was £150 million; in fact, more than double that of any previous January periods. The comparable figure for 2007 was £60 million. Again, the rationale behind all this transfer spending was to improve the performance and chances of the Clubs concerned in winning football competitions and even, in some cases, avoiding relegation from the prestigious and lucrative EPL!

This spending spree on players is largely the result of the record sale of the EPL TV rights of £1.7 billion for the current and the next two seasons. The top spender was Chelsea with £27 million, closely followed by Tottenham Hotspur with £20 million.

Paul Rawnsley, director of the Sports Business Group at Deloitte's, commented on these record transfer figures as follows:

"We had the record spending last summer which was fuelled by expectations that the clubs had on the back of money from television, and spending by new club owners. The same factors have been seen in the January window, except that now clubs have actually got their hands on the broadcasting money."

The largest fee was paid by Chelsea, who bought Nicolas Anelka from Bolton Wanderers in early January for £15 million. However, the spending on transfer fees was not confined to the top EPL Clubs, but was distributed throughout the members of the League. For example, Middlesbrough, in the lower echelons of the League, paid out an undisclosed record transfer fee of reportedly around £12m for the Brazilian forward Afonso Alves.

Transfer spending between the EPL Clubs themselves amounted to around £55m; that is, about 40% of their total spend. The balance being represented by transfer deals with lower league clubs, or overseas teams. To quote Rawnsley again:

"The Premier League can obviously pull in top players from around the world. There may be a debate about whether this is a good thing for the English game, but the way they are spending can be seen as a gauge of the financial strength of the Premier League."

And that is surely the point. Is all this spending on foreign players for the good of the English game? Likewise, is all this spending on player transfers generally for the good of the wider game? What are the limits? Should there be mandatory caps on foreign players?

An issue currently facing football's World Governing Body, FIFA, and reportedly high on President Sepp Blatter's agenda for 2008. My own views on this controversial subject have been set out in my earlier Opinion, entitled, *'Foreign Player Quotas in Football Teams: Sporting and Legal Pros and Cons'*.

It has often been said that 'money is the root of all evil' and record transfer fees, in my opinion, may yet prove to be football's downfall. I very much hope not; and that reason, common sense and sporting integrity will prevail for all those with a stake, not least the fans, in the 'beautiful game'!

The International Sports Law Journal

Restrictions on Foreign Ownership of Football Clubs: For the Good of the Game?

Football is not only the 'world's favourite game' but the world's most lucrative sport. The sale of broadcasting rights and corporate sponsorships of major events, such as the FIFA World Cup, bring mega sums into its coffers. But is such wealth necessarily for the good of the game? In particular, how much trickles down to the 'grass roots' and do fans benefit from it? Or has the integrity - the essential values that have made football what it is and so popular - of the beautiful game suffered as a result?

In 2008, football is facing a number of issues that need to be resolved. Apart from corruption in the game, one other important issue, which must surely be high on the President of World Football Sepp Blatter's agenda in the New Year, is the matter of foreign ownership of football clubs. And how to deal with this growing phenomenon, which has become the subject of much controversy and widespread discussion as of late.

One school of thought on this vexed question is that foreign ownership brings much needed capital into football clubs, enabling them to buy players and improve training and sporting facilities at their grounds. This surely benefits the fans, who are not only keen to see their teams win competitions, but also provides them with safe and

modern venues, which enhance their football experience. The local economy also benefits. And, therefore, nothing should be done.

On the other hand, others argue that foreign ownership takes away the community dimension and spirit of football and 'grass roots' involvement in the running of football clubs. Fans claim that they no longer have a say in or a stake in the future of their clubs. And, without the fans and their loyal support, clubs would not be able to function. This goes to the heart of sport and its social purpose. And, therefore, there is a need for something to be done.

How does one reconcile this dichotomy of views - for the good of the game? This is the real dilemma that needs to be addressed by the football authorities and the clubs themselves. In some respects, in reality, we may have passed the point of no return so far as football finances are concerned. It is probably too late to turn the clock back to the halcyon days when football clubs were part and parcel of the local community whom they served and local involvement was paramount and sacrosanct.

To be realistic, therefore, perhaps the solution to this problem is not to ban outright but to restrict the level of foreign investments in football clubs, retaining shares for national and local investors,

including the fans. But where do you fix the limits? And what effects do such limits give rise to under the local law, especially Company Law, and, in particular, in relation to protected minorities, as most football clubs are limited liability companies. And how do you avoid foreign interests operating through trusts and other legal mechanisms and devices, including the use of nominees, to get round any quantitative restrictions? There is a clear need for openness and transparency in such respects. Likewise, the source of the foreign investors' funds also needs to be clear. In this connection, highly leveraged financial arrangements that may be involved need to be specified and clarified, especially if the result of them will be to burden the club with heavy debt in the future.

Also, to preserve the integrity of the game and the clubs themselves, a so-called 'fit and proper person' rule could be introduced - similar to the one that operates in the English Premier League; the world's most successful and lucrative League. But, again, there is the question of how you define the concept and what objective - rather than subjective - criteria apply. And also, how you control and police such a measure. A matter for the sports lawyers and not an easy one to boot!

One could also introduce a requirement that foreign investors must set out their plans for the future development and benefit of the club concerned over, say, a five-year period, and, in particular, in what ways and how soon fans may be expected to gain from the business plan. Again, how do you legally frame and enforce such plans, which may turn out to be wishful thinking and good intentions only on the part of investors and not legally binding, as well as being based on so many assumptions and subject to so many 'caveats'. Again, all very fine in theory, but not easy to apply and enforce in practice.

At the end of the day, some would argue that perhaps it is better to leave matters to free trade and market forces and adopt a 'laissez-faire' approach, because, after all, football is now big business and, as such, has come to rely on mega sums coming into the game from a variety of sources to keep it going and secure its future.

Big questions, with no easy answers and, therefore, quite a challenge to sports administrators and their legal advisers alike, but not one, it is submitted, to be ducked. So, it is over to you Mr Blatter!

The International Sports Law Journal

Foreign Player Quotas in Football Teams: Sporting and Legal Pros and Cons

Sepp Blatter, the President of FIFA, the world governing body of football, has been concerned for some time with the preponderance of foreign players, not least in the English FA Premier League, the most successful and popular of the Football Leagues, with devoted followers throughout the world. And Blatter has recently been pontificating on the subject, announcing that he wants to introduce a cap on the number of foreign players in football teams. And, furthermore, will take on the European Commission if there are any objections to this move on the grounds of discrimination, freedom of movement of players or incompatibility with European Union (EU) Competition Law. Indeed, UEFA, the European governing body of football, is already working on its so-called 'home grown players' regulations, with the same aims and objectives.

So, what are the arguments for and against such initiatives, from a sporting and a legal point of view?

The main sporting argument in favour of such caps appears to be that the use of foreign players is detrimental to developing home grown talent. In other words, young non-foreign players, who would eventually be eligible to play in national teams in international football competitions, such as the World Cup and the UEFA Cup, are not being encouraged, trained and brought on, as substantial financial resources are being committed to buying foreign expensive players. Another sporting reason in favour of limiting the number of foreigners per team is that such restrictions would help to balance out the game. In other words, there would be more foreign players to go round the various teams and this would even out and enhance the competitive element and make for better matches. After all, leagues thrive on real competition and uncertainty of outcome!

Whereas, the main sporting argument against foreign player caps, taking again the example of the English FA Premier League, seems to be that such leagues and competitions would be less attractive from the fans' and also from the broadcasters' points of view. One main reason for the success of this League is the presence of leading foreign players in the teams that compete in this competition, adding excitement and passion to the game. In turn, this makes such a League attractive also to broadcasters, who are willing to pay mega sums for the TV rights. For example, the English Premier League, the richest in the world, has sold its principal broadcast rights to its matches for the next three seasons, beginning in August 2007 and ending in 2010, for a record sum of £1.7bn. Again, the lion's share of these rights, namely 92 live matches per season, have been sold to the satellite broadcaster, BSkyB, which will be shown as part of its Sky Sports

package on a subscription basis. The deal means that BSkyB is paying about £4.8m per game. The Irish pay-TV firm, Setanta, has won the right to show 46 matches per season, at a cost of about £2.8m per game. Since acquiring the rights, BT (British Telecom) has entered into an alliance with Setanta, under which BT will offer its subscribers to its broadband service, BT Vision, packages to view 'near live' Premier League matches (that is, at 22 00 hours on the day of the games) on a monthly subscription basis. Such sums and deals are not to be sniffed at or ignored by football clubs and broadcasters alike. So, it all seems to be a matter of money, and, the view in many quarters, particularly amongst fans, is that this obsession with the financial side of football is tending to undermine the integrity of and tarnish 'the beautiful game'.

But what of the legal position regarding these caps? Would such schemes limiting foreign players pass muster under EU Law? Particularly now since the decision of the European Court of Justice in the *Meca-Medina* case (Case C-519/04P, *Meca-Medina and Majcen v. Commission*, ECR 2006, I-6991), which, to some extent, has limited the application of the so-called 'sporting exception' (or to use EU speak the 'specificity of sport') to such restrictions under EU Law. The effect of this ruling is that there is no general exemption where restrictions are imposed for sporting reasons; each case must be considered on its own particular circumstances and merits. In any case, the restrictions should go no further than is reasonably necessary to achieve the particular sporting objective.

Also, does the so-called 'White Paper' on Sport, recently published by the European Commission, shed any light on the legal situation? The 'White Paper' accepts and takes stock of the '*acquis communautaire*' (the existing body of European Law, particularly comprising rulings of the European Court of Justice) in the sports field. And points out that the specificity of sport has been recognised and taken into account in various decisions of the European Court of Justice and the European Commission over the years. Take *Bosman* (Case C-415/93 [1995] ECR I-4921), for example, the European Court of Justice 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."

And the 'White Paper' adds that, in line with the established EU case law, the specificity of sport will continue to be so recognised, but it cannot be construed so as to justify a general exemption of sport from the application of EU Law.

The 'White Paper' also gives some examples of organisational sporting rules - the so-called 'rules of the game' - that are not likely to offend EU Competition Law, provided that their anti-competitive effects, if any, are inherent and proportionate to the legitimate objectives pursued. These examples include rules concerning the composition of national teams. A hark back to the European Court of Justice landmark ruling in the 1976 Dona case (Case 13/76, *Dona v. Mantero* [1976] ECR 1333), in which restrictions on foreign players participating in national teams in international football competitions was upheld on sporting grounds. As the Advocate General in this case pointed out in his Opinion:

".....there is, in my view, nothing to prevent considerations of purely sporting interest from justifying the imposition of some restriction on the signing of foreign players or at least on their participation in offi-

cial championship matches so as to ensure that the winning team will be representative of the state of which it is the champion team."

The Court followed the advice of the Advocate General.

It would seem from the above, that caps on foreign players in football teams could pass muster under EU Law. But, it is not a foregone conclusion, for, as they say: *'the Devil is in the detail'*. So, despite the characteristic fighting talk of Sepp Blatter, any regulations restricting the number of foreign players in football teams, introduced by FIFA and/or UEFA, will need to be very carefully drafted and, in particular, the sporting reasons for the restrictions well defined and expressed, if they are not to fall foul of EU Law. In other words, Blatter, whatever else he might think, does not have a free hand to do what he likes, even though he is the most powerful person in world football, *'the world's favourite game'*. So, it will be interesting to see what happens next in this developing and controversial area of sports regulation.

The International Sports Law Journal

Ian Blackshaw



PRESS-RELEASE:

A SOCIAL DIALOGUE IN EUROPEAN PROFESSIONAL FOOTBALL: WHO WILL PARTICIPATE AND WHAT WILL BE ON THE AGENDA?

The ASSER International Sports Law Centre in The Hague, The Netherlands, The Centre for Sports Law Research of Edge Hill University near Liverpool, United Kingdom, and the Institute for Labour Relations of the University of Leuven, Belgium, have undertaken a joint EU-cosponsored study into the identification of labour-related themes and issues which can be dealt with in a Social Dialogue which should result in a Collective Bargaining Agreement (CBA) between clubs and players in the European professional football industry.

One of the central questions at stake is whether a bipartite Social Dialogue Committee, once officially established on the basis of the EU Treaty, may regulate or make proposals in relation to common issues of concern as alternatives for or even in deviation of current UEFA and/or FIFA rules and regulations. What about the FIFA-supported "6+5" and the UEFA "home grown players rule", and the international match calendar for example? Other relevant issues are such as player's contract and transfer matters, the exploitation of players' image rights, the protection of minors from non-EU countries, doping etc.

FIFPro, the worldwide players' union, on the one hand and EPFL, the European Association of Professional Football Leagues, on the other are the obvious partners for a Social Dialogue at the European level. Recently however, the European Club Association (ECA) was established under the chairmanship of Karl-Heinz Rummenigge of Bayern Munich. What will be the role and position of ECA which directly represents a broad spectrum of European professional clubs, in the perspective of the forthcoming establishment of a Social Dialogue Committee in the European football industry? This is another key issue which is currently under discussion.

The Final Report on the above-mentioned study will be presented by the research team at an international press-conference in Brussels on **Monday 26 May 2008, kick-off: 15.30 o'clock. Venue: Koninklijke Vlaamse Academie van België voor Wetenschappen en Kunsten** (Royal Flemish Academy of Belgium for Sciences and Arts), **Paleis der Academiën, Hertogstraat 1, B 1000 Brussels.**

For further information and registration please contact: Dr Robert Siekmann, project manager, ASSER International Sports Law Centre,
The Hague, The Netherlands, Phone: +31 - (0)70 - 3420342/345/300, E-mail: sportslaw@asser.nl

Front of Royal Flemish Academy of Belgium for Sciences and Arts, the venue of the press-conference on the Social Dialogue in Professional Football Report on 26 May 2008.



Report on the Final Conference of the Row the Boat Project, Arnhem, 7-8 February 2008

The Row Must Go On

*Row, row, row your boat
Gently down the stream
Merrily, merrily, merrily, merrily
Life is but a dream.**

The final conference, which ended the project "Reinforce the Representativeness of the Social Partners in the Sport Sector: Row the Boat Project" (hereinafter "the RBT project") took place on two consecutive days at 7 and 8 February 2008 in Papendal Hotel and Conference Centre in Arnhem, the Netherlands.

The participants in the conference were formally divided in three categories - employers' representatives, employees' representatives and helpful stakeholders. Participants falling within all three categories had the chance to speak at the conference or to share their opinions during the sessions of the working groups. The conference was chaired by Allan Pilkington, who represented the SkillsActive - organization for employers in the professional, voluntary and commercial sport, member of the European Association of Sport Employers (EASE) - and also EOSE (European Observatoire of Sport and Employment).

Marie Leroux - the EASE President Delegate and RBT Project Manager - opened the conference with welcoming messages and continued with the presentation of the RBT Project. She outlined the current state of the social dialogue in the sports sector, noting that collective bargaining agreements had been concluded only in football and explained how the idea for the project had emerged. The main aim of the RBT project was developing the social dialogue in the European sports sector through the reinforcement of existing social partners. In addition, the RBT project pursued a second aim and it was to support the development of social partners in countries where the social dialogue in the sport sector is now emerging. The focus of the RBT project was not specifically on conclusion of collective bargaining agreements but rather on establishment of the framework for discussions between the social partners.

As a project perspective the organizations running the project envisaged the creation of a sport social dialogue committee at European level. The legal ground and possibility for establishment of such a committee is the Commission Decision on the Establishment of Sector Social Dialogue Committees following a request by representative European organizations of workers and employers, under which mechanism already 35 committees have come into existence. The aims of a sports social dialogue committee according to Marie Leroux shall include: giving a European recognition to the sports sector; defending the sports specificities; facilitating the development of European education and training solutions at the sectoral level; and reinforcing the professionalization of the sports sector. The recently published by the Commission White Paper on Sport was pointed out by Marie Leroux as a good opportunity for establishment of such a committee especially in view of the last recommendation therein saying that "The Commission encourages and welcomes all efforts leading to the establishment of European Social Dialogue Committee in the sports sector. It will continue to give support to both employers and employees and it will pursue its open dialogue with all sport organizations on this issue".

The project leader EASE was founded in 2003 and was meant as employers' organization in the sports sector at European level. It unites not only members from professional sport but also from the fitness, voluntary and outdoor segments of sport as an activity. EASE recognizes as its missions: understanding and defending the rights and interests of its members and generally employers in the sports sector; the harmonious development of the sports sector; participation in the sports social dialogue committee at European level; and negotiating

on behalf of employers in sport at European level. EASE offers two types of membership. Full membership is open to employer groups and associations that are formally recognized within their own country as the representative body for employers within at least one sub-sector of sport. EASE has also associated members, which are still not recognized as representative social partners at national level or are constituted in countries, where social dialogue is not clearly established. The structure of EASE consists of 4 commissions - voluntary sport, professional sport, fitness and outdoors. Such division was necessary in view of the specifics of the issues of concern to each and every of the above categories of sport.

Further, Marie Leroux introduced to the audience the former projects wherein EASE acted as a project leader or was involved as a participant such as the project "Building the Social Dialogue in the Sport Sector at European level" in 2003/2004, VOCASPORT project in 2004 and the EUROSEEN project in 2003/2005. EASE, as a social partner, decided to get involved in 2 Leonardo da Vinci projects on the European Qualifications Framework, where the role of EASE was to represent the employers' voice.

The floor was given to Jim Wilson - the director of EURO-MEI. The link between his organization and the Union Network International (UNI) - the World Employers Organization, which regional branch UNI-Europa is an employees' organization at European level, was best and figuratively explained by him through the comparison with the traditional Russian dolls "matrioshki" made of wood. When you have such a Russian doll in your hands you may open it and find that there is another one inside, however, smaller and colored differently, if you open the second one you will see a third one smaller than the second and also colored in a different way and by continuing doing this exercise you will reach a doll not larger than a peanut. Likewise, in Jim Wilson's expression, UNI constitutes the biggest doll having several regional branches - UNI-Europa, UNI - America etc. having in turn 13 individual sectors including the sector media, entertainment and arts sector UNI-MEI. Within UNI-MEI we will find the doll which we have been searching for - EURO-MEI, which represents the sector media, arts, entertainment and sports and is a merger partner of UNI - Europa. Jim Wilson presented 12 things or principles that govern and mark the work of EURO-MEI, which he called the Golden Dozen - freedom of expression, freedom of association, diversity in media and culture, international trade agreements, changing technology, new types of work, including atypical workers, professional training, health and safety, consultation, social dialogue and eventually collective bargaining, intellectual property rights, social goals and organizational matters. Although not all of the priorities in the EURO-MEI work set out in the Golden Dozen are relevant to sport, EURO-MEI is the organization on the employees' side representing the sports sector and in this respect it is the corresponding social partner of EASE.

Marie Leroux continued with presentation of the structure of the project, the work fulfilled under the project and the practical results achieved. The RBT project envisaged identification of the existing social partners, which were to be approached simultaneously at 3 different levels. Level 1 encompasses social partners who are identified at national level and already affiliated at EU level. Level 2 includes social partners identified at national level but not affiliated at EU level. Level 3 targets countries where the sports social partners do not exist at the national level and are, of course, not affiliated at EU level.

* English nursery rhyme, and a popular children's song, often sung as a round, where singers sit opposite one another

and 'row' forwards and backwards with joined hands.



The EASE President Marie Leroux is showing the just signed Joint Declaration on the mutual recognition of European social partners in the sport sector to Bernadette Segol – the UNI-Europa Regional Secretary; on the right side is the Director of EURO-MEI Jim Wilson.

Under level 1 the existing social partners in football were contacted and informal meetings with EPFL, FIFPro and UEFA took place. Further, a meeting with professional sports representatives aiming to receive their feedback regarding the subjects they would like to have on the social dialogue agenda was held on 30 October 2007 in Brussels. Finally, on 17 January 2008 an informal social dialogue meeting in Brussels was organized for the purpose of discussing the potential agenda of the social dialogue committee and the ways of initiation of social dialogue. The outcome of all meetings under level 1 is to be reported in a feasibility study for a future application for the creation of a sports social dialogue committee, which had not been prepared as of the time of the final RBT conference.

The work under Level 2 included the organization of 6 round tables in the following countries: Spain, Denmark, Finland, Italy, Portugal and Austria, aiming to present the national social partners with the benefits of being affiliated at EU level. Some of the organizers of the meetings as well as helpful stakeholders from the targeted countries had the opportunity to share their observations and impressions about the meetings at the conference. It became clear, for instance, that in Italy there is no representative organization on the employers' side. In Austria such organization is the Chamber of Commerce which was noted as something odd in comparison with France, for instance, where chambers of commerce are not recognized as social partners.

The work under Level 3 aimed meeting with local structures and authorities and bringing them expertise and knowledge of creating national employer and employee organizations. It comprised 4 country visits - Bulgaria, Hungary, Poland and Czech Republic. The targeted stakeholders were NOCs, sports federations, Ministries of Sport, of Youth, of Employment, social partners, sports lawyers and university teachers. As a result of the meetings a report on the feasibility of creating national employer and employee organizations has been prepared although at the time of the conference it was presented still as a draft.

The project results reported at the RBT conference were split in several directions. First, the project provided an overview of the social partners' organizations operating in the sports sector in the EU Member States. In particular, the project resulted in creating an RBT Database of the social partners in the EU-27 plus the non-member states Norway, Switzerland and Turkey, divided per country in accordance with their type - employee or employer organizations as well as according to the sports segment they belong to - voluntary sport, professional sport, fitness, and outdoors. Furthermore, information cards on social dialogue for each target country and overviews of the sports systems in the EU made under the preliminary research for the project were prepared. Secondly, the project reinforced the link between EASE and EURO-MEI and established contact with the professional football partners and representatives (Level 1). Thirdly, it strengthened

the European social partners representing the whole sports sector and increased their representativeness (Level 2). Finally, the project contributed to structuring employer and employee organizations in the countries where the social dialogue in sports is emerging (Level 3). The general outcome of the project was said to be the increase of the level of mutual knowledge on social dialogue in the sports sector in Europe. In particular, a table named "Social partners and helpful stakeholders met during the RBT meetings" was distributed to the participants.

The last speaker for the 1st conference day was Heinrich Wollny from the Unit Social Dialogue and Industrial Relations, DG for Employment, Social Affairs and Equal Opportunities of the European Commission as representative of the institution which financed the RBT Project. The discussions following Mr. Wollny's presentation continued during the two working groups of the RBT Final Conference - one for the employee side and the other for the employer side. Issues such as what should be a sectoral social dialogue committee, what subjects to be dealt at EU level, what happens after the Final Conference and other questions and comments from the participants were discussed.

The second day of the conference started with a welcoming message of the Director of the Dutch National Olympic Committee and also a Board Member of the Dutch Employers' Organization for the Sports Sector (WOS) Marcel Sturkenboom, who stressed the importance of the event for the entire sports sector and highlighted the advantages of Papendal as one of the top sporting centers, which second choosing for venue of the RBT Conference has turned it into a milestone for the social dialogue in the sports sector. Andrzej Rogulski from the Sport Unit with the DG for Education and Culture delivered a presentation on the White Paper on Sport pointing out that it constitutes the culmination of a long process starting with the Amsterdam Declaration in 1997 as well as an important step towards the integration of sport in the Reform Treaty.

The presentation of the first speaker marked as helpful stakeholder apart from the representatives of the Commission Drs. Paul Ruijsenaars gave a very important insight from athletes' perspective into the need of social dialogue in the sports sector and this way he indeed justified the helpful stakeholder label. Being a former basketball player, who has dedicated 24 years to that game and played international basketball for the international team of the Netherlands, Drs. Ruijsenaars expressed his sincere pain for the current situation of sportsmen accused in anti-doping rules violations, his deep concern about the undemocratic according to him legal form of the World Anti-Doping Association (WADA) where the voice of athletes is suppressed, his big desire for a strong international union of athletes to claim a modern co-management position in all sports organizations including WADA and his hope that doping regulation might become subject of the social dialogue in sport allowing athletes to shape by themselves the law which affects them most.

The conference continued with disclosure of the feedback from the working groups made by Bernadette Segol, UNI-Europa Regional Secretary and Marjolein Oorsprong, EURO-MEI Coordinator of the sports sector, on the employee side and by Marie Leroux, on the employer side. The conclusion was that a follow up of the RBT project is needed. Whereas the RBT project focused on the structure of the social dialogue the new project should focus on the content of the social dialogue. Further, request for establishment of a social dialogue committee in sports sector has to be submitted. Marjolein Oorsprong announced the joint intention of EURO-MEI and EASE to apply for the new project within the deadline for the next call of proposals set by the Commission with respect to projects concerning social dialogue and industrial relations on 14 March 2008. This decision of the social partners may be summarized as "The Row Must Go On".

At the end, Marie Leroux, Bernadette Segol and Leif Nicklagard, the Assistant General Secretary of UNIONEN - a big trade union in Sweden and member of EURO-MEI, introduced the Joint Declaration on the mutual recognition of European social partners in the sports sector, which was solemnly signed by Bernadette Segol and Jim Wilson for the employee side and Marie Leroux and Rene Van

Der Burg, EASE General Secretary, for the employer side and was met with applause by all participants.

In this way, the representatives of the social partners similarly to the singers performing the English nursery rhyme quoted in the beginning of this report sat opposite one another and started rowing forwards and backwards with joined hands. The lyrics of the song could serve as a guideline for the future routine and destiny of the boat. The first line "Row, row, row your boat" symbolizes the efforts that are needed to direct the vessel. The 3 times repetition illustrates the past, present and future that are made worthwhile by those efforts. The line further suggests that drifting is never an option and everything which is worthwhile takes pains in order to be fulfilled. The second line "*Gently down the stream*" implies that efforts must be laid with wisdom, by choosing the right streams and not fighting the current. The third line "*Merrily, merrily, merrily, merrily*" shows that despite the hardships and the limitation of choices the efforts must be laid in a joyous disposition of spirit. It would not be that easy and probably this is the reason for the four times repetition of the word merrily. And the last line "*Life is but a dream*" is determined as the wisest but also the most nihilist since it implies the meaningless of man's actions. This final line reminds me what Drs. Paul Ruijsenaars said during his presentation. He said "Conferences like this one are always in front of

crossroads: what structure, what issues for events, for content of social dialogue. Making a choice at a crossroad on a flat planet would make a difference. But since we live on a round planet in the end a choice for whatever direction leads to a point where you once started. In the worst case you shoot yourself in the back". Drs. Paul Ruijsenaars as one of the leaders of the fight of sportsmen against the doping "inquisition" in sport as he described WADA probably best feels the wisdom and the sadness of this last line.

In order to avoid this bitter acknowledgement, however, and make the song more appropriate for audience of children the last line is very often sung as "life is like a dream" rather than "life is but a dream". I think that the song of the social partners in the European social dialogue in sport could use this second version. The belief in the future of the social dialogue in sport should not be childish although the people who believe in the purity and sacredness of contemporary sport are probably naïve as children. As John Lennon used to sing "You may say I'm a dreamer, but I am not the only one"; after all, everything good in this world starts as a dream. The Row Must Go On.

Boris Kolev

Boris Kolev is a Co-chairman of the Bulgarian NGO Bulgarian Legal Society.

The International Sports
Law Journal



Joint declaration on the mutual recognition of EASE and EURO-MEI and the social dialogue

After several years of hard work - started in 2003 with the BSDSS project ("Building the Social Dialogue in the Sport Sector") - the employers of the sport sector have organised themselves at European level in EASE, the European Association of Sport Employers. On the workers' side, UNI-Europa remains the only organisation with sufficient structures and membership to represent the voice of sport workers of all kinds across Europe. Its Media, Entertainment and Sport sector, EURO-MEI, has been involved in the BSDSS project and is now, since 2006, co-operating intensively with EASE again in the RBT project (Reinforce the Representativeness of the Social Partners in the Sport Sector: Row the Boat Project). This project represents the next step in the work towards the establishment of a European social dialogue committee for sports. Working together at European level will hopefully lead to an improvement of the situation between employees and employers at national level in the European Union Member States.

The general aim of the RBT project, led by EASE in co-operation with EUROMEI, is to develop the social dialogue in the whole European sport sector encompassing its sub-sectors (voluntary, professional and commercial sports), keeping in mind the specificities of each.

Regulation at European level needs to be further developed. The sport sector has to organise itself and be pro-active to defend the specificity of the sector on many issues. The social regulation of sports will be a future task of the European social partners. EASE and EURO-MEI are willing to develop social dialogue at European level for the whole sport sector.

The finalisation of the RBT project in itself is the first step towards an application for the establishment of a European Social Dialogue Committee for the sport sector by the European Commission. Therefore EASE and EURO-MEI hereby state the following:

- 1 EASE and EURO-MEI, and their respective members, hereby recognise each other as social partners at European and national level for the sport sector in all its variety, including voluntary sports, professional sports and commercial sports, keeping in mind the specificities of each.
- 2 EASE and EURO-MEI believe that this mutual recognition is an essential pre-condition for the development of the social dialogue at all levels. It is the first step towards the establishment of a European Social Dialogue Committee for the sport sector by the European Commission.
- 3 EASE and EURO-MEI are convinced that social dialogue is a keystone in improving the professional standards of the sport sector.
- 4 To achieve this, the members of EASE and EURO-MEI have a vital role to play nationally and locally. EASE and EURO-MEI encourage their members at all levels (including the national level) to improve their arrangements for social dialogue and to develop and/or reinforce the content of this dialogue in order to respond to the needs and concerns of both parties.
- 5 EASE and EURO-MEI believe that coordination between the different levels of social dialogue (European, national and local) needs to be improved to increase the impact and the visibility of the results obtained.
- 6 EASE and EURO-MEI believe that the social dialogue in the sport sector should follow the European Social Model; promoting freedom of association, recognising representatives from both sides and building constructive dialogue, both at national and European level.
- 7 Finally, EASE and EURO-MEI will take practical measures to promote mutual recognition between their members and to improve the coordination of the different levels of social dialogue (European, national and local).

Arnhem, 8th February 2008 The English version is the original.

Marie Leroux Bernadette Ségol

EASE President Delegate UNI-Europa Regional Secretary

René van den Burg Jim Wilson

EASE General Secretary Director EURO-MEI

Report on the Conference “Sport and Work”, Lille, 10-13 December 2007

A conference under the title “Sport and Work” was held in Lille on 10 - 13 December 2007. It was organized by the laboratory “ER3S” (Sport Social Sciences Research Laboratory) established with the Faculty of Sports Sciences and Physical Education of the University of Lille 2.

The idea for the conference came to the director of ER3S professor Claude Sobry who had for a long time been keen on conducting research for the links between sport and work as activities. The conference in Lille was the culmination of a long process which started in 2005 with a series of meetings and seminars aiming to discuss, develop and crystallize the possible research topics related to sport and work. The initial call for proposals was directed only to the French sports research scientific community but soon it became clear that the international researchers in that area should not be neglected. With the help of the Université Libre de Bruxelles many researchers from nearly every country in Central and Eastern Europe were contacted. The conference was supported financially by the University of Lille 2, which provided a special grant to that end. The French Olympic Committee and the Municipality of Lille have also provided financial support. The Lille Sports Faculty helped significantly for the project by providing a grant, premises and staff. The organizers regret that neither the Department nor the Regional Council took interest in the project.

The research to be conducted was organized in 7 topics.

Topic 1: The use of sporting values in the world of business and vice versa

Topic 2: Event management, image merchandising, mediatisation

Topic 3: Entrance conditions for the sports job market

Topic 4: The exercise conditions of work in sport

Topic 5: Life after having been a professional athlete, the exit conditions, conversion and reconversion

Topic 6: Sports tourism

Topic 7: Sport and health in the firm

During the 3 days conference 62 researchers coming from 16 countries communicated extensively. Each day began with a plenary session. Pr. DHC Walfried König from the University of Colon, who has been involved in the sport political development of the Council of Europe for more than 30 years, presented a very well balanced analysis of the historic, politic, economic, legal and ethical development of sport in Europe, which gave a very good introduction to the conference.

At the plenary session of the second day the famous French economist Wladimir Andreff from the University of Paris I demonstrated how sport cannot develop on an equal basis, due to the disparities in the countries richness. He explained why the main sporting events such as the Olympic Games or Football World Cups can be organised by only a handful of the countries in the world and why the organization of such competitions cannot be a boost for the poor countries' economic development but rather a burden. Professor Andreff presented his idea for the introduction of a tax, the “coubertobin tax”¹. The name of the tax is a combination between the names of James Tobin, a Nobel Prize Winner in Economics, who in 1978 recommended a tax on foreign exchange transactions and Pierre de Coubertin who dreamed of equal participation of all countries in the world at the Olympic Games. According to prof. Andreff the introduction of the coubertobin tax would solve the current financial problems of the developing countries in the filed of sport, the problem of “muscle drain” - the flow of young talented sportsmen (especially minors) from the developing countries to the developed ones without adequate compensation for the nursery clubs, the home countries and the players themselves as well as the market distortions resulting from such “muscle drain”. Professor Andreff pointed out 4 purposes of the coubertobin tax: 1. slightly covering the education and training cost



Professor Claude Sobry (most to the right) dreams to see Lille as international centre for sports-related research. The others on the photo are (from left to the right) - Michele Demessine, representative of the Sport Department of the Lille Municipality, Patrick Pelayo, dean of the University of Lille 2 and Irene Lautier, vice-dean of the University.

of the transferred players incurred by their developing countries; 2. providing a stronger disincentive for transfers of athletes from a developing country as the younger the player is, the bigger the disincentive would be; 3. slowing down the process of “muscle drain” and 4. accruing revenues to a fund for sports development in the particular developing country (the fund would finance sports facilities building, physical education programs at school and other activities). 1% rate shall be levied on all transfers and initial wages agreed between the players from developing countries and their foreign clubs and/or players' agents. A fixed charge would be used at the first transfer regardless of the age of the player. A differentiated taxation including a surcharge on the transfer fee and initial wage of teen age and very young players would be introduced varying for the age groups 16-18, 14-16 and 12-14. The taxpayer of the coubertobin tax must be the individual or legal body which pays the transfer fee and the first year wage (professional club or a players' agent). The issue about the body responsible for the collection of the tax seems more serious since such a body must be independent from sport. Professor Andreff suggested an international body - either existing one (UNDP or the World Bank) or an ad hoc body to be created under the joint auspices of UN and IOC. The ground for the introduction of such a tax might be some sort of general agreement which must be joined by all countries involved in athlete transfers. Despite the expected reluctance of the professional leagues and clubs towards the coubertobin tax professor Andreff does not find it less desirable and feasible than the Tobin tax especially in view of the unanimous acknowledgement that transfers of teen age or younger players constitute a harmful practice, particularly for the developing countries.

At the last plenary session of the third day from the Conference Alexandre Hasting, a researcher from the Université Libre de Bruxelles and expert in European Sports Law delivered a presentation entitled “European Social Dialogue: A New Approach in the Prevention of Conflicts between Employers and Workers in Sports

¹ The presentation was based on the article Andreff, W., The Taxation of Players Moves from Developing Countries in Rodney Fort & John Fizel, eds.,

International Sports Economics Comparisons, Westport & London, Praeger 2004 (pp. 87-103)

Sector?”. After discussing the legal framework, the historical development and the conditions for establishment of European Social Dialogue in the sports sector and despite noting that collective agreements in sport may avoid the currently existing conflicts between sports rules and the EU rules Alexandre Husting expressed his scepticism regarding the future of the social dialogue. Even in football which is considered the subsector where the process of establishment of social dialogue is most advanced the social dialogue is not yet feasible. One of the reasons is, for instance, that the majority of professional football leagues, which are expected to act as social partners on the behalf of the clubs-employers are in fact affiliated bodies to the national federations and, therefore, they are not independent. Their failure to negotiate as social partners at national level affects the quality “representative” of the EPFL as an organization at European level and, therefore, questions its right to act as a social partner on the employers’ side at European level.

Every day of the conference after the plenary sessions many other presentations were delivered during the workshops divided in accordance with the 7 research topics set out above. They focused on various aspects of the sports activity. It is worth mentioning two presentations made under the 2nd topic “Event management, image merchandising, mediatisation”. Both were related to sport marketing.

Yann Abdourazakou, PhD, lecturer at the University of Lille 2 made a presentation under the title “New media and sport marketing: fiction or reality?”. The presentation highlighted the rapid growth of the 3G mobile technology in many economic sectors and focused on the social aspects of its spread in football. It sets out the possibilities it gives for creation of virtual communities of mobile football fans. In the words of Yann Abdourazakou “mobile technologies offer flexible possibilities regardless to time, space and relationship”. This has caused fundamental changes in the ways clubs and fans interact because 3G mobile phones are able to offer personalized content and target very specific audience unlike television. Some innovative football clubs are already exploring this new technological means to further promote their sports brands. Yann Abdourazakou noted that “along with the advent of MMC services, 3G mobile phones are converted into multimedia entertainment centers in the pockets of sports fans”. More particularly these devices may provide highlights broadcasting, SMS text alerts of key information, deliver crucial match shots, invite fans to submit their matches’ opinions. This interaction is an identification process for the supporters who demonstrate their allegiance to their clubs in this way.

The next presentation of Ian Webster, Senior Lecturer in Sport

Marketing at the Coventry University was titled “Assessing the Lifetime value of a football fan implications for research and practice”. Ian Webster noted the importance of fans as a revenue stream for the clubs they support and hence fans’ significance for the financial success or failure of the clubs. The presentation examined how the ageing fan-base in British football and the increase in popularity of other sports had affected, not only attendance at football matches, but also emphasized the importance of relationship marketing strategies. As such, the presentation examined lifetime value models in marketing and assessed the relevance and applicability to English football. The presentation concluded by identifying the implications of lifetime value for academic researchers and practitioners.

At the end of the conference professor Claude Sobry announced his intention to publish the best communications in a book in 2008. He expressed his desire to organize a follow up of the conference in the academic year 2009-2010. Professor Sobry shared his dream to see Lille as a centre for extensive international communication between French sports researchers and their colleagues from countries all over the world. The potential of Lille for that is quite visible - the city is located very near to the capital of the EU Brussels (110 kilometers, half an hour by train) and it is not too far away from London (235 kilometers, 2 hours with the Shuttle). One curious fact may be pointed out in this respect. The legend for the founder of Lille says that he was grown up by a hermit.

Around the year of our Lord 620, the prince of Dijon, Salvaert, makes his way to the Kingdom of England with his pregnant wife, Ermengaert. While travelling through Flanders, they fall into a trap laid by the local lord, the giant Phinaert. Phinaert has the prince and his men killed. Ermengaert flees and finds refuge at a hermit’s home in the forest, where she gives birth to a son. Upon her death, she entrusts the baby to the hermit. He feeds the boy deer milk and baptizes him with his own name, Lydéric.

Lydéric soon learns the truth about his origins, and as a youth he sets out to search for Phinaert. He finds him at the court of Dagobert I at Soissons. Lydéric kills Phinaert in a duel and so avenges his parents’ deaths. Phinaert’s lands are given to Lydéric, where the young man founds the city of Lille in the year 640.

In the year 2007 one professor who heads the Sport Social Sciences Research Laboratory of the University of Lille 2 does not wish to develop his research in hermetic conditions and invites the entire international sports research community to come to his city.

Boris Kolev

The International Sports Law Journal

International Sports Law Seminar

Thursday 5 June 2008, kick-off: 14.00 hours

6 + 5 and Home Grown Players Rule: instruments for the protection of club identity and national representative teams in football?

speakers: Dr Ruben Conzelmann, University of Cologne, Germany
Dr Stefaan van den Bogaert, University of Maastricht

moderator: Dr Robert Siekmann, ASSER International Sports Law Centre, The Hague

venue: T.M.C. Asser Instituut, R.J. Schimmelpennincklaan 20-22, The Hague, the Netherlands

Sports Law Conference in South Africa: Intellectual Property Rights and the FIFA World Cup 2010, Durban, 20-22 November 2007

A Regional Conference, hosted by the Department of Trade & Industry (DTI) of the Republic of South Africa in collaboration with the Faculty of Law of the University of KwaZulu-Natal, was held in Durban, South Africa, on 20 - 22 November, 2007.

The Conference dealt with a wide range of intellectual property legal issues in relation to sport in the run up to the hosting of the next FIFA World Cup in South Africa in 2010. The Conference covered the role, protection, management and enforcement of a wide range of intellectual property rights in sport, including athletes' image rights and the important topic of sports broadcasting rights in the context of the sports broadcasting industry in South Africa. More than 150 delegates drawn from South Africa and neighbouring countries attended this event, which, on the legal side, was organised by Andre Louw, Law Lecturer at the University of KwaZulu-Natal, Howard College, Durban.

Amongst the distinguished speakers was the Director General of the DTI, Mr Tshediso Matona, who spoke about the importance of the enforcement of intellectual property rights generally and tackling the growing problem in South Africa and also in the Region of counterfeit goods, particularly in the context of 2010; and the International Sports Lawyer, Prof Ian Blackshaw, who gave the Keynote Address on 'The Role of Intellectual Property Rights in Sport'. In his Address, Prof Blackshaw pointed out the importance of the creative use of trademarks, copyright, registered designs and 'passing off'/unfair competition' in protecting major sports events, without which such events could not be held and commercialised, thereby providing the mega funding required for the practice of world sport in general and the world's favourite sport, association football, in particular. And he illustrated his theme with a hypothetical case study in which he demonstrated how a *prima facie* generic concept/idea for an international sporting event could be transformed into a species of legally protectable property. He also chaired panel sessions on sports broad-

casting rights and contemporary legal issues in sport in South Africa raised by 2010.

The equally important issue of combating 'Ambush Marketing' (by association and intrusion) was also addressed by the leading South African Lawyer, Dr Owen Dean, Senior Partner of the Law Firm of Spoor & Fisher, Capetown, and by representatives from the FIFA Marketing Department in Zurich, Switzerland, Jorg Vollmuller and Anna Wohlleber, who confirmed the commitment of FIFA to take whatever legal and practical measures were necessary in order to protect the interests of their sponsors against unfair marketing practices of all kinds. Andrew Caiger, of the Cape and Lesotho Bar, and a member of the Editorial Board of The International Sports Law Journal, published by the International Sports Law Centre of the TMC Asser Instituut in The Hague (Director: Dr Robert Siekmann), was also a member of the panel on sports broadcasting rights and pointed out the legal issues raised by the collective sale of sports broadcasting rights and the social need to have major sporting events, such as the FIFA World Cup, aired on 'free to view' television in South Africa as well as 'pay per view' channels. Gerrie Swart of the Law Firm of Adams & Adams, Cape Town, dealt with the question of protecting the image rights of sports persons in South Africa, which is a developing phenomenon.

One of the conclusions to come out of this important and timely Conference, vehemently articulated by Dr Dean, was the pressing need to update and strengthen the South African Intellectual Property Laws, particularly the Merchandise Marks Act, which have not kept pace with business and technological developments, and thereby provide an effective legal framework in which the success of the FIFA World Cup in 2010 in South Africa could be assured, from a legal point of view.

Ian Blackshaw

The International Sports Law Journal

Sport&EU Workshop: The EU and the governance of sport - policy and perspectives, University of Chester, 6-7 July 2007

Sport Governance Focuses Discussions at Chester

The Department of Sport and Exercise Sciences and the Chester Centre for Research into Sport and Society at the University of Chester hosted the second annual workshop of the Association for the Study of Sport and the European Union (Sport&EU) entitled 'The EU and the governance of sport: policy and perspectives'. The event was organised and sponsored jointly by the Centre for the Study of International Governance (CSIG) at Loughborough University, Sport&EU and the University of Chester.

The workshop had a truly international flavour, bringing together 20 academics and practitioners from six different European countries with the aim of assessing the role and possible contribution of the European Union to the governance of sport. The timing of the debate could not have been better, as four days after the workshop the European Commission adopted its White Paper on Sport, which features a full section (almost one third of the document) dedicated to governance issues.

The CSIG and Sport&EU were pleased to welcome Alex Phillips, Head of Professional Football Services at UEFA, as guest speaker. Alex Phillips presented himself as a 'first and foremost a football person who is worried for the future of the game'. In his opening speech, he launched the debate by explaining UEFA's perspective on a democratic and transparent governance structure for European football. Alex

Phillips stressed that governing bodies have a duty of care for all levels of sport, not only the professional side. He did also recognise the responsibility of these bodies to ensure proper representation and consultation among stakeholders.

The workshop was mainly dominated by two themes: the application of EU law to sport and the dilemmas of sport governance and sport policy in a global and commercial environment.

In the legal department, Alfonso Rincón (CEU-San Pablo University, Spain) drew the delegate's attention to the contradictions of the European Court of Justice in the handling of sport related cases. Rincón analysed the extent to which the so-called *sporting exception* could be recognised in the case law of the Court. He did also argue that several u-turns of the Court in this respect might have had negative consequences for public authorities and sport governing bodies due to a lack of clarity in the criteria guiding the application of European law to the sports sector. Alexandre Mestre (PLMJ law firm, Portugal), on the other hand, focused on the application of Competition policy to sport, advocating for clearer guidelines that could facilitate governing bodies' regulation of sport.

The extent up to which the EU can help to raise governance standards in sport focused much of the delegates' attention. Roberto Branco Martins (ASSER Institute, The Netherlands) explored the

possibilities of collective bargaining between the employers and employees in the football sector under the umbrella of the European Commission. He suggested that the Social Dialogue could deal with issues such as the transfer system, match calendar, nationality quotas or player release for national team duty. The debates identified two problems for the Social Dialogue to work effectively. First, the representativeness of the social partners, especially in the employers' side (who represents the employers? Is it clubs, leagues, federations?). Second, the extent to which social dialogue could be used to regulate on issues beyond its remit without giving due consideration to third parties (e.g. doping regulations, match calendar or release of players to national teams).

It was evident in the discussions that the study of sport and sport policy in the European Union needs to deal necessarily with a multiplicity of actors and venues. This is due to the very own nature of sport and the EU as multilevel, international and multidimensional systems of governance. So far, much of the academic research has focused in the EU level. In this regard, Borja García (Loughborough University, UK) considered the evolution of the relationship between UEFA and the European institutions from confrontation in the 1990s to co-operation *for the good of the game* nowadays. García argued that the involvement of the EU in sport represents both a challenge and an opportunity for sport governing bodies. The EU has facilitated the transformation of the traditional vertical channels of authority in the governance of football, but it is also providing tools for UEFA to manage the new demands of stakeholders in the regulation of the game.

Simona Kustec-Lipicer (University of Ljubljana, Slovenia) complemented the Brussels-centric focus of the workshop with her paper on multi-level governance and the Slovenian contribution to the European Commission White Paper on Sport. Despite the intervention of EU institutions, sport remains a competence of Member States and, as such, research needs to deal with systematic comparison not only across countries, but also among different sports, as well as in relation to supranational levels and their policy processes.

It is necessary not to treat sport as a single homogeneous entity. To

that extent, despite being relatively football-centric, the workshop provided a wide range of views clearly stressing both the differences and the interconnections of the professional and grassroots levels. James O'Gorman (Staffordshire University, UK) explored the possible over regulation of grassroots football by the English FA. The solidarity principle between professional and grassroots sport, which is supposed to underpin the European Model of Sport, was identified as another challenge for sport governance and public policies.

One of the most interesting points of the workshop was the contribution of football supporters' organisations, which tend to be sidelined in these debates. Dave Boyle (Supporters Direct) and Steven Powell (Football Supporters Federation of England and Wales) contemplated the growth of EU policy on sport as an opportunity for supporters to become increasingly involved in debates surrounding the future of professional football. It remains to be seen, though, the feasibility of extending this participation throughout Europe as the engagement of civil society differs quite a lot across the continent and football is another example of this.

The conclusions of the workshop illustrate the maturity of sport as a research area within European and even international studies. Richard Parrish (Edge Hill University, UK) highlighted the seriousness of the academic work and the advance of the discipline. The study of sport and the EU has gone from a mere recompilation of EU sport-related decisions to open debates about governance, regulation, civil society participation or europeanisation. During the workshop, delegates stressed the need for further and comprehensive research in this area. Both academics and practitioners agreed that the governance of sport in Europe is becoming a crowded and complicated environment, in which rigorous research is needed to inform policy choices, which often seem to be taken based on personal beliefs or ideology.

More information about the workshop can be found at www.sportandeu.com/workshop

Borja García
Loughborough University, United Kingdom

The International Sports Law Journal

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International Sports Law Seminar

Monday 21 April 2008, kick-off: 14.00 hours

"Webster, DRC and CAS: A New Bosman?"

speakers: Prof. Frank Hendrickx, Universities of Leuven and Tilburg
Mr Frans de Weger, De Vos attorneys at law, Amsterdam
Dr Steven Jellinghaus, De Voort Hermes De Bont attorneys at law, Tilburg

Presentation of

The Jurisprudence of the FIFA Dispute Resolution Chamber,
T.M.C. Asser Press, The Hague 2008

moderators: Dr Robert Siekmann, ASSER International Sports Law Centre, The Hague
Dr Stefaan van den Bogaert, University of Maastricht

venue: T.M.C. Asser Instituut, R.J. Schimmelpennincklaan 20-22, The Hague, The Netherlands

The Jurisprudence of the FIFA Dispute Resolution Chamber

By Frans de Weger, TMC Asser Press, The Hague, The Netherlands, 2008, pp. 728 + XIII, ISBN 978-90-6704-271-0, Price: GBP 110.00

This is the latest Book published in the Asser International Sports Law Series and is a most welcome addition to this Series on such an important subject. Once again, a first in its field!

The author, Frans de Weger, is an International Sports Lawyer in the Law Firm of De Vos & Partners, Amsterdam and also a FIFA Licensed Players' Agent. After a couple of introductory chapters on the nature, organisation, composition and procedure of the FIFA Dispute Resolution Chamber (DRC), which was set up in 2001 for the purpose of resolving disputes concerning the international status and transfer of football players, and the classification of DRC cases, which include termination of players' employment contracts, compensation claims for training compensation for young players and appeals against sporting sanctions; the Book essentially consists of the texts of the rulings of the DRC in 172 selected cases, with, in a number of cases, helpful comments from the author. These include ones on the landmark Andrew Webster case, a case involving the premature and unilateral termination by the player of his contract of employment after the expiry of the so-called 'Protected Period', which was appealed to the Court of Arbitration for Sport (CAS), and whose extensively argued and detailed Award was rendered on 30 January, 2008. In fact, all rulings of the DRC are appealable within 21 days of the notification of the decision to the CAS and many of them, in fact, are appealed, thus accounting - in no small measure - for the ever increasing workload of the CAS! In many respects, therefore, it may

be added, that, in setting up the DRC, FIFA has created something of 'a monster'. The rulings of the DRC are contributing, in a number of respects, to the so-called developing '*Lex Sportiva*', as also is the significant jurisprudence being developed by the CAS itself in many appeal cases. All of this is helping to establish some degree of legal certainty in relation to sports disputes, which, because sport has become such big business, are constantly on the increase. In this respect, however, the author draws attention to the important fact that some decisions of arbitral bodies of the national football associations, which make up the membership of FIFA, are not always in line with decisions of the DRC, and quite rightly calls upon FIFA to give more attention to the DRC.

The Book also includes a number of useful Annexes, including the texts of the FIFA Regulations for the Status and Transfer of Players, including some notes on the latest version of them, which came into force on 1 January, 2008, drawing attention to what is described as "*a remarkable*" provision in Article 18b prohibiting clubs concluding contracts that enable third parties to exercise influence on the independence of clubs and the decisions taken by clubs concerning the transfer of players; and also the DRC Rules of Procedure.

The Book is complemented by a List of Abbreviations, Tables of Regulations and Cases and a workmanlike Subject Index.

Writing in the Foreword to the Book, the former FIFA General Secretary and Head of the FIFA Legal Division, Michel Zen Ruffinen, points out: "*The author, Frans de Weger, and the publishers deserve to be warmly thanked and congratulated for producing this book, which will, I am sure, prove to be an invaluable work of reference and guidance for all concerned.*"

Your reviewer would entirely agree with that and is more than happy, therefore, to recommend the Book!

The International Sports Law Journal



The Legality of Boxing: A Punch Drunk Love?

By Jack Anderson, Birkbeck Law Press, Oxford, 2007, pp. 216 + XIX, ISBN 978-0-415-42932-0, Price GBP 70.00

Boxing has had a rather chequered history since its origins in prize fighting, evolving into the glove bout sport of today and the adoption of the so-called 'Queensberry Rules' in 1865. These Rules, *inter alia*, prescribed the use of boxing gloves, three-minute rounds (with one minute in between them) and the ten-second count when one of the participants is down, as well as disallowing wrestling and hugging! At the end of the Nineteenth Century, the sport was exempted from the ordinary law of violence on the grounds that it was a well- and self-regulated sport practised by mature consenting adults whose intentions - notwithstanding that the object of the exercise was to inflict physical harm on each of the opponents - were largely sporting in nature.

The author of this Book, Jack Anderson, a law lecturer at Queen's University, Belfast, Northern Ireland, puts the subject into its historical and social context, and traces the legal response to prize fighting between 1820 and 1920 and developments in boxing from then until the present day, analysing the current relationship between the Criminal and Civil law and boxing. In his Preface, the author confesses to being a fan of boxing and also acknowledges his uneasiness with many aspects of the professional code, which he points out is the motivation for writing the Book, stating that "*it is that sense of unease that this personal study seeks to confront.*"

In his legal review of the relationship between boxing and the

Criminal Law, particularly section 47 of the Offences Against the Person Act of 1861, which created the offence of assault occasioning actual bodily harm, Anderson analyses the 1993 leading case of *R v Brown*, in which the House of Lords by a 3:2 majority held (in the words of Lord Templeman) that:

"Even when violence is intentionally inflicted and results in actual bodily harm the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating.....[for example].....violent sports including boxing are lawful activities."

And talking of violence, one recalls the words of Walker Smith, aka 'Sugar Ray Robinson', a famous fighter of his time: "I ain't never liked violence". Words which illustrate and sum up the contradictions that the sport of boxing throws up.

The author also discusses the landmark case of Michael Watson in 2001, in which he successfully sued the British Boxing Board of Control (BBBC) in negligence for failing to provide adequate ringside medical treatment. He was awarded £1million damages for the serious brain damage he suffered as a result. As the author points out the case put into question the BBBC's effectiveness as a regulatory agency, reinforcing the need for "*a root-and-branch reform of the governance of the professional sport in Britain.*" Notwithstanding, the BBBC survived and remains the sports governing body in the UK today.

The author also deals in the Book with the philosophical, moral, ethical and medical considerations of boxing, reaching the conclusion that modern boxing should undergo a fundamental transformation rather like the one that prize fighting underwent a century or so ago.

This Book, which includes an extensive Bibliography, is a thought-provoking and well-researched study of a sport that, despite its widespread popularity around the world, is constantly teetering on the edge of the abyss. Should boxing be banned? The question remains unanswered: the jury of public opinion is still out!

The International Sports Law Journal

The Sporting Exception in European Union Law

By Richard Parrish and Samuli Miettinen, T.M.C. Asser Press, The Hague, The Netherlands, 2008, pp. 295 + XIX, ISBN 978-90-6704-262-8, Price GBP 45.00

The issue addressed in this new Book is whether sport should be afforded special treatment under European Union (EU) Law, particularly in relation to the freedom of movement of persons and the competition rules. In other words, to what extent do the European Commission (Commission) and the European Court of Justice (ECJ) recognise the so-called 'specificity of sport' concept as claimed by the sporting bodies themselves. This has been an issue for many years, but has been thrown into sharp relief recently by the ruling of the ECJ in 2006 in the case of *Meca-Medina*, which introduced a case-by-case approach (a kind of 'rule of reason' analysis) to the application of EU Competition Law to sport, and the publication by the Commission in 2007 of its *White Paper on Sport* (the text of which is helpfully reproduced in an Annex to the Book), which invites more political intervention in the EU in the sporting arena in future.

In its 9 Chapters, the Book covers the 'specificity of sport' arguments; the reconciliation of the so-called 'sporting rules' with EU Law; how these arguments square with the rules on freedom of movement of persons, competition rules, the exploitation of sports broadcasting rights, the European labour market for professional players, including the international football transfer rules, which, although "agreed" with the Commission, have still, incidentally, to be legally tested in the ECJ; some contemporary and tantalising sports gover-

nance issues, including salary caps and player release conditions; and, finally, draws some thought-provoking conclusions, including identifying a number of issues still facing the emerging EU Sports Law Policy in the future. Amongst which, as the authors point out, whether or not the time is ripe to introduce a sports-related block exemption. An absolute exemption of sport from EU Law, long wished for by the sporting authorities, is not, however, on the cards in the foreseeable future. The Book is completed with an extensive and useful Bibliography; a List of Abbreviations and Acronyms; Tables of EC Legislation and Cases; and a workmanlike Index.

This Book, the latest contribution to the Asser International Sports Law Series, edited by Dr Robert Siekmann, Director of the TMC Asser Instituut International Sports Law Centre, and his colleague, Dr Janwillem Soek, is a timely addition to the debate on an important subject for all those involved in the promotion, practice and regulation of sport, particularly from a business point of view, bearing in mind that sport now represents more than 2% of the combined GNP of the 27 EU Member States.

As Stephen Weatherill, Jacques Delors Professor of European Community Law at Oxford University, UK, points out in a Foreword to the Book, sports bodies are generally reluctant to justify their claims that 'sport is special' and its practices should be considered necessary and, therefore, compatible with EU Law. This Book, he adds, should provide "governing bodies, their members and their legal advisers with a platform from which to develop balanced and well-informed arguments."

Your reviewer would entirely agree with this point of view and would congratulate the authors, both members of the Sports Law Research Centre at Edge Hill University, UK, on producing an excellent Book on a subject which will continue to exercise sports promoters, administrators and lawyers for many years to come. And one which they would do without at their peril!



Players' Agents Worldwide: Legal Aspects

Edited by R.C.R. Siekmann, R. Parrish, R. Branco Martins and J.W. Soek, TMC Asser Press, The Hague, The Netherlands 2007, Pages 872 + XXIX, ISBN 978-90-6704-245-1, Price GBP 95.00

Football is not only the world's favourite game but is also the world's most lucrative sport. They say that 'money is the root of all evil' and football certainly has its share of problems resulting from the mega sums that can be made on and off the field of play. In the United Kingdom, for example, we have now entered the age when many players earn well over £100,000 per week in the English FA Premier League. Not only do players command high salaries, but the sale of broadcasting rights brings in stratospheric sums to the Clubs. For example, the English Premier Football League, the richest in the world, recently sold its principal broadcast rights to its matches for the next three seasons, beginning in August 2007 and ending in 2010, for a record sum of US\$3.1bn (£1.7bn). Football Clubs also gain from the mega sums paid for the transfer of high profile players from one club to another. Most of these transfers are handled by players' agents, who themselves have also become multi millionaires in the process. However, players' agents have not been having a good press in recent times and a BBC Panorama Programme has branded football as being 'institutionally corrupt', largely as a result of the activities of players' agents, which, to say the least, have not always been very professional or ethical, for example, in the matter of dual representation. Many of them have been involved in conflicts of interests' situations, for example, acting at the same time for clubs and players or both clubs involved in the same transaction.

This new Book - a truly *magnum opus* taking a global view of the subject - could not be more timely, dealing, as it does, with three basic questions: what are players' agents?; why should they be regulated?; and how should they be regulated? The Book covers the legal regulations - at the international, national and sports bodies' levels - in forty countries around the world, including the major footballing constituencies, such as Argentina, Brazil, Mexico and Russia, and the so-called 'Big Five' in Europe: France, Germany, Italy, Spain and the UK.

But, as Professor Roger Blanpain of the Universities of Leuven (Belgium) and Tilburg (The Netherlands), the very first President of FIFPRO, the international professional players' association, points out in a Foreword to the Book, the issue of regulation in any sport "is always a delicate one." And goes on to remark that:

"[o]ver-regulation can do as much harm as under-regulation: it is always a matter of striking the right balance between the two..... [but] it is generally agreed that certain minimum norms and standards of behaviour by players' agents must be met to protect the integrity of football and all those with a stake and interest in its future, including players, clubs and fans alike."

As the Book shows, the levels and nature of regulation of players' agents vary from country to country.

The Book opens with three introductory chapters which help to put the subject into its proper context: 'Regulating Players' Agents: A Global Perspective'; 'The International Supply of Sports Agent Services'; and 'The *Laurent Piau* Case of the ECJ on the Status of Players' Agents'. In the important *Piau* case (Case T-193/02, *Laurent Piau v. Commission of the European Commission supported by FIFA*, Jur EG 2005, p. II-0029, no. 8) (the full text of the decision is set out in one of the Annexes to the Book), Laurent Piau, a French Players' Agent unsuccessfully challenged the legality of the FIFA Players' Agents Regulations (set out in one of the Annexes to the Book) under

EU Competition Law. The European Court of Justice upheld the decision of the Court of First Instance (CFI), on the rule-making authority of FIFA and the compatibility of the FIFA Players' Agents Regulations with Article 82 of the EC Treaty. The CFI concluded as follows:

".....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."

And on the question of a possible abuse of a dominant position by FIFA, the CFI had this to say:

"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 for the 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 on that market."

But, as is pointed out in the Book, the outcome of the *Piau* case does not lead to the legal certainty desired in the European professional

Ian Blackshaw

football sector; and the decision was not challenged under EU free movement of services principle (Article 49 of the EC Treaty) and, therefore, a real threat remains to the legality of the FIFA Players' Agents Regulations. Furthermore, the CFI are factually wrong when they say that there are no national laws regulating the profession of players' agents, when, in fact, 10 EU Member States have specific legislation dealing with the activities of players' agents.

The Book then continues with the Country Reports and is completed with some useful Annexes (already referred to), and Tables of Treaties, National Legislation and Regulations of Sports Organisations and also of Cases. There is a workmanlike Index and also a helpful List of Abbreviations and Acronyms used in the text.

This Book is the latest publication in the Asser International Sports Law Series. All the contributors to the Book are experts in the field of international sports law in general and players' agents in particular.

All in all, this Book will, I am sure, prove to be a useful and valuable resource for commercial, financial and legal advisers, players' agents, who are now facing strict exams in order to qualify as official FIFA agents, as well as all others involved in sports administration and management, including managers and coaches of football clubs around the world.

For, as the legendary Liverpool Football Club Manager, Bill Shankley, once remarked, when asked if football was a matter of life and death: *'it is more important than that!'*

The International Sports Law Journal

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3rd annual Sport&EU Workshop

Organisers: Sport&EU and the Centre for Sports Law Research, Edge Hill University

Implementing the European Commission White Paper on Sport

4-5 July 2008

Scarisbrick Hotel, Southport, United Kingdom

Keynote Speaker:

Pedro Velázquez, Deputy Head, Sports Unit, European Commission

The Centre for Sports Law Research at Edge Hill University is pleased to announce the third annual Sport&EU workshop, sponsored by the Centre for the Study of International Governance at Loughborough University, the University Association for Contemporary European Studies and Edge Hill University and organised jointly by Sport&EU and the Centre for Sports Law Research.

The workshop is open to all. For further details and updates, please visit

www.edgehill.ac.uk/Faculties/FAS/LawandCriminology/CSLR/WPCConferenceJuly2008

(Programme next page)

4. July

Welcome and Introduction 13:00-13.15

Professor Alistair McCulloch, Dean, Department of Research and Knowledge Transfer, Edge Hill University
Richard Parrish, Director, Centre for Sports Law Research and Reader in Law, Department of Law and Criminology, Edge Hill University

Keynote speech 13.15-14.15

Pedro Velázquez, Deputy Head of Unit, Sport Unit, European Commission
The EU and Sport: the implementation of the White Paper and Future prospects

Panel I 14.30-18.00 *The Organisation of Sport* (Chair to be confirmed)

- a. Jonathan Hill, UEFA
The European Commission's White Paper on Sport: A step backwards for specificity?
- b. Borja García, Loughborough University
New Governance in sport after the White Paper: The demise of the European model?
- c. Roberto Branco Martins, TMC Asser Institute and Edge Hill University
European Social Dialogue and Sports Governance

Coffee Break

- d. Alexandre Mestre, PMJ Law Firm, Lisbon, and Edge Hill University
The Lisbon Treaty and sport
- e. Ben Van Rompy (Institute for European Studies, Vrije Universiteit Brussels) & Caroline Pauwels (IBBT-SMIT)
The recognition of the specificity of sport in the European Commission's Article 81 EC case law related to sports media rights

Dinner 20.00

5. July

Breakfast

Panel II 9.30-11.00 *The Societal Role of Sport: Social Inclusion* Chair: Barrie Houlihan, Loughborough University

- a. Jack Anderson, Queen's University Belfast
Creating Synergies? Social Inclusion in the European Commission's White Paper on Sport
- b. Tina Nobis & Jürgen Baur, University of Potsdam, Department of Sport Science
Integration of adolescent migrants and persons of foreign origin into organised sports - A Discussion about the potential of sport for social inclusion regarding the German Case
- c. Chris Platts & Andrew Smith, University of Chester
Education and Welfare Provision in Professional Football Academies in Europe: Some implications of the White Paper on Sport

Panel III 11.15-12.45 *The Societal Role of Sport: Violence and Doping* (Chair to be confirmed)

- a. Peter Coenen, University of Lucerne and Edge Hill University
Football- Law' in the Netherlands; The proposed Dutch Football Law and lessons learned from the English approach to violence in football
- b. Michael Mutz, (Potsdam) Jürgen Baur (Potsdam) & Ulrike Burrmann (University of Dortmund)
Can Physical Activity Prevent Violence? Sport Participation and Violent Behaviour Among 15-year Old Adolescents
- c. Magdalena K_dzior, School of Law and Public Administration, Rzeszów, Poland
Anti-Doping Policy of the EU- recent developments

Closing remarks 12.45-13.00

Lunch 13.00

The Sports Boycott of Nigeria: Sports, Politics and Human Rights*

by R.C.R. Siekmann**

On the subject of international sports boycotts many discussions have taken place in this country, especially in the 1970's and 1980's. Sports contacts with South Africa were permanently on the agenda. In 1978, the participation of the Dutch national soccer team in the soccer World Championship in Argentina was questioned. In 1980 and four years later the Olympic Games in Moscow and Los Angeles suffered from boycotts. In 1993 the United Nations instituted a sports boycott against Yugoslavia 'minor'. The international practice match between the Netherlands and Nigeria has once again placed the problem of the relationship between sports and politics in the limelight. What is special about this case is that it involves a regional boycott, namely instituted by the European Union.

South Africa

UN resolutions (since 1971) displayed the tendency to aim to prohibit all sports contacts with South Africa. To begin with, only contacts with teams or sportsmen selected on racial grounds were discouraged. The International Declaration against apartheid in sports (1977) however, took the position that a completely integrated, non-racial exercise of sports in a country like South Africa could not exist under the apartheid regime and it was couched in binding terms. The Netherlands initially voted in favour of the resolutions and the government requested the national sports associations to abstain from 'racial' sports contacts. The International Declaration was not voted on by our country, as the government had to respect the autonomy of sports organizations and could not curtail the freedom of movement of Dutch nationals, that is to say, could not limit the freedom to leave one's country (see international human rights treaties: ICCPR, ECHR). The Netherlands could not agree with the proposition that each and every sports contact should be broken off, regardless of whether the sports organization in question was founded on racial principles or not.

The application and interpretation of the non-racial criterium was further developed in practice. The government appeared to only accord political consequences to national sports representation. With regard to respecting the autonomy of the sports associations, the Paralympics case (judgments of the Administrative Law Division of the Council of State, 1980) illustrated the point that it may be impossible to separate sports from politics, but that the government is bound to respect the sports associations' own responsibility and, where necessary, needs to live up to its own responsibility.

In 1982, the government policy regarding sports contacts with South Africa was intensified. All sports contacts with South Africa were discouraged from then on, irrespective of whether racial or non-racial sports contacts were involved, or international or non-international sports representation. The political significance of sports contacts with South Africa became decisive. It was, however, still understood that the sports associations had to abide by the regulations of international sports organizations.

The Dutch Sports Federation (NSF) could agree to this government standpoint, which resulted in the sports associations being discouraged from engaging in friendly sports contacts with South Africa. International obligations, however, still had to be met.

Then, the Minister of Foreign Affairs formulated a visa policy which in reality ruled out in advance any sports contact with South Africans in the Netherlands. The NSF justifiably protested this. The complete non-participation of South Africans could now, in fact, be forced by the government through visa policy. This was not in accordance with previously formulated policy, in which respect for the sports associations' autonomy and their international obligations were apparent features. The government consequently adjusted the criteria for granting visa so as to allow exceptions to the highly restrictive pol-

icy. World championships were excluded, whereby it had to be shown that a refusal of South African participation would result in the impossibility of the event ever being staged in the Netherlands again and that the damage thus incurred by the Dutch sports scene would be so great, that refusing South African sportsmen had to be considered disproportional.

The sports boycott of South Africa in the sports community itself ran parallel to the action of the United Nations. In 1970, the IOC expelled South Africa from the Olympic Movement. The international sports federations followed suit, either by expelling South Africa, or by prohibiting South Africa from taking part in world championships. The focus then shifted to the 'indirect' boycott: African states boycotted the Olympic Games in Montreal in 1976 because New Zealand, whose national rugby team had done a tour of South Africa, was participating.

The sports boycott of South Africa was based on recommendations of the General Assembly of the United Nations, and as such not legally binding on the Member States. The reason for the boycott lay in the flagrant and systematic human rights violations in South Africa as a result of the apartheid regime. The principle of non-discrimination is a fundamental principle in the sports world, too, which is enshrined in the Olympic Charter and the Statutes of the international sports federations. It is therefore a 'sporting' criterium to take measures against a national association violating this principle.

Serbia Montenegro

In 1992, a sports boycott was instituted against Serbia Montenegro, or Yugoslavia 'minor', in addition to an economic boycott, because of the continued military involvement of that country in the hostilities in Bosnia. The UN Security Council in Resolution 757 decided that all states had to take the necessary measures to prevent participation by persons or teams representing Serbia Montenegro in sports matches in their territory. Here, the sports boycott was not due to the violation of human rights, but to military intervention in another country. The Security Council acted on the basis of Chapter VII of the UN Charter. This means that the Council should at least have established the existence of a threat to international peace and security (Article 39 UN Charter). Such circumstances entitle the Council to proclaim non-military enforcement action (sanctions) on the basis of Article 41 of the UN Charter, which the Member States of the UN are legally obligated to carry out.

It was not in connection to the sports boycott (which was exclusively aimed against national representation: for example, Yugoslavia was not able to participate in the European soccer championship in 1992), but because of the trade embargo that questions were asked in parliament in 1993 about the transfers of the Serbian FC Volendam players, Vukov and Stefanovic. From the Minister of Justice's answers to these questions it emerged that the FIFA suspected that in transfer-

* On 27 May 1988, the T.M.C. Asser Instituut for international law in The Hague, in co-operation with the Society for Sports and Law, held a Round Table Session on this subject. During this conference introductions were held by, apart from the author of this piece, Mr. M. den Hond, LL.M., MA. (director of political affairs of the Ministry of Foreign Affairs), Mr. A. Sterk, M.A. (policy staff member for international sports affairs of the Ministry of Welfare, Public Health and Sports; he sat in for Mr. R. Kramer, LL.M., deputy director for sports with the same ministry) and

Mr. G. Wegener (head of international affairs of the NOC*NSF). The main outcome of this Asser Round Table was the mutually declared willingness on the parts of the government and the NOC*NSF to re-open the dialogue on the basis of an evaluation of the 1982 NSF "Starting points for sports and politics" (see hereafter).

** Dr. R.C.R. Siekmann is head of Research of the T.M.C. Asser Instituut for international law in The Hague; in 1984, he wrote a brochure about 'Sports contacts with South Africa' at the request of the Dutch Sports Federation.

ring Serbian players in general, deals were made to have the payments run through private persons in other countries so as to circumvent the trade embargo, which also included financial transactions. This illustrates that a general economic boycott also stretches to include sports, insofar as financial transactions (professional sports is an economic activity) are involved.

The sports boycott of Serbia Montenegro was the second sport boycott in the history of the UN. It was motivated by reasons lying outside the realm of sports, as it concerned military intervention in a neighbouring country. Sport could not, however, escape its influence, as it concerned a binding boycott, which had, moreover, also been taken up by the European Union.

The 1980 Moscow Olympics

Collective boycotts are proclaimed by intergovernmental organizations like the UN (worldwide) and the European Union (regional; see hereafter on the sports boycott of Nigeria). 'Unilateral' sports boycotts, in contrast, are proclaimed by a state or *ad hoc* group of states taking the initiative by itself.

On 20 January 1980, president Carter of the United States in a message to the chairman of the American Olympic Committee (USOC) pressed for the Committee to propose to move the Moscow Summer Games to another location, to postpone them or to cancel them altogether, unless all Soviet troops would have withdrawn from Afghanistan within a month. He made it dear that, if the IOC would not accept this proposal, the United States would not send a delegation to Moscow. "We must make clear to the Soviet Union that it cannot trample upon an independent nation and at the same time do business as usual with the rest of the world", so president Carter explained. Within a week, the presidential request to the USOC found itself supported by resolutions of the House of Representatives and the Senate, which declared with overwhelming majorities that no American athletes should take part in the Moscow Games, unless the Soviet troops would have left Afghanistan by 20 February 1980. This American reaction to the Soviet invasion of Afghanistan (on 27 December 1979) heralded the beginning of an international boycott against the Moscow Summer Games.

As far as the Netherlands were concerned, the government announced that it would advise the sport community not to participate in the Games. The government had already decided to withdraw a subsidy requested by the NOC for travel expenses of an interpreter and the costs of participation in the IOC meeting in Moscow. The Dutch government stressed, however, that given the amount involved, this would have no consequences for actual participation in the Games, nor for the independence of the sports associations involved in taking part in the Games.

The military intervention by the Soviet Union in Afghanistan as such was not a 'sporting' reason for a boycott (cf. Serbia Montenegro). Yet, staging the Olympics in a country which is in a state of war is contrary to Olympic principles, dating back to classical antiquity, when arms were put down during the Games. The IOC is entitled to take the Games away from such countries. War in progress could therefore have been a 'sporting' reason for boycotting the Moscow Games. This fits in with the fact that the General Assembly of the United Nations always calls for the suspension of war anywhere in the world during the Games (as with regard to the recent Winter Games in Japan in connection to a possible attack by the United States on Iraq). The military intervention by the Soviet Union in Hungary in 1956 at that time caused the Netherlands to boycott the Games in Melbourne because the Soviet Union would be participating ('indirect' boycott).

Much commotion was caused in 1978 on the occasion of the participation of the Dutch national soccer team in the World Championship in Argentina because of the human rights situation in that country. The Dutch government abstained from taking position. The cabaret act of Freek de Jonge and Bram Vermeulen ("The Nation's Hope in Evil Times" [*Neerlands Hoop in Bange Dagen*]) vigorously tried for a boycott, among others with their show 'Out for blood' [*Bloed aan de paal*]. The Netherlands reached the final against

the host country. If Rob Rensenbrink had scored in the last minute of regular playing time instead of hitting the post, the 'Orange' team would undoubtedly have struck a far heavier political blow to the general's regime of Videla and co. (by sporting means) than would ever have been attainable through a 'unilateral' boycott.

Sports boycott of Nigeria

The sport boycott of Nigeria is based on the 'common position' of the Council of the European Union of 4 December 1995, in which the Council decides, among others, to impose the measure of suspension of all contacts in the area of sports with Nigeria through a refusal of visa to official delegations and national teams. On 28 November 1997 the boycott was extended by a year and the Council decided to issue certain guidelines for the implementation of the common position. Exceptions could be allowed by Member States, *inter alia* for meeting obligations which had been entered into prior to the common position of 1995, especially for sports events organized under the auspices of international sport associations, such as the soccer World Championship in 1998 and practice matches already committed to, and the basketball World Championship in 1998.

The reason for this boycott may primarily be found in the continued human rights violations by the military regime in Nigeria. No 'sporting' motives are involved, however, unlike in the case of the sports boycott against South Africa due to apartheid within sport.

The common position was based on Article J.2 of the EU ('Maastricht') Treaty, which states that the Council may issue common positions in the field of foreign and security policy (CFSP). The Member States have to ensure that their national policies are in accordance with these positions (in the new Treaty of Amsterdam Article J.5 speaks of 'bringing about' instead of 'ensuring'). A common position creates no legal obligations for the Member States but contains a political commitment. With regard to Nigeria, no binding sanctions in the sense of Article 228a of the EU Treaty were laid down for the implementation of the common position. Article 228a, moreover, concerns economic boycotts of third states. An economic boycott may, however, also affect professional sports in particular. As economic boycott (oil boycott) was, however, explicitly rejected with regard to Nigeria.

The cabinet eventually decided to respect the obligations of the Royal Dutch Football Association [*KNVB*] regarding the international practice match against Nigeria and merely urged for the event to be conducted as plainly as possible. A few comments are in order here:

1. The obligations in question were entered into after 1995. The 'letter of the law' is unambivalent here. That the date of reference was allegedly 28 November 1997 - the date on which the exceptions clause was adopted - is an assumption which is contrary to the EU decision. The fact that in particular France and Germany have nevertheless interpreted the provision as such, does not derogate from this conclusion.
2. It was politically agreed among the EU members that the visa weapon would be employed, if necessary, to prevent the occurrence of sports contacts at a national representation level. The Ministry of Foreign Affairs went no further than to ask France to territorially restrict the visa for the Nigerian selection to France alone, so the Netherlands might have refused the players. France, however, was not willing to do so. On the basis of the Schengen Treaty (for the abolition of border controls at the common outer borders) though, the Netherlands in my opinion could, and should, have independently decided that the Nigerian team would not be admitted for the purpose of playing the international practice match. The 'international relations' of a Schengen country may constitute a reason for refusing visa (Article 5, paragraph 1(e), of the Schengen Treaty). As the sports boycott of Nigeria is in fact EU policy, it is therefore also Dutch foreign policy. The Netherlands politically committed itself at EU level to carry out this policy through means of visa allocation if necessary.

The government apparently did not make use of the visa policy on purely formal grounds. 'Schengen' would not have allowed for it, seeing that the border controls are relocated to the outer borders (in this

case France). France too, however, is bound by the EU boycott. The fact that France wrongly interprets the date of reference for international practice matches should not have been a reason for the Dutch government to dispense with the consistent application of the sports boycott against Nigeria. The EU boycott decision is based on the Maastricht Treaty. 'Schengen' too, is a treaty which, however, does not prevail over the EU Treaty. All countries parties to it are also EU Member States. 'Maastricht' is of a later date than 'Schengen'. The adage *Lex posterior derogat legi priori* (laws of a later date enjoy prevalence over earlier laws) is also true for treaties. Apart from this, it must be dear that the CFSP ('second pillar' of the EU) which is being taken into account in 'Schengen' ('international relations') is principally of a higher order than the admittance policy (visa policy) which should be instrumental in character with regard to the CFSP. In addition to this, it is intended since the Treaty of Amsterdam (the successor to 'Maastricht') to eventually integrate 'Schengen' into the EU Treaty (third pillar: justice and home affairs). The government reacted rather formally in this matter: 'once they have been admitted to Schengen territory, there is nothing we can do'.

Starting points for 'sports and politics'

In 1981, the NSF as the umbrella organization to the sports community in our country, drafted the so-called 'Starting points for sports and politics' after consultations with representatives of the main political parties *CDA*, *PvdA*, *VVD* and *D66*, in which the NOC was also involved. The immediate cause for this had been the boycott of the Olympic Games in Moscow a year earlier. In the 'Starting points' it is established that there should be timely consultations between organized sports and the government on upcoming international sports meets. Through such consultations it can be prevented that the sports community is presented with a *fait accompli*. The 'Starting points' have remained valid up until this day. The question whether the 'Starting points' were adhered to with regard to the Nigeria sports boycott, and the international practice match between the Netherlands and Nigeria of June last in particular, is therefore justified. And; with an eye to the future, do they offer a workable frame of reference for fruitful consultation on the international relations of the sports world?

In the first place, it has to be noted that the NOC*NSF, nor the KNVB was informed beforehand by the government that the European Union was going to decide to issue a sports boycott of Nigeria. The decision by 'Brussels' therefore came as a complete surprise to the sports community in 1995. This was the reason why the NOC*NSF at that time rejected the boycott. This principled standpoint is not derogated from by the fact that the Ministry of Welfare, Public Health and Sports informed the sports associations many times, once the boycott had been proclaimed.

In the second place, according to the 'Starting points' the Dutch government may ultimately find it desirable to render the opinion that representatives of the Dutch sports organizations should not subject themselves to political use and should not take part in certain sports manifestations. Thereby, especially large international sports events which would draw worldwide audiences were indicated, because they can become an easy target for nationalist tendencies and political lobbies. They could be used by the organizing countries for the purpose of boosting their prestige. Especially when this occurs in countries with controversial regimes, this may lead to enormous tension, the 'Starting points' claim. This concerns: countries committing military aggression (see earlier: the 1980 Moscow Olympic Games, Yugoslavia 'minor'); countries subjected to a general international boycott (cf. South Africa, Yugoslavia 'minor'); countries where serious and systematic violations of human rights are taking place (cf. South Africa, Argentina); and countries in which the principle of universality is not upheld (in example is the sports boycott of Israel). The EU boycott of Nigeria is an international boycott, albeit not a 'general' one in the sense of worldwide, but a regional one. Apart from this, there is no doubt that serious and systematic human rights violations have taken place and are still taking place in Nigeria. Nigeria was and is a country with a controversial regime.

In the third place, it is stated in the 'Starting points' that it fits in with Dutch society for political institutions to create the terms within which sports organizations may exercise their sports functions in accordance with their own responsibilities. In acquitting these functions, the sports organizations must bear in mind the responsibility brought about by the way in which society and sports are interrelated. According to the 'Starting points', opinions on the undesirability of certain international sports contacts must be accorded more weight as government and/or parliament:

- show that the sportsmen concerned are used for political purposes outside our country. This was not the case with the international practice match between the Netherlands and Nigeria, nor will it be the case with the soccer World Championship, the 'large international sports manifestation' to which the match was actually linked;
- appear to maintain a certain political consistence, also based on a wide political majority (in the Second Chamber of parliament). From a human rights perspective, it is quite unclear why a sports boycott had to be issued against Nigeria in particular but not against other similar countries. Selective indignation? The reason may be found in the sporting achievements of the *Super Eagles*, the Nigerian national soccer team, Olympic champion in 1996. This implies prestige for the military regime, and this is where that regime may be struck. Had Nigeria only disposed of a mediocre team, no sports boycott would have been proclaimed. And, one may still wonder whether a 5-1 victory of the 'Orange' team over Nigeria is not in itself an equally harsh blow to the regime of the now late Abacha. In the same way, Rob Rensenbrink in 1978 could no doubt have dealt a heavy political blow to the Argentine dictator Videla. But of course you can never tell these things beforehand ...
- second the opinion of an international political institution. This condition was met through the EU boycott.
- indicate if, and if so, which, means are being employed to attain the political goal. The Dutch sports community vigorously resists having to act as a spearhead of policy. It demands that a boycott always be part of wider policy, in which other social interests are equally involved. It is not fair that sports should be the only sector in society to have to make sacrifices. As far as Nigeria is concerned, further action only consists of the suspension of military co-operation and an arms embargo. An oil embargo could, however, not be decided on. Sports therefore seems to be disproportionately hit.
- have tested the measure for effectivity. As they themselves suffer the disadvantages, the sports world understandably demands guarantees each time that a particular boycott will in fact have the desired effect. The sports boycott of Nigeria is not effective, because the European Union has itself in 1997 still made an exception for participation of Nigeria in the soccer World Championship in France. In doing so, the EU has itself definitively undermined its own sports boycott. Cancelling the international practice match between the Netherlands and Nigeria would certainly not have fixed that.
- seriously take into account the interests of the sportsmen and the obligations flowing from the membership to an international sports organization and possible other commitments meanwhile entered into (with European and World Championships, Olympic Games and the necessary qualifying matches these obligations will be greater than with friendly matches). The World Championship has at a later stage therefore been shown every consideration by the EU. The international practice match between the Netherlands and Nigeria was a non-compulsory, friendly match. In any case according to the letter of the EU decision, it still fell within the scope of the sports boycott, in which only commitments entered into before the start of the boycott in 1995 were taken into account. This had however already been compromised because the international practice match between Germany and Nigeria had been played on 22 April last whereby a later date of reference was claimed.

Conclusion

Everything considered, one may not reasonably maintain that the KNVB should have co-operated at any cost with the cancellation of

the international match against Nigeria. Where lie the boundaries of sports' responsibility to society? In the first place, it should be established that sports itself should in any event exclude those countries that violate the principle of non-discrimination within sports itself. This principle returns in the statutes of all international sports federations. The by now classic example is apartheid in sports in South Africa. If such an intrinsic link between politics and sports is absent, sports are taken into an area where a balance should be drawn between the ways in which politics may use/abuse sports. What should be considered to be of more importance: how a regime violating human rights may abuse sports (propaganda), or: how the 'own' government may use sports by attaching a political function (boycott) to it thereby harming sports? One reaches the conclusion that the more serious the human rights violations and the greater the boost to prestige which a controversial regime may bring about through international sports contacts, the more reason there would be in principle for the sports community to consider breaking off such contacts.

International sports contacts may be used by politics for the purposes of propaganda. If Nigeria had not been allowed to take part in the soccer World Championship in France this would no doubt have been an effective boycott in terms of constituting a considerable loss of political prestige to the military regime. From a completely different perspective, sports may however also be abused by politics because other measures against a regime, such as an economic boycott, were rejected. Due to the overwhelming media attention at Olympic Games and soccer World Championships a sports boycott is an attractive instrument for politics, bringing with it little economic damage. Sports must, however, in practice be able to set the boundaries for its

responsibility to society. If the sports world refuses to co-operate in a boycott, for example, because the reason for it lies outside sports (Nigeria), then politics should make up its own balance of interests in the framework of foreign policy to see whether the boycott should be enforced through visa policy. It should not be so that the authorities in such cases merely complain that the sports world is being 'unco-operative' and cannot be forced into co-operation, which is in itself correct (the government could indeed not have cancelled the international match; only the KNVB could have done that), but leaves their own political responsibility intact.

The international match between the Netherlands and Nigeria was eventually seized upon by Amnesty International and other organizations to stage actions against the human rights violations in Nigeria. The KNVB facilitated these actions in the Amsterdam Arena soccer stadium, among others through allowing a relevant advert of Amnesty's to appear in the programme, which evoked some protest from the representatives of the Nigerian soccer association. A TV commercial, rejected by the national commercial advertisement board [STER] but not by the commercial stations, showed a keeper just before a penalty is taken, who is then executed and drops down dead - a reference to the death sentences carried out in Nigerian soccer stadiums. This fact alone could, in my opinion, actually have provided a 'sporting' reason for the KNVB to cancel the game, given the direct link between human rights violations and sports in Nigeria. The actions by Amnesty International and co. have meanwhile shown that, even if an event is gone through with, it is still possible to bring human rights violations to the attention in a way directly related to that event. Sports associations can play a facilitating role in this.



Workshop on Impact of EU Acquis on Sport - Perspective of Ukraine in the context of the Forthcoming European Football Championship EURO-2012

INT MARKT 25416

Venue:
Conference Hall (5th floor)
Ukrainian Football Federation
7A Laboratorny Lane 4
Kiev,
27 November 2007

Session I Conference Hall (the 5th floor) Chair: Mr.Oleksandr KOPYLENKO

09:00 *Registration*

09:30 *Welcome and introduction*

Mr.Ian BOAG, Head of the European Commission's Delegation to Ukraine

Mr.Hrygoriy SURKIS, President of the Ukrainian Football Federation, Member of the

Executing Committee of UEFA, Member of the Coordination Council on Preparation and Holding in Ukraine of European Football Championship Euro-2012

Mr.Oleksandr KOPYLENKO, Director of the Institute for Legislation the Verkhovna Rada of Ukraine, Member-correspondent of the National Academy of Sciences of Ukraine

Mr.Serhiy BUBKA, President of the National Olympic Committee of Ukraine, Member of the Executive Committee of the International Olympic Committee, Member of the Coordination Council on Preparation and Holding in Ukraine of European Football Championship Euro-2012

Mr.Michal LISTKIEWICZ, President of the Polish Football Federation

09:50 *Report of the Minister for Family, Youth and Sports of Ukraine*

10:10 *The European and Sport: Law and Policy*

General introduction; Introduction to EU sport policy: Amsterdam Declaration on Sport (1997), Helsinki Report on sport (2000), Nice Declaration (2000), Independent European Sport Review, Commission White Paper on Sport (2007); Current developments

Mr.Robert SIEKMANN, Director of the ASSER International Sports Law Centre (T.M.C. Asser Institute for International Law, The Hague, The Netherlands)

10:40 *Coffee break*

11:00 *The Sporting Exception in European Union Law*

Key principles of Community law and enforcement of the rights as regards sport / Impact of EU primary and secondary legislation as regards sport // Free movement of workers and its implications for professional sport / Article 12, 18, 39 EC Treaty, ECC Regulation 1612/68 // Mutual recognition of diplomas / The new Directive 2005/36/EC and its implications - MS experience // The free movement of services in relation to sport / Article 49 EC Treaty / Services Directive // The Social Dialogue in the sport sector / Application of Article 137-139 EC Treaty to professional sport // EU Media rights and Sport - EU Competition rules / Council Directive 2003/109/EC concerning the status of third country nationals who are long term residents // Cases: Walrave, Donà, Heylens, Bosman, Deliège, Lehtonen, Kolpak, Piau, Meca-Medina

Mr. Richard PARRISH, Director of the Centre for Sports Law Research, Edge Hill University, United Kingdom and **Mr Samuli MIETTINEN**, Deputy Director of the Centre

12.30 *Presentations of the Ukrainian participants*

Mr. Valeriy SUSHKEVICH, National Deputy, President of the National Committee for the Disabled, Member of the Coordination Council on Preparation and Holding in Ukraine of European Football Championship Euro-2012

Ms. Victoria TRETIAKOVA, Deputy Head of the Department on International Integration and European Law of the Institute for Legislation of the Verkhovna Rada of Ukraine

Ms. Natalia KOVALENKO, Deputy Executive Director, Head of Legal Division of the National Olympic Committee of Ukraine

Discussion

13:30 *Lunch*

Session II Conference Hall (the 3 th floor)

14:30 *Report on preparation of EURO-2012*

Mr. Hrygoriy SURKIS, President of the Ukrainian Football Federation

14:50 *Report on preparation of Euro-2012*

Mr. Michal LISTKIEWICZ, President of the Polish Football Federation

15:10 *Coffee break*

15:30 *The European Union and Football: Law and Policy*

Contracts, transfers, work permits for non-EU players, Social Dialogue in professional football at national and EU level, players' agents

Mr. Roberto BRANCO MARTINS, ASSER International Sports Law Centre lecturer in Labour Law and Sport, University of Amsterdam, The Netherlands

16:00 *Discussion*

16:20 *Presentations of the Ukrainian participants*

Mr. Ravil SAFIULLIN, National Deputy of Ukraine, Vice President of The National Olympic Committee of Ukraine, Member of the Executive Committee of the Football Federation of Ukraine, President of the Professional Football League

Ms. Olga ZHUKOVSKA, Vice-President of the Union of Advocates of Ukraine, member of the High Council of Justice of Ukraine, Member of the Appeal Committee of the Football Federation

Mr. Vadym KOPYLOV, President of the European Sport Committee

Mr. Viacheslav GAMOV, Head of Committee on Physical Education and Sports of the Ministry of Education and Science of Ukraine

Discussion

17.30 *Conclusions*

Closing of the Conference

This meeting is being organised by the
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Presentation

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- *Recruitment and Representation of players and coaches*
- *Publishing books and articles about Sports Law*
- *Translation of documents with legal content from turkish language and vice versa*

TOLUN Sports Law Center, directed by Dr. Özgerhan TOLUNAY and his team in Neuchâtel, collaborates with Mr. Ümit Cagman, Lawyer and Mr. Rıza Köklü, jurist based in Turkey. TOLUN also operates in cooperation with organisations such as *The Asser Institute*.

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UNITED NATIONS
General Assembly

Resolutions on the Olympic Truce

A/RES/48/11

2 November 1993

Forty-eighth session Agenda item 167

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/48/L.9/Rev.1 and Add.1)]

48/11. Observance of the Olympic Truce

The General Assembly,

Considering the appeal launched by the International Olympic Committee for an Olympic Truce, which was endorsed by 184 Olympic committees and presented to the Secretary-General,

Recognizing that the goal of the Olympic Movement is to build a peaceful and better world by educating the youth of the world through sport, practised without discrimination of any kind and in the Olympic spirit, which requires mutual understanding, promoted by friendship, solidarity and fair play,

Recognizing also the efforts of the International Olympic Committee to restore the ancient Greek tradition of the *ekecheria*, or "Olympic Truce", in the interest of contributing to international understanding and the maintenance of peace,

Recalling resolution CM/Res.1472 (LVIII), which supports the appeal for an Olympic Truce, adopted by the Council of Ministers of the Organization of African Unity at its fifty-eighth ordinary session, held at Cairo from 21 to 26 June 1993, and endorsed by the Assembly of Heads of State and Government of that organization,

Recognizing further the valuable contribution that the appeal launched by the International Olympic Committee for an Olympic Truce could make towards advancing the purposes and principles of the Charter of the United Nations,

1. Commends the International Olympic Committee, the International Sports Federations and the national Olympic committees for their efforts to mobilize the youth of the world in the cause of peace;
2. Urges Member States to observe the Olympic Truce from the seventh day before the opening and the seventh day following the closing of each of the Olympic Games, in accordance with the appeal launched by the International Olympic Committee;
3. Notes the idea of the Olympic Truce, as dedicated in ancient Greece to the spirit of fraternity and understanding between peoples, and urges Member States to take the initiative to abide by the Truce, individually and collectively, and to pursue in conformity with the purposes and principles of the Charter of the United Nations the peaceful settlement of all international conflicts;
4. Calls upon all Member States to cooperate with the International Olympic Committee in its efforts to promote the Olympic Truce;
5. Requests the Secretary-General to promote the observance of the Olympic Truce among Member States, drawing the attention of world public opinion to the contribution such a truce would make to the promotion of international understanding and the maintenance

of peace and goodwill, and to cooperate with the International Olympic Committee in the realization of this objective.

36th plenary meeting 25 October 1993

A/RES/50/13

21 November 1995

Fiftieth session Agenda item 40

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/50/L.15 and Add.1)]

50/13. The Olympic Ideal

The General Assembly,

Recalling its resolution 49/29 of 7 December 1994, in which it requested the Secretary-General to encourage ministers of youth and sport or concerned officials of Member States to participate in the consideration by the General Assembly at its fiftieth session of an item entitled "Building a peaceful and better world through sport and the Olympic Ideal" on the eve of the centenary of the revival of the Olympic Games in 1896 at Athens, on the initiative of a French educator, Baron Pierre de Coubertin, and called upon Member States to reaffirm during the fiftieth session of the Assembly the observance of the Olympic Truce, during the next Summer Olympic Games,

Recalling also its resolution 48/11 of 25 October 1993, which, *inter alia*, revived the ancient Greek tradition of *ekecheria* or "Olympic Truce", calling for all hostilities to cease during the Games, thereby mobilizing the youth of the world in the cause of peace,

Taking into account resolution CM/Res.28(LXII), adopted by the Council of Ministers of the Organization of African Unity at its sixty-second ordinary session, held at Addis Ababa from 21 to 23 June 1995, and endorsed by the Assembly of Heads of State and Government of that organization, which supports the appeal for an Olympic Truce,

Reaffirming that the Olympic Ideal promotes international understanding, particularly among the youth of the world, through sport and culture in order to advance the harmonious development of humankind,

Noting with satisfaction the increasing number of joint endeavours of the International Olympic Committee and the United Nations system, such as recent meetings on "Sport against drugs" with the United Nations International Drug Control Programme, "Sport and the environment" with the United Nations Environment Programme, "Sport for all and health for all" with the World Health Organization and "Forum on physical activity and sport" with the United Nations Educational, Scientific and Cultural Organization,

1. Calls upon Member States to reaffirm the observance of an Olympic Truce during the Games of the XXVI Olympiad, the Centennial Games, to be held at Atlanta, United States of America,

from 19 July to 4 August 1996, and also calls upon them to reaffirm the observance of the Olympic Truce in advance of each Summer and Winter Olympic Games;

2. *Commends* the International Olympic Committee, now in its one-hundred-and-first year, for promoting international understanding and equality among nations and thereby serving the cause of peace and the well-being of humankind by providing assistance for the development of sport and the Olympic Ideal;
3. *Welcomes* the participation of ministers of youth and sport and concerned officials and the presence of the President of the International Olympic Committee in its consideration of the item entitled "Building a peaceful and better world through sport and the Olympic Ideal" at its fiftieth session;
4. *Suggests* that national ministries of youth and sport consider collaborating with the Olympic Movement, in the spirit of Olympic ethics and fair play, on preventive education programmes such as anti-doping programmes, drug abuse prevention, environmental protection and enhancing the participation of women in all aspects of the sport movement;
5. *Requests* the Secretary-General to continue to cooperate with the International Olympic Committee in joint endeavours for the promotion of peace, equality among nations and the harmonious development of humankind;
6. *Decides* to include in the provisional agenda of its fifty-second session the item entitled "Building a peaceful and better world through sport and the Olympic Ideal" and to biennialize this item so that it will be considered in advance of each Summer and Winter Olympic Games.

52th plenary meeting 7 November 1995

A/RES/52/21

8 December 1997

Fifty-second session Agenda item 24

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/52/L.23/Rev.1 and Add. 1)]

52/21. Building a peaceful and better world through sport and the Olympic ideal

The General Assembly,

Recalling its resolution 50/13 of 7 November 1995, in which it decided to include in the provisional agenda of its fifty-second session the item entitled "Building a peaceful and better world through sport and the Olympic ideal" and to consider this item every two years in advance of each Summer and Winter Olympic Games,

Recalling also its resolution 48/11 of 25 October 1993, which, *inter alia*, revived the ancient Greek tradition of *ekecheiria* or "Olympic Truce", calling for all hostilities to cease during the Games, thereby mobilizing the youth of the world in the cause of peace,

Recognizing the valuable contribution that the appeal launched by the International Olympic Committee for an Olympic Truce, with which the National Olympic Committees of the Member States are associated, could make towards advancing the purposes and principles of the Charter of the United Nations,

Taking into account resolution CM/Res.1608 (LXII), adopted by the Council of Ministers of the Organization of African Unity at its sixty-second ordinary session, held at Addis Ababa from 21 to 23 June 1995,¹ and endorsed by the Assembly of Heads of State and Government of that organization, which supports the appeal for an Olympic Truce,

Reaffirming that the Olympic ideal promotes international understanding, particularly among the youth of the world, through sport and culture in order to advance the harmonious development of humankind,

Noting with satisfaction the increasing number of joint endeavours of the International Olympic Committee and the United Nations system, for example in the fields of development, humanitarian assis-

tance, protection of the environment, health promotion and education, in which the United Nations Development Programme, the Office of the United Nations High Commissioner for Refugees, the United Nations Environment Programme, the World Health Organization and the United Nations Educational, Scientific and Cultural Organization have participated,

1. *Urges* Member States to observe the Olympic Truce during the XVIII Olympic Winter Games, which will be held in Nagano, Japan, from 7 to 22 February 1998, the vision of which is to be a link to the twenty-first century, inspiring the search for wisdom for the new era, respect for the beauty and bounty of nature and the furtherance of peace and goodwill;
2. *Takes note* of the idea of the Olympic Truce, as dedicated in ancient Greece to the spirit of fraternity and understanding between peoples, and urges Member States to take the initiative to abide by the Olympic Truce, individually and collectively, and to pursue in conformity with the purposes and principles of the Charter of the United Nations the peaceful settlement of all international conflicts;
3. *Calls upon* all Member States to cooperate with the International Olympic Committee in its efforts to promote the Olympic Truce;
4. *Requests* the Secretary-General to promote the observance of the Olympic Truce among Member States, drawing the attention of world public opinion to the contribution such a truce would make to the promotion of international understanding and the preservation of peace and goodwill, and to cooperate with the International Olympic Committee in the realization of this objective;
5. *Welcomes* the decision of the International Olympic Committee to fly the United Nations flag at all competition sites of the Olympic Games;
6. *Decides* to include in the provisional agenda of its fifty-fourth session the item entitled "Building a peaceful and better world through sport and the Olympic ideal" and to consider this item before the Games of the XXVII Olympiad in Sydney, Australia, in the year 2000.

54th plenary meeting 25 November 1997

A/RES/54/34

18 January 2000

Fifty-fourth session Agenda item 22

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/54/L.26 and Add.1)]

54/34. Building a peaceful and better world through sport and the Olympic ideal

The General Assembly,

Recalling its resolution 52/21 of 25 November 1997, in which it decided to include in the provisional agenda of its fifty-fourth session the item entitled "Building a peaceful and better world through sport and the Olympic ideal" and to consider this item every two years in advance of each Summer and Winter Olympic Games,

Recalling also its resolution 48/11 of 25 October 1993, which, *inter alia*, revived the ancient Greek tradition of the *ekecheiria*, or "Olympic Truce", calling for all hostilities to cease during the Games, thereby mobilizing the youth of the world in the cause of peace,

Taking into account resolution CM/Res. 1608 (LXII), adopted by the Council of Ministers of the Organization of African Unity at its sixty-second ordinary session, held at Addis Ababa from 21 to 23 June 1995,¹ and endorsed by the Assembly of Heads of State and Government of that organization, which supports the appeal for an Olympic Truce,

Recognizing the valuable contribution that the appeal launched by the International Olympic Committee for an Olympic Truce, with which the National Olympic Committees of the Member States are associated, could make towards advancing the purposes and principles of the Charter of the United Nations,

Reaffirming that the Olympic ideal promotes international under-

standing, particularly among the youth of the world, through sport and culture in order to advance the harmonious development of mankind,

Noting with satisfaction the flying of the United Nations flag at all competition sites of the Olympic Games and the increasing number of joint endeavours of the International Olympic Committee and the United Nations system, for example in the fields of development, humanitarian assistance, protection of the environment, health promotion, education, eradication of poverty, the fight against AIDS, drug abuse, violence and juvenile delinquency,

Noting also with satisfaction the joint organization by the International Olympic Committee and the United Nations Educational, Scientific and Cultural Organization of the World Conference on Education and Sport for a Culture of Peace in Paris from 5 to 7 July 1999, in accordance with General Assembly resolution 52/13 of 20 November 1997, and their initiation of a programme of action pursuant to Assembly resolution 53/243 of 13 September 1999,

1. *Urges* Member States to observe the Olympic Truce during the games of the XXVII Olympiad, to be held at Sydney, Australia, from 15 September to 1 October 2000, the vision of which, at the dawn of the new millennium, is to be a highly harmonious, athlete-oriented and environmentally committed Olympic Games;
2. *Also urges* Member States to take the initiative to abide by the Olympic Truce, individually and collectively, and to pursue, in conformity with the purposes and principles of the Charter of the United Nations, the peaceful settlement of all international conflicts through diplomatic solutions;
3. *Calls upon* all Member States to cooperate with the International Olympic Committee in its efforts to use the Olympic Truce as an instrument to promote peace, dialogue and reconciliation in areas of conflict, beyond the Olympic Games period;
4. *Reaffirms* the Declaration and Programme of Action on a Culture of Peace, adopted in its resolution 53/243, and in this context welcomes the decision of the International Olympic Committee to mobilize all international sports organizations and National Olympic Committees of the Member States to undertake concrete action at the local, national, regional and world levels to promote and strengthen a culture of peace based on the spirit of the Olympic Truce;
5. *Welcomes* the setting up by the International Olympic Committee of an International Olympic Forum for Development, a platform for consultation between intergovernmental and non-governmental organizations on issues related to the development of physical education and sport for all, and an International Centre for the Olympic Truce to promote peace and human values through sport and the Olympic ideal;
6. *Requests* the Secretary-General to promote the observance of the Olympic Truce among Member States, drawing the attention of world public opinion to the contribution such a truce would make to the promotion of international understanding and the preservation of peace and goodwill, and to cooperate with the International Olympic Committee in the realization of this objective;
7. *Decides* to include in the provisional agenda of its fifty-sixth session the item entitled "Building a peaceful and better world through sport and the Olympic ideal" and to consider this item before the XIX Olympic Winter Games, to be held at Salt Lake City, United States of America, in 2002.

63rd plenary meeting 24 November 1999

A/RES/56/75

10 January 2002

Fifty-sixth session Agenda item 23

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/56/L.47 and Add.)]

56/75. Building a peaceful and better world through sport and the Olympic ideal

The General Assembly,

Recalling its decision to include in the provisional agenda of its fifty-sixth session the item entitled "Building a peaceful and better world through sport and the Olympic ideal" and to consider this item every two years in advance of each Summer and Winter Olympic Games,

Recalling also its resolution 48/11 of 25 October 1993, which, *inter alia*, revived the ancient Greek tradition of *ekecheiria* or "Olympic Truce" with the aim of ensuring the safe passage and participation of athletes and others at the Games,

Taking into account the inclusion in the United Nations Millennium Declaration¹ of an appeal for the observance of the Olympic Truce now and in the future and support for the International Olympic Committee in its efforts to promote peace and human understanding through sport and the Olympic ideal,

Recognizing that the goal of the Olympic movement is to build a peaceful and better world by educating the youth of the world through sport, practised without discrimination of any kind and in the Olympic spirit, which requires mutual understanding, promoted by friendship, solidarity and fair play,

Recognizing also the valuable contribution that the appeal launched by the International Olympic Committee for an Olympic Truce, with which the National Olympic Committees of the Member States are associated, could make towards advancing the purposes and principles of the Charter of the United Nations,

Noting with satisfaction the flying of the United Nations flag at all competition sites of the Olympic Games, and the joint endeavours of the International Olympic Committee and the United Nations system in fields such as development, humanitarian assistance, health promotion, education, women, the eradication of poverty, the fight against the human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS), drug abuse and juvenile delinquency,

Noting also with satisfaction the organization by the International Olympic Committee, with the cooperation of the Secretary-General, of round tables on sport for a culture of peace on different continents for countries that have been or are still in a conflict situation, in the framework of the International Year for the Culture of Peace and in accordance with General Assembly resolution 52/13 of 20 November 1997,

Welcoming the setting up by the International Olympic Committee, with the adherence of Member States and intergovernmental organizations, of a World Anti-Doping Agency,

1. *Requests* Member States to observe, within the framework of the Charter of the United Nations, the Olympic Truce during the XIX Olympic Winter Games to be held in Salt Lake City, United States of America, from 8 to 24 February 2002, by ensuring the safe passage and participation of athletes at the Games;
2. *Welcomes* the decision of the International Olympic Committee to mobilize all international sports organizations and that of the National Olympic Committees of the Member States to undertake concrete action at the local, national, regional and world levels to promote and strengthen a culture of peace based on the spirit of the Olympic Truce;
3. *Requests* the Secretary-General to promote the observance of the Olympic Truce among Member States, drawing the attention of world public opinion to the contribution such a truce would make to the promotion of international understanding, peace and goodwill, and to cooperate with the International Olympic Committee in the realization of this objective;
4. *Welcomes* the participation of the President in office of the General Assembly and also the representatives of the Secretary-General and the Director-General of the United Nations Educational, Scientific and Cultural Organization in the International Olympic Truce Foundation;
5. *Urges* the International Olympic Committee to devise a special programme of assistance for the development of physical education and sport for countries affected by conflicts and poverty;
6. *Decides* to include in the provisional agenda of its fifty-eighth ses-

¹ See resolution 55/2.

sion the item entitled "Building a peaceful and better world through sport and the Olympic ideal" and to consider this item before the Games of the XXVIII Olympiad, to be held in Athens in 2004.

83rd plenary meeting 11 December 2001

A/RES/58/6

18 November 2003

Fifty-eighth session Agenda item 23 (a)

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/58/L.9 and Add. 1)]

58/6. Building a peaceful and better world through sport and the Olympic ideal

The General Assembly,

Recalling its resolution 56/75 of 11 December 2001, in which it decided to include in the provisional agenda of its fifty-eighth session the item entitled "Building a peaceful and better world through sport and the Olympic Ideal"² and its decision to consider this item every two years in advance of each Summer and Winter Olympic Games,

Recalling also its resolution 48/11 of 25 October 1993, which, *inter alia*, revived the ancient Greek tradition of *ekecheiria* or "Olympic Truce" calling for a truce during the Games that would encourage a peaceful environment and ensuring the safe passage and participation of athletes and others at the Games and, thereby, mobilizing the youth of the world to the cause of peace,

Taking into account the inclusion in the United Nations Millennium Declaration³ of an appeal for the observance of the Olympic Truce now and in the future and support for the International Olympic Committee in its efforts to promote peace and human understanding through sport and the Olympic ideal,

Noting that the Games of the XXVIII Olympiad will take place from 13 to 29 August 2004 in Athens, in Greece, where the Olympic Games were born in ancient times and revived in 1896, and where the tradition of the Olympic Truce was first established,

Welcoming the initiative of the Secretary-General to establish the United Nations Inter-agency Task Force on Sport for Development and Peace,

Recognizing the important role of sport in the implementation of the internationally agreed development goals, including those contained in the Millennium Declaration,

Recognizing also the valuable contribution that the appeal launched by the International Olympic Committee for an Olympic Truce, with which the National Olympic Committees of the Member States are associated, could make towards advancing the purposes and principles of the Charter of the United Nations,

Noting with satisfaction the flying of the United Nations flag at all competition sites of the Olympic Games, and the joint endeavours of the International Olympic Committee and the United Nations system in fields such as poverty alleviation, human and economic development, humanitarian assistance, education, health promotion, gender equality, environmental protection and human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS) prevention,

Welcoming the establishment by the International Olympic Committee of an International Olympic Truce Foundation and an International Olympic Truce Centre to promote further the ideals of peace and understanding through sport, on whose Board the President in office of the General Assembly sits and the Secretary-General and the Director-General of the United Nations Educational, Scientific and Cultural Organization are represented,

Welcoming also the individual support of world personalities for the promotion of the Olympic Truce,

1. Urges Member States to observe, within the framework of the Charter of the United Nations, the Olympic Truce, individually and collectively, during the Games of the XXVIII Olympiad, to be held in Athens;
2. Welcomes the decision of the International Olympic Committee to

mobilize all international sports organizations and the National Olympic Committees of the Member States to undertake concrete actions at the local, national, regional and world levels to promote and strengthen a culture of peace based on the spirit of the Olympic Truce;

3. Calls upon all Member States to cooperate with the International Olympic Committee in its efforts to use the Olympic Truce as an instrument to promote peace, dialogue and reconciliation in areas of conflict during and beyond the Olympic Games period;
4. Welcomes the increased implementation of projects for development through sport, and encourages Member States and all concerned agencies and programmes of the United Nations system to strengthen their work in this field, in cooperation with the International Olympic Committee;
5. Requests the Secretary-General to promote the observance of the Olympic Truce among Member States and support for human development initiatives through sport, and to cooperate with the International Olympic Committee in the realization of these objectives;
6. Decides to include in the provisional agenda of its sixtieth session the sub-item entitled "Building a peaceful and better world through sport and the Olympic Ideal" and to consider this sub-item before the XX Olympic Winter Games.

52nd plenary meeting 3 November 2003

A/RES/60/8

1 December 2005

Sixtieth session Agenda item 48 (a)

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/60/L.15 and Add.1)]

60/8. Building a peaceful and better world through sport and the Olympic ideal

The General Assembly,

Recalling its resolution 56/75 of 11 December 2001, in which it decided to consider the item entitled "Building a peaceful and better world through sport and the Olympic ideal" every two years in advance of each Summer and Winter Olympic Games,

Recalling also its resolution 58/6 of 3 November 2003, in which it decided to include in the provisional agenda of its sixtieth session the sub-item entitled "Building a peaceful and better world through sport and the Olympic ideal" and to consider this sub-item before the XX Olympic Winter Games,

Bearing in mind its resolution 48/11 of 25 October 1993, which, *inter alia*, revived the ancient Greek tradition of *ekecheiria* or "Olympic Truce" calling for a truce during the Games that would encourage a peaceful environment and ensuring the safe passage and participation of athletes and others at the Games and, thereby, mobilizing the youth of the world to the cause of peace,

Taking into account the inclusion in the United Nations Millennium Declaration⁴ of an appeal for the observance of the Olympic Truce now and in the future and support for the International Olympic Committee in its efforts to promote peace and human understanding through sport and the Olympic ideal,

Recalling its resolution 58/5 of 3 November 2003, in which it decided to proclaim 2005 the International Year for Sport and Physical Education, as a means to promote education, health, development and peace,

Recognizing that the goal of the Olympic movement is to build a

² At its 2nd plenary meeting, on 19 September 2003, the General Assembly decided to include in the agenda of its fifty-eighth session an item entitled "Sport for peace and development",

including a sub-item entitled "Building a peaceful and better world through sport and the Olympic ideal".

³ See resolution 55/2.

peaceful and better world by educating the youth of the world through sport, practised without discrimination of any kind and in the Olympic spirit, which is based on mutual understanding, friendship, solidarity and fair play,

Welcoming the joint endeavours of the International Olympic Committee and the United Nations system in fields such as human development and poverty alleviation, humanitarian assistance, health promotion and HIV/AIDS prevention, combating malaria, tuberculosis and other infectious diseases, basic education, gender equality and environmental protection,

Recognizing the important role of sport in achieving internationally agreed development goals, including those contained in the Millennium Declaration, and reaffirming the commitments undertaken in this regard by the Heads of State and Government gathered at the World Summit of the General Assembly, held in New York from 14 to 16 September 2005,

Noting with satisfaction the flying of the United Nations flag at the Olympic Games,

1. *Urges* Member States to observe, within the framework of the Charter of the United Nations, the Olympic Truce, individually or collectively, during the XX Olympic Winter Games, to be held in Turin, Italy, from 10 to 26 February 2006, and the following Paralympic Winter Games, to be held also in Turin, from 10 to 19 March 2006, by ensuring the safe passage and participation of athletes at the Games;
2. *Welcomes* the decision of the International Olympic Committee to mobilize international sports organizations and the National Olympic Committees of the Member States to undertake concrete actions at the local, national, regional and world levels to promote and strengthen a culture of peace based on the spirit of the Olympic Truce and to cooperate with the national committees of the International Year for Sport and Physical Education;
3. *Requests* the Secretary-General to promote the observance of the Olympic Truce among Member States, drawing the attention of world public opinion to the contribution such a truce would make to the promotion of international understanding, peace and goodwill, and to cooperate with the International Olympic Committee in the realization of this objective;
4. *Calls upon* Member States to cooperate with the International Olympic Committee and all concerned agencies and programmes of the United Nations in their efforts to use the Olympic Truce as an instrument to promote peace, during and beyond the Olympic Games period, and to implement projects using sport as a tool for development;
5. *Decides* to include in the provisional agenda of its sixty-second session the sub-item entitled “Building a peaceful and better world through sport and the Olympic ideal” and to consider this sub-item before the Games of the XXIX Olympiad, to be held in Beijing in 2008.

43rd plenary meeting 3 November 2005

A/RES/62/4

16 November 2007

Sixty-second session Agenda item 45 (b)

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/62/L.2 and Add.1)]

62/4. Building a peaceful and better world through sport and the Olympic ideal

The General Assembly,

Recalling its resolution 60/8 of 3 November 2005, in which it decided to include in the provisional agenda of its sixty-second session the sub-item entitled “Building a peaceful and better world through sport

and the Olympic ideal”, and recalling also its prior decision to consider the item every two years in advance of each Summer and Winter Olympic Games,

Recalling also its resolution 48/11 of 25 October 1993, which, *inter alia*, revived the ancient Greek tradition of *ekecheiria* or “Olympic Truce” calling for a truce during the Games that would encourage a peaceful environment and ensure the safe passage and participation of athletes and relevant persons at the Games, thereby mobilizing the youth of the world to the cause of peace,

Taking into account the inclusion in the United Nations Millennium Declaration⁵ of an appeal for the observance of the Olympic Truce now and in the future and support for the International Olympic Committee in its efforts to promote peace and human understanding through sport and the Olympic ideal,

Noting that the Games of the XXIX Olympiad will take place from 8 to 24 August 2008, and that the Paralympic Games will take place from 6 to 17 September 2008, in Beijing,

Recognizing the increasingly important role of sport in the implementation of the internationally agreed development goals, including those contained in the Millennium Declaration, and reaffirming the commitments undertaken in this regard by the Heads of State and Government gathered at the World Summit of the General Assembly, held in New York from 14 to 16 September 2005,

Recognizing also the valuable contribution that the appeal launched by the International Olympic Committee for an Olympic Truce, with which the National Olympic Committees of the Member States are associated, could make towards advancing the purposes and principles of the Charter of the United Nations,

Recalling the three main concepts that are at the core of the Games of the XXIX Olympiad in Beijing, namely, “Green Olympics”, “High-tech Olympics” and “People’s Olympics”, and their vision to achieve a harmonious development of society,

Noting with satisfaction the flying of the United Nations flag at all competition sites of the Olympic Games, and the joint endeavours of the International Olympic Committee and the United Nations system in fields such as poverty alleviation, human and economic development, humanitarian assistance, education, health promotion and HIV/AIDS prevention, gender equality and environmental protection,

1. *Urges* Member States to observe, within the framework of the Charter of the United Nations, the Olympic Truce, individually and collectively, during the Games of the XXIX Olympiad in Beijing, the vision of which is based on the slogan “One world, one dream”, and the Paralympic Games which follow it;
2. *Welcomes* the decision of the International Olympic Committee to mobilize international sports organizations and the National Olympic Committees of the Member States to undertake concrete actions at the local, national, regional and world levels to promote and strengthen a culture of peace and harmony based on the spirit of the Olympic Truce;
3. *Calls upon* all Member States to cooperate with the International Olympic Committee in its efforts to use sport as an instrument to promote peace, dialogue and reconciliation in areas of conflict during and beyond the Olympic Games period;
4. *Welcomes* the increased implementation of projects for peace, development and human understanding through sport, and encourages Member States and all concerned agencies and programmes of the United Nations system to strengthen their work in this field, in cooperation with the International Olympic Committee;
5. *Requests* the Secretary-General to promote the observance of the Olympic Truce among Member States and support for human development initiatives through sport, and to cooperate with the International Olympic Committee and the sporting community in general in the realization of those objectives;
6. *Decides* to include in the provisional agenda of its sixty-fourth session the sub-item entitled “Building a peaceful and better world through sport and the Olympic ideal” and to consider the sub-item before the XXI Olympic Winter Games, to be held in Vancouver, Canada, in 2010.

40th plenary meeting 31 October 2007

4 See resolution 55/2.

5 See resolution 55/2.

Publication of CAS Awards

(per March 2007)

The International Council of Arbitration (ICAS) has given its consent to the publication of summaries of major and non-confidential Court of Arbitration for Sport (CAS) awards in specialised journals like The International Sports Law Journal (ISLJ), while CAS will keep on publishing its awards in its official Digest. (eds)

Arbitration CAS 2004/O/645 United States Anti-Doping Agency (USADA) v/Tim Montgomery & International Association of Athletics Federation (IAAF), award of 13 December 2005
Panel: L. Yves Fortier (Canada), President; Christopher L. Campbell (United States); Peter Leaver (United Kingdom)

The Court of Arbitration for Sport (CAS) has upheld the requests for arbitration filed by the United States Anti-Doping Agency (USADA) in July 2004 concerning the case of Tim Montgomery. As a consequence, the athlete has been declared ineligible for a period of two years starting on 6 June 2005. Furthermore, all results and awards obtained by Tim Montgomery since 31 March 2001 will be cancelled.

The Appellant, USADA, is the independent Anti-Doping Agency for Olympic sports in the United States and is responsible for managing the testing and adjudication process for doping control in that country.

The Respondent, Tim Montgomery ("Mr. Montgomery" or the "Athlete"), is an elite and highly successful American track and field athlete.

On 7 June 2004, USADA informed Respondent that it had received evidence which indicated that Mr. Montgomery was a participant in a doping conspiracy involving various elite athletes and coaches as well as the Bay Area Laboratory Cooperative ("BALCO"). On the same date, USADA submitted the matter to its Anti-Doping Review Board (the "Review Board") pursuant to paragraph 9 (a) (i) of the USADA Protocol. In accordance with the provisions of that paragraph, the Athlete also submitted a lengthy and detailed submission on the matter to the Review Board.

By letter dated 22 June 2004 (the so-called "Charging Letter"), the Respondent was charged with violations of the IAAF Anti-Doping Rules. (...) the participation in the BALCO conspiracy, the purpose of which was to trade in doping substances and techniques that were either undetectable or difficult to detect in routine testing, involved the Respondent's violations of the IAAF Rules that strictly forbid doping: Rule 55.2, Rule 56.3, Rule 56.4, Rule 60.1.

USADA and the athlete had agreed to submit their disputes directly to the Court of Arbitration for Sport, acting as sole instance in these matters. USADA requested that a four-year suspension be imposed on Tim Montgomery for his participation in what was described as a wide-ranging doping conspiracy involving BALCO.

The case was initially scheduled to be heard in November 2004. At the request of the parties, a revised timetable was established which provided for three preliminary hearings to deal with the numerous jurisdictional and evidentiary issues raised by the athletes. The hearing on the merits took place from 6 to 10 June 2005.

In its written decision, the Court of Arbitration for Sport (CAS) has decided that:

- It makes little, if indeed any difference, whether a 'beyond reasonable doubt' or 'comfortable satisfaction' standard is applied to determine the claims against the [Respondent] ... Either way, USADA bears the burden of proving, by strong evidence commensurate with the serious claims it makes that the [Respondent] committed the doping offences in question.
- USADA has met this standard. This case did not involve positive doping tests (known as "analytical positives"). The charges against the athlete were substantiated by other types of evidence. Among that evidence was the testimony of Ms. Kelli White, an elite track athlete who had previously admitted to doping with the assistance of BALCO and accepted a sanction as a result. Ms. White testified

that, on separate occasions, Montgomery admitted to her their use of a prohibited substance provided by BALCO. The Panel unanimously found that Ms White's testimony was both credible and sufficient to establish that the athlete had indeed admitted to have used prohibited substances in violation of applicable anti-doping rules. The athlete himself decided not to testify at the hearings before CAS, and Ms White's testimony in this regard remained uncontroverted. On this basis, the Tribunal finds Respondent guilty of a doping offence. In particular, the Panel finds Mr. Montgomery guilty of the offence of admitting having used a prohibited substance under IAAF Rules 55.2(iii) and 60.1(iii).

- The Panel finds that Mr. Montgomery's admission of his use of prohibited substances merits a period of ineligibility under IAAF Rules of two years. This period of ineligibility shall commence to run as of 6 June 2005, being the first day of Mr. Montgomery's hearing. The Panel is of the view that this date of commencement of the sanction is fair and appropriate in the particular circumstances of this case in view of the numerous delays in the hearing process unattributable to the Athlete. In addition, the Panel orders the retroactive cancellation of all of Mr. Montgomery's results, rankings, awards and winnings as of the date of admission of the use of prohibited substances (31 March 2001).

Arbitration CAS 2004/A/757 Finish Ice Hockey Association v/ International Ice Hockey Federation (IIHF), award of 25 October 2005

Panel: Mr François Carrard (Switzerland), Sole Arbitrator

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by the Finish Ice Hockey Association against the decision issued by the IIHF Council on 22 September 2004 whereby the latter confirmed a previous decision taken by the IIHF legal committee, regarding the calculation and payment of the applicable fees to the Jokerit Club in the case of the player Sean Bergenheim. The decision denied the allocation of an amount of USD 103,687 claimed by the Finish Ice Hockey Association from IIHF.

The player Sean Bergenheim played with the Finnish team of Jokerit Helsinki during the seasons 2001/2002 (twenty-eight games) and 2002/2003 (forty games). He was a first draft of the NHL Team New York Islanders at the 2002 NHL entry drafts. On 15 July 2003, he executed with the New York Islanders a NHL player's contract under which the New York Islanders agreed in particular to employ the player for a term of three years commencing on 1 October 2003.

An addendum "A" to the NHL player's contract, also executed on 15 July 2003 between the player and the New York Islanders, included a clause entitled "European Assignment", specifying the conditions under which, "subject to the terms of any agreement between the IIHF and NHL", the New York Islanders agreed "to loan the player to a European Hockey Club...".

While under contract with his NHL club, Sean Bergenheim played for the AHL club of Bridgeport. He then went back to Finland in mid-December 2003, where he played with the Finnish National Team during the 'World under 20 Championships'. Before 15 January 2004, he went back to his previous Finnish team, Jokerit, with which he played twenty-three games during the remainder of the 2003-2004 season which he completed with Jokerit before going back to New York in March 2004.

For each of the transfers, the standard printed "NHL Player Transfer to/from minors form" was filled in. Such form includes a printed section entitled "loaned to minor league club", providing for the characterization of the transfer as "regular transfer", or "termination of emergency conditions", or "emergency conditions not terminated, loaned", or "conditioning purposes", or "reassignment (minor to minor)" or "other (details)". The transfer of the player from the

New York Islanders to Bridgeport was characterized, under the section "Loan to a minor League Club" as "regular transfer". On the other hand, the transfer of the player from the New York Islanders to Jokerit was characterized, under the same section (Loan to a minor League club) as "other (details)" with the following characterization "Reassigned after World JR to Jokerit (Finnish League)".

Through a network of intertwined agreements, the IIHF, the NHL and a number of national associations, including Finland, have established, beginning in 1994, a system under which, in short, the NHL Clubs have the right to hire players from IIHF Clubs by paying, through the NHL, a lump sum by way of a relief fee to be annually paid to the IIHF, which lump sum is to be distributed in accordance with agreements entered into between the IIHF and the National Associations.

The contractual network concerned currently in force consists of a Memorandum of Agreement entered into on 9 June 2001 between the NHL and the IIHF ("the IIHF/NHL Agreement") and a series of Memoranda of agreement between IIHF and the IIHF National Associations regarding transfers of players to/from the National Hockey League (including the Memorandum concerning Finland - "the Memorandum" -) entered into in September and October 2001 between the IIHF and the National Associations, such Memoranda being practically all identical.

In November 2003, the Finish Ice Hockey Association, for the benefit of Jokerit, was awarded by the IIHF a payment in the amount of USD 103,687, corresponding to one half of the payment due by the IIHF to the Finish Ice Hockey Association pursuant to the distribution model and payments schedule provided in article 3 of the Memorandum, more particularly in article 3.1.2, which states the following :

"If the player returns to his previous IIHF Team between 2 October and January 15 of the player's first season under which he was under a player's contract to a NHL Team the IIHF Team/Teams shall immediately reimburse 50% of the IIHF payment attributable to the respective IIHF Team/Teams. The repayment should be distributed according to the distribution model in article 3.2 and be paid out as an extra payment in March as specified in article 3.4..." (emphasis added).

The Finish Ice Hockey Association requested from the IIHF payment of the remaining half, i.e. an additional amount of USD 103,687, submitting that the player never "returned" to Jokerit. According to the Finish Ice Hockey Association, the word "return" had to be interpreted taking into account the legal contractual status of the player who was under the "jurisdiction" of the New York Islanders.

The IIHF refused to pay the remaining half, submitting that the word "return" meant "go back" or "revert" which was exactly what had happened since the player had gone back to Jokerit before 15 January 2004. The facts being clear, Jokerit and the Finish Ice Hockey Association had no right to claim the payment of the remaining 50%.

The jurisdiction of CAS in casu is based on art. 6.1 of the Memorandum and has been recognised by both parties. In its written decision, the Panel considered that:

- While there is no dispute as to the fact that the player's contract between the New York Islanders and the player was at all times valid, it should be noted that the said contract actually provides for the possibility for a player to be loaned to a European team. It should also be noted that the contract language regarding the status of the player with the New York Islanders refers to concepts such as transfer, recall, loan, assignment or reassignment, which might all imply some form of legal characterization which is not the case with the word of "return" which covers a more generic situation of fact rather than a legal concept. The juridical "neutrality" of the word "return" is an indication that the contents of article 3.1.2 of the Memorandum emphasises more the actual situation of fact than the possible legal status of the players.
- The IIHF interpretation of the word "return" in the sense of article 3.1.2 of the Memorandum makes of such word a concept of fact and not a concept of legal status or "jurisdiction". The Panel considers that, contrary to the submission of the Finish Ice Hockey

Association, such an interpretation is not inconsistent with the general intent of all the interested parties, NHL, IIHF and National Associations to "maintain good order within the sport". The Panel further considers that the interpretation given by the IIHF does not violate the contents of the Memorandum, nor does it violate the contents of the contractual network instituted by the IIHF with the NHL and the National Associations. By considering that the player had actually "returned" to Finland between 2 October 2003 and 15 January 2004, the IIHF complied with the system instituted for the allocation of payments originating from the NHL. The player was available for Jokerit from early January 2004 on; he played twenty-three games with the team and completed the Finnish season. Thus, he contributed substantially to the club Jokerit for the remainder of the season 2003/2004. The Panel considers that these facts constitute a "return" in the sense of article 3.1.2 of the Memorandum. The IIHF interpretation is justified. Therefore, the remaining 50% of the IIHF payment concerned shall not be paid by the IIHF to the Finish Ice Hockey Association.

Arbitration CAS 2005/A/811 Galatasaray SK v/ MSV Duisburg GmbH & Co. KGaA, award of 19 December 2005

Panel: Mr. Lars Halgreen (Denmark), President; Mr. Jean-Jacques Bertrand (France); Mr. Michele Bernasconi (Switzerland)

The Court of Arbitration for Sport has decided to dismiss the appeal filed by Galatasaray SK (hereinafter "the Appellant") a football club with its registered office in Istanbul, Turkey against the decision issued by the FIFA Dispute Resolution Chamber on November 9, 2004 according to which the Appellant had to pay the amount of EUR 210'000 to MSV Duisburg GmbH & Co. KGaA (hereinafter "the Respondent"), a football club with its registered office in Duisburg, Germany as training compensation.

The player, G. (hereinafter "the player"), was born on March 3, 1982 and has been registered with the Respondent for three years from the sporting season 1999-2000 until the season 2001-2002 as an amateur player. He was 17 years old as he started playing for MSV Duisburg and 20 years old when he left the first team squad.

On June 21, 2002, the Appellant issued a document in German translated by the Appellant stating: "We hereby confirm that the contract of Mr. G. expires on 30.06.02 and there are no further claims with respect to his transfer." And the Respondent: "We hereby confirm that Mr G's contract expires as of 30 June 2002 and no transfer claims exist anymore."

The document was signed by Mr. L., employed in the Respondent's accountant department, and issued on the request of the player's attorney, i.e. Dr. H. and transmitted to him.

On August 13, 2002, the player entered into a contract as professional player with the Appellant.

On June 11, 2003, the Respondent asked the Appellant for a training compensation to be paid. The total amount claimed was of 234'900.-

On July 3, 2003, the Appellant answered by sending the document dated June 21, 2002 stating that transfer of the player had been concluded "under definite condition of no transfer related fees". Therefore, no training compensation should be paid.

As the parties could not reach an agreement, on November 9, 2004, the FIFA DRC rendered its decision according to which the Respondent, Galatasaray SK had to pay the amount of EUR 210'000 to the Claimant MSV Duisburg.

The Appellant submits that the translation of the document dated June, 21, 2002 was inaccurate and led to an unjust decision by the DRC. According to the Appellant, the Respondent waived its right to training compensation. The Appellant asks the Panel to reverse the decision of the DRC issued on November 9, 2004.

The Respondent submits that the appeal against the DRC decision was lodged after the 10 days time limit set by art. 60 of the FIFA Statutes and therefore the CAS shall refuse to hear the appeal filed by the Appellant. The Respondent also claims that the document issued

on June 21, 2002 cannot be considered as a waiver and according to the applicable FIFA regulations, training compensations are due for young players until the player's training ends and the wording itself of the statement includes only *transfer payment* and not *training compensation*. The Respondent requests the Panel to reject the appeal and confirm the DRC decision.

In its written decision the Court of Arbitration for Sport has decided that:

- Under due consideration of all the evidence submitted to the Panel, it has not been proven that the fax number used by FIFA to send the DRC decision was the right and appropriate fax number of the Appellant. In particular, the fax number used by FIFA does not match the fax numbers found on the official website of the Appellant and the Appellant's fax number set on its letterhead. It does match the one set on UEFA's website under the Club's page and the one found in UEFA's directory, though. Therefore, the decision should not be considered as served on the Appellant on December 17, 2004. The Appellant nevertheless recognises to have received the DRC decision on December 20, 2004 by mail. The Appellant's appeal was filed on December 30, 2004, therefore within the 10 days time limit set by art. 60 of the FIFA Statutes.
- All circumstances surrounding the transfer of the player are leading to the findings that a training compensation was due. All these circumstances were known by the Appellant as it received the document dated June 21, 2002. Nevertheless, on the basis of this latter document and ignoring the other circumstances, the Appellant concluded that the Respondent waived its right to a training compensation without further investing or regarding additional information from the Respondent. This reaction appears to the Panel as not appropriate.
- According to the applicable *principe de la confiance* which stems from art. 2 al. 1 of the Swiss Civil Code. (Gauch, Schluep, Tercier, Partie Générale du Droit des Obligations, Zurich, 1982, T. I, p. 38), and taking in due consideration all the evidence produced by the parties during the proceedings with CAS, the Appellant should have understood the statement in the sense that no *transfer fees* were due, but a *training compensation* could still be claimed. Or at least, the Appellant should have checked this latter point with the Respondent as the question, in fact, remained undecided and contradictory to all the circumstances. For these reasons, the Panel does not consider the document dated June 21, 2002 as a "full" waiver. Accordingly, the Respondent can validly claim a training compensation for the three seasons spent by the player in its squad.

Arbitration CAS 2005/A/835 PSV N.V. v/ FIFA & Federação Portuguesa de Futebol & CAS 2005/A/942 PSV N.V. v/ Leandro do Bomfim & FIFA, award of 3 February 2006

Panel: Mr Luigi Fumagalli (Italy), President; Mr Manfred Peter Nan (The Netherlands); Mr José Miguel Nobre Ferreira (Portugal)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeals filed by PSV Eindhoven (the "Appellant") against the decisions issued on 24 Feb. 2005 by the Single Judge of the FIFA Players' Status Committee (CAS 2005/A/835), respectively on 29 May 2005 by the Bureau of the FIFA Players' Status Committee (CAS 2005/A/942), which both considered that the employment contract between PSV and the player B. (the "Player") had to be limited to a duration of 3 years due to latter's status of minor of age at the time of the contract's signature. Therefore, the Player has been considered as free to register with another club as from 1 January 2005.

On 21 July 2001, the Player signed with PSV an employment contract starting on 1 January 2002 and ending on 30 June 2006.

By letter dated 20 January 2005, the Player requested FIFA to allow him to move to a new club of his choice, maintaining that at the time of the signature of his contract, he was still minor of age, and therefore, according to art. 36 of the Regulations for the Status and Transfer of Players 1997 (the "FIFA Players' Regulations"), he could not sign an employment contract for a period exceeding 3 years. On

the same day, the Player signed an employment contract with FC Porto.

On 31 January 2005 the Portuguese Football Federation (FPF) requested the Dutch Football Federation (KNVB) to issue the International Registration Transfer Certificate of the Player. On the same day the KNVB informed the FPF that it was "*not able to issue the international transfer certificate*", because "*PSV has informed us that the player ... is still under contract with PSV*".

By letter dated 11 February 2002 the FPF formally referred the matter to FIFA, transmitting a letter of 10 February 2005, whereby Porto requested the issuance of a provisional certificate so to allow the Player to play for his new club.

On 24 February 2005, the Single Judge of the FIFA Players' Status Committee (the "Single Judge") issued a decision in which he held that the duration of the employment contract had to be limited to 3 years, i.e. until January 2005. Therefore, the FPF was authorised to provisionally register the player with the FC Porto, with immediate effect. On 7 March 2005 PSV filed an appeal with CAS against such decision.

On 6 April 2005, FIFA informed the parties that the dispute between the Player and PSV, having "*a labour nature*", had been referred for adjudication to the FIFA Dispute Resolution Chamber (the "DRC"). On 13 May 2005, the DRC issued a decision acknowledging that the employment contract had been signed before the entry into force of the FIFA Players Regulation 2001, and was therefore subject to the FIFA Players Regulation 1997, pursuant to which contractual disputes between clubs and players had to be dealt with by the FIFA Players' Status Committee (the "PSC").

On 29 May 2005, the Bureau of the PSC reached the conclusion that the duration of the employment contract had to be limited to 3 years and consequently had ended on 1 January 2005. Therefore, the PSC decided to accept the claim filed by the Player, i.e. to declare as terminated his working relationship with PSV as of 1 January 2005 and to confirm his provisional registration for Porto. On 4 August 2004, PSV filed a statement of appeal with the CAS to challenge the decision of the PSC.

In its written decision, the Panel considered that:

- In the CAS system, for a statement of appeal against a given respondent to be admissible, it is necessary not only that it names that respondent, but also that it contains an actual claim against it. The Panel, in the present case, finds that not only has the Appellant indicated FIFA as a respondent in both appeals, but also that it has actually indicated specific claims against FIFA. Indeed FIFA has not acted, through its PSC, as a first tier adjudicative body in a dispute between PSV and the Player; FIFA has issued a decision, authorizing, first provisionally, then finally, the registration of the Player with the new club of his choice, in the exercise of its "administrative" responsibilities pursuant to Article 7 of the FIFA Players' Regulations 1997. The exercise of such function goes well beyond the mere adjudication on the contractual claims of the parties. And the Appellant criticizes the exercise of that power. In the light of the foregoing, therefore, the Panel concludes that FIFA is to be treated as a respondent in these arbitration proceedings.
- Art. 36 of the FIFA Players' Regulations 1997 could be invoked, as it was, by the Player so to obtain a decision from FIFA allowing him to register for a new club. Pursuant to para. 2 of the Preamble to the FIFA Players' Regulations 1997 "*the principles outlined in under Art. ... 36 ... of these regulations are also binding at national level*". As a result, domestic provisions inconsistent with Art. 36 cannot be invoked "*at national level*" to seek and obtain a remedy, enforcing a contract having a duration of more than 3 years, expressly prohibited by the FIFA rules. In the same way, it cannot be maintained that the regulations of the KNVB impose a duty - not to register the Player with Porto - on FIFA and the FPF, which are obviously not subject to such rules.
- Correctly, the PSC considered that the claim of the Player was not time barred pursuant to Article 3 of the PSC Procedural Rules, which provides that "*the FIFA Players' Status Committee does not hear any dispute if more than two years have elapsed since the facts*

leading to the dispute arose". The facts leading to the dispute occurred when the Appellant denied the Player's request to consider the employment contract as terminated upon expiration of the three year term indicated in Article 36: only in that moment could the Player exercise his right to seek the registration for a club of his choice. In addition, the Player does not seem to have acted in bad faith *vis-à-vis* the Appellant. On one side, the Appellant does not offer any evidence of that bad faith. On the other side, the documents on file clearly show that the Player made known his position to PSV before turning to FIFA.

- Article 36 of the FIFA Players' Regulations 1997, as invoked by the Player, was correctly applied by the FIFA bodies. In this framework, the fact that the registration of the Player with the KNVB was made only on 19 January 2002, when he had reached the age of 18 years, is irrelevant. At the moment in which the Player contractually expressed his consent to be bound to play for PSV, he was minor of age. And Article 36 of the FIFA Players' Regulations 1997 makes a clear and reasonable reference to the time of signature as the moment relevant to determine the age of the player. In the same way, the Panel fully agrees with the PSC as to the interpretation of the Declaration of 2002, and confirms that it cannot be construed as having the meaning of a confirmation by the Player, no longer minor of age, of the duration of his employment contract. In fact, by means of said declaration the Player stated that he would unconditionally respect the labour and image rights agreement he had signed with PSV Eindhoven on 21 July 2001, in order to be authorized to leave for Brazil for a certain period, without being paid and covering all his medical expenses: the employment contract was left unchanged, so that the parties thereto had all the rights, duties and claims with respect to the same contract, as they had before. Also after the signature of the Declaration of 2002 the Player was therefore entitled to seek a remedy under Article 36 of the FIFA Players' Regulations 1997.
- In principle a person should not be compelled to remain in the employment of a particular employer, as the Appellant so requests. An employee who breaches an employment contract by wrongful and premature withdrawal from it may be liable in damages or even be imposed a sanction (Article 23 of the FIFA Players' Regulations 2001), but not to an injunction to remain with his employer. This is the position under Swiss law (Article 337(d) CO) and under the CAS jurisprudence.

Arbitration CAS 2005/A/840 P. v/ Shangai Shenhua SVA SMEG FC, award of 21 December 2005

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr José Juan Pinto (Spain); Mr Michele Bernasconi (Switzerland)

The Court of Arbitration for Sport (CAS) has decided to allow the appeal filed by Mr P. ("the Appellant") against the decision issued on 4 February 2005 by the FIFA Players' Status Committee rejecting the player's claim for compensation in the amount of USD 2,2 million due to him under the employment contract with the Chinese club of Shangai Shenhua SVA SMEG FC ("the Respondent") for the 2004 and 2005 seasons. The latter was therefore ordered to pay the amount of USD 1,049,068 to P.

On 8 March 2003, the Player and the Club signed a three year employment contract (the "Player Contract"), until 28 February 2006. Art. 8 of the contract stated that if "the starting appearance [was] less than 70 % out of the whole CFA League A games (only starting appearance or total appearance time per game no less than 45 minutes can be counted) by his own will, [the Club] [had] the right to terminate this agreement, and transfer [the Player] to other football club, except for injuries which should be confirmed by the doctors or hospital appointed by [the Club]". Art. 12 stated that the "contract [came] into effect contingent upon [the Player] meeting the 3 requirements listed below (...) : 1. [The Player] must acquire international clearance from his registered association (...)".

After the Parties had signed the Player Contract, the FIFA Players'

Status Office suspended P. for having unilaterally terminated his previous employment contract with Vasco da Gama which was to have continued until 21 June 2003. Vasco da Gama and the Club eventually reached an agreement on the release of the Player. Therefore, FIFA issued a letter of clearance for the Player on 20 June 2003, but as a consequence of the FIFA suspension, the Player had missed five games of the Club in the 2003 season. He played his first game on 2 July 2003 and received no salary for the period from March to June 2003.

On 1 March 2004 the Club sent a notice of termination to the Player. According to a statistics sheet prepared by the Club, a total of 28 games were played by the Club in the 2003 season. Out of these 28 games, the Player had missed the first five due to the FIFA suspension. In addition, according to the statistics of the Club, five more games were not "counted" because the Player had played less than 45 minutes or not at all in these games. Therefore the Player had only played 18 out of 28 games, i.e. 64 % of all games during the 2003 season.

For the 2003 season, i.e. from July 2003 through February 2004, the Player received all payments due to him under the Player Contract.

On 5 March 2004 the Player filed a complaint to FIFA against the termination of his Player Contract and requested a compensation in the amount of USD 2.2 million, the amount due to him under the Player Contract for the 2004 and 2005 seasons. After leaving the Chinese club in March 2004, the Player played for Vasco da Gama (May 2004 - Dec. 2004), Al Ittihad (Jan. 2005 - Aug. 2005) and is currently playing for Fluminense (since Aug. 2005).

On 4 February 2005 the FIFA Dispute Resolution Chamber issued a decision (the "Decision") whereby it rejected the Player's claim. According to the DRC, the termination clause in Article 8.1 of the Player Contract had to be applied separately with respect to each individual season for which the Player is under contract with the Club. In addition, the words "by his own will" in the second sentence of Article 8.1 had to be interpreted as referring to the "will" of the Club, i.e. primarily the decision of the coach. According to FIFA, the clause would have been senseless if it was construed to refer to the "will" of the Player because the club would have been entitled to take disciplinary sanctions against the Player if he were to miss games by "his own will". As a consequence of these considerations, FIFA concluded that the player only played 18 out of the 28 2003 season games of the Club and thus only had a 64% starting appearance. This is not expressly stated in the Decision but derives from FIFA's reasons in the 4 February 2005 decision.

On 4 March 2005 the Player filed an appeal to CAS against the FIFA Decision. In its written decision, the Panel considered that:

- The words "out of the whole CFA League A games" has to be interpreted as referring individually to each of the three seasons for which the Player was under contract with the Club and not the entire three-year duration of the Player Contract. The former is the natural interpretation of this clause and there is no evidence or other indication that exceptionally a reference to a three-year period was intended.
- As a result of Art. 12 of the Player Contract, the latter did not take effect until 20 June 2003, the date on which FIFA issued the letter of clearance. The parties seem to have been in full agreement with this construction of Art. 12 in that the Player took no issue with the payment of salaries commencing only after that date. The Club played a total of 23 games during the period from the effective date of the Player Contract, namely 20 June 2003, until the end of the season 2003. Even if one were to disregard the five games which the Player missed during that period because of a decision by the coach, the Player played 18 games for purposes of the calculation of the Player's appearance rate. This results in an appearance rate of 78%, a ratio which does not justify a termination pursuant to Art. 8.1.
- Under the CAS jurisprudence, as a matter of principle, and in accordance with Article 337c of the Swiss Code of Obligations (CO), a party to a fixed-term employment contract which is unduly and prematurely terminated by the other party is entitled by way of compensation of his damages to payment of the salary that he would have earned until the scheduled end of the contract, if such

contract had not been terminated, with the proviso that he has a duty to mitigate the damages incurred by him (cf. CAS 2004/A/741; CAS 2003/O/535; CAS 2003/O/540 & 541). Pursuant to Art. 22 of the FIFA Regulations for the Status and Transfer of Players (2001 version) and to Art. 337c CO and in accordance with the CAS jurisprudence, the Player is entitled to a compensation in the amount of USD 2.2 million less the amount of the salary he earned during the period until the scheduled end of the Player Contract and less such amounts, if any, which he intentionally failed to earn. The calculation of the Player's claim against the Club is thus as follows: the compensation claim (USD 2,2 million) minus the amounts which the Player actually collected after leaving China (USD 187,600 from Vasco da Gama, USD 833,332 from Al Ittihad) and those he will make until the scheduled end of his Chinese Player Contract (USD 130,000 from Fluminense, until 28 Feb. 2006). As a result, the Player is entitled to a compensation in the amount of USD 1,049,068.

Arbitration CAS 2005/A/866 FC Hapoel Kia Beer-Sheva v/ S., award of 30 March 2006

Panel: Mr Luigi Fumagalli (Italy), President; Mr José Juan Pinto (Spain); Mr Michele Bernasconi (Switzerland)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by FC Hapoel Kia Beer-Sheva (the "Appellant" or the "Club") against the decision issued on 11 March 2005 by the FIFA Dispute Resolution Chamber (the "DRC"), ordering the Club to pay the amount of USD 58,200 to the Brazilian player S. (the "Player") for the breach of the employment contract between the two parties.

On 1 July 2003, the Player signed an employment contract (the "Contract") with Hapoel ending on 1 July 2006, with an option for its extension for two additional seasons. The contract provided for a "signing fee", to be paid as for USD 50,000 on 25 July 2003, as for USD 10,000 in July 2004 and as for USD 10,000 in July 2005, for a net "salary" of USD 4,000 per month, subject to increase by 5% per season, and bonuses relating to the results achieved by the Hapoel team, as well as other benefits.

On 21 July 2004, Hapoel contacted FIFA claiming that the Player had unilaterally breached the Contract by failing to report on time and disappearing since 17 July 2004 with no just cause, as stated on Art. 21 para. 1(a) of the FIFA Regulations for the Status and Transfer of Players in force since 1 September 2001 (the "FIFA Players Regulations 2001"). The Club acknowledged that it still owed USD 25,000 to the Player for the 2003/4 season.

The Player, on his side, claimed with FIFA that Hapoel had breached the Contract and requested that the Club be ordered to pay the amount claimed to be owed in July 2004 for the 2003/4 season (totalling USD 38,200) and a compensation for the breach of the Contract corresponding to the remaining value of the Contract for the seasons 2004/5 and 2005/6 (totalling USD 123,320).

On 11 March 2005, the FIFA Dispute Resolution Chamber (the "DRC") issued a decision that partially upheld the Player's claim and rejected in its entirety the Club's claim. Hapoel was therefore ordered to pay USD 58,200 to the Player, being USD 38,200, as the outstanding salaries and bonuses due to him in July 2004, and USD 20,000 as an appropriate compensation for the breach of the Contract. In support of its decision, the DRC noted that prior to leaving on holiday after his first season with the Club had ended, the Player had requested the payment of the outstanding amount due to him, which he had calculated as being USD 38,200. The DRC then remarked that despite not having received the amount due to him, the Player had showed his willingness to honour his part of the Contract, by writing to the club on 5th July 2004, requesting that the outstanding salaries be paid within 2 days of his return to Israel and by returning to Israel on 12 July 2004 despite the fact that the amount had not been paid. The Decision of the DRC was notified to the parties on 6 April 2005.

On 14 April 2005, Hapoel filed a statement of appeal with the CAS to challenge the DRC Decision.

In its written decision, the Panel considered that:

- The mere failure of the Player to immediately claim the payments due to him by Hapoel in accordance with the Contract cannot constitute a waiver of the obligation of Hapoel to make - and of the player to claim - such payments. It is actually a principle common to several jurisdictions, and well known also in Swiss law (Art. 341 CO), that an employee, pending the employment relationship, cannot surrender his rights, at least as established by mandatory rules. In addition, the Panel remarks that the Player requested Hapoel to make the outstanding payments "within 48 hours" of his return to Israel, and that Hapoel accepted such proposal: the Player returned to Israel, but received no payment. In other words, contrary to the Appellant's submissions, the Player did not waive or accept to postpone the payment, but actually requested it, as a condition of his return to Israel. As the party in breach of the Contract without just cause, the Appellant is therefore liable to pay to the Player the amounts already accrued at the time of the termination of the Contract, as well as financial compensation. With respect to the quantification of the sums accrued at the time of the termination of the Contract, the Panel notes that the request of the Player has not been challenged. Pursuant to Art. 339 CO, all claims arising from the employment relationship shall become due upon its termination. As a result, the Panel concludes that at the time of the termination of the Contract, Hapoel owed the Player an amount of USD 38,200 for accrued salaries, bonuses and signing-on fee.
- With respect to the quantification of the compensation for damages following the breach of contract, as provided by Art. 21 para. 1 of the FIFA Players Regulations 2001, the criteria to be followed are indicated in Art. 22 of the FIFA Players Regulations 2001 and in Art. 337c CO. In the light of the foregoing rules, the Panel notes that in principle the injured party should be restored in the position in which the same party would have been if the contract had been properly fulfilled. As a result, the Player should be entitled to claim payment of the entire amount he could have expected, and compensation for the damages he would have avoided, if the Contract had been implemented up to its natural expiration. Nevertheless, pursuant to Art. 337c para. 2 CO, the employee must permit a set-off against this amount for what he saved because of the termination of the employment relationship, or what he earned from another work, or what he has intentionally failed to earn. The Panel notes that the Player, at the time of the termination of the Contract, had an expectation to receive, if the Contract had been properly implemented up to its natural expiration, a net payment of USD 123,320 for expected salaries and sign-on fee. At the same time, the Panel remarks that the Player, after the termination of the employment relation with the Appellant, entered into a contract with a new club. However, the details of such new contract have not been disclosed and no request in that respect has been filed by the Appellant, which had the burden to do so. The Panel, therefore, is not in a position to apply any mitigating factor in the assessment of damages for salaries lost by the Player in the seasons 2004/2005 and 2005/2006. As a result, the Panel finds that the Player would be entitled to the payment of the full amount of USD 123,320. This amount exceeds the amount granted by the DRC. However, in deciding upon the compensation claimed by the parties, the Panel is limited by the prayers for relief, as it cannot rule *extra* or *ultra petita*. The Panel confirms therefore to be bound by the limits set by the Decision of the DRC, which has been challenged by the Appellant only, and cannot therefore be modified against the Appellant, who explicitly has not claimed for any higher amount.

Arbitration CAS 2005/A/876 Adrian Mutu v/Chelsea Football Club, award on 15 December 2005

Panel: Mr Dirk-Reiner Martens (Germany); President; Mr Michele Bernasconi (Switzerland); Mr Raj Parker (Great Britain)

The Court of Arbitration for Sport (CAS) has dismissed the appeal filed by the Romanian football player, Adrian Mutu, on 29 April 2005

against a decision issued by the Football Association Premier League Appeal Committee (FAPLAC). As a consequence, the FAPLAC Decision is confirmed. Such decision determines that:

- the Player's misconduct is to be deemed a unilateral breach of contract without just cause or sporting just cause,
- as a consequence of the Player's conduct, the Club was entitled to treat the Player Contract as at an end,
- the Club was entitled to bring a claim before the FIFA Dispute Resolution Chamber for the imposition of sporting sanctions and/or for an award of damages to compensate the Club for its added loss.

In 2003 Adrian Mutu (the "Appellant" or the "Player"), a Romanian national and a professional football player and Chelsea Football Club (the "Respondent" or the "Club"), a member of the English Premier League, entered into a player contract which was scheduled to run until 2008. For the release of the Player the Club paid a compensation in the amount of EUR 22,500,000 to the Player's previous club.

On 11 October 2004 the Player was informed that the A-sample of a drug test taken from him was positive. The test had been carried out by the English Football Association (the "FA") on 1 October 2004. In a letter to the English FA dated 17 October 2004 the Player admitted to having taken cocaine and waived his right to have his B-sample analysed.

By a letter dated 28 October 2004 the Club informed the Player that the Player Contract was terminated for gross misconduct pursuant to clause 10.1.1. On 4 November 2004 the FA Disciplinary Commission confirmed the positive result of the Player's drug test and suspended him until 18 May 2005. Further, the FA Disciplinary Commission imposed a GBP 20,000 fine on the Player. The decision was communicated to the Player on 4 November 2004. On 12 November 2004 FIFA confirmed the FA Disciplinary Commission's decision mentioned at paragraph 11 above and adopted the Player's suspension to apply world-wide.

According to Article 42 section 1(b)(i) of the FIFA Regulations for the Status and Transfer of Players which entered into force on 1 September 2001 (the "FIFA Regulations"), on 26 January 2005 the Club and the Player agreed that the FAPLAC would determine the dispute regarding "the triggering elements" under the FIFA Regulations.

The FAPLAC determined that the admitted ingestion of cocaine by the Player constituted gross misconduct pursuant to the player contract and entitled the Club to treat the contract as at an end. The FAPLAC further decided that the Club was therefore entitled to proceed to seek compensation and sporting sanctions from the FIFA Dispute Resolution Chamber ("DRC").

In the proceedings before the CAS the Player mainly contends that Articles 21 seq. of the FIFA Regulations "are designed to regulate moves of players between clubs and to distinguish those moves that are effected consensually between the club from which the player moves and the player himself".

The Player further argues that

"in the case of an alleged unilateral breach of contract by a player, on their true constructions, articles 21 to 23 inclusive of the FIFA Regulations are intended only to be applicable to a situation in which the player undermines the stability of his contract of employment with the club by unilaterally terminating such contract without just cause or sporting just cause (by, for example, leaving his club during the currency of that contract in order to play for a new club)."

According to the Player, a "unilateral breach" pursuant to Article 21 of the FIFA Regulations has to be equated with an "unlawful termination" of the Contract, and it was the Club, not the Player, that terminated the Player's Contract. Therefore, it is said, the Player did not commit a unilateral breach of contract of the kind contemplated by, and falling within the relevant articles of the FIFA Regulations.

The Club argues that there is no basis in the wording of the FIFA Regulations, in the intent behind the Regulations, or in principle to seek to draw a distinction between different types of conduct by the Player which under the applicable law, namely English law in this

case, have the same legal consequence of entitling the innocent party to treat the contract as discharged. In both instances, it is the Player who "renounces" the contract, and the Player's conduct constitutes the "unilateral breach" required for the application for the FIFA Regulations.

The Club further contends that there is no CAS decision which would support an interpretation of the applicable FIFA Regulations to the effect that only a walk-out by the Player under his contract would fall under these Regulations.

In its written decision, the CAS has decided that:

- The FIFA Regulations do not make any distinction between a player unlawfully walking out under a contract and another player who breaches his contract through other serious misconduct, like the player's taking cocaine or committing a serious on or off the pitch offence which goes to the roots of his contract with his employer. The Player's admitted use of cocaine constitutes the "unilateral breach without just cause" provided by the FIFA Regulations and triggers the consequences deriving thereof, no matter whether this breach causes the Club to give notice of termination or whether the Club continues to hold on to and insist upon performance of the contract despite the Player's breach.
- Consequently, the Club was entitled to bring a claim before the FIFA Dispute Resolution Chamber for the imposition of sporting sanctions and/or for an award of damages to compensate the Club for its added loss.

Arbitration CAS 2005/A/878 Club Guarani v/ G. & Club FC St. Gallen AG, award of 20 March 2006

Panel: Mr Massimo Coccia (Italy), President; Mr Peter Leaver QC (Great Britain); Mr Jean-Jacques Bertrand (France)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal submitted by the Paraguayan football club Guarani from the decision issued on 12 April 2005 by the FIFA Dispute Resolution Chamber (DRC), whereby the latter authorized the Paraguayan football player G. to register with the Swiss football club FC St. Gallen and ordered the Paraguayan Football Association (APF) to issue the international registration transfer certificate for the Paraguayan player in favour of the Swiss Football Association (SFV). The CAS has also ordered FC St. Gallen to pay to Club Guarani the amount of EUR 90,000 as training compensation.

G. (the "Player" and, together with St. Gallen, the "Respondents"), born on 28 January 1987, registered as an amateur player on 29 January 2002 with Club Guarani (the "Appellant"). On 26 April 2004, when the Player was 17 years old, the Appellant and the Player's parents signed an agreement (the "Agreement of 26 April 2004"). Article 4 and Article 5 of the Agreement provided respectively as follows: (i) in case of any offer made by a third party wishing to hire the Player while he was still a minor, the Player's parents and the Appellant had to negotiate jointly with such other party; (ii) upon the Player coming of age, the parties had to formalize a valid professional contract in accordance with Paraguayan law.

In early January 2005, when the Player was still a minor, the Appellant and the Player signed an employment contract under Law no. 88/91, the Paraguayan statute specifically governing professional football contracts, effective as from 29 January 2005 up to 29 January 2009 (the "Employment Contract"). The Employment Contract was not signed by the Player's parents and its date of signature was left blank.

On 21 January 2005, relying on the APF's certification that the Player was not registered as a professional player, but only as an amateur with the Appellant, the Player and his parents entered into an employment contract with FC St. Gallen, effective as from 1 February 2005 up to 30 June 2009.

On 24 January 2005, the SFV requested that the APF issue an international transfer certificate (ITC). On 28 January 2005, the APF informed the SFV that the Appellant had objected to the issuance of an ITC, due to the fact that the Player was allegedly bound by a valid

Employment Contract signed with Guarani. The SFV thus petitioned FIFA to be authorized to register the Player with St. Gallen.

On 12 April 2005, the DRC instructed the APF to issue the ITC authorizing the Swiss Federation to register the Player with St. Gallen with immediate effect. The DRC held that the Employment Contract between the Appellant and the Player could not be considered as valid according to Paraguayan legislation and to the regulations of the APF, as the Player had signed it while he was still a minor. The Appellant was aware that on the date of the signature the contract was not legally binding, since it had deliberately chosen not to fill out the contract with the true date of signature. On the other side, St. Gallen had acted in good faith because it had entered into a contract with the Player once it had received confirmation that no employment contract between the Player and the Appellant had been filed with the APF. The DRC concluded that neither compensation for breach of contract nor sporting sanctions would be applicable to the present case and that the Appellant would only be entitled to training compensation from St. Gallen. The decision was notified to the parties on 22 April 2005.

On 2 May 2005, the Appellant lodged an appeal with the CAS against the decision of the DRC.

In its written decision, the Panel considered that:

- The dispute had to be decided according to FIFA regulations and, on a subsidiary basis, according to Swiss law, with the exception of any legal issues related to the Paraguayan Contracts signed by and between the Player (and/or his parents) and the Appellant, which had to be decided in accordance with Paraguayan law, as they had no connection whatsoever with Switzerland.
- Under the general rules of the Paraguayan Labour Code, a minor is allowed to be a party to an employment relationship, subject to certain conditions. Furthermore, the Labour Code allows a *de facto* relationship to produce some legal effects. However, according to Law no. 88/91, a minor cannot be qualified as a professional football player. In addition, any professional football contract must be done in writing, must conform to the approved standard forms and must be registered with the Paraguayan League. No exceptions are allowed as a consequence of a *de facto* employment relationship. This apparent conflict of laws must be reconciled in accordance with the principle "*lex specialis derogat generali*"; thus, the provisions of Law no. 88/91 must prevail. Accordingly, as the Player signed his Employment Contract with Guarani when he was still a minor, his consent was not validly expressed. As a consequence, the Employment Contract is void and has no binding effect on the Player. In conclusion, the Player was still playing as an amateur when he signed the contract with St. Gallen.
- The Appellant certainly held the "registration rights" over the Player, insofar as the Player was registered for the Appellant with the APF. Given the Player's amateur status, such "registration rights" could have prevented the transfer of the Player without the Appellant's consent only if the Player had maintained his amateur status also in his new club/employer. However, under FIFA rules, the Player was fully free, being an amateur, to sign an employment contract with any club of his choice with the aim of becoming a professional football player.
- There is no evidence that St. Gallen was or could have been aware of the existence of Art. 4 and 5 of the Agreement of 26 April 2004. The Appellant failed to prove that St. Gallen induced the Player and his parents to disregard this Agreement. Therefore, St. Gallen may not be held responsible for the Player's and his parents' conduct. As the Appellant only requested compensation for damages towards St. Gallen, the Panel is precluded from ruling on the issue of whether the Player could be held liable for damages towards the Appellant.
- Under FIFA rules, a training compensation is owed by St. Gallen to Guarani, given the fact that the Appellant trained the Player for three years and St. Gallen signed the Player's first professional contract. As the Appellant declared that, should a compensation for damages not be awarded, it would accept the amount of EUR 90,000 already offered by St. Gallen, without need to send the

related subject matter back to FIFA, there is no need to rule on the appropriateness of such amount.

Arbitration CAS 2005/A/896 Fulham FC (1987) Ltd. v/ FC Metz, award of 16 January 2006

Panel: Mr Kaj Hober (Sweden), President; Mr Alan E. Harris (United States); Mr Olivier Carrard (Switzerland)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by Fulham FC (1987) Ltd against the decision issued on 13 April 2005 by the Single Judge of the FIFA Players' Status Committee whereby the latter ordered Fulham FC to pay to FC Metz the amount of EUR 2,013,273 plus interest as a "one-off" payment of 15% of any net transfer fee received for a subsequent transfer of S. from Fulham FC over and above the monies already paid to FC Metz for the transfer of the said player to Fulham FC.

On 5 June 2000, Fulham FC ("the Appellant") and FC Metz ("the Respondent") signed an agreement whereby they agreed that the registration of S. be transferred from FC Metz to Fulham FC for a transfer fee of FRF 20,100,000 (EUR 3,201,430). Pursuant to a clause defined in the transfer agreement (the "sell-on clause"), FC Metz was entitled to receive a sum equivalent to 15% of any net fee received by Fulham FC over and above the sum of FRF 20,100,000 should S. be subsequently transferred from Fulham FC to another club. This clause was to be valid for the first subsequent transfer only.

S. successfully passed the required medical examination and entered into a first employment contract with the Appellant on 26 June 2000. The contract was meant to remain in force until 30 June 2004 "*unless it shall have previously been terminated by substitution of a revised agreement or as hereinafter provided*" (hereinafter "the first employment contract"). On 2 May 2001, S. signed another employment agreement with the Appellant (hereinafter "the second employment contract"), under which the term of S's employment with the Appellant was extended and his wages, bonuses and accommodation allowance were significantly increased.

On 23 January 2004, the Appellant transferred S. to Manchester United Football Club Limited. It received a transfer fee amounting to GBP 11,500,000 (EUR 16,623,250). On 8 March 2004, the Respondent informed the Appellant of its intention to claim the payment pursuant to the sell-on clause as defined in the transfer agreement dated 5 June 2000. On 1 April 2004, the Respondent sent to the Appellant an invoice inviting the latter to pay the amount of EUR 2,013,273 (EUR 13,421,820 as increment value realized by Fulham FC x 15%) before 15 April 2004. On 12 August 2004, the Appellant confirmed to the Respondent that it did not intend to pay the claimed sell-on fee before a certain number of issues were addressed and clarified.

On 21 October 2004, upon complaint from the Fédération Française de Football acting on behalf of the Respondent, FIFA invited the English Football Association to inform the Appellant that it had until 1 November 2004 either to pay the requested amount of EUR 2,013,273 or to provide FIFA with the reasons for not doing so. On 1 November 2004, the Appellant confirmed that it did not agree to make any payment to the Respondent as long as the issues raised in its letter dated 12 August 2004 remained unanswered and unresolved.

The dispute was presented to the Single Judge of the Players' Status Committee. On 13 April 2005, he decided that the contract signed between the parties on June 2000 was valid and that Fulham FC therefore had to pay the amount of EUR 2,013,273, plus 5% interest p.a. starting on 1 April 2004, to FC Metz.

On 27 May 2005, the Appellant filed a statement of appeal with the CAS against the Decision of the Single Judge.

In its written decision, the Panel considered that:

- The parties have neither explicitly nor implicitly agreed upon a specific law to be applicable in case of a dispute arising out of their agreement of 5 June 2000, namely international conflict of law principles as submitted by the Appellant. On the contrary, the

Respondent contested the application of such principles, respectively, should those rules have been considered applicable, submitted that French law was to be taken into consideration instead of English law as argued by the Appellant. The leading Swiss legal doctrine is of the view that, in the absence of such an agreement, the applicable law of arbitration can also be chosen by referring to specific arbitration rules which themselves contain rules on the applicable law. In the case at hand, such specific rules are provided by the FIFA Statutes, which expressly prescribe that the rules and regulations of FIFA apply primarily and Swiss law subsidiarily.

- In the absence of agreement of the parties on the meaning of the sell-on clause and in order to determine their intent or the intent which a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, even if the words or the conduct appear to give a clear answer to the question, due consideration is to be given to all relevant circumstances of the case in order to go beyond the apparent meaning of the words or the conduct of the parties. This includes the negotiations and any subsequent conduct of the parties. It appears from the negotiations that the parties had expressly agreed to divide the player's transfer fee in two parts, a fixed amount of FRF 20,100,000 and an "additional amount". They also had reached an agreement on the method of calculation of this additional amount. No limit in time was either mentioned in relation with the sell-on fee. Therefore, the parties had agreed on all the essential terms of the transfer contract. As far as the subsequent conduct of the parties is concerned, the Appellant did not, until the proceedings before the CAS, challenge nor contest the principle of the payment due to the Respondent on the basis of the sell-on clause. The Panel was therefore of the opinion that the Appellant knew from the beginning that it had a contractual obligation to pay the sell-on fee to the Respondent.
- The words "net fee" found in the sell-on clause could only refer to the net transfer fee paid by Manchester United FC for the acquisition of S. after deduction of the costs in direct connection with the transfer of the player, namely the agents' costs. Even though, in his submission to FIFA, the Respondent admitted to be entitled to 15% of the net profit realized by the Appellant from S' transfer, the wording he used was inadequate and not consistent with its actions and calculations. In no case could all the costs and expenses associated with the employment of the player - namely agent fees, the player's wages, bonuses, insurance and the fixed amount paid by the Appellant to the Respondent pursuant to the transfer agreement - be taken into consideration to ascertain the "net fee", as the Appellant claims.
- There is no reason to adjust the sell-on fee as determined under the transfer agreement. Even though, on the one hand, the Panel accepted the idea that if S. had not entered into a second employment contract with the Appellant, the sell-on fee would have been lower since the player's value was determined in part by the length of time the second employment contract still had to run, it found, on the other hand, that it was not possible to know in how big a need Manchester United was for a player such as S. and what it was willing to pay for his acquisition. Therefore, it considered it too speculative to determine how the transfer was influenced by the length of the remaining time of the second employment contract.

CAS 2005/A/899 FC Aris Thessaloniki v/ FIFA & New Panionios N.E.C., award of 15 July 2005

Panel: Mr Beat Hodler (Switzerland), President; Mr Jean-Philippe Rochat (Switzerland); Mr Michele Bernasconi (Switzerland)

The Court of Arbitration for Sport (CAS) has dismissed the appeal filed by the Greek football club FC Aris Thessaloniki in relation to a dispute involving another Greek football club New Panionios NFC and the FIFA.

The facts related to this matter extend back to November 2004 when the FIFA Dispute Resolution Chamber upheld a monetary claim

filed by two Players against Panionios. Considering that Panionios did not pay the requested amounts to the Players, the FIFA Disciplinary Committee decided on 14 February 2005 to grant Panionios a final period of grace of thirty days for the payment of the outstanding amounts and also ruled that if such payments were not made within this time limit, 12 points (6 for each case) would be deducted from the points obtained by Panionios in the A Division of the Greek Football League. Panionios paid the amounts due to the Players but only after the expiration of the time limit fixed by the FIFA Disciplinary Committee. However, no points were deducted from Panionios' first team. Thereafter, the FC Aris, another Greek football club which was ranked 14th in the Greek Championship with 25 points and was relegated in second division while Panionios finished 11th with 35 points, filed a complaint with FIFA. According to FC Aris, these violations seriously affected its own situation, since if the decisions had been complied with, FC Aris would have remained in first division and Panionios would have been relegated to the second division. On this basis, FC Aris made the following formal requests:

- that, within 10 days, the decisions of 14 February 2005 be enforced;
- that the Disciplinary Committee open new disciplinary proceedings against Panionios;
- that sanctions be imposed on the HFF for voluntarily distorting the first division championship.

On 6 June 2005, the FIFA administration replied that the execution of a decision taken by a FIFA body fell under the competence of the relevant member association, namely the Hellenic Football Federation.

FC Aris filed an appeal with CAS on 8 June 2005 requesting in particular an order against FIFA to execute the decisions of its Disciplinary Committee by instructing the Hellenic Football Federation and the Hellenic Football League to deduct 12 points from the club Panionios.

The Appellant submitted that FIFA's letters of 6 and 7 June 2005 constitute decisions issued by FIFA, which can be appealed to CAS. As its argumentation on this point, the Appellant quotes the Award issued by CAS on 17 March 2004 (CAS 2004/A/659) in another matter, where CAS ruled that a certain letter written by FIFA constituted a decision under Article R47 of the Code. The Appellant also explains that the form of the decision, a letter, is irrelevant, as the decisive criteria are related to the content of the decision, not its form, and decisions could be issued in the form of letters.

Concerning the merits of the dispute, the Appellant argued that FIFA cannot ignore the non-execution of its decisions by the HFF against Panionios and has an obligation to make sure that its decisions are promptly and fully enforced, especially where the non-execution affects the sporting and financial rights/interests of an indirect member, such as the Appellant.

The Respondent submitted that its letter of 6 June 2005 did not contain any decision against which an appeal could be lodged. On the contrary, this letter was only meant to inform the Appellant of the situation. As a consequence, according to the Respondent, there is no "valid subject" for an appeal to CAS.

Panionios stated that it eventually paid its football players and, therefore, there is no legal reason for it to be punished.

In its written decision, the CAS has considered that:

- The form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal. What is decisive is whether there is a ruling - or, in the case of a denial of justice, an absence of ruling where there should have been a ruling - in the communication. The Panel considers that letter at stake contains no ruling that affects the legal situation of the Appellant.
- The purpose of the letter at stake was only to inform the Appellant of the applicable FIFA rules and to the fact that the FIFA Disciplinary Committee was competent to address disciplinary issues and to pronounce sanctions. The CAS Panel noted that the FIFA administration had immediately transmitted the case to the

FIFA Disciplinary Committee and thus did not commit a denial of justice. Considering that FC Aris has not exhausted all legal remedies internal to FIFA before the appeal to CAS, the Panel concluded that it had no jurisdiction to hear this case in the absence of a final decision of FIFA.

Arbitration CAS 2005/A/908 WADA v/ Wium, award of 15 November 2005

Panel: Mr Michael Geistlinger (Austria), President; Mr Hans Nater (Switzerland); Mr Conny Jörneklint (Sweden)

The Court of Arbitration for Sport (CAS) has decided to uphold the appeal filed by the World Anti-Doping Agency (WADA; the "Appellant") against the decision issued by the International Paralympic Committee's (IPC) Management Committee on 2 May 2005 whereby the latter affirmed a previous decision imposing a two years ineligibility period on a South African paralympic powerlifter, Coetzee Wium (the "Respondent"), and a disqualification of all competitive results obtained by the Respondent from 13 December 2004, including forfeiture of any medals, points and prizes. Therefore, the CAS ruled that the previous sanctions (ineligibility period and disqualification) were to be confirmed.

On 13 December 2004, the Respondent underwent a WADA out-of-competition doping control at his place of work. He was notified of the test at 9.39; the test was concluded at 9.54. On his way back, the Doping Control Officer (the "DCO") realized that he had forgotten the samples. He called the Respondent immediately, drove back to the Respondent's place of work and received the samples from the latter. In his view, the time that could have elapsed between the conclusion of the test and getting back to the Respondent was 45 minutes. Throughout this period, the samples were sealed in a tamper proof "Berlinger Test Kit".

The date of the sample collection by DHL as indicated in the documentation package for the samples of the Respondent was 14 December 2004, whereas the waybill showed 15 December 2004. The DCO explained this difference by stating that he had scheduled a pick-up via the Internet on 14 December 2004 but since no collection of the samples had taken place on this day, he had to take himself the bag into the DHL depot on the next day. There, the clerk who accepted the bag altered the date on the waybill to 15 December 2004, but the chain of custody still showed 14 December 2004.

The IPC Management Committee was presented with an Adverse Analytical Finding of the urine provided by the Respondent for testosterone or testosterone prohormones by the South African Doping Control Laboratory on 5 January 2005 and confirmed by IRMS analysis of the Doping Control Laboratory of the Deutsche Sporthochschule Köln on 27 January 2005 and reported to WADA and IPC on 3 February 2005. The T/E ratio was 43.2 for screen, well above the WADA threshold of 4.

On 14 March 2005, the IPC Management Committee decided to impose a two (2) years ineligibility period on the Respondent, based on art. 12.2 IPC Anti-Doping Code. In addition and based on art. 12.7 IPC Anti-Doping Code, all competitive results obtained by the Respondent from 13 December 2004 were disqualified including forfeiture of any medals, points and prizes. The IPC Management Committee considered the facts and held that there was a minor departure from the WADA International Standard for Testing. But there was no evidence that the sample had been tampered with in any way and the seal on the sample was wholly intact. Therefore, the Committee found that this departure did not invalidate the result.

On 16 and 23 March 2005, the General Manager of the Disability Sport South Africa (DISSA) filed two Notices of Appeal on behalf of the Respondent under art. 9.9 IPC Anti-Doping Code. She drew the conclusion that the forgetting of the samples as well as the change of the date on the waybill effectively caused a break in the chain of custody, which should render the decision of 14 March 2005 invalid. With regard to the issue of whether the sanction applied was the correct one, she argued that art 12.5.2 of the IPC Anti-Doping Code -

"no significant fault or negligence" - should be taken into consideration for defining the sanction if it was found that no significant deviation from the International Standard occurred. As a consequence, she requested a reduction of the 2 years' suspension.

On 2 May 2005, the IPC Management Committee decided to uphold the appeal and to immediately reinstate the Respondent to sport. The Committee found that a significant departure from the International Standard had occurred, as the samples were left unattended for 45 minutes and there was no clear record of exactly what had happened to them during this period, clearly breaking the chain of custody. In addition, it stated that the IPC Anti-Doping Subcommittee had not established, on the balance of probabilities, that this departure had not caused the adverse analytical finding. In light of this finding, it did not consider the second question of whether the sanction applied by the IPC Anti-Doping Subcommittee was the correct one.

In its Statement of Appeal, dated 21 June 2005, WADA asked the CAS to amend the IPC decision of 2 May 2005 in order to impose a 2 years ineligibility period on Coetzee Wium.

In its written decision, the Panel considered that:

- In a case where it is established that departures from the WADC International Standard for Testing and/or the WADA Technical Documents for Laboratory Analysis occurred during transportation, collection and/or testing, the question the Panel has to answer is: "Do these deviations cast sufficient doubt on the reliability of the test results to an extent that the finding of a Prohibited Substance in the athlete's urine was not sufficient to establish a doping offence to the comfortable satisfaction of the Panel"? If an athlete demonstrates such departures, then the IPC (or applicable ADO) shall have the burden to establish that they did not cause the Adverse Analytical Finding. The standard of proof required by CAS in all such cases is greater than mere balance of probability but less than proof beyond a reasonable doubt.
- WADA had established to its comfortable satisfaction that the deviation from the testing standard by having the samples left unattended for 45 minutes had not cast any doubt on the reliability of the test results. The practical impossibility to destroy a Berlinger bottle and the fact that the seal was intact at the samples' arrival at the laboratory excluded any act of sabotage with a possible impact on the result of the laboratory analysis as well as any probability that a negligent mishandling of the samples by the cleaning lady might have occurred involving any impact on the Adverse Analytical Finding. Also, irrespective of whether there was or was not a departure from the International Standard with regard to the non-correspondence of the date in the documentation package and on the waybill, the Panel found the explanation given by the DCO to be fully satisfactory. Given the finding of another CAS Panel in the CAS case 2001/A/337, *Bray v/FINA*, p. 24, that even a delay of two weeks could not influence an Adverse Analytical Finding, it could exclude any probability that the delay of one day could have cast any doubt on the reliability of the test results under the given circumstances.
- Although prepared to assume in favour of the Respondent that there was a departure from WADA Technical Documents for Laboratory Analysis, it nevertheless felt comfortably satisfied that the Appellant had established that such assumed departure had not risen any doubt regarding the reliability of the test results. Given the exogenous origin of the Prohibited Substance, it found that the statement regarding anabolic androgenic steroids, including testosterone, on page 3 of the WADA 2004 Prohibited List had to be applied. Since the Respondent had not risen any doubts regarding IMRS being such a reliable method, it did not find that the athlete could rebut the presumption that a WADA-accredited laboratory had conducted Sample Analysis and custodial procedures in accordance with the WADC International Standard for Laboratories. No departure from the International Standard, which would have undermined the validity of the Adverse Analytical Finding, had been established, once the exogenous origin of the Prohibited Substance had become clear.

- As a result of the forgoing deliberations, an Adverse Analytical Finding for testosterone or testosterone prohormones in the Respondent's samples had been established and that the Respondent had therefore committed an anti-doping rule violation. The Panel felt bound by art. 12.2 IPC Anti-Doping Code to impose a two years ineligibility period on the Respondent, who had not offered any arguments to make use of art. 12.5 IPC Anti-Doping Code regarding the elimination or the reduction of an ineligibility period based on exceptional circumstances.

Arbitration CAS 2005/A/909-910-911-912 M. and O. v/ Tianjin Teda F.C., Tianjin Teda F.C. v/ M. and O., Award of 9 March 2006

Panel: Jean-Philippe RoCHAT (Switzerland), President; Ruggiero StinCARDINI (Italy); Michele Bernasconi (Switzerland)

The Panel has upheld the appeal and partially reforms the Single Judge's Decision in the sense that the Club has immediately terminated the agreement by its conclusive behaviour after 10 November 2003 or has in any case breached the agreement and thereby forced the Coaches by its attitude to early terminate their employment agreements. The Club has therefore to pay the Coaches the contractual indemnities foreseen at article 10.3 of the employment agreements.

Giuseppe M. and Giancarlo O. (hereafter the "Coaches") are Italian citizens. Tianjin Teda F.C. (hereafter the "Club") is a Chinese football club.

M. and the Club entered into an employment agreement. This contract was entered into for a fixed period of time from 15 December 2002 until 14 December 2005. M. was hired as head coach of the club's first division team.

The Club later decided to hire O. as assistant coach of M.. His employment contract was signed on 1 January 2003 for a fixed period ending on 31 December 2005.

Both employment agreements contained specific clauses relating to the reduction of the annual salary depending on the ranking of the team and to the amounts due to the coaches in the event of the termination of the contract by the club.

The Coaches performed their obligations from the end of December 2002 to November 2003 apparently without any problems. In September 2003, the Club appointed a new general manager.

On 10 November 2003, M. was called for a meeting by the President of the Club. He was informed that the administrative board of the Club had decided to relieve him with immediate effect from the training and coaching activities of the first team for the remaining four matches left in the 2003 season, whereby Chinese coaches would replace them. He was therefore withdrawn all power of direction and decision. M. asked for a written confirmation of this decision, which was done in both Chinese and Italian languages. From that point on, the Coaches were deprived of their Chinese interpreter and could therefore not communicate with the players anymore.

The Club called a press conference to inform Chinese media of its decision and a Chinese football website published an article.

Considering the Club's attitude since 10 November 2003 and the article published in the press, M. wrote on 18 November 2003 to the President of the Club asking confirmation that the letter dated 10 November 2003 was to be interpreted as a dismissal letter. M. did not receive any answer.

In a second letter dated 20 November 2003, M. indicated that he considered the lack of answer of the Club as a confirmation of its interpretation. From his point of view, the Club's decision to remove and dismiss him from the key and most important tasks *de facto* equalled an unjustified unilateral breach and termination of such contract. Again, the Club did not reply to this letter.

On 8 December 2003, M.'s counsel claimed the payment of USD 1,300,000 in application of article 10.3 of his employment contract.

The Coaches were not paid their salaries in December 2003. They did not receive any letter convening them for the start of the 2004 season. On the other hand, the Club publicly announced the appoint-

ment of a new coach for the 2004 season, W.. The Coaches finally left China with their family and all their private belongings on 4 December 2003.

On 2 February 2004, the Coaches referred the matter to FIFA.

The Single Judge further considered that the Club had terminated the contracts at the end of the 2003 season. Owing to the fact that the Club's team was ranked below the 9th position, he considered that the financial consequences stipulated in article 10.4 of the agreements had to be applied.

By letters dated 17 June 2005, the Coaches both lodged appeals against the Single Judge's decisions with the CAS (CAS/A/909 and 910). The Club also appealed against these decisions by statement of appeal submitted to the CAS on 20 June 2005 (CAS/A/911 and 912). The parties have not objected to the joinder of the appeal procedures.

In its written decision, the Panel has decided that:

- As evidenced by the facts, even if the Coaches were in theory requested to attend and participate in the training, they could not communicate with the players anymore because they had no longer an interpreter. They have therefore been in fact excluded from any activity. This has been confirmed by the article published in the press, where it was clearly stated that the coach and its team would *not coach the team or have any say in tactics, but will sit on the bench for the final four matches of the season*. The coaches have factually been relegated to a mere onlooker role. The fact that the Club did not convene the Coaches for the 2004 season and that it announced the nomination of a new head coach for this season confirms that the Club's intention was to part with the Coaches. Further, the Club's absence of answer to the letters sent by the coach, which is also contrary to the Administrative Regulations of Coach of the CFA (art. 8), shows that the Club's intention was to definitely deprive the Coaches from their activity.
- As a result of these considerations, the Panel considers that the conclusive behaviour of the Club can be interpreted as an early termination of the employment agreements. The Coaches could understand from all the circumstances that their exclusion was definitive and that their employment agreements had come to an end.
- The parties have contractually agreed upon the consequences of an immediate unjustified termination of the employment agreements by the Club at article 10.3 of the contracts. As a result thereof, the Club has to pay the indemnities provided by art. 10.3 of the contracts.

CAS 2005/A/915 Spyropoulos v/ Hellenic Football Federation (HFF), award of 28 October 2005

Panel: Mr Ulrich Haas (Germany), President; Mr Michele A. R. Bernasconi (Switzerland); Mr Chris Georghiadis (Cyprus)

The Court of Arbitration for Sport (CAS) has decided to partially allow the appeal and therefore to amend the decision by the Appeal Committee of the Hellenic Football Federation dated 18 May 2005 concerning the period of ineligibility.

On 5 February 2005 in the context of a football match between the clubs New Panionios and Olympiakos, Mr. Nikolaos Spyropoulos (the Appellant), was randomly selected for a doping test. The urine sample collected from him was brought to and analysed in the WADA-accredited doping control laboratory OAKA in Athens (hereinafter the "Athens Laboratory") and revealed the presence of testosterone of an exogenous origin. The testosterone to epitestosterone ratio in the sample was detected to be greater than fifty (50). This finding was confirmed by the analysis of the B-sample a few days later.

The Appellant was sanctioned by the Hellenic Football Federation (HFF) (the Respondent) by a period of ineligibility of two (2) years.

The Player filed an appeal against this decision on 28 March 2005, which was heard before the Respondent's Appeal Committee (hereinafter "HFFAC"). In its decision dated 18 May 2005 the HFFAC rejected the player's Appeal.

By letter dated 28 June 2005 the Appellant filed both a statement of appeal and an appeal brief with the CAS, appealing against the decision by the Respondent dated 18 May 2005.

By letter dated 27 July 2005 the Respondent filed an answer whereby he was seeking the dismissal of the appeal. In the oral hearing the Respondent moved away from the legal relief it was originally seeking. It was now applying for the period of ineligibility to be reduced to an extent that would be reasonable in the light of the FIBA Regulations.

In its written decision, the CAS has decided that:

- the Player is not guilty of having committed a doping offence intentionally: the adverse analytical finding in the case of the Player was due to a contaminated nutritional supplement. The Player did not take the supplement at his own instigation, rather the supplement was prescribed by a doctor. The list of contents stated on the supplement's packaging did not mention any substance that is prohibited in sport. Neither the prescribing doctor nor the Player knew of any supposed contamination of the product.
- Art. 61(i) FIFA DC shows that an athlete cannot "blindly" rely on the advice of a third party (even that of a doctor). He has a duty to take all reasonable efforts to rule out the possibility of a doping offence as the Player is responsible for whether and what substances he ingests. To conduct himself properly the Player ought to have asked the doctor whether the nutritional supplement prescribed for him contained a prohibited substance. Before taking the preparation he could and ought also to have made sure by asking an expert third party. This particularly suggested itself because of the nature of the prescribed product. For quite a while now the risks associated with contaminated (nutritional) supplements have been strongly pointed out to athletes.
- the sanction for a doping offence provided in Art. 62 FIFA DC ranges from a minimum of 6 months to a maximum of two years. In view of the Player's gross fault the Panel considers a period of ineligibility of one year to be an appropriate sanction.

Arbitration CAS 2005/A/917 Basketball Federation of Hosova v/ International Basketball Federation, award of 15 November 2005
Panel: Mr Peter Leaver QC (England), President; Ms Maidie E. Oliveau (United States); Mr Richard H. Kreindler (Germany)

The CAS decided it had no jurisdiction to hear the appeal filed on 3 June 2005 by the Basketball Federation of Kosovo (the "Appellant") against the decision issued on 20 May 2005 ("the Decision") by the Central Board of the International Basketball Federation (FIBA) on the Appellant's application for membership of FIBA.

The Decision provided as follows :

"I acknowledge receipt of your renewed request for membership to FIBA addressed to the FIBA Central Board and received by our office on May 13, 2005.

The FIBA Central Board met on May 18 and 19 and reviewed your application and heard the opinion of FIBA Europe.

The Central Board decided unanimously that your request can not be considered as the situation has not changed since it debated your first application for membership one year ago."

In its statement of appeal, the Appellant requested that the Decision of the Central Board was changed and that its claim for membership of FIBA was approved since it fulfilled all the conditions foreseen by the FIBA Statutes.

On 20 July 2005, FIBA filed a preliminary answer, in which it raised a defence of lack of jurisdiction. It argued that the Appellant should have appealed against the Decision with the FIBA Appeals Commission, in accordance with article 12.1 and 12.9 of the FIBA Internal Regulations Governing Appeals (the "FIBA Internal Regulations"). FIBA further contended that the Appellant had not exhausted all the legal remedies available to it prior to the appeal to CAS and that, as a consequence, CAS could not entertain the appeal.

In its written decision, the Panel considered that:

- Both Art. 35 of the FIBA General Statutes and Art. 12.1 of the FIBA Internal Regulations clearly state that the FIBA Appeals Commission has jurisdiction to hear and decide on any appeal filed by affected persons against decisions rendered by FIBA, including

its organs and disciplinary bodies, including the FIBA Central Board, unless such appeal is expressly excluded by the FIBA General Statutes or by the Internal Regulations. As an affected person, the Appellant was entitled to appeal, and should have appealed, against the Decision to the Appeals Commission, which it did not.

- Pursuant to Art. 12.9 of the FIBA Internal Regulations, CAS jurisdiction is only given against decisions issued by the FIBA Appeals Commission. Further, Art. R47 of the Code of Sports-related Arbitration states that in order for an appeal to be admissible, a potential Appellant to CAS must have exhausted all the legal remedies available to it prior to the appeal to CAS, in accordance with the Statutes or Regulations of the body which has issued the challenged decision. Therefore, CAS did not have jurisdiction to hear this appeal, given the remedy of appeal available to the Appellant and provided by Article 35 of the FIBA General Statutes and Article 12.1 of the FIBA Internal Regulations.
- It was right to point out that the challenged decision did not indicate that such a legal remedy was available to the Appellant. The Appellant could quite reasonably have considered that the Decision was final, and subject only to appeal to CAS. While such misunderstanding might not have cured the Appellant's failure to appeal to the FIBA Appeals Commission, the Panel noted that the appeal to CAS was lodged within the deadline of 14 days provided by Art. 12.5 of the FIBA Internal Regulations. In other words, had the Appellant sent its appeal to the FIBA Appeals Commission instead of sending it to CAS, the Appeals Commission would have been seized of the appeal, and could have decided the Appellant's application for membership. The Appeals Commission would undoubtedly have rendered a reasoned decision, both as to the facts as well as to the legal grounds, in contrast to the curt rejection of the Appellant's application that is to be found in the Decision by the FIBA Central Board.
- Notwithstanding the concerns about the procedure followed by FIBA and as to the basis upon which the Appellant's application was rejected, CAS had no jurisdiction to hear the Appellant's appeal.

Arbitration CAS 2005/A/918 Kowalczyk v/ FIS, award of 8 December 2005

Panel: Mr John A Faylor (Germany), President; Mrs Maria Zuchowicz (Poland); Mr Olivier Carrard (Switzerland)

The Court of Arbitration for Sport (CAS) has decided to replace by a *de novo* decision on the merits the decision rendered by the FIS Doping Panel on 13 June 2005 and amended by its announcement of 13 July 2005, by which it disqualified Justyna Kowalczyk, a Polish cross-country skier, from all individual results obtained in the U23 OPA Intercontinental Cup Competition held on 23 January 2005 and imposed upon her a period of ineligibility of one year. The Panel has held that a reduced period of ineligibility ending on the date of the award provided the fair and proportionate measure of sanction.

Justyna Kowalczyk (the "Appellant") submitted to a doping control immediately following the Competition. Following an analysis of the Appellant's A-Sample, the Doping Control Laboratory in Cologne reported an Adverse Analytical Finding to the FIS on 15 February 2005, stating that the sample contained the substance Dexamethason, a Prohibited Substance listed as a glucocorticosteroid in Group S9 on the 2005 Prohibited List (International Standard) of the World Anti-Doping Code (the "WADC").

In accordance with Article 7.1.2 of the FIS Anti-Doping Rules 2004/2005 (the "FIS-Rules", which are identical to those of the WADC), inquiries were made by FIS to determine whether the Appellant's use of the substance was covered by a Therapeutic Use Exemption ("TUE"). The Appellant and her doctor had already completed an Abbreviated Therapeutic Use Exemption ("ATUE") form on 23 December 2004 which she alleges to have submitted to the Polish Ski Association, but neglected to show to the testing authorities at the time of the doping control on 23 January 2005.

Following the Adverse Analytical Finding, the Appellant submitted on 21/22 February 2005 a request for approval of the use of Dexamethason to the Therapeutic Use Exemption Committee (the "TUEC"). This request was denied by the TUEC on 1 March 2005 on the grounds that "the TUE had been submitted too late after the treatment and that no retroactive approval was possible in this case".

On 13 June 2005, the FIS Doping Panel disqualified the Appellant from the individual result in the FIS U23 OPA Intercontinental Cup Competition and imposed a two year period of ineligibility from the date of 23 January 2005.

The Doping Panel based its decision on Article 10.2 of the FIS-Rules (Imposition of Ineligibility for Prohibited Substances and Prohibited Methods), stating explicitly in paragraph 43 of the Decision that the lesser sanctions provided in Article 10.3 of the FIS-Rules (Specified Substances) were not applicable in this case as the Prohibited Substance, Dexamethason, was not a Specified Substance.

On 30 June 2005, the Appellant filed an Appeal to the CAS. She pointed out that FIS had erred in not recognizing the Prohibited Substance Dexamethason as a Specified Substance.

On 14 July 2005, the Secretary General of FIS sent a letter to the CAS stating that the FIS Doping Panel had issued a new decision acknowledging that the substance Dexamethason was a Specified Substance. The FIS Doping Panel had therefore decided to reduce the sanction from a two-year to a one year suspension.

On 16 August 2005, the Appellant filed an amendment to her Appeal Brief which stated that the FIS had imposed the reduced sanction "automatically, without a word of justification". In her view, in order to justify the maximum sanction under Article 10.3, the FIS should have proved that she had committed the doping violation with "significant fault". The FIS had failed to do this and had imposed the maximum sanction as if it had been adjudicating the case within the framework of Article 10.2. The Appellant asserted that the proper sanction should have been a warning or reprimand without any period of ineligibility.

In its answer of 5 September 2005, the Respondent challenged the Appellant's plea that the FIS Doping Panel had erred in applying the maximum sanction without giving consideration to the circumstances. The Respondent concluded that the Appellant "[had] not established the circumstances justifying her use of the Prohibited Substance. The FIS Doping Panel had legitimately exercised its judicial discretion in applying Article 10.3 by referring to Article 10.5 (Elimination or Reduction of Period of Ineligibility based on Exceptional Circumstances).

In its written decision, the Panel considered that:

- In addition to the erroneous classification of Dexamethason, the FIS Doping Panel subsequently erred in its unilateral and procedurally incorrect attempt to remedy the error. In the view of the Panel, if an ineligibility sanction is to be considered in an Article 10.3, "first violation" case, the penalty reduction possibility set forth in Article 10.5 cannot supersede, exclude or otherwise diminish the right also granted to the athlete under Article 10.3 to plead against its imposition. The grounds stated in the FIS-Doping Panel's decision excluded any consideration of the Appellant's defence that she did not use the substance to enhance her sport performance. The Appellant was thus deprived of any consideration of the minimum sanction of "warning and reprimand".
- With regard to the issue of whether an athlete, parallel to his or her Article 10.3 defence of "no enhancement of sport performance" may also plead "no Fault or Negligence" and/or "no significant Fault or Negligence" under Articles 10.5.1 and 10.5.2, it would appear to the Panel that the Article 10.5.1 defence of "no Fault or Negligence" must always be available to the accused athlete, regardless of whether an Article 10.2 or an Article 10.3 sanction is applicable. With regard to the Article 10.5.2 defence of "no significant Fault or Negligence", however, it would, in the view of the Panel, contradict the ratio legis of the "no enhancement" defence under Article 10.3, if the reduction limit under Article 10.5.2 FIS-Rules

("not less than one half of the minimum period") were to apply in parallel to the minimum "warning and reprimand" penalty for the first violation involving a Specified Substance.

- The Appellant has disclosed and substantiated her defence that Dexamethason was not intended to enhance performance. She submitted corresponding medical certifications both to the TUEC and to the FIS Doping Panel as proof of use in alleviating an Achilles tendon condition. In the view of the Panel, upon the Appellant's prima facie showing that her use of the substance was for medical reasons, the burden of proof shifted to the Respondent to prove the contrary, namely that the Appellant used this substance as a doping agent. In order to provide this rebuttal, the FIS Doping Panel should have revoked its decision and called for a new hearing of the merits of the dispute on the basis of Article 10.3 FIS-Rules.
- The Appellant acted negligently in not inquiring whether Dexamethason fell within the category of "all glucocorticosteroids" either under Group S9 of the WADA Prohibited List or on the Specified Substance list. The Appellant obviously had knowledge that the use of certain medications could cause problems; otherwise she would not have obtained the ATUE on 23 December 2004. Her negligence lies in her failure to obtain the correct information on the requirements for exemption and the procedures to be followed. The duty of care resting upon any 22 year old athlete engaged in world-class competition requires, at the very least, that she provide her treating physician a copy of the 2005 Prohibited List and that she inquire with the doctor whether any of the medications and treatments which he/she prescribes contain substances contained on the list. The Appellant might well have done this, because the prescribing physician clearly declared "Dexamethason" as a "Prohibited Substance" on the ATUE form bearing a date of 23 December 2004. Had the Appellant and her doctor correctly read the "form of use" qualification regarding glucocorticosteroids under Group S9, they would have determined that an ATUE would not satisfy WADA and FIS anti-doping requirements, because the substance was ingested orally. The negligence of the Appellant is also apparent in her neglecting to show the ATUE to FIS officials during the U23 OPA Intercontinental Cup Competition on 23 January 2005. Her negligence derives not from any ignorance of the prohibited nature of the substance - she obtained an ATUE already on 23 December 2004; her negligence lies rather in her lack of knowledge and application of the proper TUE procedures for the Specified Substance in question. The measure of this negligence does not, in the view of the Panel, justify a one year term of ineligibility. The Panel holds that a period of ineligibility ending 8 December 2005 provides the fair and proportionate measure of sanction.

Arbitration CAS 2005/A/921 FINA v/ Tobias Kreuzmann & German Swimming Federation, award of 18 January 2006

Panel: Mr Michael Geistlinger (Austria), President; Mr Denis Oswald (Switzerland); Mr John A. Taylor (Germany)

The Court of Arbitration for Sport (CAS) has decided to uphold the appeal filed by FINA (the "Appellant") against the decision issued on 13 June 2005 by the Doping Control Officer (the "DCO") of the German Swimming Federation which lifted the provisional suspension of Tobias Kreuzmann (the "First Respondent"), a licensed water polo player of the German club ASC Duisburg and a member of the German national water polo team, imposed after a positive test for finasteride. Therefore, Mr. Kreuzmann was sanctioned with a period of ineligibility of one year.

On 5th January 2005, the First Respondent signed a declaration in which he acknowledged to submit to the FINA Doping Control Rules and the World Anti-Doping Code and also that he had been informed by the German Swimming Federation (Deutscher Schwimm-Verband e.V. - DSV; the "Second Respondent") that the current anti-doping regulations of the FINA and WADA were available at certain internet addresses specified in the declaration. On 18th March 2005, he was tested positively for finasteride by the German

National Anti-Doping Agency at the occasion of an out-of-competition control during his training in Duisburg. Finasteride, a masking agent, was first put on the WADA/NADA List of Prohibited Substances 2005 (the "Prohibited List") in the updated version of the List which became effective as of 1st January 2005. By letter dated 24th April 2005, the DCO of the DSV imposed an immediate provisional suspension upon the First Respondent referring to the Anti-Doping Rules of the DSV.

By statement dated 29th April 2005, the First Respondent explained that since April 2004 he had been using the medication "propecia", containing finasteride, on prescription of his private physician Dr. med. Arno Köhler in order to fight progressing hair loss. The First Respondent had told his physician that he was a top level athlete and also had asked whether the medication was put on the List of Prohibited Substances. The First Respondent acknowledged the result of the test and admitted that he did not check whether the substance had been put on the Prohibited List 2005. These were the reasons why he did not disclose the medication on the doping control form. By letter dated 28th April 2005, his physician confirmed his statement. At the moment of writing the prescription (26 April 2004), finasteride was not included on the Prohibited List. By letter dated 25th April 2005, the pharmacist, Wolfgang Eisenpeter, confirmed that the First Respondent, when ordering the prescribed medication, had also asked for reassurance that the substance was not on the Prohibited List and that he had pointed to the fact that he was a top level athlete.

On 13th June 2005, the DCO lifted the provisional suspension of the First Respondent. He held that, since finasteride had not been part of the WADA/NADA Prohibited List 2004 at the time of first prescription, no warning notices could have been made. On the pharmacological side, the German "Rote Liste" used by pharmacists in order to identify prohibited substances was available only in the second half of February 2005. The WADA/NADA Prohibited List listed only finasteride, but not the medication "propecia". The DCO held that the First Respondent acted in a credible manner because a medical layman could hardly be expected to check all the substances contained in a particular medication. He therefore denied the presence of any culpability on the part of the First Respondent.

By letter dated 28th June 2005, FINA attempted to appeal this decision despite the fact that it had been informed by the Second Respondent that it had no right to appeal under the Anti-Doping Regulations of the DSV or the so-called "Rechtsordnung" (Legal Order) of the DSV. In order not to miss the deadline, FINA lodged an appeal to the CAS on 1st July 2005 arguing that, in the event the appeal filed on the national level were to be deemed inadmissible, the decision of the DCO would constitute the final decision. It requested the CAS to stay the proceedings until a final decision on the national level. On 12th August 2005, the appeals body of the DSV declared the FINA appeal inadmissible. FINA, it was held, was not a legal person having standing, i.e., holding party rights under § 11 DSV *Rechtsordnung*. By letter dated 17th August 2005, FINA consequently withdrew its request for decision to stay the procedure before the CAS.

In its written decision, the Panel considered that:

- FINA accepted the World Anti-Doping Code and also adopted its Anti-Doping Rules in full compliance with the Code as an independent and autonomous body of rules. The FINA Anti-Doping Rules apply to each participant in FINA activities or any of its Member Federations by virtue of the participant's membership, accreditation, or participation in FINA, its Member Federations, or their Competitions. Pursuant to art. 14.1 of the Doping Control Rules (the "FINA DC"), all FINA members must comply with these Anti-Doping Rules. It follows from art. FINA DC 13.2.1 and 13.2.3 when read in conjunction with art. FINA DC 13.1 and 13.2 that FINA is entitled to appeal to CAS, *inter alia*, regarding any decision in which it is held that no anti-doping rule violation was committed in a case involving international-level competitors, which is the case of the First Respondent. Due to the fact that art. FINA DC 13.2.1 refers to the CAS Code of Sports-related

Arbitration which includes art. R47 and the obligation to exhaust the legal remedies available to FINA as Appellant prior to the filing of the appeal in the case at hand, the Panel feels bound to state that the Appellant is not obligated to apply the provisions of the Anti-Doping Regulations of the Second Respondent, including the relevant provisions of the DSV *Rechtsordnung* prior to appealing to the CAS. These provisions, as applied by the DSV, do not provide FINA with a legal remedy against a decision of the DCO. Thus, the decision of the DCO, which must follow the FINA DC because the FINA Rules find direct application for the DSV, must be deemed to be the final decision for FINA with regard to the DSV within the meaning of art. R47 of the Code.

- There is a clear breach of the FINA DC if, due to the publication of the German translation of the updated Prohibited List in the German Federal Gazette, a point in time other than the 1st January of each year is chosen by the DSV to be the date on which the updated List applies within its jurisdiction. A later date of validation in Germany based on the notion that the changes must be translated into German cannot be accepted. If publication in German is a pre-requisite for their validity and enforcement, as the DSV contends, then the Second Respondent must confer with WADA/FINA in such a timely manner as to ensure that the validity and enactment of the updated Prohibited List is simultaneous with the publication of the List in the German Federal Gazette. Until full implementation of the FINA DC in the rules and regulations of the DSV and its members is achieved, the FINA Rules must be applied directly and must prevail in case of conflict.
- According to art. FINA DC 2.1.1, it is each competitor's personal duty to ensure that no prohibited substance enters his or her body. The statement of the First Respondent dating from 29th April 2005 shows that he obviously did not check the List before signing the declaration dated 5th January 2005. Thus, the Panel cannot avoid establishing a certain degree of negligence in the behaviour of the First Respondent which excludes the application of art. FINA DC 10.5.1 (elimination of the otherwise applicable period of ineligibility when the competitor bears no fault or negligence for an anti-doping rule violation). The Panel fully recognizes and commends the First Respondent's diligent and conscientious actions in 2004 to obtain assurances both from his physician and his pharmacist that the medication which was prescribed for his hair loss did not contain a prohibited substance. When taking the medication for the first time, he applied the standard of care to be expected of a top-level athlete. But the First Respondent's duty of care did not end in 2004. He was apparently aware that the medication would be taken for a longer period and that the WADA/FINA Prohibited List would be updated on an annual basis. The Panel takes the view, however, that the level of the First Respondent's fault in not having perceived the continuing necessity to review the updated Prohibited Lists to ensure compliance with the anti-doping rules cannot be fixed at the same high level as an athlete who does not check the Prohibited List upon taking the substance for the first time. The First Respondent's negligence lies in the fact that he did not re-check the List or have it re-checked by his physician, pharmacist or club doctor. In view of the foregoing circumstances, the Panel holds that application of art. FINA DC 10.5.2 is appropriate in the case at hand (reduction of the otherwise applicable period of ineligibility when the competitor bears no significant fault or negligence for an anti-doping rule violation). The level of the First Respondent's fault cannot be viewed as being sufficiently significant to justify a two year period of eligibility. The Panel, therefore, reduces the period to the minimum limit permitted under art. FINA DC 10.5.2, i.e. one year.

Arbitration CAS 2005/A/946 IAAF v/ FIDAL & Marco Giungi, award of 2 March 2006

Panel: Mr Jean-Philippe Rochat (Switzerland), President; Mr David W. Rivkin (USA); Mr Massimo Coccia (Italy)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by the IAAF against the decision taken by the Federazione Italiana di Atletica Leggera (FIDAL) on 25 May 2005 whereby the latter closed the action opened against Andrea Giungi, an Italian race walker, for an alleged anti-doping violation.

On 12 September 2004, Marco Giungi (the “Second Respondent”) participated in a national 20km walk competition “CDS Marcia” in Prato, Italy. After the end of the competition, he underwent a doping control.

By letter of 6 October 2004 the Italian Olympic Committee (“CONI”) notified Mr Giungi, FIDAL (the “First Respondent”) and Marco Giungi’s Club, that “traces of Norandrosterone were found at a concentration exceeding the WADA limits together with Noretiocholanolone.” These results were confirmed by the analysis carried out on the “B” sample. Norandrosterone and noretiocholanolone are both metabolites of nandrolone, a prohibited substance under IAAF Rules. The IAAF was also informed about the results of the analysis.

On the basis of the adverse analytical findings, the CONI Anti-doping Prosecutor (the “Prosecutor”) opened an investigation. On 2 December 2004 Mr Giungi appeared before the Prosecutor and acknowledged having used before and after the walk race of 12 September 2004 the nutritional supplements “Pre-gara Endurance” and “Recupero”. Mr Giungi had already requested a private analysis of the said supplements. The results showed that both supplements contained norandrosterone and noretiocholanolone. The Prosecutor then summoned the producer of “Pre-gara Endurance” and “Recupero”, Ditta Difass Company (“Difass”). Before the Prosecutor, Difass stated that after investigation, it had turned out that the consignment was contaminated by creatine pyruvate, a substance supplied to Difass by the company Giusto Favarelli S.p.A. Specific analysis over supplements belonging to the same batch that Difass had given the athlete confirmed that the products contained 19-norandrostenedione, a forerunner of 19-nortestosterone, whose ingestion causes the composition of norandrosterone and noretiocholanolone. The laboratory confirmed that the take of one or more doses of the product could theoretically be compatible with the urinary concentration of norandrosterone beyond the WADA limit. Concluding the above investigation, the Prosecutor decided on 7 March 2005 to ask the closing of the case, since the athlete had given “full and convincing proof of taking contaminated supplements without any responsibility”.

On 4 April 2005 the National Judging Commission of FIDAL (the “FIDAL Commission”), after hearing Mr Giungi’s submissions, held that, according to IAAF Rule 38.13, “the determination of exceptional circumstances in cases involving international level athletes [had to] be made by the [IAAF] Doping Review Board.” Consequently, the evaluation of the Prosecutor’s closing request was sent to the General Secretary of the Doping Review Board for final evaluation.

By letter dated 29 April 2005 the IAAF General Secretary informed FIDAL that Marco Giungi was not an International Level athlete as defined in IAAF Rules and that the competition at which he tested positive was not an International Competition.

On 25 May 2005, the FIDAL Commission rendered a new decision on Mr Giungi’s matter, in which *inter alia* pointed out that “Since the authority of the superior body was denied, the closing request, at that time proposed [by] the Prosecutor, must be examined by this Commission. [...] Even if the procedural choice puzzles us, since the impossibility of the judicial commission of expressing its different opinion [...] makes useless the provision that the closing will be ordered by the “judge” and not directly by the prosecuting body [...] the closing of the action against Mr Andrea Giungi is to be ordered”. Consequently, Mr Giungi’s case was closed. On 18 June 2005, the IAAF received from FIDAL an English translation of the decision.

In an Appeal Brief dated 22 September 2005, the IAAF challenged with the CAS the decision rendered by FIDAL Commission on 25

May 2005. The Appellant submitted that Mr Giungi had committed an anti-doping violation and, because no exceptional circumstances existed, it requested that Mr Giungi be declared ineligible for a minimum of two years.

In its written decision, the Panel considered that:

- Given that IAAF Rules refer expressly to the “rules of the Member”, IAAF incorporates its Members’ rules in its own regulations, as far as appeals procedures before “national level review bodies” are concerned. Consequently, in the case at hand IAAF subjected itself to FIDAL rules regarding possible internal appeal(s).
- According to the relevant FIDAL Anti-doping Rules, the IAAF may appeal to the competent second degree Organ of Federal Justice (Commissione d’Appello Federale) in the cases concerning national level athletes; it can only appeal to CAS “once completed the above mentioned degrees of national sports justice”. The same conclusion derives from the IAAF rules, as they provide that IAAF has a right to appeal to CAS only from a decision issued by a “national level review body” and that it may appeal a national level decision directly to CAS only when the Member’s rules expressly permit it. In view of the fact that FIDAL Anti-doping Rules do not provide the right to such direct appeal, the IAAF could not in the present case file an appeal to CAS prior to challenging the same decision before the Federal Appeals Commission.
- If the Member’s rules grant for IAAF a right to appeal a national level decision, the requisite of exhaustion of legal remedies is fulfilled only after IAAF exercises this right in fact. In the case at hand the IAAF had such right according to FIDAL Anti-doping Rules but it did not exert it, and it cannot benefit from the fact that the other parties chose not to appeal the decision before the Federal Appeals Commission.
- IAAF was unable to designate any legal basis, according to which FIDAL was obliged to accompany the notification of the FIDAL Commission’s decision with a special indication regarding possible legal remedies. Once IAAF itself has chosen to incorporate some of its Members’ rules in its own regulations, it is up to IAAF to know and understand what its rights are under its Members’ rules.

Arbitration CAS 2005/A/952 Ashley Cole v/ FAPL, award of 24 January 2006

Panel: Mr Hans Nater (Switzerland), President; Mr Stuart McInnes (England); Mr Jan Paulsson (France)

The Court of Arbitration for Sport (CAS) has decided that the appeal filed by Ashley Cole against the decision of the FAPL Appeals Committee imposing a fine to the player was inadmissible. The CAS ruled that it had no jurisdiction in the dispute.

On 27 January 2005, a meeting took place at the Royal Park Hotel in London, between, amongst others, Mr Ashley Cole (the “Appellant”), a professional footballer who plays for Arsenal FC and the English national football team, and representatives of Chelsea Football Club.

Arising from that meeting, the Disciplinary Commission (the “DCFAPL”) of the Football Association Premier League (the “FAPL”, the “Respondent”) rendered a decision on 1 June 2005, which adjudged the Appellant to have been in breach of FAPL Rule K5. This rule prevents a player who has entered into a written contact of employment with a club, from making an approach to another club with a view to negotiating a contract with such club, without having obtained the prior written consent of his club. The DCFAPL imposed a fine of GBP 100,000 on the Appellant.

The Appellant subsequently appealed the DCFAPL decision to the FAPL Appeals Committee (the “FAPLAC”). The hearing before the FAPLAC took place on 10 August 2005 and the decision was notified to the Appellant on 23 August 2005. The decision of the FAPLAC was to reduce the fine imposed upon the Appellant from GBP 100,000 to GBP 75,000.

On 31 August 2005, the Appellant filed an appeal with the Court of Arbitration for Sport (the “CAS”) against the decision of the FAPLAC.

In its written decision, the Panel considered that:

- As art. R47 of the Code of Sports-related Arbitration states, the statutes or regulations of the sports-related body from whose decision the appeal is being made, must expressly recognize the CAS as an arbitral body of appeal, in order for the CAS to have jurisdiction to hear an appeal. In the present case, the statutes or regulations of the relevant body - the FAPL - do not contain any reference to a right of appeal to the CAS. In fact, FAPL Rule R63 states that the decision of an appeal board shall be final. The CAS therefore has no jurisdiction to hear an appeal from a decision of the FAPLAC, on the basis of the statutes or regulations of the FAPL.
- The FIFA Statutes do not contain any mandatory provision that obliges the Respondent to allow a right of appeal from its decisions. Articles 59-61 of the FIFA Statutes, the FIFA Circular 827 and the FIFA press releases of 12 December 2002 and 19 October 2003, cannot be interpreted as providing for such a mandatory right of appeal from FAPL decisions. Moreover, the CAS jurisprudence suggests that if the FIFA Statutes did compel the Respondent to provide for a right of appeal from its decisions, no right of appeal to the CAS would exist until the Respondent had made provision for this right in its statutes or regulations (cf. *CAS 2004/A/676 Ismailia Sporting Club v/ CAF*, paras 2.6 and 2.7). In any event, the possible adoption of an arbitration clause that confers jurisdiction on the CAS, by a National Federation or a League, is not solely dependent upon the will of such a body, as it is also subject to the law of the country where the National Federation or League in question has its seat.
- Although the FIFA Disciplinary Code was discussed in the Respondent's submissions, in the present case there was no question of any attempt by FIFA, successful or otherwise, to intervene in accordance with article 76.2 of the FIFA Disciplinary Code. Any possible right of appeal arising from such an intervention, is therefore irrelevant for the purposes of the present case.

Arbitration CAS 2005/A/957 Clube M. v/ Fédération Internationale de Football Association (FIFA), award of 23 March 2006

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Jan Paulsson (France); Mr Michele Bernasconi (Switzerland)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by Clube M. (hereinafter referred to as the "the Club") against the decision issued on 29 August 2005 by the FIFA Disciplinary Committee and to confirm the latter.

On 29 August 2005 the FIFA Disciplinary Committee (hereinafter referred to as the "DC"), acting pursuant to Article 57.3 of the FIFA Statutes, issued a decision (hereinafter referred to as the "DC Decision") whereby the player E. (hereinafter referred to as the "Player") and the Club were pronounced guilty of failing to comply with a decision of a FIFA body in accordance with art. 70 FDC and jointly responsible to pay a fine to the amount of CHF 30,000 within 30 days of notification of the decision. If payment was not made by this deadline, sporting sanction will be imposed upon the club.

The DC Decision was rendered pursuant to Article 70 of the FIFA Disciplinary Code adopted on 8 March 2005, in force since 1 May 2005 (hereinafter referred to as the "FDC"), providing for sanctions on "anyone who fails to pay another person (such as a player, a coach or a club) a sum of money in full, even though instructed to do so by a body of FIFA".

The DC found that the Club and the Player had failed to pay to Club T. of Mexico (hereinafter referred to as the "Mexican Club") an amount of money, payable by virtue of a decision rendered by the FIFA Dispute Resolution Chamber on 14 January 2004 (hereinafter referred to as the "DRC Decision") and of an award rendered on 2 May 2005 by the Court of Arbitration for Sport (hereinafter referred to as the "CAS Award").

In light of Article 70 FDC, the DC emphasised that the CAS Award had clearly stated that if the Player had failed to pay the finan-

cial compensation to the Mexican Club within 30 days from notification, the Club was to be deemed jointly responsible for such payment. The DC noted that the Player had not paid the amount due, and that one joint debtor cannot exempt the other debtor from the latter's duty to the creditor. Otherwise, the situation of the creditor would be compromised without his consent. Consequently, both the Player and the Club were deemed jointly responsible to pay the relevant amount, as it was decided in the CAS Award.

The DC emphasised that the case referred to by the Club in order to set off its debt towards the Mexican Club was a different case with different debtors and creditors, and that "an offsetting could not be decided by the Committee anyway".

The DC decided that a fine amounting to CHF 30,000 was appropriate, consistently "with the Committee's long standing established practice". The DC considered that Article 70 FDC provides a minimum fine in the amount of CHF 5,000 (and a maximum amount of CHF 1,000,000, pursuant to Article 16.2 FDC). The DC fixed the fine in the light of the circumstance that the amount of money due to the Mexican Club was substantial, and that its non-payment could cause considerable financial difficulty for the creditor club.

On 12 September 2005, the Club filed a statement of appeal with the CAS.

In its written decision, the Court of Arbitration for Sports (CAS) ha decided that:

- The object of this appeal cannot extend beyond the limits of a review of the disciplinary sanction imposed by the DC. The Panel cannot consider requests concerning the debt owed by the Appellant to the Mexican Club, the issues relating thereto having been decided by the final and binding CAS Award. As a result, only submissions relating to the fine imposed by the DC, such as its legal basis and quantum, can be heard.
- The principle of joint liability was imposed by the DRC Decision, and was confirmed by the CAS Award, in accordance with the applicable FIFA rules. Its application is therefore final and cannot be reviewed in these proceedings. At any rate, the Panel observes that the joint nature of the obligation to the Mexican Club could not be affected by the declaration of the Player, and cannot be considered as a reason justifying the non-payment by the Club of the debt to the Mexican Club. The imposition of a joint liability between debtors, e.g. by the FIFA Rules, is obviously intended to protect the creditor, to give it the possibility to obtain payment from any of the debtors without bearing the adverse effect of a possible failure and/or insolvency of one of them. The unilateral declaration of one of the joint debtors cannot affect the position of the creditor, depriving it of the possibility to seek payment from the "released" debtor. The declaration of the Player, therefore, has not cancelled the obligation of the Club towards the Mexican Club. And the DC rightly considered the Appellant in breach of its financial obligation to the Club, notwithstanding that declaration.
- In the same way, the Panel finds that the obligation of the Club to pay the Mexican Club the amount indicated by the CAS Award is not affected by the claim of the Club to offset it against a credit of the Appellant towards another club. The conditions for a set-off are clearly not satisfied. For a set-off to take place it is necessary that two subjects are at the same time debtor and creditor to each other. The Appellant thus cannot claim to offset against the debt to the Mexican Club a credit it alleges to have towards someone else. Nor can the Appellant's claim be treated as a request to have its debt to the Mexican Club satisfied by way of assignment of a credit, since such form of payment would in any case require the consent of the Mexican Club (Articles 164 CO). The DC, therefore, rightly considered the Appellant in breach of its financial obligation to the Club, unaffected by the mentioned request for a set-off.
- The Panel concludes that the conditions for a fine to be imposed on the Club, which breached its duty to make timely payment of the CAS Award, its debt to the Mexican Club, have been met. Moreover, the amount of the fine appears to be proportionate.

Arbitration CAS 2005/A/963 International Rugby Board (IRB) v/Worgan, award of 19 March 2006

Panel : Mr Alan John Sullivan (Australia), President; Professor Richard H. McLaren (Canada); Mr Mark Andrew Hovell (England)

The Court of Arbitration for Sport has decided to uphold the appeal filed by the IRB against the decision taken by the Welsh Rugby Union Appeal Committee on 16 August 2005 in connection with the reduced sanction imposed following the occurrence of a doping offence.

UK Sport notified the WRU on 29 March 2005 that the Respondent's urine sample was found to contain 2 substances, Methylenedioxymethamphetamine (MDMA, aka ecstasy) and Hydroxymethoxymethamphetamine (HMMA), at least one of which is classified as a stimulant on the WADA Prohibited List. It was also reported that the screening analysis of the Respondent's sample indicated the presence of benzoylecgonine (a metabolite of cocaine). However, UK Sport indicated that there was insufficient analyte present for unequivocal identification and the finding was therefore considered negative.

Following notification of a positive analytical result to the Welsh Rugby Union ("WRU"), the Welsh Rugby Union ("WRU") acted in accordance with its Anti-Doping Regulations for 2004-2005 and the cross-referenced IRB Regulation 21: 'Anti-Doping'. At the first instance hearing, held by the Regulatory Committee of the WRU (the "WRURC") on 21 April 2005, the Respondent, Gethin Owen Worgan (the "Player") admitted, through his solicitor, the "presence of the prohibited substances within his system". The WRURC found that a doping infraction had occurred and imposed a two-year period of ineligibility.

The Player appealed that decision to the WRUAC on the sole issue of the length of the period of ineligibility. The WRUAC determined that "they were satisfied that the substances taken were not for their performance enhancing qualities, but rather their recreational qualities, which was a different moral issue". The WRUAC then determined that "the specified substances were recognised as recreational drugs rather than performance enhancing and that in accordance with IRB Regulation 21.22.2, members of the Appeal panel had determined to amend the sanctions previously imposed by the Regulatory Committee on 21st April 2005 by issuing a warning and a reprimand to Mr Worgan and reducing the period of ineligibility to 1 year (not 2 years) to expire on 20th April 2006".

The sole issue appealed is the length of the sanction and the jurisdiction by the Appeal Committee to have so acted. The Appellant submits that this appeal should be determined by reference to the strict application of the IRB Regulations and the WADA Code.

The Respondent appealed against the decision of the WRURC to the WRUAC, in accordance with its regulations, on the grounds that the period of ineligibility was inappropriate and too lengthy, basing his appeal on interpretation of IRB Regulation 21.22.2, which provides that "...Where a Player can establish that the Use of such a specified substance was not intended to enhance sport performance, the period of Ineligibility found in Regulation 21.22.1 shall be replaced: First violation: At a minimum, a warning and reprimand and no period of Ineligibility from future events, and at a maximum, one (1) year's Ineligibility".

Further, the Respondent in his evidence, whilst unable to account for the presence of the illegal substances in his system, posited a suspicion that some drinks he had consumed a few nights before the anti-doping control had been "spiked" and that this could account for the adverse Test results and there might be a "defence" of "Exceptional Circumstances" under IRB Regulation 21.22.4 if he could demonstrate that he bore No Fault or Negligence or No Significant Fault or Negligence in the circumstances of the substances entering his system. The WRUAC, however, rejected this 'defence' on the basis that the Respondent had not discharged his onus of proof in respect of the issue.

The foregoing doping infraction record is not appealed. Therefore, this Panel accepts that a doping offence under IRB Regulation 21.22.1 has been admitted and found to have occurred.

In its written decision, the Panel has considered that:

- The drug MDMA is specifically mentioned in the Prohibited List as a stimulant prohibited in Competition, but the substance HMMA is not expressly mentioned. The fact remains that at least one substance contained in the Respondent's sample specimen was on the Prohibited List and that is sufficient to constitute the offence.
- The IRB Regulation 21.22.2 is only applicable when the analytical result involves a listed Specified Substance. Therefore, the Appeals Committee could not apply the Specified Substance Regulation 21.22.2, which extends discretion to reduce the sanction to one year or less, depending upon the facts of the case. The WRUAC classified the substances as "specified substances". However, MDMA and HMMA are not on the WADA List of Specified Substances. As such, the Panel must conclude that the WRUAC erred in its classification of the substances, and if that was so, then the WRUAC was not entitled to apply any discretion in reducing the period of ineligibility by reason of the Prohibited Substance being a specified one.
- The intent behind the taking of such drugs is irrelevant and the mere presence of the substances constitutes a doping offence, which carries a two-year suspension according to IRB Regulation 21.22.1.
- In addition, in the absence of any positive evidence submitted by the Respondent, any attempt to suggest elimination or reduction of the period of ineligibility based on the grounds of "Exceptional Circumstances" can be discounted and must fail.

CAS 2005/A/968 S. v/ MKE Ankaragücü Spor Kulübü, award of 30 March 2006

Panel: Prof. Luigi Fumagalli (Italy), Sole Arbitrator

The Court of Arbitration for Sport (CAS) has decided to reject the appeal filed by S., a Brazilian football player, against the decision issued on 28 July 2005 by the FIFA Dispute Resolution Chamber (DRC).

On 13 July 2004, S. (hereinafter referred to as the "Appellant" or the "Player") and MKE Ankaragücü Spor Kulübü (hereinafter referred to as the "Respondent" or the "Club"), a Turkish football club, signed an employment contract (hereinafter referred to as the "Contract"), valid until 12 July 2005. According to such Contract, the Player was entitled to receive, *inter alia*, USD 25,000 "at the signature of the contract", USD 25,000 on 25 October 2005 [sic], and USD 50,000 divided in 10 monthly instalments starting on 15 August 2004, as well as bonuses, up to the maximum amount of USD 75,000, linked to match participation. The Contract contained also a section concerning the "Official Registration".

On the same 13 July 2004, the Player and the Club signed an additional contract, dated 12 July 2005 [sic], to be valid until 31 May 2006 (hereinafter referred to as the "Second Contract"; the Contract and the Second Contract are hereinafter referred to as the "Contracts"). Pursuant to such Second Contract, the Player was entitled to receive, *inter alia*, USD 25,000 on 1 July 2005, USD 25,000 on 25 October 2005, and USD 100,000 divided in 10 monthly instalments starting on 15 August 2005, as well as bonuses, up to the maximum amount of USD 100,000, linked to match participation. In the same way as the Contract, a section referring to the "Official Registration" was also contemplated in the Second Contract.

On the basis of the Contracts, the Player moved to Turkey, together with his family, and started to train with the Club.

By letter dated 6 September 2004, the Player, through his lawyer, contacted the Club asking for clarification as to his position in the Club. In such letter the Player remarked that he had not been registered with the Turkish Football Federation within the deadline of 31 August 2004 established for that purpose, and that the Club was late in making the payments due to him under the Contract. The same request was reiterated by letter dated 10 September 2004. Having received no answer from the Club, on 11 September 2004 the Player left Turkey and returned to Brazil.

On 29 September 2004, the Player turned to FIFA claiming that

the Club had breached the Contracts, by failing to register him with the Turkish Football Federation and to provide him with a work permit, and requesting that the Club be ordered to pay the sum of USD 403,000, as total amount of the payments the Player expected to receive under the Contracts up to 31 May 2006.

The Club, for its part, submitted that the Player had refused to sign the official professional football player contract mentioned in the "Official Registration" clause of the Contracts (hereinafter referred to as the "Official Contract"), necessary in order to finalize his registration with the Turkish Football Federation and to obtain a work permit. According to the Club, the Player had not wanted to sign the Official Contract, because he had realized that most of the payments he was entitled to receive were linked to match participation, and wanted therefore to renegotiate the conditions stipulated in the Contracts. At the same time, the Club alleged that it had paid to the Player an amount of USD 40,000, satisfactory of all requests submitted by the Player.

On 28 July 2005 the Dispute Resolution Chamber of FIFA (hereinafter referred to as the "DRC"), acting pursuant to Article 42 of the FIFA Regulations for the Status and Transfer of Players (September 2001 edition) (hereinafter referred to as the "FIFA Players Regulations 2001") decided to reject the claim.

The DRC underlined that "*the registration of the player depended only on the signature of this official contract and that therefore, the clause named 'Official Registration', could only be interpreted in such a manner that the parties must sign such an official contract, before they consider themselves contractually engaged*". Therefore, the DRC determined the Contract to be "*subject to a condition and that therefore it must be considered a pre-contract*".

On 26 September 2005, the Player filed a statement of appeal with the CAS.

In its written decision, the Sole arbitrator has decided that:

- One cannot accept Appellant's submission that he was satisfied with the signature of the employment contract and was not aware of the fact that also the Official Contract determined by the national federation had to be signed, so that he relied on the attitude of the Club. The Sole Arbitrator notes, first, that the Official Contract was specifically mentioned in the employment contract, and, second, that the Player, being a professional of experience, aged 29 at the time of the signature of the employment contract, could not ignore the common feature of all national football federations requiring the signature of a contract on a specific form. As the Appellant did not prove that he actually requested the Club to proceed to sign the Official Contract, and that the Club impeded the signature of the Official Contract, the Player may not now blame the Club for failing to sign.
- The finding that the Appellant has not proved that the employment contract could not be implemented because of the Respondent's fault implies the dismissal of the appeal, and of all ensuing remedies sought after by the Appellant, including the claim for damages.

Arbitration CAS 2005/A/997 ISU v/ Anzhelika Kotiuga & Skating Union of Belarus, award of 1 February 2006

Panel: Mr Michele Bernasconi (Switzerland), President; Mr Stephan Netze (Switzerland); Mr Olivier Carrard (Switzerland)

The Court of Arbitration for Sport (CAS) has decided to uphold the appeal filed by the International Skating Union (ISU, the "Appellant") against the decision of the ISU Appeals Commission holding that the ISU had not met the burden of establishing that the Belarus speed skater Anzhelika Kotiuga had committed an anti-doping violation. Therefore, the athlete was found guilty of anti-doping violation and declared ineligible for two years.

On 12 February 2005, Ms Anzhelika Kotiuga (the "Respondent 1", the "athlete") was subject to in-competition testing. The results of the analysis were negative. The Respondent 1 participated in the World Cup Final in speed skating which took place on 18, 19 and 20 February

2005, at Heerenveen, the Netherlands. She finished fourth in the 1000 meters race, division A, and first in the 500 meters race. On 19 February 2005, Ms Anzhelika Kotiuga was subject to in-competition testing in accordance with Art. 5.1.1 of the ISU Anti-Doping Rules compiled in accordance with the World Anti-Doping Code (WADC).

On 29 March 2005, the ISU informed the Skating Union of Belarus (the "Respondent 2") of the fact that Ms Anzhelika Kotiuga's urine A-sample was found to contain norandrosterone at a concentration of more than 2ng/ml as well as "*an abnormal concentration of human chorionic gonadotropin (hCG)*". The analysis of the B-sample took place on 18 May 2005 and confirmed the application of testosterone or testosterone prohormones and nandrolone or nandrolone prohormones.

On 19 August 2005, the ISU Disciplinary Commission declared Anzhelika Kotiuga responsible for an Anti-Doping violation and ordered that the results she obtained during the 2005 World Cup Final as well as her medal, points and prizes be forfeited. In addition, the ISU Disciplinary Commission imposed a two-year ban on the athlete, beginning on August 19, 2005.

On 1 September 2005, Ms Anzhelika Kotiuga lodged an appeal before the Appeals Commission of the ISU. At the hearing, the athlete produced a document containing a list of 27 inconsistencies observed by experts who had investigated the complete documentation package related to the analysis procedure of the athlete's A and B-samples. On 28 November 2005, the Appeals Commission reverted the decision of the ISU Disciplinary Commission, thereby reinstating the eligibility of Anzhelika Kotiuga, as well as medals, points and prizes. The Appeals Commission held that the ISU had not met the burden of establishing that an Anti-Doping violation had occurred, as it was not capable of rebutting most of the 27 different indices of inconsistencies in the testing process. In addition, it concluded that the athlete had proven her pregnancy condition during urine testing on 19 February 2005 and that it was not clear whether the amount of norandrosterone had been influenced by the pregnancy and/or the taking of an exogenous substance.

On 15 December 2005, the Appellant filed a statement of appeal with the CAS to request the cancellation of the Appeals Commission's decision. ISU put forward that it had been established by IRMS measurement that the origin of norandrosterone was exogenous and that such scientifically reliable evidence of the exogenous origin created an Adverse Analytical Finding which could not be subject to a demonstration of physiological or pathological condition. It emphasized that the athlete's alleged pregnancy had not been satisfactorily proven. Therefore, ISU was led to believe that the level of hCG was more likely the sign of its administration in order to simulate pregnancy and mask the administration of nandrolone. Regarding the alleged 27 deficiencies in the doping test procedure, ISU submitted that it had learned about the existence of the document that listed them only at the hearing before the Appeals Commission and that none of them constituted serious departures in the sense that they could have put into question the positive findings.

In its written decision, the Panel considered that:

- According to the results of the analyses, the concentration of norandrosterone in the Athlete's samples were by far higher than the threshold of 2 ng/ml. As a result, the burden of adducing exculpatory circumstances was shifted to the Athlete, who had to demonstrate that the concentration was due to a physiological or pathological condition. At the hearing, two experts stated that a pregnancy could not explain the high level of norandrosterone found in the Athlete's urine samples. According to them, the fact that the Athlete was pregnant in February 2005 could not be excluded; nevertheless, the metabolites found in her body were from an exogenous source, when a pregnant woman only has endogenous values of norandrosterone.
- The allegations of Respondent 1 and Respondent 2 were not substantiated by anything concrete and did not suffice to put into question the quality of the IRMS test itself or to reverse the presumption implemented by Art. 3.2.1 of the WADA Code, according to which WADA-accredited laboratories are presumed to have conducted

sample analysis in accordance with the international standards for laboratory analysis. Based on the foregoing and after careful analysis of the facts and evidence submitted to it by the parties, the Panel finds as beyond doubt that the source of norandrosterone was exogenous. In reaching this conclusion, the Panel had no difficulty to put aside the Respondents' explanations according to which the high concentration of norandrosterone in the Athlete's urine samples could be explained by an endogenous production, caused by pregnancy or by the absorption of authorized substances.

- The 27 inconsistencies put into evidence were not conclusive, did not cast a doubt on the results of the laboratory and were not likely to cause the Adverse Analytical Finding. The Panel accepted to its comfortable satisfaction that a "Supplementary Report" filed by the Appellant answered satisfactorily to all the questions left open by the documentation package related to the analysis procedure of the A and B-samples and that the experts' testimonies were reliable. Based on the totality of the evidence, it has been proven beyond reasonable doubt by the Appellant that the Athlete had committed a doping offence prohibited by the applicable ISU Anti-Doping Rules and had to take responsibility for it.
- The ISU Anti-Doping Rules provide that the period of ineligibility imposed for the presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen shall be of two years for a First Violation. The Respondents have not established any exceptional circumstances justifying the reduction of the period of ineligibility. In particular they have neither established that the Athlete bears no fault or negligence for the violation of the ISU Anti-Doping Rules nor how the prohibited substance entered Ms Kotiuga's system. The ISU Anti-Doping Rules also establish that an Anti-Doping Rule violation occurring during or in connection with an event shall lead to disqualification of all of the skater's results obtained in that Event with all Consequences, including forfeiture of all medals, points and prizes. Anzhelika Kotiuga shall therefore be declared ineligible for two years and must be disqualified for her results obtained in both races during the World Cup Finale at Heerenveen.

Arbitration CAS 2006/O/1059 Commonwealth Games Federation (CGF) v/ E., award of 24 April 2006

Panel: The Hon. Michael J Beloff QC (United Kingdom), President; Judge Hugh Fraser (Canada); Mr Henry Jolson QC (Australia)

In the matter concerning the Indian weightlifter referred to the Court of Arbitration for Sport by the Commonwealth Games Federation (CGF), the CAS Panel has decided that the Respondent has committed a doping offence contrary to Regulation 10 (2) (a) of the CGF Constitution.

The Respondent is an Indian weightlifter whose accreditation for the purpose of the Commonwealth Games ("the Games") was Number 109 389-01.

On 11 March 2006, prior to the commencement of the Games, but during the Games period a sample of urine was taken from the Respondent in an unannounced out-of-competition test in Melbourne.

On 18 March 2006 the "A" sample (number A244935) was analysed and showed that an anti-doping rule violation had occurred and that no irregularity was apparent in the processes that would have in any way affected the integrity of the test.

On 19 March 2006, the Federation Court the Medical Commission imposed a provisional suspension on the Respondent. The Chef de Mission of India Mr H.J. Dora ("Mr Dora") was invited into the Court and was duly informed of the Decision and of the Respondent's right:

1. right to promptly request an analysis of the "B" sample if the results of the test of the "A" sample were not accepted. (He was further advised that failing such a request that the "B" sample analysis may be deemed waived and the "A" sample finding used as evidence of the anti-doping violation.)
2. right to personally attend or have a nominated representative attend the "B" sample opening and analysis, if such is requested.

On 21 March 2006, pursuant to the Respondent's request, the "B" Sample was opened in the presence of Dr Trout (Deputy Director ASDTL), Mr S Cameron (Justice of the Peace), Dr B Singh (Athlete's authorised Representative) and Prof I Kono (WADA Independent Observer).

The Report stated that the doping violation was confirmed.

By letter dated 23rd March 2006, Michael Hooper, Chief Executive Officer of the CGF informed Mr Dora, that

"The Federation Court has now referred the case to the Ad-hoc Division of the Court of Arbitration for Sport for hearing as soon as possible to determine whether an anti-doping rule violation has been committed."

On 25 March 2006 a hearing took place at the Ad hoc Division offices in the World Trade Centre in Melbourne. At the request of the Respondent, the Panel granted a 48 hours adjournment.

In its written decision, the CAS has decided that:

- Further to the decision of the Panel adjourning the hearing to a date beyond the Games Period, the present matter has been assigned to the CAS Ordinary Arbitration procedure and in accordance with art. R45 of the Code, the Panel has to decide the dispute "according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide "ex aequo et bono".
- Stanazolol is a prohibited substance. It is included in the World Anti-Doping Authorities list of Prohibited substances effective as from 1 January 2006, as an Anabolic Agent (S1). If it was properly identified as present in the Respondent's bodily specimens, an anti-doping rule violation has been established irrespective of the Respondent's motive, intention, or knowledge. The issue then was as to the validity of the testing of the "B" sample.
- The Panel observed that established precedent suggested that none of the points raised by the Respondent, that is (1) a denial that he used a prohibited substance, (2) a reference to negative tests within his recent past carried out by both WADA and the Indian Authorities, (3) a suggestion that the prohibited substance whose metabolites were found that is to say satnozolol would have no performance enhancing effect could avail against the results of a properly conducted test which revealed the presence of a prohibited substance in an athlete's urine.
- Given that the analysis of the B specimen is impregnable, the conclusion that a doping offence has been committed is inevitable.

Arbitration CAS 2006/O/1060 The Commonwealth Games Federation (CGF) v/ S., award of 24 April 2004

Panel: The Hon. Michael J Beloff (United Kingdom), President; Judge Hugh Fraser (Canada); Mr Henry Jolson QC (Australia)

In the matter concerning the Indian weightlifter referred to the Court of Arbitration for Sport by the Commonwealth Games Federation (CGF), the CAS Panel has decided that the Respondent has committed a doping offence contrary to Regulation 10 (2) (a) of the CGF Constitution.

The Respondent is an Indian weightlifter whose accreditation for the purpose of the Commonwealth Games ("the Games") was Number 109 291-01.

On 10 March 2006, prior to the commencement of the Games, but during the Games period a sample of urine was taken from the Respondent in an unannounced out-of-competition test in Melbourne.

On 18 March 2006 the "A" sample was analysed and showed that an anti-doping rule violation had occurred and that no irregularity was apparent in the processes that would have in any way affected the integrity of the test.

On 19 March 2006, the Federation Court the Medical Commission imposed a provisional suspension on the Respondent. The Chef de Mission of India Mr H.J. Dora ("Mr Dora") was invited into the Court and was duly informed of the Decision and of the Respondent's right:

1. right to promptly request an analysis of the “B” sample if the results of the test of the “A” sample were not accepted. (He was further advised that failing such a request that the “B” sample analysis may be deemed waived and the “A” sample finding used as evidence of the anti-doping violation.)
2. right to personally attend or have a nominated representative attend the “B” sample opening and analysis, if such is requested.

On 22 March 2006, pursuant to the Respondent’s request, the “B” Sample was opened in the presence of Dr Trout (Deputy Director ASDTL), Mr S Cameron (Justice of the Peace), Dr B S. (Athlete’s authorised Representative) and Prof I Kono (WADA Independent Observer).

The Report stated that the doping violation was confirmed.

By letter dated 23rd March 2006, Michael Hooper, Chief Executive Officer of the CGF informed Mr Dora, that

“The Federation Court has now referred the case to the Ad-hoc Division of the Court of Arbitration for Sport for hearing as soon as possible to determine whether an anti-doping rule violation has been committed.”

On 25 March 2006 a hearing took place at the Ad hoc Division offices in the World Trade Centre in Melbourne. At the request of the Respondent, the Panel granted a 48 hours adjournment.

In its written decision, the Court of Arbitration for Sport has decided that:

- Further to the decision of the Panel adjourning the hearing to a date beyond the Games Period, the present matter has been assigned to

the CAS Ordinary Arbitration procedure and in accordance with art. R45 of the Code, the Panel has to decide the dispute “according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide “ex aequo et bono”.

- By signing the “Entry Form” each competitor including the Respondent also agreed to comply with the Constitution of the CGF and in particular with the Protocol 14 (Medical) and Regulation 10 (Prohibited Substances and Prohibited Methods) and the Standard.
- Stanazolol is a prohibited substance. It is included in the World Anti-Doping Authorities list of Prohibited substances effective as from 1 January 2006, as an Anabolic Agent (S1). If it was properly identified as present in the Respondent’s bodily specimens, an anti-doping rule violation has been established irrespective of the Respondent’s motive, intention, or knowledge. The issue then was as to the validity of the testing of the “B” sample.
- The Panel observed that established precedent suggested that none of the points raised by the Respondent, that is (1) a denial that he used a prohibited substance, (2) a reference to negative tests within his recent past carried out by both WADA and the Indian Authorities, (3) a suggestion that the prohibited substance whose metabolites were found that is to say satnozolol would have no performance enhancing effect could avail against the results of a properly conducted test which revealed the presence of a prohibited substance in an athlete’s urine.
- Given that the analysis of the B specimen is impregnable, the conclusion that a doping offence has been committed is inevitable.



From left to right: Robert Siekmann, Vyacheslav Bytsanyov, Director of “Legal League” football lawyers association, Donetsk, Ukraine and Roberto Branco Martins at the Workshop on the Impact of the EU Acquis on Sport, Kiev, 27 September 2007.

The European Union, Sport and Law

From 20 till 23 October 2007, Dr Robert Siekmann and Roberto Branco Martins, of the ASSER International Sports Law Centre visited the Faculty of Physical Education and Sports of the „Babes-Bolyai” University in Cluj-Napoca, Romania, for lecturing on „The European Union, Sport and Law” at a seminar which was organised by the host, Prof.dr. Alexandru Virgil Voicu who chaired the meeting. Robert Siekmann presented a general introduction to the subject,

whereas Roberto Branco Martins discussed freedom of movement issues in relation to sport in his presentation. Both guests inter alia were invited to attend a home match of football Premier League club CFR 1907 Ecomax during those days. The visit in fact was the start of academic cooperation in the field of education and research in the field of international sports law in the forthcoming years.

INTERNET PORTAL ON SPORTS LAW LAUNCHED IN RUSSIA

On 15 May 2008, the internet portal “Sportivnoye Pravo” (Sports Law) was started by the Moscow State Academy of Law under the supervision of the Academy’s Legal Scientific Institute’s Deputy Director and Lecturer Dr Denis I. Rogachev.

In the academic year 2006/2007 a new specialisation, “Sport and Entertainment” Lawyer, was introduced by the Academy. See; www.sportslaw.ru. E-mail: info@sportslaw.ru

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