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**Definition and Proof of  
Doping Offence**

**Olympic Movement Anti-  
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## ARBITRAL AND DISCIPLINARY RULES OF INTERNATIONAL SPORTS ORGANISATIONS

Edited by Robert C.R. Siekmann and J.W. Soek

*Co-publication with the T.M.C. Asser Instituut, The Hague, The Netherlands*

This volume contains the basic documents on the 'administration of justice', i.e., the law on disputes and disciplinary action, in the international sporting world. Included are, *inter alia*, the Statutes of the Court of Arbitration for Sport, its Rules for the Resolution of Disputes during the Olympic Games and its Mediation Rules. The following categories of rules concerning the international Olympic Sports federations are reproduced in the pertinent section: (1) arbitral and disciplinary rules in the statutes, constitutions, bye-laws and general regulations; (2) special arbitral and/or disciplinary rules and regulations; (3) disciplinary rules that are embodied in the international competition regulations of the international federations; and (4) disciplinary rules in the 'laws of the game' per sport.

This publication is realised within the framework of the international sports law project of the T.M.C. Asser Institute in The Hague and with the cooperation of the International Olympic Committee. It is the third volume in the Asser Institute's series of collections of documents on international sports law and as such a follow-up publication to *Basic Documents of*

*International Sports Organisations* (Kluwer Law International, 1998), which contains the statutes and constitutions of the international Olympic sports federations, and *Doping Rules of International Sports Organisations* (T.M.C. ASSER PRESS, 1999).

*Arbitral and Disciplinary Rules of International Sports Organisations* provides an invaluable source of reference for sports officials, legal practitioners and the academic world. With the increasing public interest in the legal aspects of sports, this collection of documents is a timely and welcome contribution to enhancing the accessibility of basic texts on international sports law.

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**ARTICLES****The Definition of Doping and the Proof of a Doping Offence***Klaus Vieweg and Christian Paul***The Shepherd's Courage - The Olympic Movement Anti-Doping Code***Janwillem Soek and Emile Vrijman***The Bosman Ruling and Nationality Clauses - A Critique of the Treatment of Nationality Clauses in the Jurisprudence of the European Court of Justice***Heiko van Staveren***PAPERS****Corporate Naming Rights - A New Phenomenon in Sports Marketing***Ian Blackshaw***Sports Licensing and Merchandising - The Legal and Practical Aspects***Ian Blackshaw***CONFERENCES****Asser/FBO Conference on the Future of Professional Football Leagues in Europe, Rotterdam, November 2001****International Sports Law Conference, Istanbul, May 2001****BOOK REVIEW****Arbitration at the Olympics - Issues of Fast-Track Dispute Resolution and Sports Law by Gabrielle Kaufmann-Kohler****BOOK ANNOUNCEMENT****FIFA Establishes Independent Football Arbitration Tribunal: An extract from 'Mediating Sports Disputes - National and International Perspectives' by Ian Blackshaw (T.M.C. Asser Press, May 2002)**

The so-called ASSER International Sports Law Project originated from the Asser Round Table Sessions that were held in the beginning of 1996 on the *Bosman* case.

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Because of the steady expansion of its activities in many fields - education, fundamental and applied research, publications, conferences, etc. - in the years before, on 1 January 2002 the ASSER International Sports Law Project officially was converted into a *Centre* within the framework of the T.M.C. Asser Institute for international law. The mission for the ASSER Centre for International Sports Law is to provide a centre of excellence in particular in the provision of high quality research, services and products to the sporting world at large (sports ministries, international - intergovernmental - organisations, sports associations and federations, the professional sports industry, etc.) on a national and international basis.

In this context, *The International Sports Law Journal* (ISLJ) will be continued as the Centre's journal the main purpose of which is to comment upon and to inform those interested in sports and the law - whether academics, practitioners or others - about "legally relevant" developments in the world of sport in a national and international perspective. As before, ISLJ will be freely distributed at national and international conferences, meetings and seminars. *Apart from that, individual subscriptions are possible via the ASSER International Sports Law Centre, T.M.C. Asser Instituut, P.O. Box 50461, 2500 GL The Hague, Fax: +31-(0)70-3420359 (see also colofon).*

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Last but not least, we heartily welcome Ian Blackshaw, Gary Blumberg and Paul Singh as new members of ISLJ's Advisory Board.

*The Editors*

# The Definition of Doping and the Proof of a Doping Offence

by Professor Dr. Klaus Vieweg\* and  
Rechtsanwalt, Dipl.-Chemiker Christian Paul\*\*

## I. Introduction

Disputes in athletics, and in sport generally, were still relatively rare a few decades ago, especially disputes involving the athletes themselves. However, the control of doping as well as commercialisation and professionalisation have altered the situation. The earnings of professional athletes have become so considerable that in each case the sanction for a doping offence can have a major impact on the athlete's career and profession, with his economic losses amounting to a very substantial sum of money. This was recently demonstrated by the judgement of the Landgericht Munich I in which more than 600,000 Euro was awarded.<sup>1</sup>

Moreover sanctions in doping cases may make commercial contracts void and therefore extend its impact beyond the world of sport.<sup>2</sup> This illustrates the need for a legally acceptable definition of doping and the importance of questions of proof, for in many cases the career of an athlete depends on these findings.

## II. The Definition of Doping

There is no common legal definition of the term "doping" for all sports. Furthermore there are no binding legal criteria for such a definition. Rather the content of a "doping" offence is defined by the sports organisations in their own individual manner. Therefore, the definition of doping generally varies between international sports organisations.<sup>3</sup> As a consequence of the hierarchical structure<sup>4</sup> of sports organisations, these definitions of doping are transferred from international to national sports organisations, which are obliged to incorporate these definitions in their own systems of rules and regulations.

Nevertheless, the doping rules and regulations of the IOC, the Olympic Movement Anti-Doping Code, which came into force in the year 2000, have gradually become a "quasi-standard" for doping rules and regulations and for the definition of doping.<sup>5</sup> This is due to the fact that the IOC has put considerable pressure on international sports organisations to adopt their standard of doping rules as a condition for participation in the Olympic Games.<sup>6</sup> As a result of this, many international sports organisations have now incorporated the rules and regulations of the Olympic Movement Anti-Doping Code.

The Olympic Movement Anti-Doping Code demonstrates the two principle ways in which doping can be legally defined: (1) an abstract definition or (2) the so-called "pragmatic" definition with a list of

prohibited substances. Both definitions are used in Article 2 of the Olympic Movement Anti-Doping Code, which reads as follows: "Doping is:

1. the use of an expedient (substance or method) which is potentially harmful to athletes' health and/or capable of enhancing their performance, or
2. the presence in the athlete's body of a Prohibited Substance or evidence of the use thereof or evidence of the use of a Prohibited Method."

However, an abstract definition of doping leaves open the question as to where doping begins. Without any further criteria, this question is considered almost unanswerable. Therefore, such an abstract definition must be regarded as being insufficiently precise and therefore - consequently - not legally binding.<sup>7</sup> In this respect, the goals of the fight against doping are to be taken into account. These are the avoidance of deception, the protection of the health of the athlete and the protection of sporting fairness<sup>8</sup>. Predominant and legally acceptable is the more pragmatic definition of doping based on a list of prohibited substances.

Judges have then to rely upon the list of forbidden substances set up by sports organisations, e.g. the IAAF or, in most cases, the IOC. Such lists of forbidden substances only include examples of substances of the prohibited classes. It has been calculated how many substances the lists would have to contain to show not only examples, but rather the whole list of known substances. Such an enumerative list would, for narcotics, anabolic agents and diuretics alone, include about 130 to 170 substances; the number of forbidden stimulants would increase from around 43 to at least 290, perhaps even to as many as 526 substances.<sup>9</sup>

For this reason and in order to take into account the rapid development of medicine, the last point in the list of prohibited substances is an open definition of doping with the term "... and related substances".<sup>10</sup> The term is defined in Chapter I Article 1 of the Olympic Movement Anti-Doping Code: "Related substance means any substance having pharmacological action and/or chemical structure similar to a Prohibited Substance or any other substance referred to in this code." However, without the help of a specialist, an athlete cannot know these substances. Therefore, this wide addition to the otherwise enumerative list of forbidden substances is in conflict with the principle of certainty. Accordingly, an athlete must always be able to differentiate between permissible and banned substances. This obviously is not the case if such a judgement can only be made by a highly skilled expert. It is therefore questionable as to whether this defini-

\* Institute for Law and Technology, Friedrich-Alexander-University Erlangen-Nuremberg, Germany. This lecture was held on the 6th Annual Congress of the European College of Sports Science on 25 July 2001. It has been amended in particular by footnotes.

\*\* KPMG BEITEN BURKHARDT, Munich, Germany

1 Landgericht München I, judgement of 27 June 2001 B 7HK O 16591/94 (not yet published), see in detail as to the Krabbe cases K. Vieweg, Doping and the Krabbe Cases, the Legal Review of Sports Decisions in Germany, in: Proceedings of the 7th International Congress of the

International Association of Sports Law (in print).

2 L. Tarasti, Legal Solutions in International Doping Cases. Awards by the IAAF Arbitration Panel 1985-1999, Mailand 2001, p. 35.

3 G. Engelbrecht, Adoption, Recognition and Harmonization of Doping Sanctions between World Sport Organisations. The International Sports Law Journal 2000, p. 3 et seq.; C. Prokop, Die Grenzen der Dopingverbote, Baden-Baden 2000, p. 93.

4 Cf. K. Vieweg, Normsetzung und -anwendung deutscher und internationaler Verbände, Berlin 1990, p. 38 et seq., p. 61 et seq.; I. Hannamann, Kartellverbot und

Verhaltenskoordinationen im Sport, Berlin 2001, p. 54 et seq. and as to the problems of restraint of competition p. 269 et seq., p. 378 et seq.

5 C. Krähe, Beweislastprobleme im internationalen Sport - am Beispiel des Olympic Movement Anti-Doping-Codes, in: J. Fritzweiler (Ed.): Doping - Sanktionen, Beweise, Ansprüche, München 2000, p. 40.

6 T. Bach, Lausanner Erklärung zum Doping und ihre Folgen. In: V. Röhrlich / K. Vieweg (Ed.): Doping-Forum, Stuttgart et al 2000, p. 75.

7 U. Haas, Aktuelle Entwicklungen in der Dopingbekämpfung, Zeitschrift für Sport und Recht (SpuRt) 2000, p. 6.

8 K. Vieweg, Divergence and Harmony in

Sports Law - The Example of Anti-Doping Rules and Regulations, in: D.C. Umbach / D. Vedder (Ed.), Sportgerichtsbarkeit und Sanktionen, Heidelberg 2001, p. 93 (p. 95 et seq.). In respect of the latter aim cf. CAS 2001/A/317, p. 17.

9 R. K. Müller / J. Grosse / D. Thieme / R. Preiss, Banned Agents and Related Compounds - How Many?, in: W. Schänzer / H. Geyer / A. Gotzmann / U. Mareck-Engelke (Ed.): Recent Advances in Doping Analysis (7), Köln 1999, p. 14 et seq.

10 K. Vieweg, Grundinformationen zur Dopingproblematik, in: K. Vieweg (Ed.): Doping - Realität und Recht, Berlin 1998, p. 24.

tion of doping is sufficiently precise to withstand legal challenge; its validity is increasingly being questioned. The list of the prohibited substances should therefore be as complete as possible to avoid legal problems.

### III. The Proof of a Doping Offence

#### 1. Strict Liability?

The sanction for a doping offence within sport is not a criminal punishment in the sense of criminal law. It is a disciplinary sanction within sport, normally under private law. However, some states have made doping a criminal offence by legislation.<sup>11</sup> Within sport, in contrast, it is disputed whether the principles of criminal law, especially the principle of “in dubio pro reo” and “nulla poena sine culpa”, are applicable.<sup>12</sup> Therefore the burden of proof, i.e. the risk of not succeeding before court when the facts are not proved, is very important.

The burden of proof in a doping case in sport generally lies with the sports organisation - the accusing party. It has to provide proof of the doping offence and of culpability. Normally, there is no evidence other than the finding of the prohibited substance in the athlete's sample. This is strong evidence of a doping offence and is, except in the few cases where a confession or witness evidence is available, the only possibility of efficient doping control.

The approach that treats the objective finding of a forbidden substance in the body fluids of an athlete as grounds for a sanction for a doping offence has been - somewhat misleadingly - labelled “strict liability”. In law, the term “strict liability” is usually understood as liability without intent or negligence. It implies no intentional element; there is no tie between the sanction and intent. In doping cases, “strict liability” means that the sanction is an inevitable consequence once the doping offence has been established, irrespective of culpability.

This is generally accepted for the *disqualification* of the athlete. For example, Article 3.3 of the Olympic Movement Anti-Doping Code states that “any case of doping during a competition automatically leads to invalidation of the result obtained, with all its consequences, including forfeit of any medals and prizes.” This is deemed necessary to protect “clean” athletes who take part in the competition; disqualification is therefore considered as nothing more than the removal of illegally acquired advantages in the competition.<sup>13</sup> The Court of Arbitration for Sport (CAS) has consequently stated that “the system of strict liability of the athlete must prevail when sporting fairness is at stake. This means that, once a banned substance is discovered in

the urine or blood of an athlete, he must automatically be disqualified from the competition in question, without any possibility for him to rebut this presumption of culpability. The result of the event has indeed been objectively influenced and, consequently, the intention of the athlete is irrelevant”.<sup>14</sup>

However, if further sanctions like a *fine* or a *ban* are to be imposed, the principle of strict liability is, from a legal point of view, no longer applicable.<sup>15</sup> Such further sanctions can only be imposed in the case of culpability (intention or negligence) and must take into account the individual extent of fault in order to accord with generally accepted principles of law.<sup>16</sup> An automatic sanction would be disproportionate and, at least in German law, unconstitutional.<sup>17</sup> According to prevailing legal opinion and that of the CAS, sanctions can therefore only be imposed if the athlete is found liable in cases of intent or negligence.<sup>18</sup>

One must bear in mind that for sanctions like a fine or a ban, strict liability is not applicable; accordingly, fault must be proven. In practice many difficulties arise. The athletes often claim they cannot find any explanation for their testing positive. They especially point out the possibilities of influence by food additives, manipulation of the samples, mistakes in the analysis or the undue influence of third persons (doctors, coaches). Most of these alleged facts can hardly be proven. Bearing in mind that the sports association in many cases bears the burden of proof concerning athletes testing positive, a ban or fine could not be validly imposed. To avoid the aforementioned problems in those presumed doping cases, the so-called principle of “prima-facie” proof (*Anschreibeweis*) is applied in Germany.<sup>19</sup>

#### 2. Prima-facie Proof of Doping

The intentional element is proven by using the so-called principle of “prima-facie” proof, which, due to the fact that it is proportionate, is constitutional. With respect to the principle of proportionality<sup>20</sup>, it is necessary to weigh up the interests of the athlete, in particular his right of personality, against those of the federation.<sup>21</sup>

Prima-facie proof<sup>22</sup> allows culpable behaviour or a cause of a finding to be proved in an indirect manner by using presumptions based on experience. For this, a typical cause of action must exist. In other words, facts must exist which can be regarded as the *typical result* of a certain behaviour.

In doping, this can be phrased as follows: An athlete in whose body fluids a forbidden substance has been found has, according to experience, administered or used the substance and has done so in a culpa-

11 For example Belgium, Sweden, Greece and Italy.

12 In the affirmative M. Buchberger, Die Überprüfbarkeit sportverbandsrechtlicher Entscheidungen durch die ordentliche Gerichtsbarkeit, Berlin 1999, p. 68 ff.; G. Petri, Die Unschuldsvermutung im Verbandsstrafverfahren, in: K. Bepler (Ed.): Sportler, Arbeit und Statuten, Berlin 2000, p. 239 (p. 264 et seq.); to the contrary L. Tarasti, Legal Solutions in International Doping Cases, p. 65; C. Krähe, Beweislastprobleme bei Doping im internationalen Sport B am Beispiel des Olympic Movement Anti-Doping-Codes (Fn. 5), p. 42; CAS 2001/A/317 p. 18.

13 T. Bach, Lausanner Erklärung zum Doping und ihre Folgen (Fn. 6), p. 73.

14 CAS 95/141; cf. L. Tarasti, Legal Solutions in International Doping Cases, p. 85; M. Reeb, Die CAS-Rechtsprechung in Doping-Fällen, in: V. Röhrich / K. Vieweg (Ed.): Doping-Forum, Stuttgart et al 2000, p. 64.

15 CAS 2001/A/317, p. 17. This is the position under Swiss law (cf. for example M. Baddeley, L'association sportive face au droit, Basel/Frankfurt am Main 1993,

p. 243) and in accordance with the Council of Europe's Anti-Doping Convention. A German Court of Appeal in the Baumann case also held that liability without fault was incompatible with the rights of the athlete and German law, cf. Oberlandesgericht Frankfurt/Main, Judgment from May 18, 2000 13W29/00, Zeitschrift für Sport und Recht (SpuRt) 2001, p. 159 (p. 162), see also NJW-RR 2000, p. 1117, 1120; K. Vieweg, Doping and the Krabbe Cases, the Legal Review of Sports Decisions in Germany, in: Proceedings of the 7th International Congress of the International Association of Sports Law (in print).

16 C. Krähe, Beweislastprobleme bei Doping im internationalen Sport. - am Beispiel des Olympic Movement Anti-Doping-Codes (Fn. 5), p. 51.

17 Oberlandesgericht Frankfurt/Main, Judgment from May 18, 2000 13W29/00, Zeitschrift für Sport und Recht (SpuRt) 2001, p. 159 (p. 162), see also NJW-RR 2000, p. 1117, 1120; Rechtsausschuss des DLV, SpuRt 1994, p. 66; cf. also CAS 2001/A/317, p. 19.

18 M. Reeb, Die CAS-Rechtsprechung in

Doping-Fällen (Fn. 14), p. 65. F. Oschütz, Der Beitrag des TAS zur Dopingbekämpfung, in: K. Vieweg (Ed.): Spektrum des Sportrechts (in print); F. Oschütz, Die Jurisprudence of the CAS in Doping Cases, The International Sports Law Journal 2001, p. 22 et seq.

19 Oberlandesgericht Frankfurt/Main, Judgment from May 18, 2000 13W29/00, Zeitschrift für Sport und Recht (SpuRt) 2001, p. 159 (p. 162), see also NJW-RR 2000, p. 1117, 1121.

20 Cf. in general to the principle of proportionality K. Vieweg, Blut und/oder Urin zur Dopingkontrolle, Schorndorf 1996, p. 89 (p. 112 et seq.).

21 M. Baddeley, L'association sportive face au droit, p. 239.

22 Cf. for details Zöller/Greger, Zivilprozessordnung, Köln 2001, vor § 284 Rn. 29.; G. Baumgärtel, Beweislastpraxis im Privatrecht, München u.a. 1998, p. 186. For prima-facie proof under Swiss law cf. O. Vogel, Grundriss des Zivilprozessrechts und des internationalen Zivilprozessrechts der Schweiz, Bern 1999, p. 264 et seq.; W. J. Habscheid, Schweizerisches Zivilprozess- und Gerichtsorganisationsrecht, Basel

1990, p. 387 et seq. The basic principle of the prima-facie proof is used by both the IAAF arbitration panel and the CAS, although the terminology used is often slightly different, e.g. “shifting the burden of proof to the athlete after a positive finding”, this giving the presumption of negligence by the athlete. Cf. L. Tarasti, Legal Solutions in International Doping Cases, p. 96. The IOC also follows this principle of a rebuttable presumption, cf. T. Haug / C. Paul, Diskussionsbericht zum Doping-Forum, in: V. Röhrich / K. Vieweg (Ed.): Doping-Forum, Stuttgart et al 2000, p. 144 and specifically for prima-facie proof p. 150; also W. Walker, in: K. Vieweg (Ed.): Doping - Realität und Recht, Berlin 1998, p. 144 et seq., and M. Baddeley, Dopingsperren als Verbandssanktion aus nationaler und internationaler Sicht, in: J. Fritzscheiler (Ed.): Doping. Sanktionen, Beweise, Ansprüche, Sport, München 2000, p. 22, and CAS 99/A/234 Medina/Majcen v. FINA, p. 18. Slightly different cf. U. Steiner, Doping aus verfassungsrechtlicher Sicht, in: V. Röhrich / K. Vieweg (Ed.): Doping-Forum, Stuttgart et al 2000, p. 135 et seq.



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ble way, in other words, with intent or due to negligence. By proving the existence of this fact, the behaviour that may have caused it is therefore also proven. The prima-facie proof therefore consists of a double presumption: Firstly the presumption of the use or application of the substance, and secondly that of a culpable element.<sup>23</sup>

Nevertheless, the prima-facie proof is ultimately only a mere *presumption*.<sup>24</sup> The athlete can defend himself and rebut the presumption by providing evidence that the finding of the substance may be due to a reason other than the application of the substance. He may, for example, state that the substance has entered his body as a contamination of a nutritional supplement, or that it was due to contaminated food like, for example, meat. The rules for rebutting the presumption of the prima-facie proof are, however, very strict. The mere claim or assertion of another possible reason for the finding of the substance is not enough. Facts must instead be presented and proved which support the theory that not the typical, but rather an alternative cause of action has credibly taken place.<sup>25</sup>

As it is very difficult for the athlete to present such credible facts, the rebuttal of the presumption has seldom succeeded. Therefore, the liability of the athlete is not a "total" liability. However, once a positive doping sample has been produced, the strict rules of defence will make it very difficult for the athlete to exonerate himself.

### 3. Contamination with Forbidden Substances and the Question of Cut-off Limits

This leads to the important question of contamination with forbidden substances.

The finding of a forbidden substance, even in very low concentrations, is treated as grounds for prima-facie proof of culpability for their application. Their presence in the athlete's body is, on the basis of experience, typically caused by such an application. Nowadays it is also known that, for example, nutritional supplements may contain traces of forbidden substances which are not declared on the product label. As a consequence, the use of such supplements is itself considered as negligent behaviour, as the athlete has the duty to be very careful with whatever substances he consumes. Therefore, even if only traces of a forbidden substance are found, the athlete is treated in the same way as if he had applied large doses of the forbidden substance, which had already left his body by the time the sample was taken. Only by proving that it was indeed a contamination and not leftover traces of a doping offence can the athlete exonerate himself. This strict treatment is often justified by the so-called "floodgate argument", which claims that if an easier excuse were possible, it would be impossible to fight doping efficiently.<sup>26</sup> However, such strict rules on behaviour can only be imposed if the athlete is indeed able to avoid the sources of contamination, which is possible with nutritional supplements as there is no need for their consumption.

The situation is only different, however, when a forbidden substance is known to be present in *everyday food* or the *natural environment* of an athlete, or even produced by the body of the athlete itself.<sup>27</sup> In such cases, it is not easy for the athlete to avoid such sub-

stances, their presence therefore does not constitute proof of negligent behaviour. Moreover, regardless of questions of culpability, the finding of a substance in such a low concentration is, in many cases, not even sufficient proof that a doping offence has occurred at all. Such concentrations are not the "typical" result of a doping offence, because it is equally possible that they result from natural sources, such as everyday food, the environment or the body.<sup>28</sup>

Such a doping sample must not be declared positive. For this reason *cut-off limits*<sup>29</sup> have to be established on a sound scientific basis.<sup>30</sup> Only when a concentration of a forbidden substance above such "normal" concentrations is found, is there sufficient proof that it is not merely a random presence, allowing the presumption that it was caused by illegal drug use.

As a consequence, cut-off limits which take into account such "normal" values of the forbidden substances have to be determined. In particular, due to biological variability, problems may arise where substances produced naturally by the human body are concerned, thus leaving a certain gap for the athlete to evade doping sanctions.

Therefore, *direct methods* of identifying forbidden substances like the isotope mass spectrometry for anabolic agents seem preferable as they provide conclusive proof that the substance must have been taken artificially without the problem of proving that it is not inside the concentration range that may normally be reached.

### 4. "Undetectable" Doping and Medical Monitoring

Taking into account reports to gene doping<sup>31</sup> and doping with hormones<sup>32</sup>, it may well be that in the not too far away future some highly sophisticated methods for doping may develop which, with the current analytical techniques, would be undetectable.

As no trace of a forbidden substance would be detectable, it may well become increasingly important to identify "indirect" sources of proof, like typical changes in certain body values as a consequence of doping. The approach of the steroid profile<sup>33</sup> may be taken as an example.

If such indirect indicators cannot supply sufficient proof for a doping offence, another approach could be to impose "health rules" in combination with medical monitoring. This is for example done by the International Cycling Union (UCI).<sup>34</sup> Another example is the upper limits of haemoglobin and haematocrit in blood used by some international federations.<sup>35</sup>

Concentrations of body values above such limits are not sufficient to prove a doping offence. They are not typically reached by doping alone, but can also likely be due to intense training or, for example, training in high altitude.<sup>36</sup>

Therefore, if an athlete has a higher value, this is not considered a doping offence. However, as a consequence, the athlete is still not allowed to compete; he is prohibited from taking part in the competition for medical reasons because of a possible dangerous condition of the body.<sup>37</sup> This would primarily safeguard the health of the athlete, but it also ensures equal competition between the athletes.

Medical Monitoring<sup>38</sup> may provide at least an indirect method to

23 Cf. C. Krähe, Beweislastprobleme bei Doping im internationalen Sport. - am Beispiel des Olympic Movement Anti-Doping-Codes (Fn. 5), p. 45; CAS 98/222 Bernhard v. ITU, p. 12.

24 As to the differences between prima-facie proof ("Anscheinsbeweis") and legal presumption cf. G. Lüke / P. Wax (Ed.): Münchener Kommentar zur Zivilprozessordnung, München 2000, § 286 Rn. 51 et seq. (prima-facie), § 292 Rn. 3 et seq. (presumption) and Rn. 26 et seq.; H.J. Musielak (Ed.): Kommentar zur Zivilprozessordnung, München 2000, § 286 Rn. 23 et seq. (prima-facie), § 292 Rn. 1 et seq. (presumption).

25 CAS 99/A/234 Meca-Medina/Majcen v. FINA, p. 16.  
26 CAS 95/141, C. v. FINA, CAS Digest p.

215, 220; cf. also CAS 2001/A/317, p. 20.

27 Consequently, nutritional supplements are not included in the definition of the natural environment or everyday food.

28 CAS 98/222 Bernhard v. ITU, p. 14.

29 C. Paul, Der Nandrolon-Grenzwert aus naturwissenschaftlich-medizinischer und rechtlicher Sicht, in: K. Wieweg (Ed.): Spektrum des Sportrechts (in print).

30 The doping rules have to be interpreted restrictively (teleologically) in this respect, as their aim is to prevent illegal manipulation, but not to punish an athlete for a low random concentration of a substance; cf. CAS 99/A/234, p. 14.

31 T. Friedmann / J. Koss, Gene Transfer and Athletics B An Impending Problem, Molecular Therapy 2001, Vol. 3, No. 6,

p. 819 et seq.; cf. also Süddeutsche Zeitung, 1 August 2000, p. 36, Frankfurter Allgemeine Zeitung, 5 April 2001, p. 39.

32 J. Segura et al., Recent Progress in the Detection of the Administration of Natural Hormones, Journal of Toxicology - Toxin Reviews 1999, p. 125 et seq.; V. P. Uralets / P. A. Gillette, Over-the-Counter Anabolic Steroids 4-Androsten-3,17-dione; 4-Androsten-3,17- $\beta$ -diol, and 19-Nor-4-androsten-3,17-dione, in: W. Schänzer / H. Geyer / A. Gotzmann / U. Mareck-Engelke (Ed.): Recent Advances in Doping Analysis (6), Köln 1998, p. 148.

33 M. Donike, Longterm influence of anabolic steroid misuse on the steroid profile, in: M. Donike / H. Geyer / M. Kraft

/ S. Rauth (Ed.): Proceedings of the 11th Workshop on Dope Analysis, Köln 1993, p. 108 et seq.

34 UCI Cycling Regulations, Part XIII Sporting Safety and Conditions, Rule 13.1.006, 13.1.013, 13.1.014.

35 International Cycling Union (UCI), International Union for Modern Pentathlon (UIPM), International Biathlon Union (IBU).

36 L. Tarasti, Legal Solutions in International Doping Cases 2001, p. 49; cf. also M. Kamber / P. Mullis / M. Saugy, EPO - vom Medikament zur perfekten Wunderwaffe im Sport, Neue Zürcher Zeitung 2000, p. 37.

37 Rule 13.1.008, 13.1.011 UCI Cycling Regulations.

combat doping in sport. Until better detection methods are found, this approach, in addition to the current doping control system, may be an adequate and legally acceptable way to fight against doping.

#### IV. Conclusions

As previously explained, there is no common legal definition of the term doping. Doping can either be defined in an abstract manner or in a pragmatic way, the latter predominant. According to this pragmatic definition, the mere presence of a forbidden substance in an athlete's body constitutes a doping offence and can lead to the disqualification of the athlete. On the other hand, in relation to sanctions, in particular bans, proof of culpability is necessary. The burden of proof of the offence lies with the accusing party, i.e. the sports organisation, which is made easier due to the principle of "prima-facie" proof. Nevertheless the athlete can defend himself by providing

evidence that the finding of the substance was due to a reason other than the application of the substance. This is relevant with regard to substances which are produced naturally by the human body. For these substances, cut-off limits have to be established to separate the permitted natural state of the body from the forbidden manipulation. In relation to sanctions, the athlete has to rebut the presumption that the finding of the substance in the body was due to intention or negligence on the part of the athlete. However it is very difficult to present credible facts to negate negligence and for this reason the rebuttal of the presumption has seldom succeeded.

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38 Cf. also G. Wagner, Eine einfache Möglichkeit zur anreizgesteuerten Dopingbekämpfung im

Hochleistungssport, in: K. Vieweg (Ed.): Doping B Realität und Recht, Berlin 1998, p. 391 (395 et seq.).



## The Olympic Movement Anti-Doping Code

# The Shepherd's Courage

by Janwillem Soek<sup>1</sup> and Emile Vrijman<sup>2</sup>

### 1. Introduction

*Lausanne, 2nd August 1999*

As you know, following the agreement which the Olympic family reached at the meeting on 27th November 1998, the draft Olympic Movement Medical Code was adopted under the title "Olympic Movement Anti-doping Code" at the World Conference on Doping in Sport in Lausanne on 2nd, 3rd and 4th February 1999. This was a major event, as it means that all the constituents of the Olympic Movement now have a common instrument with which to combat doping in sport. This Code will come into force on 1st January 2000.

In the meantime, I remain,  
Yours faithfully,

Juan Antonio SAMARANCH  
Marqués de Samaranch<sup>3</sup>

With the appearance in 1995 of the Medical Code the International Olympic Committee (IOC) for the first time united its hitherto fragmented doping regulations in one comprehensive document. In addition to banning the use of prohibited (classes of) substances and providing directions and guidelines for carrying out doping controls, the IOC Medical Code further strictly banned the trafficking of prohibited (classes of) substances, provided further instructions with respect to the accreditation and practices of the so-called "IOC accredited doping control laboratories"

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3 [www.nodoping.org/pos-anti-dop\\_code-e](http://www.nodoping.org/pos-anti-dop_code-e)  
4 On the internet site that was especially created for the international doping conference of February 1999 there also appeared - among the various documents that were contributed to the conference - some documents authored by Mr Mbaye, chairman of the working group on the legal and political aspects of doping. In his introduction of 30 September 1998 he formulated the specific tasks of

the working group. The working group should, among others, put forward proposals concerning: 1o. the definition of doping and 2o. a system of sanctions providing for a range of 'penalties' flexible enough to allow each IF to find what they need therein, these penalties being better adapted to the different infractions'. The chairman's name is usually preceded in IOC documents - including those he writes himself - by the epithet 'Judge'. Wherever Mbaye's name is mentioned below, please note that Judge Mbaye is intended.

and, in case of violation of its provisions, established sanctions for both athletes and their entourage.

Because of its' comprehensive character, the IOC Medical Code has been the focal point over the past years in the debate within the international sports community concerning the harmonisation of anti-doping rules and regulations. Not surprisingly and not widely publicized, one of the first tangible results of the "World Conference on Doping in Sport" which took place in early 1999, turned out to be a revised Medical Code, the so-called "Olympic Movement Anti-Doping Code".

### 2. A comparison

When compared to the Medical Code (MC), the structure of the Olympic Movement Anti-Doping Code (ADC) has essentially remained the same. Some elements of the MC however, have been assigned a new place in the scheme of things within the ADC, while other elements, such as "gender verification", have not returned at all. In several provisions within the ADC, reference is being made to the competence, objectives and tasks of the so-called "World Anti-Doping Agency (WADA)". These references are of a transitory character as WADA's competence, objectives and tasks had not yet been established clearly at the time of adoption of the ADC. Apparently, the IOC did not find it necessary to await the outcome of the deliberations concerning WADA before proceeding to adopt the ADC.

Apart from the aforementioned differences in structure and layout, the ADC also provides definitions, as well as descriptions, of several concepts and procedures markedly different from those applied in the past. This review intends to examine and comment on the most salient differences between both the MC and the ADC against the background of the harmonization and assess their consequences. First and foremost, the definition of doping, including its approach of the liability issue, as well as the sanctions<sup>4</sup> attached to it, will be discussed, after which attention will be paid to certain selected new elements of the doping control procedure, as well as the position of the doping control laboratories therein.

#### 2.1. The description of the doping offence

##### 2.1.1. The definition of doping

According to the MC, "doping" is understood to mean the use of prohibited (classes of) substances and methods capable of enhancing an



athlete's performance in sports, or of prohibited (classes of) substances and methods which could have such an effect. Such practices are deemed a violation of medical ethics and are generally regarded as doping<sup>5</sup>. Accordingly, the MC defines doping specifically as "the use of any substance and/or method featuring on the list of prohibited classes of substances and prohibited methods contained in Chapter II of the MC". The MC thus essentially provides the same kind of circular definition of doping as provided for in the anti-doping regulations of other international sports governing bodies. What exactly constitutes "doping" we still do not know<sup>6</sup>. In practice, doping should be regarded as the use of banned (classes of) substances and/or identified as such by the IOC.

As the definition of doping contained within the MC was felt to be incomplete, the working group established by the IOC for the purpose of redrafting its MC, was required to re-orientate itself regarding this issue. In the words of Mbaye, the working group had to achieve:

*"a definition of doping which would not sacrifice the effectiveness of prevention and punishment nor change current practice, but include an additional weapon with which to pre-empt offenders, is what seems to be needed in the fight against this scourge."*

The results of this reorientation process, can be found in a document drafted by Mbaye on December 24, 1998, in Dakar, entitled "The offence of doping and its punishment". Unfortunately, the working group did not consider it part of its assignment to formulate a definition of what constitutes "doping" that does justice to the essence of the phenomenon itself, while, at the same time, retaining a level of abstraction allowing it to be used as a legal concept in its own right. According to Mbaye, doping is to be defined as:

1. the use of an expedient (substance or method) which is potentially harmful to athletes' health and capable of enhancing their performance.
2. the presence in the athlete's body of a substance or evidence of the use of a method where such substance or method appears on the list annexed to the present Code.

This provision (included unaltered in the ADC as Article 2 of Chapter II) contains however, not one, but four definitions of doping<sup>7</sup>. Doping is:

1. the use of an expedient (substance or method) which is potentially harmful to athletes' health;
2. the use<sup>8</sup> of an expedient which is capable of enhancing performance;
3. the presence in the athlete's body of a substance that appears on the IOC list of prohibited classes of substances and prohibited methods; and
4. evidence of the use of a method that appears on the IOC list of prohibited classes of substances and prohibited methods.

It could be argued that, by formulating four definitions, the working group's task to provide one definition of what constitutes "doping" has sufficiently been accomplished. This point of view however, certainly wasn't shared Mbaye. According to Mbaye, one lacuna still existed: "We have never clearly differentiated between doping, the mere detection of which is sufficient to result in certain measures and sanctions (doping as a kind of petty offence), and intentional doping, which should be punished more severely". A description of the concept of "intentional dop-

ing" was however, not included in the December 1998 document. What constitutes "intentional doping" may be read in Article 1 of Chapter I of the ADC:

*"Intentional doping means doping in circumstances where it is established, or may reasonably be presumed, that any Participant acted knowingly or in circumstances amounting to gross negligence".*

While arguing the necessity to differentiate between doping and intentional doping, Mbaye mixes up two - distinguishable - legal phenomena: the definition of doping and the description of the doping offence. The human actions described in abstracto provide but one of the constituent elements of the doping offence. An athlete cannot be sanctioned on the basis that his actions match those described in the definition. To be sanctioned, it is also necessary that his actions are being regarded as reprehensible and thus punishable. Article 1, of Chapter II of the December 1998 document, as well as the ADC, stipulates that "doping is forbidden". Only after linking Article 2 with Article 1, one arrives at a complete description of the doping offence. In other words, the additional element required for the description to become an unlawful act is derived from the interconnection of the two provisions cited. In order to derive a better understanding of the four separate definitions of what constitutes "doping" as contained within the ADC - and because Mbaye has already pointed us in that direction - one should keep in mind that these definitions are only a part of the description of the offence. In addition, the ADC also features the concept of "intentional doping". This review intends to examine first the offence of doping as a "petty offence"<sup>9</sup>.

#### 2.1.2. Doping as a petty offence

The MC used to distinguish between a so-called "prima facie case of doping" and a so-called "definitive case of doping"<sup>10</sup>. A prima facie case of doping would occur in those cases where an athlete would test positive for such banned substances as ephedrine, pseudo-ephedrine, phenylpropanolamine and cathine, as well as testosterone and, more recently, nandrolone. While the mere detection of other banned substances in an athlete's urine sample would automatically constitute a "definitive case of doping" independent from either the athlete's intentions or the actual concentration of the banned substance found present, a "prima facie case of doping" would not, as the amount of the banned substance found present needs to be considered. Consequently a "definitive case of doping" simply does not allow an athlete the opportunity to present evidence as to his intentions or the amount of the banned substance found present to establish that a doping offence had not been intended, a prima facie case still does.

#### 2.1.3. Intentional doping

With the introduction of the ADC the concept of "intentional doping" was introduced as well. It remains however unclear in what manner "intentional doping" is different from the concept of "doping" itself as we know it. Because of the evidentiary problems encountered in the past by sports governing bodies all around the globe when trying to prove that the athlete having tested positive intended to use doping to enhance his performance, the anti doping rules and regulations establishing what constitutes a doping offence have gradually shifted away from specified actions to a mere factual finding - i.e., whether a banned substance was found present in the athlete's urine sample - resulting in the introduction of the so-called "strict liability approach". In other words, once the presence of a banned substance in the ath-

5 Second 'whereas' of the preamble.

6 The biggest problem, Verbruggen said ... are the untraceable substances. 'At the moment, it's EPO, which use cannot or only barely be proven. In a while, it will be even newer substances. Cell implants, genetic engineering, the end is nowhere near in sight.' Investigating these offences is getting harder and so is punishing them. There are always borderline cases.

'And what exactly is doping?', Verbruggen wonders. NRC 3-2-1999.

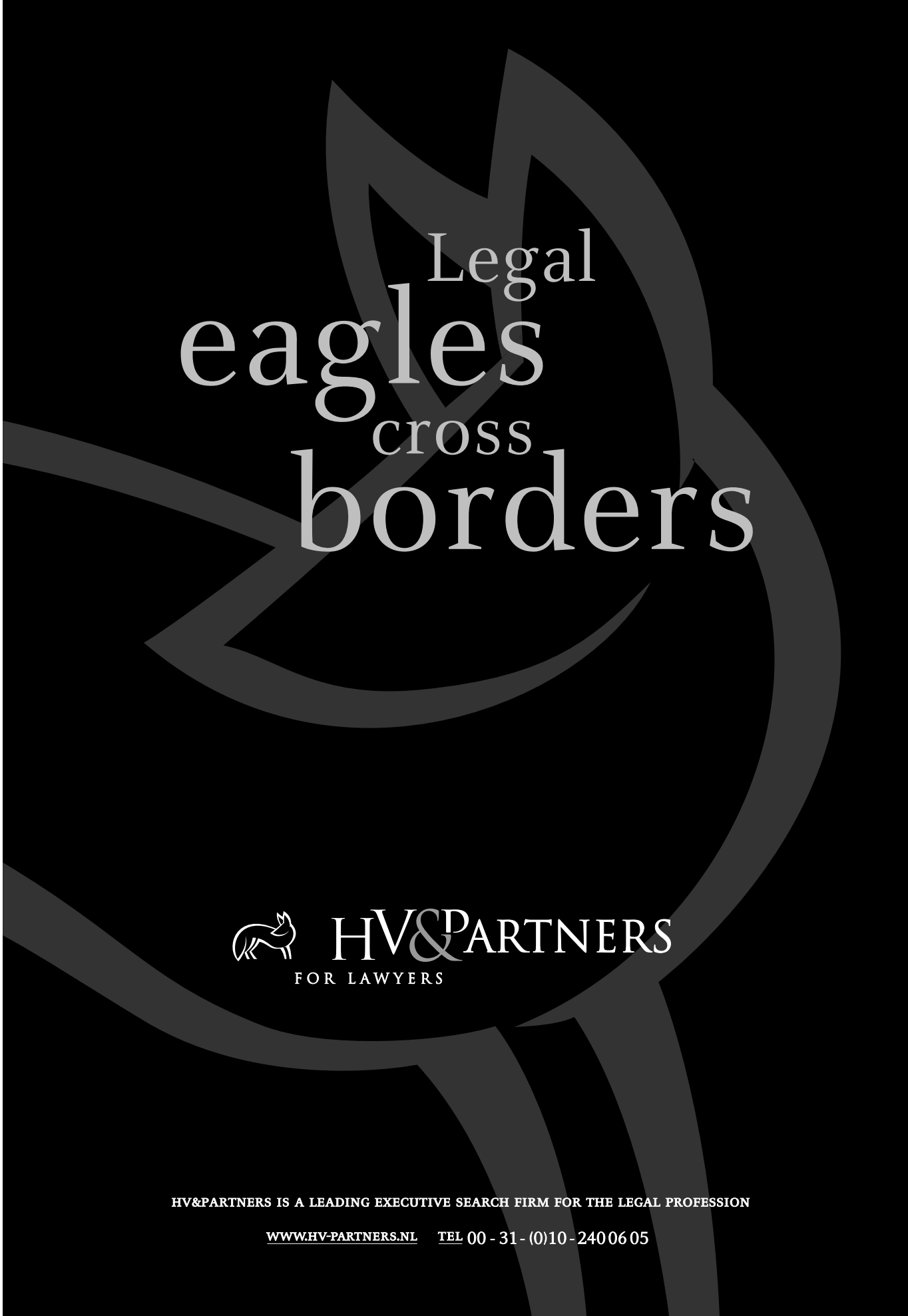
7 'Une définition claire et suffisamment large du dopage paraît nécessaire. D'une part pour couvrir tous les cas de figure et d'autre part pour une bonne conduite de la procédure menée par une autorité sportive ou judiciaire à l'encontre d'une personne, athlète ou non, poursuivi pour dopage. Une définition imprécise ou

incomplète permettrait à des personnes responsables d'un manquement à la réglementation sur le dopage d'échapper aux sanctions', says La Rochefoucauld in a memo to the working group. Rap Conf Mond fev 99.lwp, p. 10/33.

8 'Use' is understood to mean by the ADC pursuant to Art. 1, Ch. I: 'the application, ingestion, injection, consumption by any means whatsoever of any

Prohibited Substance or Prohibited Method. Use includes counselling the use of, permitting the use of or condoning the use of any Prohibited Substance or Prohibited Method.'

9 As an aside, it could be mentioned that most athletes will not consider an offence punishable by exclusion for a minimum of two years a 'petty offence'.  
10 MC, Arts. IV and V, Ch. II.

A large, stylized eagle logo is centered in the background, rendered in a dark gray color. The eagle's wings are spread, and its tail feathers are visible. The logo is composed of thick, curved lines.

Legal  
eagles  
cross  
borders



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lete's urine sample had been established, the athlete would be fully liable for this. A discussion of the alleged absence of intent and consequently of culpability thus became unnecessary. With the introduction of the concept of "intentional doping" however, such a discussion appears to have become relevant once again.

The confusion regarding both doping offences, is further aided by the manner in which the ADC has been structured. The definition of what constitutes a doping offence has been included - extensively - in Chapter II, titled "*The offence of doping and its punishment*". Consequently, it would have made sense to include the definition of intentional doping in this Chapter as well. Chapter II was written however by Mbaye some time in December of 1998 and did not include a definition of "intentional doping". As this draft version was included within the ADC's final draft almost unaltered, it should be assumed that the definition of "intentional doping" came along at a later date and subsequently was introduced in Article 1 of Chapter I of the ADC. Consequently, the definition of what constitutes "intentional doping" thus precedes the general definition of doping, of which it actually is an aggravated form. This inconsistency might have been noticed at an earlier stage, as Article 3 of Chapter II specifies the applicable sanctions in case on intentional doping, while Article 4 of Chapter II contains further provisions concerning evidence of intentional doping. The Article 4 rule may be found *in statu nascendi* in Mbaye's draft of December 1998: "*Evidence of fraudulent intent in cases of doping can be adduced by any means whatsoever, including presumption*". Couched in ADC terms this rule reads: "*Intentional doping can be proved by any means whatsoever, including presumption*"<sup>11</sup>.

### 3. Liability

#### 3.1. Strict liability

Article 2 of Chapter II of the ADC contains a provision detailing what constitutes doping similar to Article IV of the MC, as well as likewise Articles in the anti-doping rules and regulations of a great many international sports governing bodies<sup>12</sup>. This provision has derived from CAS case law establishing a two-stage system in doping cases, based upon the strict liability approach. At the first stage, the sports governing body needs to establish that a doping offence has indeed been committed by showing a banned substance to be present within the athlete's body tissue or fluids<sup>13</sup>. Accordingly, many sports administrators held the view that the strict liability approach did not require them to show a relationship between the intent to commit a doping offence and the actual offence itself, in order to sanction the athlete: "[...] *the principal offence of doping consists merely of the finding of the presence of a prohibited substance in an athlete's body tissue or fluids. The rule does not provide that an athlete must have taken the substance deliberately. It creates an offence of strict liability in that the athlete's intent is completely irrelevant*"<sup>14</sup>.

This rather laid back approach by sports governing bodies of the requirements for proving a doping offence (focusing only on the consequences of the unlawful act, i.e., doping thus establishing the strict

liability of the athlete) has been rudely interrupted by a recent CAS decision<sup>15</sup>. In this decision the Panel presiding over the matter argues that, if a sports governing body organisation opts to sanction the consequences of the unlawful act rather than the unlawful act itself, the causal relationship between the unlawful act and its consequences should be entirely clear and incontestable. Generally speaking, in tort law the causal between the unlawful act itself and its consequences is not automatically assumed present but requires proof. Even in cases of strict liability - requiring no proof of guilt - the causal relationship between the unlawful act itself and its consequences nevertheless remains an element requiring proof by the party invoking liability. Bearing in mind the quasi criminal law character of such disciplinary proceedings as doping cases, the Panel in this matter deemed it unacceptable to apply the strict liability concept more stringently against an athlete accused of having committed a doping offence, as would have been the case under civil in which the strict liability concept is firmly rooted. Consequently a causal link between the unlawful act itself and its consequences still remains an element requiring proof by the party basing its arguments for sanctioning on the consequences of the unlawful act. In other words, whereas the strict liability rule precludes a sports governing body from having to prove that a doping offence has been committed by showing the athlete to be guilty of the presence of a prohibited substance in his body, the same rule, according to the Panel, does, however, not preclude a sports governing body from having to prove that such presence is the result of use by the athlete<sup>16</sup>.

Once the existence of a doping offence has been established, the second stage is reached, resulting in a shift of the burden of proof from the sports governing body to the athlete accused of having committed a doping offence<sup>17</sup>. At this stage, the accused athlete is given the opportunity to show why he is not guilty (and thus not culpable) of having committed the offence. At this stage of the proceedings, the focus has shifted to the (severity) of the applicable sanction in accordance with the principle of proportionality, provided the sports governing body in question applies a flexible sanctioning system.

#### 3.2. Culpable liability

Apart from the strict liability definition of doping - ignoring the issued of guilt and intent - the ADC features three other definitions of doping which focus on the unlawfulness of the act of doping and require proof of culpability (either negligence or intent). One of these definitions aims at the use of a banned method. The remaining two concern the use of banned substances in general.

According to the first sentence of Article 2 of Chapter I of the ADC, the use of an expedient (either a substance or method) potentially harmful to an athlete's health, is prohibited. This provision must be directed at substances and/or methods currently not listed on the IOC list of prohibited classes of substances and prohibited methods. If not, this situation would already be fully covered by the provision contained in Article 2 of Chapter II of the ADC. Having to prove

11 A salient editorial difference between the two categories of doping definitions may still be spotted. The doping definitions of Art. 2, Ch. II address 'athletes', while the definition of intentional doping in Art. 1 of Ch. I uses the term 'participant'. It is possible that it was simply forgotten to 'readdress' the provision of Art. 2. 'Participant' in Art. 1 is understood to mean: 'any athlete, coach, trainer, official, medical or para-medical personnel working with or treating athletes participating in or preparing for sports competitions of the Olympic Games, those competitions to which the IOC grants its patronage or support and all competitions organized under the authority, whether direct or delegated, of an IF or NOC'. If intentional doping is an aggravated form of doping, it is highly relevant that the

group of persons, which the provisions address, is the same.

12 IAAF Rules and Regulations, Rule 55, para. 2; FISA Rules of racing and related bye-laws, Rule 80, para. 2; IWF Anti-doping Policy, Art. 5.1; FINA Doping Control, DC 1.2; IBU Anti-doping, Blood Test and Gender Verification Rules; ITF Anti-doping Programme (c); ITU Doping Control Rules and Procedural Guidelines, 2.2; FIS Doping Rules - Rules 1 - 3; ATP en WTA Official Rulebook - Players - Tennis' Anti-doping Program - C.1.

13 See the CAS decision of 14-2-1996, in re L./FINA, CAS 95/142.

14 M. Gay in a speech during the International Symposium on Sport & Law at the beginning of 1991.

15 CAS decision of 8-1999, in re Bernhard

v. ITU, TAS 98/222.

16 The criticism does not entirely ignore the strict liability rule. Lob, for example, writes in his article 'Dopage, responsabilité objective ('strict liability') et de quelques autres questions' (SJZ 95(1999) no. 12, p. 272) 'Il nous paraît qu'une sentence du TAS fondée sur le principe de la responsabilité objective pourrait être attaquée devant les tribunaux ordinaires. L'art. 36 g du Concordat du 27 août 1969 sur arbitrage permet en effet l'annulation d'une sentence arbitrale lorsque la sentence est arbitraire, parce qu'elle constitue une violation évidente du droit ou de l'équité. Le principe de la responsabilité objective apparaît aussi critiquable s'il est appliqué à la durée de la suspension. Les règles statutaires peuvent certes prévoir des normes, mais il appartient

aux fédérations de tenir compte de toutes les circonstances et de prendre en considération en particulier la gravité de la faute de l'athlète concerné.

17 See CAS 98/208 N. 5.10: 'If the presence of a prohibited substance is established to the high degree of satisfaction required by the seriousness of the allegation, then the burden shifts to the competitor to show why, in the case of a diuretic, the maximum sanction should not be imposed. The Panel repeats that under the new FINA rules it is only at the level of sanction not of finding of innocence or guilt, that the concept of shifting burden becomes relevant at all. And it is only at this juncture too that questions of intent become relevant.'

however, that an athlete has used a substance or a method which has not been listed on the IOC list of prohibited classes of substances and prohibited methods, but which is harmful to the athlete's health, thus constituting doping, forces sports governing bodies, once again, to face insurmountable obstacles concerning the required scientific evidence related to such an offence. This definition therefore merely appears to be a reflection of the first "whereas" in the ADC preamble, then a serious attempt to provide a new and additional definition of doping, i.e., "[...] the Olympic Movement, [...] takes measures, the goal of which is to prevent endangering the health of athletes"<sup>18</sup>.

The second part of Article 2 of Chapter I of the ADC, prohibits, in conjunction with Article 1 of Chapter II, the use of an expedient - either a substance or a method - which potentially could enhance an athlete's performance. According to Bette and Schimanck: "*With this provision hängt für eine - insbesondere auch rechtliche - Handhabbarkeit dieser Art der Dopingdefinition alles davon ab, inwieweit sich in sachlicher Hinsicht hinreichend präzise und umfassend, in zeitlicher Hinsicht hinreichend dauerhaft und in sozialer Hinsicht hinreichend intersubjektiv einheitlich bestimmen lässt, welche Art von Handeln sich als 'unnatürliche' sportliche Leistungssteigerung begreifen lässt. In dem Maße hingegen, wie genau diese Spezifizierungen nicht gelingen, erweist sich eine Wesensdefinition des Dopings als unbrauchbar*"<sup>19</sup>. The 1996 so-called "Bromantan case" provides a perfect example of the caveat of Bette and Schimanck, as it shows that the rules and regulations on which the fight against doping is based suffer from a systematic defect because they allow an athlete using a performance enhancing substance not listed of the IOC's list of prohibited classes of substances and prohibited methods to go free. With the introduction of the provision contained in Article 2 of Chapter II - the second part of the first sentence - the Working Group has attempted to repair this defect. Neither the Working Group, nor Mbaye have been blind to the limitations of this approach from an evidentiary point of view:

*"[this provision] will [...] enable the Olympic Movement to guard against such a case [the Bromantan case, the authors], it should nevertheless be noted that doping will be counteracted essentially on the basis of detection of the presence or use of prohibited substances and methods"*.

The last remaining definition of doping concerns the use - if established - of a method listed on the IOC list of prohibited classes of substances and prohibited methods. As the use or application of a banned method remains difficult to prove directly, but instead, - to a larger or lesser extent - depends on indirect proof, such as the occurrence of subsequent side effects, this offence does not lend itself for application of the strict liability principle.

In conclusion, the ADC has little news to offer concerning the definition of what constitutes a doping offence. Both the MC, as well as the anti-doping rules and regulations of a large number of international sports governing bodies, have long since contained provisions similar to those in the ADC.

### 3.3. Liability in case of intentional doping

The introduction of the concept of "*intentional doping*" raises the question whether or not the IOC is raking up old and awkward matters? Old, because the evidentiary problems concerning proof of intent had already led to the development of the strict liability

approach of the doping offence. Awkward, because "*establishing proof of such intention will clearly be difficult, and for that reason it is necessary to establish regulations governing it*"<sup>20</sup>. This however, would be absurd. Although not mentioned in so many words in the ADC<sup>21</sup>, it would make sense not to consider the offence of "*intentional doping*" as being equal to the offence of doping as defined in Article 2 of Chapter II. Apparently, "*intentional doping*" is an aggravated form of doping. If sports governing body is successful in proving that a doping offence has indeed been committed for which the athlete is strictly liable, it would then be allowed to present further evidence that the athlete, when committing the offence, had also intended to do so. This would allow a sports governing body to suspend an athlete from competition for life, as opposed to a suspension of a limited duration in cases in which it has failed to prove the existence of such an intention. A similar difference exists with regard to the fine to be imposed. In case of prove intent, such a fine could amount to a maximum of US\$ 1,000,000.—, as opposed to US\$ 100,000.— if intent is not proven<sup>22</sup>.

## 4. Sanctions

The sanctions to be imposed in case of a doping offence has been committed, can be divided into two categories. Article 3 of Chapter 1 of the ADC contains a range of sanctions in case of a regular doping offence, while the paragraphs 2 and 3 provide a range of sanctions, among others, in case of an aggravated doping offence. Both ranges of sanctions allow amendments to be made with regard to (the nature of) the actual banned substance used. One sub category within these ranges concerns the use of such substances as ephedrine, phenylpropanolamine, pseudo-efedrine, caffeine, strychnine or related substances, while the other sub-category addresses the use of all remaining banned substances.

### 4.1. Sanctions in case of a regular or "non-aggravated" doping offence

Regardless of (the nature of) the banned substance used, two sanctions can be applied both in case of regular and aggravated doping, i.e., a ban on participation in one or several sports competitions and a fine of up to US\$ 100,000.—. In case an athlete has been found guilty of having used a banned substance as ephedrine, he could be let off with only a warning, or be suspended from any competition for a duration of one to six months. Would the same athlete test positive for using any of the other remaining banned substances, he could very well face a suspension from the competition for a minimum period of two years.

The IOC's proposal to include in the ADC a two year suspension as a minimum sanction for a first time offence of doping, actually turned out to be the only serious disputed issue at the IOC's 1999 World Conference on Doping in Sport in Lausanne, Switzerland. Politicians (22 Ministers and State Secretaries), sports governing bodies (35 International Federations) and athletes (The IOC's athletes' commission represented by the former Norwegian speed skater Koss), all declared to be in favour of such a minimum sanction for a first time doping offence. Only two International Federations, the FIFA and the UCI, opposed this proposal<sup>23</sup>. The Lausanne Declaration of February 4, 1999, carefully states the compromise reached:

18 To most sporting participants the side effects of these drugs outweigh the advantages of taking them. At the highest level the competitive instincts of many participants may blind them to the dangers. So how justified are NGBs in taking a paternalist approach and protecting the welfare of sporting participants? Traditional paternalist jurisprudence would argue that this approach is only valid if the effect of the prohibition is to protect those unable to make an informed and rational judgment for themselves or to prevent harm to others.

The obvious example of the former would be a ban on the taking of performance enhancing drugs by children and junior athletes but extending the ban beyond this point is difficult to justify on this basis.' Gardiner, et al., *Sports Law*, p. 164.

19 Karl-Heinrich Bette and Uwe Schimanck, "Doping und Recht - soziologisch betrachtet", in K. Vieweg, *Doping, Realität und Recht* (1998), p. 359.

20 Mbaye in his introduction of 30 September 1998.

21 Nor does it follow from what Mbaye

wrote in his introduction. '... we have never clearly differentiated between doping ... and intentional doping'.

22 ADC Ch. II, Art. 3 (1) and (2).

23 Hein Verbruggen ... 'People here (at the World Doping Conference) are always talking about penalties. ... Penalties are unimportant ... 'That's also what I told Koss. I'm sitting next to the chairman of the swimming federation. He deals out a four-year penalty to a swimmer, she goes to the American Courts and gets two years there. Then that penalty is reduced by the Court of Arbitration to six

months. And the chairman actually owes her 15,000 dollars in damages.' *Volkskrant* 3-2-1999. It seems that only the penalty of two years is an issue here. I'm not crazy about that time limit. Every court will refine such a suspension after which the sports federations will be saddled with enormous claims for damages. When pressed, I will agree to this, but when the time comes that we have to pay damages I'm counting on the same kind of solidarity.' *Telegraaf* 3-2-1999.



*"In accordance with the wishes of the athletes, the NOCs and a large majority of the IFs, the minimum required sanction for major doping substances or prohibited methods shall be a suspension of the athlete from all competition for a period of two years, for a first offence. However, based on specific, exceptional circumstances to be evaluated in the first instance by the competent IF bodies, there may be a provision for a possible modification of the two-year sanction [authors' emphasis]"*.

Thus the underlined part of the Declaration was incorporated into the ADC.

#### 4.2. Sanctions in case of an aggravated doping offence

As has already been indicated before, the sanctions contained in both paragraph 2 and 3 of Article 3 of Chapter II do not only address the offence of "intentional doping", but also include to the use of a masking agent intended to prevent or distort the results of a doping test, the refusal to participate in a doping test and the apparent involvement of an official, member of an athlete's entourage or the medical or pharmaceutical profession. Again, a distinction is being made between the use of ephedrine and ephedrine-related substances and other banned substances. Apart from those sanctions such as the suspension from competition and the US\$ 100,000.-fine contained within the first range of sanctions discussed before, the athlete having used ephedrine or a related substance may, in case of an aggravated doping offence, be suspended from any competition for a period of two to eight years. The sanctions to be applied in case of use of any of the remaining banned substances, also apply in case of a repeat offence involving the use of ephedrine and ephedrine related substances.

An athlete having committed a repeat doping offence may be sanctioned in three different manners. He may be:

1. banned from participating in any sport in any capacity whatsoever;
2. fined up to \$ 1,000,000.—; and
3. suspended between four years and life from all sports competitions.

When reviewing this extended range of sanctioning options contained in Article 3 of Chapter I of the ADC, one cannot fail to notice the recurring difference in applicable sanctions between ephedrine and ephedrine related substances and all other remaining banned substances. This distinction in applicable sanctions based upon (the nature of) the banned substance actually having been used, already featured within the MC. The major difference between the sanctions catalogued within the MC and those in the ADC is found in the introduction of the principle of proportionality in sanctioning decisions. Although the distinction between sanctions applied in case of first offence and repeat offences already contained in the MC has been continued in the ADC, it is now also possible to translate the gravity of the offence in the actual sanction to be applied. Furthermore, pursuant to the italicised phrase at the end of Article 3 of Chapter II of the ADC, sanctions may be imposed concurrently insofar as they are compatible. In addition, regular or unannounced doping tests may also be conducted over a specified period of time.

While representatives of governments and sports governing bodies appeared to outdo each other at the 1999 IOC World Conference on Doping in Sport in Lausanne, Switzerland with respect to proposing the most severe sanction to be applied in case of a doping offence being committed - such as two-year minimum sanction<sup>24</sup> -, a change now appears to have occurred. At the so-called "Asser Round Table Session" of the T.M.C. Asser Institute in The Hague, the Netherlands,

24 Shortly after the conclusion of the conference, the FINA in its Doping Control Rules of 1-6-1999 established a penalty of a minimum of four years.

25 See also CAS decision of 22-4-1996, in re C. v. FINA, CAS 95/141.

26 CAS decision of 8-1999, in re Bernhard v. ITU, TAS 98/222.

27 MC Ch. VI, Art. III.

28 ADC Ch. VI, Art. 3.

29 ADC Ch. VI, Art. 3, sub (b) holds an exception to this rule: '... if, without otherwise affecting the competition, it is still possible for the Participant to be reinserted, the Participant may continue to take part in the competition. (For example, if

addressing the harmonisation of anti-doping rules and regulations, Jaime Andreu, Head of the Sports Unit of the Education and Culture Directorate of the European Commission, informed the participants that the opinions within the European Union's Commission concerning the severity of sanctions to be imposed in case of a first time offence of doping were variegated. The European Union Commission's approach has been influenced by:

1. the finding that a ban of more than two years for a first time doping offence is not supported by national legislation in most member states; and
2. the opinion that a two year suspension could put an end to the careers of athletes in some sports, as opposed to other where this would not be the case at all.

#### 4.3. Competitors and athletes

As has already been mentioned in paragraph 4.2, the sanctioned contained in paragraph 2 and 3 of Article 3 of Chapter II of the ADC, also apply to officials, members of the athlete's entourage, or the medical and pharmaceutical profession. It remains unclear whether the sanctions specified in paragraph 1 of Article 3 of Chapter II of the ADC also applies to members of the athlete's entourage or members of the medical profession involved in a doping offence. As opposed to paragraph 2 of Article 3 of Chapter II of the ADC, these individuals are not mentioned in paragraph 1 of Article 3, while paragraph 2 of Article 1 only refers to athletes.

#### 4.4. Sports sanctions

According to paragraph 3 of Article 3 of Chapter II of the ADC, every doping offence committed during competitions will result in a disqualification and subsequent annulment of the result obtained at that competition, including the forfeiture of any medals and prizes thus gained<sup>25</sup>. Consequently, in the dictum of its decision of August 8, 1999,<sup>26</sup> in which a decision of a sports governing body in a doping case was reversed, the CAS Panel ordered the disqualification of the athlete lifted and his results and titles thus gained to be confirmed.

Under the provisions of the MC, an athlete was only considered to have tested positive and thus to have committed a doping offence, if the results of the analysis of the so-called B-sample confirmed those of the A-sample, or, if the athlete having tested positive, renounced his right to have his B-sample analysed<sup>27</sup>. On the basis of the ADC however, an athlete is already deemed to have tested positive and thus to have committed a doping offence on the basis of a positive result of the analysis of the athlete's A-sample<sup>28</sup>. The athlete does retain however, the right to have his B-sample analysed. If the result of the analysis of sample B is negative, the athlete is not automatically fully rehabilitated. Although no additional sanctions will be applied, the initial sanction of the disqualification remains in force<sup>29</sup>.

#### 4.5. No possibility of reinstatement

As the ADC allows sports governing bodies to exclude an athlete from competition for an extremely long period of time, one should keep in mind that such an extended period of suspension may conflict with national case law regarding the issue of "restraint of trade"<sup>30</sup>, as developed within various countries. Consequently, it would have been reasonable to expect the ADC to contain a provision allowing a suspended athlete to be reinstated after a certain period of time has elapsed<sup>31</sup>. Various international sports governing bodies did in fact include such a provision within their anti-doping rules and regulations, allowing a suspended athlete, under certain conditions, the right to request to be re-admitted before the actual suspension will have expired. Usually, "extraordinary circumstances" are required to allow such a request<sup>32</sup>.

an athlete is entered in more than one event and the second has not commenced, it may be possible to enter the second event.)'

30 See Gardiner, et al., Sports Law, pp. 248-249.

31 See Darren Bailey, "Doping Control in the United Kingdom", in K. Vieweg,

Doping, Recht und Realität, (1998) pp. 352-354.

Not surprisingly, the ADC is also devoid of any provision concerning the revision of doping cases, as the issue of reinstatement is closely connected with the absence of a provision allowing the review of sanctions initially applied. In this regard, the International Weightlifting Federation's anti-doping rules and regulations provide an elegant solution by allowing a decision to be reviewed at a later date, after new, relevant, information has become available.<sup>33</sup> A similar provision would should have been included in the ADC.

## 5. Conducting doping trials

### 5.1. The rights of the accused

The MC did contain a provision concerning the right of the athlete, accused of having committed a doping offence, to be heard (*audi et alteram partem*), which included:

1. the right to be informed of the charges brought;
2. the right to appear in person or to be represented during the proceedings; and
3. the right to submit evidence, call witnesses or to submit a defence in writing<sup>34</sup>.

Remarkably, such a provision has not been included in the ADC, despite the statement concerning athletes' rights to the contrary contained in the last paragraph of the ADC's preamble, advocating the protection of these rights<sup>35</sup>. The failure to include a similar provision as the one above within the ADC constitutes, given its exemplary function, not only a serious omission, but furthermore illustrates the ever advancing erosion of athletes' rights in doping cases<sup>36</sup>. If the international sports community intends to make recourse to the civil courts more difficult through harmonisation of its' anti-doping rules and regulations, it will sooner achieve the opposite if it neglects fundamental (human) rights. The question if and to what extent a doping trial actually still represents a "fair trail", thus becomes increasingly important and relevant.

### 5.2. The position of IOC accredited laboratories in doping trials

Chapter III of the ADC, mainly dealing with appeals, also contains a provision concerning the status and position of the IOC accredited doping control laboratories in a doping trial. Even more so than its positioning within the ADC, the content of this Article is cause for wonder<sup>37</sup>. Even though the exclusive position awarded to IOC accredited doping control laboratories in the ADC already provides these institutions with a certain measure of self-evident exclusivity - also with regard to the assessment of the quality and proficiency of the analytical procedures carried out by these laboratories - this appears not to be enough. According to Article 2 of Chapter III of the ADC:

*"Accredited laboratories are presumed to have conducted testing and*

*custodial procedures in accordance with prevailing and acceptable standards of scientific practice"*<sup>38</sup>.

In other words, in addition to the exclusive status awarded to IOC accredited laboratories, this position furthermore gives rise - for no apparent reason - to the presumption that, in case of a doping trial, the laboratory concerned functioned in accordance with its applicable guidelines and Good Laboratory Practice (GLP). It is however, possible for the athlete accused of having committed a doping offence to adduce evidence to the contrary:

*"This presumption can be rebutted by convincing evidence to the contrary, but the accredited laboratory shall have no onus in the first instance to show that it conducted the procedures other than in accordance with its customary practices"*.

One should note however, that the evidence to be adduced by the accused athlete not only needs to be "convincing"<sup>39</sup>, the laboratory in question is in no need in the first instance to show anything more than that it conducted the procedures and analyses concerned in its own customary manner<sup>40</sup>. Again the laboratory concerned is under no obligation to prove beforehand that it followed its procedures correctly. In other words: only after evidence to the contrary has been introduced by the athlete accused of having committed a doping offence, is the laboratory required to show it conducted its analyses<sup>41</sup>.

Judging from the above, it is clear that the position of the of the IOC accredited doping control laboratories in doping cases is special and cannot be simply equated with the position of an expert witness in regular legal proceedings, as the latter has to explain and document on which scientific evidence he has relied in providing his expert testimony is based on, especially with regard to the methods of research or analysis used. The privileged position of the IOC accredited doping control laboratories not only contributes to a further increase of the procedural inequality between parties in a doping trial<sup>42</sup>, it also seriously impedes objective fact-finding. After all, why would IOC accredited doping control laboratories in case of doubt co-operate in further research or scientific investigations potentially exculpating the accused athlete when their own findings are presumed to be (scientifically) correctness? This is especially relevant in those cases in which there exists a scientific difference of opinion about the possible origin of the banned substance found present in the athlete's body tissues or fluids and/or the applicable sanctioning norm<sup>43</sup>.

### 5.3. The relationship between the IOC and the CAS

The ADC provides an athlete accused of having committed a doping offence not only with the right to appeal any decision of the IOC with CAS, but also against decisions of International Federations in

32 IPC Appendix 3, 8.2, Art. 3.2; IAAF Procedural Guidelines for Doping Control, 4. Exceptional circumstances, rule 4.1; ICF Procedural Guidelines for Doping Controls, 3 Exceptional circumstances, sub 1; ITF 8. Tennis Anti-Doping Programme, (Q) Application for Reinstatement Following Permanent Disqualification, para. 1; FIS Procedural Guidelines for doping and haemoglobin control, D Exceptional circumstances, para. 1; ATP Procedural Guidelines for Doping Controls, 3 Exceptional circumstances, sub 1.1; WTA Procedural Guidelines for doping and hemoglobin control, D Exceptional circumstances, para. 1, sub 1.1 through 1.4.

33 IWF Anti-Doping Policy, 15. Appeal, review of sanction, 15.18: 'If at any time new and relevant information becomes available, the sanction may be reviewed. The review will be conducted by the Appeal Committee in light of the new information.'

34 MC Ch. VII, Art. VII read: Any individ-

ual ... has the right to be heard by the IOC organ competent for applying or recommending a measure or sanction to such individual, team or entity. The right to be heard includes the right to be acquainted with the charges and the right to appear personally, to be represented, to bring forward evidence, including witnesses, or to submit a defence in writing.

35 'WHEREAS in keeping with the desire of the Olympic Movement to act in the best interests of athletes ... whose rights to justice must be safeguarded, the Olympic Movement Anti-Doping Code shall include provisions to enable appeals to be lodged with the Court of Arbitration for Sport (CAS) against certain decisions rendered in application of such Code.'

36 In this context the omission concerned, given its character, could be called Freudian.

37 ADC Ch. III, Appeals.

38 ADC Ch. III, Art. 2.

39 It is not clear what is intended by "convincing evidence". This qualification does

not follow from the ADC itself, or from the CAS case law regarding doping.

40 Accordingly, it is thus without question assumed that this 'its customary practices' are in accordance with "prevailing and acceptable standards of scientific practice".

41 In the MC, Ch. X, Art. II a provision was included on the basis of which it had to be presumed that the accredited laboratory had conducted the tests and analyses of the samples in accordance with the highest scientific standards and that the results of those analyses had to be presumed scientifically correct. That rule has not returned in the ADC.

42 Not only does the athlete need to verify if and to what extent the IOC accredited doping control laboratory concerned acted in conformity with its usual practice, i.e., in conformity with IOC guidelines, but also if and to what extent these guidelines are in accordance with "prevailing and acceptable standards of scientific practice". A salient detail in

this context, is the fact that the athlete, in order to prove the above, completely depends on the information adduced by the laboratory concerned at the trial via the (inter)national sports governing body concerned.

43 In this context the current discussion regarding positive results in case of endogenous substances, especially where the origin of the so-called "nandrolon positives" is concerned, provides a perfect example for this attitude. Until recently, it was assumed that nandrolon was an exogenous substance, alien to the human body. At this time however, it is generally accepted that nandrolon is endogenous. Even though scientifically speaking doubts exist as to the correctness of the cut-off limit (2 ng/ml) currently applied for sanctioning, this has, at least until now, not induced the IOC accredited laboratories concerned to conduct further scientific research with regard to this issue, other than an epidemiological study of their own test results.

doping cases<sup>44</sup>. However, the IOC is not entitled to award such a right with regard to decisions by International Federations, as this lies outside scope of the IOC's authority<sup>45</sup>. International Federations are completely autonomous from the IOC, which means that the sole authority to include such a provision within their anti-doping rules and regulations solely rests with the International Federations themselves. At this time only half of all Olympic International Federations recognise the jurisdiction of CAS as their final appellate body in doping matters.

Not only does the ADC -incorrectly - pretend to create a relationship between the International Federations and CAS, as the International Federations' final appellate body, it also interferes in matters only CAS itself can - and should- regulate. For example, the ADC contains a provision stipulating that parties who bring their case before CAS must "proceed with all due despatch"<sup>46</sup>. In addition, the ADC also pretends to endow CAS with the power to draw inferences from the dilatory behaviour of one of the parties and to award costs against a party whose behaviour is vexatious, frivolous or dilatory<sup>47</sup>.

## 6. Conclusion

The IOC motto "*Citius, altius, fortius*" does not readily apply to the ADC. On the contrary, compared to the MC and from a legal point of view, it is fair to say that matters have deteriorated rather than improved, especially where the definition of doping is concerned. It seems as if the IOC wishes to depart from the well established and

clear principle of strict liability in doping cases in exchange for a more variable system of incurring liability. It is clear that this does not aid the transparency of the subject matter and will probably cause unnecessary confusion.

Finally, one may wonder if and to what extent the IOC and the international sports governing bodies, in their continuing efforts to protect the positive social values of sports by continuing "strengthening" of their anti-doping rules and regulations, are not in effect violating more general fundamental human rights and principles themselves. This, of course, can never be the goal of creating effective anti-doping rules and regulations. Nevertheless, it now appears as if every sense of direction and proportion is being lost.

*Die armen Schafe sagen zu ihrem Zugführer: 'Gehe nur immer voran, so wird es uns nie an Mut fehlen, dir zu folgen.' Der arme Zugführer aber denkt bei sich: Folg mir nur immer nach, so wird es mir nicht an Mut fehlen, euch zu führen.*

Nietzsche

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44ADC Ch. III, Art. 1.

45 In Art. R27 of the CAS Procedural Rules

it is indicated which cases under which circumstances may be brought before the CAS. One of the conditions is that "the statutes or regulations of ... (the sports)

bodies ... provide for an appeal to the CAS ...".

46ADC Ch. III, Art. 4.

47ADC Ch. III, Art. 5. Part F of the CAS Procedural Rules (Arts. R64-R6) provides for the "costs of the proceedings".



Lecture at the 'On the Road to the Olympics 2004' Conference, Athens, November 2000

# The Bosman Ruling and Nationality Clauses

*A critique of the treatment of nationality clauses in the jurisprudence of the European Court of Justice*

by Heiko T. van Staveren, Professor of Sport and Law, Vrije Universiteit Amsterdam

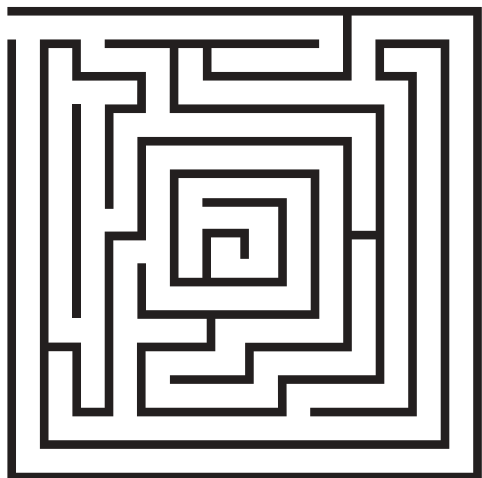
*In the Bosman ruling<sup>1</sup>, the Court of Justice of the European Communities ruled that two distinct regulations were in contravention of Article 39 (which, at that time, was Article 48) of the EEC Treaty, since they impeded the exchange of players/European citizens between two clubs in different member states.*

The first regulation was known in sporting parlance as the transfer system. This system consisted of collective regulations governing the transfer of a player from a club in one member state to a club in another member state. It meant that the new club was required to pay a remuneration to the old club. Many clubs were concerned about the Court of Justice ruling that such regulations were invalid since they were incompatible with Article 39 of the EEC Treaty. They feared that it would give players unlimited freedom to join the club of their choice in another member state. The Court's ruling related to the obligation for a transfer fee to be paid for a player who was in fact free. In other words, the player was no longer under contract to his old club. The Court's ruling did not apply to players who were still under contract to their old club. In the latter case, play-

ers can gain their freedom by first terminating their current contract with their old club. This can be achieved by legal means, by buying out their contract. The clubs have availed themselves of this option by offering players long-term agreements that include provisions for premature termination by buying out the contract. Accordingly, the judgement of the Court of Justice of the European Communities concerning the old transfer system has only meant that another legal channel has been found by which the objectives of the old transfer system can largely be realized. Nevertheless, the practice of buying out contracts gives the impression that the world of sport does not make normal use of regulations pertaining to labour law. According to reports, the European Commission wants to combat this practice by invoking its powers under competition law, as contained in Article 81 of the EEC Treaty. A matter of legal interest is whether it is indeed possible for legal regulations pertaining to labour law to be in contravention of competition law. Furthermore, would it be acceptable to place competition law above labour law? The real question, however, is whether sport clubs will be prepared to passively await the result of

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1. 15 December 1995, case C-415/93, Jur. 1995, p. I-4921, NJ 1996, 637



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such deliberations. That they are already looking for new options is shown by the transfer of the Portuguese footballer Figo from Barcelona to Real Madrid, which involved a type of trade in 'image rights'.

The search for an alternative transfer system can be seen as direct consequence of the Bosman ruling, however a more fundamental question is whether this phenomenon is inherent to the exploitation of sport. It would be better if Europe were pronounce judgement on this matter, rather than simply treating the symptoms. After all, sport is part and parcel of society. It is in recognition of this fact that the Court of Justice of the European Communities has queried the relationship between professional sport and the EEC Treaty. The Court provided further confirmation of that last April, in a judgement concerning two new sport-related cases. One concerned a regulation prohibiting basketball clubs from introducing new players into their teams after a specific fixture date in the annual competition.<sup>2</sup> The other case concerned a selection procedure used by judo clubs.<sup>3</sup> In both cases, the Court ruled that such sporting regulations are unaffected by the EEC Treaty, since they are peculiar to the sport in question. However, the Court issued a warning to the effect that this limitation is restricted to the specific purpose of the regulations concerned.

### Nationality clauses

Both cases made use of the standards employed by the Court to evaluate the so-called nationality clauses. These clauses were a central feature of the Bosman ruling, as was the transfer system in operation at the time. The Court declared them to be invalid in regard to specific regulations of the Union of European Football Associations which imposed restrictions on clubs in the various member states regarding the inclusion in their line-up of footballers possessing the nationality of another member state. The Court ruled that such nationality clauses are incompatible with Article 39 of the EEC Treaty.

Following the ruling, UEFA and various national associations amended their regulations in the area of nationality clauses to a much greater extent than was actually stipulated by the Court. In UEFA competitions between clubs, and in national competitions, clubs are now free to include as many foreigners in their line-up as they wish, regardless of whether these players are citizens of the European community or not. In taking stock, we are forced to conclude that scrapping the nationality clause in various national competitions has enormously increased the numbers of foreign players. This has already led to commotion and protest at the various national sport organizations. The latter are now employing all possible means of limiting the numbers of foreigners in their competitions. I feel that the Court's ruling in this matter went too far, and I would like to present my views for your consideration.

At the time of the Bosman case, the nationality clause was represented by a rule that clubs could not include more than three foreigners in their line-up. A further two foreign players were permitted provided that these players had a long-term association with the country in which the club was located. At that time, several other team sports also had clauses relating to foreigners. Even in more individual sports such as cycling there was a rule that at least half of the cyclists contracted to a given sponsor group must be nationals of the country whose cycling association had officially recognized that group's sponsorship.

Any such collective regulations that discriminate on the basis of nationality are incompatible with Article 39 of the EEC Treaty. Paragraph 2 of that article expressly prohibits any obstruction of the free movement of workers within the European Community that is based on differences in nationality of citizens of the member states. Nevertheless, it is generally assumed that such incompatibility should not be too rigorously pursued in the case of sport. The Court had issued a ruling in 1974, in the well-known Koch/Walrave case, concerning the relationship between nationality clauses and the EEC Treaty.<sup>4</sup> This concerned a regulation of the International Bicycle

Racing Association (UCI) in the early 1970s, which stipulated that at the motor-paced cycling World Championship, the pacesetter and the rider should be of the same nationality. The Dutch pacesetters Norbert Koch and Bruno Walrave contested the regulation since, for the remainder of the bicycle racing season, they acted as pacemakers for riders who, while not Dutch, were citizens of another European state. Their case led to questions being addressed to the Court concerning the compatibility of this nationality clause with Article 39 (which, at that time, was Article 48) of the EEC Treaty. The Court ruled that the EEC Treaty was not applicable to professional sport if it concerned regulations or practices of professional sporting activities that are justified by non-economic considerations related to the specific context and character of given competitions. By way of an example, the Court stated that this exception might apply to international competitions. However, the Court did not state that the exception was limited to this particular example. In addition, a subsequent ruling was not restricted by this limitation<sup>5</sup>, so UEFA, partly supported by previous agreements with the European Commission, considered its position with regard to the regulation to be secure.<sup>6</sup> In the Bosman ruling, the Court expressed the view that these agreements were irrelevant, and made it clear that discrimination on the basis of nationality was only permitted in the case of so-called international matches but not in any other matches.

By imposing a total ban on limitations to the inclusion of foreigners in other top sporting competitions the Court has, in my view, given insufficient consideration to the specific characteristics of sport. Furthermore, in the Bosman ruling, the Court failed to clarify the reason for making an exception in the case of international matches.

Although foreigner clauses or nationality clauses are indeed an impediment to the free movement of workers, in terms of their origin and nature they have little in common with the set of regulations referred to as the transfer system. The origin of nationality clauses can be traced back to the national and regional rivalries that underpin all sports competitions. It was here in Athens, in 1896, that Baron Pierre de Coubertin linked national rivalry to the modern Olympic Games. His idealistic objective was to get nations to pit their strength against one another on sports fields rather than on battlefields. In practical terms, nationality also lent clarity to the composition of the opposing parties in a match, since these were classified by national borders or by the boundaries between districts. It was on this basis that, during the last century, sport developed into the global phenomenon that it is today. Hence it is a generally accepted fact that, in terms of competitions and organization, sport discriminates, by definition, on the grounds of nationality. The conflict between sport and legal rules that prohibit discrimination on the basis of nationality arises because these rules make no allowance for sport. However, conflicts between legal rules and sports rules are not always resolved in favour of the legal rules. The law must also respect sports rules, especially those that are fundamental to the prestige and social acceptance of sport. For example, the acceptance of contact sports such as judo, wrestling and boxing has certain legal consequences. Boxers, judoka's, wrestlers or practitioners of other contact sports cannot be held legally liable for any injury inflicted on an opponent, provided that they have adhered to the rules of the sport during the match in question. In Dutch jurisprudence, the special position enjoyed by sport in liability law is supported by the argument that the participants in sporting events, unlike those going about their business in society at large, can to some extent expect to be involved in mutually hazardous behaviour engen-

2. 13 April 2000, C-176/96, <http://europa.eu.int/jurisp/> (Lehtonen)  
3. 11 April 2000, additional cases C-51/96 and C-191/76, <http://europa.eu.int/jurisp/> (Deliège)  
4. Court of Justice of the European Communities 12 December 1974, 36/74 Jur. 74, p. 1405, NJ 1975, 148 (Koch&Walrave-UCI).

5. Court of Justice of the European Communities 14 July 1976, 13/76 Jur. 1976, p. 1333, NJ 1977, 139 (Donà-Mantero)  
6. In 1991, following a series of meetings with Mr Bangemann, vice-chairman of the Commission, UEFA decided on the above nationality clause (see paragraph 27 of the Bosman ruling).

dered by the match itself.<sup>7</sup> This case will be argued in much the same way in other European countries since, if they were not an exceptional case, many contact sports - especially combat sports - would be prohibited.

### Lehtonen and Deliège cases

However, this exceptional position only related to those rules that characterize the sport as such. It is from this quality that they derive their legal immunity. In its last two rulings in this area, the Court of Justice has been clearer than it was in the case of the Bosman ruling. In the ruling of 13 April 2000, the Court was required to answer the question of whether certain rules of the national and international basketball associations were in contravention of Article 39 of the EEC Treaty. This was because the rules in question forbade players from other member states from competing in championship or relegation matches if their transfer had taken place after a certain date. It was these rules that prevented the Finnish basketball player Jyri Lehtonen from participating in the play-offs of the Belgian club Castors Braine. His transfer in the Spring of 1996 had taken place after the deadline. The Court ruled that the regulation did indeed impose a restriction on the free movement of workers, as referred to in Article 39 of the EEC Treaty. However, an exception can be made if the rules are only imposed in connection with the orderly course of the competition. This means that they must be non-economic in nature and only associated with the sport in question. The Court regarded this exception as feasible since any transfers taking place after the set deadline could exert considerable influence on the competitive value of a team in the course of a championship. This would be at the expense of the comparability of the results obtained by the various teams competing in that championship, thereby threatening the orderly course of the entire championship. In other words, the rule guarantees a fair contest, which is one of the most essential principles of sport. Such rules must be proportional, however, and this was probably not the case with regard to the basketball regulation. This was because the deadline for players from the European zone was a month earlier than the deadline for players from outside the zone. Had Jyri Lehtonen been an American transferring from America rather than a Fin, then he could have played for the club without any problems.

The other case concerned the matter of whether selection regulations contravened the free movement of services, as referred to in Article 59 of the EEC Treaty. Here, it was the selection rules of judo that were being challenged by the judoka Deliège. Her argument was that these rules set a maximum limit on the number of participants per national federation. She also argued that selection for participation had been made entirely dependent on the decision of the national judo federation. Here too, the Court ruled that as long as a selection criterion derives from the need to organize matches in a fair and ordered way then it cannot be incompatible with the EEC Treaty, since the rule is non-economic in nature. As with the Lehtonen case, this judgement can clearly be traced back to the fundamental rules for a fair contest. It is these rules that give sport its socially accepted aspect.

Such clarity is lacking in the exception created for sport by the Court of Justice with regard to the conflict between the non-discriminatory rules of the EEC Treaty and sports rules that discriminate on the grounds of nationality. In the Bosman ruling, this exception is expressly restricted to the nationality stipulations applicable to competitions, in which teams are representing their countries (paragraphs 76 and 128). It should be understood that this refers to competitions held at the Olympic Games or to competitions held in the context of European or World championships in various branches of sport. However, neither in the Bosman ruling nor in the preceding rulings does the Court clearly demonstrate the link with the fundamental characteristics of sport. It was this lack of clarity in the Bosman case that caused Advocate General Lenz to query the 'exceptional situation' cited by the Court in previous rulings<sup>8</sup>. He cited the Olympic Games and the Football World Championship in this regard, observing that this 'exceptional situation' specifically applies to those events that involve the largest sums of money. Sadly Lenz did not pursue the

matter any further, simply remarking that such nationality clauses were never put forward in the Bosman case. The Court of Justice of the European Communities, which routinely examines clauses of this type, has nevertheless failed to further clarify the legal background of the exceptional situation as it applies to international competitions. This leaves one with the distinct impression that these arguments are based on emotional arguments rather than legal ones.<sup>9</sup> The emotional argument is based on the impression that professional sportsmen and sportswomen are representing their country in such competitions. This has no basis in terms of the law, however. Quite the contrary in fact, as far as the law is concerned everything is negotiable. Governments do not select sportsmen and sportswomen, nor do they send them abroad. These tasks are left to private sporting organizations, the athletes' sporting federation or their National Olympic Committee. In such competitions, therefore, they are only representing their national federation or, in the case of the Olympic Games, their National Olympic Committee. It is not a sound legal argument to state that only these organizations are authorized to select athletes for the event in question if these athletes are nationals of the country in which the sports federation or National Olympic Committee are based. This restrictive authorization, which is also used to discriminate on the grounds of nationality, should first be tested for validity against the Treaty. As Advocate General Lenz has correctly pointed out, for the events in question this is not simply about sport, there is much more at stake. The national rivalries involved mean that, in comparison to other competitions, these top sporting events are also top economic events in the world of sport. In view of this, there is every reason to invoke the EEC Treaty. Accordingly, sound legal arguments are required if they are to be granted exclusion.

### International representative matches

The lack of transparency that is apparent in the argument supporting discrimination in international sports competitions makes it all the more difficult to understand why the Court stoutly refuses to allow discrimination in club matches, on the grounds that this is in contravention of the EEC Treaty. The Court merely emphasizes the fact that restricting the numbers of foreigners per club does not affect specific matches in which teams represent their country (paragraph 128). As has been pointed out, there is no legal distinction between this case and that of international matches. As a result, the only option is to cast around for emotional arguments in favour of granting exception for the clauses in question. However, the Court refutes such arguments and it is this that causes me to question the Court's reasoning. In paragraph 131 for example, it is contended that 'the link between the club and the member state in which it is based cannot be seen as inherent to the sporting activity in question, as with the link between this club and its district, town or region'. This reasoning is quite out of touch with the real world, since clubs do everything in their power to demonstrate their link with their district, town or region. Indeed, a great many clubs carry the name of their district, town or region. The Court evidently bases this strange view of the world on the fact that there are no longer any rules stating that clubs in various districts, towns or regions are restricted to including in their competition lineup only a limited number of players from other districts, towns or

7. H.R. 19-10-1990, NJ 1992, 621 (eye lost due to heedless stroke in a tennis match) and H.R. 28-06-1991, NJ 1992, 622 (kicking someone when he was down, during a football match).

8. With regard to the view that discrimination on the grounds of nationality should be permitted in the case of international matches, paragraph 139 of his conclusion states that: "That conclusion appears obvious and convincing, but it is not easy to state the reason for it. In view in particular of the fact that matches between national teams - as in the football World Cup - nowadays indeed have considerable financial significance,

it is hardly still possible to assume that this is not (or not also) economic activity. The exception accepted by the Court cannot be based on Article 48. Since the question is not relevant for the decision in the present case, I need not discuss it further in this context."

9. One argument might have been that sport is a cultural asset which is stimulated at all levels by such concepts of national rivalry. The Court did not wish to use this approach when demarcating the Treaty's areas of applicability, accordingly it rejected the arguments of this kind that had been put forward by the German government (paragraph 72).

regions against which they play in their national championships. At the end of paragraph 131 it states: "Although clubs from various districts, towns or regions play against one another in national championships, there is no rule to the effect that, for the purpose of such games, clubs are only allowed to include a limited number of players from other districts, towns or regions in their line-up". In my view, however, it is quite implausible to suggest that the Court's ruling in the Bosman case would have been any different if UEFA had stipulated that, for the purpose of UEFA competitions, clubs could only include in their line-up players who were connected to their own district, town or region. Furthermore, such a rule would pose no great problems since, in most cases, it would be a fairly simple matter for players to move to the district, town or region in question.<sup>10</sup> Although such rules existed in the past, to emphasize the aspect of regional rivalry in competitions, they have now been absorbed into the nationality clauses that developed with the rise of national and international competitions. This has caused the interregional and interdistrict competitions to disappear, so neither districts nor regions play any part in the competition. These matches have been replaced by those between national federations and any regional rivalry associated with the sport is now primarily based on the club's association with the region. Regional rivalry associated with the sport has not disappeared entirely, instead it has been partly assimilated by the national rivalry associated with the sport. The national sport federation plays a pivotal role in this. If the Court of Justice bases the immunity of the nationality clause for international matches on the national rivalry associated with the sport then, in the interests of consistency, it must recognize that this will work its way down to club level to some extent. The sequence of events involved is as follows. In selecting sides for international competitions, these clubs' federations are allowed to select only players with the nationality of the country in which the federation is based. Accordingly, it will be very much in each federation's interest to ensure that there is sufficient space in the top clubs of their national competitions for home-grown talent. I therefore take

the view that there is an argument, inherent to sport itself, for permitting club sides to operate a limited foreigners clause. I quite understand why certain individuals, some of them in top political circles in Spain, expressed their concern during the 1998 World Championships in France. At issue was the fact that a player such as Amor, who is prominent in top Spanish competitions, was restricted to a place on his club's substitutes' bench. Following the Bosman ruling, the national rivalry associated with the sport and the relationship in that regard between club football and international football have not lived up to their promise. That relationship is the sporting, non-economic consequence of retaining the need for clauses limiting the number of foreigners per club. As far as the federations of the member states are concerned, this need will only disappear when Europe starts participating in sport as a single entity. It will then enter teams possessing European nationality for various World Championships and the Olympic Games. However, the current federations are no longer national federations. Instead they are more district-based, while above them is a European 'national' federation. Although the Court of Justice has prohibited the use of nationality clauses by club sides, the cause of the problem still remains. European sports politics must speak out and make it clear whether the aim is for Europe to be represented as a single nation in the world of sport, as in other areas. If this is not the case then club sides should once again be permitted to operate a restricted nationality clause.

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10. Professional football was approved in Britain in 1885, however this was subject to the strict condition that clubs must not take on players living outside a 6-mile zone centred on the club's registered place of business. Furthermore, professional footballers could only join the line-up of teams representing their

district or country if they had played for the same club for two years (or more). See Green, G., Usill, H.V. and Witty, J.R., *The History of The Football Association*, published by the F.A. in 1953 to mark the 90th anniversary of the Football Association, p. 107-108.



## 11th Asser Round Table Session on International Sports Law

Thursday 30 May 2002

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*Speakers*

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**Roberto Branco Martins**, University of Amsterdam, *presenting a FBO-commissioned study on the Round Table Session's subject*;

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**Theo van Seggelen**, Chairman of VVCS (Netherlands Professional Football Players' Union) and General Secretary of FIFPro (International Federation of Professional Football Players)

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# Corporate Naming Rights - A New Phenomenon in Sports Marketing

by Ian Blackshaw\*

## Introduction

Originating in the States, Sports Sponsorship has spread across the world and grown into a US\$22 billion global business, as companies and firms have come to realise the value of associating themselves and their products and services with prestigious sports events.

As one leading International Sports Marketing Agency (ISL) once observed:

*"sports sponsorship has evolved to form an integral part of brand marketing, mature enough for even the most conservative companies to recognise it as a natural, indispensable ingredient in their marketing mix".*

In fact, sports sponsorship is now widely perceived as a more attractive alternative to other forms of traditional advertising and promotion, particularly in terms of cost effectiveness, which in these highly competitive times is a crucial consideration.

Similar to sports sponsorship, another kind of marketing phenomenon, delivering equally attractive benefits at considerably less cost than traditional advertising, has grown up in the States. This is corporate naming of sports stadiums and arenas. It has been described by one of its users as:

*"the new wave in sponsorship...[which] benefits everybody".*

In this Paper, we will take a look at the reasons for the rise in popularity of attaching corporate names to stadiums and arenas, and also at some of the contractual legal issues that the granting and exploitation of the corresponding corporate naming rights can give rise to in practice.

## Corporate Naming of Stadiums and Arenas

The modern practice of unconnected corporations buying naming rights of stadiums and arenas seems to originate in the purchase by the Great Western Bank of the naming rights to the Los Angeles Forum in 1987. Previously, a number of stadiums had been named after their corporate founders, for example, the 'Busch Stadium' in St. Louis.

The practice of naming stadiums and arenas after corporations has grown over the years, not only in the States, but also in Canada, and not only in relation to new stadiums and arenas, but also to refurbished ones.

The practice not only provides income to the stadiums and arenas concerned, but also provides the corporations, who hold the naming rights, with very valuable advertising, promotional and public relations benefits. Indeed, without the revenues from the sale of corporate naming rights, many stadiums and arenas, without any financial support from the public sector, would never be built and local communities would suffer by being deprived of modern sports facilities. The sale of corporate naming rights also benefits publicly owned

sports facilities by providing additional income that can be used for enhancing them.

So, what are the benefits to corporations in holding naming rights of sports facilities?

## Corporate Naming Rights Benefits

Corporations benefit from naming rights in a number of ways.

The use of a corporate name on a sports stadium or an arena receives exposures and impressions, which are difficult, if not impossible, to quantify. Television, radio and the print media all refer to the corporation's name when reporting on events held at that facility. The name of the stadium also appears on tickets, programmes and other consumer items. Also, people can see the name on the external signage when attending, walking, driving, or even flying past the facility.

All of this adds up to a cost-effective form of advertising for corporations and their products and services. For example, in 1991, America West Airlines purchased the naming rights to a new arena being built for the 'Phoenix Suns' at a cost of US\$550,000 for the first year, with an annual uplift of 3%. During the 1993 NBA Finals, when the 'Suns' hosted the 'Chicago Bulls', a single 30-second commercial spot on NBC cost US\$300,000. America West's name and logo were seen countless times at a cost of US\$583,495, less than the cost of a one-minute television commercial, namely US\$600,000.

Corporate naming rights also confer a unique and exclusive kind of benefit on those who hold them, in that they are attached to a relatively limited number of major sports facilities. They enjoy, therefore, a certain *cachet*.

They also create goodwill for corporations by allowing them to project a positive image in the community in which the sports stadiums and arenas are located.

Naming rights can also be the vehicle for raising public awareness of corporations and their products and services in regions where they are starting up or expanding their business operations.

Naming rights also allow for cross-promotion through "*product tie-ins*" at the sports facilities. For example, in the case of a bank owning the naming rights, they will have the right to have ATMs placed in the stadium or arena.

Naming rights often bring with them the right for the corporation to receive, or purchase, a box or a suite at the stadium or arena for corporate hospitality purposes.

Finally, and perhaps most important of all, the costs of purchasing the naming rights can be used by the corporation as tax deductible advertising expenses, under the relevant provisions of the US Internal Revenue Code. These costs are tax deductible in many other countries too.

In order to enjoy the benefits of corporate naming arrangements, the rights themselves need to be well defined and incorporated in, as far as legally possible, water-tight Agreements. We will now take a look at some of the contractual legal issues that need to be addressed in order to achieve these results and gain the full benefits of the naming rights concerned.

## Contractual Legal Issues

As with any kind of Rights Agreement, perhaps the most important provision of all is the "*grant of rights*" clause.

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This defines the nature and scope of the rights granted, and needs to be drafted very carefully and precisely, to avoid any ambiguities and uncertainties, which can lead to misunderstandings and differences, which, in turn, can lead to disputes, which can be time consuming and costly. For example, are the rights exclusive or non-exclusive? And what is included in the rights package?

As part of a growing trend, in addition to the naming rights granted, other commercial opportunities are included as part of a marketing package. These additional rights could include rights to boxes or suites for corporate entertaining, franchise rights, including so-called 'pouring rights', particularly important in the case where a soft drinks company is concerned, team sponsorship rights, and even facility financing rights, where a bank or other financial institution is involved. Such "tying" arrangements may, however, give rise to Anti-Trust problems in certain circumstances.

For example, in 1995, Pepsi acquired quite a comprehensive package of marketing and promotional rights, as part of its naming deal in relation to a new sports facility for the 'Denver Nuggets' and the 'Rocky Mountain Extreme'. For an undisclosed sum, believed to be between 35 and 68 million dollars, Pepsi acquired the exclusive naming and distribution rights for the facility, plus sponsorship rights for the 'Nuggets' and the 'Extreme', joint marketing opportunities on television and radio, as well as exclusive marketing rights at other tourist attractions within the entertainment complex surrounding the arena. Quite a stitch up!

Allied to the "grant of rights" clause, is the "duration" clause, which is equally important. Naming rights can be granted for any length of time ("term"). The longer the term, the greater the value and, of course, the greater the price. In general, however, the rights tend to be granted on an annual renewable basis. If they are granted for a fixed term, an option to renew is often included in the Naming Rights Agreement (see later). Rights granted in perpetuity can cause legal problems - interminable agreements are generally frowned on by the Courts and also Competition Authorities.

Naming rights packages need to be accompanied by certain "warranties" by the owner of the stadium or arena, to ensure that they are worth the vast sums paid for them.

For example, these rights are not worth very much if the stadium or arena does not stage many events in the course of a year. The presence of a professional or collegiate team playing its home games at the facility is normally a contractual requirement in naming rights deals, because it guarantees a minimum number of dates that a facility is in operation. This is covered by warranties on the part of the owner of the facility, who warrants its active use during the term of the Naming Rights Agreement.

Of course, in the case of multi-use facilities, that is, those that stage sports and other events, such as concerts, the need for such warranties is not so important. The legal effects and practical consequences of any breaches of such warranties need to be spelled out in the Naming Rights Agreement.

Another important clause in any commercial agreement is the "consideration" clause. This defines the 'quid pro quo' for the rights granted. This need not always be money, but can in sponsorship type deals, such as naming rights arrangements, be in non-monetary form, that is, value in kind. This could, for example, in the case of a soft drinks company, be the supply of free product to a sponsored team. In any case, the amount of the monetary consideration and the value of the benefit in kind need, in each case, to be clearly defined.

So also do the payment arrangements - when and where they are to be made. Often, in naming rights deals, instead of a lump sum fee, an annual rights fee is payable, subject to a yearly uplift to cover inflation. This also needs to be spelled out in the Naming Rights Agreement, especially if the uplift is linked to some cost of living index. The payment of interest for late payments, the rate of interest and when it accrues also need to be covered in the Agreement.

The "termination" clause is also an important contractual provision. The grounds for termination, who may terminate and the effects

of termination need to be precisely stated in the Agreement. A provision is often included, whereby non-material breaches can be remedied by the party in default within a specified period of time, say, 15 days, failing which the other party may terminate the Agreement. What is material and what is not material needs to be defined and also whether "days" are natural days or working days.

On expiration of the Naming Rights Agreement, the naming rights automatically come to an end by effluxion of time. So, what happens then? In theory, the owner of the stadium or arena can grant the rights to someone else. But this may prove costly to the owner, who would have to incur the expense of repainting or replacing signs, reprinting tickets, producing new seat tags and other items, such as plastic cups and paper napkins, and so on, depending on the extent of the 'branding'. It is more likely that the owner will seek to do a new deal with the former holder of the naming rights.

From the point of view of the rights holder, it is prudent and advisable to include in the Naming Rights Agreement an option to renew the Agreement, or, at the very least, a right of first refusal to be granted the naming rights. Any such pre-emptive right should be accompanied by a 'matching option' in favour of the former holder of the naming rights. In other words, if the conditions for granting the rights for a new term are refused by the former holder of them, because they are financially unacceptable, then the rights owner cannot offer a third party better terms than those refused by the former holder of the rights, without first offering the same deal to the latter. It will be appreciated that options to renew, rights of first refusal and matching options need to be very carefully drafted. In particular, the periods of time and the manner in which they are to be exercised need to be precisely defined. Options and pre-emptive rights can also raise Competition Law issues.

Another important contractual provision to include in a Naming Rights Agreement is a "confidentiality" clause. For business reasons, the parties to the Agreement will wish to keep the terms confidential, especially the financial ones. They will also wish to control releases of information to the media, as well as the holding and conduct of any Press Conferences. Any secrecy obligations will be subject to any requirements by law to disclose any confidential material to third parties, for example, in Court Proceedings. Furthermore, any information of a confidential character that is already in or subsequently enters the public domain, through no fault of the parties to the Agreement, is not subject to the secrecy obligations undertaken by them.

Lastly and by no means least, the parties to a Naming Rights Agreement need to include a "Dispute Resolution Clause". In other words, they need to decide, in advance, how any dispute arising between them in relation to the Agreement is to be resolved. Nowadays, there are a number of options for the parties to choose from for settling their disputes.

They can be traditional and go to Court. They can be more adventurous and choose arbitration. Or they can be thoroughly modern and opt for some alternative form of dispute resolution ("ADR").

ADR comes in several different forms:

- Conciliation;
- Mediation;
- Mini Trials;
- Expert Determination;
- Good Faith Determination.

ADR is flexible, informal, confidential, speedy and inexpensive. Whereas, Court and Arbitration Proceedings are, in comparison, complex, formal, slow and expensive.

Of all the forms of ADR, mediation is proving to be a popular and effective way of settling sports disputes. The settlement in July 1999 by mediation of the dispute between the boxer, Richie Woodhall, and

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the boxing promoter/manger, Frank Warren, is a good example. Perhaps the main reason for the success of mediation is that the mediation process, which is a kind of commercial negotiation, is designed to preserve and restore personal and business relationships. This is particularly important in a sporting context, where the sports world is a comparatively small one. However, mediation can only work in those cases where the parties in dispute wish to reach an amicable settlement. Likewise, if the parties need to establish a precedent or require some form of injunctive relief, then Court Proceedings need to be taken.

In the Naming Rights Agreement, the parties can - and should - include a provision, stating the form of dispute resolution that it is to apply in the event of a dispute. This provision should also include other practical details, such as, in the case of mediation, the Body that will organise the mediation and appoint the mediator and where the mediation will take place. For example, mediation is now offered by the IOC Court of Arbitration for Sport, based in Lausanne, Switzerland, and also by the London-based UK Sports Dispute Resolution Panel.

The dispute resolution clause may include a number of alternative forms of dispute resolution, specifying the circumstances in which they will apply. For example, the clause may provide for expert determination for settling technical matters, such as intellectual property disputes, and mediation in all other cases.

In any case, the parties can always agree on an *ad hoc* basis, but perhaps the most important point here is "agree". It is often better to agree in advance when the situation is less emotive.

Now let us take a look at the potential for exploiting naming rights in Europe.

### The European Scene

As with many things, sports ideas and developments in the States have a habit, in time, of spreading to the rest of the world - and not least to Europe. New sports stadiums and arenas, similar to the sports and entertainment complexes, which are growing up in the States, are beginning to be developed in Europe.

For example, the "Hartwall Arena" in Helsinki, Finland. This seats up to 14,000 people and features 78 suites. It is a multi-purpose facility, and has established itself as the country's top location for sport, music and corporate events. It incorporates many media facilities, including state of the art broadcast production and editing suites.

In the UK, 'Bolton Wanderers' Football Club play at the 'Reebok' Stadium and 'Stoke City' Football Club play at the 'Britannia' Stadium. And the famous Oval cricket ground in London has been re-named 'The AMP Oval' after the Australian Financial Services Company 'AMP', which has paid £2 million for a five years' exclusive naming rights deal. Incidentally, it should be noted that the use of such naming rights has an impact on the traditional sports marketing model of a 'clean stadium' from a branding and promotional point of view.

Generally speaking, however, Europe tends to be soccer mad and tends to build only soccer stadiums. However, the promoters of new soccer stadiums being planned and built, like the proposed but still not yet agreed new Wembley Stadium in North London, are beginning to realise that, to rely only on gate receipts, is not enough. These stadiums need to generate revenues from other activities, such as the

sale of corporate naming rights. In fact, a multi-national company is reportedly prepared to pay £10 million per year for the naming rights to the new Wembley stadium when it is built. Another solution to this financial problem is to incorporate arenas into new stadiums to attract other sports, such as track and field, and other events, such as pop concerts. The actual format/composition of the new Wembley Stadium - a sports stadium or an arena/entertainment/leisure complex - continues, as mentioned, to be a source of controversy.

As part of the funding process, additional revenues can also be generated from various kinds of sponsorship, including the sale of corporate naming rights, combined with, as is increasingly happening in the States, other marketing and promotional packages. However, packages, like the Pepsi one previously mentioned, may encounter Competition Law problems. In any case, we Europeans can, no doubt, learn from our American cousins how to deal with and overcome any legal threats of this or, indeed,

any other kind. In many respects, that is exactly how the European Competition Rules have developed, based on the experience of the Anti-Trust Authorities in the States.

Likewise, Europe can also learn from the practice in the States of granting naming rights to lending institutions that finance private sports facilities. In these cases, the bank or finance house arranging the finance acquires the naming rights to the new facility and uses the naming rights fees to reduce the debt repayments on the loan. It also acquires valuable promotional and marketing rights as part of the rights package as well.

Furthermore, new and existing stadiums and arenas in Europe will also need to learn from the States who are wiring up their facilities to allow spectators to take full advantage of the digital and interactive age directly from their seats! Such developments also offer further marketing opportunities for creative sports marketers.

### Conclusions

The use of Corporate Naming Rights as an innovative form of sports sponsorship is a growing marketing phenomenon in the States and is also beginning to spread elsewhere, including many parts of Europe.

Corporate Naming Rights offer a wide range of benefits to stadium and arena owners and corporations wanting to associate themselves and their products and services with major sports and sports events. They also provide, in many cases, a cheaper and more effective form of advertising and promotion.

As further investment in new sports facilities in Europe grows, to meet the increasing demands of event organisers, sports players and spectators alike, Corporate Naming Rights Packages are likely to increase in Europe, as they are continuing to do so in the States, particularly those linked to financings of new stadiums and arenas. The new Wembley Stadium, for example, could benefit from a corporate naming rights arrangement, particularly as financing the £712 million project is proving problematical.

Like other kinds of commercial and financial arrangements, they need to be well defined and incorporated in well-drafted Agreements. And, where disputes do arise, these need to be settled by the most appropriate and effective means available, not forgetting the new forms of alternative dispute resolution, especially mediation.

## Asser-Leuven-Tilburg Sports Law Seminar

Seminar on *Transfers and Agents*, University of Leuven, Wednesday 15 May 2002  
Speakers: Roger Blanpain, Stefan Kesenne, Marc Boes, Johnny Maeschalck, Frank Hendrickx, Dirk Degraen (Sport & Entertainment Management), Steef Jellinghaus

# Sports Licensing and Merchandising - The Legal and Practical Aspects

by Ian Blackshaw

## Introduction

Sport is now a global industry and accounts for more than 3% of world trade and more than 1% of the GNP of the European Union (EU).

In the EU, the sports industry has created - directly or indirectly - more than two million jobs.

In the UK, sport provides employment for some 420,000 people, and is worth £12 billion a year in consumer spending.

With the advent of the internet and the mega sums being paid for broadcasting rights of prestigious sports events - for example, the English Premier League in the Summer of 2000 sold its broadcasting rights for the next three seasons for a staggering £1.65 billion - the sports industry is set to grow even further in the future.

Not only are broadcasters scrambling for sports rights, but so also are sponsors, who are prepared to pay in the region of US\$50 million for an exclusive world-wide association with the Olympic Games, to promote their products and services. In 2000, the world-wide market for sports sponsorship grew by 14% to US\$22 billion, whilst spending in Europe alone increased by 16% to US\$6.5 billion. The global figure is expected to rise to US\$26 billion over the next five years! Also, a three-year exclusive sponsorship of the English Premier League now costs £48 million!

Likewise, licensing and merchandising rights in relation to sports events are also much in demand, commanding high returns for the rights owners (licensors) and concessionaires (licensees) alike.

But licensing is a specialised business and sports licensing presents its own particular challenges and traps for the unwary. Getting it right brings attractive financial rewards - getting it wrong can result in financial losses and ruin. See 'Licence to thrill' by I. Blackshaw in 5 Sports and Character Licensing 2000 at pages 6 - 8.

Sports licensing and merchandising programmes offer a wide range of possibilities including:

- Sports event and team logos and emblems ('logo licensing');
- Sports event and team 'mascots' ('character licensing');
- Sports stars licensing ('personality licensing'); and
- Sports clothing and footwear licensing ('product licensing').

In the time available, I shall summarise the main legal, commercial and practical issues involved in sports licensing and hopefully point you in the right direction. But, as with all things legal, and lawyers in particular, no guarantees are given!

## Contractual Issues

The terms and conditions of the licensing deal need to be well defined and incorporated into a clear and unambiguous Licence Agreement. A 'back of the envelope' approach will not do!

Even worse are oral agreements, which Sam Goldwyn, of Metro Goldwyn Mayer fame, reputedly once said are "not worth the paper they are written on!" Badly drafted Agreements lead to uncertainties and misunderstandings, which, in turn, lead to disputes, which can and often do prove costly in terms of time and money for all parties concerned.

The need for a well-drafted Agreement cannot be overstated and

repays all the effort, time and money involved in producing one.

So, let us take a look at the main provisions that need to be included in a Sports Licence Agreement.

Perhaps the most important one is the so-called 'grant of rights' clause. This clause defines the nature and the scope of the rights granted by the licensor to the licensee in relation to the particular sports event. This clause will specify whether the licence granted is an 'exclusive' or 'non-exclusive' one. It will also define the 'licensed products' to be included in the licence, as well as the 'distribution channels' through which they may be sold. We will return to this subject, which has important commercial and financial consequences later.

The 'grant of rights' clause will also specify the territories in which the products may be sold, as well as the 'term' during which the licence will operate. It will often include other restrictions on the use of the 'licensed products', for example, as 'premiums', give-aways or other sale promotional items.

It should be noted, *en passant*, that restrictive clauses, such as these and, indeed, any others, could give rise to competition law issues, especially at the EU level under Articles 81 and 82 of the European Treaty. This is a complex subject and needs a specific presentation, or even an entire Conference, to do justice to it. However, to underline its importance, suffice to say that Licensing Agreements have received a great deal of attention from the EU Competition Authorities over many years and that breaches of the EU Competition Rules can result in substantial fines - up to 10% of the world-wide group turnover of the offending party! Notification of offending Agreements can avoid the imposition of fines.

In defining the rights to be granted by the licensor to the licensee, particular attention needs to be paid to the legal nature and status of those rights. In other words, what 'intellectual property rights' are involved? Also, the Licence Agreement needs to deal specifically with internet and other electronic rights - whether or not they are included. We will also return to both these important matters later.

As the rights being granted relate to a particular sports event, there will also be a specific prohibition against using or permitting the rights from being used in any manner contrary to public morals, or which compromise or reflect unfavourably on the good name, good will and reputation of the sports body concerned, its event or its sport. Likewise, the grant of rights will be made subject to the rules of the sports body concerned, for example, in the case of an Olympics Merchandising Programme, the Olympic Charter.

If the Licence Agreement is an exclusive one - in other words, only the licensee (not even the licensor) may exploit the licence products in a particular geographical territory during the term of the Agreement - it is usual to impose a minimum annual sales performance on the licensee, in order to maximise the financial returns from the licence. If the sales of the licensed products do not reach the specified minimum, it is open to the licensor to terminate the Licence Agreement.

Combined with such a 'performance clause' is an express undertaking by the licensee to "actively stimulate the demand for and promote the sale of the licensed products within the territory during the term".

In settling the precise terms of the performance requirement, the



licensor and licensee should agree on realistic targets. Otherwise, there will be problems of enforcement and viability of the Licence.

A 'performance clause' also has intellectual property implications; likewise do quality control provisions in the Agreement, both of which I shall go into in more detail later.

An equally important provision in any Licence Agreement is the 'consideration clause' - the financial *quid pro quo* for the licence. We will deal with this particular matter in more detail later, as well as payment terms and special financial considerations that need to be taken into account in the case of cross-border Licence Agreements.

Sports Licence Agreements, like other Licence Agreements, are often entered into on a personal basis - in the sense of the personal characteristics, for example, technical competence and financial standing of the licensee (a so-called '*contract intuitu personae*'). Accordingly, the Agreement should be expressly stated to be a contract that can be terminated in the event that such personal characteristics cease to exist. For example, this can occur on a change of ownership or control of the licensee, rendering perhaps the new owner of the licence unsuitable.

It is also usual not to allow any assignment or sub-licence of the licence outside the licensee's corporate group, which needs to be defined, without prior written approval. In such cases, licensees will often require the inclusion of wording, where not legally implied, to the effect that such consent is not to be unreasonably withheld or delayed.

Termination provisions should also be included in the Licence Agreement. The grounds for termination, by either party, and the practical consequences should be clearly stated. It is usual to make a distinction between a 'minor' breach and a 'major' one. In the case of the former, the party in breach is usually given an opportunity of remedying the breach within a specified period of time (e.g. 15 days); whereas, in the latter case, the Licence Agreement can be terminated forthwith, that is, without notice. Where notice periods are specified in 'days', the Agreement should define whether 'days' are 'natural days or working' ones. Likewise, in the case of 'months', these should be defined as 'lunar' or 'calendar'.

The legal and practical consequences of termination or expiration of the licence should be particularly spelled out in the Agreement in the case of Sports Licences. Sports events are often cyclical - the World Cup, for example, takes place every four years - and the circulation of out-of-date merchandise can cause commercial confusion and loss of value. It is usual, therefore, to include a provision in the Licence Agreement requiring the licensee to clear the market of licensed products within, say, six months of termination/expiration, after which any remaining stocks should be destroyed.

Another important and sensitive area is confidentiality. Sports Bodies like to control the dissemination of confidential information relating to their activities, especially their financial and commercial ones. Accordingly, it is usual to include appropriate provisions on keeping the terms of the Licence Agreement strictly confidential, especially financial details, and also controlling the issue and contents of press releases concerning the licensing deal.

Finally, careful attention should be paid to the use of so-called 'belt and braces' clauses. These include, *inter alia*, 'waiver', 'severance' and 'notice' clauses. They also often include so-called 'entire agreement' clauses, which can constitute a two-edged sword. The clause normally runs as follows:

*"This Agreement constitutes the whole Agreement between the parties relating to its subject matter and supersedes and extinguishes any and all prior drafts, agreements, undertakings, representations, warranties and arrangements, whether written and oral relating to its subject matter".*

In the recent case of *Julian White v Bristol Rugby Ltd* (Decision of Judge Havelock-Allan QC in the Bristol Mercantile Court on 17 August, 2001), such a clause prevented a rugby player from taking advantage of an alleged oral opt-out clause in an employment con-

tract with serious financial and other consequences (see case report and comment in the January/February 2002 issue of the Sports Law Bulletin vol 5 no 1 at page 3).

### Intellectual Property Issues

Before granting or taking a Sports Licence Agreement, the legal nature and status of the rights being granted need to be considered. Are the rights concerned intellectual property rights and, therefore, protected by Law?

Most Sports Licence Agreements are related to particular sports events and involve the use of the particular 'logos' for those events. Essentially, sports logos are designs used for identifying and promoting particular sports and sports events. They often incorporate the name of the particular sports event in distinctive lettering as part of the design.

Insofar as they are original and distinctive, they are registrable as 'device marks' under Trade Mark Law. A prospective licensee will need to check, therefore, whether the sports logo has been registered as a trade mark, or if not, whether an application for registration has been filed at the Trade Marks Registry - or indeed whether the logo is legally registrable at all. If the logo has been registered as a Trade Mark, any unauthorised (i.e. unlicensed) use can generally be legally prevented. This will affect the value of the Licence. But see the recent case of *Arsenal Football Club Plc v Matthew Reed* (*The Times Law Report* of 26 April 2001).

On the subject of trade mark registration and protection generally, see the article, entitled '*Trademark protection issues - why register?*' 1999 1 Sports and Character Licensing at page 26.

As to the value of the goodwill in a trade mark, trade name or initials and the extent that it can be legally protected, see the recent case of *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc.* involving the commercial use of the initials 'WWF' decided by Mr. Justice Jacob in the Chancery Division of the High Court on 10 August, 2001. A summary and a comment on this case appears in the September/October 2001 issue of the Sports Law Bulletin vol 4 no 5 at page 5.

Sports logos can also benefit from legal protection as an 'artistic work' under Copyright Law. Again, the legal status needs to be checked, because, if the logo does not enjoy trade mark or copyright protection, generally speaking, anybody can use it and the Licence is worthless.

The prospective licensee will need to check in which countries trade mark protection has been obtained - trade mark rights are territorial in nature - and also for which classes of goods they have been registered. For example, if the Licence is to cover clothing, the sports logo will need to be registered in Class 25 of the Nice Classification, which covers clothing, footwear and headgear. If the logo is to be used on sports bags, it will need to be registered in Class 18.

In certain jurisdictions, including the UK, the parties will need to enter into a separate Registered User Agreement, which will need to be registered at the local Trade Mark Office.

For trade mark protection purposes, as well as commercial reasons, the Licence Agreement will need to contain 'quality control' provisions. The licensor will need to exercise control over the quality of the licensed products and over the advertising and promotional material for them. Samples of the products will need to be approved by the licensor before being put on the market. In this connection, the Licence Agreement should include a provision requiring the licensee to mark the licensed products and their packaging with trade mark and copyright legends, the wording of which will need to be previously approved by the licensor.

In practice, to avoid bureaucratic delays in obtaining the necessary approvals, which should always be provided in writing, provision is often made in the Licence Agreement for approval to be 'deemed' where, after a certain period of time, there has been no express disapproval, merely silence. Provision should also be made for approval in one format to be 'deemed' to cover approval in a similar format, pro-

vided the context remains essentially the same. Without any of these approvals, the value of the sports logo may suffer.

Likewise, the validity of a registered Trade Mark in the UK and elsewhere depends upon its commercial use. For this reason, as well as commercial ones, minimum performance obligations are imposed on licensees, especially where the Licence is an exclusive one.

It is also advisable to include a clause in the Licence Agreement that any use by the licensee of the registered trade mark(s) shall 'enure' for the benefit of the licensor. This includes any additional 'goodwill' created by the licensee in using the mark.

For legal protection reasons also, it is necessary to include appropriate provisions in the Licence Agreement for protecting and defending intellectual property rights against infringements by third parties. Counterfeiting is particularly rife as far as consumer goods bearing prestigious sports logos, such as the Olympic Rings, are concerned. The Far East is often the source of these illicit products, but counterfeiting also occurs nearer home.

It is necessary, therefore, to include clear provisions in the Licence Agreement for reporting and dealing with such infringements. These provisions will call for a close liaison and collaboration between the licensor and licensee, particularly as to who is responsible for taking what kind of action, including legal proceedings, and within what time scale.

There will also need to be indemnities covering legal costs and other expenses where action is required to be taken by the licensee on behalf of the licensor.

### Branding and Distribution Channels

Not only can sports events and products associated with them be branded with a distinctive logo, but so also can sports leagues and players. The same contractual and intellectual property law considerations mentioned above apply in such cases.

For example, the popular and highly successful UEFA 'Champions League' has registered the name and a distinctive logo as a 'composite' trade mark. For an interesting article, entitled '*Being distinctive - the problem of creating composite logos*', on the registration and use of 'composite logos' in connection with major sporting events, see the January/February 2002 issue of the '*Sports Law Bulletin*' (vol 5 no 1) at page 5.

Many famous sports persons have registered their names (e.g. Eric Cantona has registered the name 'Cantona 7' (the 'seven' referring to his playing position)) and 'nick names' as trade marks (e.g. 'Gazza' (Paul Gascoigne) and 'images' (e.g. the eyes of Damon Hill looking out from the visor of his racing helmet) and have entered into Licence Agreements with Companies and Firms to promote their products and services. These arrangements have proved to be lucrative for both parties.

In all licensing cases, the licensor also needs to control the distribution channels through which the '*licensed products*' may be sold, for commercial and legal reasons. See the judgement of Mr. Justice Pumfrey in the Chancery Division of the High Court delivered on 24 July, 2001 and published in *The Times Law Report* of 9 October, 2001 in the case of *South Core Inc v Besant and Others (t/a Reef)*. In that case, the Judge held that, in assessing the likelihood of public confusion between two trade marks, the Court has to consider both the likely users of the goods concerned and the distribution channels through which the goods are sold. Although the case concerned a Pop group ('Reef') and the use of their name on T-shirts, the decision has important ramifications for sports logo licensing and sports personalty merchandising.

The sales channels affect the public's perception of the product, its quality and price. In marketing terms, it is a matter of '*positioning*'. For example, a product sold through '*mail order*' has a lesser image, compared with one sold through a '*luxury retail outlet*', such as Harrods. It is in the interests of the licensor and the licensee to project the best image for the licensed product and get the best financial results from the licensing relationship.

The perception of the licensed product as a '*cheap*' or '*high quality*' item is largely determined by its distribution channels and this affects the value of the brand as an asset in the hands of the brand owner.

'*Snob value*' helps to raise the price and also the sales of the '*licensed products*'.

However, it should be noted that restrictions on the marketing of 'designer' products can raise competition law and trademark issues at the EU and national levels. See the recent ruling of the European Court of Justice of 20 November, 2001 in the case of *Levi Strauss & Co v Tesco Stores Ltd.*

### Sports Licensing and the Net

Another important distribution channel nowadays is the internet: '*e-commerce*' or '*e-tailing*'.

The on-line sale of sports products is gaining ground and the licensor and licensee should consider whether the licensed products are suitable for sale in this manner. For example, clothing products may not be suitable for sale in this way, as the spectacular failure of the clothing e-tailer "*boom.com*" has demonstrated. Purchasers need to see and touch clothes before buying, especially highly priced ones. One is reminded here of the seasoned salesman's cry: "*never mind the price, feel the quality!*"

If products are suitable for sale on the net, appropriate terms should be agreed and incorporated in the Licence Agreement.

If these selling rights are not to be included in the Licence, this should also be expressly stated in the Agreement, to avoid any misunderstandings.

### International Considerations

Where Sports Licensing Agreements transcend national boundaries, special provisions need to be included in the Agreements, for example, '*force majeure*', '*proper law*' and '*dispute resolution*' clauses.

A '*force majeure*' clause can be particularly useful and relevant where the Licence Agreement covers developing countries. The clause will range from a full-blown one in UK and US Agreements, where everything - including the 'kitchen sink' as they say - needs to be covered, to short form clauses in the case of Licences for Civil Law countries, under whose Civil or Commercial Codes, full-blown '*force majeure*' provisions are implied and, therefore, automatically included.

Rather than leave the matter to chance under the Rules of Private International Law, it is advisable for parties to agree in advance in the Licence Agreement on the Law, which will apply in the event of a dispute. English and Swiss Law are popular choices in International Sports Licence Agreements.

Likewise, the parties need to include an express provision in the Licence Agreement on the manner in which any disputes will be settled - by the courts, arbitration or other alternative forms of dispute resolution ("ADR"). In relation to sports matters, the parties could, for example, decide to refer their disputes under the Licence Agreement to the Court of Arbitration for Sport ("CAS"), which is based in Lausanne, Switzerland. The CAS was set up by the IOC in 1983, specifically to deal with a wide range of disputes "*arising from the practice of sport*". The CAS has proved to be a popular and effective forum for the settlement of sports disputes, including commercial ones.

Alternatively, the parties may decide to use ADR for the settlement of their disputes. Mediation, one of the forms of ADR, is proving to be very successful generally and, in particular, in sports cases. It is interesting to note that the CAS now has a Mediation Division. See article by I. Blackshaw, entitled 'Sporting settlements' in the *Solicitors Journal* 2001 vol 145 no 27.

Certain financial provisions also need to be included in International Licence Agreements and these are dealt with later.

Finally, in view of the strict (i.e. no fault) product liability rules,

which apply in the EU, provisions dealing with product liability issues need to be included in the Licence Agreement. For the purposes of EU Law, there is a wide definition of the term 'manufacturer', which includes those who affix or allow being affixed their name or mark to products manufactured by someone else under their authority.

In other words, licensors can also be held legally liable for defective products produced by their licensees, which cause harm to consumers. For example, this could be a particular problem where, for example, toys and novelty items for children are licensed. Thus, it is usual to include indemnity provisions in favour of the licensor in the Licence Agreement, backed by product liability insurance on the part of the licensee. It is also usual and advisable to include provisions for noting the interests of the licensor on the licensee's product liability insurance policy.

Likewise, provisions dealing with the handling of any corresponding litigation, including, as mentioned above, infringements of intellectual property rights, also need to be expressly included in the Licence Agreement.

### Maximising Sports Licensing Revenues

As previously mentioned, one of the most important clauses in a Licence Agreement is the 'consideration clause' - the financial provisions. To maximise the financial returns from the Licence, careful thought needs to be given to all the financial arrangements. The impact of any corresponding withholding and other taxes also needs to be taken into account.

The price of the Licence can be a lump sum ("licence fee") and/or periodic payments ("royalties") based on turnover. In the latter case, the basis on which the royalties are to be calculated needs to be precisely defined.

If, as is usual, they are to be charged on the 'net invoice price' of the licensed products, this needs to be carefully defined. For example, what about 'trade discounts', what about sales to 'associated companies' (which also need to be defined) of the licensee, what about defective and returned goods, and so on?

There should be provisions defining when the royalty is earned ('accrued') and when and where (specified bank account) the royalty is to be paid ('settlement') and who bears any bank costs.

Likewise, there need to be provisions on sales accounting, delivery of royalty statements and the right of the licensor (or its agent) to inspect the licensee's accounting records and take copies of them.

In the case of International Licence Agreements, it will also be necessary to specify the 'currency of payment' of the licence fee and/or the royalties, as well as the corresponding exchange rate for converting from one currency to the other. Royalties may accrue and be calculated in one currency ('currency of obligation') but payable in another ('currency of payment').

Furthermore, provision will also need to be made for exchange control implications for payments from countries that limit the transfer of funds abroad, especially 'hard currency' (e.g. US dollars), and require governmental approvals of Licence Agreements, especially their financial terms (e.g. royalty rates).

A supplementary provision will need to be included to cover the case of failures to obtain exchange control approvals, within a specified period of time (say three months) and their practical consequences (e.g. termination of the Licence Agreement).

Again, the question of any right of 'set-off' between the licensor and the licensee and the right to claim interest, and, if so, at what rate, on

late payments of licence fees and/or royalties also need to be provided for in the Licence Agreement.

Finally, any tax considerations need to be factored into the Licence Agreement. For example, whether payments are to be made free or subject to any required withholding tax.

### Managing Sports Licences

A successful licensing deal not only needs a carefully planned licensing strategy but a good licensing manager to implement it in practice. This is particularly true of Sports Licence Agreements.

Ideally, in my experience, the person managing the project should be the same person who negotiated the deal. This ensures continuity and also helps to avoid any misunderstandings and clarify any ambiguities or uncertainties in interpreting the Licence Agreement.

The qualities needed to be a successful licensing manager include:

*product and market knowledge;*  
*patience;*  
*empathy, especially an ability to understand and get on with cultural difference in international licensing deals;*  
*attention to detail;*  
*an appreciation and understanding of the legal issues;*  
*an organised and systematic approach;*  
*foresight;*  
*a willingness to make things work; and, above all, integrity and fair mindedness.*

Knowledge of the product and belief in it, as well as an understanding of the market place and the role of advertising and sales promotion, as well as retailing and distribution, are particularly crucial requirements for a successful licensing programme.

Licensing also needs trust and understanding and a close working relationship on the part of both the licensor and the licensee.

The licensing relationship is not an easy one to manage, but provides a challenging and rewarding work experience.

### Conclusions

Of course, it has not been possible in the time available to go into great detail or cover everything - licensing is a big subject (an entire week could be devoted to it) and a complex one. But, I hope that I have been able to give you the main outlines of what Sports Licensing involves and alert you to some of the basic legal and practical issues, which need to be addressed, and how to handle them, to ensure a successful outcome.

It should, I think, be clear that this is a specialised field, with its own peculiarities and structures, which need to be taken into account when negotiating, drafting, settling and implementing Sports Licence Agreements.

Particular issues arise and need to be taken into account in relation to International Licensing deals - those which transcend national boundaries - and especially those which operate in the Member and Associate Member Countries of the European Union

Sports Licensing and Merchandising is an exciting and lucrative business, offering many possibilities for the creative and the intrepid.

But getting things right and paying attention to the details, especially the legal ones, are not only essential but also the keys to successful Sports Licensing and Merchandising.



## Asser-Leuven-Tilburg Sports Law Seminar

Seminar on *Players' Agents*, University of Tilburg, Wednesday 22 May 2002  
Speakers: Roger Blanpain, Miel Maessen, Frank Hendrickx and a representative of a Netherlands Players' Agency



# ASSER/FBO Conference on the Future of Professional Football Leagues in Europe, Rotterdam, November 2001

*The international conference 'The Future of Professional Football Leagues in Europe: Competitive Balance and Fair Competition?' taking place in the Feyenoord Stadium in Rotterdam on Monday, 26 November 2001 under the chairmanship of Prof. Dr. Heiko van Staveren yielded the desired clarity. The new international competitions urged and wished for by the clubs from the minor football-playing countries could be established in the European Union from a legal point of view, but any co-operation on the part of the UEFA and the clubs from the major football-playing countries united within the G14 need not be counted on. Nor will the European Commission display any activity in this direction of its own accord. 'Still, if one or several clubs come to Brussels to complain, we will, of course, respond' says Jaime Andreu, Head of the Sports Unit of the Directorate General for Education and Culture of the European Union.*

## Economic activity

Legally speaking, there are no impediments for clubs to either independently or jointly display the initiatives leading up to the desired new competitions. Professional football, as Andreu, too, emphasised, is an economic activity for which there are no boundaries in place within the European Union and to which the rules concerning competition are applicable. However, the EU will not be forcing sports organisations such as the UEFA to either establish new European competitions besides or not the present system of national competitions, the Champions League and the UEFA Cup.

The need to have a European competition was evidently shown during the conference, which had been organised by the *T.M.C. Asser Instituut* in co-operation with the FBO (Netherlands Organisation of Professional Football Clubs). Professional football clubs from 'minor' football nations need economic expansion in order to be able to keep up in Europe. This is an absolute precondition for survival. The Champions League at present only serves to increase the divide. Because of the system of distribution an Italian club, for example, receives twice the amount of funding (over 10 million Euros) than a Dutch participant does, even if the latter played twice as many matches.

The need was made crystal-clear by Thomas Hoehn of PriceWaterhouseCoopers London and co-author of the report 'Game on: Sports Investment for European Media Companies'. Jean-Louis Dupont, a lawyer with Hannequart and Rasir Attorneys in Brussels, as well as a board member of Standard Liège, did not leave any room for doubt either. Standard Liège, he had it known, would not hesitate to be part of a Benelux competition, which, according to Dupont, is currently the most realistic option.

## Scaling up

Harry van Raaij, chairman of PSV Eindhoven, would like to extend beyond just the Benelux. In a thoroughly founded and well-reasoned speech bearing the telling title 'There is no Europe (EU)' he outlined the situation which in his view will result within a matter of years in the demise of the Netherlands as an internationally significant football club nation. With all its consequences (for the other clubs as well). In order to be able to compete with the major football-playing countries (England, Italy, Spain and Germany) an increase of scale will shortly have to be sought so as to avoid drowning in the streams of money flowing to these countries from the Champions League. His passionate argument was illustrated by figures on the ever-widening chasm.

As a former member of the KNVB (Netherlands FA)'s Professional Football Section, Van Raaij was surprised at the attitude taken by

Henk Kesler speaking before him, who this time was not speaking as a director of the Professional Football Section of the KNVB but as a member of the UEFA Professional Football Committee. There was nothing in Kesler now that was reminiscent of the man with whom he had worked together for some five years. In Rotterdam, Kesler hid behind the so-called democracy of the 51 member country-organisations to not have to take any action as UEFA and he pointed to the democratic way in which the UEFA had also inquired of the top countries whether changes were necessary and if so, which?

The conference in the Rotterdam Feyenoord stadium, attended by some 160 interested persons from a large number of European countries, reached its high point after Van Raaij's contribution when the audience was given the opportunity of intervening in the discussion. The (tight) time schedule was immediately exceeded by an hour. Something the last four speakers (Glen Kirton of Fasttrack Soccer from London on football marketing, the American lawyer James Gray, Ronald Buys as the general manager for the Amsterdam Admirals, one of six American football teams operating in Europe under the auspices of the NFL (National Football League), and Jaap Hoeksma of Euroknow Amsterdam) could not make up for anymore.

## Free European market

Nevertheless, it had been a highly successful day, as Dr. Robert Siekmann, general co-ordinator of the Asser International Sports Law Project, concluded some two hours later. And not just because it had generated the principled (and positive) answer he had so craved to the question whether the integrated, free European market also applied to professional football, even if Jaime Andreu had made some reservations as regards the UEFA line of action with respect to the continued existence of national boundaries. A sports organisation may be permitted to do this, but this can never keep others from sailing a different course...

The 'success' for Siekmann mainly lay in the high level of the contributions from the many international speakers and the clarity that the conference eventually did bring. With, in addition, the generous amounts of information which had been put across within seven hours. Like the contribution by Ronald Buys, who had been added to the list of speakers at the last moment. His case study on American Football and especially the NFL proved what such a far-reaching co-operation can bring forth.

## American approach

The NFL structure had, by the way, already been discussed - even if not mentioned by that name - by Thomas Hoehn. He argued in favour of the American approach (receipts-sharing, joint television and media contracts, joint merchandising, salary cap and drafting system whereby the lowest ranking team is granted first rights to attract new talent) and the establishment of a European competition with four European conferences.

To this end, four leagues could be formed in Europe, under the umbrella of a major European competition, ending in play-offs between the numbers one and two of each league consisting of 15 (or 16) clubs. The South-West League would be made up of clubs from France, Spain (5 each), Portugal (3) and Belgium (2), the North League of clubs from seven countries (United Kingdom 6, the Netherlands 3, Scotland 2, Denmark 1, Sweden 1 and Finland 1). Thirteen countries would be part of the East League (Russia 2, Czech Republic 2, and also Turkey, Romania, Hungary, the Ukraine, Austria, Georgia, Croatia, Slovakia, Poland, Belarus and Bulgaria, all 1) and three would be part of the Central League (Italy and Germany with 7 clubs each and Switzerland with 1 club).

The International Sports Law Journal

Translated from: *Voetbalzaken*, Newsletter of FBO (Netherlands Federation of Professional Association Football Clubs), No. 20, Week 48 (2001).



Istanbul, May 2001

# International Sports Law Conference

*The first ever Conference on Sports Law in Turkey was held in Istanbul on 14 and 15 May, 2001.*

*It was organised by the Ankara and Istanbul Law Offices of Selim Sariibrahimoglu, in association with LFT International, a Legal and Financial Training Company.*

*The Conference was sponsored by The Turkish Football Association, Globalstar, a mobile 'phone company, and the World Jurist Association and also actively supported by Fikret Unlu, the Turkish Minister of Sports. Opening speeches were given by Haluk Ulusoy, President of The Turkish Football Association and Celal Dogan, President of the Anatolian Sports Clubs Association.*

First of all, the Conference tackled the fundamental issues of whether there is such a thing as 'Sports Law' and what is its future, including the need for and development of a 'Lex Sportiva', particularly in view of the international and global nature of sport. And then went on to consider a wide range of legal and ethical issues, including doping, excessive violence on and off the field of play and dispute resolution, facing sport and all those involved in sport, including sports federations, event organisers, rights holders and brokers, sponsors, merchandisers, sports marketing agents and broadcasters, as well as sports persons themselves.

International Sports Lawyer, Ian Blackshaw, spoke and led discussions on the first day of the Conference on the legal aspects of sport as a global business, product and commodity and also led a workshop on the negotiation, drafting, interpretation and enforcement of international sports sponsorship merchandising and endorsement agreements. He also explained the importance of national and EU competition rules, where sport is involved in an economic activity, of particular interest in Turkey as a candidate for EU membership, and the impact of tax on sports marketing and commercial deals and arrangements, especially at the international level, and how to legitimately mitigate its effects.

Ian Blackshaw also discussed the legal protection in the UK, the rest of Europe and the States of sports personality rights and the new arrangements for cities bidding to host the Olympic Games. Again, this latter topic was of particular interest to Turkey in general and Istanbul in particular, which is bidding, for the third time, to host the Summer Games in 2008, and provoked a lively debate on the ethical and legal issues!

On the second day, the Conference heard presentations during the morning from Mehmet Ali Bakanay, a lawyer with the Sariibrahimoglu Law Office in Ankara, on the need for the reform of Turkish Law and its approximation to European Law in the sporting context; the regulation of doping in sport in general and football in particular by Prof Turgay Atasu, Dean of the Istanbul University Medical School; and Turker Arslan, the chairman of The Turkish Football Association Arbitration Board.

As may be expected, the issue of doping raised the temperature of the Conference, especially discussions on the ethical aspects, and the need for harmonisation, as far as possible, of banned substances, test-

ing procedures and penalties. Prof Atasu stressed health concerns as the main rationale for anti-doping measures and the need for severe and deterrent punishments of offenders and their coaches and medical advisers.

Prof Arslan explained the legal status and work of the Football Arbitration Board and faced some vociferous criticisms of the inconsistency of 'sentences' handed down by the Arbitration Board - especially the variety in the length of suspensions - and also the fact their decisions were final and binding and, therefore, no review of them was possible by the Turkish Courts.

The afternoon session was addressed by UK Sports Lawyer, Mel Goldberg, who is the current Vice Chairman of the British Association for Sport and the Law, and Sports Law Academic, Andrew Caiger, who is also a member of the South African Bar.

Mel Goldberg, an expert on negotiating and documenting football transfers, discussed the new International Football Transfer Rules 'agreed' between the World Governing Body, FIFA, and UEFA, the European Governing Body, with the European Commission in Brussels on 5 March and due to be approved by the FIFA Executive in Buenos Aires on 5 July. He also dealt with the intricacies of transfer contracts, the thorny and vexed question of bribery and corruption in sport, especially 'match fixing', as well as the resolution of sports disputes and the role of sports governing bodies in them. His contributions were not only informative but also lively and entertaining with music and sound effects!

Andrew Caiger, co-editor with Simon Gardiner, Director of the International Sports Law Centre at Anglia Polytechnic University, Chelmsford, UK, of the Book 'Professional Sport in the EU: Regulation and Re-regulation' published earlier this year by the Asser Press, dealt with the legal status and powers of international sports governing bodies, especially in disciplinary cases. Drawing on his specialist research and teaching in the field, he also covered the important topics of broadcasting and media issues in sport, which through joint selling arrangements are commanding staggering rights fees and fuelling the commercialisation of sport around the world.

The two of them skilfully fielded questions raised by the delegates.

The Conference proceedings were conducted in English and Turkish with simultaneous translations.

The Conference was a great success and provoked much interest not only amongst the delegates, but also the Turkish media, who were also well represented and widely reported the event.

The organisers are planning to repeat the Conference in September.

Turkish Lawyer, Selim Sariibrahimoglu, and his Law Office, are to be congratulated and thanked for their enterprise and initiative in organising such an interesting and stimulating Conference and helping to take the first steps to putting 'sports law' on the 'legal map' in Turkey - whether technically speaking there is such a thing as 'sports law'!

*Ian Blackshaw*

The International Sports  
Law Journal

## Arbitration at the Olympics

By *Gabrielle Kaufmann-Kobler*

This book is written by the former President of the ad hoc Division, who is a leading practitioner and Professor of International Dispute Resolution in Geneva, writes this book.

- The Author traces the evolution of the ad hoc Division from its origins in Atlanta through to recent developments in Sydney and gives a detailed account of the cases resolved, the applicable arbitration rules and the practical workings of this unique arbitral body.
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*Edited by Matthieu Reeb*

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Edited by the Acting Secretary General of CAS, this compilation, which won the coveted René Cassin Prize, has prepared the ground for a specialized case law and signals a real *lex sportiva* in development.

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# Arbitration at the Olympics

Issues of Fast-Track Dispute Resolution and Sports Law

By Gabrielle Kaufmann-Kohler

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*This slim volume is somewhat premature and delivers less than its eye-catching sub-title and its author in her Introduction promises.*

Published in October last year, it would have more useful to wait until after the experiences of the Ad Hoc Division (AHD) of the Court of Arbitration for Sport (CAS) at this year's February Winter Olympic Games in Salt Lake City had been reported, analysed and evaluated. The author, a former Joint President of the CAS AHD, would then have been in a better position to review the work of the CAS AHD, drawing on not only the experiences of two Summer Games but also two Winter Games as well.

Even then, it could be too soon to draw any meaningful conclusions about the contribution of the CAS AHD to the development of a discrete body of sports law - either a '*lex sportiva*' or a more limited '*lex specialis*' - bearing in mind that the CAS AHD dealt with only five cases in Nagano, six cases in Atlanta and fifteen cases in Sydney. What, I wonder, does Salt Lake City hold in store for us?

The decision by the IOC to establish the CAS in 1983 was a bold and visionary one. The decision of 28 September, 1995 of the International Council for Arbitration of Sport (ICAS), the body interposed between the IOC and the CAS to give it more credibility and independence, under the so-called '*Paris Agreement*' of 22 June, 1994, to establish a CAS AHD was an inspired and practical one. To render fair and free decisions on issues arising during the course of the Games within twenty-four hours of the disputes being referred. An ambitious aim and one that, thanks to the high calibre and professional dedication of the members of the AHD, has generally been accomplished. Not always, however, to the satisfaction of the athletes, as the well-publicised and sad case of Andrea Raducan, the seventeen-year old Rumanian gymnast, shows.

Raducan was stripped of her gold medal at the Sydney Summer Olympics as a result of taking a 'flu remedy, prescribed by her team doctor, which contained pseudoephedrine, a banned substance under the Olympic Movement Anti-Doping Code (as amended on 1 January, 2000). She appealed to the CAS AHD which, applying a strict liability rule, upheld the decision in an award rendered on 28 September, 2000. The AHD stated:

*"The Panel is aware of the impact its decision will have on a fine, young, elite athlete. It finds, in balancing the interests of Miss Raducan with the*

*commitment of the Olympic Movement to drug-free sport, the Anti-Doping Code must be enforced without compromise".*

But that was not the end of the matter. Raducan appealed to the Swiss Federal Tribunal (the Swiss Supreme Court) pursuant to the provisions of article 190(2) of the Swiss Federal Code on Private International Law of 18 December, 1987. The Tribunal dismissed the appeal finding that her claims of unequal treatment and violation of Swiss Public Procedural Policy were "*without merit*", and ordered the appellant to pay its costs of 5,000 Sw. Frs.

Sadly, there is no real discussion or analysis of this appeal case decision or the other equally important earlier one rendered on 15 March, 1993 by the Swiss Supreme Court challenging the decision of CAS in *Elmar Gundel v FEI/CAS*. Indeed, the book consists primarily of the texts of CAS AHD decisions in cases brought at the Atlanta, Nagano and Sydney Games. These, of course, are available from other sources.

For example, all the CAS AHD Awards at the Sydney Games, together with the corresponding Arbitration Rules, the reference to arbitration clause in the entry form, the application form for submitting an appeal to the CAS AHD, and the seminal jurisdictional judgement on the place of the 'seat' of arbitration of the CAS of the New South Wales Court of Appeal on 1 September 2000 in the case *Raguz v Sullivan & Ors*. are available free of charge from the CAS headquarters in Lausanne Switzerland in the excellent Digest edited by the acting Secretary General of CAS, Matthieu Reeb, and published in December 2000.

The Book also contains other recycled previously published material, including Chapters III & IV dealing with the Arbitration Cases decided at the Nagano and Atlanta Olympic Games. However, to be fair, I suppose it is helpful, for reference purposes, to have all the material together in one place.

The Book is completed with a List of Cited Awards and Cases, a Glossary of Acronyms and a useful Selected (*sic*) Bibliography, prepared with the assistance of a research student at Geneva University Law School, where the author teaches. There is also a short but adequate index.

Despite its weaknesses, which I have flagged, this Book provides a useful but rather limited contribution to the evolving and increasingly important subject of alternative dispute resolution in the field of international sport. To that extent, its publication is to be welcomed.

Whilst there is some need for a Book on the AHD of CAS, there is a greater need for a Book on the CAS itself drawing on its experience and contribution to an alternative quick and effective dispute resolution mechanism in the sports arena over almost twenty years.

Ian Blackshaw

## 12th Asser Round Table Session on International Sports Law

Thursday 13 June 2002

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Opening: 14.00 hours

Language: English

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Matthieu Reeb, Secretary-General, Court of Arbitration for Sport, Lausanne, Switzerland;

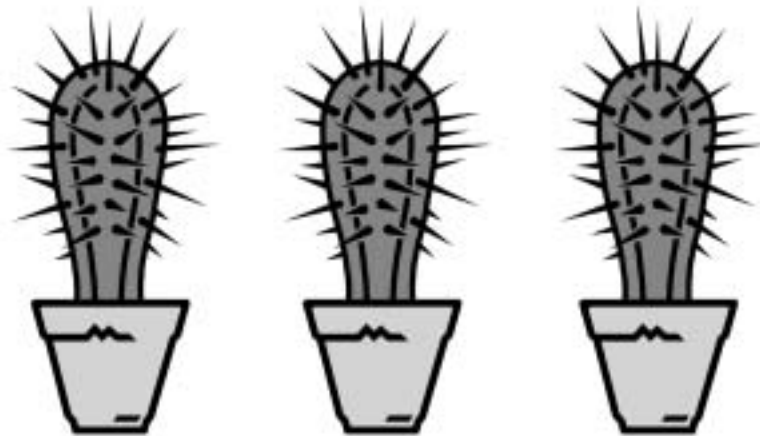
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# FIFA Establishes Independent Football Arbitration Tribunal

*At its Congress in Buenos Aires on 5 July, FIFA, the World Governing Body of Football, announced the setting up of an 'independent' Arbitration Tribunal for Football (ATF) to deal with a variety of disputes as a final 'court of appeal'.*

*The ATF does not, however, have jurisdiction in respect of infringements of the 'Laws of the Game' or suspensions of up to four matches. And the amount in dispute must be 10,000 Sw.Frs. or more.*

As a result of this decision, Article 63 of the FIFA Statutes has been replaced by the following Article:

## Creation of an arbitration system

The International Court for Football Arbitration (ICFA) is a foundation created by the Congress and is responsible for

- establishing and maintaining an Arbitration Tribunal for Football (ATF)
- executing arbitration regulations to be observed by ATF
- promoting conciliatory options for resolving football disputes.

The Executive Committee will enact rules for funding ICFA so as to guarantee its independence.

## ATF ruling as the sole authority

Only ATF is authorised to settle any disputes involving FIFA, the confederations, national associations, leagues, clubs, players, officials and licensed agents for which the value involved in the litigation is the same as or more than a specified value fixed from time to time by the Congress. ATF is also responsible for settling disputes arising between a third party and any of the foregoing entities or persons provided they are covered by an arbitration agreement.

## ATF ruling as a board of appeal

ATF is responsible for dealing with appeals against decisions of the last instance, after all previous stages of appeal provided for at FIFA, confederation, national association, league or club level have been exhausted. ATF does not, however, hear appeals on:

- violations of the Laws of the Game
- suspensions of up to four matches.

## Proceedings

The ATF proceedings are subject to the provisions of the ATF Regulations.

## Funding

FIFA, acting as a fund raising agent, will ensure the funding required for ICFA to function properly by levying an amount to be determined by the FIFA Executive Committee on earnings from the marketing of FIFA World Cup<sup>(tm)</sup> television and marketing rights.

## Observance of arbitration Ordinary courts of law

The confederations, national associations and leagues shall recognise ATF as the supreme jurisdictional authority. They shall agree to take every precaution to ensure that their members, players and officials observe the ATF procedure for arbitration. The same obligation applies to licensed agents.

Recourse to ordinary courts of law is prohibited, unless specifically provided for in FIFA Regulations.

The national associations shall, in order to give effect to the foregoing, insert a clause in their statutes by which their clubs and mem-

bers shall not be permitted to take a dispute to courts of law but shall be required to submit any disagreement to the jurisdiction of the association or to ATF.

## Compliance with FIFA's decisions

The confederations, national associations and leagues shall agree to comply fully with any decisions passed by the authorities responsible at FIFA which according to these Statutes are final and not subject to the right of appeal. They shall agree to take every precaution to ensure that their members, players and officials comply with these decisions. The same obligation applies to licensed agents.

## Sanctions

Any breach of the aforementioned provisions shall be sanctioned in accordance with the FIFA List of Disciplinary Measures (cf. Art. 44, par. 4). In particular, any club that contravenes the terms outlined above may be sanctioned by being suspended from all international activity (official competitions and friendly matches) in addition to receiving a ban on all international matches (involving national associations and clubs) played in its stadium.

Although Football is part of the 'Olympic Programme', FIFA does not, like most International Olympic Sports Governing Bodies, refer disputes to the Court of Arbitration for Sport (CAS), set up by the IOC in 1983 - not even to the Appellate Division of the CAS, which hears appeals from International Sports Governing Bodies on disciplinary matters, particularly doping cases. However, during the Summer Games, football disputes, like all other sporting disputes arising during the Games, are required to be submitted to the so-called Ad Hoc Division of the CAS, which is in session throughout the Games to settle disputes within 24 hours of being referred. In fact, such references are a condition precedent for participation in the Games<sup>2</sup>.

To a large extent, the creation of the ATF was foreseen and necessitated by the new International Transfer Rules, agreed by FIFA, UEFA and The EU Commission in Brussels on 5 March, 2001, following the Bosman case in 1995, and approved by the FIFA Congress on 5 July, 2001.<sup>(2)</sup> However, initially the new Rules were challenged under EU Competition Rules and Belgian Labour Law by the International Football Players Union, FIFPro, in the Brussels High Court, in which an injunction was sought to prevent FIFA from implementing them. The dispute was amicably settled and the Court Proceedings withdrawn by FIFPro on 31 August, 2001.

Under the new International Transfer Rules, disputes, especially those concerning the amount of compensation to be paid to clubs for their 'investment' in players under 23, who move during the currency or at the end of their contracts, will be settled by this new Football Arbitration Tribunal.

The new Rules came into effect on 1 September, 2001 and on 24 August, 2001, FIFA issued a Circular No 769, entitled 'Status and Transfer of Players', summarising and explaining the main points of the Rules<sup>3</sup>. Particular reference should be made to section 7 of this Circular, headed 'Dispute Settlement', which explains the relationship between FIFA's Dispute Resolution Chamber and the new Arbitration Tribunal for Football. As will be seen (para e.), FIFA offers "low cost, speedy, confidential and mediation" for the settlement of disputes between a player and a club. The text of section 7 is as follows:

"The key to the new dispute settlement provisions are the following elements:

- a. Players and clubs have the choice to submit the triggering, contract-related elements of their disputes to national courts or to football arbitration<sup>4</sup>. Whatever the choice they make, the sportive sanctions envisaged in the present regulations can only be imposed by FIFA bodies, notably the Dispute Resolution Chamber. Decisions of this Chamber are subject to appeal to the Arbitration Tribunal for Football.
- b. FIFA's Dispute Resolution Chamber will be composed of members chosen in equal numbers by players and clubs, as well as an independent chairman<sup>5</sup>. The same is true for the Arbitration Tribunal for Football whenever it hears appeals from decisions taken by FIFA's Dispute Resolution Chamber<sup>6</sup>.
- c. If a party chooses to have its dispute resolved through football arbitration, the triggering, contract-related elements of the dispute will be handled by FIFA's Dispute Resolution Chamber at the request of this party, unless both parties have agreed in writing or it is provided in a collective bargaining agreement not to submit this part of the dispute to FIFA's Chamber but rather to a national sportive arbitration tribunal. However, for this agreement or this provision to be recognized by FIFA, the national arbitration tribunal must also be composed of members chosen in equal numbers by players and clubs, as well as an independent chairman<sup>7</sup>.
- d. Whenever a dispute between a player and a club is put to football arbitration, and an unjustified contractual breach is found, FIFA's Dispute Resolution Chamber is exclusively competent to establish the consequences of this finding (notably sportive sanctions, financial compensation), subject to appeal to the Arbitration tribunal for Football. The same is true for disputes relating to training compensation<sup>8</sup>.
- e. Whenever a dispute between a player and a club arises, FIFA will offer low cost, speedy, confidential conciliation facilities available to the parties. The parties are free to accept mediation by an independent mediator. Any such conciliation will not delay or interfere with the formal dispute settlement procedures<sup>9</sup>.
- f. Before reaching any decision in the matters discussed here, FIFA's Dispute Resolution Chamber will ask the national association which held the registration of the player before the dispute arose to give its opinion on the dispute<sup>10</sup>.

The ATF will operate under the umbrella of a new Foundation created by FIFA, the International Court for Football Arbitration (ICFA), whose funding will be the responsibility of the FIFA Executive Committee, who will act as a 'funding agent'. The ICFA follows the model of the International Council of Arbitration for Sport (ICAS), which was set up by the IOC in 1994, to fund and regulate the CAS, following the Elmar Gundel case in 1993<sup>11</sup>, in which the independ-

ence of the CAS was challenged in the Swiss Federal Tribunal. Although this legal challenge was rejected on the facts and circumstances of the particular case, the Tribunal did, however, express certain reservations in case the IOC was a party to proceedings before the CAS whilst the CAS was entirely funded by the IOC.

The exclusion in para. 6 of the right to resort to the ordinary courts of law, being an attempt to oust the jurisdiction of the courts, is void under English Law - and also under many other Legal Systems around the world - as being contrary to 'public policy' ('*ordre public*'). However, if reworded to the effect that recourse to the ordinary courts is only permitted after all procedures under the ATF have been exhausted, this is perfectly valid under the House of Lords ruling in the leading English case of *Scott v. Avery*<sup>12</sup>.

At the time of writing, the Rules to implement all these new arrangements have not yet been issued.

So, watch this space!

The establishment by FIFA of an Independent Football Arbitration Tribunal is further proof of the need to resolve sports disputes by alternative means, thereby avoiding lengthy delays and high costs in the Civil Courts, and settling such disputes, as Bernard Foucher, President of the French Board of Mediators, has said: "within the family of sport".

This article is an extract from a new Book, entitled 'Mediating Sports Disputes - National and International Perspectives, A Practice and Documentation Manual' by Ian Blackshaw to be published shortly by T.M.C. Asser Press (T.M.C. Asser Institute, The Hague, The Netherlands).

*Ian Blackshaw*

- 1 See Section 2.11 of 'Basic Documents of International Sports Organisations' (1998) edited by Robert C. R. Siekmann & Jan Willem Soek Kluwer Law International The Hague The Netherlands at pp.265 - 282.
- 2 Bye-Law 5.1 of art. 49 of the Olympic Charter.
- 3 Case C-415/93 Union Royale Belge des Societies de Football ASBL v Bosman [1995] ECR I-4921.
- 4 The text of this Circular and the new Transfer Regulations themselves can be downloaded by logging on to the official FIFA website: 'www.fifa.com'.
- 5 See art. 42. 1 of the FIFA Transfer Regulations.
- 6 See art. 42.1(b)(i), *ibid.* and art. 15 of the Application Regulations.
- 7 See art. 42.1(c), *ibid.*
- 8 See art. 42.1(b)(i), *ibid.*
- 9 See art. 42.1(b)(ii)-(v), *ibid.*
- 10 See art. 42.1(a), *ibid.*
- 11 See arts. 42-44, *ibid.*
- 12 Elmar Gundel v FEI/CAS [1993] I Civil Court (Swiss Fed Trib). 13 [1856] 5 HL Cas 811.

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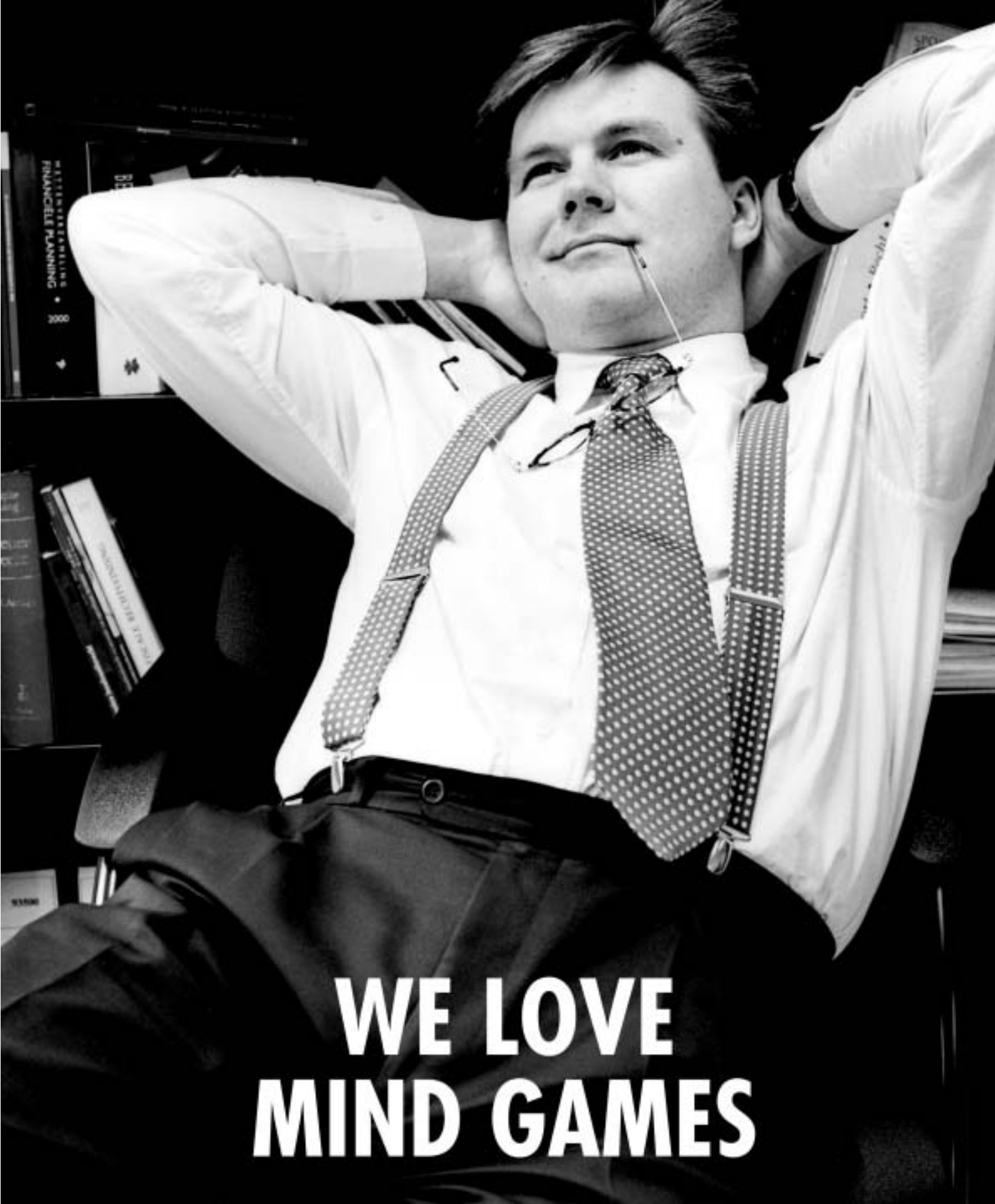
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# PROFESSIONAL SPORT IN THE EUROPEAN UNION: Regulation and Re-regulation

Edited by Andrew Caiger and Simon Gardiner

This book comes at a critical time for the future development of sports law. Sport is becoming increasingly commercialised and commodified and, presently, sports business accounts for around three per cent of world economic activity. Its regulation, however, is fragmentary and it is difficult to delineate issues of pure sport and issues of business. In several contributions, eminent sports law scholars examine the interface between sport, business and policy. They analyze how law regulates sport and sports business and demonstrate the need to redefine the frontier between 'Sporting' rules and regulations and legal regulation. It is suggested that sporting bodies and associations have a significant role to play in shaping the contours of this frontier. It is also suggested that there is sufficient clarity in EU polity, which allows sports associations to become proactive in their own re-regulation.

In their *Postscript* the editors summarize the contents of the book and draw final conclusions. The accessibility of the contributions is facilitated by a *Table of Cases* and an *Index*.

*Professional Sport in the European Union: Regulation and Re-regulation* engages the debate concerning how best sport can be re-regulated in the 21st century and represents a significant contribution to the recognition of a *Lex Sportiva*.

*Andrew Caiger and Simon Gardiner, are both connected to the International Sports Law Centre of Anglia Polytechnic University, Chelmsford, United Kingdom.*

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