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EU Sports Policy

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EDITORIAL 2

ARTICLES

The Future EU Sports Policy: Hollow Words on Hallowed Ground? 3*An Vermeersch***The Sporting Exemption Principle in the European Court of Justice's Case Law** 7*Marios Papaloukas***The Case against the Applicability of the FIFA Solidarity Mechanism Only to International Transfers. Irregularity of Solidarity or Solidarity in the Irregularity** 11*Ian Blackshaw and Boris Kolev***Critiquing Collett: The Assumption of Risk in Football as a Profession** 18*Adam Whyte***Being Punitive: The Court of Arbitration for Sport Overturns Webster** 20*Braham Dabscheck***All Sports for Free! A Difficult Match? Right to Information in the Digital Broadcasting Era** 29*Katrien Lefever and Tom Evens***Limits on Foreign Professional Players Competing in the Russian Federation: Problems and Prospects** 33*Mikhail Prokopets***Regulating against Player Movement in Professional Rugby League: a Competition Law Analysis of the RFL's "Club-Trained Rule"** 38*Leanne O'Leary***A Plea for Olympic Recognition for Curaçao** 43*Roy Paul Bottse***At Last, a Football Law in the Netherlands?** 59*Peter T.M. Coenen***The Slovak Act on the Organization and Support of Sport; a Missed Opportunity?** 65*Jozef Corba***Regulation in the Market of Sports Agents. Or No Regulation at All?** 70*Mark Smienk***Betting in Sports Events. Gambling in Italy** 93*Felice Antignani, Michele Colucci and Felix Majani***Legal Regulation of Sports Betting in Spain and its History** 99*Yago Vázquez, Jordi López and José Juan Pintó***Estonia: Regulation of Sports Betting under the New Gambling Act** 112*Katarina Pijetlovic***Sports Betting in Latvia: Law and Policy** 118*Sarmis Spilbergs and Reinis Pavars***Sports Betting in Lithuania** 122*Jaunius Gumbis and Liudas Karnickas*

PAPERS

Sports Betting in the United States 124*John T. Wolohan***Sports Betting: Law and Policy. A UK Perspective** 127*Genevieve Gordon*

OPINION

• **Money Laundering and Tax Evasion in Football** 134• **CAS Publishes the Decisions Rendered at the 2008 Beijing Olympic Games** 135• **English Premier League Clubs Win Important 'Cyber Squatting' Case** 135• **Two New Sports Added to the Olympics** 139• **English Premier League 'Fit and Proper Person' Rules: Are They Tough Enough and are They Being Strictly Applied and Enforced?** 140*Ian Blackshaw*

HISTORY**The Atlantic Raiders Affair 142***Chuck Korr and Marvin Close***The Legal Regime for a Permanent Olympic Site 148***Frederic C. Rich***DOCUMENTATION****EL Code of Conduct on Sports Betting 162****EDITORIAL**

On 16 September this year, the 9th Asser International Sports Law Lecture took place in The Hague. The theme was “Sports Betting Policy from a European Legal Perspective: Freedom of Services versus General Interest”.

Presentations were given by Tjeerd Veenstra, director of the Dutch Lotto and chairman of the legal working group of the European Lotteries executive committee; Joris van Manen, Partner of De Brauw Blackstone Westbroek Law Firm, Amsterdam; Prof. John Wolohan, Ithaca College, Ithaca, New York, and Genevieve Gordon, Birkbeck College, London University. The meeting was chaired by Alan Littler, Law Faculty, University of Tilburg. The Lecture was highly topical due to the fact that on 8 September 2009 the Grand Chamber of the European Court of Justice, in the case of *Liga de Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* gave an important preliminary ruling on sports betting in the context of Article 49 of the EC Treaty. The papers presented by John Wolohan and Genevieve Gordon can be found in this issue of ISLJ, next to country studies on sports betting from Italy, Spain and the Baltic States.

In the week of 5-9 October, Robert Siekmann and Roberto Branco Martins visited Indonesia for the purpose of association football-related lectures in the context of special courses for CEOs and managers of the professional football clubs of the League in Indonesia as well as lectures at the Pelita Harapan University in Djakarta. The visit constituted the first step in implementing the cooperation agreement between the Indonesia Lex Sportiva Institute (Director Hinca I.P. Pandjaitan) and the ASSER International Sports Law Centre, which was signed by the parties concerned in The Hague on 18 June 2009.

In September, in cooperation with Stefaan van den Bogaert, professor in European Law, Leiden University and visiting professor in

European Sports Law at the Free University, Brussels, and with Richard Parrish, director of the Centre for Sports Law Research at Edge Hill University, United Kingdom, the Asser Institute submitted a project proposal on a “Study on the Equal Treatment of Non-Nationals in Individual Sports Competitions” to the European Commission. The proposal was submitted in response to a call for tender which was announced by the European Commission in the White Paper on Sport.

Also in September, two further proposals were presented to the European Commission under the Industrial Relations and Social Dialogue budget heading. The first proposal, regarding “Contractual Relations in European Elite Hockey”, was submitted by the Dutch Premier League Hockey organization with the support of the European Hockey Federation (Euro Hockey League), while the second proposal, regarding a “Study into the Protection of non-EU Minors in European Professional Football”, was made by the Dutch players agents’ organisation ProProf with the support of the European trade union ETUC. For both proposals, the ASSER International Sports Law Centre acts as the main partner of the applicant organisations.

As from 2010, the Asser Institute will be represented in the Expert Panel of the newly established Equestres Institute in Tilburg, The Netherlands. The Institute brings together international veterinary and legal knowhow on equestrian sports and will provide legal expertise, binding opinions and consulting services to equine organisations.

Finally we extend a heartfelt welcome to Hinca Pandjaitan, Director of the Indonesia Lex Sportiva Institute in Djakarta, as a new member of ISLJ’s Advisory Board.

*The Editors***ASSER INTERNATIONAL SPORTS LAW SERIES***Editors***Robert C.R. Siekmann and Janwillem Soek**

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Basic Documents of International Sports Organisations, R.C.R. Siekmann and J.W. Soek, eds. (The Hague/Boston/London, Kluwer Law International 1998)

Doping Rules of International Sports Organisations, R.C.R. Siekmann, J.W. Soek and A. Bellani, eds. (The Hague, T.M.C.ASSER PRESS 1999)

Professional Sport in the European Union: Regulation and Re-regulation, A. Caiger and S. Gardiner, eds. (The Hague, T.M.C.ASSER PRESS 2000)

Arbitral and Disciplinary Rules of International Sports Organisations, R.C.R. Siekmann and J.W. Soek, eds. (The Hague, T.M.C.ASSER PRESS 2001)

Mediating Sports Disputes: National and International Perspectives, I.S. Blackshaw (The Hague, T.M.C.ASSER PRESS 2002)

The European Union and Sport: Legal and Policy Documents, R.C.R. Siekmann and J.W. Soek, eds. (The Hague, T.M.C.ASSER PRESS 2005)

Sports Image Rights in Europe, I.S. Blackshaw and R.C.R. Siekmann, eds. (The Hague, T.M.C.ASSER PRESS 2005)

The Court of Arbitration for Sport 1984-2004, I.S. Blackshaw, R.C.R. Siekmann and J.W. Soek, eds. (The Hague, T.M.C.ASSER PRESS 2006)

The Strict Liability Principle and the Human Rights of Athletes in Doping Cases, J.W. Soek (The Hague, T.M.C.ASSER PRESS 2006)

The Future EU Sports Policy: Hollow Words on Hallowed Ground?

by An Vermeersch*

The Treaty on the functioning of the European Union stipulates that the Union will “contribute to the promotion of European sporting issues” and that the Union’s action “shall be aimed at developing the European dimension in sport” (Article 165 TFEU). Can this lead to a concrete EU sports policy? In reality, the answer lies in setting priorities and finding the legal tools necessary to achieve the goals set. To answer the question, a comparison is made between the priorities of the actors involved and the results in practice. In order to assess the Union’s future action in the field of sport, the current and future priorities and the legal framework provided by the TFEU are analysed.

Introduction

The evolution of the European Union’s sports policy is characterised by the dual mechanism that traditionally guides the European integration process: negative versus positive integration.¹ Negative (indirect) integration relates to measures increasing market integration by the removal of (national) trade barriers and obstacles to free movement and competition. Positive (direct) integration relates to common European policies with aims that go beyond the removal of these obstacles. In relation to the indirect EU sports policy, in particular the application of the European rules concerning free movement and competition to sport, a clear legal framework emerged. Even if this framework needs further refinement, with a prominent role for the *case-by-case* approach, it is unlikely that it will be subject to major changes. The future of the EU’s direct sports policy seems less obvious. Whereas it is clear that the EU is ‘active’ in the field of sport, these actions are very diverse and can hardly be defined as a comprehensive European sports policy.²

This paper explores the possibility of a future (direct) EU sports policy. Rather than analysing the theoretical explanation for the evolution of the EU’s sports policy³ or the changing relationship between the EU and the world of sport⁴, this paper focuses on the concrete actions in practice. Thus, a tentative agenda for the future (direct) EU sports policy will be outlined. First, a comparison is made between the priorities set forward by the different actors involved and the results in practice. Second, the limits of the future EU policy will be analysed on the basis of a (new) legal framework.

Priorities versus results

Search for priorities

The origins of the direct sports approach go back to the 1984 Fontainebleau European Council⁵ and the Adonnino Report of the

European Parliament on ‘A People’s Europe’.⁶ At that time, the Community’s policy concentrated on the potential of sport to achieve ‘European goals’. Sport was in the first place considered as a forum for communication among peoples, as a tool to strengthen the image of the EU in the minds of its citizens.⁷ Concretely, the Community’s involvement in the field of sport remained for the most part limited to the funding of international sporting competitions like the European Sailing Regatta or the Tour de l’Avenir in cycling.⁸ After the adoption of the Single European Act in 1986, Community interest in the field of sport moved on to a broader social, educational and cultural plane and the first pleas for the development of a European sports policy emerged.⁹ This evolution was further induced by the *Bosman* judgment,¹⁰ and the reactions from the sports world to this case in particular.¹¹

In order to get an overview of the - past and current - priorities of the EU’s involvement in the field of sport, an analysis is made of the ‘sports agenda’ of the European institutions and the Member States. Three preliminary remarks should be made in this respect. First, this overview aims at illuminating general tendencies, rather than aiming at an exhaustive and detailed listing. As Commissioner Reding correctly pointed out in 2002, the latter would be difficult.¹² Second, whereas the correlation between the activities of the different actors should not be ignored, this overview makes a distinction between the priorities set forward by the Member States, the European Parliament and the European Commission respectively. Third, the sports world is not mentioned as a separate actor. This is not to say that the sports world does not play a role in the agenda-setting at EU level.

The table¹³ on page 4 lists the main agenda items of the successive EU presidencies over the 2000-2011 period. Three findings emerge. First, the activities of the Member States cover a great number of topics, ranging from non-profit sports organisations to the economic dimension of sport. Second, a number of issues can regularly be found on the agenda, with the fight against doping (including the relationship with WADA) and the broader discussion on the legal framework and the future evolution of the sports policy (including the follow-up of the Nice Declaration, the position of sport in the Treaty and the White Paper) as two ‘permanent’ agenda items. Third, a trend towards more coherence by the classification of topics can be observed. This is illustrated by the joint initiative of the European Commission and the Dutch presidency in 2004 to adopt a *Rolling Agenda for Sport* to define the priority themes for Member State discussions on sport at EU level. The *Rolling Agenda* includes the follow-

* Assistant Professor, European Institute, Ghent University. The author would like to thank Borja García, Kirstyn Inglis and Astrid Vervaeke for their comments on an earlier version of this article. The usual disclaimer applies. Comments are welcome at An.Vermeersch@Gent.be.

1 Parrish, ‘The Politics of Sports Regulation in the European Union’, (2003) *Journal of European Public Policy*, p. 250; Sharpf, ‘Negative and Positive Integration in the Political Economy of European Welfare States’, in Marks, Scharpf, Schmitter and Streeck (eds.) *Governance in the European Union* (SAGE Publications, London, 1996), p. 15. On the distinction between indirect and direct sports policy, see Tokarski, Steinbach, Petry and Jesse, *Two Players -*

One goal? Sport in the European Union (Meyer & Meyer, Oxford, 2004), p. 61.

2 Van den Bogaert and Vermeersch, ‘Sport and the European Treaty: A Tale of Uneasy Bedfellows?’, (2006) *E.L.Rev.*, p. 821-840.

3 For an overview see Meier, Emergence, Dynamics and impact of European sport policy - perspectives from political science’, in Gardiner, Parrish and Siekmann (eds.) *EU, Sport, Law and Policy. Regulation, re-regulation and representation* (T.M.C. Asser Press, The Hague, 2009), p. 7-33.

4 García, ‘From regulation to governance and representation: agenda-setting and the EU’s involvement in sport’, (2007) *Entertainment and Sports Law Journal*.

5 Conclusions of the Fontainebleau European Council (25-26 June 1984),

Bulletin European Communities, 6-1984.

6 Adonnino Report, ‘A People’s Europe’, *Bulletin European Communities*, 6-1985, Suppl. 7/85.

7 *Ibidem*, 5.9.; European Parliament, Resolution on sport in the Community, 13 April 1984, [1984] *OJ C* 127/142.

8 Tokarski, Steinbach, Petry and Jesse, above n. 1, p. 62-63.

9 European Parliament, Resolution on sport in the European Community and a People’s Europe, 17 February 1989, [1989] *OJ C* 69/234.

10 Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman* [1995] *ECR* I-4921.

11 See for instance Parrish, *Sports law and policy in the European Union* (Manchester University Press, Manchester, 2003).

12 In answer to a written question of MEP Theresa Zabell concerning a detailed list of all measures and actions connected with sport or with sportsmen and women during the term of office, the Commissioner stated: “[...] the Commission has not performed a general survey of all the sport-related initiatives undertaken during the current legislative period. This would be difficult to do, given the wide range of policies and initiatives concerned.”. See Written question E-1470/02 by Theresa Zabell to the Commission, Actions connected with sport, 27 May 2002, [2002] *OJ C* 301E/154.

13 For the sources where this table is based on, see Annex I.

Table 1: Agenda items under the successive EU presidencies (2000-2011)

Topic	Presidency																						
	F 2000	S 2001	B 2001	SP 2002	DK 2002	GR 2003	IT 2003	FR 2004	NT 2004	LUX 2005	UK 2005	AUS 2005	FIN 2006	GER 2007	PORT 2007	SLCV 2006	F 2006	CZH 2009	S 2009	SP 2010	B 2010	H 2011	
Anti-doping	X	X	X	X	X	X	X	X	X	X	X	X	X	T/X	T/X	T/X	T/X	T/X	T/X	T/X	T/X	T/X	T/X
Autonomy of sport																	T	T/X	T				
Consultation and dialogue with sport organisations		X											X		X	X	X						
Economic dimension of sport												X	X	T/X	T/X	T/X	X	X					
Education and training	X										X		X	T	T/X	T/X	T/X	T/X	T				
Enlargement							X							T	T	T							
EU Sport Programme																X					T	T	T
EYES 2004			X	X	X	X	X	X	X	X													
Financing and gambling									X	X		X			X								
Free movement of sportsmen										X													
Governance	X												X		X	X	X						
Health											X		X	T	T/X	T/X	T/X	T/X	T	T	T	T	T
International sport policy														T	T	T							
Youth and minors	X																						
Legal framework (Nice/Treaty/White Paper/Sport Programme)	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	T	T	T	T	T	T	T
Non-profit sport organisations													X		X	X		X					
Political development in Tibet																X							
Promoting equal opportunities and diversity in and through sport											X												
Prospects for disabled people to participate in sports activities		X																					
Rolling agenda									X	X					X					X			
Social cohesion and integration														X		X							
Social dimension of sport													X			X					T	T	T
Specificity of sport	X		X										X				T/X	T	T				
Sport and development politics								X				X											
Sport and violence														X									
Sport as an instrument improving multicultural dialogue								X															
Sport science														T	T	T							
Volunteering					X						X						T	T/X	T				
Women and sport			X		X																		

T refers to priority of the Team Presidency

X refers to priority of the individual Presidency

ing subjects: fight against doping, sport and health, sport and education, social function of sport, volunteering in sport, economic dimension of sport. In addition, the ministers agreed to set up a number of Working Groups involving a core group of interested Member States. The topics covered by these Working Groups correspond to a large extent to the *Rolling Agenda*: Sport & health, Sport & economics, Non-profit sport organisations, Anti-doping, Education and training, and the White Paper on Sport. Moreover, the cooperation within Team Presidencies aims at a better continuity of the debates under the subsequent Presidencies.

The scope of sport-related topics that have been dealt with by the European Parliament seems to be even broader. Already in the 1990's, the Parliament adopted two resolutions, based on the *Larive* report

and the *Pack* report,¹⁴ covering a great number of issues.¹⁵ A glance at the titles of the Parliament's sport-related resolutions of recent years confirms this broad scope of interest: women and sport, development and sport, forced prostitution in the context of world sports events, combating doping in sport, professional football.¹⁶

Whereas the European Commission has unmistakably been involved in numerous sport-related issues, it can be remarked that the Commission has rather consistently aimed at categorizing the future actions in the field of sport in its policy documents. Already in 1991, the Commission highlighted three main lines for the development of Community action: information for sporting authorities on the impact of the single market on sport; a communications policy to use sport as a means of heightening awareness of belonging to the Community; specific measures in areas where sport can give the

14 European Parliament, Report on the European Community and sport, A3-326/94, rapporteur Larive; European Parliament, Report on the role of the European Union in the field of sport, A4-197/97, rapporteur Pack.

15 European Parliament, Resolution on the European Community and sport, [1994] OJ C 205/486; European Parliament, Resolution on the role of the European Union in the field of sport, [1997] OJ C 200/252.

16 European Parliament, Resolution on

women and sport, [2004] OJ C 68E/605; European Parliament, Resolution on development and sport, [2006] OJ C 285E/135; European Parliament, Resolution on forced prostitution in the context of world sports events, [2006]

OJ C 291E/292; European Parliament, Resolution on combating doping in sport, [2006] OJ C 33E/590; European Parliament, Resolution on the future of professional football in Europe, [2008] OJ C 27E/206.

Community a new dimension, such as support for the disabled and the establishment of exchange and training programmes on a Community scale.¹⁷ In its *Helsinki Report on Sport*, the Commission focussed on the reaffirmation and strengthening of the educational and social function of sport and the clarification of the legal environment of sport.¹⁸ Moreover, the Commission considered itself as the defender of the European Sport Model.

The 2007 *White Paper on Sport* covers three major themes: the societal role of sport, the economic dimension of sport, and the organisation of sport.¹⁹ However, both the first and the third themes include a wide range of 'sub-themes'. The Commission's White Paper and its accompanying documents have two important merits. First, these documents, and in particular the background document, provide a correct summary of the application of EC law to sport.²⁰ Second, the listing of 53 actions in the *Action Plan Pierre de Coubertin* provided a clear indication of the Commission's future plans in the field of sport.²¹ Contrary to former policy statements, the Commission now sees itself (and the European Union) with a limited role.²² This is illustrated by the repeated use of words like "support", "facilitate", or "promote", by the lack of any concrete legislative proposals and by the fact that the Member States and the sports organisations are referred to as key players. It should also be noted that whereas the Commission still refers to the European sport model, it stipulates that "[...] it is unrealistic to try to define a unified model of organisation of sport in Europe".²³

Modest results

The results of the direct EU sports policy are thus far rather limited. In practice, bringing topics on to the EU sports agenda often results in raising awareness, collecting information, and exchanging best practices. The 'concrete outcome' remains limited to the level of communications, conclusions, resolutions, reports or declarations. This to a certain extent reflects the fact that in the past rather vague or unrealistic goals, such as the preservation of the European Sport Model, have been put forward. However, even when more concrete targets were set, they seemed difficult to accomplish. In this regard, reference can be made to the Commission's support plan to combat doping.²⁴ In the aftermath of the 1998 'Festina Tour' the Commission suggested a three-layer approach: to assemble the experts' opinions on the ethical, legal and scientific dimensions of doping; to contribute to the creation of WADA; and to mobilise Community instruments and competences relevant to the field of doping. However, the realisation of this support plan and the development of a comprehensive EU anti-doping policy in general has proved to be rather troublesome.²⁵

Nevertheless, the evolution towards a more coherent EU sports agenda, the establishment of working groups and the Commission's new approach in its *White Paper* seem to have some positive effects. Whereas the implementation period of the *Action Plan Pierre de Coubertin* will continue till the end of the year 2012, it is too soon for a final evaluation. Yet, the regular drafting of implementation reports provides a useful overview of the progress made. In practice, reference can be made to the endorsement of *Physical Activity Guidelines* and the adoption by WADA's Executive Committee of a revised

International Standard following the EU Article 29 Data Protection Working Party on the World Anti-Doping Agency's International Standard for the Protection of Privacy as notable results.²⁶ Moreover, the dialogue with the sports federations, in particular the IOC, was strengthened by initiatives such as the 'reinvention' of the European Sport Forum and the organisation of top-level meetings with the Olympic Movement.²⁷

Legal framework and political will

The absence of an express reference to sport in the EC Treaty has often been put forward as the key explanation for the limited outcome of the EU's actions in the field of sport. Admittedly, the lack of a clear legal (and consequently also financial) basis had effects inevitably.²⁸ However, the absence of a 'sports Article' seems not the only reason for the modest results of the EU approach. In practice, lacking determination or political will seems to be another important factor. Again, the actions in the field of doping illustrate this. Even if this issue figured high on the political agenda, in the past, the Commission openly blamed the Council for failing to back it.²⁹ As Lenaerts flawlessly stated (in the field of education), this seeming contradiction between high level political declarations and the result in practice can be explained by the fact that "it makes a great difference to a Member State whether it gives its approval to a 'resolution' or 'conclusion', or it adopts a measure which is going to form part of judicially enforceable Community law".³⁰ Indeed, it is not because a specific legal basis in the field of sport is absent, that all (legal) action in the field of doping must be excluded. In reality, links can be found with public health, education, research, employment and social policy, and even the functioning of the Internal Market.³¹

It is against this background that the sport provisions in the Lisbon Treaty must be assessed.

Article 165 of the Treaty on the Functioning of the European Union (TFEU)³² stipulates the following on sport:

1. [...] The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.
2. Union action shall be aimed at:
 - developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe. [...]"

The importance of these Treaty provisions lies principally in the fact that they help to create clarity in the so-called 'legal environment of sport'. This insertion of sport in the formal framework of the Treaty turns it into an official Union policy. For the first time, the EU is

17 Communication from the Commission to the Council and the European Parliament, The European Community and sport, SEC (91) 1438 final.

18 Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework, COM (99) 644 final.

19 European Commission, White Paper on Sport, COM (2007) 391 final.

20 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions, Community support plan to combat dop-

ing in sport, COM (1999) 643 final.

21 Commission Staff Working Document, *Action Plan "Pierre de Coubertin"*, SEC (2007) 934.

22 See Weatherill, *The White Paper on Sport as an exercise in 'Better regulation'*, in Gardiner, Parrish and Siekmann (eds.) *EU, Sport, Law and Policy. Regulation, re-regulation and representation* (T.M.C. Asser Press, The Hague, 2009), p. 101-114.

23 White Paper on Sport, above n. 19, p. 12.

24 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Community support plan to combat dop-

ing in sport, COM (1999) 643.

25 See Vermeersch, "The European Union and the fight against doping in sport: on the field or on the sidelines?", (2006) *Entertainment and Sports Law Journal*.

26 Presidency's Conclusions of the informal meeting of the ministers in charge of sport, Biarritz, 27-28 November 2008, p. 1; World Anti-Doping Agency adopts revised data protection standard and continues successful dialogue with the EU, IP/09/733.

27 Report from the EU Sport Forum, organised by the European Commission, Biarritz, 26-27 November 2008; Commission holds second high-level meeting with Olympic movement,

IP/09/888. See in this respect also European Council Declaration on sport, Presidency conclusions, 11 and 12 December 2008, annex 5.

28 Van den Bogaert and Vermeersch, above n. 2, p. 823.

29 Oral question by Athanasios Pafilis (H-0249/04), Deep dismay over the use of drugs at the Olympic Games.

30 Lenaerts, 'Education in the European Community law after Maastricht', (1994) *CML Rev.*, p. 7-41.

31 Vermeersch, above n. 25

32 Consolidated version of the Treaty on the Functioning of the European Union, [2008] *OJ C* 115/47.

granted an express, albeit limited, role to play in the field of sport. Moreover, these provisions also demarcate the level playing field of the EU in sport, stipulating that the Union can only engage in supporting, co-ordinating and complementary action. The competence in this context rests primarily with the Member States and the sporting federations. The sporting associations do not have to fear that their regulatory competences have been encroached upon.

Practically speaking, Article 165 TFEU provides the necessary legal and financial basis for the further development of a coherent direct sports policy. The question, however, remains: what will this policy look like? On the one hand, the Treaty comprises general and high-profile goals such as the development of the European dimension in sport, the promotion of fairness and openness in sporting competitions and cooperation between sports bodies, and the protection of the physical and moral integrity of sportsmen and sportswomen. On the other hand, the Union is given only a limited set of instruments as it is foreseen that the Parliament and the Council can merely establish incentive measures and besides these, the Council can adopt only recommendations. Furthermore, harmonisation of the Member States' laws and regulations is explicitly prohibited. These restrictions illustrate that the role of the Union in the field of sport is to remain limited. In this respect, it is nevertheless submitted to reconsider this exclusion of any harmonisation of the laws and regulations of the Member States. It seems possible to envisage areas of sport where harmonisation at supranational level might actually be the solution to a particular problem. This does not automatically have to contradict with the limited competence of the Union in sporting affairs. Arguably, in the fight against doping, for example, the Union could fulfil a useful complementary role by providing a legal framework for the uniform implementation (in all Member States) of arrangements agreed upon at international level, e.g. within the World Anti-Doping Agency.

The contradiction between imposing policy goals and limited means available to achieve them, results from two opposing basic assumptions. With regard to the definition of the future EU actions in the field of sport, clearly a broad description has been opted for. The only restriction seems to be that the actions need to "contribute to the promotion of European sporting issues" and "developing the European dimension in sport". Whereas a definition of these concepts is lacking, these notions seem to emphasise primarily the need for a cross boarder element in order for the EU to be able to act. Moreover, aims like promoting fairness and openness in sporting competitions, cooperation between bodies responsible for sports, and protection of the physical and moral integrity of sportsmen and sportswomen leave room for a broad interpretation so that they can cover a great number of activities. Conversely, most of the current EU actions in the field of sport seem to fall under these broad Treaty provisions.³³ With regard to the concrete instruments for the implementation of the EU action, the Union's competence is - as for the other supporting, co-ordinating or complementary competences - formulated in a strict sense. The inclusion of sport in the Treaty has thus partially also a symbolic character, for it 'legitimises' initiatives already taken in the domain of sport. In addition, it endorses the will to further develop these actions.

In practice, it cannot be expected that these Treaty provisions bring a major change to the EU's direct sports approach. The limited set of legal instruments seems to prevail over the broad definition of policy goals. Apart from confirming initiatives and giving an important impetus to further develop and streamline sport-related actions, the

inclusion of sport in the Treaty will certainly have two concrete consequences. First, the sport-related meetings - especially those of the EU sports ministers - will no longer be limited to an informal framework. Second, an EU Sport Programme becomes feasible.

Future actions

It is clear then that despite the trend towards a more coherent EU sports-agenda, the range of EU sports priorities is still wide. Moreover, every topic potentially covers a great number of sub-topics. Therefore, further preparation of the implementation of the Lisbon Treaty and the EU sports policy in general can be welcomed. In this respect, reference can be made to the 2009 *Preparatory Action in the field of sport*.³⁴ This Action is built around three pillars and gives an indication of how the Commission wants to organise this preparatory phase and what topics can be considered as 'priorities among the priorities'. The first pillar relates to a number of studies, surveys, conferences and seminars that will be organised in order to support the Commission's dialogue with representatives from the sports world. Topics that will be covered are good governance in sport (including licensing systems), socio-economic data (including a Eurobarometer poll) and the societal aspects of sport (including the fight against doping). The second pillar relates to the identification and testing of networks and good practices in the fields of physical activity, sports training, disability sport and gender equality.³⁵ The third pillar aims at promoting the European visibility at sporting events and involves financial support for the 2009 Mediterranean Games in Pescara (EUR 1,000,000) and the 2009 European Youth Olympic Festival in Tampere (EUR 1,500,000).³⁶ The project EU:SPORT:FUTURE illustrates that the Commission also wants to involve the European citizens in the preparation of the future EU's actions in the field of sport.³⁷ After the opening statement "Have your say what the EU shall do in the field of sport!" the broader public was invited to fill in a questionnaire dealing with five topics: volunteering, health, education, employment, society.

By way of conclusion, it can be stated that even after the ratification and entry into force of the Lisbon Treaty, the development of a fully fledged EU sports policy will be difficult. Whether or not the implementation of this policy will lead to concrete actions will depend upon the will of the actors involved to make a clear choice within the broad range of priorities and to use the legal opportunities in the best possible way.

ANNEX

Agenda items under the successive EU presidencies (2000-2011) - sources

- France 2000:** Allocution introductive de Marie-George Buffet, Parlement européen, Audition par la Commission Culture, Education, Jeunesse, Sport et Médias, 12 July 2000.
- Sweden 2001:** Presidency summary of the Meeting of Sports Directors, Solna, 18-19 April 2001.
- Belgium 2001 :** Conclusions of the Belgian Presidency, Conference of the Ministers of Sport of the 15 Member States of the European Union, Brussels, 12 November 2001.
- Spain 2002:** Communiqué de Presse, Ministère des Sports France, 17 May 2002.
- Denmark 2002:** The Presidency's conclusions, EU Sports Ministers Conference, Arhus, 21-22 November 2002.
- Greece 2003:** Conference "Women and Sports", The Greek Presidency of the European Union; Six-Monthly Report on Developments in the EU by Minister for Arts, Sport and Tourism, John O'Donoghue, T.D., 1 January 2003- 30 June 2003.
- Italy 2003:** Conclusions of the Italian Presidency, Informal meeting of Ministers for sport of the European Union, Artimino, 2-3 October 2003.
- Ireland 2004:** Six-Monthly Report on Developments in the EU by Minister for Arts, Sport and Tourism, John O'Donoghue, T.D., 1 January 2004- 30 June 2004.
- The Netherlands 2004:** The Presidency's conclusions, Informal EU

³³ Whereas the sports provisions clearly focus on the social and educational aspects of sport, the economic dimension of sport seems to fall outside the scope of the Treaty. However, this does not mean that there can not be discussions about the economic value of sport or an exchange of data and best practices on EU level.

³⁴ Commission decision adopting the 2009

annual work programme on grants and contracts for the preparatory action in the field of sport and for the special annual events, C(2009)1685.

³⁵ Preparatory Action in the field of sport, call for proposals EAC/21/2009.

³⁶ Commission decision, above n. 34, p. 10-11.

³⁷ See <http://www.eusportfuture.eu>

- Sports Ministers Conference, The Hague, 1-2 December 2004: Address given by Clémence Ross-van Dorp, State Secretary of health, Welfare and Sport, during the EP Presidency presentation, Brussels, 2 September 2004.
- Luxembourg 2005:** The Presidency's conclusions, Informal meeting of the European Union Sports Ministers, Luxembourg, 28-29 April 2005.
- United Kingdom 2005:** EU presidency's conclusions on sport, Informal meeting of EU Sports Ministers, Liverpool, 19-20 September 2005.
- Austria 2006:** Conclusions of the Austrian Presidency, EU-Sport Directors meeting, Vienna Hofburg, 29-30 March 2006.
- Finland 2006:** Conference Conclusions, Ministerial Conference "The EU & Sport": matching expectations", Brussels, 27-28 November 2006.
- Germany 2007:** Council of the European Union, 18-month Programme of the German, Portuguese and Slovenian Presidencies, 17079/06, December 2006; Conclusions of the EU Presidency at the Informal Meeting of EU Ministers Responsible for Sport, Stuttgart, 12-13 March 2007; Meeting of European Directors-General for Sport in Bonn preparing Ministers' Meeting, Bonn, 1-2 February 2007.
- Portugal 2007:** Council of the European Union, 18-month Programme of the German, Portuguese and Slovenian Presidencies, 17079/06, 21 December 2006; Conclusions of the Informal Council of Ministers of Sport of the European Union, Lisbon, 25 October 2007; Presidency Conclusions, European Union Sport Directors Meeting, Lisbon, 12-14 July 2007.
- Slovenia 2008:** Council of the European Union, 18-month Programme of the German, Portuguese and Slovenian Presidencies, 17079/06, 21 December 2006; Presidency conclusions, Informal meeting of EU ministers responsible for sport, Brdo pri Kranju, 16-17 March 2008; Presidency conclusions, Informal EU Sports Directors General Meeting, Brdo pri Kranju, 4-5 February 2008.
- France 2008:** Council of the European Union, 18-month Programme of the Council, from the future French, Czech and Swedish Presidencies, 11249/08, 30 June 2008; Presidency's Conclusions of the informal meeting of the ministers in charge of sport, Biarritz, 27-28 November 2008.
- Czech Republic 2009:** Council of the European Union, 18-month Programme of the Council, from the future French, Czech and Swedish Presidencies, 11249/08, 30 June 2008; Informal meeting of EU Sport Directors, Prague, 28-29 April 2009.
- Sweden 2009:** Council of the European Union, 18-month Programme of the Council, from the future French, Czech and Swedish Presidencies, 11249/08, 30 June 2008; Member State Working Group on the White Paper on Sport, meeting of 31 March 2009.
- Spain 2010:** Provisional info, see Member State Working Group on the White Paper on Sport, meeting of 31 March 2009.
- Belgium 2010:** Provisional info, see Member State Working Group on the White Paper on Sport, meeting of 31 March 2009.
- Hungary 2011:** Provisional info, see Member State Working Group on the White Paper on Sport, meeting of 31 March 2009.



The Sporting Exemption Principle in the European Court of Justice's Case Law

by **Marios Papaloukas***

As early as the seventies the sports authorities in Europe started a campaign in order to achieve the recognition of a sporting exemption from the European rules. In their view the whole of the sporting activity containing also sports rules issued by them should not be subject to the European Treaty provisions. After more than thirty years, many legal and political confrontations have resulted in the application by the European Court of Justice of the principle of proportionality in many different sports related cases in order to exclude some areas of the sports sector from the European Internal Market and Competition Rules. This exclusion however which is often referred to as "the sporting exemption" is neither absolute nor unconditional.

1. The first efforts for the adoption of the sporting exemption¹ principle

The European Court of Justice's decision (ECJ) in the case of Bosman², which hit the large part of the sports world like a bolt of lightning, was actually intended to be anything but.³ The EU had, through its Institutions, shown its intentions much earlier. In fact, it

had shown its intention that sport would no longer remain fire-proofed. The whole athletic establishment and its rules would have been examined to assess how much they were keeping pace with the rules of the Internal Market⁴ and also those of European Competition Law.^{5,6} The decisions of the ECJ with regard to sport, initially referring to infringements of the laws of the Internal Market have more recently come under those relating to Competition Law. They are examined however in this paper as if they were the same subject since it appears that the ECJ tends to establish a common rule for both cases, with common exceptions.

The decisive damage inflicted by the Institutions of the European Union on the sporting establishment, was due to the fact that it decided to treat athletic institutions and their unions (federations, teams etc.) as common businesses. This however had come into being twenty years prior to the Bosman case. In any case, after the issuing of the Bosman decision, the inconvenience of the sports entities should have been expected.

It is often forgotten by those not practicing the legal profession,

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European Law, (2007), volume 3, issue 3, 224-237.

2 M. Papaloukas, Sport: Case Law of the Court of Justice of the E.C. (Papaloukas Editions 2008), 16-34. (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311952).

3 A. Vermeersch, "All's Fair in Sport and Competition? The Application of EC

Competition Rules to Sport", Journal of Contemporary European Law, (2007), volume 3, issue 3, 238-254.

4 M. Papaloukas, "Sports Law and the Sports Market". Sport Management International Journal (2005), Vol. 1(1): 39-45. (<http://www.choregia.org/a2.pdf>).

5 A. Rincon, "EC Competition and Internal Market Law: On the Existence

of a Sporting Exemption and its Withdrawal", Journal of Contemporary European Law, (2007), volume 3, issue 3, 224-237.

6 M. Papaloukas, "Sports Law and the European Union". Sport Management International Journal (2007), Vol. 3(2): 39-49. (<http://www.choregia.org/24.pdf>).

that before the famous Bosman decision, the ECJ had issued two other decisions relating to the field of sport in 1974 and 1976,⁷ which showed that the European Community Institutions intended to deal more extensively with the issue of the conformity of sporting institutions to the rules of European Integration. These decisions followed steps made by the European Parliament and the European Commission, leading to the same goal.⁸

The ECJ's first decision (*Walrave-Koch v. Union Cycliste Internationale*)⁹ was on the question of the legality of the provision of statutes of Union Cycliste Internationale (UCI), which stated that the 'pacemaker', that is, the one who sets the pace (usually using a motorcycle), must be of the same nationality as the cyclist. It was stated by UCI that the pacemaker and the cyclist constitute members of one team and in this sense, the members of a team should be of the same nationality. The ECJ ruled that, with regard to national teams, this restriction caused no harm. On the other hand however, to a certain degree, the decision adopted legal views which, 19 years later, were contained also in the Bosman Case. It was confirmed then, that the regulations of European Law with regard to the freedom to seek employment and the provision of services in the European region were also to be applied to sport.

With the publication of the second decision relating to sport, issued 17 years prior to the Bosman case (*Dona v. Mantero*)¹⁰, which concerned the legality of the scheme which forbade the utilisation of foreign footballers in Italy, it is beyond debate today, that this was a foreboding of what was to follow.

The first official reaction of the European Parliament is contained in Resolution No. 120/33 dated 1/4/89 and relates to the free circulation of professional footballers in the Community. In the resolution, the sporting authorities are "accused" of allowing the sports provisions to preserve firstly, the so called transfer systems (on the basis of which, for a transfer to take place, the team which accepts a player must pay a deposit to the team from which the player is transferring) and secondly, the restrictions imposed by the football federation on the teams regarding the utilisation of foreign players.

Under Parliamentary pressure, the European Commission in 1990 set into motion negotiation mechanisms with both national federations and UEFA¹¹, relating to these issues. The result of these negotiations on the subject of the limitations of use of foreign players, was the so called agreement 3+2, which took on the characteristics of a non-binding 'Gentlemen's Agreement'. In as far as the transfer systems themselves were concerned however, there was no notable progress made.

The noose was tightened however and the countdown for the end of these UEFA regulations had started, when the European Community, at the beginning of 1992, decided that the Belgian Football Union in its efforts to bring all the associations of indoor football under its jurisdiction, by forcing them to accept its regulations about this sport, was violating the provisions of the articles 85 and 86 of the EC Treaty on Competition, and asked the Belgian Football Federation to take provisional measures to amend the violations.

2. The Establishment and Confirmation of the Sporting Exemption (Decisions *Walrave*, *Dona* and *Bosman*)

The principle of the sporting exemption^{12,13} was invoked for the first time in the *Walrave* case. This principle satisfied the athletic institutions since they were ensured the autonomy that they desired. Little importance was given then to the fact that in this decision, before the point at which the sporting exemption was mentioned, it had been clarified primarily that sporting activity falls under Community Law in so far as it can be considered an economic activity, according to article 2 of the Treaty. After such a statement, there appeared to be little sense in claiming that a sporting exemption was in fact introduced. In the same decision however, the ECJ ruled also that the prohibition on discrimination based on nationality contained in articles 7, 48 and 59 of the Treaty, does not affect the composition of sports teams, in particular the national teams, the formation of which is a question of *purely sporting interest* and as such has nothing to do with economic activity. The rule that was applied in this decision is therefore, that, while on the one hand, the sports sector involving an economic activity is subject to the rules of European Law concerning the Internal Market, on the other hand, sports issues of purely sporting interest have by definition no relation to economic activity, and are therefore excluded. In this case therefore, no importance is placed on how much a practice involves economic activity, but rather on how much it is a matter of purely sporting interest, since by definition these practices cannot have any link to economic activity.

The principle of sporting exemption was confirmed and perhaps even expanded in the *Dona* case of 1976. In line with this decision, rules or a national practice, even adopted by a sporting organization, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of a member state, are incompatible with article 7 and, as the case may be, with articles 48 to 51 or 59 to 66 of the Treaty, unless such rules or practice excludes foreign players from participating in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus *of sporting interest only*.

In contrast to the *Walrave* decision therefore, in the *Dona* case, the ECJ considered as a basic criterion, the amount of economic characteristics contained in a certain sporting activity has, in deciding whether or not it can be exempted. It was decided that all activities that do not have an economic flavour, are by definition cases of sporting interest only.

If we examine as a whole these two early decisions of the ECJ, we see that the rule applied by the court with regard to sport was that primarily, there exist practices that are of a purely sporting interest and these are automatically excluded. If a practice is not included in this category, then a decision must be made on how much it constitutes an economic activity. If it constitutes an economic activity, it is not excluded, whereas if it does not, then it can be classed as of only sporting interest and as a result, excluded from the European internal market and competition rules.

Sport in 1974 and 1976 when the *Walrave* and *Dona* cases were brought before the ECJ, was of course quite different from in the 1990's when the *Bosman* ruling was issued. Commercialisation was not as widespread as in the 1990's, by which time very few sporting areas had no economic activity, and even less had no effect on the economic sector. It would be difficult to claim that sport, even in the 1970's, was completely free from economic effect. Perhaps the ECJ wished to give a little more time to sporting institutions in order to prepare themselves for the changes that were to come. Moreover, even from the *Dona* case of 1976 the ECJ's ruling recognizes that a particular nature exists in sport, and this perhaps justifies the time extension granted to sports authorities¹⁴.

In the *Bosman* case, the ECJ provides for a clarification from the outset, that its former legal precedent cannot form the basis for a complete exception for sport from European Laws, clarified in paragraph 76 thus:

"As regards the difficulty of severing the economic aspects from the sporting aspects of football, the Court has held (in *Donà* paras 14

7 R. Siekmann, "The European Union and Sport: Law and Policy", *The International Sports Law Journal*, (2007), 99-100.

8 R. Siekmann, "The EU and Sport: Is Sport Special in EU Law and Policy?", (<http://sportslaw.ru/data/files/siekmann.doc>)

9 Case 36-74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, 1974 ECR P-01405.

10 Case 13-76, *Gaetano Donà v. Mario Mantero*, 1976 ECR P-01333.

11 B. García, "UEFA and the European Union: From Confrontation to Co-Operation?", *Journal of Contemporary*

European Research, (2007), Vol. 3, Issue 3, 202-223.

12 A. Rincon, "EC Competition and Internal Market Law: On the Existence of a Sporting Exemption and its Withdrawal", *Journal of Contemporary European Research*, (2007), Vol. 3, Issue 3, 224-237.

13 J. Vermeersch, "All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport", *Journal of Contemporary European Research*, (2007), Vol. 3, Issue 3, 238-254.

14 A. Rincon, "EC Competition and Internal Market Law: On the Existence of a Sporting Exemption and its Withdrawal", *Journal of Contemporary European Research*, (2007), Vol. 3, Issue 3, 224-237.

and 15) that the provisions of Community law concerning freedom of movement of persons and of provision of services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches. It stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.”

In the Bosman ruling therefore the ECJ did not reject the previous decisions but limited their scope significantly by further defining their context. Rather than examining whether the practice was an issue of genuine sporting interest, the ECJ advanced to the next question, namely whether the contested practice involved any economic activity. As for the criterion, whether the contested practice is an issue of sporting interest - which automatically means according to this ruling that there is no economic activity, there appeared to be no longer an issue since it the Court had already ruled that the practice in question was in fact an economic activity.

A reasonable interpretation of the decision may be then, that the rule set by the Bosman decision is that if a practice is an economic activity, it cannot be excluded. In such a case the ECJ did not need to refer to the Dona decision since, according to that decision, only if a practice is not an economic activity it may be then considered as of sporting interest and therefore be excluded. Why then did it choose to refer to the Dona decision and not to ignore it?

The ECJ's non-reference in the Bosman ruling of the rule set in the Walrave Case and on the other hand the reference in paragraph 76, to the rule set in the Dona Case, in conjunction with its obvious attempt to find a way through the Dona rule cannot mean anything other than the fact that the Bosman ruling was intended to amend the Dona rule in the sense that practices of sporting interest are not excluded for the reason that they lack economic characteristics by definition as was mentioned in the Dona case, but they are excluded because they are of sporting interest and may be excluded even if they contain an economic interest but do not exceed the (sporting) purpose for which they were intended.

This interpretation may not be the most obvious. Indeed for many years it was considered more reasonable to interpret the Bosman ruling as meaning that sporting activities of an economic nature are never excluded. But if we are to examine the whole of the ECJ's case law on the sporting exemption, this is surely the only interpretation which goes hand in hand and even prepares the ground for the ECJ's case law which it was about to follow.

3. From the Restriction of the “Sporting Interest” to the Principle of Proportionality (Decisions Delière, Lehtonen)

It could be said that the Court in the cases Delière and Lehtonen elaborated further on the notion of sporting interest. The ECJ decided on two cases where, whether they involve economic activity or not, they were considered as part of the sporting exemption. First, in the Delière case the sporting rules that derive from a need inherent in the organisation of high-level international athletic competitions are excluded, not because they do not have economic interest but because they do not constitute in their selves a restriction on the freedom of the provision of services. Secondly, in the Lehtonen case too, the

court does not refer to the criterion of economic activity and it considers, that a prima facie violating Internal Market sporting provision, in case its adoption is justified by objective reasons concerning only sport as such, will not go against the rules of the Internal Market. These decisions established a sporting exemption from the rules of the Internal Market.

If one were to examine the decisions of the ECJ mentioned so far, one would realise that practices of sporting interest are not automatically excluded but instead are constantly subject to increasing conditions being placed on them in order to restrict their exemption. The ECJ is clearly possessed by the fear that it expressed in paragraph 76 of the Bosman decision, the fear that the argument of sporting interest will be used as a pretext for the exclusion of the sporting activity as a whole from European Law, even when an important part of it constitutes economic activity.

Following on from these decisions in any case a practice of sporting interest, aside from whether it has an economic character or not, can be excluded, when it does not exceed the purpose for which it was established (Dona), when it does not constitute in itself a restriction on the freedom of provision of services (Delière) and when its adoption is justified by objective reasons concerning only sport as such (Lehtonen).

It is obvious that the ECJ could not continue infinitely devising different notions in every decision in order to close the flood gates and limit the cases falling under the scope of sporting interest. Inevitably it would have to take the only way around this problem by adopting the principle of proportionality as the sole solution in order to prevent the exceptions overriding the rule.¹⁵

4. The Principle of Proportionality as a Criterion for the Exemption (Decisions DLG, Wouters and Piau)

The principle of proportionality has derived from German Law and is a very common principle in European Countries, some of which include it in their Constitutions' provisions in order to limit restrictions of fundamental human rights from public authorities. Although it was first invoked by the ECJ in its case law it has now been embodied in the Treaties of the EU.¹⁶

It has been recognized by the ECJ as a general principle of Community Law. This principle imposes on the Community Institutions as well as on member states a restriction on the exercise of competences under Community Law. According to this principle, each measure that is adopted should be in proportion (reasonable relation) with the sought result. The measure cannot exceed the necessary limits for the achievement of its objectives. In other words, there should exist an equivalence, a proportionality between the extent of action and its sought objective¹⁷. The most striking point about this principle is that it leaves a great deal to the judgment of the Court.¹⁸

The idea for the establishment of the sporting exemption came from the cases DLG¹⁹ and Wouters²⁰, neither of which are sports related cases. In fact the first from these cases concerned a litigation procedure between co-operative unions of Denmark for a provision of their statute and the second concerned a provision of a lawyer's association statute in Holland in both which cases these provisions were allegedly contrary to competition law. Nevertheless these cases are worth mentioning since in the post-Bosman era they are possibly the most important decisions for sport as all the post-Bosman decisions of the ECJ relating to the sporting exemption were based on them.

These non-sporting cases were invoked in sports related cases in order to establish the principle of proportionality as a criterion for how much a sports provision abides to European Law. Thus in the DLG decision, the ECJ states that a provision will not be considered contrary to European Law, provided that it is restricted to what is necessary to ensure that the cooperative functions properly. In the Wouters decision, again the ECJ remained consistent with its decision in the DLG case, ruling that despite effects restrictive of competition, that are inherent in it, if a provision is necessary for the proper practice of the legal profession, as organised in the Member State concerned, it will not be considered as infringing Competition Law.

15 A. Rincon, “EC Competition and Internal Market Law: On the Existence of a Sporting Exemption and its Withdrawal”, *Journal of Contemporary European Research*, (2007), Vol. 3, Issue 3, 224-237.

16 T.C. Hartley, “The Foundations of European Community Law”, sixth edition (Oxford University Press, 2007), pp. 152.

17 N. Emiliou, “The Principle of Proportionality in European Law: A Comparative Study”, (Kluwer Law International, 1996).

18 T.C. Hartley, “The Foundations of European Community Law”, sixth edition (Oxford University Press, 2007), pp. 152.

19 Case C-250/92, Göttrup-Klim e.a. Grovwareforeninger v. Dansk Landbrugs Grovareselskab AmbA. 1994 ECR I-05641.

20 Case C-309/99, J. C. J. Wouters, J. W. Savelbergh, Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 ECR I-01577.

According to this ruling, the ECJ considers that there exist certain measures, which although they may be restrictive to competition, are not established with the aim of restricting competition but are aimed at the legal and rightful regulation of a subject within the competence of the authority issuing this provision. The objective is to legally protect its rights and only as a side-effect competition is restricted.

Consequently those sporting provisions and practices that limit competition could be excluded from the Competition rules, provided that they are not established with the aim of restricting competition as such, but have as their aim the legal and rightful regulation of matters concerning the athletic institution by which the provision is issued, with the restriction of competition being merely a side-effect. This of course presupposes that the ECJ would recognize to sports authorities the right of self-regulation and autonomy, and grant them an area of absolute competence. All that remained was for a sports case to be brought before the ECJ in order for it to apply the two former decisions in a case involving sport and ensure the principle of proportionality was to be applied directly to sport.

This opportunity arose in the Piau case, which concerned a contestation of the sports provisions with regard to sports agents. The ECJ seized the occasion to refer back expressly to the previous decisions of the cases of DLG and Wouters.

5. The Contestation and Final Predominance of the Principle of Proportionality (Decisions Meca-Medina)

Following the Piau case, the Meca-Medina case²¹ has had a much greater impact on sports since initially it was brought before the Court of the First Instance of the European Community, which recognised the sporting exemption principle but also based its decision to ECJ's previous case law on this subject. That is to say, it

invoked the previous decisions Walrave and Dona. In this way, instead of using the principle of proportionality, it referred to rules of a purely sporting interest, and, as such, having nothing to do with economic activity. Then it added that the fact that purely sporting rules may have nothing to do with economic activity, with the result that they do not fall within the scope of Articles 39 EC and 49 EC, means, also, that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC.²² The wording in this decision takes us many years back to the 1970s and specifically to the Walrave case, since it invokes the rule of purely athletic rules that by definition do not constitute economic activity.

The agitation that this case would have caused would have been great, had it not been brought before the ECJ in order to reverse it completely²³. The legal and sporting worlds feared that if this first-level decision would be upheld, this would mean the ECJ abandoning the concept of proportionality and regressing many years to theories supporting the existence of rules of a pure sporting nature. The ECJ, in reversing this decision of the Court of First Instance, dealt the final blow to the theory surrounding purely athletic rules as a benefit to the principle of proportionality.

6. Conclusion

One must bear in mind that there is no legal doctrine of "stare decisis" in European Law. The ECJ however usually follows its previous decisions. In case where the Court does not follow its previous case law, it does not overrule the earlier case law as a common law court would do but it simply ignores it.²⁴ After the Meca-Medina case it is safe to say that a principle of relative sporting exemption from the European Internal Market and Competition Rules has set a precedent in the ECJ's case law that will be followed in the future even if some further modifications are accepted. The sports authorities in Europe have sought for an exemption for more than thirty years. Their efforts started in the early seventies invoking legal arguments before the ECJ for the recognition of the exclusion of sports rules from the scope of European law. The struggle was continued in the political arena²⁵ in a successful campaign²⁶ that led to the adoption of the White Paper on Sports²⁷ recognising the specificity of sport²⁸ and also in the inclusion of sport in the provisions of the new Treaty of Lisbon.²⁹ It is true that the sports authorities were aiming to an absolute, clear and unambiguous rule of exclusion of sports as a whole from the provisions of European law and not an exclusion according to the principle of proportionality, that transfers the power to the judge to decide whether an activity is to be excluded. Nevertheless the current situation means that the sports authorities have won a decisive battle but not the war of absolute exclusion. They can certainly face the future battles for sports betting rights and sports events transmissions rights with a certain amount of optimism.

21 Case C-519/04 David Meca-Medina, Igor Majcen v. Commission of the European Communities, Republic of Finland, Judgment of 18 July 2006.

22 Case C-519/04 David Meca-Medina, Igor Majcen v. Commission of the European Communities, Republic of Finland, Judgment of 18 July 2006 paras 7-8.

23 M. Papaloukas, "Sport: Case Law of the Court of Justice of the E.C.", (Papaloukas Publications 2008), 299-308. (papers.ssrn.com/sol3/papers.cfm?abstract_id=1311952)

24 T.C. Hartley, "The Foundations of European Community Law", sixth edition (Oxford University Press, 2007), pp. 72.

25 See the speech of Nicola Sarkozy on the

Sporting Exemption (www.euractiv.com/en/sports/sarkozy-backs-european-sporting-exemption/article-174130)

26 Report from the EU Sport Forum Organised by the European Commission in Biarritz on 26-27 November 2008 (ec.europa.eu/sport/pdf/doc687_en.pdf)

27 The White Paper on Sport (ec.europa.eu/sport/white-paper/index_en.htm)

28 I. Blackshaw, "The Specificity of Sport and the EU White Paper on Sport: Some Comments", *The International Sports Law Journal* (2007), 87-88.

29 The European Treaty of Lisbon (<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>)



From left to right: Hinca Pandjaitan, Director of the Indonesia Lex Sportiva Institute, Djakarta, Roberto Branco Martins (ASSER International Sports Law Centre), Prof. Bintan Saragih, Dean School of Law, Pelita Harapan University (UPH), Djakarta, Robert Siekmann (Director, ASSER International Sports Law Centre) and Joko Driyono, Director of the Football League of Indonesia, at the International Seminar on "Lex Sportiva and Professional Football" at UPH in Djakarta, 8 October 2009.

Irregularity of Solidarity or Solidarity in the Irregularity*

by Ian Blackshaw and Boris Kolev**

Introductory Remarks

The FIFA Commentary of the FIFA Regulations on the Status and Transfer of Players (the Regulations), which is based on the jurisprudence of the competent decision-making bodies of FIFA and the Court of Arbitration for Sport (CAS), interprets the provision of article 1 (3) of the Regulations to the effect that the solidarity mechanism does not apply in the case of a transfer between clubs belonging to one national association. Indeed, the most recent case law of the FIFA Dispute Resolution Chamber (DRC) and the CAS confirms the applicability of the FIFA Solidarity Mechanism only to international transfers. This is so even in the cases where a member association of FIFA has failed to foresee a system to reward the clubs investing in the training and education of young players at national level as required by article 1.2 of the Regulations.

If we see the Football Associations who have turned a blind eye to the one of the most important principles of today's football and somehow missed to implement it in their domestic regulations one might be surprised to find the English and Italian associations on the list. At the same time, countries like Bulgaria, for instance, have duly incorporated the FIFA provisions on solidarity in their respective internal rules.

The reason for the non-compliance of the biggest football countries in Europe is obvious. Only in the football leagues of such countries, there might be domestic transfers for significant amounts of money concerning players entirely trained and educated by foreign clubs. This means that even the 5% for solidarity could amount to a serious sum which will have to leave the country. And while this conduct may be understandable from the point of view of the English and Italian clubs what does it have to do with the idea of solidarity? This is obviously one serious irregularity of the whole solidarity system as developed by FIFA which totally undermines it. And if there is any solidarity left, this is only the solidarity among the national associations of the biggest European football leagues to maintain this irregularity as long as possible.

FIFA and the CAS have so far refused to remedy this injustice by insisting that the FIFA solidarity mechanism applies only regarding international transfers, which, according to the respective decisions, follows from the alleged clear wording of the FIFA Regulations. We agree that the FIFA Regulations are clear; however, this article argues that they are clear in saying just the opposite: the FIFA Solidarity Mechanism applies to all transfers either international or domestic.

Before moving to the essence of our analysis, we would like to mention some important preliminary points.

Some Preliminary Points

The Commentary and Notes are there for guidance purposes only and cannot affect the legal meaning and interpretation of the Regulations themselves. And, as the FIFA Commentary on the Regulations itself makes clear, the explanations in this Commentary are subject to changes or amendments of the relevant jurisprudence by the relevant bodies. Even the presence of CAS decisions should not make the matter completely settled because the principle of 'stare decisis' is not followed by the CAS; and even a similar case may be tried again with a different outcome, especially in view of new arguments such as the ones advanced in this article.

The issue whether the solidarity mechanism shall apply to all transfers of players or only in cases of so-called international transfers may be answered correctly and thoroughly only after first examining the historical background to and the inherent reasoning and justification for the introduction of this mechanism. As Gerard McMeel, Professor of Law at Bristol University, United Kingdom, in his recent major work on *The Construction of Contracts* (Oxford University Press, UK, 2007) explains in respect of the interpretation of contracts, and, by analogy rules and regulations, which he refers to as the 'Objective Principle in Interpretation', one has to take into account the objective framework of facts within which the measures came into existence. In other words, the background to and purpose of the Regulations are key to a proper understanding and interpretation of them.

Thus, as a starting point of our analysis, it is necessary to consider the historical background to the introduction of the FIFA Transfer and Status of Players Regulations.

The Origin of the FIFA Transfer and Status of Players Regulations

The Regulations have their origin in the decision of the Executive Committee of FIFA passed at the FIFA Congress in Buenos Aires on 5 July 2001. A new feature of these Regulations was the introduction of new provisions on training and education compensation and the so-called solidarity mechanism, which was designed and intended to reward clubs that have been responsible for the training, education and formation of young players between the ages of 12 and 23 and also to restore the competitive balance between the smaller and the big clubs. This principle is regarded by FIFA as an important and fundamental one. It is clear that the solidarity between clubs is the main and fundamental principle, on which the Regulations are based. The solidarity mechanism is still regarded by FIFA as a fundamental and important principle of the Regulations. And indeed it is the *raison d'être* of the Regulations, because, without this mechanism, FIFA

* This joint article is the result of the joint work of the authors as lawyers in a case aiming to prove a claim based on the FIFA solidarity mechanism in respect of a domestic transfer. They were engaged by the Bulgarian football club CSKA Sofia to investigate the possibilities for sustaining a claim for solidarity against Manchester United FC in connection with the transfer of the federative rights of the CSKA former player Dimitar Berbatov from Tottenham Hotspur FC to Manchester United FC in the fall of

2008. The amount of the transfer fee due to Tottenham Hotspur according to the information reported by the media was 30.75 million pounds. Despite the presence of a case law to the contrary, the authors consider that the non-applicability of the FIFA solidarity system to domestic transfers leads to quite unfair results. Namely, that the club who invested and trained a player capable of moving from one club to another for such significant amounts is deprived from receiving anything, simply because the English

Football Association has not complied with the provisions of article 1.2. of the FIFA Regulations, even though the concrete provisions on solidarity in the Regulations do not make any distinction between international and domestic transfers. The club CSKA Sofia was ready to lead the battle aiming to overrule the current practice so the claim was lodged with the FIFA DRC. However, due to recent changes in the ownership and management of the club and also financial difficulties, CSKA Sofia was forced to

withdraw its claim, thus missing the opportunity of becoming a flagman of the battle of the small clubs for real solidarity.

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would not have been able to justify and to operate a transfer system of players, because of EU considerations arising out of the European Court of Justice decision in Bosman.

The EU background of the Regulations is very well explained by the very well known Professor dealing with international sports law, Stephen Weatherill, Jacques Delors Professor of EC law, at Oxford University, United Kingdom, in his Book 'European Sports Law Collected Papers' published by the T.M.C. ASSER Press in 2007 (hereinafter "Weatherill").

"Bosman has prompted significant change in the practice of clubs in their dealings with players, and some of the potential wider implications argued for above (though by no means all of them) have also been instrumental in inducing the shaping of a revised system. In March 2001 it was announced that, after extended and sometimes acrimonious discussion, an agreement had been reached between the Commission and football's governing bodies for the world, FIFA, and for Europe, UEFA. The Commission went so far as to announce that the deal of March 2001 had been "formalized" through an exchange of letters recorded in a Commission Press Release between Mr. Mario Monti, the European Competition Commissioner, and the President of FIFA, Mr. Sepp Blatter. ...Eventually in June 2002 the Commission closed its investigation declaring "the end of the Commission's involvement in disputes between players, clubs and football organizations". ...The key features of this system that the Commission is prepared to treat as compatible with EC competition law and the law of freedom of movement provide (inter alia):

That in the case of players aged under 23, a system of training compensation should be in place to encourage and reward the training effort of clubs, in particular small clubs;

That there should be the creation of solidarity mechanism that would redistribute a significant proportion of income to clubs involved in the training and education of a player, including amateur clubs.

The second justification for regulation of the industry which the Court accepted as permissible in principle was the need to encourage the recruitment of young players. Advocate-General Lenz suggested that appropriate transfer rules might be acceptable if based genuinely on costs of training. But he felt it unnecessary to explore the matter more fully. He commented that any system would have to cover costs incurred in training by the selling club, which he thinks should only be the first club. This seems an irrational limitation, for it is not only the player's first club that may spend money in improving a player's capabilities."

Weatherill's conclusion was, in fact, reflected in the Regulations which established the solidarity mechanism aiming to reward not only the first club but any club, which has spent money in improving a player's capabilities. The solidarity mechanism is a key feature of the transfer system introduced in 2001 and it was among those features according to which the Commission still regards this new system as compatible with the EC competition law and the law of freedom of movement of persons. That is why the adoption and introduction of the solidarity mechanism at national level must not depend only on the will and the discretion of the particular national associations but it is rather binding per se at national level.

The Structure of the Regulations – transfer rules as an international matter, training compensation and solidarity mechanism – separate treatment.

The Structure of the Regulations follows the outcome of the Bosman judgment and they are in line with the agreement reached between the European Commission and the World and European football governing bodies. The reason that the Regulations contain binding rules concerning the transfer between clubs belonging to different Associations is that Bosman was about a cross-border transfer and not about a national transfer.

This is confirmed by Weatherill on page 106 of his Book: "The explicit terms of the judgment do not decide that a system of transfer

fees within a single Member State falls foul of article 48...Bosman wished to move from Belgium to France and the explicit terms of the ruling deal only with cross-border matters in connection with article 48, so nothing in the explicit terms of the judgment declares a transfer between two clubs located within the same Member State incompatible with Community law. Several national associations responded to the judgment by asserting its inapplicability to domestic transfers and confirming the maintenance of a transfer regime within their own league. Such restrictions on contractual freedom seem to be subject to the supervision of national law alone. The European Court of Justice conceded in Bosman that Article 48 is inapplicable to situations wholly internal to a single Member State, citing well-established case law on the point. The Court seems reluctant to extend the scope of Community law to prohibit such "reverse discrimination" by a State against its own nationals....As is clear from the second question in Bosman national associations may not respond by introducing limits on the number of EU nationals who may be imported in this way, so pressure will increase on national associations to remove the anomaly by agreeing to abandon fees altogether. Moreover, it is plain that the successful institution of a proper wealth distribution system in Europe, as discussed in Section 5.1.1. above, would involve a removal of the anomaly between domestic and cross-border transfers, as part of a wholesale reorganization of the game's finances. To this extent, even though Bosman concerns only cross-border deals, it is likely to exert a wider impact on the football economy".

The training compensation and the solidarity mechanism, however, are a totally different matter, and they were meant to encourage the recruitment of young people in line with the opinion of the Advocate-General Lenz in Bosman. The training compensation system and the solidarity mechanism are supposed to serve as an instrument for rewarding investments in training and compensation, which was also the purpose of the transfer system before Bosman according to its defenders. Unlike the transfer system in its form as existing before Bosman, however, the training compensation and the solidarity mechanism were viewed by the European Commission as compatible with EU law and that is why the European Commission regarded this new solidarity mechanism as a key feature of the new Regulations.

Therefore, it would be absolutely implausible to equate this new system to a part of the "transfer between clubs belonging to different situations" and thus to exclude its applicability at national level.

This approach was followed first in a decision of the FIFA Dispute Resolution Chamber (DRC) of 2003 related to the transfer within England of the Irish player Robbie Keane. The DRC admitted that this was a case of international transfer and thus applied the FIFA rules on solidarity. However, this approach was soon abandoned in a decision of 22 July 2004 regarding the solidarity contribution related to the transfer of the federative rights to the player C, which reads as follows:

"...The DRC referred to the contents of the Regulations and in particular, to their Preamble. Par. 1 of the Preamble establishes that the Regulations deal with the status and eligibility of players, as well as with the rules applicable whenever players move between clubs belonging to different associations. The deciding body lent emphasis to the wording of the last part of the aforementioned clause and concluded that, in fact, the Regulations are not applicable to transfers of the federative rights to a player between two clubs affiliated to the same association. Consequently, the members of the Chamber present at the meeting were of the unanimous opinion that the previous jurisprudence of the DRC needs reviewing and concluded that the principle regarding the solidarity mechanism contained in the Regulations is not applicable to national transfers, not even in cases where the club claiming the payment of the relevant contribution is affiliated to another association".

This interpretation of article 1.1. of the FIFA Regulations made in the above cited decision of the DRC, with the greatest of respect, cannot be accepted. The Panel erroneously attributed the principle regarding the solidarity mechanism to the wording "transfer between clubs belonging to different associations". The solidarity mechanism does

not fall within the wording “transfer between clubs belonging to different associations” and was not meant to be included there by the legislator as already explained in the above analysis of the historical roots of the rules on solidarity.

Article 1.1. lists specific matters, regarding which the Regulations established global and binding rules, and these matters are explicitly stated: (i) status of players, (ii) their eligibility to participate in Organized Football and (iii) their transfer between clubs belonging to different associations. But the Regulations also deal with other matters, including Maintenance of Contractual Stability, Training Compensation and Solidarity Mechanism. Therefore, FIFA cannot validly conclude that Article 1.1. is an all-embracing provision governing all matters covered by the Regulations, including the Solidarity Mechanism and Contribution.

Then, article 1.3. indicates which provisions related to the matters stated in article 1.1. have to be included without modifications in the Associations Regulations and, further, it indicates the provisions, with respect to which the Associations will have certain discretion but still having the obligation to respect certain principles enumerated therein. If we see the said articles and principles they concern exactly the provisions on the status of players, their eligibility to participate in Organized Football (registration of players) and “transfer between clubs belonging to a different association (maintenance of contractual stability between professionals and clubs and international transfers involving minors)”. The training compensation and solidarity mechanism are not included in article 1.3. simply because they do not fall within the wording “transfer between clubs belonging to different associations” and have nothing to do with the scope of article 1.1. Article 1.1. is absolutely inapplicable to the solidarity mechanism.

The matters which remain outside the scope of articles 1.1. and 1.3. are (i) settlement of disputes (jurisdiction), (ii) training compensation and solidarity mechanism and (iii) release of players for association teams. These matters are dealt with in article 1.2. and 1.4., accordingly.

Regarding the settlement of disputes, article 1.2. requires the national association to foresee rules for such settlement between clubs and players in accordance with the principles stipulated in these Regulations. Regarding the training compensation and the solidarity mechanism, this article requires the national associations to foresee a system to reward the clubs investing in the training and education of young players. Without any doubt, although not mentioned specifically for the solidarity mechanism, such a system referred to in article 1.2. must be based on the principles stipulated in the Regulations. And these principles are the ones stated in article 21 and Annex 5. The 2001 version of the Regulations contained explicitly the word “principles” before the concrete wording of the provisions on the solidarity mechanism, and precisely this version was applicable at the time of the issuance of the above cited decision of the DRC. Although the word “principles” is omitted in the most recent 2008 edition, it is clear that the solidarity between clubs is the main and fundamental principle, on which the Regulations were based and their key feature.

Interpretation of article 21 and annex 5 - refer to any transfer

The provisions on the solidarity mechanism set out in article 21 and Annex 5 of the Regulations must be interpreted by applying a common sense approach in accordance with their normal, natural, and ordinary meaning; in other words, if it is stated “if a professional is transferred” this would mean - by all means - all kind of transfers, both national and international; there is no qualification to such a statement.

Article 21 of the Regulations 2008 reads as follows:

“If a professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club (solidarity contribution). The provisions concerning solidarity contributions are set out in Annexe 5 of these regulations.”

It is clearly stated that this principle is applicable in the case of any transfer of a player -international or national - before the expiry of his contract. There is nothing in this wording suggesting or implying that

such a transfer must involve clubs belonging to different associations: in other words, be limited only to international transfers. The panel in the above-mentioned decision, in fact, narrowed the scope of this principle by erroneously, as we demonstrated above, adding that the clubs involved in such transfer must belong to different associations. This conclusion of the DRC came as a result of the erroneous interpretation of article 1.1. of the Regulations under which the said article was deemed applicable to the FIFA solidarity mechanism, which is not true. It is a well settled canon of interpretation that a general provision Art. 1.1., cannot override or derogate from a specific provision: Art. 21 is a specific provision dealing with a separate and self-contained subject, namely, the solidarity mechanism and contribution. This is known as the ‘*generalia no specialibus derogant*’ principle of legal interpretation.¹

Annex 5 of the Regulations also says nothing that could be possibly construed in a sense that the transfer must be between clubs belonging to different associations. It reads as follows:

“If a professional moves during the course of a contract, 5% of any compensation, not including training compensation paid to his former club, shall be deducted from the total amount of this compensation and distributed by the new club as a solidarity contribution to the club(s) involved in his training and education over the years. This solidarity contribution reflects the number of years (calculated pro rata if less than one year) he was registered with the relevant club(s) between the seasons of his 12th and 23rd birthdays, as follows:

- Season of 12th birthday: 5% (i.e. 0.25% of total compensation);
- Season of 13th birthday: 5% (i.e. 0.25% of total compensation);
- Season of 14th birthday: 5% (i.e. 0.25% of total compensation);
- Season of 15th birthday: 5% (i.e. 0.25% of total compensation);
- Season of 16th birthday: 10% (i.e. 0.5% of total compensation);
- Season of 17th birthday: 10% (i.e. 0.5% of total compensation);
- Season of 18th birthday: 10% (i.e. 0.5% of total compensation);
- Season of 19th birthday: 10% (i.e. 0.5% of total compensation);
- Season of 20th birthday: 10% (i.e. 0.5% of total compensation);
- Season of 21st birthday: 10% (i.e. 0.5% of total compensation);
- Season of 22nd birthday: 10% (i.e. 0.5% of total compensation);
- Season of 23rd birthday: 10% (i.e. 0.5% of total compensation).”

Again, it is obvious that the provision applies whenever a professional moves during the course of a contract.

Therefore, the single provision from the Preamble that is applicable to the solidarity mechanism is the last sentence of article 1.2, which states that national associations should foresee a system to reward the clubs investing in the training and education of young players. There is nothing in this provision excluding the binding effect of the provisions of the Regulations regarding the solidarity mechanism on the national associations. To admit that the national associations may derogate from the provisions in the Regulations regarding the solidarity mechanism by explicitly making it inapplicable in case of domestic transfers or by merely being silent on this issue would lead to absurd results: *Reductio ad absurdum*.

If a distinction is made between national and international transfers so far as the payment of a solidarity contribution is concerned, other absurd results follow and the payment of a solidarity contribution can be easily circumvented where, for example, two national transfers are made at a high price, followed by an international one at an artificially low price, in which case only an insignificant solidarity contribution would be payable and would not reflect the true value of and investment of the player transferred. This can hardly be described as ‘solidarity’ in any sense or meaning of the term!

Furthermore, if a distinction is made between national transfers

¹ For a recent judicial example of the application of this rule, see paragraph 23 of the judgment in the English Court of

Appeal case of *Golden Fleece Maritime Inc and Anor v ST Shipping and Anor* [2008] 1 C.L.C. 861 (CA), 23 May 2008.



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and international transfers with the result that the solidarity mechanism only operates in the case of international transfers, this could adversely influence the transfer fees demanded in the case of international transfers vis-à-vis national transfers. Such a scenario could infringe on the right to freedom of movement within the European Union and run counter to the ruling made in Bosman. This can also constitute anti-competitive conduct contrary to the EU Competition Rules.

In addition, if a distinction is made between national transfers, which do not qualify for a solidarity contribution and international transfers which do, this distinction itself can also have an anti-competitive effect contrary to national competition laws.

And lastly, but certainly not the least important, by applying the same flawed reasoning for distinction between national and international transfers, the national associations might be entitled to derogate from the provisions on the jurisdiction of the FIFA DRC and the Single Judge by relying on the second sentence of article 1.2, which allows the national association to set their own rules for the settlement of disputes between clubs and players. It is obvious that the national associations are not entitled to do so and they could only legislate on the matter of jurisdiction in cases which are not subject to the mandatory provisions on jurisdiction laid down in the Regulations.

Parallel between the solidarity mechanism and the dispute settlement mechanism

The parallel between the solidarity mechanism and the mechanism for settlement of disputes between clubs and players as provided for in the FIFA Regulations is, in our opinion, very useful and is worthy of further elaboration.

1. Both matters are not included in article 1.1, although they are undoubtedly present in the Regulations. This confirms the single correct conclusion that article 1.1 does not exhaust all matters which are included within the scope of the Regulations. This certainly means that there are also other matters in the Regulations which may be binding even if not stated expressly in article 1.1.
2. Both the solidarity and dispute resolution mechanisms are included in article 1.2 as matters which have to be mandatorily regulated by the internal regulations issued by the national associations, which are subject to approval by FIFA.

Both matters, therefore, are similarly treated in the Regulations. That is why it is very important to see what are the consequences which follow in the case of failure of the national associations to foresee rules for the settlement of disputes between clubs and players, because this will provide a valuable guideline about the necessary consequences that follow in the comparable case of failure of the national association to provide rules for rewarding clubs investing in the training and education of young players.

In all cases of failure of national associations to provide rules on settlement of disputes between clubs and players there will be no independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs established at national level and, therefore, all cases having an international dimension may be referred to FIFA, which is competent pursuant to article 22 of the FIFA Regulations. The case law of the DRC confirms that also “in the absence of a national sports arbitration tribunal [...] the DRC] is competent to deal with a dispute, even if written agreements signed between the parties involved in the dispute contain a clause by means of which the (exclusive) jurisdiction of another body is chosen.”². Even if a national sports arbitration tribunal exists, the DRC could still declare it holds authority if it cannot be guaranteed that the tribunal is composed of members chosen in equal numbers by players and clubs with an independent chairman.³

It is obvious that the FIFA primary goal is to achieve a fair and effective dispute settlement mechanism within the family of football, and that is why it allows parties to such disputes to base their claims on the FIFA rules on jurisdiction, where such are absent at the national level or inadequate and inappropriate to guarantee the fair result of the proceedings. And, it is further submitted, that this is so regardless

of the fact that the respective rules of the national association have been subject to approval by FIFA or actually approved by FIFA. Also, nobody could possibly construe the absence of the settlement of disputes between players and clubs from the scope of the Regulations in article 1.1 as meaning that the rules about dispute settlement under the Regulations are applicable only to cases of disputes concerning or arising out of transfers of players between clubs belonging to different associations. Such an interpretation of the Regulations is clearly unsustainable. In the case of solidarity between clubs, the major objective of FIFA, when interpreting its own rules, should be that all clubs, which have invested in the training and education of young players, should be rewarded in all cases of transfers of such players throughout their career wherever it may take them. Therefore, in the absence of any alternative solidarity mechanism operating at national level, similarly to the case of the absence of any dispute settlement mechanism at national level, the FIFA rules on solidarity must be applied also at the national level.

Moreover, the very wording of the rules on the solidarity mechanism in article 21 of the Regulations is quite broad and unqualified and, therefore, relates to all transfers and not only international ones. Unlike the dispute settlement rules which specify that there should be international dimension in the dispute between a club and a player in order to be heard by the FIFA dispute resolution bodies, in the case of solidarity there are absolutely no limitations stated regarding the right of the clubs who contributed to the training and education of the player to receive solidarity contributions. This means that there are even much more solid grounds for FIFA to apply its rules on solidarity in the cases of domestic transfers, provided that national rules are absent or inadequate, than is the case for imposing its dispute resolutions system at national level.

Therefore, the articles on dispute settlement and solidarity as stated in the FIFA Regulations are the only ones in the Regulations that may determine their own scope. Article 22 defines the types of disputes that fall within the FIFA competence and provide certain limitations. Article 21 also defines the scope of the rule regarding the solidarity mechanism and it clearly and undoubtedly according to its wording expressly states that it applies in all cases of transfers without imposing any qualifications or limitations.

Recommendations

The purpose of this article is to call upon FIFA, in the light of our arguments, to look again at and revise the current interpretation of its rules regarding the application of the solidarity mechanism at the national level. Because the current interpretation is not only legally unsustainable, but also causes significant injustice to the clubs, who have invested in the training and education of young players and are not rewarded although such players are moving during their career for significant amounts of money - both at the national and international levels. And the FIFA Regulations themselves permit the right and allow for the justification for FIFA to do so.

Article 1.2 provides merely an option for the national associations to choose another form of rewarding the clubs investing in training and education of young players. It would be absolutely illogical and unfair, therefore, to allow such national associations to avoid the application of any system for solidarity by merely failing to meet their obligation under the FIFA rules. These provisions cannot be derogated by the national associations and they could either restate them in the respective national associations' regulations or provide additional elements to the solidarity mechanism as already regulated by the Regulations.

Article 21, which deals with the solidarity mechanism, is not enumerated in article 1.3. among the provisions that are binding at national level, because article 21 says quite clearly and explicitly that whenever a professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club (solidarity contribution). This clearly means that this provision covers

2 Case 86833 of 17.8.2006

3 Case 14288 of 15.1.2004

the cases of both national and international transfers. Therefore, it is not legally necessary to make any specific provision on this subject. Furthermore, article 1.3 does not indicate as binding at the national level also the provisions of the Regulations on jurisdiction and it would be absurd to accept that the latter provisions are not binding at the national level.

To deny the binding nature of the solidarity mechanism established under the Regulations at the national level would further undermine the nature and the essence of the principle of solidarity. The solidarity mechanism was designed, as previously mentioned, to fill in the gap between the rich and the poor clubs, which gap threatens the competitive balance and the 'level playing field' for football clubs worldwide. In other words, to ensure financial fair play between clubs.

Furthermore, the obligation for payment of solidarity contributions is not dependent on whether the player moves from one country to another: it always goes with the player when he moves either internationally or within one country. Conceptually, the investment is made in the player and also the principle/objective of the solidarity mechanism is to maintain a competitive balance between football clubs, and this applies nationally and internationally - the leagues are national and international - without any discrimination between them. In other words, the solidarity contribution attaches to and moves with the player from club to club - it is a kind of 'financial baggage' that the player carries with him and is not dependent on an artificial distinction between an international and a national transfer. It moves with the player wherever the player goes, as clearly and unequivocally stated in Article 21: "If a professional is transferred before the expiry of his contract....". The only qualification in this Article is one of time; not of place!

Finally, if the FIFA legislator had wanted to make it clear that the solidarity mechanism does not apply in the case of a transfer between clubs belonging to the same national associations he should have simply stated this explicitly in the Regulations and/or their annexes, which are an integral part thereof. However, he stated explicitly just the opposite - that the solidarity mechanism applies whenever a player moves in the course of his contract. At the same time, the so-stated rule is opposed on the ground of flawed reasoning and erroneous interpretation of other provisions of the Regulations. For instance, Article 21 of the Regulations could have expressly stated that a solidar-

ity contribution is only payable in accordance with the provisions of Art.1.1. Or could have stated that "Subject to and in the circumstances foreseen in article 1.1. and without prejudice to article 1.3., if a professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club (solidarity contribution)". No such qualifying phrase or provisions apply. It follows, therefore, that Art. 21 may not be interpreted restrictively. In other words, in a way that excludes national transfers from the solidarity contribution as the Respondent claims. In other words, under the 'contra proferentem' principle of interpretation, the provision is construed against the party seeking to include a restriction or a limitation in an otherwise clear and unqualified provision, on the basis that, if that meaning had been intended, the draftsman could have - and, indeed, should have - included such restriction or limitation.

It is also a basic principle of legal interpretation that different expressions denote different meanings. In Article 1.1, the expression "international transfer" is used and this expression recurs in other Articles. It is significant that Article 21 refers only to a "transfer". This indicates that the drafters of Article 21 had all transfers in mind and not only international transfers. This argument is supported by the general principle of interpretation that there is no redundancy in a legal text and that effect should be given to each and every word in the text. If "transfer" in Article 21 should be interpreted to refer to international transfers only, the word "international" in, for example, Articles 9 (International Transfer Certificate) and 19 (Protection of Minors) would serve absolutely no purpose whatsoever and, therefore, be redundant. This is not legally tenable from an interpretation point of view.⁴

Concluding Remarks

It is a great pity that, for the reasons already mentioned, CSKA Sofia were not able to proceed with their claim for a solidarity contribution in the FIFA DRC and even, if necessary, on appeal to the CAS itself, as, in the opinion of the authors of this article, the issues regarding the interpretation of the FIFA Regulations on the Status and Transfer of Players raised in this article would have been given a thorough airing and the previous erroneous - and, indeed, unfair - interpretation and application of the Regulations to international transfers only would have been corrected.

It is to be hoped, therefore, that - before too long - someone of the calibre of Maitre Jean Louis Dupont (of Bosman and other groundbreaking football cases' fame) would take up the cudgels on behalf of another claimant football club for a solidarity contribution in relation to a national transfer of a leading player and thereby lay to rest this 'received' but entirely unjustified and unjust interpretation of the FIFA Regulations - once and for all!

Or is that too much to hope for?

⁴ See also in support of this argument, the discussion of the rule that different words or expressions indicate different meanings and the rule that there are no superfluous words in a contract, and, by analogy, a legal regulation or, indeed, any legal text requiring interpretation, in Professor Steve Cornelius's Book on

Principles of the Interpretation of Contracts (LexisNexis, SA, 2nd ed, 2007) at pp 121 and 122 (cited with approval in the Provincial High Court in Johannesburg, South Africa, judgment in the case of *Birkenruth Estates(Pty)Ltd v Unitrans Motors (Pty) Ltd* [2005] 3 All SA 128 (W)).



NINTH ASSER INTERNATIONAL SPORTS LAW LECTURE

*Sports Betting Policy in a European Legal Perspective:
Freedom of Services versus General Interest*

**T.M.C. Asser Institute, The Hague
16 September 2009**

Chairman: Alan Littler, Law Faculty, University of Tilburg

Speakers

- Tjeerd Veenstra, Director of the Dutch Lotto and Member of the Executive Committee of European Lotteries
- Joris van Manen, Partner, De Brauw Blackstone Westbroek Law Firm, Amsterdam
- Professor John Wolohan, Ithaca College, Ithaca, New York
- Genevieve Gordon, Birkbeck College, London University

Critiquing Collett: The Assumption of Risk in Football as a Profession

by Adam Whyte*

Recently in the matter between Gary Smith & Anr and Ben Collett it was decided that a football player could be compensated for future earnings that were lost as a result of a dangerous play on the football field. Ben Collett, once a promising 18 year old Manchester United Football Club academy player, never regained his former ability or realized his potential to be a professional footballer. However, football, much like any sport, is a profession which carries a high level risk of injury and consequently the early termination of one's career. The participants and hopefuls know this when pursuing this fragile career option. I will endeavour to explore whether or not it is correct for the courts to award losses for potential career earnings; a value which is so difficult to determine, whether the courts have the capacity to calculate the future earnings of a footballer, and if the Judge's calculation of future loss of earnings was done so appropriately and accurately.

Introduction

On 1 May 2003, Ben Collett, the respondent, was playing in his first match for the Reserves team of Manchester United. As a result of a high, "over the ball" tackle from Mr. Gary Smith, a Middlesbrough Football Club player, Mr. Collett suffered severe fractures of the right tibia and fibula. He was 18 years old at the time.

Despite making an apparently good recovery from the fractures, he never regained his former ability, and two/ three years after the accident he gave up on professional football to pursue other career options.

Mr. Collett issued civil proceedings against Middlesbrough Football Club and Mr. Gary Smith, the appellants, claiming that he had been deprived of his chance to pursue a lucrative career as a professional footballer.

On 17 June 2009, the England and Wales Court of Appeal (Civil Division) made a ruling on the said order awarding damages in favour of Mr. Collett. They upheld judge's decision and set a new standard for what can be claimed as a result of negligence that has occurred on the field of play.

On 3 October 2009, Lord Swift awarded the player GBP 4,577,323. The main issue was the award for the *loss of future earnings* which the judge valued at GBP 3,854,328.

Future loss of earnings; the rationale

It is common practice to compensate a worker for future loss of earnings, where the worker has suffered damage, as a result of another's liability¹. However, generally the worker is compensated for the amount of money which they would have earned based on their current position in the company, or a position which they would have reasonably been expected to have achieved.

In this situation, we have an 18 year old footballer player with no guarantee of success being awarded compensation for a profession which he had not even begun practicing. In order to support his claim the respondent in this case called upon "expert witnesses" in order to testify on his behalf. Sir Alex Ferguson, the manager of Manchester United Football Club, Mr. Gary Neville, the captain of Manchester United Football Club, and Mr. Paul McGuinness, the club's under 18's coach and Assistant Youth Academy manager who had coached the respondent from the ages of 9 to 16.

These witnesses described the respondent as an excellent talent in a variety of ways. They mentioned that he had won the Jimmy Murphy Award for Young Player of the Year in 2002/2003², he was a left-footed midfielder³, and that the player was "self-disciplined, focused and professional, both on and off the pitch."

The appellants called their own witnesses, Mr. Nigel Spackman, and Dr. Bill Gerrard, who had not seen the respondent play but had seen film of the respondent in action, and did not view the player in such high regard as the aforementioned witnesses.

With no disrespect to the witnesses of the appellants, it is easy to see why the court were willing to give the opinion's of the respondent's witnesses more clout and weight⁴. This was clearly demonstrated when Dr. Gerrard used statistics to demonstrate that very few 16 or 17 year old Manchester United scholarship players enjoy a career as a top level professional. The trial judge did not doubt the accuracy of said statistics, but said they could not take into account the "golden opinions" about the respondent's game and personality.

Furthermore, the judge purported to calculate the earnings the player would have received in his career but for⁵ the injury sustained as a result of the actions of the Middlesbrough player, Mr. Gary Smith.

Future loss of earnings; Calculation

In order to calculate the future earnings of the player, the two paramount factors to be considered are 1) what the annual salary of the player would be and 2) the amount of years the player would play. The judge then felt it appropriate to apply "discounts" which she felt would reflect the contingent risks inherent to the periods where pay was being determined. The loss of earnings can be divided into two categories; the monies that would have been earned from the date of the injury to the date of the trial, and the salary that the player would have earned after the date of the trial.

Loss of Earnings before the Date of the Trial

The calculation of the loss of earnings before the date of the trial is done so in a reasonable and well thought out manner. However, said reasonableness is all based on hyperbole and potential, and not on actual events, the career path which the judge hypothesizes the player will take is seemingly based on the non-corroborated evidence of expert witness Sir Alex Ferguson. It strikes me as a huge surprise that the calculations made by the Judge were not challenged⁶.

The Judge found that in 2003/2004 Mr. Smith would have continued to play for Manchester United without any loss of earnings for that year. In 2004/2005 he would have stayed with Manchester United playing mainly in the Reserves team and occasionally in the First team, and earned just below GBP 59,000. In 2005/2006 he would have been sent on loan to an "aspiring Championship club," and earned just over GBP 65,000. In 2006/2007 he would have been sold to an aspiring Championship club, and earned just under GBP 190,000. Finally in 2007/2008 he would have remained with the Championship club and earned GBP 236,000.

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1 <http://www.fdfs.com/wc/history.html>, <http://www.enotes.com/everyday-law-encyclopedia/workers-compensation>

2 Joining an elite list of Player's before, and after him to have won the award - Ryan Giggs, Paul Scholes, Wes Brown, Phil Neville, Giuseppe Rossi, Danny Welbeck, and Federico Macheda to name a few.

3 "A rarity which added to the player's value on the pitch"

4 Mr. Spackman had substantially altered his view about the player in oral evidence, after having heard the submissions of the respondent's witnesses.

5 The "But For Test" is the basis for demonstrating causation of damages incurred. legal-dictionary.thefreedictionary.com/But+for+test - The injury would not have occurred but for the defendant's negligent act. *Barnett v. Chelsea and Kensington Hospital Management Centre* [1968], *Brooks v. Home Office* [1999]

6 *Ben Smith & Anor v Collett* [2009] EWCA Civ 583 (17 June 2009) at Paragraph 14

This is not an unrealistic career path, particularly for a player with so much acumen, who had achieved much success at a prestigious club, and grand praise from highly regarded figures in the football world.

The judge then decided not to apply any discount to the amounts awarded in the first three post-injury years because she regarded the defendant's position as safe and secure, because he would have received his salary despite any injury which occurred during these years. She then applied a 5% discount to account for the remote contingencies other than injury which could have occurred. This brought the total amount of compensation to GBP 456,095

Loss of Earnings after the Trial

In order to calculate the future loss of earnings after the date of the trial the judge assessed the sums at present day values which the respondent probably would have earned playing in the first team of an upper end Championship club, taking into account evidence from the witnesses in the trial⁷ and the present earnings of the respondents contemporaries at the Manchester United academy.

The Judge also contemplated date relating to footballer's wages and how they had risen in, and probably would, based on statistics, continue to rise in the future. The judge considered the figures generated by accountants Deloitte, survey's of footballers wages conduct the by the Independent Newspaper⁸, the expert opinion of Mr. Stein that Mr. Collett would play for an "aspiring" Championship club to determine a figure for wages. The judge then added 60% of earnings for bonuses, and a deduction of 4% for agent's fees and deemed that the respondent would have likely played until the age of 35, and concluded that the defendant would have probably earned GBP 3,261,055.

Furthermore she considered that the respondent would have a 60% chance of playing in the Premiership for one third of his career and therefore calculated the potential difference in salaries had the player played in the Premiership multiplied by the probable amount of time played in the Premiership and included additional earnings of GBP 1,401,930 or a total figure of GBP 4,662,985.

Finally the judge deducted the likely earnings from the career in Journalism, which Mr. Collett was pursuing, until the age of 35 and applied a 15% discount to the award to account of contingencies and came to the final figure of GBP 3,854,328.

Critiquing the calculations

Surely the most important part of this decision to assess is not the concept of awarding damages for "potential earnings," but the method of calculating said damages.

I propose that if the courts are intent on protecting these "potential earnings" and include future earnings as damages. Then the system of calculation must be much more refined. The current test of taking expert witnesses opinion of where the player would end up at minimum and then factoring a discount on the total amount for contingencies is far too subjective and relies on evidence from "football people" who will no doubt have varying degrees of knowledge and generally sympathy for the party in question.

I do not doubt the integrity of Mr. Collett's witness involved in this case for a second, each have forged a remarkable and long lasting career in the world of football. However, can a decision be almost entirely based on the testimony of witnesses who have such a close relationship to the claimant; people who trained, managed and played with the player every day. Furthermore the decision is laden with opinion statements which are treated as fact⁹.

7 Expert witness Melvyn Stein, a consultant to an agency company who represent a large number of professional footballers with extensive experience in the football industry gave witness on the potential earnings.
www.thesun.co.uk/sol/homepage/news/article1545770.ece - Mrs. Justice Swift made the award, which could rise by at least £200,000 - after calling Sir Alex's evidence "most significant"

8 Survey conducted in 2005 showed that

the average wage of a Premiership player was GBP 676,000 per year and GBP 195,750 for a Championship Player.

9 The judge held that the respondent had a good chance of playing in the Premiership and estimated he had a "60% chance of playing in the Premiership for one third of his playing career."

10 Assuming that gambling, online or otherwise is legal in the jurisdiction in question.

If the English Courts are going to set a precedent of awarding people with it is necessary to develop a more precise and less subjective test for calculating what the compensation should have been for the future loss of earnings.

The best method perhaps would be to take a large sample of all the contemporaries of the aggrieved party and take an average of 1) how long their careers were, 2) how much they earned over their careers, 3) the increase in the league salary from the previous years. That way you don't have to apply an arbitrary "discount" figure which takes into account any "contingencies" including risk of injury.

It should be noted that these average salaries also take into account the player's whose careers were ended prematurely by injury, therefore those who are litigious and seek recourse to their wounds, will be rewarded more than the footballer who accepts his injury as part of his job, and begins to pursue another career path.

Conclusion

This decision is morally commendable, it compensates Mr. Collett for the reckless actions of another, which deprived of him a potentially very profitable career in sport. However, the word "potentially" is the problem with this decision. It is too much based on potential and hypothesis; it strays too far from the principles of the law, and focuses too much on preserving justice, and being fair to someone who knew the risks of getting involved in a career in sport.

When we hypothesize about what a player could have earned, if follow the line of reasoning from this recent case we are wading in dangerous water. How can we calculate the prospective earnings of an athlete, when there is so much uncertainty and risk which comes with a career in athletics. What if the player was particularly good looking, or excellent with the press, or had a famous girlfriend or wife, or played for a "fashionable club." Can we calculate the prospective earnings which are generated as a direct result of the player's marketability? What if we corroborate said evidence with the expert opinion of the head of marketing of a worldwide brand, or with the management teams who handle athletes such as David Beckham or Cristiano Ronaldo.

It is clear that Mr. Collett had bad luck of the highest order. However, people who engage in risky activity for their career know that there is a certain risk which comes with their career path, and certain securities which you are not afforded. If a professional poker player who had a good level of success online and was able to generate a consistent and substantial monthly income over a period of several years; would he be entitled to sue his internet provider if their service was down during a large tournament, and sue for the amount which "on average," factoring in the risk of internet coverage being lost, he would have earned from said tournament? Would he be able to sue the Municipal government for loss of earnings if they accidentally cut the power lines when he was on the final table of a "big-cash tournament?"¹⁰

What about young promising dancers, actors or musicians who suffer freak accidents and are unable to forge a career in the talent industry? Should they be compensated for their loss of earnings as a result of the negligence of another, whether it is in the scope of their employment or not?

One must be conscious of the principles of contract which are inherent to one's employment. Certain jobs carry certain risks with them which you must be aware of. Perhaps the athlete should have known that there was a risk that he would be injured and never play football again. The expert witness Mr. Wilkinson said it best during the trial that "[B]arring injury, the worst case scenario, was that the respondent would have played throughout his career for a Championship club." The key portion of this sentence is "barring injury." The problem in this situation is that injuries do happen; player's careers do get cut short. All soccer players know this and perhaps should accept this risk as "part of the job."

Had Middlesbrough not immediately admitted liability, certainly a noble gesture, and said that the responsibility fell on Gary Smith, perhaps there would have been a more resilient defense. It would have been interesting to analyze whether or not the actions of Mr. Smith

were within the course of his employment, ergo whether or not Middlesbrough FC could be found liable for his actions.

However, this is a topic for another day, for now we must contemplate whether or not a precedent where people can be rewarded for their potential earnings really serves justice, or whether it an empathetic decision made because of sympathetic circumstances¹¹.

¹¹ The payout is only a fraction of his once potential "future earnings", but it seems like a lot of this is based on speculation, which is strange. Obviously Middlesbrough admitting fault kicked this off, but one must wonder how these

judgments can be so definitive when the potential prospects of athletes are anything but. - www.theoffside.com/world-football/former-united-prospect-rakes-in-record-injury-compensation.html

Being Punitive: The Court of Arbitration for Sport Overturns *Webster*

by **Braham Dabscheck***

FIFA, the governing body of world football has developed a set of rules to regulate situations where players or clubs unilaterally terminate contracts. These rules provide a prominent role for the Court of Arbitration for Sport (CAS) in regulating disputes associated with their interpretation. On 28 January 2008, in Webster, the CAS handed down a decision concerning a special set of circumstances envisaged by these rules. On 19 May 2009, in Matuzalem, a case with the same special set of circumstances the CAS overturned Webster. The paper examines the two decisions, provides a critique of Matuzalem and proposes an amendment to FIFA's rules to overcome this inconsistency. The major critique of Matuzalem is that it did not engage with Webster, is based on fictions such as an option transfer fee in a loan agreement between two clubs which was not crystallised, is inconsistent with basic tenets of economics and contains dubious reasoning and calculations in its determination of the level of compensation.

Among the other criteria of compensation referred to in article 17(1), the Panel considers that the remuneration and benefits due to the player under his new contract is not the most appropriate criterion on which to rely in cases involving unilateral termination by the Player beyond the Protected Period, because rather than focusing on the content of the employment contract which has been breached, it is linked to the Player's future financial situation and is potentially punitive.

...just as the Player would be entitled in principle to the outstanding remuneration due until the expiry of the term of the contract in case of unilateral termination by the club [subject it may be to mitigation by loss], the club should be entitled to receive an equivalent amount in case of termination by the Player.¹

From time to time, the Federation International de Football Association (FIFA), the governing body of world football, promulgates rules concerning the status and transfer of players (The FIFA Statutes). The 2001 rules introduced some major changes. The most

important of these were that compensation payments would be paid to a player's training club for a player, aged 18 to 23, who moves to another club irrespective of whether it occurs during or at the end of his contract; and that there would not be such payments for players over 23 who moved to a new club following the expiry of their contract with their former club.² The rules also championed the maintenance of contractual stability.³

Further revisions to these rules by FIFA came into operation in July 2005.⁴ They provided more detail and guidance for dealing with issues pertaining to the maintenance of contractual stability. The Regulations brought into being a Players' Status Committee and a Dispute Resolution Chamber (DRC) to resolve various disputes which may occur between clubs and players.⁵ Decisions of the DRC can be appealed to the Court of Arbitration for Sport (CAS).⁶

Article 13, entitled 'Respect of Contract', states that

*A contract between a Professional and a club may only be terminated on expiry of the term of the contract or by mutual consent.*⁷

Despite this, however, the Regulations countenance contracts being terminated for just cause or for sporting just cause.⁸ The former is where either a club or player does not fulfil obligations contained in the contract and, the latter, where a player does not appear in 10 per cent of official matches played during the season.

Article 16 states that

A contract cannot be unilaterally terminated during the course of a Season.

Article 17 provides details on the consequences of terminating a contract without just cause. They are

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

* Senior Fellow, Faculty of Law, University of Melbourne, Australia. Braham Dabscheck was a consultant for FIFPro and helped prepare 'Time for a New Approach: The International Player Transfer System, A FIFPro Report to the European Commission', 9 February 2001 (mimeo). He is solely responsible for the views, omissions and errors contained in this paper.

¹ Court of Arbitration for Sport, CAS 2007/A/1298 *Wigan Athletic FC v/Heart of Midlothian*; CAS 2007/A/1299 *Heart of Midlothian v/Webster & Wigan Athletic FC*; CAS 2007/A/1300 *Webster v/Heart of Midlothian*, 30 January 2008,

paragraphs 150 and 151. (Hereafter The Court of Arbitration for Sport, The Webster Decision, 30 January 2008).

² FIFA Regulations Regarding the Status and Transfer of Players [5 July 2001], see especially Chapters V and VII. Also see Principles for the Amendment of FIFA Rules Regarding International Transfers [5 March 2001]; Regulations Governing the Application of the Regulations Governing the Status and Transfer of Players [5 July 2001]. These rules were developed in response to a decision by the European Court of Justice which found compensation payments to clubs for players whose contract with such clubs had expired to be inconsistent with

the freedom of movement of workers within the European Community as enshrined in the European Treaty. See Case C-415/93 *Union Royale des Sociétés de Football Association v Bosman* [1995] ECR I-4921.

³ FIFA Regulations Regarding the Status and Transfer of Players [5 July 2001], Chapter VIII.

⁴ Federation International de Football Association, Regulations for the Status and Transfer of Players [1 July 2005]. Subsequent amendments were ratified in October 2007, which came into effect on 1 January 2008. The 2005 rules are relevant here.

⁵ Articles 22 - 25, Regulations for the

Status and Transfer of Players [1 July 2005].

⁶ Article 24.2, Regulations for the Status and Transfer of Players [1 July 2005]. Also see Article 60, FIFA Statutes: Regulations Governing the Application of the Statutes, Standing Orders of the Congress, 8 June 2006 and Court of Arbitration for Sport, Statutes of the Bodies Working for the Settlement of Sports-related Disputes, Article 47.

⁷ Article 13, Regulations for the Status and Transfer of Players [1 July 2005].

⁸ Articles 14 and 15, Regulations for the Status and Transfer of Players [1 July 2005].

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

2. Entitlement to compensation cannot be assigned to a third party. If a Professional is required to pay compensation, the Professional and his New Club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.
3. In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the Protected Period. This sanction shall be a restriction of four months on his eligibility to play in Official Matches. In the case of aggravating circumstances, the restriction shall last six months. In all cases, these sporting sanctions shall take effect from the start of the following season of the New Club. Unilateral breach without just cause or sporting just cause after the Protected Period will not result in sporting sanctions. Disciplinary measures may, however, be imposed outside of the Protected Period for failure to give notice of termination (i.e. within fifteen days following the last match of the season). The Protected Period starts again when, while renewing the contract, the duration of the previous contract is extended.
4. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club to be found in breach of contract or found to be inducing a breach of contract during the Protected Period. It shall be presumed, unless established to the contrary, that any club signing a Professional who has terminated his contract without just cause has induced the Professional to commit the breach. The club shall be bound from registering any new players, either nationally or internationally, for two Registration Periods.
5. Any person subject to the FIFA Statutes and FIFA regulations (club officials, players' agents, players etc) who acts in a manner designed to induce a breach of contract between a professional and a club on order to facilitate the transfer of the player shall be sanctioned.⁹

Article 17 makes reference to a term called the Protected Period, a Registration Period and the last match of a Season. Clause 7 of the Regulations define the Protected Period as

a period of three entire Seasons or three years, whichever comes first, following the entry into force of a contract, if such contract was concluded prior to the 28th birthday of the Professional, or to a period of two entire Seasons or two years, whichever comes first, following the force into entry of a contract, if such contract was concluded after the 28th birthday of the Professional.¹⁰

These various provisions are omnibus or general rules designed to deal with the myriad of ways in which contracts can be unilaterally breached; whether it be by club or player, during or between seasons, in or out of the protected period and involving complications when players revolve to a new club, in another country or continent, as a result of, or prior, to the resolution of a real or imagined contractual

dispute. Sorting out the issues involved in these latter disputes often requires the wisdom of Solomon. The rules also countenance what will be described as sanctioned, or special, unilateral termination of contracts, which, as with general terminations, require the payment of compensation. These are situations with players who are over 23, who have played with their club for three or two seasons - the former for players over 23 and the latter over 28 - and are outside the protected period and terminate their contract in a fifteen day window at the end of the season.

On 30 January 2008, the CAS handed down a decision dealing with such a sanctioned unilateral termination, when Andrew Webster unilaterally terminated his contract with the Scottish club Heart of Midlothian.¹¹ In doing so it developed a jurisprudence concerning sanctioned unilateral terminated contracts. On 19 May 2009, in adjudicating on a second sanctioned unilateral termination, by Matuzalem Francelino da Silva, of Brazil, with FC Shakhtar Donetsk, of the Ukraine, the CAS adopted a radically different approach to its decision in the earlier case.¹²

This paper is concerned with examining the difference between the two cases, or what will be described as the overturning of *Webster*. There are fundamental differences in the methodology of the two cases which will result in confusion on how to proceed in future cases. At a minimum, there will need to be another or other cases, to provide clarity concerning future examples of sanctioned unilateral terminations as occurred in *Webster* and *Matuzalem*.

*Webster*¹³

Andrew Webster, who was eighteen at the time, signed a four plus year contract with Heart of Midlothian of the Scottish League in March 2001. Hearts paid his former club Arbroath, also of the Scottish League, a transfer fee of 75,000. In 2003, Hearts signed him to another four year contract. During this period Webster established himself as a leading player and represented Scotland 22 times. Hearts attempted to sign Webster to a new contract in the period April 2005 to April 2006. Webster declined. Given that he would be over 23 at the expiry of his contract, free of a compensation fee he wanted to test the market and see what he could earn. Hearts responded by not selecting him for games at the end of 2005/2006 season. Webster decided to unilaterally terminate his contract, at the end of the season, as he was entitled to under the FIFA Statutes, and obtained employment with Wigan Athletic of the English Premier League. Wigan subsequently loaned him to Glasgow Rangers of the Scottish League.¹⁴ Eventually the case found its way to the CAS.

In determining the compensation that may result from a unilateral breach of a contract Article 17(1) is open ended - note the phrase 'any other objective criteria' - and the criteria that can be considered 'shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract)¹⁵

Hearts based its claim for compensation on five limbs. They were the opportunity it had lost to transfer him to another club including the cost of acquiring a replacement player of similar age and ability and the transfer fee it had paid in obtaining his services; the residual value of the last year remaining on his contract with Hearts; the profit Webster obtained from breaking his contract (the difference in income of the last year of his contact with Hearts and the first year of his contact with his new club); its costs in prosecuting the case; and for commercial and sporting losses.¹⁶

In adjudicating on these claims the CAS adopted the principle that Article 17 (1) should apply equally to clubs and players. It said Article 17 'applies to the unilateral termination of contracts both by players and clubs... [and] must be interpreted and applied in a manner which avoids favouring clubs over players or vice versa.'¹⁷ It added, that subject to contractual obligations,

compensation should not be punitive or lead to enrichment and should be calculated on the basis of the criteria that tend to ensure clubs and players are put on equal footing ... [and] that the crite-

9 Article 17, Regulations for the Status and Transfer of Players [1 July 2005].

10 Clause 7, Definitions, Regulations for the Status and Transfer of Players [1 July 2005].

11 The Court of Arbitration for Sport, The Webster Decision, 30 January 2008.

12 CAS 2008/A/1519 - FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA; CAS 2008/A/1520 - Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v/ FC Shakhtar Donetsk (Ukraine) & FIFA, 19 May 2009. (Hereafter The Court of Arbitration for Sport, The Matuzalem

Decision, 19 May 2009).

13 The material here draws on Braham Dabscheck, 'Developing Uniform Criteria for the Specificity of Sport: The Webster Case,' 2008 (3) *The Australian and New Zealand Sports Law Journal*, 103-118.

14 Paragraphs 8 to 36 of the Court of Arbitration for Sport, the Webster Decision, 30 January 2008.

15 Article 17 (1), Regulations for the Status and Transfer of Players [1 July 2005].

16 Paragraph 63 of The Court of Arbitration for Sport, The Webster Decision, 30 January 2008.

17 Paragraph 136, The Court of Arbitration for Sport, The Webster Decision, 30

ria applicable in a given type of situation and therefore the method of calculation of the compensation be as predictable as possible.¹⁸

It also said

just as the Player would be entitled in principle to the outstanding remuneration due until the expiry of the term of the contract in case of unilateral termination by the club [subject it may be to mitigation by loss], the club should be entitled to receive an equivalent amount in case of termination by the Player.¹⁹

To adopt an approach whereby a club would receive payments for the lost profit and replacement value of losing a player would lead to the enrichment of a club and would be punitive vis a vis a player.²⁰ The CAS dismissed Heart's submissions, other than the residual value of the last year of his contract. It rejected linking compensation to income from his new club and the transfer fee Hearts had paid to secure his services.²¹ With respect to the latter it said 'the fee must be deemed amortised over the term of his contract' and that he had played with Hearts for a longer period than the four years of his initial contract.²² The CAS awarded 150,000, the residual value remaining on the last year of his contract.²³

Matuzalem²⁴

Matuzalem Francelino da Silva signed a five year contract with the Ukrainian club Shakhtar Donetsk in July 2004. It paid a transfer fee of €8 million to the Italian club Brescia to secure his services. Under the terms of his contract he was paid €96,925 a month (€1,163,100 per annum). In April 2007 this was increased to €98,490 a month (€1,181,880 per annum). The contract also provided provision for the payment of additional monies for accommodation, a car and travel. Clause 2.2 of his contract said

Transfer of the **Football Player** to another club or a squad prior to expiration of the contract is supposed only with the consent of the **Club** and under condition of compensation the **Club's** expenses on the keeping and training of the **Football Player**, cost of his rights, search of substitute and other costs in full measure. The size of indemnity is defined under the agreement between clubs

Clause 3.3 states that 'in the case the Club receives a transfer fee in amount of 25,000,000 EUR or exceeding the same above the Club undertakes to arrange the transfer in the agreed period'.²⁵

On 1 June 2007 the Italian club Palermo offered Shakhtar Donetsk a transfer fee of US \$7 million to obtain Matuzalem. Shakhtar Donetsk declined the offer.²⁶

On 2 July 2007 Matuzalem wrote to Shakhtar Donetsk and unilaterally terminated his employment contract, consistent with the sanctioned unilateral termination of the FIFA Statutes. That is, he was over 23 and less than 28 had played with the club for three years and terminated his contract within the fifteen day period at the end of the season. The two years remaining on his unexpired contract with Shakhtar Donetsk covered the 2007/2008 and 2008/2009 seasons. Matuzalem claimed that his decision was not motivated by personal gain. It was designed to save his marriage, as his wife could not stand living in Donetsk.²⁷

On 19 July Matuzalem entered into a contract with the club Spanish Real Zaragoza for three seasons (which would expire on 30 June 2010). He was to be paid €10,000 fourteen times a year plus an annual signing on fee of €860,000 per season and unspecified match bonuses. He took an 18 per cent pay cut to escape Donetsk and make his wife happy. The contract also included a clause whereby Matuzalem agreed to pay Real Zaragoza €6 million if he prematurely terminated his contract without the club's fault.²⁸

Matuzalem was injured for a large part of the 2007/2008 season and only played fourteen games. Real Zaragoza suffered the indignity of being relegated to the second division. Given the quality of Matuzalem, Real Zaragoza entered into a loan arrangement, signed on 17 July 2008, with the Italian club Lazio.²⁹ The agreement between Real Zaragoza and Lazio contained an option clause whereby Lazio could make the transfer of Matuzalem 'definitive' if it paid Real Zaragoza a transfer fee of €13 - €15 million, with the variance being dependent on other factors such as whether or not Lazio qualified for European championships.³⁰ It is unclear what weight or status should be attached to this interclub contract. The only contracts referred to in Article 17 (1) of the FIFA Statutes are those between the player and the club whose contract he unilaterally terminated and with his new club. As will be shown below, this option clause between the two clubs played the major part in the CAS's decision.

On 22 July 2008, Matuzalem signed with Lazio for €895,000 for the 2008/2009 season, €3,220,900 for both the 2009/2010 and 2010/2011 seasons and other remuneration which was not specified.³¹ He also signed a new contract with Real Zaragoza in August 2008, the terms of which would not be honoured during his loan period with Lazio. For the 2008/2009 to 2010/2011 seasons, if he returned to Real Zaragoza he would receive €2,320,000 per season plus unspecified match bonuses.³²

The balance left on Matuzalem's contract when he unilaterally terminated his employment with Shakhtar Donetsk was two years. The CAS concluded that under the terms of his contract he would have received €1.2 million a season, or a total of €2.4 million.³³ If the CAS had followed *Webster*, ceteris paribus, it would have awarded this amount to Shakhtar Donetsk. The CAS eschewed this approach. It included the three year contracts Matuzalem negotiated with Lazio, for the 2008/2009 to 2010/11 seasons, and the first year of his first contract (the 2007/2008 season) with Real Zaragoza and the first two years of his second contract (2008/2009 and 2009/2010 seasons), which were amortised over two years and then averaged,³⁴ as an indicator of his worth as a player in the determination of its calculations. This was equal to €4,325,000.

Before examining the major issue upon which the CAS based its decision it might be useful to look at other factors which it considered and/or rejected. Included in Matuzalem's second contract with Real Zaragoza was a clause where he agreed to pay €22.5 million if he unilaterally breached his contract.³⁵ Shakhtar Donetsk maintained that this figure provided an objective measure of his worth as a player. The CAS rejected this proposition on the basis that 'such a penalty clause...has more a deterrent effect than an appreciation nature'.³⁶

The CAS then considered whether Shakhtar Donetsk should be

January 2008.
18 Paragraph 138, The Court of Arbitration for Sport, The Webster Decision, 30 January 2008.
19 Paragraph 151 of The Court of Arbitration for Sport, The Webster Decision, 30 January 2008.
20 Paragraph 139 of The Court of Arbitration for Sport, The Webster Decision, 30 January 2008.
21 Paragraph 150 of The Court of Arbitration for Sport, The Webster Decision, 30 January 2008.
22 Paragraph 148 of The Court of Arbitration for Sport, The Webster Decision, 30 January 2008.
23 Paragraphs 152 and 156 of The Court of

Arbitration for Sport, The Webster Decision, 30 January 2008.
24 Brazilians, especially footballers are usually referred to by their first name or a nickname. See Alex Bellos, *Futebol: The Brazilian Way of Life*, Bloomsbury, London, 2002. For brief details of Matuzalem Francelino da Silva's career see the entry in Wikipedia, accessed 21 June 2009.
25 Paragraphs 1 to 11 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.
26 Paragraph 14 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.
27 Paragraphs 15 and 36 of The Court of

Arbitration for Sport, The Matuzalem Decision, 19 May 2009.
28 Paragraph 18 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.
29 Paragraph 18 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009. Also see the entry on Matuzalem in Wikipedia.
30 Paragraph 20 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009. There were also a number of other caveats that have been ignored.
31 Paragraph 21 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

32 Paragraph 22 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.
33 Paragraph 94 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.
34 Paragraphs 107, 108 and 177 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.
35 Paragraph 20 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.
36 Paragraph 110 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009. The word 'appreciation' contains the notion of giving something its true value.

compensated for the income it could have conceivably obtained from missed transfer fees. Palermo, it should be recalled, had offered a transfer fee of US \$7 million, in June 2007 (or approximately €5.2, given exchange rates at the time)³⁷ in an unsuccessful attempt to obtain Matuzalem's services. The CAS said

Even admitting that under the present specific circumstances no direct damage was suffered by Shakhtar Donetsk because of a potential but never concretized transfer, the Panel... will take such an offer into due consideration as an additional element to establish the value of the services of the Player and the loss caused by the Player to Shakhtar Donetsk through the termination of his contract. At the same time based on the specific circumstances of this case, the Panel is satisfied that Shakhtar Donetsk is not in a position to claim the amount USD 7 mio. as compensable loss of profits.³⁸

It is difficult to follow the CAS's thinking on this matter - something which should be considered 'as an additional element', which at one and the same time is something that the club 'is not in a position to claim' - and will be a source of frustration for other parties in future cases in seeking guidance on how to proceed and/or what to expect.

The CAS concluded the income that Shakhtar Donetsk avoided paying Matuzalem following his unilateral termination - a sum of €2.4 million over the two years remaining on his contract - should be deducted from whatever amount it should receive as way of compensation³⁹

Shakhtar Donetsk paid Brescia a transfer fee of €8 million to obtain the services of Matuzalem.⁴⁰ The CAS ruled that the non-amortised value of the transfer fee - 2/5 of the fee which equalled €3.2 million - should be incorporated in its decision.⁴¹ The CAS then, as it had with the Palermo transfer fee, found a reason for its non inclusion as part of the compensation payout. It said

since in the present case the Panel was able to calculate the value of the lost services of the Player at the moment of the breach and on the basis of convincing evidence, and taking into consideration that within such value of the lost services the value of the fees to acquire such services has been incorporated, there is no reason to add to such value the amount of the non-amortised fees of Shakhtar Donetsk⁴²

The CAS rejected Shakhtar Donetsk's submission that it should be compensated for solidarity payments (payments made to clubs who contributed to the training of players who move to another club before the expiry of their contracts),⁴³ as it could have deducted such payments to Brescia when it secured Matuzalem's services, and if it did not, this was due to its own decision making.⁴⁴ The CAS also concluded that payments Shakhtar Donetsk paid to agents in securing Matuzalem were part of the costs clubs experienced in obtaining players and were not compensable.⁴⁵

The CAS also considered whether Shakhtar Donetsk should be compensated for the costs of finding a replacement player. Shakhtar Donetsk obtained a player who played in the same position as Matuzalem, midfield, for a transfer fee of €20 million. The CAS found that the club had not demonstrated to its satisfaction that the

player and the transfer fee paid 'were linked to the gap left' by Matuzalem 'or that the costs of hiring' the replacement 'have been somehow increased by the termination of the Player.'⁴⁶

The CAS turned its mind to Shakhtar Donetsk being compensated for costs incurred in training Matuzalem. It ruled against providing such compensation and was 'appreciative that Shakhtar Donetsk did not seek to build up fictive'⁴⁷ figures and did not submit that it had made any particular investments in the training or formation of Matuzalem.⁴⁸ The reason why Shakhtar Donetsk made no submissions on training costs is because under Annex 4 of the FIFA Statutes they are precluded from doing so. Article 1.1 of Annex Four says 'Training Compensation shall be payable, as a general rule, up to the age of 23 for training incurred up to the age of 21'.⁴⁹ Matuzalem was 27 when he unilaterally terminated his contract. In considering this issue the CAS has exposed its ignorance concerning the operation of the FIFA Statutes.

Matuzalem terminated his contract just before the start of the qualifying rounds of the UEFA Champions League. The CAS found that his departure harmed the club and, without providing any reasoning on how it reached its decision, concluded that Shakhtar Donetsk was entitled to additional compensation of six months of his salary; a figure of €600,000.⁵⁰ The rules governing the operation of the DRC, the body whose decisions are appealable to the CAS, require it to include 'reasons for its findings'.⁵¹ If a 'lower court' such as the DRC is required to provide reasons for its decisions it seems reasonable to expect that such a standard should be applied to the 'higher court' responsible for appeals and the overall governance of the jurisdiction. On this matter the CAS seems to have abandoned a responsibility that it should have performed.

The factor that played the major part in the CAS's determination was the option clause contained in the loan agreement negotiated between Real Zaragoza and Lazio signed on 17 July 2008. It maintained that transfer fees offered for a player 'reflect or at least bring some additional information on the value that a third party (and possibly the market) is going to give to the services of the player at stake'.⁵²

Lazio had an option to takeover Matuzalem's employment contract for a sum of €13 - €15 million.⁵³ It maintained that, together with the income that the respective clubs were prepared to pay Matuzalem, as represented by the respective contracts they had entered into with him, provided the best guide as to the compensation that should be paid to Shakhtar Donetsk. The CAS found that Lazio in obtaining the services of Matuzalem was prepared to pay him his contracted salary plus an average transfer fee of €14 million; a total of €21,336,880. The value of Matuzalem, for Real Zaragoza, was the €14 million transfer fee and lower contracted payments for a total of €19,640,000.⁵⁴

The CAS went on to say the Player had a valid contract with Shakhtar Donetsk with a remaining duration of two years. By applying the total costs of SS Lazio and Real Zaragoza to a period of two years, the value is approx. EUR 14,224,534 and approx. EUR 13,093,334, respectively.⁵⁵

37 Monthly Average Graph (Euro, American Dollar) 2007, <http://www.x-rates.com/d/EUR/USD/hist2007.html>, accessed 23 June 2009.

38 Paragraph 121 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

39 Paragraph 124 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

40 Paragraph 6 of the Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

41 Paragraph 127 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

42 Paragraph 131 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

43 Article 20, Federation International de Football Association, Regulations for the Status and Transfer of Players [1 July 2005].

44 Paragraph 128 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

45 Paragraphs 129 and 130 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

46 Paragraph 138 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

47 An alternative word would be fictitious.

48 Paragraph 143 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

49 Article 1, Annex Four, Federation International de Football Association, Regulations for the Status and Transfer of Players [1 July 2005].

50 Paragraph 178 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009. Also see paragraphs 172 and 173.

51 Article 13.4 (F), Federation International de Football Associations, Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber [1 July 2005].

52 Paragraph 104 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

53 Paragraph 20 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

54 Paragraph 107 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009. That is € million for the 2007/2008 season and €3,320,000 for both the 2008/2009 and 2009/2010 seasons. Note the inclusion here of payments for three seasons.

55 Paragraph 108 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

In determining the amount of compensation that Matuzalem and Real Zaragoza were severally liable to pay Shakhtar Donetsk, the CAS took the €14,224,534 and €13,093,334 amounts above, deducted the two years salary (from both figures) that Shakhtar Donetsk saved following Matuzalem's departure, averaged the resulting two amounts - which equalled €11,258,934 - and added an extra €600,000 for Matuzalem having left the club prior to the start of the UEFA Champions League; a total of €11,858,934.⁵⁶

A Critique

If *Webster* and *Matuzalem* are combined there are five factors which two different Panels of the CAS took into account in their respective decisions. They are *the employment contract with the former club, the employment contract with the new club, fees and expenses incurred by the former club, transfer fees - whether real or fictional, such as an option clause in an interclub agreement, and damages resulting from a player leaving before the playing of a major tournament.* The items in italics are from the 'list' contained in Article 17 (1). The other two, transfer fees and a major tournament are inclusions of the CAS via the 'any other objective criteria' of Article 17 (1).

Webster used the employment contract with his the former club to determine the level of compensation - namely the residual value/income remaining on the contract. It rejected income the player obtained from the new contract as a player would receive inferior treatment in comparison with a club and its punitive impact on a player; and awarding compensation for costs associated with obtaining a player on the facts of the case.⁵⁷ Whereas *Webster* based its compensation on income remaining on the contract with the former club, for *Matuzalem* this was an element to be deducted from compensation based on new contracts; contracts that were negotiated a year after the unilateral terminated contract, including periods after the expiry of the period remaining on this former contract, an optional transfer fee which was never activated and damages for not being available for a prestigious tournament.

The role of courts is to develop principles in resolving the disputes that are presented to them for adjudication. Courts pride themselves on the consistency of their decision making and the principles they develop (*stare decisis*). Adherence to following precedents is designed to ensure that the decisions of courts are consistent over time and that individual judges keep their personal biases and preferences under control. Particularly in cases which involve the awarding of compensation/damages, to not follow such an approach would amount to a 'lucky-dip'. Consistency also provides guidance to the parties and helps them to resolve such disputes without the need for litigation. This is not to say that a court cannot develop new principles in responding to the issues that come before them. In doing so, however, it would explain its rationale for rejecting previous principles and the adoption of a new or different approach. At a minimum it would engage in a discussion with the previous principles and decisions developed by the court.

In handing down its decision in *Matuzalem*, the CAS drew on earlier cases involving the unilateral termination of contracts,⁵⁸ as would

be expected. However, these were cases concerned with the omnibus or general unilateral termination of contracts, rather than the special or sanctioned unilateral termination for players over 23, who have played for their club for the number of seasons required by the protected period and terminated their contracts within the fifteen days allowed at the end of a season, as occurred in *Webster*.

There are eight references to *Webster* in *Matuzalem*. Only one appears in the text of the decision in summarising a submission by the player and Real Zaragoza.⁵⁹ The other seven are in footnotes, made in passing to various points associated with the case.⁶⁰ *Matuzalem* has not engaged with *Webster*, nor provided a rationale for rejecting principles developed sixteen months earlier. This failure constitutes the major weakness and criticism that can be directed at *Matuzalem*. There are also other problems.

The compensation awarded by the CAS is mainly based on the option clause contained in the loan agreement between Real Zaragoza and the income paid, or available, to Matuzalem by the two respective clubs. Two of these three elements are fictional. The option clause was never crystallised. Matuzalem's contract with Real Zaragoza would only have come to life and provided him with income if Lazio decided to dispense with his services. Courts normally base their decisions on facts not fictions.

The CAS said that the offer of transfer fees provided a guide to the value attached to a player.⁶¹ It accepted the option clause of a transfer fee of (averaged) €14 million contained in the loan agreement of 17 July 2008 between Real Zaragoza and Lazio, but not the transfer fee equal to €5.2 million offered by Palermo on 1 July 2007. As indicated above, its reasons for not taking account of the latter are confusing. Even though, to use the words of the CAS, the transfer was 'never concretized'⁶² it was a real, rather than a fictional, offer made by a club for the services of Matuzalem. Given an acceptance of the logic of the value the CAS ascribed to transfer fees, it is odd that it was not included. How would its incorporation have impacted on the calculations made by the CAS?

Assuming that Palermo would have entered into a three year agreement with Matuzalem, such as his agreements with Real Zaragoza and Lazio (see above), and amortising the value of the €5.2 million offer over two years, Matuzalem's value as revealed by this offer would be equal to €3,466,667 million. This figure should have been averaged with the CAS's calculations concerning the option clause transfer fee. This would reduce the transfer element in its calculations from €9,333,333 (two thirds of €14 million) to €6,400,000 for a total compensation payout of €8,925,601.⁶³ *Revision One*.

The CAS was in error when it applied the option clause transfer fee for two years, as the agreement between Real Zaragoza and Lazio was entered into with one, not two, years of his unilaterally breached contract with Shakhtar Donetsk remaining. If we incorporate the averaging principle adopted in the above paragraph, with a one year amortised value of the option clause transfer fee and the two year amortised value of the Palermo offer, the transfer element in the calculations falls to €4,066,667,⁶⁴ for a total compensation payout of €6,792,267. *Revision Two*.

⁵⁶ Paragraphs 177 to 179 of The Court of Arbitration for Sport, *The Matuzalem Decision*, 19 May 2009.

⁵⁷ The Court of Arbitration for Sport, *The Webster Decision*, 30 January 2008.

⁵⁸ CAS 2003/O/540, *Karlen v/China Chongqing Lifan FC*; CAS 2004/A/791, *SASP Le Havre Athletic Club et L'Association Le Havre Athletic Club v/FIFA, Newcastle United & Charles N'Zogbia*; CAS 2005/A/866 *FV Hapoel v/Siston*; CAS 2005/A/893, *Mitsu v/Al-Ain Sports Club*; CAS 2005/A/902 & 903, *Mexes & AS Roma v/ AJ Auxerre*; CAS 2006/A/1061, *Manuel de Brito Filho v/Itrihad Football Club*; CAS 2006/A/1062, *Da Ngbe Football Club v/Etoga*; CAS 2006/A/1180, *Galatasaray*

v/Ribery & OM; CAS 2006/A/1082-1104, *Valladolid v/ Barreto Caceres & Cerro Porteno*; CAS 2006/A/1100, *Eltai v/Gaziantepspor*; CAS 2006/A/1141, *Moises Moura Pinheiro v/FIFA & PFC Krilja Sovetov*; CAS 2007/A/1205, *Itzhak Shum v/ Litex Lovech*; CAS 2007/A/1314, *M. Ali Bouabe & Sporting Lokeren Oost-Vlaanderen v/Association Sportive des Forces Armees*; CAS 2007/A/1358, *FC Pyunik Yerevan v/Carle Lombe, AFC Bucaresti & FIFA*; CAS 2007/A/1359, *FC Pyunik Yerevan v/ Edel Apoula Edima Bete, AFC Bucaresti & FIFA*; CAS 2008/A/1448, *Mahmoud Abdel Razeq Hassan Fadl-Allah & Zamalek SC v/Paok FC & FIFA*; CAS 2008/A/1453 & 1469, *Elkin Soto Jaramillo & FSV Mainz 05*

v/CD Once Caldas & FIFA; CAS 2008/A/1568, *Tomas Mica & Football Club Wil 1900 v/FIFA & Club PFC Naftex AC Bourgas*

⁵⁹ Paragraph 138 of The Court of Arbitration for Sport, *The Matuzalem Decision*, 19 May 2009.

⁶⁰ They are footnote 15 (paragraph 116), re determining damages; footnote 16 (paragraph 117), re including transfer fees in calculation of losses; footnote 20 (paragraph 123), re discussion concerning salaries of old and new club in determining compensation; footnote 24 (paragraph 142), re commentary on training costs; footnote 25 (paragraph 144), re discussion of the relevant law of the country concerned; footnote 33 (paragraph 153), re

specificity of sport; and footnote 36 (paragraph 183), re interest payments; of The Court of Arbitration for Sport, *The Matuzalem Decision*, 19 May 2009.

⁶¹ Paragraph 104 of The Court of Arbitration for Sport, *The Matuzalem Decision*, 19 May 2009.

⁶² Paragraph 121 of The Court of Arbitration for Sport, *The Matuzalem Decision*, 19 May 2009.

⁶³ The difference between these two figures is deducted from the total payout of the CAS to determine the revised figure.

⁶⁴ One third of €4 million is averaged with the amortised two year value of the Palermo offer. This average figure is deducted from the total payout of the CAS to determine the revised figure.

A more basic question is what weight should be attached to the option transfer fee which assumed such importance in the compensation awarded by the CAS? Alternatively, what does an option clause for a transfer fee of €14 million in the loan agreement tell us about the value of Matuzalem? An option clause provides a party with an option to make a purchase. It constitutes a testing of the market. The party who has this option will take it up or it won't. It will take it up if it believes that it is in its interests to do so, and vice versa. Lazio did not exercise its option clause rights. It decided it was not in its interests to affect a 'definitive' transfer of Matuzalem for €14 million.

Economic theory postulates that value is determined by the intersection of the forces of supply and demand. If these two forces do not intersect there is no transaction; hence the good or service under consideration has no value. The €14 million was the supply price that Real Zaragoza placed on Matuzalem. It represents the price it wished to receive for him. Lazio was not prepared to pay such a price. There was no transaction and in the absence of a transaction it is impossible to prescribe any value for Matuzalem on the transfer market. This is the stuff of a tutorial in a first year economics course.

The option fee represents an unsuccessful testing of the market; income that Real Zaragoza hoped to obtain for Matuzalem. What is disturbing here is that the CAS has accepted that what a club hopes to receive in a transfer fee in calculations concerning the value of a player. Moreover, this fictional transfer fee assumes the lion's share (72 per cent) of the compensation subsequently awarded. If the option transfer fee is subtracted from the amount the CAS awarded, *ceteris paribus* and ignoring the Palermo offer, the compensation payout is equal to €2,525,601. *Revision Three*. If the real transfer offer of Palermo (amortised over two years) is substituted for the option transfer fee used by the CAS, the payout would be equal to €5,986,268. *Revision Four*.

The CAS included the three year contracts Matuzalem negotiated with Lazio, for the 2008/2009 to 2010/11 seasons, and the first year of his first contract (the 2007/2008 season) with Real Zaragoza and the first two years of his second contract (2008/2009 and 2009/2010 seasons), which were amortised over two years and then averaged,⁶⁵ as an indicator of his worth as a player in the determination of its calculations. Under the terms of the loan deal between the two clubs he could not receive income from both contracts. The averaging of both helps to diminish criticisms concerning double counting. The values the CAS ascribed to these amounts, however, leads to a more fundamental problem.

If Matuzalem had have played out his five year contract with Shakhtar Donetsk he would have been able to take up employment with another club free of the encumbrance of a transfer fee. He would have been a free agent. He unilaterally left Shakhtar Donetsk with two years remaining on his contract. Article 17 (1) says that one of the 'particular criteria' that needs to be taken account of in determining a compensation payout is 'the time remaining on the existing contract'.⁶⁶ This should mean, to the extent that Shakhtar Donetsk should receive compensation for income earned by Matuzalem from other clubs, it should be for the 2007/2008 and 2008/2009 seasons. The CAS inflated its calculations on income earned during seasons after the expiry date of his contract when he could have become a free agent; and on fictional levels of income rather than what he actually earned.

In the 2007/2008 season he received €1 million from Real Zaragoza and in 2008/2009 €895,000 from Lazio.⁶⁷ If these two are summed and substituted for the fictitious earnings the CAS ascribed in its determination (€4,325,600) the compensation payout, *ceteris paribus*, falls to €9,428,333. *Revision Five*. If this revision is incorporated with those conducted above, the levels of compensation would be equal to €6,495,000 for the average of the amortised value of the Palermo transfer offer and the option transfer fee as calculated by the CAS (*Revision Six*); €4,361,666 for the average of the Palermo offer and one year amortised value of the option transfer fee (*Revision Seven*); €95,000 if both the Palermo offer and the CAS's calculation of the option transfer fee are ignored (*Revision Eight*); and €3,555,667 if the Palermo offer is included and the option transfer fee excluded (*Revision Nine*).

The CAS accepted that an amortised value of the transfer fee that Shakhtar Donetsk paid Brescia to secure Matuzalem, an amount equal to €3.2 million, should be incorporated into its decision. It refrained from doing so, however, because it was 'able to calculate at the moment of the breach' the value of the lost services which it claimed it incorporated in its decision making.⁶⁸ This statement is most ingenuous. Matuzalem breached his contract on 2 July 2007.⁶⁹ The overwhelming majority of the CAS's award - the option transfer fee negotiated between the clubs on 17 July 2008, Matuzalem's three year contract with Lazio on 22 July 2008 and with Real Zaragoza on 12 August 2008⁷⁰ - was based on developments which occurred many moments, more than a year's worth, after 'the moment of the breach.' A major problem with the CAS's handling of the Brescia transfer fee offer is discerning whether transfer fees should be included or not, and if they are how they should be included in calculations of compensation. On one reading they should. On another they should not, if they have 'been incorporated'⁷¹ with other factors in the decision making process.

The CAS added €600,000 to its award because Matuzalem had abandoned Shakhtar Donetsk prior to the beginning of the UEFA Champions League.⁷² It failed to provide any rationale (such as how his absence 'changed' the results of various games and the translation of this into a monetary amount - note here its problems in attributing a value for an equivalent or replacement player)⁷³ on how it arrived at this figure. Its failure to provide an explanation on this matter will require a resolution in future cases.

Webster enunciated the principle that Article 17 (1) should apply equally to players and clubs and compensation payments should not be punitive or lead to enrichment. *Matuzalem* favours clubs over players and enables the enrichment of clubs that cannot be replicated by players. If Shakhtar Donetsk had unilaterally terminated Matuzalem's contract he would have been entitled to receive €2.4 million, income owing to him on his contract. Matuzalem unilaterally terminated his contract and Shakhtar Donetsk was awarded €11,658,934. *Matuzalem* has developed principles which do not treat players and clubs equally and are punitive towards players. Can this be rectified?

There are three ways in which clubs can end an employment relationship with a player. The first is to simply pay out his contract. The second is to unilaterally terminate the contract using Article 17 and wait for a ruling from the DRC or the CAS as to the level of compensation. With both these approaches the player would presumably receive the same level of compensation. If he finds himself terminated by the second option should he receive a top-up for the increased strain and the need to litigate to realise his rights over the more gentle termination of having his contract paid out? The third is to transfer the player to another club during the life of the contract and receive the concomitant payment of a transfer fee. This third option may provide a potential way for *Matuzalem* to be squared with *Walker* for players transferred to other clubs.

This third option could be viewed as a club bringing about the constructive unilateral termination of a player's contract. In the various ways that a club has available to it to influence the behaviour of a player, it can convince him that it is time to move on. When a player unilaterally terminates a contract, Article 17 assumes the club that takes up his employment is severally involved and jointly liable for the

65 Paragraphs 107, 108 and 177 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

66 Article 17 (1), Federation International de Football Association, Regulations for the Status and Transfer of Players [1 July 2005].

67 Paragraphs 18 and 21 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

68 Paragraph 131 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

69 Paragraph 26 of The Court of

Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

70 Paragraphs 20, 21 and 22 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

71 Paragraph 131 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

72 Paragraph 178 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

73 Paragraph 138 of The Court of Arbitration for Sport, The Matuzalem Decision, 19 May 2009.

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compensation awarded. Applying a rule of equivalence, to this notion of constructive unilateral termination, would mean that both the new and old club should be severally liable to pay compensation to the player. If we follow the logic of *Matuzalem*, the player should be awarded the value of his lost income from his old club, plus the transfer paid for him, because the said transfer fee (which results from the constructive unilateral termination of his contract) clearly and unambiguously states his worth. It represents what a club was prepared to pay to obtain his services.

The transfer of a player to another club is, tautologically, a club induced transfer. It might be useful to regard Article 17 as providing a means for a player to initiate a player induced transfer. What is the difference between the two? In principle, especially after *Matuzalem*, there is none. With a club induced transfer, involving the constructive unilateral termination of a contract, the old club receives a transfer fee. With a player induced transfer, the old club can utilise a bureaucratic process to obtain income based on future earnings of the player and a combination of real and fictitious transfer fee offers. The player is treated less equally than the club, irrespective of whether the player or club unilaterally terminates the contract. With the exception of a qualification which will be discussed below, for players and clubs under Article 17 to be treated equally requires a rejection of *Matuzalem*.

Matuzalem is based on events, the respective two three year contracts negotiated with Real Zaragoza and Lazio and subsequent earnings from Lazio and the fictitious transfer fee, which occurred more than a year after he terminated his contract. *Matuzalem* encourages the club that has lost a player to litigate rather than enter into negotiations with the player and his new club to seek a settlement. The best strategy for an aggrieved club is to drag out proceedings for as long as possible, hope that his new club will offer him higher payments than what it had paid and that there will be 'various' transfer offers for his services and take its chances in a lucky-dip.

This can be contrasted with *Webster*. It provides clear guidance as to what matters should be included in determining compensation; namely the income remaining on that portion of the contract not fulfilled. An Australian example may help to illustrate this point. Ante Covic was a goalkeeper with Newcastle Jets of the A-League. The Swedish club Elfsborg unsuccessfully approached Newcastle Jets to secure his transfer. Covic, who was over 28 and satisfied the various provisions in Article 17 (1), with advice from the Australian Professional Footballers' Association, unilaterally terminated his contract. In subsequent negotiations, the parties pointed to *Webster* as providing guidance on the compensation to be paid to Newcastle Jets.⁷⁴

Article 17 (1) allows 'fees and expenses' incurred by the former club, amortised over the life of the contract, to be included in compensation calculations.⁷⁵ *Webster* did not incorporate such payments because Heart of Midlothian had recouped such costs and he had played with the club longer than the length of his original contract.⁷⁶

74 Braham Dabscheck, 'An Australian *Webster*: Ante Covic Takes Advantage of FIFA's Unilateral Termination of Contract Rules', (2009) 78 *The Commentator* 1.

75 Article 17 (1), Federation International de Football Association, Regulations for the Status and Transfer of Players [1 July 2005].

76 Paragraph 148 of The Court of Arbitration for Sport, The *Webster* Decision, 30 January 2008

77 Paragraph 127 of The Court of Arbitration for Sport, The *Matuzalem* Decision, 19 May 2009.

78 FIFPro, Decision in *Matuzalem* case not unfavourable for players, 20/5/2009; FIFPro website, <http://www.fifpro.org/index.php?mod=one&id=17091>, accessed 29 June 2009. Also see FIFA's press release of the same

day which praises the decision; FIFA, 'Matuzalem case: CAS decision fully backs FIFA regulations; FIFA website, <http://www.fifa.com/aboutfifa/federation/administration/releases/newsid=1060323.html>, accessed 29 June 2009.

79 See David Yallop, *How They Stole The Game*, Poetic Publishing, London, 1999; Andrew Jennings, *Foul! The Secret World Of FIFA: Bribes Vote Rigging And Ticket Scandals*, HarperSport, London, 2006; David Goldblatt, *The Ball Is Round: A Global History Of Football*, Viking, London, 2006; and for an Australian example Report by the Hon. D. G. Stewart, Published by the Senate Environment, Recreation, Communications and the Arts References Committee, 10 January 1995, Canberra.

Matuzalem had two years to run on his contract. The CAS amortised the five year value of the transfer fee Shakhtar Donetsk paid Brescia in equal annual amounts, resulting in a liability of €3.2 million.⁷⁷ If the approach employed in *Webster* is followed and combined with the addition of this amortised value of the transfer fee, the qualification that was flagged above, the compensation payout to Shakhtar Donetsk would have been €5.6 million. *Revision Ten*.

More thought may be needed in deciding on the most appropriate way to amortise the value of a transfer fee. Rather than attaching an equal weight to each year it may be more appropriate to bias the weighting to the early years on the assumption that as players get older they lose their competitive ability; their bodies wear out, are more prone to injury, lose that extra yard of pace and so on. It may be more appropriate to adopt a five year depreciation based on 35, 25, 20, 15 and 5. If this was substituted for the above calculation, the payout would fall to €4 million. *Revision Eleven*. These two figures are both higher than the €2,325,601 calculated in *Revision Three*, which subtracted the fictional transfer from the amount awarded by the CAS.

Looking Forward

The day after *Matuzalem* was handed down FIFPro issued a press release which said 'this case is certainly not a revision of the *Webster* case but merely a case by case decision with some critical elements that have not been well thought out'.⁷⁸ The analysis here concurs with the second half of the sentence, not the first. FIFPro's cautious response may be because the bulk of the compensation awarded was based on a fictitious transfer fee in a loan agreement between two clubs and an expectation that this will not occur in future cases.

If nothing else, *Matuzalem* provides a powerful incentive for a club which enters into a loan agreement with another club, after obtaining a player who has unilaterally terminated his contract, not to include an option transfer clause in a loan agreement. This may in fact be the lasting impact of *Matuzalem*. An approach which followed *Webster* and the addition of two different scenarios of amortised transfer fees would have provided a higher compensation payout than *Matuzalem*, shorn of the fictitious transfer fee.

In contrast to *Webster*, which based compensation on the contract unilaterally terminated, *Matuzalem* links it to income of the new club, or club, and to income obtained after the balance of the expiry of the contract unilaterally terminated. Linking compensation to future earnings was rejected by *Webster* because of its discriminatory and punitive impact on players. The indefinite nature of the compensation to be awarded after the event has the appearance of being designed to have a chilling effect on players who desire to unilaterally terminate their contracts and clubs prepared to employ them.

It is so easy for ways and means to be found to avoid such swords of Damocles. Players and clubs can enter into side agreements to reduce the 'book' amount of payments to hide the real levels from prying eyes. Alternatively, sponsors or friends of the club can be found to provide extra sources of income to players and their families. *Matuzalem* will have the effect of driving transactions underground and adding to the charges of corruption which have often been associated with the global operation of football across the globe.⁷⁹ A major advantage of *Webster* is that linking payments to existing contracts avoids such problems.

The language associated with Article 17 is and needs to be broad to deal with the various ways in which clubs and players unilaterally breach contracts. FIFPro may give consideration to entering into negotiations with FIFA, and in doing so enlisting the support of the European Commission, to make an addition to Article 17 to take account of the sanctioned or special unilateral terminations of contracts as occurred in *Webster* and *Matuzalem* - situations where players over 23 satisfy the time/season limits (do not fall foul of the protected period) and the fifteen day rule at the end of the season when unilateral terminations occur. The inclusion that is proposed here - The *Webster* Rule, is

Article 17 (6)

For a player over 23 who unilaterally terminates his contract with his Club outside the Protected Period, that is after a period of three entire Seasons or three years whichever comes first, and for a player over 28 after a period of two entire seasons or two years whichever comes first, and the termination occurs within fifteen days of the completion of the last match of the season, the only criteria that can be included in determining compensation are the remuneration and benefits due to the player under the existing contract and the fees and expenses incurred by the Former Club (amortised over the term of the contract). The contract of the player with a new club or clubs and the offer of transfer fees are not criteria to be considered.

Matuzalem is a confusing and poorly thought out decision. It is based on fictions and events which occurred after the commission of the

unilateral termination of the contract - the option transfer which Real Zaragoza hoped to obtain but never realised and contracts negotiated after the unilateral termination based on income to be earned after the expiry of the unilaterally terminated contract. It provides an incentive for an aggrieved party to litigate and promotes a lucky-dip mentality. It is inconsistent with and overturns *Webster*. Moreover, it did not engage with and provide a rationale for rejecting *Webster*.

Future cases will see a club who has lost a player in circumstances similar to *Webster* and *Matuzalem* relying on *Matuzalem* in its submissions. The player and his new club will point to the confusion and problems in *Matuzalem* and base their case on the reasoning of *Webster*. The two cases are inconsistent. This inconsistency will need to be resolved by the CAS in future cases which will be submitted to it for adjudication.



All Sports for Free! A Difficult Match? Right to Information in the Digital Broadcasting Era

by Katrien Lefever and Tom Evens*

1. Introduction

Needless to say that sport fulfils a vital function in our society. As the European Commission argues in its white paper on sport, “*sport is a growing social and economic phenomenon which makes an important contribution to the European Union’s strategic objectives of solidarity and prosperity*”.¹ According to the famous Latin saying “*mens sana in corpore sano*”, sports contribute to the physical and psychological well-being of the people. Moreover, sports hold an enormous potential for community building regardless of age or race by fighting against racism and violence and by promoting volunteering and active citizenship. But more than ever, sports have developed into a dynamic global business environment. Broadly defined, sports’ macro-economic impact in the European Union is estimated at 407 billion Euros, accounting for 4.58% of EU GDP.² This economic value of sports is exemplified by the top wages sports stars earn and especially by the multibillion dollar broadcasting rights contracts, which have played a major role in the establishment of professional sports and the media sport content economy.

The exploding broadcasting rights marketplace is considered one of the driving forces behind this fast-growing share of sports within the European economy. In today’s hypercompetitive media climate, these sports rights have become increasingly important for broadcasters as well as platform operators to differentiate from other competitors. In this era of digital and mobile television platforms, live sports coverage

has shifted from terrestrial and free-to-air (FTA) television towards digital premium television. For these new platforms, the acquisition of live sports rights became a competitive advantage to drive up subscription uptake and to reign supreme in the digital premium content marketplace. However, as these premium platforms including pay-television require an additional subscription payment, analogue households could be denied access to major sports events. Contrary to the United States, the European Commission has introduced the list of major events mechanism within its regulatory framework to guarantee access to these sports events and to safeguard the right to information of the public. This mechanism should allow Member States to assure free-to-air coverage of events of major interest for society. Although the European Commission claims that this major events mechanism is working satisfactorily, at least some critical assessments should be made.

Because issues on sports broadcasting rights have mainly been studied either from an economic or from a legal perspective, an interdisciplinary approach is handled in this article. As the transformation of the media ecosystem may affect the sale and application of media sports rights in a fundamental manner, the article kicks off with a political economy of the digital sports broadcasting market. In this section, the digitised value chain and the established synergy between sports and digital media are emphasised. Afterwards, the legal implications of exclusive sports coverage for major events with a national interest are critically explored with a specific focus on the Flemish legislation.

2. Digital sports broadcasting market

For decades, sports and the media, in particular broadcasting, have developed a self-interesting relationship allowing them to gain benefits from their complementary interests. Sports act as a pool for content and audience for broadcasters, which function as a revenue source and a promotion tool for sports.³ This interdependence between sporting organisations, media companies and public society is often referred to as the sports/media complex.⁴ This relationship originates from the end of the 18th century when newspapers began to cover sporting events. This clearly meant a win-win situation for both parties: sports coverage enabled newspapers to sell more copies and to attract manufacturers interested in advertising their products to these committed sports readers while sporting organisations gained benefits from this media exposure to drive up stadium attendance.

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1 Commission of the European Communities (2007). *White paper on sport*, Brussels: European Commission, p. 2.

2 Kleissner, A. (2008). *Economic trends in sport. Sport satellite accounts in Europe*. European Conference on Sport and Innovation, March 13, Eindhoven, The Netherlands.

3 Bolotny, F. and Bourg, J.-F. (2006). The demand for media coverage, in: W. Andreff and S. Szymanski (Eds.), *Handbook of the Economics of Sport* (pp. 112-133). Cheltenham: Edward Elgar.

4 Jhally, S. (1989). Cultural studies and the Sports/media complex, in: L. Wenner (Ed.), *Media, Sport and Society* (pp. 70-97). London: Sage.

As ticket sales represented the major revenue source for sporting organisations at that time, the introduction of televised sports was originally feared to cause depletion in stadium attendance because people would attend the events directly from their own living room. However, live television sports soon demonstrated to be a fan builder and a financial engine for sports clubs as well. For broadcasters, sports programming became an important competitive feature to attract a large crowd of viewers with significant buying power that was interesting to target by advertisements.⁵ Although sports clubs' income heavily inflated thanks to the increased media exposure, the economic model of European sports was still built on stadium attendance and ticket sales.⁶

However, recent policy developments towards liberalisation in the European broadcasting market have fundamentally reshaped sports' financing model thanks to the expansion of the broadcasting industry. The emergence of digital technology has further broadened the media ecosystem and has multiplied the number of delivery platforms and sports channels. This has in turn fundamentally transformed the structure of the sports business, which has become heavily dependent on television rights as its primary revenue source.⁷ In today's era of abundance, digital premium channels have taken free-to-air television's place as primary medium for live sports coverage.⁸ For platform operators, acquiring sports rights was instrumental to secure a strategic market position and to establish a basis for a sustainable development of the emerging digital television landscape. Next to offering a basic package targeting a broad audience while containing generalist channels, television aggregators provide successful content such as recent Hollywood movies and large sports competitions on premium channels that are only accessible for end-users by paying an extra subscription fee.⁹ By means of pay-per-view (PPV) games and thematic sports channel boutiques, a direct monetary exchange between media sports providers and sports fans has been established, which is clearly challenging traditional television business and viewing practices.

2.1. The new media sport ecosystem

Traditionally, Porter's value chain concept¹⁰ has been widely applied to analyse the roles of all stakeholders involved in the value creating process within the broadcasting industry as it maps the position these stakeholders occupy in the flow of value-adding activities. A firm acquires a competitive advantage when holding a crucial stake in this chain of activities (such as the exploitation of sports media rights or the distribution of content) where value is created through a sequential line of stages in which suppliers add value and pass their output to the next intervenient in the chain until the product or service finally reaches the end-user. Four consecutive stages, from creation to consumption, can be distinguished in the value chain in which established actors are assumed to play fixed roles:¹¹

1. **Creation and production:** in this stage, content is invented, financed and produced. Beside production companies, rights holders (and rights intermediaries as they reduce transaction costs) are an important part of this stage of the value chain.
2. **Aggregation:** aggregators are dealing with scheduling programmes in channels (broadcasters) and bundling these channels in packages to be distributed (platform operators). In this stage, added value is created by the inclusion of new services and applications in broadcasting (such as interactivity and on-demand features).

3. **Distribution:** distributors are making television content widely accessible through the network infrastructure they exploit. In this stage, telecom companies such as access providers and network operators are involved in distributing and reproducing the content packages to be sold to clients.
4. **Consumption:** in this final stage, television viewers pay and consume the content. In the case of digital media, this content is often enriched by interactive and personalised applications.

However, this sequential concept of value chains through which value flows is out of time due to the ongoing processes of globalisation and especially digitisation. Due to the evolution towards a digitised supply chain, the media ecosystem is characterised by a far-reaching convergence trend, which blurs boundaries between applications, transmission networks and access devices. In this converging ICT environment digital content services can reach consumers by a range of digital transmission technologies and over different platforms. Digitisation has facilitated a shift from the traditional layered ICT model to a so-called vertical intertwined layer model.¹² In a traditional layer model, every content service had its corresponding infrastructure and transportation protocol, thus clearly resulting in vertical integration. Digitisation has now resulted in an ecosystem where a direct link between 'medium' and 'message' can no longer be distinguished.¹³

Whereas companies used to create monopolies and bottlenecks in this distribution stage as market power was largely derived from controlling stakes over distribution networks, this scarcity has changed into an era of plenty thanks to the rise of alternative distribution technologies. Many of these technologies have enabled the delivery of sports content in ways previously almost unthinkable, such as wireless and mobile services. As a result of the wide array of digital distribution channels, one company is hardly able to control the flow of sports content any longer. Moreover, these former monopolists have to face competition from new actors who are entering the sports broadcasting domain as digital technologies have lowered entry barriers to do so. Mobile internet and mobile television suppliers have come into play¹⁴, Internet service providers have developed online sports portals and social network sites dedicated to sports communities¹⁵ while users have broken into formerly professional roles acting as creator and distributor of (user-generated) audiovisual content.¹⁶ Finally, sports clubs have been profiting from the opportunities of new media technology advancements to become media entities as well to extract commercial value from content packages¹⁷, to have "their own voice in the global sports market"¹⁸ or to exploit the broadcasting rights themselves as the understated Dutch example shows.

In contrast to most other European soccer leagues, which have pooled broadcasting rights in order to sell them to the highest bidding broadcasting company, the soccer clubs of the Dutch first division, also known as Eredivisie, have decided to exploit their broadcasting rights themselves. Since no national provider was willing to offer the demanded fee for the live broadcasting rights, the soccer clubs launched their own digital television channel Eredivisie Live, which broadcasts all the national and European league games of the first division clubs, club documentaries and highlights of other European soccer leagues, in cooperation with production company Endemol in 2008. Whereas television providers have obtained exclusive access to

5 Gaustad, T. (2000). The economics of sports programming, *Nordicom Review* 21(2): 101-113.

6 Helland, K. (2007). Changing sports, changing media. Mass appeal, the sports/media complex and TV sports rights, *Nordicom Review* 28(Jubilee issue): 105-119.

7 Andreff, W. and Staudohar, P. (2000). The evolving European model of professional sports finance, *Journal of Sports Economics* 1(3): 257-276.

8 Boyle, R. and Haynes, R. (2004). *Football in the new media age*. London: Routledge.

9 Imberti, A.D. and Prario, B. (2005). Digital television era: is content the king?, *Tripodos Extra* 4(2): 651-660.

10 Porter, M. (1985). *Competitive advantage. Creating and sustaining superior performance*. New York: The Free Press.

11 L.L. Landerset and M.J. Cunha (2004). *The audiovisual value chain*. Lisbon: Obercom.

12 Küng, L., Kröll, A.-M., Ripken, B. and Walker, M. (1999). Impact of the digital revolution on the media and communications industries, *The Public* 6(3): 29 - 48.

13 Bouwman, H., Van Dijk, J., Van Den

Hooff, B. and Van de Wijngaert, L. (2002). *ICT in organisaties. Adoptie, implementatie, gebruik en effecten*. Amsterdam: Boom.

14 Pickles, J. (2007). Will sport be a 'battering ram' for mobile TV? Or will carriers be put off by the battle for (changing) sports rights?, *InterMedia* 35(3): 18-20.

15 Hutchins, B. and Rowe, D. (2009). From broadcast scarcity to digital plenitude: the changing dynamics of the media sport content economy, *Television & New Media* 10(4): 354-370.

16 Slot, M. (2007). Changing user roles in

ICT developments; the case of digital television, *Telematics & Informatics* 24(4): 303-314.

17 Boyle, R. (2004). Mobile communications and the sports industry: the case of 3G, *Trends in Communication* 12(2): 73-82.

18 Ginesta, X. and Sopena, J.P. (2008). *The global media sports complex and its resistances: the case of Spanish media clubs*. IAMCR Conference, July 20-25, Stockholm, Sweden.

live sports rights in many other countries as acquiring sports programming is part of their strategy to gain market share, Eredivisie Live is broadcast by all digital television operators in the Netherlands although the channel's subscription price may vary amongst these operators. Digital viewers should thus not switch to another television operator to enjoy live soccer as all digital television operators have equal access to these rights although viewers still have to pay an extra subscription fee. Instead of exclusion this approach requires cooperation between all stakeholders involved in the soccer game and therefore exemplifies the new media (sport) ecosystem.

As it becomes impossible to develop and manage all these ICT services and thus control all value-adding activities including the distribution stage, today's media companies are striving for a new concept of value creation, which no longer rests in positioning a series of activities in the value chain. Value is now created through partnerships and relationships with all stakeholders cooperating to create and reinvent value. This myriad of suppliers, partners, alliances and customers, also known as the value network, requires openness to new players, new distribution platforms, new financing and revenue sharing models.¹⁹ Given the intense battle between broadcasters, platform operators and the emerging mobile and online content providers for acquiring sports rights and offering sports footage to end-users, the dynamics of the media sport content economy can clearly benefit from this network approach.

3. List of major events mechanism in the digital media landscape

In the struggle for broadcasting rights, free-to-air broadcasters have lost the bidding war to premium and digital television operators. However, this trend may lead to important sports events, which were previously broadcast freely to the public, migrating to pay-television platforms. This shift is likely to cause the so-called siphoning effect that occurs "*when an event or programme currently shown on free-to-air television is purchased by an operator for the purpose of showing it on a subscription channel instead. If such a transfer occurs, the programme or event will become unavailable for showing on free television system or its showing on free television will be delayed so a segment of the people [...] could be denied access altogether.*"²⁰ Concerns have arisen about the consequences of the exploitation of exclusive broadcasting rights by these subscription-based platforms as households, unable or unwilling to pay an additional fee on top of their basic cable or satellite charge could be deprived access to major sports events, which may endanger their right to information and cultural citizenship.²¹

Given that some sports events are seen as so vital and of heritage importance, *i.e.* creating a sense of national identity, public authorities consider it justified to protect these events from "*disappearing behind a decoder*". In order to prevent this migration to premium platforms and to safeguard the public's right to information with regard to those events, the list of major events mechanism was introduced in Article 3a of the Television Without Frontiers Directive (hereafter TWF Directive).²² This mechanism allows the Member States to draw up a list of events, being of major importance for society that can only

be broadcast on "*free-to-air television*" in order to ensure that a "*substantial proportion*" of the public would not be deprived of access to such events.

Ten years later, when the TWF Directive was fundamentally revised and renamed the Audiovisual Media Service Directive (hereafter AVMS Directive), the list of major events provision as such was not subject to modifications.²³ As the majority of stakeholders argued that Article 3a of the TWF Directive was working satisfactorily, there was no urgent, pressing need for a revision of this provision.²⁴ Hence, the article was only renumbered Article 3j AVMS Directive. Still, while transposing this Directive in national law in the beginning of 2009, the Flemish legislator decided to revise that provision in order to create more legal certainty in the digitised world.²⁵ The reviewed Article 153 §1 states that "*the Flemish Government shall draw up a list of events considered to be of major importance for the public and which, for this reason, may not be broadcast on an exclusive basis so that a large part of the public of the Flemish Community cannot watch them live or deferred on television via the basic package of the different aggregators*". Although the Flemish legislator assumed that the replacement of the term '*free-to-air television*' by '*basic package of the different aggregators*' would create more legal certainty amongst broadcasters and digital television operators, the question rises whether this assumption is correct. In the rest of this article, it will be examined whether or not this change is justified as a step forward in guaranteeing the public's access to major sports events.

3.1. Basic package

According to the new provision, a large part of the public should thus be able to watch those major events on television via the basic package of the aggregators, which are exploiting the digital television platforms. But what exactly does the Flemish legislator mean with 'basic package' and how should this term be interpreted?

The Flemish Media Decree itself does not contain a clear definition of the term 'basic package'. Although the Explanatory Memorandum defines basic package as "*the general or first package offered by the aggregator*"²⁶, this definition does not, however, offer real clearness and raises a lot of questions. The main question that rises is whether or not basic package should be understood as a free basic package, which can be equalled free-to-air television in the former regulation, and whether or not a digital supply can be qualified as basic package. Currently, digital television signals are almost always displayed on analogue television sets that are connected to a digital receiver or set-top-box. That implies that digital signals are converted into analogue signals before being displayed.²⁷ Obviously, to get access to the digital content supply a decoder is needed, resulting in an extra expenditure for the consumer. Now, does this imply that digital television and its digital supply should not be qualified as free-to-air television?

3.1.1. Free-to-air television

To answer this question one should go back to the rationale behind the events list mechanism, *i.e.* the public should be able to watch

19 Peppard, J. and Rylander, A. (2006).

From value chain to value network: insights for mobile operators, *European Management Journal* 24(2-3): 128-141.

20 Home Box Office, Inc v. FCC 567 F.2d 9, (D.C. Cir 1977)

21 Jeanrenaud, C. and Kesenne, S. (2006). Sport and the media: an overview, in C. Jeanrenaud and S. Kesenne (Eds.), *The economics of sports and the media* (pp. 1-25). Cheltenham: Edward Elgar.

22 Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (89/552/EEC), *OJL* 298/23, 17 October 1989.

23 Directive 2007/65/EC Of the European

Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, *OJL* 332/27, 18 December 2007.

24 Commission of the European Communities, *Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers"*, 6 January 2003, COM(2002) 778 final, 10; Commission of the European Communities, Communication from the Commission to the European Parliament,

the Council, the Economic and Social Committee and the Committee of the Regions, *The future of European regulatory audiovisual policy*, 15 December 2003, COM(2003) 784 final, 16; Department for Culture, Media and Sport, Final report on Working Group 2: Rights to information and short extracts, Liverpool Audiovisual Conference - Between Culture and Commerce, ec.europa.eu/avpolicy/docs/reg/modernisation/liverpool_2005/uk-conference-report-en.

25 The implementation of the AVMS Directive was the ideal moment for a profound revision of the Flemish Media Decree. For more information about this revision, see: Stevens, D., Lefever, K., Valcke, P. and Braeckvelt, D. (2009). Structuur en Krachtlijnen van het

Nieuwe Vlaamse Mediadecreet. *A&M*. (in press); Lefever, K. and Stevens, D. (2009). Vlaamse mediadecreten in nieuw en toekomstgericht kleedje, *Juristenkrant* 187: 4-5.

26 Memorie van Toelichting [Explanatory Memorandum], Ontwerp van Decreet betreffende de radio-omroep en televisie, *Parl. Doc.* vi. Parl. 2008-09, Stuk 2014/1, p. 53.

27 Commission of the European Communities (2003). *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off')*, 17 September 2003, COM(2003) 541 final.

major sports events on television without paying extra for it. In the digital media landscape, viewers who don't possess the standard technical equipment such as a digital decoder will be denied access to digital channels and events of major importance that will be reserved for digital (premium) platforms. The question now rises whether this would contradict recital 22 of the TWF Directive according to which free television is television that the public can receive "without payment in addition to the modes of funding of broadcasting [...] (such as licence fee and/or the basic tier subscription fee to a cable network)". The question that needs to be answered is whether there is a link between the following two phrases: 'without payment in addition' and 'the modes of funding of broadcasting'. If there is a link, this would imply that 'without extra payment' refers (as regard content) to 'the modes of funding of broadcasting', and therefore, refers to the payment of an extra subscription fee. If there is no link between those two phrases, 'without extra payment' would not refer (as regard content) to "the modes of funding of broadcasting", and therefore, it would not only refer to the payment of an extra subscription fee, but also to the extra cost coupled with the acquisition of access equipment.

In the European Union, however, there is no consensus on how digital television should be qualified. In some Member States, pay-television programmes as well as the programmes of the public broadcaster are broadcasted in an encrypted way to prevent signal theft or copyright infringements. According to Helberger, public broadcasters that encrypt their programmes, for example for reasons of copyright (as in the case of Denmark en Austria), could still be considered free as long as they do not impose an additional access fee.²⁸ In Italy, however, the Italian regulation on the listed events states very clearly that the Italian public should have the possibility to follow the listed events on free television without incurring additional costs for the acquisition of technical equipment.²⁹ Hence, in Italy, digital television will not be qualified as freely available. Whether or not digital television will be qualified as free-to-air television is up to the Member States' interpretation. The Flemish legislator, though, has never specified how digital television should be qualified in the Flemish Community.

3.1.2. Digital package

Should this aforementioned reasoning be applied *mutatis mutandis* for the revised Article 153 of the Flemish Media Decree? Given that the rationale behind the events list regulation has stayed the same, it can be assumed that this question should be answered affirmative. In particular, this would imply that the term 'basic package' refers to the supply that every client gets when subscribing to the service of an aggregator without any additional payment. Hence, it can be assumed that premium packages offering additional content such as movie and sports channels cannot be qualified as basic package because the payment of an additional subscription fee is required.

28 Helberger, N. (2005). *Controlling access to content - Regulating Conditional Access in Digital Broadcasting*. The Hague: Kluwer law international.

29 Article 2 of the Decision No 8/1999 of the Communications Authority of 9 March 1999, as amended by its Decision No 172/1999 of 28 July 1999.

30 Order of the Flemish Government of 28 May 2004 establishing the list of events of major importance to society, *Belgian State Gazette*, 19 August 2004.

31 Art. 2 of the Order of 28 May 2004 of the Flemish Government establishing the list of events of major importance to society.

32 Art. 1 (3) Broadcasting (major events television coverage) Act, 1999. (Publication in accordance with Article 3a(2) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as

amended by Directive 97/36/EC of the European Parliament and of the Council, *OJ C 100/12*, 26 April 2003).

33 Parliamentary Debates, Major Events Television Coverage Bill, 1999: Second Stage (Resumed), 2 June 1999, historical-debates.oireachtas.ie/D/0505/D.0505.199906020005.html.

34 Commission Decision of 25 June 2007 on the compatibility with Community law of measures taken by Ireland pursuant to Article 3a(1) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, *OJ L 180/17*, 10 July 2007.

35 Studiedienst van de Vlaamse Regering (2009). *Vrind 2009. Vlaamse Regionale Indicatoren*. Vlaamse Overheid: Brussel.

36 Snoeck, D. (2009). *Helft Vlaamse gezinnen kijkt digitale televisie*, *De Tijd*, 4 augustus 2009.

As regards the digital package, the reasoning applied for digital television can be repeated. It is up to the Flemish legislator to decide whether or not the digital package should be qualified as basic package. If this would mean that only broadcasters included in the analogue basic package of the aggregators are allowed to broadcast the major events, this would definitely undermine the future proof character of the Flemish Media Decree.

3.1.3. Basic offer

The last remark is related to the must-carry provision. Article 186 of the Flemish Media Decree states that aggregators making use of networks, which are the principal means to receive broadcasts for a significant number of end-users, are obliged to include some predefined channels in their 'basic offer'. Just like the Flemish Media Decree fails to define 'basic package', the Decree does not contain a definition of the term 'basic offer'. Moreover, the Explanatory Memorandum does not clarify this term either. Could or should this term be interpreted as a synonym of the 'basic package' mentioned in Article 153?

3.2. Substantial proportion

Even if the digital package would fall under the scope of the basic package, this does not automatically imply that digital-only channels can broadcast listed events. After all, according to this provision, it is required that "a large part of the public of the Flemish Community can watch the listed event live or deferred on television via the basic package of the different aggregators". What does this notion mean? The phrase 'a large part of the public', copied from the former provision, is further specified in the Order of 28 May 2004.³⁰ It is important to notice that this Order was not amended when the Flemish Media Decree was revised.

Article 2 of that Order states that "the exclusive rights over the listed events may not be exercised in such a way as to prevent a large part of the population from following these events on free-to-air television. A large part of the population of the Flemish Community is considered to be able to follow an event of major importance to society on free-access television when the event is broadcast by a television station transmitting in the Dutch language and can be received by at least 90 % of the population without any payment in excess of the television distribution subscription price".³¹ This implies that it is up to a single television station to reach at least 90% of the population and that this single entity should broadcast the listed events. If we should apply this reasoning *mutatis mutandis* to the new provision, this implies that the broadcaster that has acquired the exclusive rights to broadcast a listed event should be included in the basic package of a single aggregator that reaches at least 90 % of the television households.

However, Article 153 §1 further states that this coverage requirement should be fulfilled by the "basic package of the different aggregators". Can it be assumed that this means that different aggregators together should reach 90% of the public? In Ireland, for example, the definition of the broadcaster that should reach 95% of the households is not confined to single entities. Two or more broadcasters who enter into a contract or arrangement to jointly provide near universal coverage of a designated event shall be deemed to be a single broadcaster with respect to that event.³² Therefore, a number of broadcasters, even of quite a small scale and whose combined free-to-air coverage meets the required percentage, can qualify to provide coverage of a designated event.³³ Given that the European Commission has decided that the measures pursuant to Article 3a(1) of the TWF Directive are compatible with Community law³⁴, it can be assumed that the Commission is likely to accept the possibility that the penetration rate is reached by different aggregators together.

Though, the problem is that digital television or digital packages in Flanders does not yet reach the required 90% penetration rate. According to recent estimations and based on figures provided by digital television providers, the different aggregators reached the milestone of one million connections by the end of 2008.³⁵ In June 2009, the total amount of digital television households has been estimated at 1.2 million households.³⁶ This implies that about the half of all Flemish households have access to digital television content and that the

required coverage of 90% is not met. Given the fact that the phrases 'basic package' and 'large part of the public' are two cumulative conditions, digital-only channels distributed by all aggregators - even if the digital package is qualified as basic package - are unable to broadcast listed events exclusively since they do not reach the required part of the public.

4. Conclusion

The introduction of digital television is often hailed as a new revolution in today's media landscape as it provides a lot of new opportunities for content producers, advertisers and viewers (e.g. on-demand services, better picture quality, more channel choice, interactive applications). Although digitisation may have a disruptive impact on the current business and revenue models of the broadcasting industry, the majority of households is reluctant to switch to these digital television services and prefers watching analogue signals. In their attempt to convince these viewers to migrate to digital television, aggregators are collecting a very attractive and appealing bouquet of content, which is preferably not available in the offer of other platform operators. This offer contains a basic package with especially generalist channels; some of them can also be viewed on analogue television, others are so-called digital-only and can be accessed by a digital decoder. Moreover, television operators are keen to provide successful content such as major sports events on premium channels that are only accessible for end-users by paying an extra subscription fee.

As operators are likely to lock sports content behind a digital decoder, households unable or unwilling to migrate to digital television services could be deprived access to major sports events, which may endanger their right to information and cultural citizenship. Therefore, the list of major events mechanism has been introduced to guarantee the public to watch major sports events on television without paying extra for it. Although this provision has not been subject to changes while revising the TWF Directive in 2007, the Flemish

Government recently decided to review the provision to create more legal certainty amongst broadcasters and television operators. From now on, major events are no longer guaranteed by 'free-to-air television' but by the 'basic package of the different aggregators'. It seems like the Flemish Government has finally upgraded its legal framework to the digital television ecosystem, however, some questions arise as this revision is likely to fit the incumbent digital television operators like a glove.

In first instance, we can raise the question whether the public's right to information has actually been fortified by this new provision. In our view, the public's right to information has rather been eroded. Although the provision does not allow digital television operators to schedule sports events on digital-only channels that are not accessible for the analogue television households, the real practice shows a different light on this issue. Nevertheless, with the provision, the Flemish Government has tried to push the uptake of digital television services, which is expected to reach a penetration of 85 to 90% in 2015. By programming major (sports) events on digital-only channels, platform operators hope to convince the analogue mass to switch to digital television services. Until 2015, analogue households can only fear that they will not be excluded from the coverage of some major events that are listed.

Secondly, the Flemish Government aimed to create more legal certainty amongst broadcasters and platform operators. However, as the Flemish Media Decree and the Explanatory Memorandum do not provide clear definitions of what is actually meant with 'basic package' and 'different aggregators', the question rises whether this amendment is really a step forward. In this article, we have questioned the real meaning of these two concepts and we have found that although the new provision aimed to create more legal certainty, the revision has rather caused even more vagueness and uncertainty than there was before...



Limits on Foreign Professional Players Competing in the Russian Federation: Problems and Prospects

by Mikhail Prokopets*

1. Introduction

The topic of limiting the number of foreign players¹ in Russian sport gains ever greater popularity each sporting season. Unfortunately, this is to a large degree in response to scandals. Football lovers still have fresh memories of a situation, surrounding the scandal that flared up when Zenit FC violated the foreign-player limit in a 2009 Russian Football Championship match against FC Lokomotiv. Another hot debate, about the value of introducing a Russian Hockey Federation limit on foreign goal-minders, only recently died down.

Supporters and opponents of foreign-player limits are well represented, and both sides can list solid and well-founded arguments, both in favour of their own viewpoints and to counter the opposing views. The arguments of those in favour of a limit on foreign players appeal to the patriotism of football supporters, who want to see and empathize with a "a guy from the next street", and not a foreigner, who "doesn't even know any Russian", even on condition of the latter's outstanding sporting ability. Globalization has penetrated many sectors of the economies of the world, covering almost all fields of human endeavour, and the opponents of limits counter: why should sport - a mirror of life - be any exception?

We will refrain from judging who is right, or whose arguments are better grounded. However, considering the fact that the arguments of supporters of a limit are reflected in the regulations of the Russian Football Union (RFU), and in the regulations of the Continental Hockey League (CHL), it appears that this group can now celebrate victory.

The idea of a limit is not a Russian invention. As regards football, limits were in place in many European countries until they started to contravene European legislation. For example, after rulings on lawsuits by Bosman and Simutenkov, which will be discussed below, European sporting federations lost the right to independently establish limits. The reality is now such that migration, labour and social policy with respect to foreign citizens is the exclusive prerogative of the state, and not of social organizations - a category which includes sporting federations.

Nevertheless, despite the non-conformance with European legislation, the topic of limits is becoming ever more popular in European football, too. Senior football officials have recently made statements ever more frequently about the need to introduce a limit, thanks to the evident advantages for the sport.

In 2008, the FIFA congress approved of a proposal by its president, Sepp Blatter, to introduce a mandatory limit on foreign players in clubs, known as the "6+5" system. The following new rule is to be introduced from 2012: at least six players who have the right to play

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¹ The established [Russian] sporting term is *legioner*, meaning a foreign athlete or player.

for the national team of the country where the given club is based must come on to the field. Thus, there can be a maximum of five foreign players on the field at any one time².

The position of FIFA and its president was supported by Michel Platini, head of UEFA. "I support the idea of reducing the number of foreigners on the field. On the one hand, reducing the limit allows clubs to have more home-bred players, which encourages the development of football in the country, and on the other hand creates a barrier for those foreign players, whose level is fairly low," noted the UEFA president³.

It is worth noting that confidence in the introduction of such a limit on the part of European football officials is very obviously out of tune with European labour legislation, which fact is confirmed by the rulings of courts on similar cases, including the court ruling on the Bosman affair. Frankly, it is not entirely clear what arguments the FIFA and UEFA leaderships can use to convince European bureaucrats of the need to create exceptions, specifically for sport.

The specific advantages and disadvantages of introducing a limit - economic, social and for the sport - were not taken into account during the writing of this article. We are primarily interested in the legal basis for restricting the rights of foreign citizens when they perform labour on Russian territory.

In addition, of all the criteria listed, it is the legal aspect that we consider to be the most important and of highest priority. It is precisely a failure to conform to legal criteria that could put the idea of such a limit in doubt. It is from this viewpoint that we will try to answer the question of the legal status of foreign sportsmen in Russia, on the legality of introducing a limit on participation by foreign citizens in sporting competitions in the Russian Federation, and on the legality of the limit, in the form that it currently exists. This analysis of the legality of the limit explores examples from two of the most popular sports in Russia: football and hockey, analysing the rules of the RFU and the CHL.

2. The status of foreign employees under current Russian Federation legislation

Any foreign, professional athlete, regardless of the sport in question, is above all an employee and, therefore, the rights and obligations established by Russian legislation for foreign employees pertain for such persons.

Let us review the status of foreign citizens in Russia, including foreign athletes, as well as the question of whether Russian legislation stipulates a restriction of the labour rights of foreign workers.

Foreign citizens in Russia have a special status. This status is regulated by the Federal Law on the Legal Status of Foreign Citizens in the Russian Federation, of 2002. According to this law, a *foreign citizen* is a physical person, who is not a citizen of the Russian Federation, and who bears proof of citizenship (nationality) from a foreign state.

As regards the rights of foreign citizens to work on Russian territory, "foreign citizens exercise the right to freely deploy their abilities to work, select a field of endeavour and a profession, and exercise the right to freely deploy their capabilities and property for business and other economic activity not forbidden by law, with provision for the restrictions stipulated by Federal law⁴". In essence, foreigners are extended rights and obligations with respect to labour, that are identical to the rights and obligations of citizens of Russia.

In order to conclude a labour contract between an employer and a foreign worker, lawmakers stipulate that the employer and the employee must obtain the following additional documents:

1. In order to conclude a labour contract with a foreign citizen an employer, who may also be a foreigner, must obtain *permission* to recruit and use foreign workers. A payment is exacted from employers for each recruited foreign worker, in the sum of one minimum monthly labour wage, in exchange for the issue of permission to recruit each foreign worker.

2. In turn, the foreigner himself must obtain a *work permit*. A work permit is a document that confirms the right of the given foreign worker to temporarily perform labour activities on the territory of the Russian Federation, or the right of a foreign citizen, registered in the Russian Federation as a private businessman, to perform business activity. The permit is issued free of charge.

Paragraph 4, article 13 of the Federal Law On the Legal Status of Foreign Citizens contains a list of persons who have the right to perform labour activities without obtaining a work permit. For example, no work permit is required for: foreigners who have the status of permanent residency on the territory of the Russian Federation, accredited journalists, diplomatic personnel, teachers, employees of foreign assembly and service companies, students of Russian colleges and universities employed during their vacation, and others.

The exceptions listed do not include footballers, hockey players, or any other athletes. This means that they exercise the same rights and bear the same obligations, in respect to labour relations, as the majority of foreigners. In part, this holds for the right to freely exercise one's right to work and for the obligation to obtain a work permit to perform labour activities on the territory of the Russian Federation.

The legislation of the Russian Federation contains no specific restrictions on the labour rights of foreign athletes, but a mechanism is nevertheless provided, that could be utilized for this purpose.

After the adoption of the new Law on Physical Culture and Sport in the Russian Federation, dated 4 December 2007, No. 329-FZ, the legislation of the Russian Federation gained a basis for establishing limits on the numbers of foreign athletes participating in Russian competitions.

According to subparagraph 7, paragraph 1, article 16 of the Federal Law on Physical Culture and Sport in the Russian Federation, *only pan-Russian social organizations* have the right to establish restrictions on athletes' participation in pan-Russian official sporting competitions in the corresponding sports, if they do not have the right to represent the national sporting teams of the Russian Federation in compliance with the norms of international sporting organizations, hosting the relevant international competitions.

In other words, any pan-Russian sporting federation may establish, in its internal documents (for example, the rules for holding competitions), a limit on participation in official sporting competitions by a special category of employees.

We will note that in this case we are not talking only of foreign citizens: the term used is: "an athlete, not possessing the right to represent the national sports teams of the Russian Federation in compliance with the norms of international sporting organizations hosting the relevant international competitions." This term is far broader than the definitions of foreign players stipulated by the rules of the RFU or the CHL. According to these rules, a foreign player is always a citizen of a foreign state, and the language used in the Federal Law on Physical Culture and Sport does not exclude situations where a citizen of the Russian Federation may also become subject to such a limit. For example, citizens of the Russian Federation who have dual citizenship, and who have already played for the national team of another country, are subject to this limit.

Another example: in football a practice is very common, whereby a footballer holds two passports, one Russian and one of another country, that was previously part of the USSR and is now a member of the CIS - such as Ukraine or Moldova. There is no dual citizenship treaty between Russia and these countries, and on receipt of Russian citizenship the above footballers, nevertheless, retain their passport from the other country, which allows them to play in the national team of that country. In this situation, as they are citizens of Russian, such footballers also find themselves subject to the limit.

It appears strange that sporting federations have been awarded the right to establish, in their internal documents, restrictions on participation by foreign athletes in competitions, and effectively thus restrict the labour rights of these athletes. No criteria for such documents are stipulated in the Federal Law and, effectively, according to the given norm, the sporting federation may restrict the rights of foreign ath-

2 http://www.sovsport.ru/gazeta/article-item/293434_2

4 Para. 1, art. 13 of the Federal Law On the Legal Status of Foreign Citizens in the RF

3 <http://uasport.net/football/533611>

letes in any form, even including a complete ban on participation by foreigners in Russian competitions (as, for example, already occurred in the second-division of the Professional Football League, PFL).

Moreover, according to paragraph 5, article 18.1 of the Federal Law on the Legal Status of Foreign Citizens in the Russian Federation, the government of the RF retains the right, annually and making provisions for regional labour market factors, as well as the need for priority placement of RF citizens in jobs, to establish the legal proportion of foreign workers, deployed in various sectors of the economy by commercial entities, which perform activities both on the territory of one or several constituent members of the Russian Federation, and on the entire territory of the Russian Federation. In other words, this federal law specifically awards the government of the Russian Federation the right to set quotas and restrict the use of foreign workers in various sectors of the economy, including activities related to sport.

It was as a part of the implementation of these provisions of the federal law, that on 31 December 2008 the RF government adopted the order 'On Establishing for 2009 the Legal Proportion of Foreign Workers Employed in Commercial Entities Active in the Retail Industry and Sport on the Territory of the RF'. This document establishes the legal proportion of foreign workers employed in activities related to sport, as 25% of the total number of employees used by the above commercial entities.

In this way, the government also established a, somewhat idiosyncratic, form of limiting the number of competing foreign athletes. However, this was done in an extremely ineffective fashion: the unit of measurement was taken as the total number of employees in a sporting organization, and not the actual athletes, and so in order to dodge this limit, a sport club has merely to increase the number of full-time cleaners, formally boosting the total number of employees, and in so doing thus also increasing the number of foreign employees that can be hired by the club. In addition, as far as is known, nothing is actually done to verify and ensure conformance with this governmental order.

Nevertheless, it is clear that in the question of limiting the number of foreigners in sport, there is a clear dualism: according to the Federal Law On Physical Culture and Sport in the Russian Federation, a limit may be established by a pan-Russian social organization, while the Federal Law On the Legal Status of Foreign Citizens delegates these authorities to the RF government.

In our opinion such important issues must be resolved at the state level, or at least remain under governmental control, although the legal formalization, presentation and execution of these authorities must be afforded a far higher level of legal detail than is evident in the government order mentioned above.

3. International treaties regulating the labour rights of foreign workers on the territory of the Russian Federation.

According to the provisions of article 15 of the RF constitution, universally-recognized principles and norms of international law and international treaties of the RF are an integral part of the RF law system. If international treaties of the RF establish other rules than are stipulated by law, then the rules of the international treaty are applied.

At the time of writing this article, the RF has a ratified agreement with the European Union and a treaty with the Republic of Belarus, regulating the labour rights of citizens of the party countries.

For example, according to article 23 of the Agreement on partnership and cooperation establishing a partnership between the European communities and their Member States, of one part and the Russian Federation, or the other part, of 24 June 1994 (hereafter the RF-EU agreement) "*Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any dis-*

crimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals."

Moreover, the above rule is valid for both parties to the agreement, and therefore Russia, by observing the terms and rules current in Russia, provides the regime discussed above to citizens of any EU member state, who is legally hired to work on Russian territory.

In addition to the agreement with the EU, Russia has also ratified a treaty with the Republic of Belarus, on Equal Rights of Citizens, dated 25 December, 1998. According to article 7 of this treaty, "*the Parties will provide to citizens of Russia and Belarus equal rights to employment, remuneration and the extension of other social and legal guarantees on the territories of Russia and Belarus. Citizens of Russia and Belarus have equal rights with respect to remuneration for labour, work and rest schedules, labour protection and the terms of employment, and other labour relations issues.*"

Thus, if a citizen of an EU country is legally hired in Russia, i.e. in observation of all the necessary procedures in section two of this article - if the employer obtains permission to recruit a foreign worker and the employee himself procures a work permit - then discrimination against that employee, on grounds of citizenship and with respect to the terms of employment, remuneration or termination, is banned.

The same is true for citizens of Belarus, working in Russian legally, with the sole difference that according to Resolution No. 4 of the Supreme Council of the Belarus-Russia Community, dated 22 June 1996, the procedure for regulating the recruitment and use of foreign workers with respect to citizens of the Republic of Belarus and the Russian Federation and citizens of the Russian Federation in the Republic of Belarus, which is based on national legislation, is not applicable. That is, a citizen of Belarus, in case of employment on Russian territory, need not obtain a work permit, and his employer need not obtain permission to recruit him as a foreign worker.

Thus, it is clear that for sporting federations, according to the Federal Law On Physical Culture and Sport in the Russian Federation, establishing restrictions on participation by foreigners in Russian sporting competitions is a violation of the above international treaties, ratified by Russia, as such restrictions clearly discriminate against citizens of EU member states and Belarus. There are no such restrictions with respect to citizens of the Russian Federation. Therefore the limits, current in Russian sporting competitions, cannot be applied to the citizens of EU member states, or citizens of the Republic of Belarus.

These conclusions are indirectly confirmed by the records of a court case, won by the Russian footballer Igor Simutenkov, against the Spanish Royal Football Federation (RFEF) in the Spanish Supreme Court.

4. The Simutenkov Case⁵

In 2001 Russian footballer Igor Simutenkov, playing for the Spanish club Tenerife, submitted to RFEF a request for a cessation of discrimination with respect to his labour rights, based on article 23 of the RF-EU agreement.

The discriminatory rules, in his opinion, were the result of the text of an agreement between the RFEF, the National Professional Football League and the Association of Spanish Footballers, dated 28 May 1999, which introduced a limit on foreign players, and according to which no more than three footballers, who are not citizens of EU states, can play at any one time in any one first-division match in the 2000/2001-2004/2005 seasons; in the second division the rule is no more than three footballers simultaneously in matches in the 2000/2001-2001/2002 seasons, and no more than two footballers at any one time in matches of subsequent seasons. Simutenkov's request was rejected by a decision of the RFEF⁶.

Then Simutenkov filed a lawsuit with Central Court No. 3 for administrative disputes, against the decision of RFEF, challenging the rejection of his appeal against discrimination. The lawsuit was denied in a legal ruling on 22 October 2002, and Simutenkov filed an appeal against this court ruling, with the National Appeals Assembly, which ruled in favour of a suspension of hearings on the case, pending resolution of the following question:

5 Case C-265/03 Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol [2005] ECR I-5961

6 *Zakon*, No. 1, January 2008, P. A. Kalinichenko. The ruling on the Simutenkov case and its consequences.

“Is article 23 of the Partnership and Cooperation Agreement, establishing a partnership between the European Communities and their Member States for the first part, and the Russian Federation for the second part (the Agreement), concluded in Corfu on 24 June 1994, violated by the application of a rule by a sporting federation with respect to a professional sportsman possessing Russian citizenship, who was legally employed by a Spanish Football Club, as the main source of income, where this rule stipulates that clubs may use in national competitions only a limited number of players from countries falling outside the European Economic Space?”

This question is similar to the one that arose in connection with case C-438/00, of the German Handball Club (Kolpak⁷). In this case, the court ruled that a professional handball player (of Slovak nationality), working legally in a German club, could refer to the terms of a Euro-Slovak Agreement, in order to avoid any form of discrimination of his labour rights, compared to German handball players. In this case, the national handball federation had a rule, similar to the disputed RFEF rule, which disallows clubs from deploying in matches more players with non-EU citizenship, than stipulated.

In the Kolpak case it was found that such restrictions are a part of the terms of employment, as they directly influence participation in league and cup matches. In the Kolpak case, the court paid particular attention to the fact that the limit covered the official team matches: specifically those matches, in which participation is the core labour function of the athlete, and this means that the limit definitively discriminates against the athlete as regards the terms of employment, compared to other players, who are members of EU countries. The limit disputed by Simutenkov also refers to official matches, and for this reason it also impacts the main endeavours of professional athletes.

Upon review of the Simutenkov case, the court needed a significant period of time - about four years, to finally recognize, in April of 2005, that “paragraph 1, article 23 of the Partnership and Cooperation Agreement between Russia and the EU must be interpreted as excluding the application to professional athletes of Russian ethnicity, *who legally work in football clubs, located on the territory of EU member states*, of the rule, stipulated by a sporting federation of the given state, which determines that clubs may only deploy in competitions, organized at the national level, only a restricted number of players from countries that are not party to the European Economic Community Space.”

Thus, the court unambiguously stated that any restrictions on grounds of nationality, discriminating against Russian citizens with respect to the terms of employment, are unacceptable. Moreover, the limit on the number of foreign players was unambiguously declared to be a restriction of the terms of employment.

It is noteworthy that prior to Simutenkov other footballers, with citizenship of non-EU member states, also filed lawsuits with Spanish courts. Cases are known, of complaints lodged with courts by Russian Federation citizens, such as the current FC Spartak trainer, Valery Karpin, Viktor Onopko, and the Ukrainian, Andrei Shevchenko⁸.

In the context of the Simutenkov case, another infamous case that comes to mind is the “Bosman affair⁹” as a result of which the foreign-player limit was declared illegal in the EU, if it restricts the participation of footballers in a championship match, if such players are from a different country which is also a member of the EU. The result of this case was that footballers were recognized as regular migrant workers, and for this reason the limit on the number of foreign players was recognized as violating the principle of free movement of workers within the framework of the common European labour market. Following the Bosman affair, foreign-player limits for players from EU member states and countries of the European Economic Space were discontinued. And if the consequence of the Bosman

affair was an abrogation of limits on footballers with citizenship of EU member states, the Simutenkov case cancelled such limits for all citizens, whose countries had concluded agreements and treaties with the EU on cooperation, which include the principle of equality and non-discrimination against citizens of the party states in labour relations.

In addition, another important consequence of this case was that, because the agreement between the EU and the RF is bilateral, footballers who are the subjects of one of these EU member states will have the right to refer to these same provisions on the unacceptability of discrimination and the establishment of limits, if they are to work in Russia and become subject to such discrimination.

It is important here to remember that such a ruling, as was issued on the Simutenkov case, does not form a precedent for Russia, and in the case of such discrimination against an EU member state citizen, the case will be reviewed once again, this time in a Russian court. Nevertheless, the Simutenkov case presents us with a set of arguments that could also be sufficient to convince a Russian court of the inadmissibility of a limit.

5. Limits on participation by foreign citizens in hockey and football championships, established by the RFU and the CHL

In this section, we will examine the limits, current at the time of writing this article, in football and hockey championships, from the viewpoint of their conformance with legislation and the international treaties of the Russian Federation.

5.1. Football competitions held under the aegis of the RFU

At the time of writing this article the limit on participation by foreign citizens in the Russian football championship has been established by the rules for holding competitions in 2009 (hereafter, the RFU rules), approved jointly by the RFU and the RFPL (Russian Football Premier League).

According to these rules, a foreign player is a footballer (player), who does not hold a passport and citizenship of the Russian Federation, and who does hold a complete transfer certificate and a valid labour contract with a Club.

The essence of the limit is that during a match played by the club, there can be no more than six foreign players on the field. Meanwhile, the number of foreign players entered into the match record is not limited.

Also, according to the regulatory documents passed jointly by the RFU and the PFL (Professional Football League), governing first- and second-division championships, no more than three foreign players can simultaneously represent the team on the field during a first-division match. The participation of foreign footballers in second-division matches is forbidden.

Thus, in the premier league up to six foreign footballers can be on the field at one time, up to three in the first division, and no foreign footballers are allowed in the second division.

According to article 46 of the 2008 RFU Disciplinary Regulations, in case of violation of the above-mentioned limit on foreign players in a team, the offender is recorded as losing the game with a score of 3-0, and a fine is levied of 500,000 roubles.

5.2. The open hockey championship (CHL)

According to the Rules, which are current at the time of writing, for the open Russian hockey championship, the 2008/2009 CHL championship, (hereafter, the CHL Rules), a foreign hockey player is considered to be a hockey player who does not hold Russian Federation citizenship and who is a citizen (subject) of a foreign state.

The CHL limit is of two types: a limit on entering the list of team players for the season and a limit for a specific team match.

According to article 91 of the CHL Rules, when compiling a season list, a club cannot enter more than five foreign hockey players in forward positions, or no more than one foreign goal-minder and three foreigners in the field. In this way, the authors of the rules have essentially declared one foreign goal-minder equal to two foreign players in the field.

7 (5) Case 438/00 *Deutscher Handballbund eV v Maros Kolpak* [2003] ECR I-4135.

8 *Zakon*, No. 1, January 2008, P. A.

Kalinichenko. The ruling on the Simutenkov case and its consequences.

9 Case 61/89 *Union royale belge des*

sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others, Union des associations européennes de football (UEFA) v. Jean-Marc Bosman (Bosman) [1990] ECR I-3551.

Article 95 of the CHL Rules governs the team list at the match itself. According to this article, the list may not include more than four foreign hockey players, regardless of the positions they play. Moreover, the team list for a Russian club for any given championship match can not contain more than one foreign goal-minder.

The CHL Rules also establish an interesting restriction with respect to the play time of foreign goal-minders. Thus, in the first stage of the championship foreign goal-minders cannot spend more than 65% of the team's play time during official match time.

Given violation of the above provisions, the CHL Disciplinary Committee may apply sanctions in the form of a fine, or disqualification. The regulatory documents of the CHL do not stipulate any specific sizes for sanctions punishing violation of the foreign-player limit.

We note that the CHL Rules establishing the limit were adopted by a commercial entity, OOO CHL, while the right to establish such restrictions is only possessed, according to law, by pan-Russian social organizations.

Meanwhile, Russian sports lawyers currently offer two main opinions on the problem of limits.

Lawyers supporting the first viewpoint consider that the limit existing in RFU football competitions does not allow for discrimination against foreign athletes, because the limit does not restrict clubs in terms of the number of foreign footballers hired, but only restricts the number on the field at any one time. Therefore, all foreigners hired by the club can theoretically appear on the field sooner or later, and can even get to stay on the field permanently, given sufficient effort. Similar arguments were put forward by the RFEF when reviewing the Simutenkov case.

Those in favour of this approach should consult the definition of *discrimination* itself, as listed in both Russian legislation¹⁰, and in international treaties and agreements ratified by the RFU¹¹. According to the above documents, *any discrimination whatsoever* on national grounds is banned in the field of labour.

Thus, according to ILO Convention, No. 111, the term "discrimination" includes:

any difference, exclusion or preference, executed on the grounds of race, skin colour, gender, religion, political convictions, foreign origin or social provenance, which leads to the abrogation or violation of equal opportunities or treatment in the field of labour and endeavours; any other difference, exclusion or preference, leading to the abrogation or violation of equal opportunities or treatment in the field of labour and endeavours.

Therefore, absolutely no inequality and discrimination on grounds of nationality is allowed. The fact that the limit, current in both football and hockey, establishes an inequality between citizens of Russian and foreign citizens, flows from the language of the limit itself. For example, there is discrimination impacting the rights of the seventh foreign player in football premier league matches or hockey goal-minders, who have the right to spend just 65% of matches on the ice in the first

round of hockey competitions. Moreover, discrimination by nationality is most obvious in football matches of the second division, as foreigners *have no right to play whatsoever*.

The second viewpoint is that sport should be recognized as a special field of social relations, and establish for this field special rules, which differ from the rules in other spheres of life. This is the concept of the so-called "specificity of sport".

The benefits for the sport of a foreign-player limit are obvious to all. I consider that all countries will eventually come to this point of view, as is confirmed by the latest statements by leading FIFA and UEFA officials. In this connection, it is necessary to adopt laws and enter into agreements, including international treaties, which take into account this special nature of sport, making provision for targeted policies on sport.

6. General conclusions

Thus, after performing a legal analysis of the foreign-player limits current in football and hockey championships of the RFU and the CHL, as well as reviewing Russian national legislation regulating relations in the field of labour and in the field of physical culture and sport, as well as international treaties and agreements ratified by Russia and related to the above legal relations, the following general conclusions can be drawn.

1. The foreign-player limit current in Russian football competitions is established by the regulatory norms of a pan-Russian social organization, the RFU, which means that this restriction largely complies with the provisions of article 16 of the Federal Law On Culture and Sport.

However, the limit is universal and covers absolutely all types of foreign footballers, including citizens of Belarus and citizens of EU member states which, as we ascertained earlier, violates international agreements and treaties ratified by the Russian Federation.

Unlike the EU, where, as a result of the Simutenkov case, norms reinforced in the agreement between Russia and the EU, as well as the entire set of partnership agreements between the EU and third countries, received the status of norms of direct effect¹², in Russia the fact of discrimination of rights of foreign athletes by means of foreign-player limits remains to be demonstrated in new court proceedings.

Thus, although the foreign-player limit currently in place in Russian football is formally lawful, we consider that if a footballer who is a citizen of an EU member state files a lawsuit, the court reviewing the case will have sufficient grounds to issue a ruling similar to that issued on the case of Simutenkov, recognizing the limit in Russian football competitions to be discriminatory on grounds of nationality, with respect to the terms of employment.

2. We consider that the risk that a foreign-player limit established by the rules of the CHL will be successfully appealed in court is far higher than for the rules adopted by the RFU. As was stated above, OOO CHL is a commercial entity, while the Federal Law on Physical Culture and Sport extends the right to restrict participation by foreign athletes in competitions only to pan-Russian social organizations. The points discussed above, regarding the risk of an appeal against the limit due to its contradiction of international treaties and agreements ratified by the Russian Federation, are also valid for hockey competitions.

¹⁰ Part 2, article 19 of the RF Constitution, part 2, article 3 of the Labour Code.

¹¹ ILO Convention No. 111, On Discrimination in the Field of Labour and Endeavours .

¹² *Zakon*, No. 1, January 2008, P. A. Kalinichenko. The ruling on the Simutenkov case and its consequences.

Regulating against Player Movement in Professional Rugby League: a Competition Law Analysis of the RFL's "Club-Trained Rule"

by Leanne O'Leary*

*'Who do you want to play for Great Britain? The elite or the mediocre? Because at the moment you are forcing clubs to sign mediocre players instead of other players because of this [club trained rule]... The problem is we don't have enough top quality players in this country. There needs to be something done to develop players for Great Britain... but I don't think this is the right tool.'*¹

Introduction

In recent years the number of foreign players participating in Europe's premier professional rugby league competition, the Super League competition, has increased.² According to the Rugby Football League, the sporting code's governing body for rugby league in the United Kingdom, in 2007 at least 45% of players employed in the Super League competition were ineligible to play for Great Britain.³ Rugby league is played at a professional level in the United Kingdom, France, New Zealand and Australia, and the Super League competition is one of two full time professional rugby league competitions in the world (the other competition is the Australian NRL). At some stage during a professional career a foreign player may take up employment in the Super League competition.

Many of the foreign players who play in the Super League competition are from Australia, New Zealand or the Pacific Islands. Some of those players are dual nationals (with one nationality being that of a Member State); or are nationals of a country with whom the European Union has an association agreement. These players fall outside the scope of the RFL's "overseas quota rule" which limits to five the number of foreign players which a Super League club may register in its first team squad.⁴

A foreign player of dual nationality with (one nationality being that of a Member State) is able to provide playing services to a Super League club without national immigration constraints. Other foreign players participating in the competition - including those players who may benefit from the decision in *Deutscher Handballbund eV v Kolpak*⁵ - require immigration approval to work as a professional rugby league player in the United Kingdom. The criteria for a professional rugby league player's work permit are determined by the United Kingdom Border Agency following consultation with the RFL and the Rugby League Players Association ("RLPA").⁶ Consultations usually take the form of meetings and/or written correspondence, and the criteria are renewed annually.⁷ Overall, the immigration procedures for employing a foreign player in the Super League competition are similar to those which apply to other industries in which an employer wishes to employ foreign labour.

The increased number of foreign players in the Super League competition purportedly harms the employment opportunities of local players in the competition; and reduces the pool of players available

for selection to the English international representative team with a consequential detrimental effect for the success potential of the team in international representative matches. Consequently, in 2008, the RFL adopted the "club trained rule" (which is based on UEFA's "Home-Grown Player Rule"). The "club trained rule" aims to reduce the number of foreign players in the competition (amongst other things). Pursuant to the rule, a club's first team must comprise of a certain number of players who satisfy the definition of "club trained", "federation trained" and "academy junior".⁸ If a player does not satisfy the relevant definition in relation to his employment at a particular club, he is ineligible for registration with the RFL and unable to provide playing services to that club.⁹

This article examines the legality of the "club trained rule" under Article 81 (EC). It considers the background to the rule's introduction, including: the regulatory framework in which the competition operated in 2007; the principal pathway for a player into a professional career in Super League; the factors that influenced the level of financial investment made by a Super League club in junior player development; and the factors that influenced club demand for foreign players. It summarises the relevant market; highlights the rule's market effects; examines the justifications advanced in favour of the rule; and considers whether or not the rule is a proportionate means of achieving a legitimate aim, taking into account the "specificity of sport".¹⁰ The article concludes that the "club trained rule" is anti-competitive; does not satisfy the requirements of the test established in *Meca-Medina and Majcen v Commission*;¹¹ and was unnecessary in light of other changes to the competition's regulatory framework made between 2007 and 2009.

"The Club Trained Rule"

Pursuant to the "club trained rule" a Super League club's first team must comprise of: a maximum of five players who satisfy none of the definitions of "club trained player", "federation trained player" or "academy junior"; and a minimum of eight club trained players or academy juniors. The remainder of the team must comprise of federation trained players or academy juniors.¹²

"Club trained player" is defined as, 'a player who has been on the Club's register for any 3 full Seasons before the end of the Season in which he ceases to be eligible by age for Academy rugby league'.¹³ "Federation trained player" is 'a player who, for any 3 full seasons before the end of the season in which he ceases to be eligible by age for Academy rugby league has been on one of the Club's registers or the register of another Club being a member of the same rugby league federation'.¹⁴ An "academy junior" is a player 'who is eligible by age for Academy rugby league and who is on the club's register'.¹⁵ A player ceases to be eligible by age for academy rugby league at twenty one years.

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1 Personal interview with Coach A (November 2007).

2 The Super League competition is a professional rugby league competition which comprises of fourteen rugby league clubs. The clubs are situated in the United Kingdom and France. In 2009 the clubs participating in the Super League competition are: Bradford Bulls; Castleford Tigers; Catalans Dragons; Celtic Crusaders; Harlequins RL; Huddersfield

Giants; Hull FC; Hull KR; Leeds Rhinos; St Helens; Salford City Reds; Wakefield Trinity Wildcats; Warrington Wolves; and Wigan Warriors.

3 Personal interview with the Rugby Football League ("RFL") (October 2007). In 2007 the Great Britain international representative rugby league team was comprised of players who were selected from throughout the British Isles. In 2008 international representative teams for Wales, Scotland, England and Ireland were created and the selection process amended accordingly. In 2009 the RFL is responsible for the selection of the English international representative rugby league team.

4 RFL Operational Rules 2009, C1:4:2. See also Case C-415/93 *Union Royale Belge des Societes de Football Association v Bosman* [1995] ECR I-4921; Case C-438/00 *Deutscher Handballbund eV v Kolpak* [2003] ECR I-4135; and Case C-265/03 *Simutenkov v Ministerio de Educacion y Cultura, Real Federacion Espanola de Futbol* [2005] ECR I-2579.

5 *Supra* n 5.

6 Personal correspondence with the United Kingdom Border Agency (17 September 2008). The criteria for a permit to work as a professional rugby league player are listed on the official website of the United Kingdom Border Agency: <<http://www.homeoffice.gov.uk>>.

7 Personal correspondence *supra* n 7.

8 RFL Operational Rules 2009, B1:11A.

9 RFL Operational Rules 2009, C1:2:1.

10 See Case C-519/04 *Meca-Medina and Majcen v Commission* [2006] ECR I-69; and Commission (EC), *White Paper on Sport COM* (2007) 391 final, 11 July 2007.

11 *Supra* n 11.

12 RFL Operational Rules 2009, B1:11A.

13 RFL Operational Rules 2009, B1:11B(a).

14 RFL Operational Rules 2009, B1:11B(b). "Federation" is defined as 'a governing body for a country recognised by the Rugby League International Federation': RFL Operational Rules 2009, 1(x). "Club" means 'any member which is a

The RFL may declare that a player who does not comply with the rule's requirements is nonetheless "federation trained" or "club trained" provided the player demonstrates that he 'satisfies the spirit of the definition'.¹⁶ Failure to comply with the "club trained rule" is an act of misconduct.¹⁷ Penalties imposed against a club for an infringement of the rule include: a fine; the deduction of competition points; or the requirement that a club play its games behind closed doors (amongst others).¹⁸

Background

Before examining the legality of the rule under Article 81 (EC) it is pertinent to consider the context in which the sport was played immediately prior to the rule's introduction. The information summarised below is extrapolated from interviews conducted with industry stakeholders during 2007.¹⁹

1. The Principal Pathway Into Employment in the Super League Competition

In 2007 the principal pathway for a player into a full time professional career at a Super League club was through participation in rugby league at school or an amateur club. The RFL - then as now - divides the United Kingdom geographically into service areas which are based on metropolitan council boundaries. Talented junior players are selected from amateur clubs to play "service area" rugby. The service area competitions are divided into age levels (for example, under-15, under-14, and so on). Players who participate in service area competitions are also likely to attend regional and national rugby league training camps.

A scholarship scheme runs in conjunction with the various service area, amateur and school competitions. Pursuant to the scheme a professional rugby league club provides an annual scholarship to a player aged seventeen years or under. The player receives advice on nutrition and fitness and is permitted to train with the professional club. The RFL Scholarship Scheme Rules regulate the scheme.²⁰

At seventeen years of age a player is eligible for employment in a Super League club academy team and from the academy may obtain a contract as a full time professional player in the first team of a Super League club. Those players who do not obtain employment in a first team may seek employment as a part time professional player in the competition divisions below Super League or leave the industry altogether.²¹

2. Factors That Influenced Recruitment Decisions

In 2007 professional players were typically recruited to a Super League club's first team from: the club's academy; other Super League clubs; the Australian NRL clubs; and Championship clubs. Factors that influenced a club's decision to recruit a player were: the player's skills; the player's contract costs; the salary cap; a player's personal attributes and character; whether the player fitted within the team dynamic; the player's potential off-field contribution to the club; the player's experience and/or age; the player's public profile, and the player's potential to add-value to the club's brand and generate income for the club's sports business. The effect of a player's recruitment for the development of the Great Britain international representative team was not a consideration for a majority of the British clubs.

Nationality was a factor in the recruitment decisions of the French club, Catalans Dragons. A goal of the club was to develop French rugby league and the calibre of French professional rugby league play-

ers. Of 28 players employed at the time of interview in 2007, twenty players were French and eight players were from Australia and New Zealand.

The majority of British clubs interviewed preferred to recruit players residing locally rather than foreign players. However, information extrapolated from interviews suggested that a shortage of skilled professional players existed in the northern hemisphere. As one club stated:

*'...the policy we have is to recruit the best players available to ensure we have the best possible team from whatever origin that is....As an individual club we would rather recruit English players than overseas players but the quality isn't always there in the English players that it is in the overseas players, particularly in the Australian players.'*²²

The majority of British clubs interviewed commented that it was not cost effective to recruit a foreign player when compared to the cost of investment in an academy or junior player development. One club stated that it was cost effective in the short term. The cost of recruiting a foreign player was described as including: the player's salary; transport costs to and from the United Kingdom; accommodation costs; and the costs associated with providing a car. In some cases, it also included the costs of relocating the player's family. The cost of developing a player in the academy was described as the player's salary plus the money invested in junior player development. Over time the cost of developing a junior player was cheaper than recruiting a foreign player. The recruitment of a foreign player was described by some British clubs as a "short term" or "easy option" when compared to the time taken to develop a junior player.

3. Factors That Influenced Club Demand For Foreign Players

In 2007 the factors that influenced Super League club demand for foreign players were: the threat of relegation from the competition; the means of entry for a club into the competition; a shortage of skilled local players; and the financial benefit accruing to a club from the employment of a foreign player (particularly a high profile player).

One club described increasing its recruitment of foreign players during the playing season in order to avoid relegation. Those clubs interviewed that entered the competition by way of promotion from the division below Super League commented that the recruitment of foreign players increased following promotion. The point in time at which promotion was confirmed; and the non-availability of skilled players in the local labour market contributed to an increased demand for foreign players. According to one club:

*'There aren't very many players around once you get promoted and you look where you can. Most of the quality English players are all signed because generally people would prefer to sign English players rather than overseas players so then you look overseas where there are a lot more players in Australia and New Zealand, particularly in Australia where there are a lot more people playing the game there than what there are here.'*²³

London Broncos (now Harlequins RL) entered the Super League competition in 1995 and Catalans Dragons was admitted by agreement of the existing Super League clubs in 2006. Both clubs were provided with an exemption from the "overseas quota rule" which enabled the clubs to recruit an increased number of foreign players. The exemption was provided owing to a shortage of skilled players in the local labour market.

Finally, one club reported that recruitment of a high profile foreign player had positive financial effects for a club's sports business:

*'You know when [name omitted for reasons of confidentiality] came over to play for us, did it have an uplifting factor on all of the squad here? Absolutely. The whole borough wide community. Shop sales, lottery sales, everything benefited....'*²⁴

4. Foreign Players in the Super League Competition

According to those industry participants interviewed, foreign players benefited the competition, clubs and consumers in a number of ways. First, foreign players brought to the Super League competition: new playing skills; experience of development, training and playing meth-

Rugby League Club and any other Rugby League Football club or other body which may be invited to join the RFL from time to time': RFL Operational Rules 2009, 1(k).

15 RFL Operational Rules 2009, B1:11B(c).

16 RFL Operational Rules 2009, B1:15.

17 RFL Operational Rules 2009, D1:10(r).

18 RFL Operational Rules 2009, D1:12.

19 Those stakeholders interviewed included: Super League clubs, Championship clubs (the competition division below Super League), professional rugby league

players, the RFL, the Rugby League Players' Association, professional coaches, and sports agents.

20 RFL Operational Rules 2009, E9.

21 There are two competition divisions below Super League: the Championship; and Championship 1.

22 Personal interview with Super League Club D (February 2007).

23 Personal interview with Championship Club A (November 2007).

24 Personal interview with Super League Club F (May 2007).

ods used in the Australian NRL; and professional work habits (such as, for example, an awareness of player responsibilities to the club and its sponsors).

Secondly, some foreign players: acted as role models for less-experienced players; and shared playing experience and skills which assisted the development of local players. Thirdly, foreign players with experience of playing at an international representative level provided a benchmark against which British and French international representative players could measure their skills. Fourthly, a high profile foreign player contributed positively to a club's financial position through, for example, increased gate revenue and merchandise sales. Overall foreign players assisted with improving the standard of rugby league played in the Super League competition.

Some industry participants commented that competition from foreign players for employment in the Super League competition had: limited the development opportunities of some local players; and reduced the selection pool for the Great Britain international representative team. A successful international representative team brought benefits for a Super League club's business and the game as a whole by raising the profile of the sport. Three clubs interviewed also commented that their respective supporters preferred to see a majority of local players in a team rather than a team comprising mainly of foreign players.

Interestingly, those British players interviewed who followed the principal pathway into a career in Super League did not perceive the presence of foreign players in the competition as an obstacle to gaining employment. Instead players referred to: competition with experienced players generally (irrespective of nationality); the higher performance expectations of a player in the competition (when compared to the performance expectations in the academy competition); more strenuous training requirements; and the faster, more physical level of play when compared to that required to participate in the academy competitions, as obstacles to gaining employment or playing opportunities in a Super League club first team.

Finally, participation in the Super League competition provided some foreign players with the opportunity to gain selection to an international representative team (subject to the selection policy adopted by a sporting code's governing body). One New Zealand rugby league player interviewed commented that playing in Super League had assisted his career progression through to selection for the New Zealand international representative team.

5. Factors That Influenced Club Investment in Junior Player Development

In 2007 the number of players and coaching staff employed in a Super League club academy; and the quality of training facilities differed

between clubs. Generally, those more affluent clubs with a history of playing in the Super League competition had well established academies, and academy players were recruited to: the club's first team; another Super League club; or a club in the Championship competition divisions.

A club's: financial circumstances; history of participation in the Super League competition; and policy concerning junior development, influenced the level of investment that a club made in its academy. Some clubs interviewed commented that investment in junior development was not a priority when the club was seeking promotion or avoiding relegation.

In 2007 Super League clubs received financial payments from the RFL for: rugby league scholarships; the employment of a player performance manager; and the development of a player who was selected to the Great Britain international representative team. No other financial incentives were provided by the RFL to the clubs for investing in junior player development.

Changes to the Regulatory Framework Between 2007 and 2009

Between 2007 and 2009 a number of amendments were made to the competition's regulatory framework. First, the means of entry for clubs into the competition was amended; relegation and promotion was removed and replaced by a franchise licensing system. The license application process assesses the club against criteria which take into account: the club's playing strength (including investment in the development of junior players); and the club's financial position and business performance amongst other things. Secondly, in 2009 the number of clubs competing in Super League was increased from twelve to fourteen thereby increasing the number of full time players required for the competition. The following section summarises the market for playing services provided to the Super League competition, and discusses the effects of the "club trained rule".

The Relevant Market Defined

The "club trained rule" applies in the market for playing services to the Super League competition.²⁵ The Super League clubs which compete in the competition from time to time comprise the demand-side. A Super League club requires twenty five players for its first team squad. A change in the number of clubs participating in the Super League competition may increase (or decrease) demand for playing services. In 2009 the number of clubs participating in the competition increased from twelve to fourteen thereby increasing demand from 300 players to 350 players. A change in the regulatory rules to permit a club to name more players in a first team squad may also positively affect demand.

On the supply-side, the market comprises of players with skills of a standard required to compete in the Super League competition. Those players generally have experience of playing in Super League. Additionally, players employed in a Super League club academy, at a Championship club or at an Australian NRL club may fall within the market provided the player has the requisite skill level and/or talent to play in the Super League competition.

The skills of players from other sporting codes are not usually substitutable for those of a professional rugby league player.²⁶ A rugby union player is more likely to possess skills which transpose to rugby league; although the ease with which a player may move between the codes depends on the player's talent and the position played in rugby union (for example, rugby union players who play in a "forward position" have "rucking and mauling" skills which are not required in rugby league). Those rugby union players recruited to a club generally have prior experience of playing professional rugby league.²⁷ Owing to the presence of French and British clubs in the relevant market, inter-state trade is potentially affected by the rule's application.²⁸

The "club trained rule" was agreed by the clubs and the RFL at a meeting in June 2007 and implemented unilaterally in February 2008. For the purposes of Article 81 (EC) the "club trained rule" forms an agreement between undertakings. A Super League club engages in economic activity when it purchases playing services in the market and accordingly may be described as an "undertaking".²⁹ Playing serv-

25 For a general discussion concerning market definition, A. Jones and B. Sufirin, *EC Competition Law* (2008) 58 - 93. See also guidance published by the European Commission: Commission (EC), *Definition of the Relevant Market for the Purposes of Community Competition Law* (Notice) [1997] OJ C372/5.

26 An example of an athlete who tried to switch between sporting codes is that of Dwayne Chambers, a Great Britain representative track athlete who temporarily played for Castleford Tigers in April 2008: see "Chambers Secures Castleford Trial" *BBC Sport* (London, 31 March 2008) <http://news.bbc.co.uk/sport1/hi/rugby_league/super_league/castleford/7321908.stm> accessed 17 June 2009; and "Chambers Not Wanted by Castleford" *BBC Sport* (London, 6 May 2008) <http://news.bbc.co.uk/sport1/hi/rugby_league/super_league/castleford/7385928.stm> accessed 17 June 2009.

27 For example: Mr Iestyn Harris (Leeds

Rhinos, Cardiff Rugby Union Club, Bradford Bulls); Mr Henry Paul (Bradford Bulls, Gloucester Rugby Union Club; Harlequins RL); Mr Chev Walker (Leeds Rhinos, Bath Rugby Union Club, Hull KR); Mr Karl Pryce (Bradford Bulls, Gloucester Rugby Union Club, Wigan Warriors); and Mr Brian Carney (Wigan Warriors, Australian NRL Club Newcastle Knights, Munster Rugby Union Club, Warrington Wolves).

28 See, for example, Case 56/65 *Societe La Technique Miniere v Maschinenbau Ulm GmbH* [1966] ECR 235. See also Commission (EC), *Guidelines on the Effect of Trade Concept Contained in Articles 81 and 82 of the Treaty* (Notice) 27 April 2004 [2004] OJ C101/81.

29 See, for example: Case C-41/90 *Hofner and Elser v Macroton GmbH* [1991] ECR I-1979, para 21; and Case C-49/07 *Motosykletistiki Omospondia Elladon Npid v Elliniko Dimosio* [2008] 5 CMLR 11, para 11.

ices acquired by the clubs in the relevant market are used in the RFL's Challenge Cup competition, from which the RFL derives revenue. The RFL also derives revenue from the participation of the international representative team in international matches. When adopting a rule like the "club trained rule" it may be argued that the RFL is exercising a regulatory function and is not engaged in economic activity.³⁰ Nonetheless the rule was adopted following agreement by the RFL and the clubs; the RFL co-ordinates the activity of the clubs in the relevant market; engages in economic activity on other related markets; and potentially benefits from the rule's implementation. On this basis the RFL may be described as an undertaking and a party to an agreement that restricts competition in the market for playing services to the Super League competition.³¹

Market Effects

The rule distorts, restricts and prevents competition between the clubs and between the players in the market for playing services. In the absence of the "club trained rule", a Super League club would recruit without limitation a player on the basis of his playing skills and experience (subject only to national immigration rules and financial constraints). Now a club is obliged to recruit players taking into account the player's status as "club trained", "federation trained" or "academy junior". The rule may prevent a club from recruiting a player; and a player may be unable to access employment at a particular club even though demand may exist for the player's services.³² It may also encourage player recruitment based on the location of a player's development training rather than the player's skill level. Overall, the "club trained rule" results in an inefficient allocation of resources. The flow-on effect for consumers is a reduction in the quality of the entertainment product.

The larger more affluent clubs with a history of developing junior players are in a better position to comply with the rule's requirements than the less affluent clubs with smaller academies. Additionally, a player who was not registered at an RFL member club prior to the age of twenty one is at a disadvantage when compared to a player who was so registered. The former player's capacity to compete for a contract in the Super League competition is reduced; and access to employment is limited. Additional effects of the rule are described below.

1. Age Discrimination

The rule as initially implemented in February 2008 had an age-related discriminatory effect that arose irrespective of a player's nationality. The circumstances of ten professional players interviewed in 2007 illustrate the rule's effects. All players were aged over twenty-one at the time of interview, and eight players were British; one player was a dual national (Australian/British); and one player was a New Zealander with British residency. All players interviewed qualified under Rugby League International Federation Rules for selection to the Great Britain international representative rugby league team.³³

Of those players interviewed, six players were not affected by the "club trained rule". Those players had entered a career in professional rugby league through employment at a Super League club academy and satisfied the rule's requirements. However, four players inter-

viewed did not enter a career in Super League through the principal pathway and en face did not satisfy the definition of "academy junior", "club trained" or "federation trained". Owing to their age, the players were unable to comply with the rule's requirements.

The pathways of the four affected players were as follows:

- A player of dual Australian/British nationality trained and played at a club in the Australian NRL and did not qualify as "club-trained", as "federation trained" or as an "academy junior".
- A New Zealand player with British residency was recruited from New Zealand and did not satisfy the rule's requirements.
- A British player attended a tertiary institution immediately after he left school. He played in a Super League club academy team during the summer holidays. Following the completion of his tertiary education, the player obtained a contract at a Championship club and then a contract with a Super League club. The total period of time registered at an RFL-member club before the age of twenty one was less than three years.
- A British player who did not play rugby league at school, attended university and played professional rugby union at academy level before turning to professional rugby league at twenty years of age. The total period of time registered at an RFL-member club before the age of twenty one was less than three years.

Amendments to the rule made subsequently in August and September 2008 reduced the age-related discriminatory effect (although the timing of the rule changes nonetheless disadvantaged some players).³⁴ As a consequence of the amendment, the four players described above now qualify as "federation trained" (provided the player applies for the exemption). The players, however, will never qualify as "club trained" because of: the player's age; and the pathway each player took into a professional career. "Club trained" status may be more beneficial than "federation trained" status owing to the rule's requirements that a club recruit a minimum number of "club trained players".

2. Loss of "Club Trained Player" Status

When a "club trained player" moves from the club at which he received his development training, the player is categorised as a "federation trained player" in relation to his subsequent employment at another Super League club. Owing to the minimum recruitment requirements for "club trained players" and "academy juniors", the capacity of a "federation trained player" to compete for employment is reduced. The more "club trained players" or "academy juniors" a Super League club employs, the fewer positions available for a "federation trained player". Over time a first team may potentially comprise of up to twenty five "academy juniors" and "club trained players" and zero "federation trained players". The loss of "club trained player" status may provide an incentive for a player to remain at the club with whom he received his development training or to return to that club at some point in the future. Over time, the "club trained rule" may contribute to less player movement throughout the competition thereby harming competitive balance.³⁵

3. Access to Employment

The "club trained rule" limits access to employment for those players who do not follow the principal pathway into a career in professional rugby league. A professional rugby union player who undertakes his development training at a professional rugby union club does not satisfy the rule's requirements. Similarly affected is a player who learned his trade in the Australian NRL. As the interviews demonstrated above, a player who delays entering a professional rugby league career in order to pursue a tertiary education may also be disadvantaged. Although the rule applies equally to all players irrespective of nationality, it may, nonetheless, infringe Article 39 (EC) if it detrimentally affects a player's right of free movement. A detailed consideration of the rule's compliance with Article 39 (EC) is beyond the scope of this article.

Justifications Advanced in Respect of the "Club Trained Rule"

The RFL Operational Rules 2009 describe the rationale for the "club trained rule" as two-fold:

³⁰ See generally R. Subitto QC, 'How a Lack of Analytical Rigour Has Resulted in an Overbroad Application of EC Competition Law in the Sports Sector' [2009] 2 ISLR 21.

³¹ See, for example: *Meca-Medina*, supra n 11, para 38; and Case T-193/02 *Piau v Commission* [2005] ECR II-209.

³² See, for example, the situation of Mr James Evans whose contract at Bradford Bulls was not renewed despite the club's desire to retain his services: 'Bulls Chief Slams RFL Dispensation' *Rugby League & League Express*, (Brighouse, 1 September 2008) 5.

³³ Rugby League International Federation Rules (January 2001), 3.1.

³⁴ See: 'Bulls Chief Slams RFL

Dispensation' *Rugby League & League Express*, (Brighouse, 1 September 2008) 5; 'RFL U-Turn Gives Career Lifeline to Non-Brit Players' *League Weekly* (Dewsbury, 1 September 2008) 2; and 'Thunder Land Tigers Hooker' *League Weekly* (Dewsbury, 29 September 2008) 10.

³⁵ An even distribution of playing talent maximises "uncertainty of outcome" which in turn purportedly: increases spectator interest in the sporting competition; and revenue for the competition's organisers. For a general discussion, see S. Szymanski, 'Economic Design of Sporting Contests' [2003] 41(4) *Journal of Economic Literature* 1137.

³⁶ RFL Operational Rules 2009, Br:8.

*'The purpose behind the 'Club Trained Player' Rule is to encourage clubs to develop and better develop their own players so that there are more players coming into the game and so that the standard improves. A further purpose is to afford an opportunity to junior players to play in top level competitive matches in order to aid their development and ensure the development of the sport.'*³⁶

The interviews with industry participants in 2007 highlighted additional purposes of the rule as: to increase the selection pool for the Great Britain international representative team; and to decrease the number of foreign players participating in the competition. Each of these objectives are discussed in turn.

1. To Encourage Clubs To Develop Their Own Players So That There Are More Players Coming Into The Game And So That The Standard Improves

The European Commission has acknowledged that the development of junior athletes is a legitimate objective of a professional sports organisation.³⁷ In *Union Royale Belge des Societes de Football Association v Bosman*³⁸ the European Court of Justice accepted, inter alia, that in view of the considerable social importance of sporting activities, the aim of encouraging the recruitment and training of junior players was legitimate.³⁹ Since the aim is accepted as legitimate, the question is whether the "club trained rule" is a proportionate means of pursuing that objective.

All clubs interviewed acknowledged investing in junior player development although the level of club investment depended upon: the length of time a club had participated in the Super League competition; and relegation and promotion. The latter no longer applies as a means of entry into the competition thereby removing a regulatory factor which may have discouraged club investment in junior player development.

Other aspects of the competition's regulatory framework already apply to encourage clubs to develop junior players. First, under the RFL Operational Rules, a Super League club is obliged to operate teams in the academy reserve competition and the U18 competition.⁴⁰ Failure to do so amounts to misconduct and penalties apply.⁴¹ Secondly, a successful application for a Super League license requires a club to demonstrate investment in junior development. A club that wishes to obtain a Super League license will likely focus on the development of junior players (amongst other things) in order to satisfy the criteria for entry into the competition.

In light of changes to the regulatory framework between 2007 and 2009 - in particular the removal of promotion and relegation - the "club trained rule" was unnecessary as a means of encouraging clubs to develop junior players. Owing to the simultaneous introduction of the "club trained rule" and the licensing system, the opportunity to measure the effect of the latter as a mechanism for encouraging junior player development was lost. Since the competition's regulatory framework already encourages clubs to develop junior players in ways that are non-discriminatory and less restrictive of competition, the rule is not a proportionate means of achieving the stated aim.

2. To Provide Junior Players With the Opportunity To Play At an Elite Level and to Aid Their Development and the Development of the Sport

A measure which provides a junior player with the opportunity to play at an elite level satisfies a legitimate objective of a professional

sports business and/or sporting code's governing body.⁴² Without experience of playing in Super League, a junior player may face difficulties securing a contract in a Super League club first team, and some players may be lost from the sport at an academy level as a result.

The interviews demonstrated that a club's objective of avoiding relegation may have limited the opportunities for a junior player to break into a club's first team. In order to avoid relegation, a club generally preferred to recruit or field experienced players rather than provide a less experienced player with the opportunity to play. Relegation, however, no longer applies in the competition and in light of the licensing system requirements, a club may be more inclined to provide playing opportunities to junior players.

Some players interviewed who entered a career in the Super League competition through the principal pathway commented that competition with other more experienced players (irrespective of nationality) was an obstacle to employment in a first team. A regulatory rule which reserves a number of first team positions for academy players may be justified as a measure for assisting academy players to overcome that obstacle, provided a reasonable number of first team positions are reserved.⁴³

The "club trained rule" in its current form, however, applies to all players who wish to participate in Super League and its restrictive effects are wide ranging. Whilst it may afford junior players with a greater opportunity to be included in a Super League club's first team squad, it does so in a manner which is disproportionate, discriminatory and anti-competitive.

3. To Increase the Pool of Players Eligible For Selection to the International Representative Team

A successful international representative team assists the RFL with its constitutional objective of developing the sport of rugby league. It raises the profile of the sport which in turn benefits the businesses of Super League clubs, consumers and the sport generally. The more players eligible for selection to the English international representative team, the more depth in squad positions and the success potential of the international representative team may improve as a result. In *Bosman* UEFA argued that a rule which limited the number of foreign players that a football club could select for its team was required, inter alia, to promote a large pool of playing talent for selection to the international representative team of the country in which the club was located. The argument was rejected in the context of a claim brought under Article 39 (EC) and may also be rejected in the context of an alleged infringement of Article 81 (EC).

Some foreign players with dual nationality may qualify for selection to the international representative team. Over time other foreign players may qualify for selection on the basis of residency. Maurie Fa'asavalu, a former Samoan rugby union player, is an example of a player who qualified on the basis of residency for selection to the English international representative team.⁴⁴

4. To Reduce Super League Club Demand For Foreign Players

The interviews demonstrated that demand for experienced foreign players increased when: a club was threatened with relegation from the Super League competition; a club was promoted to the Super League competition; or a skills shortage existed in the local labour market. The removal of relegation and promotion as a means of entry into the competition has removed two key factors that influenced demand for foreign players.

In times of a skills shortage the industry requires skilled foreign players to fill positions. The "club trained rule" reduces the capacity of a club to recruit skilled (and experienced) foreign players. An increase in the number of teams participating in the Super League competition in 2009 potentially exacerbates the problem and overall, there may be a decrease in the quality of the entertainment product for consumers.

The interviews demonstrated that foreign players participating in Super League: benefited Super League clubs financially through increased ticket sales and merchandise sales; improved the skills of local players; and improved the standard of play in the Super League

³⁷ *White Paper on Sport*, supra n 11, 68.

³⁸ *Bosman*, supra n 5.

³⁹ *Bosman*, supra n 5, para 106.

⁴⁰ Rule B7:4 of the RFL Operational Rules 2009 provides that: *'It is compulsory for Super League clubs to comply with the regulations and to run teams in both the Reserve and Academy (U18) competitions which are fit for purpose and meet the entry criteria specific to the competitions.'*

⁴¹ *Ibid.*

⁴² *Bosman*, supra n 5.

⁴³ See generally R. Conzelmann, 'Models for the Promotion of Home Grown Players For the Protection of National Representative Teams' [2008] 3-4 ISLJ 26.

⁴⁴ 'Maurie Fa'asavalu Demonstrates He Is True Brit' *Telegraph* (London), 29 October 2007 www.telegraph.co.uk/sport/rugbyleague/2324431/Maurie-Fa-asavalu-demonstrates-he-is-true-Brit.html accessed 17 June 2009.

competition (thereby enhancing the entertainment spectacle for consumers). Furthermore, attendance data collated by the RFL demonstrates that average weekly attendance at a Super League match increased annually between 2001 and 2008.⁴⁵ Since the number of foreign players participating in the competition also increased over the latter part of that period, it is arguable that the number of foreign players in a Super League first team squad does not negatively affect supporter interest. The positive benefits provided by foreign players to the competition, local players and consumers outweigh the introduction of a rule that discriminates, limits competition in the relevant market and ultimately reduces the quality of the sporting spectacle for consumers.

Conclusion

The “club trained rule” is anti-competitive, discriminatory and disproportionate to the aims it seeks to achieve; it infringes Article 81(1). Furthermore, it is unlikely the exemption contained in Article 81(3) applies. Whether the “club trained rule” improves production of playing services or promotes technical or economic progress is difficult to

⁴⁵ Rugby Football League, *Super League Attendance Data 2000-2008* (as at 4 September 2008).

ascertain because of its simultaneous introduction with the licensing system; and the removal of the “rule of promotion and relegation”. The competition’s regulatory framework encourages the Super League clubs to develop junior players in ways that: are non-discriminatory; have a minimum effect in the market for playing services; and do not impede access to employment for some players. The “club trained rule” was thus unnecessary in light of other aspects of the regulatory framework.

The RFL and the clubs can not protect the local labour market from competition with nationals from other Member States (a factor in common with other British employers). If a reduction in the number of foreign players is required, the RFL may use the consultation process undertaken annually with the United Kingdom Border Agency to strengthen the criteria for a professional rugby league player’s work permit. In that way the RFL may legitimately influence the number of foreign players entering the competition through employment at British clubs. Finally, the rule was introduced by the RFL and the clubs unilaterally following limited consultation with affected parties. A more robust application of European competition law is required in order to limit the exercise of private regulatory power that detrimentally affects the consumer interest and the employment interests of professional rugby league players.



A Plea for Olympic Recognition for Curaçao

by Roy Paul Bottse*

Introduction

One of the deepest sensations of the Olympic Games is seeing your national flag flying among all the other ones while marching into the Stadium on the opening day. Participants and team officials will always have difficulty to explain the emotional feelings of that moment. For all, it is the fulfillment of an incredible dream, topping rough and tough years of hard work and sacrifices.

I am grateful to be among the lucky few to ever experience the Olympic Games as participants. My own experiences date back to more than three decades ago,¹ and up to date, they have been the rewarding compensation for all the hardship I went through. I will never forget seeing our flag flying proudly and intensely among all the many others. To me it was a moving confirmation of international recognition of our country.

The Olympic Games are one of the best-known ongoing inheritances of mankind. Hence, all countries, small or big, have the historical right to be part of this wonderful tradition. As a former Olympic athlete I will always do whatever I can to promote, protect and support participation in this unmatched magical event.

Now, many years later I have decided to pursue another dream: studying law. It has had my attention ever since, but somehow I never got to doing it, until 2005 when I had to take care of my sick wife and decided to quit my job. While she was mostly sleeping in the afternoon and the early evenings, I took on law school in order to do something useful and interesting.

Combining the past and the present, I have elected my final thesis in relation to our sport identity within the constitutional reform our country is going through. My attention is primarily fixed on gathering relevant supporting arguments towards contesting a routinely confirmed impossibility of recognition for a National Olympic Committee (NOC) of an autonomous Curaçao by the NOC Relations Department of the International Olympic Committee (I.O.C).

It all started with the historical event of the referendum held in Curaçao in April 2005, in which the majority of the population voted for the option of abandoning the Netherlands Antilles constellation and becoming an autonomous country within the Kingdom.²

Among other things, one would expect this alteration to include that local athletes will no longer compete internationally under the Netherlands Antilles (AHO)³ flag, but in the future will showcase the colors and anthem of Curaçao. However, referring to the current Olympic Charter the current Netherlands Antilles Olympic Committee (NAOC), proclaimed that recognition of a Curaçao Olympic Committee of its own is not feasible.

The case itself has not much to do with sports, but is an interesting riddle of constitutional, national, international private and public law as well as sports law. Note that in order to understand the presented problem and the advocated approach, one must not restrict him self to national law but frequently shift to the territories of international and international sport law, which both have their specific doctrines and customaries. One typical aspect international law is certainly that it is not static, but adapts to *opinio juris*, and also that interpretation is legal part of authoritative decisions.⁴ Most probably this case is the first issue contesting the true value of the future autonomy of Curaçao as negotiated by the island political leadership.

My Thesis is the following:
Is, in the year 2009, the verbatim text of Rule 31.1 of the Olympic Charter,

* Master Thesis, University of the Netherlands Antilles, Faculty of Law, July 2009.

² <http://referendum.cura.net>.

³ Antillas Holandesas, AHO, the formal Olympic abbreviation for the Netherlands Antilles as included in the IOC list.

¹ <http://www.sports-reference.com/olympics/summer/1976/ATH/mens-800-metres.html>.

⁴ J. C. Barker, *International law and international relations*. p. 176.

which is a private law provision in accordance with Swiss Law, a rightful ground for withholding IOC recognition from an NOC of an autonomous Curaçao?

In answering my Thesis I have formulated the following sub-questions:

1. Are sports and international sports representation of the Netherlands Antilles, in particular in Curaçao, formally organized?
2. How important are the Olympic Games to Curaçao?
3. Did NAOC act unlawfully with its approach to the IOC and NOC/NSF (Holland) for its continuation after the dissolution of the Netherlands Antilles?
4. Is access to participation in the Olympic Games a favor or a right of recognized nations?
5. Is there an appeal in case the IOC formally rejects CSF's request for recognition?
6. What are, in my opinion, justifying arguments against Rule 31.1?
7. Is there any party that may suffer any harm in case it is decided to grant IOC recognition to CSF?

"Meta hodos"

In random order, the following have been the most important areas of the study:

1. The constitutional and sports structure in relation to the matter.
2. The NAOC attitude against a Curaçao NOC of its own.
3. The interest of IOC recognition for the Curaçao Sports Federation, CSF, and the future country Curaçao.
4. The Olympic Charter, with special attention to relevant articles.
5. The opinion of reputable law experts on the matter.
6. Relevant jurisprudence.
7. The IOC legal and operational structure.
8. Relevant statehood concepts and recognition criteria.
9. Interpretation theories and practices in international law.
10. Procedures at IOC and at the Arbitration Tribunals.
11. The steps to be taken to increase feasibility of the notion.

The information was acquired by way of formal documents, literature, interviews and meetings with sports officials and lawyers, and selectively included in the following subdivision of my Thesis.

Section 1 contains constitutional information of the Netherlands Antilles, the constitutional reform as agreed by Final Declaration on November 6, 2006 and explains the way sport is formally structured in the Netherlands Antilles and Curaçao.

Section 2 gives information on the questionable steps of NAOC against the interest of the future country Curaçao.

Section 3 explains the relevant Charter rules for recognition and links the rules development to global political issues.

Section 4 gives a short explanation of the IOC organization and the law applicable to this institute.

Section 5 deals with the conceptions of an independent state and an autonomous state as regarded by international public law literature and customaries regarding law interpretation, in fact questioning the IOC notion regarding Rule 31.1

Section 6 includes the most important sine qua non conditions towards IOC recognition and stresses the several essential amendments CSF has made of its Articles of Association for complying with the Charter. This Section also covers contacts with experts in Europe on the matter.

Section 7 summarizes the essential arguments to be presented in support of the recognition request to the IOC. These are the most

important legal grounds of the issue, valid also for the eventual filing of the case at CAS or the Swiss Federal Court.

Section 8 contains my final conclusion, answering the sub-questions and the central matter of the Thesis. It ends with recommendations regarding the legal actions to be taken to achieve an IOC recognized Curaçao NOC of its own, once the constitutional change has taken place.

1. Level playing field

The intention of this Section is to give relevant information on our constitutional structure and the way our sport is organized therein. This information is essential to establish that Curaçao is an orderly society as well as that sport is well taken care of and that international sport representation as part of the coming change will no be problem at all.

1.1. Our country's status in a bird's eye view

Fundamental for any further dealing with the matter is the knowledge that the Netherlands Antilles is a constituent country of the Kingdom of the Netherlands.⁵ The other fellow countries are Holland (The Netherlands) and Aruba.

In 1954 these countries of their own free will agreed to the Charter of the Kingdom of the Netherlands, the supreme constitutional law.⁶ The Kingdom is the formal State, headed by the Crown. The monarchy is represented by a governor in Aruba and one in the Netherlands Antilles. However, all countries have considerable internal right of self-governance, have domestic jurisdiction⁷ and intervention by the Kingdom is only permissible under very clear specified conditions, in general when fundamental rights and freedom are at danger and the relevant country's own national government is failing, or unfit to handle the situation on its own.⁸ Further I will refer to the said Charter as the Statute.

The coming autonomy of Curaçao can be considered one of the later effects of the Atlantic Charter signed between the United States of America and Great Britain after World War II, which was the stepping stone towards the modern United Nations we know today. It was also the first strong obligation to colonial powers to "*respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them*".⁹ Shortly thereafter the United Nation Charter was signed, which now explicitly included the right of self-determination of people.¹⁰ It was therefore no surprise, but an inevitable consequence, that self-governance also came alive in the Netherlands Antilles those days. Although it still took until 1954 before the "Statuut voor het Koninkrijk der Nederlanden", the Statute, was concluded among the countries forming the Kingdom of the Netherlands at that moment.

We are underway and well connected to many international structures assisting small countries to become self-supporting and respected societies. Our search for the best concept continues and is not different from others who have already proven to be successful players in the world today.¹¹ One inevitable requirement is that we have to step forward and occupy our available slot, exercising our right of self-representation given in the Statute.

1.2 Government and sports

The Central Government of the Netherlands Antilles is currently a coalition formed by political parties of the five islands of the Netherlands Antilles, viz. Curaçao - St. Maarten - Bonaire - St. Eustatius - Saba.

Curaçao, the largest and by far the most populated, is the capital and governing center of the Netherlands Antilles. The legislative National Parliament is elected every four years and in accordance with western democratic principles, a joint majority (coalition) forms the executive council of ministers, including a minister responsible for sports.

In addition to these national institutes, each island of the Netherlands Antilles has its own island council and executive commissioner. One of the commissioners is specifically responsible for sports on the respective island.

5 http://www.babylon.com/definition/Kingdom_of_the_Netherlands/English.

6 www.minbzk.nl/contents/pages/48365/thecharterfortheKingdomofthenetherlands.pdf.

7 The right of a state to have primary responsibility for all matters occurring within its boundaries

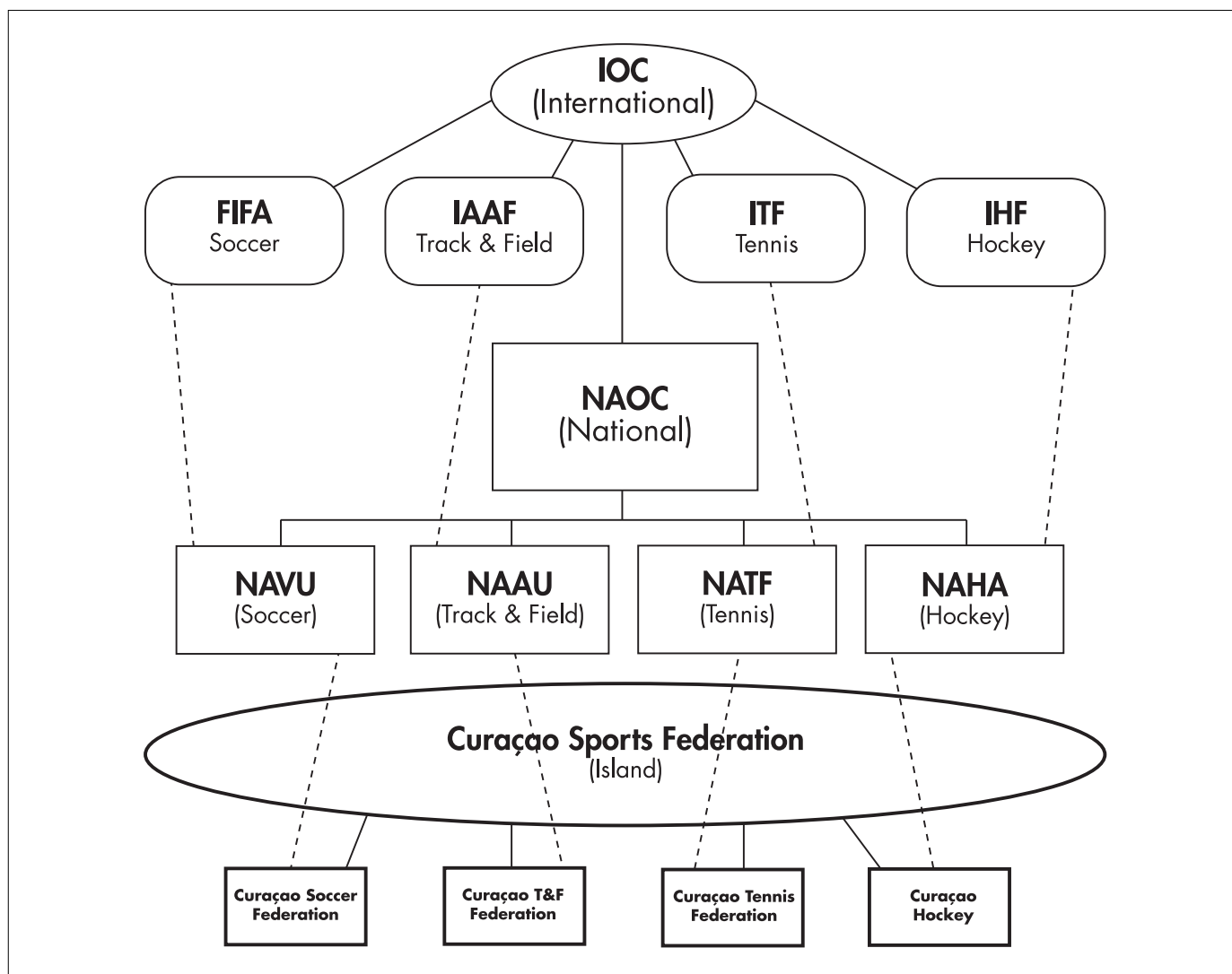
8 Charter of the Kingdom of the

Netherlands, art 43, including the explanatory memorandum.

9 <http://www.internet-esq.com/ussaugusta/atlantici.htm>.

10 www.un.org/aboutun/charter/intro.shtml.

11 A. LeRoy Bennett. International Organizations, Principles & Issues (1991), p. 15 -21.



Each country of the Kingdom has all the governmental and nation identifying elements and structures in place. I will elaborate more on this important proof of statehood in paragraph 5.2.

Sport in the Kingdom is similarly organized. It must be noted that, contrary to, for instance, Great Britain or France, we do not have a central NOC for the Kingdom. Holland, Aruba and the Netherlands Antilles, each have their own recognized NOC.¹²

NAOC is the NOC of the Netherlands Antilles, consisting of 20 affiliated national (Antillean) federations (NF).¹³ Each affiliated NF represents one particular sport (soccer or swimming or basketball etc). Most NFs are members of their respective international organization. Setting aside one exception, Triathlon, all NFs are located in Curaçao. According to its regulations, NAOC membership is only open to NFs, affiliated to their designated international governing body.¹⁴ For instance, the NAVU, the Antillean Soccer Federation, is a member of the FIFA, the international governing body for soccer, consequently NAVU was able to affiliate with NAOC. This is a requirement of the IOC.¹⁵

1.3 Sports infrastructure of Curaçao

Each island has its own overall Sports Federation. The Curaçao Sports Federation (CSF), is the overall sports governing body of Curaçao. It was founded in 1968 in accordance with the laws of the Netherlands Antilles¹⁶, having its office in Willemstad, Curaçao. CSF has a work-

ing relationship with NAOC, but is not affiliated.¹⁷ CSF works closely with the island government and contributes to island sports policy development.

CSF has 32 affiliated members, which are the several designated island federations (IF), such as boxing or swimming etc. Almost all known athletes of the Netherlands Antilles originate from Curaçao and were recruited and trained by local IFs. Examples are the many major league baseball players in the USA, but also world class swimmers, tennis players, track & field athletes and shooters. The only exceptions are the windsurfers who are mostly from Bonaire; however, the one and only Olympic medal the Netherlands Antilles ever won, came from the Curaçao windsurfer Jan Boersma (1988 in Seoul).¹⁸

In interviews with officials of NFs (NAOC members), regarding the history and functioning of their respective organizations, it was explained that most NFs, if not all, were in fact founded to comply with IOC rules. It was also voiced that most are not functioning as they should and that in most cases the same people of the board of the respective IF are running also the NFs. NAOC is fully aware of this flattered and unworkable situation.¹⁹

1.4 The relationship between NAOC and CSF

It is a public secret that the relationship between CSF and NAOC is uneasy, to say the least, and has frequently resulted in well hidden mean confrontations. According to interviewed insiders, the major causes igniting the repeating clinches are: overlapping areas of authority, chasing the same sponsors, acting on behalf of the same athletes, competence regarding selection of national teams, press exposure, fights for governmental financial support and power play of individ-

¹² geography.about.com/.../countryinformation/.../olympiccodes.htm.

¹³ NAOC Annual report 2007, enclosure VII.

¹⁴ Olympic Charter 2007, rule 30.

¹⁵ Olympic Charter 2007, rule 29.1.2.

¹⁶ Articles of Association of Curaçao Sport Federation (2007).

¹⁷ NAOC Annual report 2007, p 3.

¹⁸ <http://www.sports-reference.com/olympics/summer/1988/>.

¹⁹ NAOC annual report 2007, p 10.

uals, which is generally considered typical for a small society as described by former governor and sociologist professor René Römer in several of his dissertations.²⁰

Sport is an integrated part of a society and therefore often reflects the same phenomena as the political administration of that country. In our case it does not differ. Therefore it is not surprising that the long criticized government structure of the Netherlands Antilles is among the main reasons why the option of continuing the Netherlands Antilles was outvoted in the referendum of April 2005.

A vast majority of Curaçao and St. Maarten voted for their island to become an autonomous country within the Kingdom, whilst the choice of the people of the islands of Bonaire, St. Eustatius and Saba (BES islands) was for their respective islands to become part of Holland²¹, similar to the French constellation with their overseas territories.²²

The above mentioned development had no positive impact on the already simmering relationship between NAOC and CSF. And we will see later on how this led to concealed steps by NAOC in order to escape from becoming redundant once Curaçao becomes an autonomous country.

1.5. The referendum and sports

Upon the result of the April 2005 referendum, the transitional constitutional process was launched. Following months of negotiations, the Final Declaration (“Slotverklaring”), the agreement among all players of the constitutional alteration, was signed on November 6, 2006.²³ In this concluding document, the relevant topics with respect to my Thesis are: the Statute of the Kingdom will stay in effect; agreement on dissolution of the Netherlands Antilles; Curaçao and St. Maarten will become autonomous countries within the Kingdom and the legal successors of the Netherlands Antilles; the BES islands will become overseas territories of Holland; all international treaty obligations binding upon the Netherlands Antilles, will remain in effect in the new countries Curaçao and St. Maarten; the new countries are firstly responsible for materializing their new status.

Sport in the Netherlands Antilles and, in particular, in Curaçao is in no way linked to governmental policy rules regarding international politics. Interviewed officials could not recall having ever received or heard of instructions given by the government. Contrary to the situation in Holland, where the government issues and coordinates the rules for sports in relation to their foreign policy.²⁴ Had this been the case in Curaçao, the matter of this Thesis would have been foreseen.

2. The NAOC hustle for overtime play

The previous Section has given a view of how the national and insular sports organizations are part of our constitutional framework. In addition, the strained relations between NAOC and CSF came across, as a result of “double government”. It was made clear that it is undesirable to continue like this, since it only generates complicated frictions, and that the votes of the smaller islands are in fact misused to simply maintain the power of a happy few.

In this Section I will identify several unlawful NAOC moves against the future rights of CSF/Curaçao. To judge the actions taken by NAOC, I will use regular and sports law fundamentals, viz. good

faith and fair play as well as the duty of care, which are unmistakably also part of the Civil Code of the Netherlands Antilles.²⁵

2.1. Obscure double play

Just before the referendum of April 2005, NAOC understood that its existence may sooner or later be at stake. From that moment on there was less than three years to go to the upcoming Beijing Olympic Games of 2008. Obviously, NAOC had a big need for stability and ease, in order to acquire funds to facilitate the training and other essentials, including participation of prospective athletes in regional pre-Olympic related events such as the Pan Am and the ODESUR Games²⁶, organized in between.

The available correspondence between NAOC - IOC, and also with NOC/NSF, shows that NAOC wasted no time to initiate its survival plan, using in particular Olympic Charter Rule 31.1 as the only argument to justify its continuance dream. NAOC seemed to have understood that even though Charter Rule 31.1 must be kept crucial, it will need two versions to sell the story. One for at home, and the other one at the IOC, however both backed by Rule 31.1.

Regarding the IOC. The records show that NAOC approached the IOC with the version that all the five islands became aware of the restraining effect of Rule 31.1 and therefore decided to request the IOC to allow them to stay together under the existing IOC recognition of NAOC. In itself this is a very remarkable proposition since the Charter has no provision for a “geographical or sports authority”²⁷ representing a combination of several countries and certainly not in unity with fractions of another country. The version presented to the IOC was supported by the information that the constitutional change will be more or less an internal shift of political authority without real constitutional consequences and that the most crucial aspects, such as law system and nationality, will anyhow remain the same. To make sure the IOC understood the well wrapped intended impression, NAOC wrote: “It is stated though by Holland that the new status will differ from the one of Aruba”.²⁸ Note that the letter dates from October 2006 and up to then no national discussion had been held in support of the NAOC vow on the matter to the IOC. NAOC has failed to prove the opposite and, in particular, has neither been able to provide satisfactory evidence that the interest of Curaçao was not set aside from the very first moment and also that the story was not submitted to the IOC as an already discussed desire of all the five islands sports authorities. Since this is not true, summarizing, it can be said that NAOC has intentionally presented false information and thus put the IOC on the wrong footing.

Regarding the Netherlands Antilles: Even though Charter Rule 31.1 was also the trump at home, the presentation was smartly brought reversely. Here the sell was that due to Charter Rule 31.1 it will be impossible for Curaçao (we all know the other islands do not have any real meaning in the matter) to achieve its own IOC recognition. Agreed it was not very visible to outsiders, but CSF has certainly made it clear it was not happy with the NAOC campaign. As can be seen in the documents, NAOC was therefore in a serious need to get a formal statement from the IOC to back up its assertion. Between October 2006 and June 21, 2007, NAOC trailed IOC officials and lobbied in the coulisses all over the world at several IOC meetings and events²⁹ to find support for their survival struggle. Urged by growing doubt at home, NAOC with the assistance from NOC / NSF (Holland), supplicated the IOC for a letter confirming that none of the islands will be able to get proper IOC recognition without compliance with Charter Rule 31.1. While analyzing the involvement of NOC / NSF and the documentation on this marrying up with NAOC, it became clear that there is an undeniable interest to block the intentions of CSF with regard to proper IOC recognition. This statement will be clarified in the next section.

The way NAOC has dealt with the interest of CSF / Curaçao was not responsible and not careful. Given the described status of NAOC, it had the lawful obligation to this. NAOC's maneuvers, in particular acting without any consent and consistently without the presence of CSF officials, were not accidents, but must be considered willful acts in violation of the principle of good faith.

20 R. Römer. Kleinschaligheid en ontwikkeling. (1991) p. 305 -321.

21 www.caribbeannetnews.com/2005/04/11/autonomy.shtml - 72k.

22 [en.wikipedia.org/wiki/Overseas_territory_\(France\)](http://en.wikipedia.org/wiki/Overseas_territory_(France)) - 36k.

23 Final declaration on the future constitutional status of Curaçao and St. Maarten, The Hague, November 6, 2006.

24 R. Siekmann. International Sport Law Journal (2008). Volume 1-2 p. 84.

25 Code Civil Netherlands Antilles, articles 3 : 11, 12, and 13.

26 http://www.olympic.org/organisation/actions/index_uk.asp. ODEPA

organizes the Pan Am Games for the Americas. (North and South together), whilst ODESUR participation is only for South American athletes.

27 IOC Emailed letter of June 18 to NAOC and NOC/NSF. It summarizes the meeting held that day between the parties. mentioned, Section A shows that parties agreed NAOC to act as geographical and sport authority.

28 NAOC letter to IOC, October 13, 2006, under subtitle Curaçao & St. Maarten.

29 NAOC letter to IOC, October 13, 2006. See the opening paragraph.

2.2. The objectionable NAOC intention

On June 21, 2007, NAOC directed a letter to the IOC mentioning as subject indication: *“evolution of NOC of the Netherlands Antilles”*.³⁰ In this letter NAOC once again highlights its sell to the IOC suggesting that the constitutional change is nothing more than some minor status changes of the several islands causing a few logical internal adaptations of the NAOC structure.

However, in that same letter to the IOC, NAOC requested to receive a letter stating the following: “based on the Olympic Charter, definitely it is impossible for one of the five Antillean islands to establish their proper recognized NOC, as long as the respective island does not get its independent status as defined by the United Nations” (-underlined by me-). Note that the NAOC request differs significantly from Rule 31.1 of the Olympic Charter which states: “In the Olympic Charter, the expression country means Independent State, recognized by the international community”. As can be seen, no reference whatsoever is made to the United Nations. For the account of NAOC, the terminology “international community” was suspiciously substituted with “United Nations”.

The IOC answer of June 28, 2007 shows that the NAOC request is fundamentally out of line. This can be seen unmistakably because IOC wisely only quoted Rule 31.1 and did not dare to substitute -international community- with -United Nations-. Certainly the IOC (NOC Relation Department in this matter) is fully aware of the complexity of international recognition of countries.

NAOC as supreme national sports authority of the dissolving Netherlands Antilles, in fact acted inimical in its effort to deliberately try to twist (falsify) an existing Charter Rule, with the intention to create an extra difficult obstacle for CSF on its way to the IOC. CSF, even though not a member of NAOC, but whose interest is known to NAOC, rightfully blames NAOC for acting dishonestly and for willfully misleading.

2.3. Against good faith and fair play

Good faith is a basic principle of law. In sports it is referred to as fair play, which is a fundamental doctrine of Sports Law.³¹ With this as the backdrop, I have analyzed the available documents and the way the interest of CSF / Curaçao in the matter was treated. In addition to the NAOC missteps already mentioned, the profound search uncovered several violations of good faith and/or fair play. Most of these were smartly hidden and integrated into innocent looking approaches. The result shows a pragmatic bond of political and personal power conservation.

It leaves no room for doubt that NAOC, the highest national sports authority of the Netherlands Antilles, must honor and respect the lawfully expressed preference of the people of Curaçao. Given its undisputable precognition of the dissolution of the Netherlands Antilles, it should have refrained from actions that would diminish the rightful consequences of the referendum held. However, exactly the opposite occurred.

NAOC knew perfectly well that it was not appointed or authorized to act as attorney of CSF to discuss this matter with the IOC or NOC / NSF. Moreover, when confronted with its questionable acts, NAOC justifies its behavior by saying it acted in the interest of the athletes.

In the several meetings I had with CSF related audiences, I learned that no one was convinced by this explanation, simply because NAOC never attempted to obtain authorization for representation of CSF specifically for this matter. As the highest sports authority of the dissolving Netherlands Antilles, NAOC has willfully violated the fundamental principles of good governance,³² and in particular has fail to

comply with the requirements of transparency and accountability with the CSF (Curaçao) interest.

The following illustrate the additional objectionable NAOC actions.

- Refusal to present proof of steps taken to have firstly investigated the possibility of IOC recognition for an NOC of Curaçao. NAOC refuses to cooperate to present background information, saying their archive is not accessible.³³ The status of NAOC is comparable with a governmental institute in service of the general public and therefore must be governed transparently as set forth by principles of good governance.
- Intentionally use of an unsigned ministerial note, dated May 2006, as the formal standpoint of the national government to sell their -we do not have another choice- story to their members and the sport society in the islands. The document has had an intimidating effect on several parties, leaving them no other choice than to agree with the NAOC information.
- Intentionally incorrect formulation of a Resolution. On July 5, 2007 NAOC had its members sign a Resolution in compliance with the IOC condition regarding proof of unity on the matter. The first subparagraph states that none of the islands will get an autonomous status as described by the United Nations. This information is not accurate: the reserved autonomy of Curaçao is fully in accordance with United Nations description as shown in the UN Treaty on Civil and Political Rights (ICCPR) article 1. Furthermore, NAOC refuses to disclose the translated copy of the said Resolution as it was sent to the IOC. Suited with certain exclusive authority and recognized as a public service institute of the country, this refusal to practice transparency must be regarded an act of inappropriate governance.
- NAOC violated the right of the IF, the island federations affiliated with CSF, by way of intentionally created confusion by the unjust act of having the Antillean federations formally declare to support the continuation of NAOC, despite the ongoing dissolution of the Netherlands Antilles³⁴. Whilst it is very clear to NAOC that the only ones entitled to agree on their right of international representation once Curaçao becomes autonomous, are the island federations of Curaçao. This willful involvement of unauthorized parties with the intention to give the impression of nationally agreed cooperation is a flagrant violation of the consequently legally reserved future rights of the island federations of Curaçao to decide their Olympic destiny.
- The NAOC falsely creates the impression that the CSF has agreed to the continuing existence of NAOC³⁵. In its earlier mentioned achieved Resolution, the NAOC intentionally listed a meeting with the CSF as part of their process, although it is aware of the fact that the CSF, the lawful representative of the sports federations of Curaçao, by far the largest sports federation of the Netherlands Antilles, has ever since withheld its support to the NAOC intentions and recently has repeated their position by formal letter to the government of Curaçao and copies to the Antillean Minister of Sports, the NAOC and the IOC, emphasizing once more that it has never abandoned its right to establish a Curaçao NOC of its own and will pursue its right towards IOC recognition³⁶. NAOC hereby violates the right by acting indecently against good faith, harming reserved rights of CSF and its members.
- NAOC intentionally diminishes the value of the autonomy of Curaçao to something of ample significance, not of sufficient weight to reckon with. NAOC wrote *“essential in our discussion with you is that all of the five islands will remain part of the Dutch Kingdom, and our nationality (Dutch E.U Passport) will remain the same”*. In that same letter: *“it is therefore not possible for one of the five islands to apply for an NOC of its own”*³⁷. NAOC again did not mention that it is not a matter of an island, but an **autonomous country**. NAOC also included: *“The bigger islands will go for a separate status within the Dutch Kingdom, somewhat like Aruba. It is stated though by Holland that the new status will differ from the one of Aruba”*.
- NAOC purposely induces formal substance of national govern-

30 NAOC letter to IOC, June 21, 2007, NAOC2007.180/wm.

31 O. Olatawura. International Sports Law Journal (2008) Volume 3-4, p 300-143.

32 www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp.

33 NAOC letter December 10, 2008. Nr. NAOC2008.303/rt.

34 NAOC Resolution July 5, 2007, Paragraph D sub 3.

35 NAOC Resolution July 5, 2007, Paragraph E sub 6.

36 CSF letter of April 16, 2009 to Island Council of Curaçao, announcing its intention to seek a Curaçao NOC of its own.

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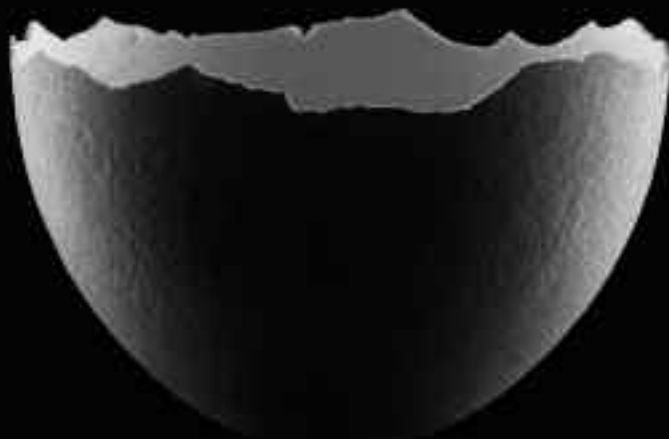
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**ALBANIAN CHEMIST
MERITA URUCI OF SAMI
FRASHERI STREET HAD
TWO EGGS ON BROWN
TOAST FOR BREAKFAST
THIS MORNING**



WOLF THEISS

ALBANIA, ARMENIA, AUSTRIA, BELGIUM, BOSNIA AND HERZEGOVINA, BRAZIL, CANADA, CROATIA, CZECH REPUBLIC,
FRANCE, GERMANY, HUNGARY, ITALY, JAPAN, KAZAKHSTAN, LITHUANIA, MALAYSIA, MEXICO, NETHERLANDS,
POLAND, PORTUGAL, ROMANIA, RUSSIA, SLOVAKIA, SLOVENE REPUBLIC, SLOVENIA, SWITZERLAND, UKRAINE

mental support by informing the IOC that the Minister of Sports of the Netherlands Antilles shares its view.³⁸ This, against the fact that NAOC knows that the Commissioner of Sports of the island of Curaçao is the primary political official to deal with. Simply because the Minister of Sports of the Netherlands Antilles is no authority in the matter of the future country Curaçao. The Netherlands Antilles will be dissolved.

- NAOC has worked out some sort of agreement with NOC/NSF (Olympic Committee of Holland). However, for reasons one can only speculate on, NAOC clearly avoids to divulge this engagement. In its Resolution referred to earlier, no mentioning whatsoever is included on this and also it is not part of the various explanatory notes NAOC sent around between 2006 - today. I have spoken to three experienced secretaries general of national federations who claimed that NAOC members formally were never informed about the NOC/NSF relationship regarding continuation of NAOC. Nevertheless, in several IOC and NOC/NSF letters, confirmation of the Holland connection appears regarding this absolutely national matter³⁹. Since CSF is mentioned in the resolution, it has the right to receive a copy. Refusing is not only creating suspicion of hidden intentions, but is also against the principle of good governance, in particular against the condition of transparency.

2.4. Deep-laid three-party plot against the interest of Curaçao ?

While learning about the several inimical efforts of NAOC against good faith and fair play, one surely will wonder about the motives and also about the consequences. Although the sensibility of the question made it impossible to really pinpoint the true motives, I was able to bring this forward in my conversations with the executives of national federations, who without hesitation informed me that it primarily has to do with prestige, personal gain and influence. However, further analyzing the available documents, I came to the conclusion that an important additional motive is that Holland is willing to make funds available to NAOC, in exchange for sheltering the new born Holland villages in the Caribbean, the BES islands⁴⁰. This construction will secure access for the BES athletes, if any, to participate in regional events. It can only be possible with the continuation of NAOC as “geographical sports authority”, whatever this may be. I suspect that the perspective of funds availability was dominant in the policy of an ongoing single NOC. Our national government, by way of the Minister of Sports, has anyway openly welcomed also this Holland deal and apparently the interest of CSF (in reality Curaçao) in this matter was of no importance. This can be seen in a variety of documents. It is my conclusion that NAOC, NOC/NSF and our Minister of Sports are in fact involved in a carefully nursed plot against the interest of Curaçao / CSF.

The foregoing most probably explains the confirmed cooperation of the Minister of Sports of the Netherlands Antilles, combining the NAOC fund problem with the sports interest of the BES islands. And this solution fits neatly into the questioned contours of the hidden plan from the Kingdom government to maintain a number of Netherlands Antilles structures. This in fact is a disguised continuation of the country’s present constellation.

Sport, all over the globe, is a recognized and highly respected element of nations’ cultural affairs⁴¹, as well as an integral part of the constitutional status and national identity. Therefore, it is beyond doubt, that every society is entitled to protect, reserve and conserve these values at all times.

Resuming the above, it is evident that NAOC has applied the old

37 NAOC letter to IOC, October 13, 2006, under Curaçao & St.Maarten.

38 NAOC letter to IOC, October 13, 2006, under Curaçao & St.Maarten.

39 IOC letter , June 28, 2007, cc addressees and also NOC/NSF letter April 23, 2007 to IOC/cc NAOC.

40 NOC/NSF letter to IOC, Ref. # DIR.018750.AMD, April 23, 2007.

41 www.athleticinsight.com/Vol9Iss1/CulturalMeaningandMotivation.htm

#Introduction.

42 A.Vroom. Sport en nationaliteit. TAR. Volume 4 (2007), p 246. This is a magazine for law and justice in the Netherlands Antilles. In the conclusion of this article the author states that sport representation is part of autonomy.

Latin concept of “qui iure suo utitur, neminem laedit”: he who uses his right cannot be considered abusive. This is an outmoded old Roman law principles, nowadays not setting aside one’s liability arising from bad faith acts against another’s known interest. The conspiring activities NAOC secretly participated in were intentionally directed to concertedly set CSF off side. These are all flagrant violations of the future rights of CSF⁴² and totally against good faith.

3. The enormous influence of the Games on the world nation

The objectionable NAOC moves against the interest of CSF and future autonomous country Curaçao were highlighted in the previous Section. I have also stressed the questionable triangle symbiosis between NAOC, NOC /NSF and our Minister of Sports. The facts presented made it clear that NAOC has violated the respected principle of fair play and has also neglected its societal duty of care with regards to the future right of self-representation of the Curaçao sports community.

In this Section I will analyze the most important IOC criteria for recognition and also depict some remarkable impacting events at several Games. The intention is to bring forward the molding effect the Games have ever since had on the development of world politics. As a matter of fact, there is no influential topic one can come up with that has not been promoted, presented or protested during the Games over the years. To name a few : Technology, Communications, Human Rights, Politics, Disabled people, Women Rights, Smoking, Doping, Drugs abuse, including alcohol, Children Rights, Environmental issues, Security, Nuclear issues, Peace and War, all became inclusive part of the Games. Therefore, being part of the Games is being part of the moving world. Every country, every nation should!

3.1. IOC recognition of NOCs

Rule 3.1 of the Charter states: “The condition for belonging to the Olympic Movement is recognition by the IOC”. So, contrary to what many think, an NOC is not a member of the IOC. Upon request an NOC, provided it has complied with the Charter stipulated requirements, becomes the recognized authority to exclusively enter national athletes for participation in Olympic and other IOC controlled Games. That, simply said, is the content and effect of the IOC recognition. Rule 28.3 of the Charter gives NOCs the exclusive rights to represent their country at the Olympic Games. Do note that the entity to be represented is the country.

The further detailed criteria dealing with IOC recognition are primarily found in Rules 28 and 29. By-law 1.1 of these rules reads: “A national sports organization applying for recognition as an NOC, shall file an application with the IOC demonstrating that the applicant fulfils all conditions prescribed in the Olympic Charter, in particular in Rule 29 and BLR 28 and 29”. It is obvious that in particular the content of these two rules (Rule 29 and the Bye-Laws of Rules 28 and 29) are dominant in judging an application for recognition.

It is obvious that recognition and authority of NOCs are formal meanings at the IOC and therefore captured in specific articles and the respective Bye Laws. In relation to the NAOC intentions, up to this moment backed by the NOC Relation Department of the IOC, I add here some remarks regarding the application of these rules and By-laws on the matter.

Sub Rule 28.3

“The NOCs have the exclusive authority for the representation of their respective countries at the Olympic Games and at the regional, continental or world multi-sports competitions patronized by the IOC. In addition, each NOC is obliged to participate in the Games of the Olympiad by sending athletes”. This rule gives exclusive rights per country to one NOC. Note that there is no provision whatsoever for a “geographical or sports authority” as NOC, consisting of more countries and or fractions of countries. Simply said, Mexico City cannot be represented by the NOC of USA. Only the Mexican Olympic Committee is entitled to that. Pursuant to this Rule, the country Curaçao should have its own NOC because maintaining NAOC has no legal basis in the Olympic Charter once the constitutional alteration becomes a fact.

Sub Rule 29.5

It reads “*The area of jurisdiction of an NOC must coincide with the limits of the country in which it is established and has its headquarters*”. This Rule also makes it clear that the IOC exclusively recognizes one NOC per country. And that an NOC must be established in the country it belongs to and also that it must have its headquarter in that particular country. So, once the Netherlands Antilles are dissolved, NAOC will no longer meet the requirement of this Rule, because it will no longer have a jurisdiction coinciding with the limits of a country. Only CSF will be the lawful party to this claim.

Sub Rule 42.1.

“*Any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor*”. Once the Netherlands Antilles is dissolved, NAOC in fact cannot rightfully enter a competitor, because it does not meet the criteria set forth in Rule 42.1 any longer. It goes without saying that the same NOC cannot be established in more than one country, unless there is a legal constitutional union e.g. Great Britain or France and the Arabian Emirates. And this is also the case for the Netherlands Antilles. However, since Curaçao, St. Maarten and the BES islands, will no longer form a constitutional unit, an eventual common NOC of them formally cannot meet the condition of Rule 29.5 respectively 42.1

I refer to diagram 1 and ascertain that after the constitutional alteration, CSF will be the national sports organization of Curaçao. Not NAOC.

Sub Rule 31.1

“*In the Olympic Charter, the expression “country” means an Independent State recognized by the international community*”.

The By-laws of Rules 28 and 29 sub 1.1 indicate that with regard to recognition, Rules 28 and 29 are primordial: “*A national sports organization applying for recognition as an NOC shall file an application with the IOC demonstrating that the applicant fulfils all conditions prescribed by the Olympic Charter, in particular in Rule 29 and BLR 28 and 29*”. To me future country Curaçao will be able to fully fulfill the demands of these two Rules.

However, in the IOC answering letter to NAOC dated 28, June 2007, Rule 31.1 has been singled out as the most important criterion for pre-declaring future autonomous country Curaçao not fit for recognition.

3.2. Rule 31.1 : very slippery and questionable

Anyone familiar with international public law will immediately raise eyebrows when reading the text of Rule 31.1. This is because the rule contains two very delicate international public law qualifications, which for many years already have been the principal points of severe international disputes.

In this respect it is good to realize that Olympism historically was developed parallel with the political events taking place from the early days on. It is the reality and uncontested that our own and regional development differs from that of other areas. Luckily, the record shows that through all the turbulences, the IOC was always able to get along well with the several regional differences and wisely acted accordingly.

The root of this all can be found in almost every speech of the legendary IOC President and founder Pierre de Coubertin reminding the world of the differences and that the IOC must live with the reality of all the five continents which, as every one can see in the rings of the symbolizing Olympic emblem, are interlinked, have the same size, but have different colors. He has always called for “functioning” instead of “cause”, and stressed that in Olympism, symbols matter⁴³.

43 IOC. Pierre de Coubertin, 1863 -1937, Olympism, Selected writing (2000), p. 580-584.

44 IOC. Pierre de Coubertin, 1863 -1937, Olympism, Selected writings (2000), p.36.

45 The International Sports Law Journal.

(2008). Volume 1-2, p 128 -132.

46 www.la84foundation.org/SportsLibrary/ISOR/ISOR1992e.pdf.

47 tafkac.org/celebrities/jesse_owens_hitler_legends.html.

48 www.cbc.ca/olympics/history/.../f-olympics-history-1956.html.

Remarkably, Pierre de Coubertin made “respect for the country” his first commandment of Olympism in his speech in Stuttgart - Germany⁴⁴ in 1936. And exactly this principle is what I feel must be regarded in judging the status and possibility of recognition for CSF as NOC of Curaçao. The content of Rule 31.1, in particular the current international opinions on the two elements, certainly urge interpretation of this regulation. This in itself, is normal and daily practice when dealing with laws and Rules. In the next Section I will extensively discuss the two elements of this crucial Rule for CSF/Curaçao and its people.

3.3. Politics and the Olympic Games ever since

When it all started during the ancient times, there was something called the “Ekecheiria”. Today we call it the Olympic Truce. It is a historical rule of the ancient days for giving free passage to the athletes on their way to Athens, regardless if their city was at war or had tension with others. From those days on the basic Olympic Games principle of honoring the representation of peoples by their athletes has existed. Today it is included in UN resolutions⁴⁵, making UN member states respect a ceasefire period commencing a few days before the Games and ending a few days after. The Games became a period of non-violence, nowadays referred to as the Olympic Truce.

Fired up in the early 70’s, The Olympic Games have been increasingly dragged into several political issues⁴⁶. Obviously due to its enormous exposure, the Games have become one of the best stages for politically motivated messages. And also at the same time, next to offering the best arena for athletes, countries proudly showcase their existence, occupying their slot in the queue of nations with great dignity.

In both national and international society, the Games have always had a very massive impact. Sport is globally considered a cross-border industry and at the same time, an undisputed nation binding phenomenon. Everyone obviously remembers the exciting periods of the Soccer World Championships, the Tour de France and the Major Baseball League matches, recalling the enormous patriotic expressions by the peoples of all participating nations.

3.4. Relevant historical developments

Next to athletic duels on the fields, the Olympic Games were very often the historical stages for meaningful off field actions. Countries and their delegates were ever since confronted with the reality that sport and politics go hand in hand and that the world society expects countries to demonstrate their sympathy or rejection against issues and events important to mankind. In many ways participants at the Games were presented with effects of democratization, quest for human rights and attention for the environment, to name a few. This has always given Olympic participation special additional value. Nations become involved very directly into pressing international matters. In particular participating small countries come to the sense that they have a role to play and that world politics is closer to them than seemed. It is most important that these happenings not only come to us by the media, but also through our athletes and delegates. They are our eyes when the pounding impacts of these off field events take place. A few historical ones are the following.

- In 1939 Adolf Hitler tried to use the Olympic Games for making the World believe that national socialism was a sound and well running machine, and also the underscoring of his theory that there are inferior and superior races, topped with his refusal to present the several gold medals to the black American athlete Jesse Owens at the award ceremony in Berlin⁴⁷. IOC could do nothing then just see how the Games were abused.
- In 1956 there was an American led boycott as a protest against the Soviet invasion of Hungary, which in those days put extra strain on the existing Cold War tension⁴⁸.
- Closer to our world was the strong message of African Americans calling for civil rights for colored people in America at the 1968 Olympics in Mexico. At the moment of playing the American anthem during the award ceremony, medal winners Tommy Smith and John Carlos, raised a black gloved fist, the sign of the Black

Panther Movement, at that time the most profiling militant organization against racism in the USA⁴⁹.

- During the 1972 Games in Munich there was the brutal hostage taking and murdering of Israeli athletes by Palestinian extremists, in this way involving the entire world directly in the Middle East violence going on for ages already⁵⁰.
- In 1976 African nations boycotted the Montreal Games because New Zealand, whose Rugby team had made a tour through South Africa those days, was allowed to compete. Non discrimination is part of the Olympic Charter and of course violation must be followed by severe measures. I think the IOC should have prevented New Zealand from participating in the Games of 1976⁵¹.
- The United Nations resolution of 1978, suspending the UN status of South Africa for its humiliating Apartheid regime against blacks, calling for the world to apply this decision in any possible way. A memorable thing is the fact that the IOC had taken banning steps against South Africa as early as 1971. And although consistently on the agendas, political power play in the UN delayed a decision until the 1978. In the early 80s the IOC position was enforced by Black Listing all foreign athletes competing in South Africa since the acceptance of the said UN resolution and prohibiting these Black Listed athletes to compete in events held in UN member states⁵².
- In 1980 America led another boycott, now against the Moscow Games in protest against the Soviet invasion of Afghanistan. It was supported by 61 other nations⁵³.
- Political topics during the Games were not limited to certain races or regions. In this connection I mention the enormously complicated discussion between the IOC - China and Taiwan. Few know that it took the IOC and the international lobby some years to find a workable solution between these two countries, which was formulated in 1979 in the Nagoya Resolution⁵⁴. The IOC was able to bridge the long existing fundamental trouble between these two countries, but could not prevent China from continue considering Taiwan just a rebellious province until today.
- One of the recent interesting effects recorded, is the right of participation of Muslim women in sport. The I.O.C. adopted UN conceptions on this and decided to ban Brunei for its prohibition of women to participate in sports⁵⁵. This pressure worked well and resulted in drastically change of the Brunei policy on the matter.

In addition to the generally positive influence of these Games linked events, let's not forget the several IOC concerted awareness rising activities against every form of discrimination, the extra attention for disabled people and the special attention for environmental protection. It all became part of the Olympic mission⁵⁶ in which the athlete primarily serves and presents the country in the best and most dignified manner he or she is able to.

This athlete from Lesotho was in Beijing and will take home priceless impressions and stories. His country and people are truly part of the world community. Will we?

4. IOC and the legal rules of the games

The great importance of the Games to nations can never be denied. In the previous Section I focused on this using the influential developments to underline that Olympic involvement is a must for every country, including the involvement of their people and their athletes, while explaining Olympism as the blended interest of the athlete

(who we as people endorse and sponsor), and the country (the territory and its people). I have also exposed the inside jobs against our national interest.

Now it is time to take a closer look at the IOC organization in relation with the Thesis as well as on the legal possibilities with regards to disputes with the IOC, including lawsuits. Since the IOC became an international institute, it must respect the regulations applicable to organizations of this kind. One certainly is that it must allow judgment of its actions.⁵⁷

4.1. The formal status and organization of the IOC

The IOC is a private organization. This can be seen in Rule 15 of the Olympic Charter. The organization was founded in 1894 by Baron Pierre de Coubertin, a French educator and sportsman. The Charter rules outlining its legal status read: Rule 15.1: "The IOC is an international non-governmental not-for-profit organization, of unlimited duration, in the form of an association with the status of a legal person, recognized by the Swiss Federal Council in accordance with an agreement entered into on 1 November 2000", Rule 15.2 "Its seat is in Lausanne (Switzerland), the Olympic capital".⁵⁸ Its mission is to promote Olympism throughout the world and to lead the Olympic Movement. Its role is quite extensive, but, briefly stated, supportive by all means to sports on all the five continents, symbolized by the five interlaced rings on the Olympic emblem.

The Olympic Movement is the organized, concerted, universal and permanent action formed by all parties involved in Olympic sports and its spirit.

The IOC is governed by a Council of 115 internationally elected members, including the IOC Executive Board consisting of 15 people, responsible for the general management of the organization. All members are confirmed by oath. Related to the IOC, there are a number of specialized commissions. These are formally appointed advisory groups on specific topics assisting the Session (the council), the Executive Board and/or the President. The best known are the ones dealing with: ethics - evaluation of sites - Games coordination - Olympic Solidarity - Medical Aspects.

It is globally known that Switzerland, due to its position in the financial world, strives to extreme neutrality and gives high respect to fundamental law principles as well as the Law of Nations, United Nations Human Rights Treaties and Resolutions regarding the right of self-determination of peoples.⁵⁹ The country is not part of the European Union, but adheres very much to the European laws, claims to oppose discrimination and to attach great value to the principle of equality.⁶⁰

For the sake of completeness I add to the above that IOC has listed 202 recognized NOCs of which American Samoa - Aruba - Bermuda - British Virgin Island - Cayman Islands - Cook Island - Guam - Hong Kong - Netherlands Antilles - Palestine - Puerto Rico - Taiwan and US Virgin Islands (14 in total) are not independent states (in terms of the United Nations), but countries with more or less autonomy. Other than that, their constitutional frame and status, de facto and de jure, is not intercomparable at all.

4.2. International disputes trial in sports today.

As time went by and sports in general increased enormously in all senses, so did the numbers of sports related lawsuits and disputes. The Swiss and other national courts could not keep up with the needed expertise and in the early 80s it became prudent to create an independent and impartial arbitration institute for sports related conflicts. Reason why Jose Samaranch, the then President of the IOC, founded the Court of Arbitration for Sports (CAS) in 1984, providing settlement of disputes at a very high professional juridical level, applying procedural rules of justice accepted worldwide, adapted to the specific needs of the sports world by way of arbitration. CAS is completely funded by the IOC, though the idea was to avoid all and any IOC influence in the professional functioning of CAS.

Unfortunately, it did not work well in the early days and serious doubt was raised on the impartiality of CAS, due to its financial dependency of IOC.

49 www.infoplease.com/spot/summer-olympics-mexico-city.html.

50 www.jewishvirtuallibrary.org/jsource/Terrorism/munich.html.

51 www.cbc.ca/olympics/history/.../f-olympics-history-1976.html.

52 www.iisg.nl/collections/anti-apartheid/history/jaren80-1.php.

53 www.cbc.ca/sports/indepth/feature-boycotts-countries.html.

54 www.teco.org.au/whatnew/six_call_for_democracy_forum.htm - 39k.

55 www.javno.com/en-sports/

brunei-excluded-from-olympic-games_170392-99k.

56 www.olympic.org/uk/organisation/missions/environment_uk.asp - 18k.

57 C.F. Amerasinghe. Principles of the institutional law of international organizations (1998), p 15.

58 multimedia.olympic.org/pdf/en_report_122.pdf.

59 www.eda.admin.ch/eda/en/home/topics/intla/humri.html.

60 en.wikipedia.org/wiki/Montevideo_Convention_Signatories.

To secure the appreciation of CAS it was needed to improve its integrity, which was achieved in 1994 with the signing of the so-called Paris Agreement. It included the installation of an extra body between the IOC and CAS, dealing with ordinary arbitration and also in charge of the CAS administrative and financial matters, so as to distance and guard CAS sufficiently against IOC interference.

This newly installed entity is the International Council of Arbitration for Sports (ICAS). The preamble of the Paris Agreement reads as follows: “with the aim of facilitating the resolution of disputes in the field of sport, an arbitration institution entitled the “Court of Arbitration for Sport” (hereinafter the CAS) has been created, and that, with the aim of ensuring the protection of the rights of the parties before the CAS and the absolute independence of this institution, the parties have decided by mutual agreement to create a Foundation for international sports-related arbitration, called the “International Council of Arbitration for Sport” (hereinafter the ICAS), under the aegis of which the CAS will henceforth be placed”.⁶¹

The ICAS and the CAS together, have over 300 arbitrators from 55 countries, chosen for their specialist knowledge of arbitration and sports law. CAS tribunals try an average of 200 cases annually,⁶² apply Swiss law and most of the time following the stare decisis principle⁶³, observing previous decisions in similar cases. However, CAS tribunals frequently also decide ex aequo et bono.⁶⁴ In addition, both the ICAS and the CAS take into account the fundamental doctrines of international Sports Law, viz. Access - Fair play - Olympism - Commerce⁶⁵.

4.3. Legal options in an eventual dispute with the IOC

The basic rule is that all parties recognized by the IOC have accepted the Olympic Charter, of which Rule 15.4 declares the CAS to be the only instance to hear disputes. Both institutes are operating under the Code of Sports-related Arbitration. Among other information, this Code indicates that the CAS has two instances, the Ordinary Division and the Appeal Arbitration Division. Based on the CAS Rule R45 parties to a dispute can decide to the applicable law and in absence CAS may apply Swiss law.⁶⁶ It is also mentioned that in rare instances, CAS decisions can be appealed to the Swiss Federal Tribunal. In addition to the described courts, the CAS also operates Ad Hoc Panels at Olympic sites. Since these are not relevant to my Thesis, I further disregard them.

In the event that an eligible party wants to file a case at the CAS, it is not compulsory to hire a lawyer for this⁶⁷. However, from reports and listening to a few who have been in procedures at this tribunal, it is advisable to have a lawyer because the knowledge of arbitration and Sports Law, a non codified law system, to great extend related to International Law, referred to as Lex Sportiva, considered a lex specialis.⁶⁸ Its principles contain among others the principles of good faith and fair play, considered firm doctrines in sports globally. The more arbitrational style of the CAS courts calls for specific expertise, most regular lawyers do not master.

The CSF is not yet a party to the Olympic Charter, so it does not fall under the sphere of action of Rule 15.4, and as a consequence it cannot unwillingly be bound by the Charter. However, in accordance

with the CAS Procedural Rule R27⁶⁹ the CSF has the option to file the case at CAS, which is a far less costly institute than Federal Swiss Courts. Note that the CAS is an arbitration tribunal, applying internationally accepted principles of arbitration, constitutionally available to hear and decide every sports related dispute presented to them, provided the parties comply with the regulations of the Code of Sports Related Arbitration.

The other option is to file the case at the Swiss Federal Court, following the lex loci delicti commissi principle of international private law⁷⁰, which means the jurisdiction where the conflict arises (if the CSF request will be denied, this will be Lausanne - Switzerland) is indicative for the choice of forum and applicable law. It must be clear that based on this international law principle mentioned, it is impossible for the CSF to take the case to our Court in Curaçao upon rejection by the IOC.

Churandy Martina, after his 200 mtr race in Beijing in 2008. Churandy is from Curaçao, affiliated to and trained by a CSF member federation. It is time his chest reads *Curaçao*.

Or will he be forced to carry the Stateless flag ??

5. Rule 31.1 and our Autonomy

The previous information contained the more formal frame of the Olympic organization and has mentioned the available legal provisions in the specific case of IOC recognition denial. In anticipation of a possible arbitration or lawsuit procedure by the CSF, it was also emphasized that as early as the initial application for recognition, experienced legal support will be crucial.

In this Section I will mention why Charter Rule 31.1 was included in the Charter and elaborate on the conceptions independent and autonomous state as described in international public law literature and customaries, explaining also how little difference there is today between these two conceptions.

5.1. Originating background of Rule 31.1

This Rule has been altered in 1996 following years of increasing political pressure on IOC regarding several requests for recognition. Until that date, recognition was not linked to the status of a country as can be seen on the IOC answer hereunder. According to verbal information received from officials of the IOC Legal Affairs Department, the IOC was confronted with a number of conflicting requests in the early 80's. The majority of these applications came from rebellious groups occupying part of an existing country trying to declare a state and looking around for supportive recognition by other countries. These efforts of state recognition appeared not so easy and as a result, many of these separation movements creatively thought to have found a better way by applying for Olympic recognition. Among them were well-known groups like ETA (Basque - Spain), Polisario (West-Sahara/Morocco), IRA (North Ireland - Great Britain), FARC (Colombia), and many other groups from all over the world.⁷¹

In addition, there were also countries and cities which declared themselves independent, dissociating from their authentic country. Most were, and some still are, in the middle of tensional conflicts with their country of origin, among others: Taiwan and Macau (both China); a number of new Soviet countries; Yugoslavia fractions; other former Eastern European countries with internal separation conflicts and the PLO in the Middle East. I have contacted IOC on the origin of Rule 31.1 and received the following answer. (see page 48)

IOC had to adjust its regulations otherwise the organization would largely be misused by several of these parties, de jure not in compliance with the internationally accepted standards of statehood. I have tried to get my hand on the preparatory notes of the proposal for the alteration of Rule 34, renumbered to 31.1, but was unsuccessful.

On page 48 at the right is the text of page 5 of the minutes of Session 105th of 1996 held in Atlanta. The additional remark of the Chairman of the IOC Legal Commission Judge H.E. Kéba Mbaye gives a good indication that political struggles were influential in the altering.

61 <http://www.tas-cas.org/en/infogenerales.asp/4-3-237-1011-4-1-1/5-0-1011-3-0-0/>.

62 www.faqs.org/sports-science/Ce-Do/Court-of-Arbitration-for-Sport-CAS.html.

63 I. Blackshaw. International Sports Law Journal, Volume 1-2 (2008), p. 20.

64 Ex aequo et bono in Latin means “according to the right and good” also “from equity and conscience”, it is a legal term often used in arbitration, it refers to the room to arbitrators for dispute with consideration of the law and to decide on solely what they consider to be fair and equitable in a case.

65 O. Olatawura. International Sports Law Journal. Volume 3-4 (2008), p.130-143.

66 www.tas-cas.org/d2wfiles/document/281/5048/0/3.1%20CodeEngnov2004.pdf

67 www.tas-cas.org/d2wfiles/document/281/5048/0/3.1%20CodeEngnov2004.pdf

68 O. Olatawura. International Sports Law Journal. Volume 3-4 (2008), p.130-143.

69 www.tas-cas.org/d2wfiles/document/281/5048/0/3.1%20CodeEngnov2004.pdf

70 C.E. Amerasinghe. Principles of the institutional law of international organization (1996), p. 226-229.

71 en.wikipedia.org/wiki/List_of_active_autonomist_and_secessionist_movements.

**INTERNATIONAL OLYMPIC COMMITTEE
ANSWER RELATED TO A QUESTION POSTED ON
WWW.OLYMPIC.ORG**

You asked:

Why was Rule 31.1 of the Olympic charter added to the charter?

Answer:

Dear Roy Bottse,

Today's Rule 31.1 is a revised version of what used to be Rule 34.1 of the Olympic Charter just prior to the revision.

The previous version (1995 Olympic Charter) was the following: "In the Olympic Charter, the expression "country" shall mean any country, state, territory or part of a territory which the IOC in its absolute discretion considers as the area of a recognized NOC [National Olympic Committee]".

The revision to paragraph 1 and the reason for the revision is found in the minutes of the 105th IOC Session in Atlanta in 1996 (15th to 18th of July).

Note that the modification, which you still see in the current edition of the Olympic Charter under Rule 31.1, was made "to bring into line the jurisdiction of the NOCs with that of independent member states of the international community".

We hope that this information will be of assistance.

Sincerely,

IOC Research and Reference Service

In any case, the verbally received information reflects the real cause of the alteration, whilst the formally mentioned reason "to bring into line the jurisdiction of the NOCs with that of independent member states of the international community" is but a well selected diplomatic text. The real purpose of Rule 31.1 is solely to protect the IOC and the Olympic Games against figurative recognition. It does not need any further argumentation that Curaçao complies with the terms of a well respected partner in the international community and certainly cannot be compared with earlier mentioned rebellious groups or countries who's origin for many years already is part of severe political tension.

5.2 Independent State- is an outmoded status

The Netherlands Antilles is considered a country and listed worldwide as such⁷². This is not so amazing, since in accordance with the Kingdom Charter we can decide on entering relations with other countries⁷³. This ability co-decides the value of our statehood, which will be the same for Curaçao once autonomous.

The statehood measure, based on the ability to enter into relations with other countries, is referred to as the declarative theory. It judges four factors: permanent population / defined and controlled territory / effective control by a government / capacity to enter into relations with other States. If these are met, then the country is considered a State.⁷⁴

There is also the constitutive theory. This defines a State as a person of international law if, and only if, it is recognized as sovereign by other states⁷⁵. Experts agree that this theory is much too open to political abuse, reason why the declarative theory became the more accepted measure⁷⁶. I refer to article 3 of the Montevideo Convention⁷⁷ as well as to the Commission on Former Yugoslavia (the Badminter Arbitration Committee, 1991). They both explicitly follow the declarative theory of statehood to decide the status of a country.

The foregoing is important since the qualification -Independent State- has undergone significant changes regarding its meaning and spirit. Since the global development of integration of states into

72 www.nationmaster.com/encyclopedia/List-of-countries.

73 Charter of the Kingdom of the Netherlands, article 41.

74 P. Malanczuk. Akehurst's Modern introduction to international law (2006), p. 83.

75 P. Malanczuk. Akehurst's Modern introduction to international law (2006), p. 83.

76 P. Malanczuk. Akehurst's Modern introduction to international law (2006), p.84.

77 en.wikipedia.org/wiki/Montevideo_Convention.

78 geography.about.com/cs/politicalgeog/a/statenation.htm.

Olympic Movement. Also he wished to mention that the Taiwanese post office had issued philatelic material to mark the Olympic centennial. He would be pleased to give a copy to anyone interested.

THE PRESIDENT suggested that Mr. Pound send a letter of congratulation to the authors of the music used in the public service announcement.

DECISIONS

1. Report of the Centennial Working Group approved
2. A letter of congratulations to be sent to the authors of the music used for the IOC's public service announcement.

D) Centennial Olympic Congress of Unity Study

Report by the Chairman, H.E. Judge Kéba Mbaye, 18th July 1996

H.E. JUDGE MBAYE introduced the members of the Centennial; Olympic Congress of Unity Study Commission and presented its report (Annex 5).

Item 1. *The strengthening of relations between the Olympic Movement and governmental and non-governmental organizations so that the work of the Movement in favour of peace is more effective.* Rapporteur H.E. Judge Kéba Mbaye.

H.E. JUDGE MBAYE read out the introduction. The Commission Secretary, Mr. Shahbaz Behnam, read out the proposed amendment to the Fundamental Principles, paragraph 3.

H.E. JUDGE MBAYE asked the Commission Secretary to read out paragraphs 1 and 2 of Rule 34.

H.E. JUDGE MBAYE pointed out that the provision, if adopted, would not have any retroactive effect. Portions of territory which possessed an NOC would continue to possess that NOC and the new rule would not, of course, confer the dignity of independent states on non-independent portions of countries not recognized by the international community.

There being no comments, both amendments were approved.

Item 2. Issues of Sport and the Environment, Rapporteur, Mr. Richard W. Pound, QC.

H.E. JUDGE MBAYE read out the introduction.

At the invitation of H.E. JUDGE MBAYE, the Commission Secretary, Mr. Shahbaz Behnam, read out the draft resolution.

THE PRESIDENT pointed out that this was a resolution and not an amendment to the Charter. He put it into the Session for approval.

There being no comments, THE PRESIDENT declared the resolution adopted.

At the invitation of H.E. JUDGE MBAYE the Commission Secretary, Mr. Shahbaz Behnam, read out the draft amendment to Rule 2, paragraph 10 of the Olympic Charter.

H.E. MR. SCHMITT proposed that the words "in a general way ("d'une manière générale") be deleted as they were superfluous.

On behalf of the Commission H.E. JUDGE MBAYE said that the amendment could be accepted.

THE PRESIDENT put the draft amendment, as amended by H.E. Mr. Pal Schmitt to the Session for approval.

There being no comments, THE PRESIDENT declared the draft amendment, as amended by H.E. Mr. Pal Schmitt, adopted.

supranational unities, a combination of a variety of factors, has been taken into consideration to value a country's true statehood. In addition to the four declarative theory constituents, the following aspects are now taken into account: existence of an own constitution⁷⁸, well formed culture, language, democratically elected parliament, flag, anthem, currency, social security system, central bank, import and export laws, taxation system, independent jurisdiction, law enforcement, educational system, public media, public transportation, public healthcare infrastructure. It is true and correct that Curaçao will not comply with all aspects, but most certainly it will fulfill far over 90 % of the criteria. In other words, if applying Rule 31.1 to deny the CSF its Olympic recognition, it will be important to have a clear and actual understanding of the - Independent State-concept. Referring to the Principles of International Law, in particular the General Rules of Interpretation as used to explain Treaties⁷⁹, applying mostly the teleological principle of *ut res magis valeat quam pereat* that meanings given to words must be justified. The Olympic Charter may not be a Treaty, but since the IOC is established in accordance with international law and in fact is functioning as a Treaty, I am of the opinion that Treaty interpretation principles may be permissible to explain the meaning of -Independent State- in the most current context.

5.3 Recognition by the international community

Rule 31.1 contains another questionable element: recognition by the international community. This concept is very controversial and among the most complicated topics of international law.

Professor Peter Malanczuk, a reputable expert in International Law, defines recognition as willingness to deal with the other state as a member of the international community⁸⁰. Considering this definition, I feel comfortable to say that future country Curaçao will easily meet the recognition criterion aspect of Rule 31.1.

In more support of the above I add that according to Malanczuk, Switzerland and Germany have always applied the effective law governing a foreign territory, even if it was not recognized as a state⁸¹. So, regardless of recognition, these two countries look in particular at the practical side of the government and if the law in that country functions effectively and creates the public management structure needed, it is a major reason to accept it as a state. To my humble opinion, I see herein a conflict between the Swiss international law policy and the verbatim text of IOC Rule 31.1

5.4 A country, a nation, or simply both

The variations on statehood have increased in number and are no longer limited to the conventional types. One of the new conceptions is well represented in our region and is called nation-state. In the Caribbean every island-country represents a nation, a culturally homogeneous group of people, larger than a single tribe or community, sharing a common language, national institutions, a general religion, and substantial historical experience. These are amicably functioning respected and organized societies. However, if graded by European standards they may come short in certain ways, due to their size and inherent characteristics. This requires a different approach, which is formally recognized and accepted by the UN General Assembly⁸². These island nation-states are usually very small, but nevertheless reasonably self-supporting countries⁸³. The UN adopted approach leaves no room for any doubt that the international self-representation of these small nations must be respected. Of course, Olympic representation is an inherent part of these UN accepted prerogatives. As a consequence, an autonomous Curaçao should not be held off for the important privileged right of presenting itself to the world during the Games.

Against the background of the foregoing information, filing a substantiated request for IOC recognition is absolutely recommendable and if rejected, CSF must present the matter to CAS requesting *ex aequo et bono* principle application *ex CAS Procedural Rule R45*⁸⁴. Among other arguments, CSF shall have to make it clear that there is a big difference between our country Curaçao and the earlier mentioned groups whose territorial claims and unlawful searching for international recognition through the Games, have been denied in the past and have caused the existence of Rule 31.1.

Next to the noted reasons, it is important to underline that an IOC decision to consider Curaçao a country in line with Rule 31.1, is not against no other party's interest. The absence of whatever harm suffering of others may not be a legal ground for the requested recognition, but surely it should be regarded as favorable to CSF. I hereby refer to the recognition disputes such as: China - Taiwan (heavy political confrontations); Scotland- Great Britain (precedent effect, once part of Great Britain NOC, no alteration unless change of constitutional status by Scotland); Kosovo-Russia / Serbia (difficult rooted regional internal political contests) and the several others, who for many years already are blocked from IOC recognition due to objections by pow-

erful interested parties. Besides the absence of a harm suffering party, recognition of the CSF, will also not create any political tension or imbalance in our region or elsewhere. And most important...., Curaçao has no intention whatsoever to abuse IOC recognition for political purposes. In other words, there is no justifying third party linked reason to withhold the CSF the IOC recognition. In concluding this paragraph I want to point to the fact that for a while already, there has hardly been any so-called Independent State, with really full control over its initial sovereign territory or actions. Mostly for efficiency reasons, many became an integrated part of a larger entity and have subjected their constitution and laws to supranational law provisions. Examples are the European countries, but also the newly formed Soviet States within the Russian Commonwealth. These developments have led to a new phenomenon rising with regard to statehood, referred to as interdependent states⁸⁵. I therefore once more emphasize that applying the outmoded verbatim text of Rule 31.1 must be on a casuistic basis.

6. No IOC recognition without Charter compatibility

The foregoing chapter explained that statehood conceptions are judged differently nowadays, since the evolution of international relations between countries makes the conventional definitions outmoded. It was also brought forward that the future country Curaçao will fulfill nearly all required aspects of statehood reflected by the most respected countries today and I emphatically advocated a case by case approach when using Rule 31.1.

In this chapter I will present the most important *sine qua non* conditions and highlight the essentials CSF needs to cover and comply with, in order to become eligible. In this section I also make mention of meetings I had with reputable experts in Europe on the matter.

6.1 Resetting the legal position of CSF

Somewhere in September 2008 I once again read in the newspaper that the NAOC will be maintained because an NOC of Curaçao is not achievable, due to Charter Rule 31.1. Being very sensitive to national Olympic representation, it was against my gut feeling. To verify the matter I then contacted some former Olympic international friends, who requested me not to refer to them because they occupy important positions on their NOCs. All listened to my story and advised to not accept the rejection solely based on Rule 31.1 and to find ways to CAS arbitration or even the Swiss court. Among these friends are former Dutch and British world top contenders.

Analyzing the situation it became clear to me that I will have to win the hearts and minds of the CSF board and the members, in order to go against the NAOC proclamation. Collecting information was crucial and since I stepped down as president of the Curaçao Lawn Tennis Federation in 2005, my access to information is very much limited and could solely rely on confidential cooperation. I also knew upfront that this would not be easy, given the threatening nature of my opinion. I came quickly to the logical conclusion that I will need adequate lobbying to get me there. Luckily, out of nowhere I ran into a former senior governmental sports advisor and it appeared we share the same vision on the matter. In a very short time we met frequently and at a point decided to team up to pursue what we believe in.

Things like this of course do not remain undiscovered in a small community. In no time we were labeled troublemakers in the media and experiencing heavy resistance to our expressed idea. This was not surprising since no one so far has questioned the related NAOC steps. It quickly became clear that politicians and some of the other islands sport federations were supporting NAOC in its slick survival struggle, without even being aware that nation-owned valuable future rights were giving away without even having investigated the possibilities for Curaçao. Based on the aggressive reaction we realized that we were disturbing the smooth runway NAOC and company have had so far.

Knowing that the CSF is the only entity that truly can claim formal representation of the Curacao sport society, we were very happy when asked to do an informing presentation to a selected audience consisting of IF's, governmental officials and a few members of the Island Council of Curaçao. Meanwhile I had made contact with the T.M.C. Asser

79 C.F. Amerasinghe. Principles of the institutional law of international organizations (1998), Chapter 2.

80 P. Malanczuk. Akehurst's Modern introduction to international law (2006), p. 82.

81 P. Malanczuk. Akehurst's Modern introduction to international law (2006), p. 86.

82 www.unohrls.org/UserFiles/File/SIDS%20documents/A-RES-53-189A.pdf.

83 Lammert de Jong en Dirk Kruijt. Extended Statehood in the Caribbean (2005), p. 11.

84 <http://www.tas-cas.org/d2wfiles/document/281/5048/0/3.1%20CodeEngnov2004.pdf>.

85 P. Malanczuk. Akehurst's Modern introduction to international law (2006), p. 79.

Institute for Sports Law in The Hague - Holland in the person of Dr. Robert Siekmann, an expert in Sports Law⁸⁶. By e-mail I could explain the issue to him and he immediately considered it a very interesting topic. It was clear to him that it was not an ordinary sport dispute, but rather an international public and private law related question. A few mail messages later we decided to have a meeting in Holland to discuss the matter and, at my request, Siekmann agreed to introduce me to a reputable lawyer, experienced in CAS procedures and international law, to guide the CSF and Curaçao through the entire procedure.

In early February 2009 I went to Holland and visited the T.M.C. Asser Institute for Sports Law. It was an exciting experience meeting with the world wide recognized sports law expert dr. Siekmann. He really took time for me and linked me to Prof. dr. Ian Blackshaw, originally from England but residing in France, introduced by Siekmann as one of the best European legal counselors regarding sports arbitration and CAS procedures.⁸⁷

Shortly thereafter I had contact with Prof. Blackshaw. I explained the matter to him in detail. He understood the problem perfectly and also sensed that it is not a typical sports conflict. At his request I sent him additional information on my return to Curaçao. In subsequent mail messages we agreed on some strategically dos and don'ts. It does not need further clarification that the entire procedure for seeking IOC recognition by the CSF, fundamentally depends on the fact that Curaçao indeed will be an autonomous country within the Kingdom and there must be clarity about the exact date.

6.2 The Sine Qua Non conditions

In addition to the above, the following requirements must be considered very crucial, without which recognition is unachievable.

Sine Qua Non condition #1

One of the legal requirements at this point in time recommended by Blackshaw was that the CSF must formally claim its position and officially inform the NAOC and the IOC that it reserves the right to seek proper IOC recognition once Curaçao becomes autonomous. According to Blackshaw, this is essential for the rest of the procedure, since after analyzing the documentation provided, we agreed that the NAOC information given to the IOC, confirms that all the five islands of the Netherlands Antilles have agreed in advance to continue with the NAOC as a territorial NOC, once the dissolution of the Netherlands Antilles takes effect. In the documentation mentioned in chapters 2 and 3, it can be seen that both, the IOC and the NOC/NSF, did realize the juridical importance of this⁸⁸.

Shortly after my return to Curaçao, preparations for a presentation for the CSF General Assembly started. An important goal was to obtain the green light for our exploring intentions and simultaneously achieve the formal appointment of a well balanced working group (board members and delegates) to deal with the matter. In order to be able to keep things moving, it was necessary for us to offer the General Assembly our ongoing support and be appointed as advisors to the working group⁸⁹. The first step worked out well. After an hour of giving information and answering a number of questions, the CSF General Assembly concluded that it will pursue proper IOC recognition. Our plan of action presented, including the appointment of a working group, was unanimously accepted. *Having the blessing of the General Assembly of the CSF is an important sine qua non condition for initiating the next step.*

Sine Qua Non condition # 2

Within days the working group released a letter announcing their existence to the island government, copy to the NAOC, the IOC and

the Minister of Sports of the Netherlands Antilles. In this letter the CSF requests the government to take into account the fact that the General Assembly of the CSF, after receiving circumstantial information, has decided unanimously to exercise its right resulting from the constitutional alteration, seeking proper IOC recognition⁹⁰. The CSF made it clear that there has never been an agreement with the NAOC and that the CSF has never abandoned its position of lawful representative of the sports federations of Curaçao. Legally this closes the door on the NAOC as regards continuing with whatever scenario. Stopping any further damaging activities on the part of the NAOC is crucial and will allow the CSF the ease to overlook the new situation and to come to necessary preparatory steps. Among other things, an important one is that at least five member federations (IF's) of the CSF have to become direct members of their specific international federation (IF). This procedure should be initiated the soonest as proof of this process will be needed to support the request to the IOC. *Any organization filing for IOC recognition as an NOC must prove that it has at least five member federations affiliated with their IF⁹¹, a sine qua non condition to initiate IOC recognition.*

Sine Qua Non condition # 3

I have matched the CSF Articles of Association with the Charter on conformity. This aspect is fundamental since non-conformity leads to early IOC dismissal of recognition request. Any NOC filing for IOC recognition must prove to have included certain compulsory rules in its Articles of Association. The following are the adaptations the CSF will at least have to make in its Articles of Associations to become eligible for filing to acquire IOC recognition.

1. have legal status, unless excused, ex Rule 3.2
2. be the national sports association of the country, ex Rule 3.2
3. include that the CSF will promote Olympism as a co-objective and supports the Olympic Movement. Ex Rule 28.2
4. accept all NFs, affiliated with their respective IOC recognized IFs, as members. Ex Rule 29.1.2
5. include all active and retired Olympic athletes originating from Curaçao. Ex Rule 29.1.3

This Statutory compatibility with the Charter is a sine qua non condition⁹².

Sine Qua Non condition # 4

Although not within the scope of my Thesis, I can't ignore the need of funds for this operation. Aware of the constraint this may represent for the CSF, the working group had preliminary conversations with Island Council members. They were confronted with the idea that any expenses incurred in connection with the CSF's efforts to seek IOC recognition, are a direct consequence of the constitutional change and of the general interest. The working group has given a number of examples of costs covered by the budget for constitutional change and has filed a written request to the island government for the same. It looks right to me that the CSF attempt to get IOC recognition is directly linked to the status change and also of general interest. Consequently, the costs should be covered by designated funds against the effects of the constitutional alteration. The legal guidance to the acquire recognition at the IOC, and, if required, the procedure at the CAS, will surely require legal fees and other related costs. I have referred earlier to the Sports Related Arbitration Code and noted that the CAS only reviews rejected facts/grounds and not accepts new arguments. In other words, the CSF will need expertise as early as the initial filing with the IOC for effective presentation of the legal arguments dealing with Rule 31.1. Adding new elements to the denied request when presenting the case to the CAS, is not permissible. *Timely availability of funds must therefore also be regarded a sine qua non condition.*

7. The juridical justification of the CSF request

The information and remarks of the previous chapters show the necessary aspects for the right valuation and understanding of the legal complications involved with the intention of the CSF to seek IOC recognition. No doubt it all looks quite complicated and difficult;

86 www.sportslaw.nl/categorieen/intro.asp?c_nr=10&l2=-626k.

87 www.sportslaw.nl/categorieen/intro.asp?sub_categorie=77-73k.

88 IOC letter of June 18th 2007, paragraph 1 point A

89 Articles of Associations Curaçao Sport Federation (2007), article 14

90 CSF letter to Island Council of Curaçao, April 16 2009.

91 Olympic Charter Bye-Laws to Rules 28-29, 1.2.

92 Olympic Charter Rule 3.2.

however it will all come to the level of drive and determination of the involved parties.

The formal request for recognition to be presented at the IOC, must contain well selected justifying and legal arguments, and also include supporting legalized exhibits. I am aware that once hired, the experts will come up with a few more, but in this chapter I have listed my most relevant advocating arguments supporting the request at IOC or later instances.

7.1 The CSF main legal arguments

Argument # 1

Equality among the countries in the Kingdom is part of the Charter of the Kingdom of the Netherlands.

Based on the Charter of the Kingdom, constituted in 1954, every country in the Kingdom shall have the same constitutional rights and in particular each shall be entitled to independently take care of its own interests⁹³. Self-representation and participation at Olympic Games or alike, is not singled out. Holland and Aruba already have their own NOC. Withholding Curaçao (CSF) IOC recognition, will create an unacceptable disharmony and unneeded controversy among the countries. The Kingdom will certainly be forced to step forward to protect the interest of Curaçao.

Argument # 2

The Kingdom of the Netherlands has never had an NOC.

Contrary to other Monarchies or Republics with overseas associated countries or territories, the Kingdom of the Netherlands has never had a centralized NOC. Each country within the Kingdom has always provided for its own NOC which has ever since been regarded a national identity in each of the countries, considered to be very important for the national sports development and the unity among their people. An imposed continuation of the NAOC of a dissolved Netherlands Antilles devaluates the autonomy of Curaçao as compared with Aruba and Holland.

Argument # 3

The Charter does not provide for any geographical and sports authority as the NOC.

The islands of the Netherlands Antilles will no longer have a constitutional unifying relationship. The Olympic Charter has no provision for an NOC consisting of more countries and fractions of another country. Neither is there any provision to accept a “geographical and sports authority” as an NOC. This bethought solution is against the interest of the new country Curaçao.

Argument # 4

Curaçao historically has its own national sports federation with active affiliated member federations, and has adapted its Statute to IOC standards.

In accordance with the Charter Rule 29.5, the jurisdiction of an NOC must coincide with the limits of the country where it is established and has its headquarter. The CSF, the national federation of Curaçao has existed since 1968 and has already jurisdiction over Curaçao as regards sports. Once Curaçao becomes an autonomous country, the CSF is willing and prepared to act in accordance with the Charter. Consequently, the CSF will take charge and be the NOC of Curaçao. Its members will become the national sports federations and will also be prepared to take on their obligation in this connection. Solutions in which federations of a dissolved Netherlands Antilles are maintained are against the interest of Curaçao and therefore not acceptable. The IOC is requested not to support violations against Rule 29.5 and, consequently, accept the CSF as the single entitled party for Curaçao, able to comply with the rule mentioned.

Argument # 5

The General Assembly of the CSF has chosen for its own IOC recognition. The NAOC has never had authority over the Olympic future of an autonomous Curaçao.

The NAOC and the IOC were made aware that the CSF has formally elected to pursue its own IOC recognition and were requested to respect this rightful choice. Although not a condition, the CSF position taken has the support of the island government. As a result, the presented NAOC Resolution of July 5, 2007 has no effect or meaning for Curaçao. The CSF was never part of it. Reference is made to the fact that the IOC and the NOC /NSF Holland have conditioned the continuation of the NAOC with the approval of each of the five islands. The CSF, the lawful representative of the Curaçao sports society, has never approved NAOC's continuation and will not do so in the future either.

Argument # 6

Denying CSF the IOC recognition is an act against the Fundamental Principles of Olympism.

Curaçao will undisputedly be a self governing country, equal to Aruba and Holland. It will have the capacity to independently take care of its interest as can be seen in the Preamble Charter of the Kingdom of the Netherlands. The choice of being part of the Kingdom of the Netherlands is a political. According to Fundamental Principle of Olympism # 5 “ Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement”. According to Charter Rule 1.2 the IOC is also part of the Olympic Movement and fully bound by the Charter. And in addition, the IOC has formally adopted the UN Charter which grants equal rights to peoples.

Argument # 7

UN Resolution A/RES/53/189, February 12, 1999 is applicable.

Once autonomous, Curaçao will be added to the UN list of developing small island states. In accordance with the UN Resolution on this, these countries need to be assisted additionally because of their limited territorial size and small population. In line with this, application of a more current interpretation of Rule 31.1 in favor of the CSF will be consistent with the spirit of this said UN Resolution.

Argument # 8

The access doctrine of Sports Law supersede Rule 31.1

The access doctrine in Sports Law prescribes promotion of participation and disavows exclusion. Rejecting the CSF request for IOC recognition de facto means denying these athletes, falling under the jurisdiction of the CSF, the effect of this doctrine. Given the explained status of Curaçao, once autonomous, the overtaken meaning of Rule 31.1 must be derogated by the mentioned Sports Law doctrine.

Argument # 9

Participation under the NAOC will establish a precedent effect against the CSF

If an autonomous Curaçao participates in the next Games under the suggested artificial, and in fact illegal, NAOC identity, it may be bound by the precedent effect, an often used customary in International Law, making it very difficult to recall the choice once made. The CSF is aware of this and wants to avoid being forced into that position. The CSF therefore requests the IOC not to accept the suggested geographical and sports authority NOC format as mentioned in the NOC Relations Department letter to NAOC and NOC/NSF, but to grant the CSF the requested recognition for appropriate representation in accordance with the Charter.

Argument # 10

The CSF request for recognition qualifies for a decision ex aequo et bono applying the legal method of rule interpretation.

Based on all the foregoing it is clear that the situation of Curaçao is exceptional. Considering that the country is on its way to become

⁹³ Charter of the Kingdom of the Netherlands, Preamble.

an autonomous country in the Kingdom, based on the UN sanctioned right of self-determination of the people of former colonies; the spirit of the UN Resolution calls for special support and assistance to small island-nations; there is no central NOC in the Kingdom and the other countries within the Kingdom do have their own NOCs; no third party will suffer damage or political discomfort; Curaçao cannot be considered among the parties against whom the guarding effect of Rule 31.1 was introduced; the non-discriminating principle of Olympism and the Access doctrine of Sports Law, these all justify a special appeal to the IOC to not simply apply Rule 31.1, but to decide ex aequo et bono on the CSF request for recognition.

I have searched for jurisprudence concerning the matter as described in this Thesis⁹⁴. I hate to say I could not find any. On the other hand, the Curaçao/CSF case is a unique one and therefore will hopefully be treated as such. I feel comfortable that all the mentioned arguments will contribute to achieve a deeper look into the CSF request rather than just a routine judgment by the NOC Relations Department of the IOC and that the spirit of Olympism will prevail, making a procedure at the CAS unnecessary.

In support of its request the CSF is advised to include the following legalized documents in its petition to the IOC:

1. Copy of the Charter of the Kingdom.
2. Copy of the sport structure of Curaçao and a version of the adapted CSF Statute.
3. Copy of translated minutes of the General Assembly meeting of April 1, 2009.
4. Formal letter of the island government, e.g. the Lt. Governor, stating the stipulated day of the constitutional change.

8. Conclusion and recommendations

In the introduction I have made it no secret that my research would be directed to finding legal and rightful arguments in favor of the CSF rightful desire to be recognized by the IOC as the NOC of an autonomous Curaçao. During the course of the study I was inspired, not only by the expressed dream of many with whom I have discussed my point of view, but also by the lack of confidence and esteem noted at several known people at the helm of our community. They both have been very valuable to me and I sincerely hope to share the moment with them all, seeing the Curaçao flag carried into the Olympic stadium in 2012 in London.

Conclusion

The Thesis I have formulated reads:

Is, in the year 2009, the verbatim text of Rule 31.1 of the Olympic Charter, a private law provision in accordance with Swiss Law, a rightful ground for withholding IOC recognition to an NOC of an autonomous Curaçao?

The answer to me is firmly *NO*.

In the year 2009, the verbatim text of Rule 31.1 of the Olympic Charter, a private law provision in accordance with Swiss Law, is NOT a rightful ground for withholding IOC recognition to an NOC of an autonomous Curaçao!!

This conclusion is supported by all the detailed information given and formulated in the arguments included in Chapter 7. I am of the opinion that I have established sufficient legal grounds for a substantiated request by the CSF for IOC recognition and also for an arbitration trial of the matter at the CAS, if deemed necessary. Except for the verbatim text of Rule 31.1, I have encountered no justifying grounds to act against the constitutional choice of the people of Curaçao by withholding the IOC recognition to CSF. Aside from answering the Thesis itself, I consider it of great importance to explicitly mention that the research uncovered objectionable information against the NAOC and its allies for their willful concerted actions against the interest of Curaçao and the rights of the CSF. I refer to the several documents mentioned and also to the choice made unani-

mously by the General Assembly of the CSF of April 1 last to pursue its own IOC recognition; until then this was systematically obfuscated and discouraged by the NAOC, which in my view has acted shamelessly against the principles of good faith and duty of care.

Recommendations

My first recommendation to the CSF is to consistently monitor the NAOC moves regarding this matter and to protect its future rights immediately, whenever needed. Parallel with this safeguarding process, the CSF should follow a logical sequence of connected activities to be most efficient. Basically these are the Sine Qua Non items mentioned in Chapter 6. First priority for the CSF is to assure availability of funds needed to carry out the converting process. In order to be entitled to government finances I have advised to approach the Island Council with a petition in which the alteration is presented as a direct consequence of the constitutional change and thus attempt to qualify for the available financial help covering the effects of the change.

Once there is clarity on the financial means, the CSF must timely hire a knowledgeable international legal professional, with the relevant network and totally knowledgeable with IOC/CAS procedures. This person will be needed to prepare the initial request to IOC. The arguments mentioned in chapter 7 should be very instrumental to the composition of the request. The early hiring of the legal expert will contribute to efficient use of the time left to run the CSF request through the IOC and if needed, through the tribunal procedure at the CAS. In any case, the available time is limited to two years, marked by the next Games. While busy trying to secure funds through the government, it is recommended that the CSF contacts a local civil law notary and starts to provide information for adapting its Memorandum of Association to become Olympic Charter compatible. Once hired, the legal advisor previously mentioned, can be of help to make sure the adaptations will be correct and complete.

Secondly I advise to timely support and encouraging of the CSF affiliated federations to make an early start with their preparatory work towards adaption of their own Memorandums of Association in accordance with the requirements of their respective international bodies. For efficiency reasons, it would be advisable to involve the same civil law notary as the one working on the CSF adaptation.

And, finally, I strongly suggest the appointment of a result-oriented coordinator to consistently supervise the entire process. There are only two years left.

Closing remarks

The selected Thesis and the way I choose to handle it, were a bit more time consuming than I could afford. There were too many moments that I had to depend on the cooperation of some busy people, which certainly tested my patience and resilience. Nevertheless, I am happy with the result and do hope it may contribute to taking the country Curaçao to London in 2012.

Successfully completing law school symbolizes the fulfillment of a promise I made. Freed from this, I will now prepare to confront new challenges. Despite my age, I feel there is still time enough to extend the utilization of the many things I have learned in life so far. The years at law school have certainly enriches me, not only in legal knowledge but also the stamina in studying documents and raises my interest significantly for a much wider area then earlier. So with for sure a lot more in the quiver bag than when I started four years ago, I leave the University of the Netherlands Antilles and hope that its own future within the dissolving constellation will be well guarded so that many more will benefit from this good institute.

Abbreviations

BES Bonaire - St. Eustatius - Saba
CAS Court of Arbitration for Sports
CSF Curaçao Sports Federation
ETA Basque homeland freedom movement
EU European Union
FIFA Federation of International Football Associations

⁹⁴ www.tas-cas.org/jurisprudence-archives.

ICAS International Council for Arbitration in Sports
ICCPR International Covenant on Civil and Political Rights
IF Island Federations
IOC International Olympic Committee
IRA Irish Republican Army
NAOC Netherlands Antilles Olympic Committee
NAVU Netherlands Antilles Soccer Union

NF National Federation
NOC National Olympic Committee
NOC/NSF National Olympic Committee / Netherlands Sports Federation
ODESUR Sports organization of South America
PLO Palestinian Liberation Organization
UN United Nations



At Last, a Football Law in the Netherlands?

by Peter T.M. Coenen*

Introduction

For a long time there has been a discussion about football specific legislation in the Netherlands. It seems like this legislation will finally enter into force before the end of 2009. The proposed legislation is currently awaiting approval from the First Chamber of Parliament in the Netherlands.

The proposed law has come a long way, since its conception as a law specifically and exclusively designed to deal with the problem of football hooliganism. The proposed Football Law is now incorporated into a much broader piece of legislation, designed to deal with a myriad of different public order offences. The proposed law, as initiated by the Dutch cabinet, has been passed by the Second Chamber of Parliament. The Second Chamber however, has added some possibly controversial amendments. Approval of the proposed Football Law by the First Chamber of Parliament is anticipated before the end of 2009.

This paper will provide an in depth look into the proposed Football Law in the Netherlands. This paper will look at how the Dutch legislature attempts to deal with the problem of football hooliganism. The Netherlands has been able to look at similar legislation in a number of other countries and has been able to learn from the difficulties these countries have encountered with this legislation. The Dutch legislature has come up with a fairly moderate proposed law, which avoids a lot of the draconian measures present in comparable laws in other countries. This paper attempts to give an overview of the Dutch legislation and show how this proposed law fits in the current array of measures to combat football hooliganism in the Netherlands. First, a look will be provided at the history of the proposed Football Law. Secondly, this paper will look at the actual text of the proposed Football Law. Finally, this paper will look at how the proposed Football Law could work within the current framework of measures to deal with football hooliganism in the Netherlands.

Why a Football Law?

"If there would have been a Football Law in the Netherlands, these hooligans would have never been able to attend this game." These are the words of Onno Jacobs, the financial director of Feyenoord Rotterdam. Feyenoord had just played a game in the UEFA Cup tournament in the French city of Nancy against the local team, AS Nancy. Feyenoord had lost the game, and even worse, the fans of the Rotterdam team had rioted before and during the game. The game had to be interrupted for half an hour as fights broke out in the stands and the police had to restrain the hooligans with tear gas. Feyenoord fans had already fought with the police in the city centre before the game.

As a result of the behavior of the fans, Feyenoord was thrown out of the UEFA Cup tournament. In the weeks leading up to the game, the team had been worried that hooligans might use this game as an

occasion to misbehave. Approximately 3000 Dutch fans came to Nancy on the day of the game. Feyenoord had sold 1300 tickets to its fans through its official channels to registered fans of Feyenoord. This way Feyenoord ensured they were aware of the identity of these fans. Through this ticketing system, the Rotterdam club hoped to control the tickets and see that they did not end up in the hands of known hooligans.

However, this means also that about 1700 fans were present in Nancy that either did not have a valid ticket for the game or had gotten their tickets for the game through other channels. Feyenoord, even before the game, had received strong indications that known hooligans wanted to travel to Nancy for the game. There had been problems at a number of international games previously and the club was put on notice by UEFA that any more problems would result in a severe penalty. Feyenoord's board therefore urged the supporters to behave in Nancy. Unfortunately this plea could not prevent the outbreak of serious riots at the match against Nancy. In the aftermath of the riots in Nancy, it became clear that at least a number of the hooligans present had stadium bans for the stadiums in the Netherlands.

For the board of Feyenoord, and for a lot of other people it was clear. The time had come for a Football Law. Feyenoord started an action on its website, collecting signatures of supporters of a Football Law. Furthermore, the Rotterdam club put a large advertisement in a national newspaper, asking for a Football Law. The newspaper-ad was signed by a lot of famous Dutch people, including current Vice Prime Minister Wouter Bos.

The result of these riots and the ensuing media coverage, as happens so often in the aftermath of such a serious incident, was that the subject of a Football Law in the Netherlands came to the top of the agenda again of policymakers in the Netherlands. Onno Jacobs urged the political parties in the Netherlands to act. "In a Football Law, a reporting duty can be implemented. In that case these hooligans would have never been able to travel to Nancy." The theory in this case is that if a hooligan (or a suspected hooligan) who has misbehaved in the past at football games, has to report at the local police station at the time of the games of his favorite club or country, that hooligan cannot be present at those games and therefore cannot cause any more disorder.

On May 9, 2008, the Dutch cabinet approved the long-awaited Football Law. The Football Law was then discussed in the Second Chamber of Parliament. During the discussions in the second Chamber, the Football Law was amended on a couple of important points. The amended Football Law was passed by the Second Chamber of

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Parliament with a large majority of the votes. The Football Law is currently awaiting approval by the First Chamber of the Dutch Parliament. and the First Chamber cannot make amendments to the proposal. A simple majority of the votes in the First Chamber will suffice for the Football Law to become law. The Football Law likely could enter into force before the end of 2009.

The Royal Dutch Football Association's initiative

The KNVB, the Royal Dutch Football Association, had already been working on a Football Law. The KNVB, backed up by the opinion of the general public, felt that the time had come for a Football Law. In February 2007, the KNVB presented a concept for a Football Law. The KNVB had talked about the details of this Football Law with a large number of experts on the subject. The KNVB discussed the concept with academics, politicians, civil servants and legal experts. The KNVB also looked the experiences in England, in which a similar Football Law has been in force for a long time.

The KNVB, while presenting their concept, asserted that a relatively small number of all people that go to football games cause problems at or around football games. Most of these hooligans have prior convictions for criminal acts and are likely to violate the law again. The KNVB, in its draft, concluded that the Football Law should focus on addressing this core group of hooligans. This constitutes a break with the past, when measures addressing the problem of football hooliganism mostly focused on the immediate prevention of disorder in and around the stadium. These measures mostly provided an immediate response to disorder or the threat thereof. However, the KNVB felt it would be better to directly target the hooligans themselves at an earlier stage in the process and thereby possibly prevent riots from breaking out.

At the core of the KNVB proposal is a broad definition of a football event. According to the KNVB, every criminal act at or around a football event (this is not just the match itself, but includes for example a celebration after winning a championship), or which stems from the identification of the perpetrator with a certain football club, should be punished more severely. In case a person is punished for a criminal act around a football event, there should be a number of possible additional punishments possible. The KNVB mentions a stadium ban, an area ban, which means that the person is banned from being in a certain area for a certain time, and a reporting duty. The stadium ban and area ban are measures designed to keep the football hooligan away from football games or other football related events, where these hooligans could engage in disorder. A reporting duty means that the hooligan has to report at a police station close to his or her residence. A reporting duty provides a control mechanism to ensure that that hooligan does not attend any football events, even though he or she is banned from attending that event because of a stadium ban and/or area ban. The KNVB adds that if a supporter does not follow the terms of a stadium ban, area ban and/or reporting duty, it should be possible to detain that person. A further crucial element in the KNVB proposal is the extraterritorial application of Dutch criminal law to (Dutch) supporters that misbehave at a football event abroad. This would for example enable the Dutch authorities to prosecute the hooligans that misbehaved in Nancy in the Netherlands. The KNVB, in presenting this proposal, sent a clear signal to the political parties in the Netherlands. Now it was up to them to act.

In the array of measures before the Football Law, some of the penalties addressed in the KNVB proposal were already possible. A criminal law stadium ban was already possible upon a conviction for a football related crime. Furthermore, a reporting duty was also already possible upon a conviction for a football related crime. However, this possibility is rarely used in the Netherlands.

Presently a stadium ban, area ban and/or reporting duty are only possible after a conviction for a football related crime. The KNVB also has its own array of measures to control football hooliganism. The KNVB, as the organizer of football games in the Netherlands, can hand out a national stadium ban to supporters who misbehave at or around professional football games in the Netherlands. This authority of the KNVB is based on the contractual relationship

between them and the supporter who buys a ticket for a game. Even where there is no such contractual relationship, the KNVB is empowered to act based on the fact that the clubs are the owners of the stadiums. The clubs, as stadium-owners, have given the KNVB the authority to deny persons access to their grounds. Such a national stadium ban is valid for all games in the Eredivisie (the highest professional level), the Jupiler league (the second highest professional level), all games of Dutch national teams (including youth teams) at home or abroad, all national cup games and all international games in which a Dutch team is represented, including the Champions League, UEFA Cup (and the current Europa League) and the Intertoto competition.

Political response

The KNVB's proposal was taken up by three of the historically largest political parties, the socialist PVDA, the liberal VVD and the Christian-democrat CDA. On June 28, 2007, the initiators presented a proposal for a Football Law to the Minister of Domestic Affairs in parliament.

The proposal of the political parties again pointed out that it is only a relatively small group of hooligans that are responsible for most of the problems at and around football matches. In their proposal, the political parties also opted for a broad definition of a football event. One of the reasons for this is that a lot of football related violence does not occur in or around football stadiums anymore. Most notably, the most notorious football riot in the Netherlands, the riot in Beverwijk between Feyenoord and Ajax supporters, in which one Ajax supporter died, took place in a field next to the highway. Fans of both teams were on their way to an away game of their clubs and clashed somewhere in the middle in a field next to the highway. This shows that football hooliganism is a problem that transcends the boundaries of the football stadium and that any concerted effort to combat football hooliganism therefore should not be limited to the actual stadium and its direct surroundings.

Furthermore, over the years large scale disorder has broken out during celebrations of cup and championship celebrations. For example large scale riots broke out in the city centre of Rotterdam after Feyenoord won the UEFA Cup in 2002 and large scale riots broke out in the city centre of Amsterdam after Ajax won the Dutch Cup in 2007. From these riots occurring outside the actual stadium and sometimes even unrelated to any actual games, the political parties concluded that a new definition of a football event was needed. Any person involved in disorder with a connection to football should be punished for that behavior, and the specific football-related measures (stadium and area ban and reporting duty) should be handed out to that person.

The core of the proposal of the political parties is divided into three pillars. The first pillar is that a stadium and area ban and a reporting duty should be taken up in the (criminal) law. This ensures a quick and targeted approach aimed at the small core group of hooligans. Through a reporting duty, hooligans will be prevented from being present in and around football stadiums and therefore will not be able to cause any problems at or during football matches. Neglecting a reporting duty will be an offense punishable by law.

Pillar two provides that the aforementioned measures (stadium ban, area ban and reporting duty) can be handed out by the prosecutor and the mayor of a city to persons that, based on their behavior, can be connected to football hooliganism. This provision leads to number of different conclusions. First of all, for a measure to be handed out, a criminal conviction would no longer be necessary. Second of all, handing out a measure should go fairly quickly. The procedure to hand out a measure should not be overly complicated. The proposal further mentions that the mayor and prosecutor should discuss who is to hand out a measure in an individual case. In case the person concerned appeals a measure handed out against him or her, the measure should not be suspended. If the judge rules that a measure was not justified, the person concerned should receive damages.

The third pillar of the political parties' proposal is a proposal to criminalize the preparation of public disorder leading to (risk) of death

or serious bodily harm. Such preparation can be evidenced by internet-communications, phone conversations, etc. The goal of this third pillar is to enable the authorities to respond to the threat of disorder in an earlier stadium. For example, if the police intercept a communication on an internet message board between two groups of hooligans, setting a time and place for a fight in a field somewhere, within the current array of measures the police can only respond once an actual fight breaks out. Under the new proposal, the person posting the message could be prosecuted, without an actual fight breaking out.

The Football Law

The proposed Football Law was initiated on May 20, 2008 by the Ministry of Domestic Affairs and the Ministry of Justice. On April 7, 2009, the proposed Football Law was approved by the Second Chamber of Parliament with an overwhelming majority. The Second Chamber made a number of far reaching amendments to the Football Law.

In the Netherlands, for a law to take effect, a couple steps have to be taken. Most laws are initiated by the government, due to the complexity of most laws and the resources of the Ministry. After a law is initiated, advice regarding the law is asked of the Council of State. Following this advice, the law is sent to the Second chamber of Parliament. The Second Chamber can make amendments to the proposed law. The Second Chamber then holds a public vote on the proposed law. After the Second Chamber has approved a proposed law, the proposal is sent to the First Chamber. The First Chamber cannot make amendments to any legislative proposals. The First Chamber discusses the proposed law and then votes on the proposal. A simple majority of the votes suffices for the proposal to pass in the First Chamber. If questions arise concerning a proposal in the First Chamber, the vote can be held off for a period of time. However, the First Chamber has no right of amendment and can therefore not make changes to any proposed legislation itself. After the First Chamber approves proposed legislation, the law can take effect after it is signed by the Queen of the Netherlands.

The actual proposal for the Football Law, as it stands now, was initiated by the Ministry of Domestic Affairs and the Ministry of Justice, even though the first steps to come to such a law were taken by a number of parliamentarians. The Football Law, after the Council of State's advisory opinion was received and attached to it, was sent to the Second Chamber of Parliament. The Second Chamber discussed the Football Law and made some (important) amendments to the proposal. The Football Law was then voted on and with an overwhelming majority approved by the Second Chamber. The Second Chamber then sent the Football Law to the First Chamber, where it is currently being discussed and awaits the vote in the First Chamber. However, given the overwhelming majority the proposal received in the vote in the Second Chamber, it is to be expected that the proposal will also pass the vote in the First Chamber. The Football Law, if passed in the First Chamber, could enter into force before the end of 2009.

The Football Law has been included in a broader proposed law to counteract public disorder. The law is, in a broad sense, supposed to counteract all sorts of different structural nuisances. This law specifically targets violations of public order by groups of people (for example youths or football supporters), who through their often times criminal behavior, create an unsafe environment in the areas or neighborhoods where they hang around. The current legal array of measures in the Netherlands, according to the drafters of the proposed law, does not suffice to deal with this problem. The problem with the behavior of such groups currently is that the police have to wait until an actual criminal act happens until they can deal with this group. A further problem in such a case is that the police have to be able to pinpoint the crime to a specific, individual perpetrator. And even if the police are able to pinpoint a criminal act to a certain person and punish that person for that act, they might still not actually be doing anything about the overall unsafe environment created by the group. Such a group in a lot of cases consist of leaders and followers. To really deal with the problems caused by a certain group, the police will need to deal with these leaders. However, these leaders will often times not engage in any criminal acts directly, but direct their follow-

ers into doing these acts. Under the current array of legal measures, it is therefore very difficult for the authorities to directly take measures against such a group that causes disorder and their leaders.

The behavior that is specifically targeted by this law is structural and often times criminal behavior through which public order is violated. Specific examples of such behavior are intimidation, threatening behavior and vandalism. The person targeted by this law engages in such behavior individually or within the group he or she forms a part of. However, there has to be a pattern of possibly criminal behavior that structurally violates public order.

Even though this law targets offences against public disorder in a broader sense, one of the specific aims of this law is to deal with the problem of football hooliganism. This law is specifically intended to provide a zero tolerance policy for the small core group of hooligans that structurally misbehaves around football matches. According to a number of surveys studied in preparation for this law, hooligan groups are loosely structured groups with a dynamic membership. However, these surveys also show that at the core of these hooligan groups are a small number of people, who have been members of the group for a while and who have clear, hierarchical roles within the group. It is these hooligans, who are at the core of their respective groups and who are able to direct the behavior of the group, which this law specifically intends to target.

In the current array of measures, there are some possibilities for the mayor to respond to the behavior targeted. However, these measures are more designed to respond to immediate outbreaks that violate public order, rather than the structural violations against public order targeted in the new law. There are also some possibilities to deal with these structural violations of public order through criminal law. However, these possibilities are also rather limited due to the difficulties in finding the actual perpetrators within a group and dealing with the leaders of a group (as discussed above). The new instruments created by this law, therefore are specifically designed to counteract structural violations of public order, like football hooliganism. This means that these new measures need to be capable of stopping this behavior at an early stage, have a preventive effect, and directly interfere with the group dynamics of the violating group. To accomplish this goal, under this new law the competencies of the mayor and the prosecutor will be enhanced to deal with this behavior.

The Municipalities Law

Under this law the competences of the mayor under the Municipalities Law are strengthened to deal with these structural violations of public order. The mayor can hand out the following measures: an area ban, a group ban (which means that no more than three people are allowed to group together at certain designated public spaces within a municipality) and/or a reporting duty. The mayor can hand out such a measure to a person who has repeatedly violated public order individually or in a group; or to a person who played a leading role in such a group that has repeatedly violated public order. The fact that a mayor can hand out such a measure also to a person who individually repeatedly violates public order is one of the amendments made by the Second Chamber of Parliament. Originally, the proposed law was only designed to deal with public order violations committed in a group setting. However, by including the possibility of measures against individual violators, the scope of the law has been drastically widened.

The mayor can hand out such a measure for a maximum of three months at a time. A measure can be extended three times with another three month period, to a maximum of twelve months. A mayor can hand out a reporting duty to a person who lives in another municipality, but the mayor in this case has to discuss this measure with the mayor of the municipality of residence of the person (the municipality of residence is also the municipality where a person would have to report). This power is especially valid for football hooligans, since in this way a mayor can act against hooligans of the visiting team that violate public order in another municipality than where they live. If a measure is handed out to a person by a prosecutor, the mayor cannot then also hand out a measure to that person. If new facts and cir-



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cumstances arise, a measure can be altered both to the advantage as well as to the detriment of the person to whom the measure was handed out. A measure will be lifted if the measure is no longer necessary for the prevention of further violations of public order. A person to whom a measure is handed out can ask the mayor to temporarily lift (parts of) the measure. A measure from the mayor is an administrative decision governed by public law and has to comply with certain legal norms. This means that such a decision can be appealed to and tested by the courts. Each extension of a measure is also a new decision and can therefore also be appealed.

The Criminal Code and the Code of Criminal Procedure

Under this law the competences of the prosecutor under the Criminal Code and the Code of Criminal Procedure are strengthened to deal with these structural violations of public order. The prosecutor is part of the public prosecutor's office and therefore, according to the drafters of the law, especially equipped to deal with such violations in anticipation of a verdict by a judge. The prosecutor can hand out a measure against a person suspected of committing the following offences: one that resulted in a serious violation of public order and where there is a serious risk of further violations of public order; or where there is a serious risk of harmful behavior of the suspect regarding other persons; or where there is a serious risk of harmful behavior of the suspect regarding goods. In this case the prosecutor can hand out an area ban, a contact ban (which means that the suspect is not allowed to have contact with a person or certain persons), a reporting duty and/or a counseling duty (this means that the suspect has to receive counseling that could help him or her refrain from criminal behavior). The prosecutor can hand out a measure for a maximum period of 90 days. This period can be extended three times with another 90 day period, but cannot exceed 360 days. A measure handed out by a prosecutor will end when there is an irrevocable verdict by a judge on the suspect's case. A measure handed out by a prosecutor has to be seen in the light of the case where the person concerned is a suspect. Therefore, as soon as there is a binding judgment in the case against that suspect, the measure of the prosecutor will cease to exist. The judge, in ruling upon this case, will take the measure of the prosecutor into account. While the suspect is awaiting his or her trial, the judge can be asked to review a measure. In this case, the judge can alter the duration and the content of a measure. If the judge rules that a measure is no longer needed, the judge can revoke the measure.

Specific football related issues

An area ban can be handed out to a hooligan by both the mayor and the prosecutor. Such a measure can be for one or more specifically defined areas within a municipality. However, an area ban has to be tailored to a degree towards the personal circumstances of the person concerned, taking into account where that person lives, where that person works, etc.

A reporting duty can be handed out by both the mayor and the prosecutor. A reporting duty after amendment by the Second Chamber of Parliament has become an independent measure, so it does not have to be attached to any other measure (in the original proposal a reporting duty had to be attached to an area ban). The mayor has discretion to decide where a person against whom a reporting duty is issued has to report. The person, against whom a reporting duty is issued by a prosecutor, has to report to a predetermined investigating officer.

A mayor can hand out a group ban. A group in this instance is defined as a group of three people or more. A mayor can hand out such a ban when such a group does not have a reasonable goal to be together, for example outside a football stadium during a match. This measure enables a mayor to deal with unwanted groups, which repeatedly violate public order in a certain area. Such a group ban is effective for a certain, defined area within the municipality.

A prosecutor can hand out a contact ban. This ban ensures that a suspect of a criminal act does not engage with his or her victims anymore, or does not intimidate possible witnesses before the case goes to trial.

The measures mentioned in the proposed law are specifically designed to deal with the problem of football hooliganism. This can be seen for example in the fact that a mayor can hand out a reporting duty to a person who lives in a different municipality and thus has to report in that different municipality. These measures should also be used to ensure that football hooligans do not travel to away games of their team to cause problems there.

Furthermore, after an amendment by the Second Chamber of Parliament, a new article will be added to the criminal code. This article stipulates that a person who intentionally provides opportunity, means or information resulting in violence against goods or persons will be criminally liable. Under this article, the person who for example puts a message on a message board calling out other hooligans to fight at a certain time and place, can be prosecuted.

A violation of a measure is a criminal offense and can result in a fine or even a prison sentence. The prosecutor and mayor will discuss what approach to take under this law. In case both the mayor and the prosecutor want to hand out a measure to a certain person, the mayor will defer to the prosecutor. Before a measure is handed out, it is crucial that a dossier is created on the person to whom the measure would be handed out. This dossier provides details regarding the specific behavior of the person concerned, the behavior of the group he or she is a part of, the group structure and dynamic, previous measures taken against this person or group and whether there is a fear for further violations of public order. This dossier can include contributions from for example the police, the prosecutor's office and other instances.

A Football Law that solves all problems?

The term Football Law regarding the state of the current proposed law is a little misleading. The law that is expected to enter into force soon is a law designed to counteract all sorts of violations against public order. Football hooliganism is only one of the specific public order problems that this law is designed to deal with. As can be seen from the legislative history, football hooliganism was the main focus when this law was initiated. In the title of the law one can even find a specific mention of football hooliganism. The Football Law was initiated as a result of a number of highly publicized football riots that shocked the general public in the Netherlands. However, as the riots in Nancy slowly disappeared from the national spotlight, other social problems received a lot of attention. Most notable are the public order problems with street youths in the inner cities. What was initially meant as a law specifically to counteract football hooliganism has therefore evolved into a sort of catch-all law for all kinds of violations of public disorder. This does not mean that the Football Law cannot be used anymore to deal with the problem of football hooliganism.

The Dutch Minister of Justice, in reply to questions raised in the First Chamber regarding the Football Law, stresses the fact that football hooliganism by nature brings with it violations of public order committed by a group of persons and directed by the leaders of that group. Therefore, the prosecutor and mayor are the most suitable persons within the Dutch legal system to deal with football hooliganism within the framework of this law. The Minister of Justice also stresses the fact that this law is not designed to deal with immediate outbreaks of public disorder. The Minister states that this law is designed to counteract a pattern of violations of public disorder, for example by a group of football hooligans. However, where there is a riot, a mayor has other means (emergency measures), more specifically designed to counteract that immediate outbreak of public disorder. This law is designed to break a structural pattern of public order violations committed by groups and in some instances by individuals.

This law will not solve the problem of football hooliganism in the Netherlands. With this law, football hooliganism in the Netherlands will not disappear. This law does however form a welcome addition to the current array of legal measures to deal with football hooliganism. And that is exactly how this law should be viewed - as an addition to the current legal framework to address football hooliganism, which gives far-reaching powers to the mayor and prosecutor to deal with the problems caused by hooligan groups. This law provides the

authorities with something that was lacking before in the legal framework—a direct way to address the most notorious violators and leaders of the Dutch hooligan groups and to hopefully break the hierarchical structure of these groups.

This law fits in nicely within the current legal framework to counteract football hooliganism in the Netherlands. In case of (a threat of) immediate violations of public order, the mayor can issue an emergency ordinance based on the Municipalities law. This is a fairly severe measure that impacts an individual's constitutional rights and the mayor accordingly needs to be very cautious in using this instrument. However, an emergency ordinance is a measure that is an appropriate response to very serious and immediate threats to public order, for example a large scale riot between competing football fans within the boundaries of the municipality the mayor is responsible for. The powers given to the mayor in the proposed Football Law fill a void in the possibilities for a mayor to deal with football hooligans. In those situations where there is no immediate threat to public order that requires the extreme measure of an emergency ordinance, but where there is a structural pattern of public order violations by football hooligans, this proposal offers the mayor a way to act.

In and around the stadium, the clubs and the KNVB are responsible for maintaining the order, together with the authorities. If someone does not behave within a stadium, that person can be expelled from the stadium by the stewards employed by the clubs, who as representatives of the club maintain order within the stadium. If someone's behavior warrants this, the KNVB can also act against this person by giving the person concerned a civil law stadium ban.

If a person commits a football related criminal act, this can ultimately warrant a criminal sanction. This person will then be punished for that act by a judge upon a complaint by the prosecutor. The judge in the case of a conviction for a football related crime can, on the basis of article 14(c) of the Criminal Code, attach a measure such as a stadium ban, an area ban and/or a reporting duty to this conviction. However, this possibility has not or rarely been used by judges in the Netherlands. The powers given to the prosecutor under this law fill a gap in the current array of legal measures, in that they provide the possibility of handing out a measure to a person against whom there is a strong suspicion of a criminal act who is not convicted for that act yet. The proposed Football Law will also most likely change the attitude of judges with regard to article 14 (c) of the Criminal Code. If the prosecutor has already handed out a measure to a person, the judge, upon convicting someone for a football related crime will be more likely to take over such a measure. So while article 14 (c) Criminal Code is rarely used at this point, it is to be expected that after the football law enters into force, this article will be used more often to attach conditions to a conviction for a football related crime.

In conclusion, the Football Law has been taken up in a broader proposed law to counteract various violations of public order. This does not mean that the Football Law does not help in combating football hooliganism. As shown above, the Football Law fills an important void in the powers of the mayor and prosecutor to deal with football hooliganism. Therefore, it is to be hoped that this law will enter into force as soon as possible.



The Slovak Act on the Organization and Support of Sport; a Missed Opportunity?

by Jozef Čorba*

1. Introduction

The changes in the political and economic system in Slovakia that were initiated in 1989 influenced all areas of public life including sports. The transition from a directly controlled economy to an economy based on market mechanisms and free competition led to the introduction of market elements in the field of sport also. Nowadays, sport is perceived as a 'product' that is supplied to an audience - consumers. Hence, in order to be successful this product has to be of the best quality.

To improve quality and sport results one needs high quality athletes. Athletes can only achieve better results if they are given sufficient time and space for preparation. The highest level of sport competition requires systematic long-term preparation, which can only be achieved if athletes can practice sport as their profession. It was already apparent under the previous political system that if Slovak athletes were to be successful and able to significantly compete with athletes from other countries they needed to engage in sport professionally. In the period before 1989, however, officially professional sport did not exist in Czechoslovakia. Athletes were officially employed in various state businesses or public bodies, where they supposedly performed various white or blue collar functions while practising their sport as amateurs. In reality, they performed their non-sport jobs only in name and dedicated all their time to sports activities and preparation for sports events on behalf of their employer. They were therefore in an actual sense professional athletes, although

formally amateurs and subject to appraisal for their 'official' jobs which they were in fact not doing at all.

This simulation of amateur status was eliminated from sport after 1989 and since then the highest level of sport has been organized along the lines of the principles of professionalism. Many sport clubs transformed into corporate bodies based on principles of private law, especially as private law associations established on the basis of Act no. 83/1990 on associations, and more recently, especially in top sport competitions, sport clubs have been established as companies under the Commercial Code that came into force in 1991.

With these changes discussions also began concerning the options for the legal regulation of this new situation in sport. Act no. 68/1956 on the organization of physical education, according to which the relationships in amateur sports organizations are regulated, was considered no longer suitable to the demands of this new era.

2. The development of sport legislation in Slovakia after 1989

The first decree related to the field of sport was adopted by the Slovak parliament at the time when the Czech-Slovak Federative Republic still existed as Act no. 198/1990 which contained 9 provisions. This Act was, however, more of declarative than of practical importance.

On the first day of the year 1993 Czechoslovakia split into two autonomous states and the legislative developments in both states took their own turn, although of course the laws of both countries are still significantly inspired by each other.

In Slovakia, Act no. 288/1997 on physical culture and on the amendment and completion of Act no. 455/1991 on trade law were adopted. However, this Act could not yet be considered as the fundamental Sports Act due to its restrictive wording which fails to address most of the questions that needed to be answered in relation to sport.

Kralik distinguishes various perspectives amongst states according

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to the amount of regulations in the field of sport that result from their own legislation: on the one hand, there are states with a liberal model of interference in the field of sport and on the other hand, states which use an interventionist model. The interventionist model, which he considers to be dominant in the Slovak Republic, is characterized by a situation where the state is the main sponsor of sport, usually through government institutions. The state in this model is also responsible for the development and support of sport and cooperates with sports organizations.¹

Although the abovementioned Act no. 288/1997 is not particularly voluminous and does not have a complex character, it does indeed still contain the elements of state intervention in the field of sports.

The Act lists the public bodies in charge of physical culture and defines their competence. One of the tasks so defined by this Act is to support the preparation and participation of athletes in representing the Slovak Republic. Certain public bodies are obliged to co-operate to secure the conditions and facilities necessary for the preparation of athletes and their medical care, as well as the exemption of athletes from military service. In particular, the Act determines the amount of financial support allocated to sport from the annual state budget, of which a minimum of 0,5 % is to be spent on physical education. It also includes the resources from the national budget determined by the special Act on state support of sport.

The Act on physical culture provided for the adoption of the Act on state support of sport. The legislator realized however that in practice, sport includes many more issues than just state support of sport and faced the more demanding task of creating a Sports Act which would comprehensively regulate all the legal relationships that stem from involvement in sport activities.

3. Original proposal of the Sport Act

It has been claimed that especially the professionalization of sport brought with it a plethora of ambiguities, legislative gaps, and other problems and questions which resonate throughout the entire legal system.² Many of these problems were determined by the decisions of the ECJ in the cases mentioned above which mainly concerned the legal position of professional athletes in team sports and individual sports, the legal nature of contractual relations between professional athletes and sport clubs, the status and degree of autonomy of sport organizations, the question of broadcasting concessions for sport events, sponsorship, etc.

In the previous electoral term, the Government of the Slovak Republic already prepared a bold and ground-breaking proposal for a Sport Act,³ in which solutions for many of these problems were determined. The proposal was bold in that it would quite radically change the position of athletes and their relationship to sport clubs.

The proposal started from two distinctions that can be made within sport that influence the position of athletes, namely the distinction between amateur and professional sports and the distinction between team and individual sports. Although the legislator hereby chose the correct approach, it did not, in my opinion, reach the aspired goal, as the criteria used to make the distinctions were unsuitable.

3.1. Professional and amateur sport

Article 2(2)(b) of the proposal defined a professional athlete as a person who performs sport as part of an employment relationship based on a sport contract or on a freelance basis, while Article 2(2)(c) defined an amateur athlete as a person who performs sport on the basis of a contract for the performance of sport activities.

However, this latter definition of amateur athlete did not match the general idea of what was considered the essence of amateur sport as it contradicts the present understanding of amateur sport as an activity

performed without any financial reward. For example, Article 1.29(11) of the Rules of transfer of amateur footballers, which were adopted by the Slovak Football Association on 10 July 1993, defines an amateur (in accordance with the FIFA provisions for the status and transfer of players) as a player who has never received a financial reward for their football performance above the amount of real expense following from their performance.

Similarly, the Polish Act on physical culture perceives the receipt of a financial reward for the performance of sport as the criterion distinguishing professional sport from amateur sport. It further also states in Article 3 that professional sport is performed for the purpose of a financial reward.⁴

There are of course cases where amateur athletes receive a certain reward for performing a sport activity, but generally this is restricted to a reward intended to compensate them for any expenses resulting from taking part in the competition. However, such a reward must not constitute a reward for their actual participation in a sport competition.

Payment of compensation for the expenses of amateur athletes is based on the legal relationship between the sports club or association and the athlete who is a member of this club or association. It is not based on a service contract other than an employment contract as this would mean that the athlete should be granted a reward in addition to compensation of expenses.

3.2. Team and individual sport

The proposal for the Sports Act contained two ways in which to define professional athletes, namely professional athletes who perform their activity on the basis of a sport contract and professional athletes who perform their activity on a freelance basis. The main difference is whether the athlete performs a team sport or an individual sport. If they perform a team sport, they act on behalf of a club to which they are tied by means of a sports contract, while in the case of an individual sport the athlete performs the sport independently.

Article 1(2)(c) of the proposal defines a team sport as a branch of sport that is performed by at least two persons who act as one participant in a sport competition, provided there is no competition of individuals in this competition.

The proposal offers no definition of individual sport, which may be presumed to mean that all other sports are considered individual sports.

The phrase 'provided there is no competition of individuals in this competition' may give rise to certain problems. If the legislator intended it to mean that collective sports are only those which exclusively include competitions of teams and do not include competitions of individuals, a problem may arise in the classification of certain sports, such as for example tennis, boxing, swimming and athletics, which may include both team competitions and individual competitions. At the same time, if athletes compete on behalf of a sports club, their performance in these sports should be considered according to the rules applying to team sports given that they have entered into a relationship with the sports club which contains the same elements as in a 'purely' team sport. However, this interpretation would be more acceptable if the definition contained the wording 'provided there is no competition of individuals in this sport'.

However, the legislator chose to use the words 'provided there is no competition of individuals in this competition' by which it probably meant 'competition of teams'. In this sense, some branches of sport where both teams and individuals take part in competition should then be considered to be both individual and team sports.

A problem with interpretation could emerge for example in cases such as the Formula 1 competition, where two kinds of evaluation exist within one and the same competition - the award for individual pilots and the award for teams (Constructors' Championship). This would imply that car racing, or at least Formula 1, is an individual sport, although the relationship between individual Formula 1 pilots and their teams is evidently built on principles that are similar to the principles at work in the relationship between athletes and sports club in team sports.

1 Králík, M.: *Právo ve sportu*. Praha: C. H. Beck, 2001, s. 179.

2 Králík, M.: *Zamyšlení nad tzv. sportovním právem*. *Právní rozhledy*, v1, 1998, c. 10, s. 491.

3 The full wording of this Act can be found at www.rokovania.sk/appl/

[material.nsf/o/FE52238C945CF595C12571060048FC41/\\$FILE/Zdroj.html](http://material.nsf/o/FE52238C945CF595C12571060048FC41/$FILE/Zdroj.html) (d'alej len "návrh zákona o športe").

4 Sobczak, J.: *Prawo sportowe (wybór aktów normatywnych)*, Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa, 1998, s. 16.

On the other hand, individual sports are those sports that do not fulfil the criteria by which team sports are described. In these branches of sport competitions are organized for individuals. In our opinion, individual competitions should be considered as competitions in which athletes compete as physical entities in their own name and on their own responsibility and as such enter into an individual legal relationship with the event organizer.

By contrast, in team sports athletes do not enter competitions in their own name, but in the name of and on the responsibility of another entity, for example a sport club or association. At the same time, the deciding factor should not be whether in a particular competition the team is represented by only one athlete or several athletes. This is why sports like tennis, table tennis, boxing, wrestling, etc. can still be considered to be team sports when the athletes compete in the name of their teams, but can also be considered to be individual sports when the athletes compete in their own name, e.g. like in the case of the professional tennis competitions organized by ATP and WTA.

As a defining criterion it should not be decisive whether in a given sport there is a competition of individuals from the point of view of the number of athletes acting as one participant in the competition. The criterion should instead be the fact whether individuals or teams take part in a particular branch of sport.

In this way, it could be concluded that there are no purely individual sports, as all sports include a team competition (and by this we do not mean representation teams, where the situation is more complicated).

It would be better not to speak of individual and team *sports*, but of individual and team *competitions*, because the differences in the legal relationship and the legal consequences derive from the fact whether athletes compete in the name of the team or in their own name and not from how many athletes make up for one participant in the competition.

3.3. Professional sport contract

Another issue leading to potential controversy was the fact that according to the proposal for the Sports Act an employment contract was established by a professional sport contract. This followed from an amendment of the sport contract under Article 57 of the proposal - elements that were amended were especially certain issues regarding the conclusion of such a contract, its duration, the rights and responsibilities of the parties to the contract, and the consequences of breach and termination of the contract. Relevant provisions of the Labour Code were declared applicable to the legal relationship thus established between the sport club and the athlete, even if this subsidiary part was absent from the Labour Code, as it followed logically therefrom and also from a terminological point of view. The proposal for a Sports Act stated that an employment relationship is formed between an athlete and a sport club and that this relationship is established by a contract of employment as stated in the Labour Code. However, if the subject of the contract of employment was engagement in sport activity, provisions of special law in this area (sports law) which regulates contracts of employment would then also have to be applied to this contract. The amendment of the sport-specific employment contract made it only slightly different from a general contract of employment. The amendments were necessary to follow the relationship between sport clubs and athletes having

regard to the special character of sports activity and specific issues that arise in the field of sports. The appropriateness of the involvement of these discrepancies in the proposal could be the subject of a lengthy discussion here. However, that is not the aim of this article. The aim of this article is to take a closer look at the present amendment.

The abovementioned provisions were received rather sceptically by the representatives of sport administration and management. For the sport clubs (and from the point of view of taxation and social security, also for some athletes) it is more convenient to regulate the relationship with their athletes by means of company law or private law contracts. In my opinion, the legislator applied the aforementioned usual ECJ rules which state that there is an employment relationship between the sport club and the athlete. This conclusion is confirmed by the legal definition of the term dependent labour according to Act no. 311/2001 under the Labour Code. The element of dependency is apparent for example in the case of professional footballers. Footballers cannot decide themselves whether they will take part in a match on Saturday, or choose the position they would like to play on, or the team's strategy. These choices all depend on the instructions given by the club, or, alternatively, by the coach acting as the athlete's supervisor.

The proposal attempted to shed more light on the position of individual athletes as well. It may be concluded that an individual athlete performs a sport activity continually, individually,⁵ in his own name and on his own responsibility, and for profit,⁶ Therefore, they act as trade licence holders. The Trade Licence Code does not exclude sports activity from the definition of the term 'trade' in Article 3 of Trade Licence Code and so sport activity is not excluded from trade licence business.

However, no trade licences or any other business concessions are issued for the performance of sport activities and individual athletes are considered to be a type of freelancers *sui generis*. It was stated in the proposal for a Sport Act that a professional athlete who performs sports activities in a professional or open competition and acts in his own name and on his own responsibility is considered to be a freelance worker according to special regulations. These special regulations, as was explained in a footnote, were intended to be the provisions of the Trade Licence Code. Such athletes would then be considered entrepreneurs under Article 2(2)(b) of the Commercial Code. The explanatory memorandum that went with the proposal for a Sports Act in connection with this stated that if the performance of a sport activity does not involve any elements of dependency this means that the athlete acts on his own behalf, in his own name and on his own responsibility, and that from an institutional point of view such athletes have the status of freelance workers. As a result, the amendments to the law on sport activities performed individually fall under the scope of the Commercial Code.

It is certainly necessary to define accurately whether a person is considered an entrepreneur or a freelance worker as this determines their obligations in their relationship with sport event organizers, sport equipment manufacturers or TV broadcasting corporations. It also determines the applicability of the Commercial Code or the Civil Code. The proposal for a Sports Act can be accused of inconsistency in relation to the solution of this problem.

4. Act on the organization and support of sport

The proposal for a Sports Act that was analysed above did not even reach the stage of first reading in the Slovak parliament, as the parliamentary elections in 2006 led to a new government and a rearrangement of the political forces in parliament. The new government did not, however, drop the issue of the adoption of a new Sports Act as the basic regulation for sport from its agenda. Moreover, the composition of the working group that prepared the first proposal for a Sports Act remained unchanged. However, anyone thinking that in the continued work on the preparation of the proposal the mistakes inherent in the previous draft as analysed above would be remedied would be in for an unpleasant surprise.

5 The definition of the individual nature of the performed activity may be ambiguous in some individual sports, which is caused by the fact that there are no criteria to distinguish between individual and team sports under current law and the definition in the prepared amendment of the law is dubious. It is not always possible to make a clear distinction between individual and non-individual sports on the basis of this definition. Also, in some branches of sport

that appear to be individual, the athletes perform for the benefit of their sport club and their individuality or performance in their own name is not fully 'guaranteed' (for example in shooting or tennis).

6 There can be no doubt that one of the aims of professional athletes is the financial reward which they receive, as their salary and other financial rewards are their main sources of income.

4.1. The relationship between sport club and athlete

Under pressure from the representatives of sport management, who categorically refused the option of regulating the relationship between sport clubs and athletes on the basis of employment law (with exceptions under specific sport law), the legislator simply chose not to regulate the position of amateur and professional athletes. Therefore, the new law failed to regulate precisely that which was expected by the entire legal profession. For this reason, the resulting legislative product cannot be considered a Sports Act and its authors have qualified it as merely an Act on the organization and support of sport. The Act that came into force on 1 September 2008⁷ is limited to regulating the role of public bodies in supporting sport, the organization of sport events, the fight against doping, dispute resolution in sport, issues of sports representation and an information system.

The new Act therefore only partially accomplishes the goal which was set by the government. In comparison to the brief Act no. 288/1997, which was not repealed when the new Act came into force and is therefore still valid, steps forward were only made in relation to the fight against doping and the more accurate definition of the competences of sport associations in resolving conflicts that arise during the organization or the course of sport competitions.

The new Act fails to define the legal position of athletes as well as failing to regulate the relationship between athletes and sport clubs. Sport clubs will continue to conclude various hybrid contracts of sport activity pretending that athletes are not employed by their clubs, that athletes have to pay their own taxes and insurance premiums, that they are not entitled to compensation of travel costs when travelling to meet their sporting opponents, etc.

4.2. Sport clubs

In accordance with the policy of the present government, the Act on the organization and support of sport represents a step back with regard to the position of sport clubs. According to Article 9(2) of the Act, sport clubs can only be established as private law associations or as commercial law companies established for a different purpose than engaging in business. At the same time, the Act determines in the provision that follows which payments represent the sport club's own income. The government's intention was for the sport clubs to be involved in sport only and not to engage in any other business activities or generate a profit, but to invest all their income in further sporting activity. In my opinion, this restriction may prove counterproductive. At a time when it is understood in surrounding countries that sport is an economic activity which can be profitable and that sport clubs behave as enterprises⁸ on the market, Slovakia seems to have taken the opposite direction and is involved in lengthy discussions concerning a legal regime that could be applied to so-called non-business commercial companies

4.3. National sport associations

The new Act has in a way strengthened the position of some sport associations. These are in particular the associations which according to the new Act can be considered national sport associations.

The first condition laid down by the Act for national sport associations to fulfil is that they must be established as private law associations. This seems a little restrictive and it is unclear why it was necessary to exclude different types of legal personality, although it is true that sport associations are in most cases private law associations already.

Another criterion is the recognition of such a sport association by the Slovak Olympic Committee, which has to recognize it as the representative of a sport that is acknowledged by the International Olympic Committee or by the International Federation of Sports at Schools or the International Federation of Sports at Universities. If a

sport association is not recognized by any of these organizations it can still acquire the status of national sport association if it is a member of an international sport association which unites at least 10 national sport associations as members. At the same time, a national sport association must have at least ten active sport clubs (possibly as their members - the meaning of the verb 'to have' is not specified in this definition) and at least 200 certified athletes, it has to organize regular national sport competition for at least three consecutive years, has to ensure the selection and preparation of athletes for representation, has to rear new sport talent and has to create conditions for out-of-school sport activities for children.

Sport associations which fulfil these criteria become authorized partners in the dialogue with the public bodies involved in sport, meaning more specifically that they may represent the interests of a given sport in relations with ministries and other public bodies and that they are authorized to ensure the preparation of sport representation and participation in international sports events, which enhances the dominant position and status of these associations.

The Act further determines the possible sources of income of national sport associations, which as becomes clear from the explanatory memorandum should apparently be limited. What would happen if a national sport association enjoys other types of income is not clear. The Act makes it possible for national sport associations to establish commercial companies. However, if these involve business in state representation, the national sport association can be the only partner in such a commercial company and the profits can only be used to carry out the tasks listed in the Act on the organization and support of sport or to finance its own operation.

It is possible that the legislator's intention was to prevent the leaking of finances which are intended to further develop sport into the private income of certain individuals. What is the real *ratio legis* of such restrictions does not become clear either from the Act itself, or from the explanatory memorandum. In fact, if it is possible to regard the rewarding of the association's top management as part of financing the association's operation, this restriction is useless.

In connection with these provisions, the explanatory memorandum calls for transparency in the financing of national sport associations. It is however our opinion that there are other legal institutions which sufficiently ensure the transparency of the financial relationships with private persons and of the acknowledgment and utilization of grants from the public budget and that to restrict the activities and freedom in decision making of national sport associations does not help reinforce transparency.

4.3.1. National sport associations and national representation

The Act defines the representation of the state in sport by explicitly stating that an athlete who is a member of the national sport representation does not represent the corresponding national sport association, but directly represents the Slovak Republic and that this representation is delegated to the Slovak Olympic Committee, the Slovak Paralympic Committee or the national sport association. The Act considers the Slovak Republic as the participant in international sport competitions, not the particular sport association which is a member of the particular international sport association organizing the competition. However, this perspective does not always correspond with the rules of international sport associations. For instance, according to the rules of UEFA concerning the organization of the European Football Championship, the Championship is intended not for individual countries, but for the teams of the member associations.⁹

It remains unclear also who authorizes representation in sports that are not Olympic sports and where there is no active association which has the status of national sport association.

4.3.2. Normative authorization of national sport associations

The national sport association organizes or authorizes the organization of national sport competitions. According to the Act on the organization and support of sport the entity which organizes a sport competition is authorized to determine the conditions for participation, the rules of competition, supervision of the course of the com-

7 Act no. 300/2008 on the organization and support of sport and the amendment and completion of certain other provisions.

8 Di Pietro, D.: The Dual Nature of Football Clubs and the Need for Special

Legislation, *The International Sports Law Journal*, 2003, c. 2, s. 24 and following.

9 Article 1.01 UEFA rules for European Football Championships 2006/8 available at www.uefa.com/newsfiles/19079.pdf.

petition and the prizes or rewards in accordance with Articles 850 and 851 of the Civil Code.

This provision, probably without the legislator's intention, means a significant breakthrough in the perception of sport rules adopted by sport associations. The rules of national sport associations on the organization of sport competitions are now no longer merely a contractual matter, but the competence of national sport associations to adopt such rules is defined by law. The recipients of these rules will have to abide by them, regardless of their acceptance of them at the time of application for a competition, application for membership of the national association, etc. This could be said to constitute a delegation of state authority to national sport associations in determining the rights and duties of participants in sport competitions, candidates for participation in sport competitions or other entities involved in sport competitions.

It should be mentioned that the legal acknowledgment of these competences of national sport associations does not alter the fact that the rules issued by them must be in accordance with mandatory rules of law.

In our opinion, sport rules, even if they are issued in accordance with legal authorization, cannot prevail over generally binding legal provisions. In spite of their legal authorization, they fail to meet the conditions for classification as normative legal acts, because they are not necessarily published in a way described by law.¹⁰ For this reason, we believe that such regulations are subordinate to mandatory rules in all normative legal acts¹¹.

In our opinion, the legal solution adopted acknowledges the right of national sport associations to adopt provisions which are not related to their own organization, but are also related to the commercial activity of their members, as was also an objection raised by the Court of first instance when it reviewed the nature of sport rules, for example in the judgment in the *Piau* case.

The question still remains as to how broadly we should interpret the authorization of national associations to determine the rules of sport competitions. Should the authorization include rules for the TV or radio broadcasting of sport events, or rules for employing players' agents? If so, then these rules would be automatically binding upon entities that are not members of national sport associations, for example television companies or drafters of professional sport contracts, all on the basis of Article 8(3) of the Act on the organization and support of sport.

4.4. Dispute resolution in sport

Part 4 of the Act on the organization and support of sport containing Articles 24-27 that deal with dispute resolution in sport will have significant impact on the legal situation in sport. The Act still distinguishes between the resolution of disputes that arise in the course of a particular team game or an individual performance and disputes that arise outside this context.

The resolution of disputes arising during the course of the game is left to the competence of the sport associations or to arbitrators appointed by them under the rules of the sport association concerned (i.e. not in accordance with Act no. 244/2020 on arbitral proceedings) and arbitrators' decisions in such cases are final. It is apparent that the legislator clearly wished to exclude such arbitral awards from appeal proceedings or special proceedings so that the smooth running of the competition is not disrupted. This is a case of legal delegation of the competence to issue individual legal acts. However, what if a

participant in a sport competition feels prejudiced by the arbitrator's decision in the course of a game and decides to turn to a general court with a claim for reparation? Claims for reparation are typically cases for private (or alternatively commercial) law and a court will have to hear such a case or it could be considered as a refusal of justice (*denegatio iustitiae*).

National sport associations are also authorized to decide in cases that arise outside the course of a particular game and involve breaches of the rules for competition or of the rules of national associations that regulate disputes between:

- a) the organizer of a sport event and a sport club participating in such an event or an athlete competing individually and in his own name;
- b) sport clubs that are members of the national sport association if the dispute does not relate to commercial law or property issues;
- c) a sport club that is a member of a national sport association and an athlete or sport expert who is a member of or has a contractual relationship with the sport club if the dispute does not relate to the fulfilment of contractual obligations concerning labour law or private law rights, as such disputes have to be decided by the relevant courts.

The legislator thus attempts carefully to allocate competence between the national sport associations and the courts. This demarcation of the discretionary powers of national associations within the law strengthens the overall position of national associations and the authority of their decisions. It could be said that the Act acknowledges the legal authorization of national sport associations to issue individual legal acts. We have to appreciate the contribution of the new Act in this field, as it clearly declares that issues closely related to the organization of sports events are subject to a certain degree of autonomy and that the state should not interfere in this without sufficient reason. However, in our opinion, this does not mean that authorized decisions of national associations may not be reviewed by the general courts under the aforementioned Article 15 of Act no. 83/1990 on associations. Decisions of national associations made outside the context of a particular game are not considered final according to the Act on the organization and support of sport (other than is the case for arbitrator's decisions as mentioned above). In reviewing such decisions, the general courts will only investigate whether the decision of the national association is not contrary to its rules or regulations or to provisions of law that prevail over the provisions of sport associations or sport competitions' regulations. National associations should not presume to take over the role of general courts, as decision making in commercial disputes between sport clubs is excluded from their authority by law (it is not clear why the situation is not the same in respect of private law disputes). Outside their authority is also decision making regarding labour law and private law claims arising in contractual relationships¹² between clubs and athletes or coaches. These are disputes that according to Article 7 of the Civil Code belong to the jurisdiction of the general courts. However, this does not eliminate the possibility of sidestepping the jurisdiction of the general courts through arbitral action.

Typical disputes that are to be decided by national associations outside the course of a particular game may for example be disputes regarding permission to participate in the competition or refusal of such permission. Possible claims for damages submitted by sport clubs that are refused permission to compete will still be decided by the general courts.

It is worth noting that the Act presumes that a commercial law relationship is mainly developed between sport clubs. Although the Act does not contain a legal definition of either team or individual sport, in Article 25(1)(a) it discusses the legal relationship between the organizer of a sport competition on the one hand and a sport club or an athlete performing individually and in his own name on the other. In this way, the legislator implies criteria for the distinction between team sports and individual sports. These criteria would then establish whether a participant in a sport competition is a sport club or an athlete competing individually and in his own name - similarly to what we stressed elsewhere in the present article.¹³

¹⁰ See Brösl, A. - Dobrovicová, G. - Kanárik, I.: *Teória práva*, Košice: UPJŠ, 2004, p. 46

¹¹ The publication of legal acts nowadays makes for the only difference between rules adopted by sport administration bodies and generally binding provisions adopted by municipalities as local authorities. This cannot be said about the relationship between the norms of sport associations and generally binding provisions of municipalities as these are

original normative legal acts, *idem*, p. 57.

¹² It is interesting to note that the Act only excludes decision making in contractual disputes concerning labour law and private law. The legislator apparently forgot about possible conflicts arising outside the scope of contracts where there is no reason for any deciding authority of the sport association as such disputes do not follow from the contractual relationship between their members.

5. Conclusion

In this article I have expressed my disappointment with the fact that although a significant piece of legislation was being prepared in the Slovak Republic which should have served as a fundamental code for the ever changing and dynamically developing field of sport, all there is left is just a bare outline. Fundamental problems that trouble lawyers dealing with sport were left unresolved and open to ad hoc treatment by sport clubs and sport organizations.

Sport administrators managed to eliminate from the proposal all references to issues of employment under a professional sport contract and still believe that if they do not call their contract with an athlete an employment contract that they do not have to fulfil any of the duties of an employer towards its employees under provisions of tax and social security law. Still, if the Slovak Labour Code defines the term dependent work and if all contracts are considered on the basis of their content and not on how they are formally described their point of view may prove to be shortsighted and they could be unpleasantly surprised at the next tax or social insurance audit.

¹³ For example Corba, J.: Obchodovanie s bielym mäsom? Právne aspekty zmluvných vzťahov pri prestupoch športovcov. In: Husár, J. (ed.): Právo a obchodovanie. Zborník príspevkov úst-

níkov vedeckej konferencie doktorandov konanej 7. júna 2007 v Košiciach, Košice: UPJŠ, 2008, s. 46 - 56, available at www.pravo.upjs.sk

Under the present state of affairs, the legal relationship between a professional athlete and a sport club is according to Slovak law only regulated by the Labour Code. The previous proposal for a Sport Act which was rejected by sport administration bodies should have contained a special provision with regard to the field of sport as *lex generalis*, which would have considered all the specifications of the legal relationships in the field of sport, the necessarily brief nature of a career in sport, changes in the beginning and ending of the sport seasons, etc..

For these reasons, I consider the failure to adopt a new, comprehensive Sports Act and the adoption instead of a limited Act on only the organization and support of sport as a missed opportunity to develop legal relations in the field of sport.

On the other hand, it may be considered an advantage of the present Act that it strengthens the position of sport associations that have the status of national sport associations. It also attempts to clarify the competence of arbitrators in questions in connection with sport activity and the division between state bodies and sport management bodies.

It remains to be seen what contribution the new Act will make in the Slovak Republic once it is applied in practice.

Regulation in the Market of Sports Agents. Or No Regulation at All?

by Mark Smienk*

1. Introduction

There is an actual debate going on, what to do with the profession of sports agents. Recently, the Voetbal International¹ published an article about the profession of sports agents.² The article said that all regulations applicable to the sports agent will be eliminated. The license, which is in place now, will be withdrawn. The clubs are not obliged to pay money to the sports agent anymore, the players have to pay it. It is not officially published by the 'Fédération Internationale de Football Association' (FIFA), but some people confirms that this will be the new step against the corrupt sports agents. The sports agents will go in a free market and everyone can enter it without any education. In the light of this debate, it is interesting to see what regulations are in place and what the implications these regulations give. It is not sure, whether the FIFA really is going to do this, but it will lead to a heavily debate between sports agents, clubs, players and the FIFA.

The last decades, the industry of sports agents has emerged tremendously, especially in the United States of America (USA). Before, athletes and clubs were not negotiating very often over their contract. All the athletes could only negotiate with one club and if they want to play they had to accept it (Wilde, 1992). The clubs had a lot of power in the old situation. This is called a monopsonistic market, there exist a single buyer. The single buyer is the club or the owners of the club, because sports owners are a small and interconnected group and they group together and act as monopsonists (Kahn, 2000). The reserve clause created such a market for the participants, the reserve clause was created by the sports organizations. It meant that most players stayed with one club during their career.

When the reserve clause did not exist anymore, the athletes were free to negotiate with other clubs at end of the contract. At the same time, the professionalizing of sports all over the world contributed to higher salaries and more transfers of athletes. It has lead to a multi-billion industry (Wilde, 1992).

These two developments have lead to more power for the athletes in the USA. As explained in Rosen (1981), the connection between personal reward of an individual and the size of the market is closely connected. So, the evolution of professional sports to a multi-billion euro industry is an important aspect of the increase of the salaries.

The paragraph above is about the USA, but the situation in Europe is a little bit different. There are some similarities and some differences. First and probably most important difference is the reserve clause, because it never existed in Europe. When we discuss Europe, the main focus will be on European football. In European football, there was a major change after the Bosman-arrest in 1995, but it was almost the same as the reserve clause. So, in Europe there was monopsonistic power for the clubs, but not as much as it was in the USA. That is the reason why we should read all the articles and literature from the USA with caution, because it cannot be translated totally to Europe. I will discuss more of the differences between the USA and Europe, in chapter 1.2. The Bosman-arrest in European football also created a new system, which was that the players became free agents, when the contract expired. The professionalizing of sports was also present in Europe and it came at the same time as the Bosman-arrest, roughly. The Bosman-arrest and the professionalizing of sports have also lead to multi-billion euro industry in Europe. So, in Europe the Bosman-arrest and the professionalizing of sports leads to the higher salaries of players and also leads to more power of the players in comparison with the clubs.

The changing labor market for players³ has lead to the creation of a new market: the market for sports agents. I will discuss the labor market for players more extensively, in chapter 2.2. A sports agent is

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¹ A Dutch magazine with articles about the football world.

² The article can be found in: Voetbal International, week 34, pp. 114-118.

negotiating on behalf of a player with the club and they receive a commission for the service.

Nowadays, the sports agents are part of the professional sport culture. They have a significant power in the market, some people even say that they have too much power. In such a way, that they can influence the migration flows, transfer fees and wages in the way they want it. It used to be a two-sided relationship between a player and a club. Today, the sports agent is the third actor in the market.

So, the two-sided relationship evolved over time towards a three-way relationship, consisting of the clubs, players and the sports agents.

There is a principal-agent problem in the three-way relationship, because the sports agent is negotiating on the behalf of the athlete. The third party is not involved in the traditional principal agent problem, but we have to keep the clubs in mind. They can influence the principal-agent relationship between the player and his sports agent, by aligning the interests of the clubs more with the sports agents. The athlete and sports agent have a conflict of interest and there is information asymmetry, because every actor is trying to maximize his own profits. A sports agent has more knowhow of the market and he has more experience in the bargaining process. For the athlete, it is important to give the right incentives to the sports agent in order to align the interest of the sports agent and the athlete. If a sports agent is negotiating a contract in the interest of the player, then this can be seen as bargaining at arm's length (Bebchuk and Fried, 2004). The principal-agent problem and the bargaining at arm's length will be discussed in respectively chapter 2.3 and chapter 2.4.

Authorities or private institutions have to set some regulations in order to constrain the power of a sports agent and the ability to abuse a player (Sobel, 1987). Without any regulation, the power of a sports agent or a group of sports agents might become too strong. Nowadays, there are regulations in the market of sports agents. A good example is the license, which is needed to be a sports agent in most sports. If the requirements for such a license are high, the quality of the sports agent increases.

Furthermore, there is not much research available in the field of sports agents in Europe, in contrast with the United States of America. The literature about the sports agents in USA is extensive and it can be used for sports agents in Europe, but there is still not a clear guideline how to regulate the market for sports agents.

1.1. Problem statement

In this research, the focus will be on the regulation in the market of sports agents. When thinking about the regulation in the market of sports agents, several questions arise. Why is there a need for the market for sports agents to be regulated? More specifically, which problems or market failures arise in an unregulated market for sports agents? Can these problems be solved by regulation, and if so, how?

What can be learned from regulation of the market for sports agents in the USA for Europe and in particular the Netherlands? In order to narrow the research, the following problem statement is formulated:

“How does the market for sports agents in football look like in the Netherlands and is the regulation in place enough to create an efficient market?”

In order to answer the research question it is necessary to set up some sub questions. The first would be: What does the academic literature say about the market of sports agents and what economic theories are useful for this market? The second question is: What regulations are

3 The players received more bargaining power during contract negotiations, as explained in the paragraphs above.

4 Not the same as European football.

5 The highest league in the Netherlands is the 'Eredivisie' and the second league calls 'Eerste Divisie'. It used to be the case that the clubs in the second highest

league could not relegate. This season the clubs can relegate.

6 The regulations set in the USA on the clubs are to maintain the competitive balance within the competition. It is a reaction on the closed leagues and play-off system. (Groot, 2008).

7 The functions will be explained in chapter 2.1.

in place in the market of sports agents in the Netherlands? After that, the question arises: How does the market of sports agents looks like in the Netherlands? Finally: What experiences do the actors in the market have with the different regulations in place?

So, I will first start with a theoretical framework of economic theories. In order to understand the market for sports agents, it is good to explain shortly how the labor market for players works. Further examples of theories are moral hazard, adverse selection, principal-agent problem and more. After that, there will be a short review of the literature on this topic. At this moment, there is not yet a clear overview of the market for sports agents in the Netherlands. So, after the literature discussion I will give the view of different actors on the market. In order to this, I have done interviews as an empirical study. The actors are the clubs, sports agents and the players. The focus in the research will be on Dutch football. At last, there will be a conclusion, with the findings of this study.

1.2. Differences between USA and Europe

In this chapter, some of the important differences and similarities of USA sports and European sports will be discussed. It is important to know the differences, because the most of the academic literature is from the USA.

First, it is important to know which sports are called USA sports or European sports. In the USA there

are four main sports, which are played on a great scale throughout USA. The four sports are Ice hockey, Basketball, Baseball and American Football.⁴ In Europe, there is one sport throughout the continent, which is very popular. This sport is football or like the English people prefer to say it, it is soccer. In this research, I will use the name football.

In the leagues in USA there are closed leagues, which are not in place in Europe. This means that a club cannot relegate to a lower level. The implication is that the competition at the bottom of the league is not very exciting. In Europe there are open leagues. It is different in every country until which level. In the Netherlands, for the first season, the league became an open league.⁵ The clubs in the second highest level can relegate to a lower league. To determine the champion in the USA, the clubs have to play playoffs at the end of the season. In Europe it is determined by playing a competition without playoffs.

In the USA there are several regulations on the clubs, which restricts the clubs in buying players. For example, there is a rookie draft. It means, that the club which ended at the bottom of the league can choose, as first, a young player (rookie). So, the worst clubs can choose, in theory, the best player for their squad. Furthermore, there is the salary cap. The salary cap means that a club has a limitation on the salary expenditures. It is not possible for the club to get a lot of star players for a high salary, because that would go beyond the salary cap. Another example is gate-sharing.⁶ In Europe there are no regulations like these, which limits the clubs.

So, you can conclude that the literature from the USA is written from another perspective and another landscape, in comparison with Europe. That is why the literature from the USA cannot be translated fully to the European market.

1.3. Methodology

The methodology used, in illustrating the market of sports agents, is interviews. To make a clear picture of the market of sports agents, it is necessary to speak all different actors within the market.

Due to the lack of time, it is not possible to speak with every sports agent active in the Netherlands.

There are some companies active in the Netherlands, which are focused on the monitoring of professional footballers. So, I have spoken with two sports agents in such a company active. These companies are trying to offer function one until function five to all the players.⁷ There are other actors active, besides the sports agent. The players and clubs are also part of this market. The players are the clients of the sports agents and the clubs also can be a client of a sports agent or they are the negotiating partner, when the sports agent is represent-



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ing a player. In order to create an objective opinion about the role of sports agents, I will try to contact these actors as well. I was able to arrange a meeting with a manager of a club and one manager was able to respond by e-mail. I was not able to contact any player. So, an interesting part of the research is not included. It was also due to the lack of time and the busy period for players (the pre-season).

The first interview is with an academic, with a high expertise on the field of sports agents. He is giving his academic view on the different topics in the market of sports agents. In this way, I can sketch the global picture of the market and from an independent view. The academic, who was willing to cooperate with the research, was Rob Siekmann.

Besides the three main actors in the market and the academic, there are several other important actors present in the market. First of all, there are unions active. The 'Vereniging Van Contractspelers' (VVCS) is the union of the players. The most important role of the VVCS is that they are negotiating on behalf of all the Dutch professional players during the collectively bargaining process. The collectively bargaining process deals with the secondary working conditions. The collectively bargaining process will be discussed in chapter 2.2.5 and chapter 3.5.2. It would be interesting to know, what their opinion is about the sports agents and the interesting topics of the market.

Furthermore, the 'Federatie Betaald voetbal Organisaties' (FBO) is present in the market. They are the union for the clubs and they are representing the clubs during the collectively bargaining process.

Finally, the sports agents also have a union: ProAgent. ProAgent is also included in the research.

The 'Koninklijke Nederlandse Voetbal Bond' (KNVB) is the regulator in the market of sports agents.

They also monitor the market if some sports agents are not acting according to the regulations and they can impose fines or sanctions. They also issue the license and are responsible for the exam. They are an important actor on the market as a legislator. That is why, it would be interesting to include the KNVB in the research.

Some interesting topics will be discussed during the interviews. The license is nowadays a hot topic in the market of sports agents and how it should be structured. Or if there needs to be a license at all, maybe is a free market a better option. On this moment, 103 sports agents received the license from the KNVB. Worldwide, there are thousands of sports agents. All sports agents with a license are permitted to be active in the Netherlands, also when the exam is done in Azerbaijan. So, this makes the market even more complex as it already is. It is not possible to include sports agents from all over the world.

After several interviews, I will try to summarize the comments about the topics, like the license, transparency, monitoring function of KNVB and a possible new set of regulations. In this way, I can make some hypotheses about the market of sports agents. In the beginning of chapter 4, I will set some hypotheses and when the interviews are done, I can change the hypotheses. The research I will do is called explorative research, I am looking for hypotheses and I am not going to check them with quantitative research. It is clear that there is not a representative group, who I am going to interview. I was limited by time and the busy period for players and sports agents. The transfer period and the pre-season are going on, when I am writing the thesis. This limits the results, but still there can be some interesting results. It is never been done before and in this research the view of the different unions are present, as well as the view of clubs and sports agents. So, I hope to formulate some interesting and clear hypotheses in the conclusions.

2. The theoretical background of the market of sports agents

In this chapter, the theoretical background will be discussed of the market of sports. Firstly, the sports agents will be discussed and what functions they fulfill. It will lead to a definition of sports agents, which will be used throughout the paper. After that, I will discuss the labor market of players. This discussion is needed, to make clear

where the sports agents come in. Thirdly, some economic theories will be discussed, like the principal-agent problem and the bargaining at arm's length.

2.1. Sports agents

An interesting study has been done by Sobel (1987) about the regulation of sports agents. He is not only giving ideas and insights about regulation, but he also describes the functions of a sports agent.

This paragraph will explain what a sports agent is and what his functions are. In this way, I will avoid any discussion whether someone is a sports agent or not.

2.1.1. Functions

A sports agent is the representative of an athlete during negotiations and he has four main functions according to Sobel (1987), but these functions do not have to be done by a single agent. The definition of a sports agent is also given by Parrish in the book of Siekmann et al. (2007).⁸ The definition is:

'An agent is a person authorized to act for another when dealing with third parties. In theory, a players' agent is merely an intermediary ensuring the supply and demand for labor within sport is met.

For a fee (commission), they assist players in finding clubs, or clubs in finding players' (Siekmann et al., 2007, pp. 1-2)

This is the definition, which will be used in this research. Now, the different functions will be explained from the article of Sobel (1987)

The first function of the sports agent is the negotiating of an athlete's contract. The service of contract negotiation is valuable for almost every athlete, because most athletes have little experience with negotiations and have no business background. This is the main reason, why there exists a market for sports agents. Sports agents have more knowledge over the salaries of other players than the athletes, and they have more knowledge of the details of collective bargaining agreements. For most athletes, this is a reason to hire a sports agent, to negotiate their contract. Also athletes with a business background will hire a sports agent, because the bargaining process during the negotiations can influence the performance of the athlete. Sports agents have an insulating function. The insulating function of sports agents during the bargaining process is when a player has to play for the club after successful negotiations. When there were critics from the club (in order to bargain a lower salary), it could affect the performance of the athlete. Shropshire and Davis (2008) also thinks that the insulating function of a sports agent is very important. It will return in chapter 2.4.4. A good example of the insulating function of a sports agent is shown in the movie Jerry Maguire. The athlete in the movie wants a renewal of his contract, but the sports agent is hearing all the critics on the player. It depends on the sports agent, what the player is hearing. The movie is a good movie about the sports agent and the relation between the sports agent and player is shown clearly.

The second function of a sports agent is obtaining, reviewing and negotiating new contracts. This is also in the commercial sector to get sponsor contracts for the athlete. When the contract of a player expires, the sports agent is responsible for the negotiations during the renewal of a contract. The first function, described above, is getting the athlete at a club, but after this the relation continues. The sports agent can obtain other contracts from third parties or a renewal of the current contract with the club. A good example of an endorsement is the deal between Nike and Roger Federer. Roger Federer is one of best tennis players of the world and is dominating it for a few years now. He signed a tenyear deal with Nike, for more than ten million dollar a year. This is part of the second function of sports agents, to arrange sponsor contracts for their players. In this research, the focus of function two will be on reviewing and the negotiating of the current contract with the clubs. The sponsor's contracts will be excluded. It is important to specify the research. If the sponsor's contracts will be included, it will become more difficult to sketch the whole market of sports agents.

The third function according to Sobel (1987) is investment advice and income management. This is different from the first two func-

8 The article of R. Parrish: 'Regulating Players' Agents: A Global Perspective' is

published in the book of Siekmann et al. (2007), pp. 1-14.

tions. There are two important features of athletes, which encourages athletes to hire sports agents for investment advice and income management. Firstly, the length of the career of an athlete is overall quite short, compared with a normal career. Secondly, many athletes are paid very well. For an athlete, it is not easy to make good decisions about investments, because they do not have the knowledge. Income management is needed, because most of the athletes find it difficult budgeting their expenses over their whole life course. Many athletes become very rich on a young age and they are not always aware of all the different expenses. Since the third function is different from the first two, it might be performed by a specialist.

The fourth function of sports agent is legal and tax counseling, because the above functions have several legal and tax implications. It makes sense, if the third and fourth function is performed by different specialists.

Nowadays, another function can be added to the list, because athletes sign deals with sports agents at a younger age. This means that the sports agent is concerned about the education, health and progress of the youth player under contract. The fifth function will lead to an increase in monitoring by the sports agent. In this way, the relation between the sports agent and the athlete will be more intensive.

Sometimes it is even called as 'babysitting' by sports agents (Shropshire & Davis, 2008)

2.1.2. Conclusion

In this study we will focus on the sports agents who perform all the functions for the player. Sports agents, who perform the five functions, are the greater players in the market of sports agents and they have a clear vision and goal as a sports agent. The third and fourth functions can be outsourced to specialists. These companies of sports agents are not those, who are looking for fast deals and money.

The first two functions of sports agents are the main reasons why the market for sports agents exists.

For simplicity, it will be assumed that every athlete has one sports agent who is negotiating the contract. So, a sports agent is the representative of an athlete who negotiates on his behalf with the club to bargain the best possible contract.

2.2. Labor market for players

In order to clarify what the role is of sports agents, it is necessary to illustrate how the labor market for players works. Due to inefficiencies in this market, there is a need for sports agents in the bargaining process between the athletes and clubs. In this paragraph, the labor market for players will be explained and it shall be pointed out where the sports agents come in.

The fans of professional sports and the media are astonished, when they hear about the salaries of several star athletes in different kinds of sports. Whenever a football player, baseball star or race driver signs a multi-year contract for several millions euro's a year, the public is thinking: why are these people earning such amounts of money? Economists immediately recognize scarcity rents, because the supply of star athletes consists of a few athletes. It automatically means that the athletes have a powerful position in the bargaining process, which results in the high salaries nowadays (Rosen & Sanderson, 2001). If there are no scarcity rents, the wage would be driven down to the opportunity costs of the athlete, which was the case before the free agency (Quirk & Fort, 1999). The labor market for athletes has some important elements, which are also present in normal labor markets. For economists, the labor market for athletes is an interesting field for applied economics, because there is a lot of information available of the workers (athletes) and their production (goals, home runs, assists and more) is known. It makes it easier to estimate the marginal product of player, which is usually not possible for the normal labor market. Still, there are some difficulties for clubs to determine the wage of a player. In a perfect world, player salaries would reflect the value of athletes to their teams. The high demand to professional sports is leading to the high salaries of the athletes (Quirk & Fort, 1999).

In the economic discussion of the labor market in professional sports, some aspects dominate in most academic literature. These top-

ics are: demand for labor, monopsonistic market and the winner's curse.

For convenience, the topics will be discussed in turn.

2.2.1. Demand of labor

The demand for labor is derived from the demand curve for the ultimate goods and services, where the labor is used as an input. Economics uses the marginal product of labor to determine, what a specific worker has contributed to the service or good. The theory of the marginal productivity theory relies on the assumption of profit maximizing. This assumption is the basis of the model, because more labor is employed up to the point that the last unit of labor adds as much revenue to the firm as it costs the firm. So, the marginal product of labor must equal the marginal cost of labor. If the last unit of labor costs more to a firm than it brings in additional revenue, then a firm would not hire the last unit of labor (Sandy, Sloane & Rosen- traub, 2004).

One of the unique aspects of the labor market for athletes is the fact that personal contributions are easily to observe. The marginal product of a player can easily be assessed and this is an important input for team owners to set the wage for a player. A lot of data is available on the personal achievements of the players in games. By setting the wages of players, the demand for the professional sport is also important, as explained above. When the demand for the professional sport increases, the athletes can expect to receive higher salaries. The competitive balance measures the attractiveness of a certain competition. With a higher competitive balance, costumers are willing to pay more for the services (Groot, 2008, pp. 25-27).

'If general managers really were perfect judges of talent, there would be no need to play the league schedule to determine the league champion - we'd simply award the title to the one with the highest payroll.' (Quirk & Fort, 1999, p. 85)

This quote says that there are difficulties in determining the talent of athletes and subsequently the salary, because otherwise the salary would exactly match the marginal product of labor. There are two important difficulties in determining the marginal product. The first difficulty is the presence of interdependence of athletes in team sports. It is important that the players cooperate with each other and that they make each other better, by knowing each other's weaknesses and strengths (Sandy et al., 2004). This makes it difficult to know the marginal product of labor of one player of the team, because he could be good in cooperating with other athletes. Secondly, clubs have uncertainty over the future marginal product of labor of an athlete. They could be injured or the skills can deteriorate or improve and with a rookie the clubs do not know what to expect from these athletes. The uncertainty of the future of a player makes it hard for club to set the right wage for an athlete. The stats of an athlete are not providing a certain marginal product of labor for the next season.

For a club, there are also high training costs in order to raise a potential good player. The training a player receives is useful for every club in the same sport. This leads to the chance that the player goes to another club and the club who invested in the player does not receive compensation. That is an economic rationale for long contracts, because clubs need incentives to invest in their players. Clubs also have difficulties to monitor their young players. It is hard for a club, to monitor a young player outside the training field, if they do so there are high costs involved.

Summarizing, the clubs face difficulties in the labor market through the degree of uncertainty of future productivity, the high training and monitoring costs and the high sensitivity of productivity to cooperation between players within one team. In the next chapter, the power of the clubs will be discussed (Sandy et al., 2004).

2.2.2. Monopsonistic market

The number of clubs at the highest level in a particular sport is small and may form an interconnected group, which has the danger to lead to some kind of power. In this case, it will lead to monopsonistic power in the labor market of athletes. The result is that the athletes

are paid below the marginal product of labor. When the monopsonistic power of the clubs is decreasing, then the wage of the athletes will increase. The term 'monopsonistic power' refers to a factor market with few buyers (Sandy et al., 2004). The amount of power clubs have depends on whether there is just one league or rival leagues. As discussed by Kahn (2000), when there exist two rival leagues the salaries of the players goes up in this period. It is not conclusive evidence of a decrease in monopsonistic power, because there could be other reasons for the rise of the salaries. Kahn (2000) also showed that, when there is just one league the salaries are going down. He analyzed it in the baseball league. He founds more evidence in other sports, which suggests that with rival leagues there is less monopsonistic power for the clubs. Since most sports do not have two rival leagues, this means that there is potentially a high degree of monopsonistic power for the clubs. The monopsonistic power of the clubs was even stronger when the reserve clause⁹ existed in most American sports. Under the reserve clause players have to remain with the original team, unless the club decided to trade or sell the athlete to another team. They never became free agents, who could sell their services to other teams. In the USA the change to free agency came in 1976. In Europe this change came later. The Bosman-arrest in 1995 had a great impact on European soccer. After the Bosman-arrest players could become free agents, when the contract expired. This has led to a decrease of power of the clubs, because players at the end of the contract are free to offer their services to every club. It has led to more competition between clubs in order to attract the free agents (Kahn, 2000). The change was less intense than in the USA, because before the Bosman-arrest the clubs have less monopsonistic power than the monopsonistic power in the USA, during the reserve clause.

An economic rationale for the reserve clause is that it gives the clubs incentives to invest in their players. For example, if the training costs for young talents are high and the skills they learn are general skills, then these skills can be used in every team active in that sport and the skills are not specific for a team. With the free agency the incentives for investing in the training of young talents fell drastically (Rosen & Anderson, 2001).

Another important feature of this market could be the hold-up problem. The hold-up problem exists between two parties, who have to bargain with each other. The most efficient solution between the two parties would be when they are cooperating with each other. But the two parties are afraid to lose power in the bargaining process between the two parties. When one of the parties loses power, then the profits of the party will be reduced. Both parties have to invest in the relation or to cooperate with each other to reach the efficient outcome. In order to reach it, the parties have to work together.

The hold-up problem could also exist in the bargaining process between club and player or between player and sports agent, when the sports agent is representing a player. This could be the reason why clubs can offer contracts with multiple years and a player cannot break this contract. In this way, a club can invest in the relationship between the player and club, because a player cannot leave the club when he wants. In this way, the hold-up problem could be solved between the club and the player, but it ends after a few years (the con-

tract length). Thereafter, a player is free to move every club he wants, because there is free agency. So, the hold-up problem could still exist for a small part in the labor market of players.

In the next chapter, some important features came up about professional team sports, like the existence of rival leagues or the reserve clause/free agency. The two features had an impact on the amount of monopsony power of the clubs. Another feature that came up was the hold-up problem, which exists in the labor market of players. When the clubs have more power in the relationship between the player and the club, then there is not a high need for sports agents. The players were getting more bargaining power by the abolition of the reserve clause system in the USA or after the landmark case of the Bosman-arrest in Europe. To recoup all the possible benefits, a sports agent can help the player. As been explained before, sports agents have more knowledge of the market and they are more experienced in the bargaining process. They are able to bargain a better salary for the athlete, which would not be reached when he was not using a sports agent. The abolition of the reserve clause increased the demand for sports agents, but the existence of one league (and not two rival leagues) will decrease the demand for sports agents. The increase of the abolition of the reserve clause is far greater than the effect of rival leagues.

2.2.3. Winner's curse

Another possible economic reason of the high salaries of the players is the winner's curse. High salaries do not have to be bad by definition, because a player can earn a high wage through the scarcity rents discussed earlier. In practice, you can argue that most of the players are paid more than the marginal product of labor.

The winner's curse is a phenomenon from the bidding theory. It depends on the kind of auction that is used. There are several types of auction available: the Dutch auction¹⁰, the English auction¹¹ and the sealed bid auction. The sealed-bid auction is the best example to explain the winner's curse. Everyone has to make a bid and the bid is only known by the bidder himself. This leads to information asymmetry between the different buyers. The one with the highest bid wins the bidding process, but the difference between the highest bid and the second-best offer is known as the winner's curse. If the offer of the highest bidder was one euro more than the second highest bidder, he would also win the auction.

The bidding process in contracting athletes is not a sealed-bid auction, but for clubs it is hard to determine the value of a player and to know what other teams are willing to pay for the player (second-best offer). So, the bidding process have some features of the sealed-bid auction, like the information asymmetry between clubs. They do not know what others are willing to offer. The best solution is, when the highest offer is one euro above the second-best offer. The chance that the team who contracts a free agent is overestimating his marginal product of labor is bigger, then that a team is able to contract the free agent who is underestimating his marginal product of labor (Quirk & Fort, 1992).

The sports agents also benefit from the winner's curse. They are paid by a commission of the salary or signing fee of the player. When the clubs are paying a winner's curse, the sports agents also receive a higher commission. The winner's curse makes this profession even more attractive than it already was, because there are large amounts of money going to sports agents as rewards for their services. It will lead to more sports agents, who offer their services to athletes. In the next chapter, the need for sports agents will be explained.

So, the discussion of the winner's curse leads to the conclusion that the chance that clubs are contracting free agents for a higher salary than the marginal product of labor is bigger. It also leads to larger rewards of sports agents.

2.2.4. The need for sports agents

As discussed in this chapter, the power of clubs in the bargaining process is very large. Over time, there have been some changes in regulation, think of the free agency, which increased the power of players. Or the power of clubs has been decreased, because the regulations

⁹ The 'reserve clause' gave club owners an exclusive option to renew the annual contract of initially eleven (and subsequently all) players under contract to them. A series of annual renewals could tie a player to a club for the duration of his career (Sandy et al., 2004). The reserve clause only existed in the American team sports. The reserve clause did not exist in European football, but the system before the Bosman-arrest almost looked the same. Players could not switch for free to another club, after the ending of their contract. It means that the clubs could keep the players for their entire career at a club. So, the reserve clause existed in European football in a different form.

¹⁰ It starts with a high bidding price and the price is lowered until the willingness to pay of one of the consumers is reached. The bidding stops immediately after the first bid. The winner's curse can be present in this type of auction.

¹¹ This is the most common bidding process. Consumers are bidding openly against each other and the subsequent bid is higher than the one before. When no consumer wants to bid more than the last bid, then the end of the auction is reached. There is a smaller chance that the winner's curse is present in this type of auction.

are in place to limit the powers of the clubs. Despite these regulations, the clubs still have more power than the athletes for several reasons. One reason is that clubs are more often in contract negotiation and what follows is that they are more experienced in negotiating. It leads to less power for the players, who are much less experienced in a bargaining process. The clubs have more knowledge of the bargaining process than the players have. A club also has more knowledge on the salaries of other players, which lead to an advantage of the club in the bargaining process.

For example young players, which never have been in a bargaining process before, do not know what they can ask from the club. Absent other information, they may think that the contract offered is normal to a player with his marginal product of labor.¹² If the clubs are fair and act trustworthy, there will be no problems. But under the assumption that clubs maximize profits, they will offer the player a wage below the marginal product of labor. When the wage is under the marginal product of labor, a club exploits the player (Sandy et al., 2004). In economic theory, the asymmetry in the experience and information in the bidding process of both parties is a market failure. This market failure explains the creation of the market of sports agents. Sports agents assist athletes in the bargaining process, as explained before in the chapter 2.1. The sports agents have a function to protect the athletes, and with their expertise knowledge they are able to do it.

In the bargaining process, clubs are trying to present the marginal product of labor as low as possible from a player. Whereas the players want to present a higher marginal product of labor than it is in reality, in order to increase salaries (profits). The club is highlighting the bad things a player did during a match, which lowers the marginal product of labor. A sports agent could be the objective third party¹³, who determines the real marginal product of labor. The bargaining process, the renewal of the contract, can have negative externalities on the performance of the athlete. So, for athletes as well as the clubs, it is beneficial that sports agents fulfill an insulating function in the critics on the player from the club (Sobel, 1987). It is also explained shortly in function two, but it illustrates why sports agents are not only beneficial for athletes, but also for clubs.

Furthermore, the contract for athletes is getting more complicated than it used to be. Clubs have to meet a host of legal regulations from the authorities, with setting up a legal contract. Clubs do not always have the specific knowledge of designing such a contract. Players even know less about setting up a contract, because clubs are more often designing such a contract or they could even hire a lawyer in the organization. The clubs will have more knowledge about designing the contract in a legitimate way, which could result in exploitation of the player. For instance, the club may include some restrictions in the contract, which the player does not fully understand. Again, this indicates a market failure in the labor market for athletes. Sports agents play an important role here, because they have more knowledge of the design of a contract. They can protect the athletes from exploitation and clubs do not need to hire a lawyer.

After all the most important regulation, which resulted in the creation of the market for sports agents, is the free agency. Before the free agency athletes did not have any market power, if they wanted to play they had to accept the contract offer (Wilde, 1992). Due to the reserve clause, athletes had not any bargaining power and were most of the times their whole career with the same club. After the free agency, and when the professional sports evolved into a multi-billion euro industry, the need for professional sports agents became apparent.

2.2.5. Unions

In the bargaining process between clubs and players, there is another actor active. In this chapter the role of unions will be explained short-

12 It is hard to decide what the marginal product of labor is for a rookie. There are no stats available or stats from the past. There exists future uncertainty as explained in chapter 2.2.1.

13 It could be possible, if he is paying on

an hourly base for example. If the sports agent receives a commission, like it is the case nowadays, then the sports agent also wants a higher salary for the player, in order to increase his own commission.

ly, because it will complete the picture. In the United States of America the unions have more power than in Europe. In the USA the unions came up in the 1970's, and their power was revealed in several strikes and lockouts in all four sports in the USA (Quirk & Fort, 1999). With these rigorous actions, the unions tried to achieve better agreements for the players.

Unlike most unions, sports unions both in USA and Europe do not negotiate the salaries of individual members (Sandy et al., 2004).

The main task of a union is to bargain the conditions of a contract for every player in that sport. They bargain collectively about working conditions, insurance against injury and pension arrangements for example. They reach a collective bargaining agreement with the clubs and the agreement applies to all players in that sport. Due to the short duration of a career of the athlete, it is important that the focus of sports unions is on the health and safety risks (Sandy et al., 2004). The individual salary setting is done by clubs and the players, who use a sports agent. So, a union is settling an agreement for all the players with the secondary conditions. Every player is bargaining with the club about his individual salary and length of the contract. It will be illustrated in figure 1.

The role of unions is explained from the perspective in the USA. There exists a great difference between a union active in Europe and a union active in the USA. The power of unions in the USA is larger than in Europe. In Europe they bargain mainly over the secondary working conditions. These elements of the employment relationship between player and club apply to all the players. A good example is the safety, because the safety net is important of a player, who is injured. It means that sports agents take care of player-specific elements of the contract, such as the salary, transfer fee, contract duration and more. The role of the unions limits the services offered by the sports agents.

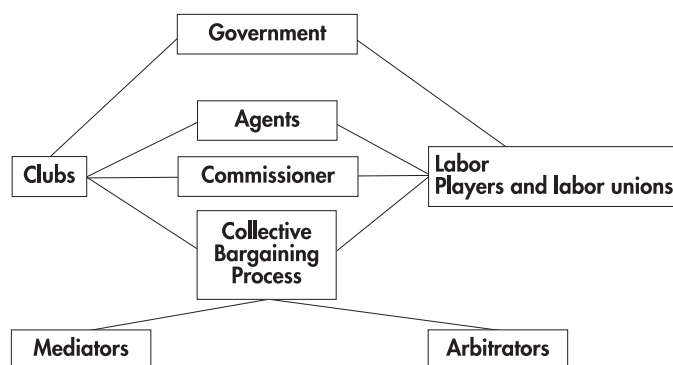
Sports agents do not have to bargain about every aspect in the contract, because the unions solved the secondary working conditions.

So, the limited influence of unions in Europe means that sports agents have more space in the negotiations. In the Netherlands there is a collectively bargaining result, which leads to some rules about the secondary working conditions. The sports agents or clubs cannot change this rules by a contract. The bargaining process in the Netherlands is discussed extensively in chapter 3.5.2.

2.2.6. Conclusion

As Staudohar (1996) explains in his book, the labor relations in the sports business are not that straightforward.

Figure 1: The relation between the different actors in the labor market.



Source: Staudohar (1996)

The focus of this study is on the blue parts, and the purple part (government) has an important influence in the three-way relationship by regulations. The green part of the figure will be left out of the research, with the exception of the collectively bargaining process. It is not the main focus of the paper, but it is interesting to see an example of the collective bargaining process. It will be shown in chapter 3.5.2.

In this research, the focus will be on the three-way relation between the club, agents and the players.

The government is also included as the legislator, who implements different regulations on the three actors.

2.3. Principal-agent problem

In agency theory, the agent acts on behalf of the principal. The problem in that case, is the existence of asymmetric information. This could create a moral hazard problem, since the principal cannot perfectly observe the effort of the agent, and the agent behaves not fully in the interest of the principal (Holmstrom, 1979). The heart of agency theory is the conflict of interests, when individuals with different objectives cooperate with each other (Eisenhardt, 1989).

So, there are two important features of the theory, first there must be information asymmetry and second a conflict of interest. The sports agent has more knowledge about the bargaining process than the athlete, because the experience of other negotiations. The sports agents have more knowledge about the salaries of other athletes. The sports agent, as well as the athlete, wants to maximize their own objective function. In this research, the focus will be on the profit maximizing actors, for convenience. There are other factors, which can influence the objective function of an athlete or the sports agent, but they are not included. The profit maximizing actors are resulting in the conflict of interest between a sports agent and an athlete. For example, a sports agent can make a quick deal with a club, which is more beneficial for him than for the player. To overcome the agency problems, arising from the relationship between a sports agent and an athlete, the athlete has to give the right incentives to the sports agent. As we sketched it above, it seems like a two-way relationship, but in reality there is a three-way relationship. The third party is the club.¹⁴

The traditional principal-agent problem is between the sports agent and the player, because the sports agent is acting on the behalf of the athlete. It is important to keep the role of the clubs in mind, because they need sports agents as well. The clubs need the sports agents, not only to contract a particular player, but also to attract other players in the future. The other way around, the sports agents need a club in the future, in order to obtain a contract for another player. When an athlete has a sports agent, then it is important to keep in mind that the sports agent (agent) has to do what the athlete (principal) wants. An agent has to carry out the business affairs of his principal not of himself.¹⁵

The three parties in the bargaining process have different interests, but by using the right incentives the conflict of interest between the sports agent and the athlete can be mitigated. The clubs can also try to reduce the alignment of interest between the sports agents and the athlete, in order to get a lower salary in the contract (in the interests of the clubs). The clubs could reward sports agents, when they act in their interest and not in the interest of their principal. The three-way relationship between the clubs, sports agents and the athletes is very complex and it cannot be said who has a more powerful position in the relationship.

An interesting example of the relation between sports agents and players, derived from the brokers, is that the interest of the sports agent is never fully the same as from the athlete. When the sports agent gets paid by a commission of the salary, the commission is 10 percent for example. When the player receives an offer of 2 million euro a year, the sports agent will receive 200.000 euro. With some effort by the sports agent the player could also receive 2,2 million. The

reward for the sports agent is 20.000 euro's, but the effort he has to do could cost more than the 20.000 euro he receives. When this is the case, he would accept the offer at 2 million euro a year. The player misses out some extra benefit, but he did not know that. It is a good example of how the interest of sports agents and players will conflict even after the commission fee. It is hard to fully align the interest of the sports agent and the player.

There are two related concepts, which can be introduced in the principal-agent relationship. The moral hazard and adverse selection will be discussed now. Moral hazard could occur, because sports agents are acting on behalf of the athletes. It means that they could benefit for it, but the sports agents are not bearing the full risks. When reputation is introduced, then the sports agents are bearing risks. It depends on the discount rate of future deals and how much it affects future deals. Adverse selection could occur in the relationship athlete-sports agent or club-sports agent. There is information asymmetry in these relationships, this leads to the possibility of adverse selection.

2.3.1. Moral hazard

Moral hazard is a market failure, which often occurs in the insurance market. It occurs, when individuals change risk behavior, because of insurance. It could lead to a different behavior of the individual. The individual could act more risky than he would do when he was fully exposed to the risk. It could be the result of a principal-agent relationship, where the agent also not bears the full risk of his actions. The agent cannot completely monitor the agent (Arrow, 1970, pp. 220-222). When there is a conflict of interest, the agent will have an incentive to act inappropriate. So, it is important, as has been said before that the interests of the agent and the principal are aligned.

An example of the insurance market will explain it better. When a consumer takes insurance from a firm, a part of his risk went to the firm. He does not have to pay all the costs for damage done by his actions. This has obviously an effect on the incentives of the consumer. The consumer will be more careless than he would be when he was fully exposed to the risk. So, more risks are taken by the consumer with the insurance. This behavior is called moral hazard, and it leads to more costs for the firms. When the moral hazard is happening very often, the market for insurance companies will fail.

The difficulty is the information asymmetry between the insurance company and the consumer. The insurance company cannot monitor the consumers in the degree of risk taking (Arrow, 1963). A possible solution for the market failure in the insurance market is, for example, the introduction of the compulsory no-claim¹⁶ regulation or compulsory deductibles.¹⁷ The risks for the consumer would increase by such regulation, because with any damage they have to pay a part themselves or they will lose their no-claim. The increase in risks for the consumer will lead to a change in the incentives of risk taking by the consumer. The insurance companies have to deal with moral hazard through these regulations.

The moral hazard problem is also present in the market of sports agents. As explained at the principal-agent problem, the sports agents are acting on the behalf of the athletes. The sports agent can earn money by making a good deal, but cannot lose any money (no risk involved). The risk of the failure of a contract is born by the athlete (principal). It could lead to more risk taking by the sports agent. For sports agents, there is some risk involved, because he is investing time and money into the contracts between player and clubs. The sports agent has some costs at the beginning, but still the risks are very low.

As can be seen in Figure 2, in the beginning the sports agents are investing a little money and time.

The payoff is going down until the point where a contract is reached (point A). When there is a contract between the athlete and the club, the sports agent gets his commission fee and the payoff increases. When the player is renegotiating the contract with the club, the sports agent will receive a commission, which is at point B. Before the renegotiating, the sports agent has to invest some time and money to make the deal, this leads to the decrease in profits before point B. The figure is simplified, but it gives a good illustration the low risk of the sports agent.

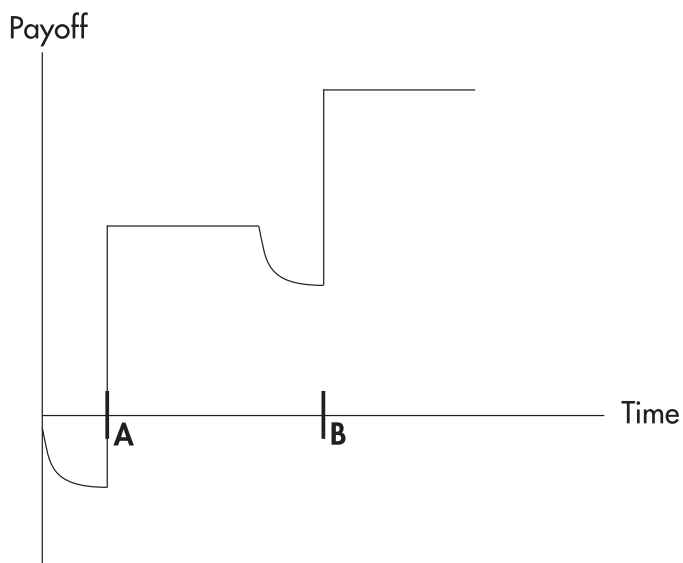
¹⁴ Nowadays, the clubs also need the sports agents by the increasing amount of regulations, which results in more rules by making up a contract. It could even occur that the clubs assign a sports agent and the player does that as well, but they assign different sports agents. It will result in negotiations with four parties: two sports agents, the club and the player. In order to keep it simple I will stick to the three-way relation in this research.

¹⁵ Only if the principal wants something to be done, which is illegal, than the agent have no duty to obey the principal (Shropshire & Davis, 2008, pp. 18-21).

¹⁶ A no-claim is a regulation implying that a person gets an amount of money back, when there was no claim on the insurance for a whole year.

¹⁷ When a consumer needs his insurance, there is a part of the costs which have to be paid by the consumer himself.

Figure 2: The payoff of a sports agent



The earnings can be much higher than the costs linked with the bargaining process, as showed in Figure 2. Moral hazard can exist in the market for sports agents. The moral hazard problem can be solved by the introduction of reputation, because it will increase the risk of the sports agent. When he is taking too many risks and other athletes are able to observe it, it would be harder for him to represent any athletes in the future. It depends on the discount factor of the sports agents, how much the future profits are worth. To introduce a good reputational system there is a need for regulation. The license is a way to reach it, because only the sports agents with a good quality will receive a license.

To let the system work, athletes must have the option to ask, if the license can be withdrawn of the sports agent by poor performance (or unethical behavior). So, the market failure in the market of sports agents can be solved by the introduction of a reputation system.

2.3.2. Adverse selection

Adverse selection is a market failure, which is often present in the insurance market. A main condition for adverse selection is that there is asymmetric information between the buyer and the firm. If consumers as well as the firms are fully informed, there will not be adverse selection in the market.

So, there is quality uncertainty for the consumers or for the firms.

A good example in the insurance market is, when insurance companies do not know the risk profile of all consumers. In this case, adverse selection is that the consumers who will need the insurance more will insure themselves. A company that is using the average risk profile of the whole group to set the premium will see that only the higher risk profiles consumers will take out insurance. This means that the premiums do not equal the chance of paying to the costumers. A firm cannot keep this up and will go bankrupt. The solution for the adverse selection problem in the market of insurance companies is solved by compulsory insurance, which will lead to the average risk profile (Akerlof, 1970).

A well-known example is the example from Akerlof (1970), about the automobile industry. For simplicity, there will be the assumption that there are two quality cars: good cars and bad cars (also called 'lemons'). Information asymmetry is present in the automobile market, which means that consumers cannot distinguish a good quality car from a bad quality car. The value of a car with low quality is lower than the value of a high quality car. The consumers cannot distinguish a bad or a good car and they do not want to pay more for a car. Every supplier will set the same price and then a firm who sells the low quality car can make more profits, because the prices of the cars are the same. The buyers are not able to distinct the different qualities. At the end, the market will fail and the only product offered on the market is the 'lemons'. It is a market failure, which can be solved by giving

more information about the quality of the cars to the buyers. Trust is an important aspect in the models of Akerlof (1970).

By introducing adverse selection, it did not become clear what the market of sports agents has to do with it. In this section, the link will be explained between adverse selection and the market of sports agents. In the market of sports agents, there are buyers and sellers. The buyers of the services are the athletes and the sellers are the sports agents. The buyers do not have any information about the quality of the service. There exists information asymmetry in the market, which is the main condition for adverse selection. The sports agents asks the same price and the buyer cannot distinguish the different qualities. In such a market, the potentially good quality sports agent does not have the incentive to be a good quality sports agent. The good quality agent is not rewarded for it. There is a market failure in the market for sports agents. The quality will decrease to the point, where all the sports agents have the same low quality services. The possible solution for the market failure is already in place in most sports. As also explained in Akerlof (1970), a license can be the solution for the market failure. Most sports agents need a sports agent's license in order to do their profession. It depends on the conditions for receiving the license, if sports agents with a license provide good quality services. If the conditions of receiving the license are severe, then the quality increases of the service of sports agents. The sports agent with a license gives a positive signal to the buyers (or athletes in this case). With the licensing in the market for sports agents, athletes know which sports agents are from a good quality and who are from a poor quality.

2.4. Bargaining at arm's length

Bargaining at arm's length is a theory, which is mostly used by financial economists. It is used in the bargaining process between executives and the board of the directors over the salary of the executives.

Board of directors is bargaining, in this relationship, with the executive, on behalf of the shareholders.

The shareholders are the owners of the firm and they are the residual claimants (Fama & Jensen, 1983). They cannot bargain with the executives over the salary, because the shareholders have limited power. When the board of directors is bargaining with the executives with the interest of the shareholders in mind, it is called bargaining at arm's length. So, they will try to maximize profits for the shareholders. It will lead to an efficient contract and the bonus schemes used are good incentives.

In reality, it is not always happening due to information asymmetry and due to the lack of time by the board of directors. They often delegate the bargaining process to compensation committees. There are some social and psychological factors, which will influence the bargaining process. It will increase the power in the bargaining process of executives. These factors are like friendship, loyalty, collegiality and authority. The board of directors and executives has a close relationship with each other and are often in the same board (interlocking) or even friends. Sometimes, the chief executive officer (CEO) is also the president of the board and this will lead to authority of the CEO. So, the board of directors is not an independent actor in the bargaining process and they are probably not serving the shareholders' interests (Bebchuk & Fried, 2004).

When a sports agent is negotiating on behalf of the athlete, the athlete wants the sports agent to act in his interest (at arm's length). The athletes are the principal in the relation, which means that the sports agent has to obey the athlete. But due to the information asymmetry there are options for the sports agents to maximize his benefits. The athletes are not the same as the shareholders with limited power, because the athletes can choose their sports agent. When a sports agent is not acting in his interest, the athlete could easily replace the sports agent. In contrast, the shareholders are consisting of a lot of people; they are not easy to organize to get the replacement done. The clubs can have some power over the sports agent, by giving him rewards or future contract negotiations at the club. When the club can exert some power over the sports agent, then the relationship between the sports agent and the athlete is damaged. In this case, the

sports agent will not bargain at arm's length and will not serve the athlete in his best interest. It is hard to monitor for an athlete, whether the sports agent is serving his interest. It leads to information asymmetry between the sports agent and the athlete.

In principle, the sports agents will be bargaining at arm's length, but the clubs can increase the influence on the sports agent. Due to the information asymmetry, the sports agent cannot be monitored fully.

2.5. Conclusion

In this chapter, several economic theories have been discussed, which are relevant in the market of sports agents. Economic theories like monopsonistic market, winner's curse, moral hazard and bargaining at arm's length are very important. With the explanation of these theories, the understanding of the market of sports agents should be better for the reader. It should be clear what the role of a sports agent is in the labor relation between athletes and the clubs. Decades ago, the bargaining power was with the clubs, because they had monopsonistic power. It has changed by regulations and the professionalizing of sports. The power shifted to the athletes, which had to use sports agents in order to get the best contract. The dependency of athletes on sports agents lead to an increase in power of the sports agent. The change of power lead to the creation of the market of sports agents and the power of sports agents is still increasing. There is regulation (and more needed) to restrain the power of the sports agents. In the next chapter, there will be an overview of the regulations in the market of sports agents.

3. Regulation of the market of sports agents

In this chapter, there will be a review of the literature from the academic world. In chapter 2, there has been referred to several papers. In order to avoid repeating myself, the articles already explained in chapter 2 will not be discussed extensively. After that, the regulations will be explained, which affects the sports agents in the Netherlands. The focus of the regulations will be on the Netherlands and Europe. Regulations from the USA will not be included, unlike the literature.

3.1. Labor market of professional sports

There is a lot of academic literature about the labor market available. In the previous chapter, I have used some of the literature already. There are some interesting articles which will be discussed shortly in this chapter. In most articles about this specific topic, there is referred to Rottenberg (1956).

Rottenberg was the first to investigate the labor market for athletes from an economic point of view.

Rottenberg focused on the American sports, like most research in professional sports. His research was done with the assumption of the frictionless world of the Coase theorem. He found that free agency has no effect on the player allocation. The most important difference was who would get the money.

In the case of free agency, more money would go to the athletes. It would have some important implications for professional sports worldwide, but the assumptions he made are very strong and these assumptions will not hold in the real world. One implication could be that the free agency did not have any influence on the mobility of an athlete. Some of the assumptions Rottenberg made were: perfect information, transactions costs are zero and that the wealth effects are zero. These assumptions are strong and not always realistic. If the assumptions do not hold, than the free agency could play a role in the player allocation (Rottenberg, 1956).

Rosen and Sanderson (2001) also wrote an interesting article about the labor markets in professional sports. They find that it is easy for clubs to measure the marginal product of labor, because there are a lot of stats available of the individual player. In this way, it is easy to calculate the marginal product of labor for an individual player. They find something interesting, which is a well-known labor market observation, the variation in starting wages in professions is much smaller than the variation in wages of more experienced workers. The wages of athletes will increase by their work ethic and abilities to

learn. At the start, when they are rookies, most salaries of different players are the same. They also refer, like many authors in the field of labor economics, to the case of wage discrimination. In many team sports, wage discrimination was present in the 70's and 80's, but in the 90's the wage discrimination was not easily to detect. In the book of Sandy, Sloane and Rosentraub (2004), they support the finding of Rosen and Sanderson (2001) that the marginal product of labor is easily to measure for clubs. They state that there are some difficulties in determining the marginal product of labor, like cross-player complementarities and future uncertainty. It has been discussed extensively in chapter 2.2.

Quirk and Fort (1999) wrote a chapter about the players. It is an interesting chapter, if a reader wants to know more about the players, I have to recommend reading it. The public opinion thinks that the high salaries of the athletes are leading to the higher costs of the tickets in a stadium. This is not the case, because the higher salaries only reflect the value of a player to the team. The higher demand towards professional sports leads to the multi-billion dollar industry, which it is nowadays. So, the higher demand towards professional sports is leading to the higher salaries of athletes. An important feature of the higher demand is how high the competitive balance is. When there is more competition between clubs on the field, the crowd will like the sport more (Groot, 2008). The writers represent gate-sharing as a solution to the escalating player salaries, but these salaries are still the value of a player. The gate-sharing will not be discussed in this research as a regulation, because in Europe it is not a regulation.

3.2. The business of sports agents

Shropshire and Davis (2008) wrote a book about the business of sports agents. The book is focused primarily on the American sports, but the experiences in these sports can be used for the European sports. The sports agent has a long tradition in the American sports. A standard anecdote is told in this book about the coach of the green bay packers, Vincent Lombardi.

'It was time to negotiate center Jim Ringo's contract for the coming year. The player came into the office with a gentleman wearing a suit. When Lombardi asked the player to identify the gentleman, Ringo responded that he had come to help in the contract negotiation. The story has it that Lombardi excused himself, stepped into the next room, and made a phone call. When he returned he informed Ringo that he was negotiating with the wrong team because he had just been traded to Philadelphia.' (Shropshire & Davis, 2008, p. 12)

This anecdote is illustrating how most team owners or managers looked towards the profession of sports agents. They think the sports agents are just there for a fast buck, but this view has changed over time. The anecdote is from the 60's and there are some changes since then, as explained before, which have lead to the acceptance of sports agents.

There are some problems arising in the business of sports agents, which have led to the need of regulation stated before. There is the danger of unethical behavior by the sports agents, when they want to attract young talented athletes. Some stories tell that the unethical behavior differs from giving money, gifts or even threaten the talents to sign a contract with the sports agent. In order to avoid this unethical behavior or in some cases even criminal behavior. Specific regulation is needed to restrain the power of a sports agent and to increase the control on sports agents. There are several solutions presented to overcome these problems in the book of Shropshire and Davis (2008). The specific laws explained in the book are not interesting for the research, because the laws are mainly on a state level or federal level in the USA.

Another book about the business of sports agent is written by Stein (2008), with the main focus on England and especially on the regulations of the Football Association (FA). Mel Stein is a sports agent himself and wrote the book to give some insights in the different regulations of the FA, with a cynical view on the regulations and the license. It is not an academic book, but it gives insight in the business of sports agent from the point of view of a sports agent. It becomes

quite clear that the business is tough and it is hard to recruit any players. Not only, because the players are hard to contact and do not respond to simple letters. Also when you attract a player, it is hard to keep him at your agency.

Several other agents will try to get the 'big fishes' away from you, even before the real big money comes in at your agency. The business of sports agents is risky and that is what Mel Stein tries to explain. The regulations are not always bad (he is cynical about the regulations), because some regulations are there to protect the sports agent against other sports agents. It is clear that the relation between a sports agent and the athlete does not stop after negotiation of a contract. The sports agent assists an athlete during his career and sometimes even after his career. Not only about business deals, but also in some small things. For example, when an athlete needs a lift or when his mother needs a lawyer for example. Stein (2008) accomplished with his book to illustrate the role of a sports agent in the professional environment in Europe.

3.3. Regulation of sports agents

Wilde (1992) wrote an interesting article about the regulation of athlete agents. It was one of the first articles on this specific topic. The article is an overview of the different regulations in place in the USA and it gave an overview of the literature in this field of research. The professional sports were evolving into a multi-billion dollar industry, which led to the need of professional assistance in setting up a contract. Without going into the details of the different regulations in different states of the USA, the main finding is quite interesting. At first, the athletes needed protection against the clubs, because they were the weaker participant in the negotiations. By the introduction of sports agents the protection was created, but nowadays the athletes also need protection against the sports agents. The sports agents got more power, with the possibility to abuse this power. They state in the conclusion that with the right measures (regulations) the public focus can shift away from the unscrupulousness and incompetence back to the beneficial services that sports agents deliver.

Before the research of Wilde (1992), there was an interesting paper from Sobel (1987). Wilde (1992) did not use the paper of Sobel (1987) for his research. In the paper of Sobel (1987), there is also an overview of the several regulations in the different states. In the paper, he starts with an interesting part, the origins of the player agent and the functions of a sports agent. The functions of the sports agent have been explained in chapter 2.1. After that, he goes on with an extensive discussion about the several regulations on state level. This is not a good way of regulating in the case of sports agents.

Sports agents are a profession, which is national based in the USA. The sports agent who is ethical, competent and successful will represent athletes on a national level. So, he is an advocate of federal regulation, but a main condition is that it does not add another set of rules, but it has to replace the state regulation.

This study is useful for Europe, especially in sports which are done on a European level. The most interesting example is European football. Here can be said that a competent, ethical and successful sports agent will represent athletes throughout Europe. As can be seen from the research of Sobel (1987), there is a need for regulation on European level and not on a national level. It would be hard for a sports agent to be active in the different countries. Nowadays there has been some European regulation, with the FIFA license, which every sports agent has to have in the case of football players.

The use of European legislation is more efficient and leads to uniformity within the market of sports agents. It is important that the European regulation replaces the regulations, which are in place nowadays. There are some sports which are nationally based, like ice-skating in the Netherlands. In that case, it is not necessary to have European legislation. The main finding of Sobel (1987) is that federal regulation is more efficient than state-by-state regulation.

3.4. Regulations of sports agents in Europe

In this chapter, the regulations in Europe will be discussed, which are relevant for the sports agent.

There are regulations from the private institution FIFA, but the European Union (EU) also put constraints on the sports agents. The EU has article 81 and 82 from the EC Treaty, competition regulation, which also affect the sports agents. First, I will start with discussing the regulations set by the European Union, the Piau case will be discussed as well. Finally, I will discuss the regulations set by the FIFA.

3.4.1. European Union regulations

The Netherlands is part of the EU, this means that the sports agent also have to consider the regulations set by the European Commission. Sometimes, people are thinking that sport is above the law or that sport is unique and that they are exempt from the regulations. This is most of the times not the case. A good example of this is the case by Bosman.¹⁸ In this case, the regulations set by the FIFA are clearly overruled by the European Court of Justice. Nowadays, the FIFA is willing to introduce the 6+5 rule¹⁹, but this contradicts with the vision of the EU on free mobility of labor within the EU. This rule cannot be introduced, because it is not in line with the vision of the EU. As explained, the role of the EU in sports is very important and that is the reason why I mention some regulations set by the European Commission, specifically article 81 and 82 of the EC Treaty. These articles are about competitive behavior. The market of sports agents, especially in the Netherlands, are relative young and still very innovative. There are at this moment no clear pictures of how the market is structured in the Netherlands. There are a lot of different players in the market and because there is a lack of transparency, it is not clear how big each player is. As an example, a firm with only one client, but the player is one of the greatest football players, can be the biggest player in the market. In chapter 4, I will try to structure the market. For now, I will continue with article 81 and 82 of the EC Treaty. After that, I will use a case from 2005 as an explanation of the impact of article 81 and 82 of the EC treaty on the sports agent.

3.4.1.1. Article 81 of EC Treaty

Agreements between firms which have the object to distort or prevent competition are forbidden. It means that it does not have to lead to a distortion or a prevention of competition, but when the intent is present to distort or prevent competition by a firm that it is forbidden by article 81. Some examples of the agreements are to limit production, to split the market, or to make price agreements. In this way, firms or undertakings are able to keep the price artificial high of the product they are selling (Jones & Suffrin, 2008, pp. 121-204).

In the market of sports agents, there are several companies present, all offering a broad set of services to the professional football players. The companies could agree with each other about splitting up the market. Every company has his own area, where he can sell his services or products. For example, company A and company B comes to the agreement that company A is only active in the northern part of the Netherlands and that company B is only active in the southern part of the Netherlands. In this way, they split up the market and it will decrease competition among sports agents. This agreement, between company A and company B, is not in line with article 81 and the European Commission can start an investigation against them. This was a simple example, how article 81 could influence the market of sports agents. It is not possible to keep the prices artificial high, because in this market most of the sports agents are getting paid by commission. The minimum and maximum commissions are set by the FIFA. But still, the sports agent has to take this article in mind by doing their business.

3.4.1.2. Article 82 of EC Treaty

It is forbidden for one or more firms to make abuse of a dominant position within a common market or a substantial part of it. There are a few essential questions or concepts relevant in this case. What is the geographical market? What is the product market? These concepts are needed to define the market where a firm is active and whether they

¹⁸ Bosman-case explained in chapter 2.2.1.
¹⁹ 6+5 rule = A team needs a minimum of 6 players from the home country in the

team and they can have a maximum of 5 foreign players in the line-up.

have a dominant position. Thereafter, the question arises if there is an abuse of their power (Jones & Suffrin, 2008, pp. 293-349).

In the market of sports agents, with an international character, it cannot be said that there is a company present with a dominant position. This article is not yet very relevant for this market, because the market is very young and innovative with a lot of new entrants. On the moment, the level of new entrants will go down or will disappear at all (a mature market), then it could be the case that one company has a dominant position. It is important that this firm will act according article 82. For example, when company A has a dominant position in the market and there is another player, company B, present. Company B has a much smaller market share than company A. Company B is trying to increase market share by fair competition. Company A can react with predatory pricing.

Predatory pricing is setting the price of the product below the marginal costs. In this way, company B will go out of the market, then can Company A increase the prices to recoup its losses from the predatory pricing. The use of predatory pricing is according article 82 of EC Treaty the abuse of the dominant position (Jones & Suffrin, 2008, pp. 443-466). This simple example, explains why firms in the market of sports agents could be influenced by article 82 in the future. In the next chapter, there will be a case, which illustrates the impact of the regulations set by the European Commission.

3.4.1.3. Case Piau - European Commission, FIFA

The Piau case is an interesting case for sports agents. Laurent Piau is a French sports agent and he lodged a complaint at the European Commission about the FIFA. The complaint is about the players' agent regulations that will be discussed in chapter 3.4.2.1. His complaint contended several aspects, he said it was restricting the competition and limiting the free movement of services. The Court of First Instance (CFI) thinks that the FIFA players' agent regulation was legitimate. Ultimately, Piau appealed at the European Court of Justice (ECJ) against this decision. The ECJ rejected the appeal and agrees with the CFI. So, it is proven that the FIFA does not limit the competition by setting the players' agents regulations.

The CFI and the ECJ only looked to the competition regulations, article 81 and 82 of EC Treaty. They did not look to article 49 about the free movement of services. In the book of Siekmann et al. (2007), Roberto Branco Martins has an interesting article about the Piau-case (Siekmann et al., 2007, pp. 37-56). It becomes clear from the article that the Piau-case did not lead to legal certainty. It was not challenged under the free movements of services principle and that is a threat for the players' agents regulations. In the article it became clear that the CFI was incorrect about the regulations in the profession of sports agents. They state that there are no regulations present in the laws. The article explains that 93 % of the sports agents, worldwide, fall under regulations set by international or national governing bodies. So, there is still legal uncertainty in the market of sports agents.

It is an interesting case for the sports agents worldwide, but it still does not give legal certainty to the profession. There was a decision by the CFI and ECJ, but there were some flaws in the decision. So, legal certainty is necessary for the profession of sports agents, but they still do not have it.

3.4.2. Regulations of the FIFA

The FIFA is the international organization of the sport football. The organization is created on the 21th of May in 1904. The FIFA is also setting some regulations on the different actors in this sport. Not only the players' agents (as the FIFA calls sports agents), but also the players, clubs and referees are restricted by regulations of the FIFA. There are six continental associations member of the FIFA, the 'Union of European Football Associations' (UEFA) is the European member. In this research, the focus will be on the regulations of the sports agents. There are two important set of regulations, which the sports agent have to take into account, these are the players' agent regulations and

the transfer regulation. The first one speaks for itself and the second set of regulations is important, because the sports agent is negotiating on behalf of the player during the transfer. It is interesting for the sports agents to know the regulations set by a transfer of a player.

3.4.2.1. Players' agent regulations

In the last version of these regulations, there are some important aspects.²⁰ First of all, they explain who can carry out the activity of players' agents. Every natural person, who is licensed, can carry out such activity. There are some exemptions on this rule: 'The parents, siblings or spouse of the player may represent him in the negotiating or renegotiating of an employment contract'.²¹ Furthermore, legally authorized lawyers are also exempt of this rule. Any other person, who wants to represent players during the negotiating contract, needs a license. In the regulations, there is explained how someone can send an application for the exam and how the examination procedure works. The examination procedure is worldwide the same, in order to avoid any differences in difficulty in the exam between countries. Every exam consist of twenty questions, fifteen of the questions are made by the FIFA. The other five questions are made by every national association themselves (in the Netherlands the KNVB). The FIFA also have the right to execute spot checks at the associations, with regard to the examination procedure. With the new procedure, the FIFA tries to centralize the issue of licenses. In his way, they try to create one license, which cannot be bought in corrupt countries, for example. It does not matter if the license is received in Columbia or the Netherlands for example. The FIFA guarantees that everyone with the license has done the exam in a proper way. The question is, whether the license in every country really has the same value.

When a sports agent passes the exam of the license, he is requested by the association to conclude professional liability insurance. The FIFA asks the associations in the different countries, to make a list of the sports agents in each country and the examining date. The FIFA is keeping this information in a public database. In this way, a club or player can easily check whether the sports agent have the license or not. Clubs and players are obliged to use a sports agent with a license during the bargaining process, if not, they can receive sanctions. The FIFA wants that every sports agent have to take a re-exam, every five years. It means that a license expires after five years after the date of issue as explained in article 17.

There are also some rights and obligations, which have to be taken into account by the sports agent. Article 19 of the players' agent regulation is about the representation contract between the player and the sports agent. There has to be a written representation contract between the player and the sports agent. The contract is only valid for two years and it has to be extended by a new written agreement. Whenever a player is a minor, the player's legal guardians shall also sign the representation contract.

In the contract it should be clear, who is paying the sports agent and what the commission is. In this way, the transparency will be improved among sports agents. Also a regulation which will improve the transparency in the market of sports agents is that the contract has to be signed four times. The player or club has to keep the first copy and the second copy is for the sports agent. In order to improve the registration process a copy have to be sent to the association the player or club belongs and one copy has to be sent to the association the sports agent belongs. In this way, every association can keep a record of the different sports agents who are active and which players they are representing.

Furthermore, there are some regulations set about the remuneration of the sports agent (article 20). A sports agent can only ask a commission for the annual basic gross income of the player and the signing fee, when he has negotiated the employment contract. Other benefits cannot be included, like a car or other privileges. The sports agent has to decide in advance, whether he is receiving his remuneration in a lump sum payment or annual installments. In the second case, the sports agents are entitled to the annual installments even after the expiration of the representation contract. When the sports agent and the player could not come to an agreement about the remuneration

²⁰ The players' agent regulations can be found in the appendix.

²¹ Article 4.1 of the regulations players' agents.

neration, then the sports agent is entitled to three per cent of the basic income as explained at the beginning of this paragraph.

To avoid large competition between sports agents for the players, there are some rules in contacting the different players. A licensed sports agent is not permitted to contact a player, who is under an exclusive representation contract by another sports agent.

At last, there are some regulations set about the different sanctions towards sports agents, players or clubs. And what the language will be of the exam done in all countries.

In the players' agent regulations there are some regulations set, which have a great impact on the market of sports agent. The centralization of the issue of the license had and still has a great impact. In this way, the market of sports agent is getting more transparent. When the sports agents are receiving large amounts of money, than there could begin a public outrage. A public outrage is explained in Bebchuk & Fried (2004) in the case of directors. When the directors are receiving large bonuses, then the public do not like that. They will try to reduce that and the board of directors, who are giving the bonuses to the directors, are trying to give lower bonuses in order to decrease the public outrage. This could be the case with sports agents and players. When it is transparent, there could be a public outrage. To avoid the public outrage, the sports agents will ask a fair commission. Now, I will continue with the transfer regulations also set by the FIFA.

3.4.2.2. Transfer regulations

The transfer regulations are not as important as the players' agent regulations, but for a sports agent it is important to know the basics of the transfer system. The sports agents are very often part of a transfer of a player that leads to the importance of knowing the transfer regulations. For a sports agent, it is not important to know the exact rules on the solidarity mechanisms as the sports agent does not have to pay the transfer fee himself to a club. I will explain some of the basic elements of these regulations.

First, there are some rules set about whether a football player is a professional or an amateur and when clubs can register their players. For clubs, it is important to know when a player can be bought and registered. The sports agent does not necessary have to know this, but it is good to know when he can transfer the player to another club, for example. After that, there are some regulations set about the contract between player and club. There are some regulations set in order to keep contractual stability and there are set some causes when a contract can be terminated from both sides. 'A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement' (article 13). This article makes clear, that the FIFA is trying to increase contractual stability.

In these regulations, the FIFA also are protecting the minors. A minor cannot transfer to a foreign country. A minor is any person under eighteen years. There some exceptions made, for example when the parents of the player are moving towards the other country. At last, there are some regulations about the jurisdiction and some final remarks about the final provisions.

The regulations are important for sports agents in a way that they have to take in mind the regulation set. When he is searching for a new club for a minor, who is seventeen years old, then he knows that he can only look for a club within the borders. There are more examples, why these regulations are important for the sports agent. The main regulations of the sports agent are set in the players' agent regulations. A sports agent is obliged to know the transfer regulation in order to receive the license. It is material for the exam of the license.

3.5. Regulations of sports agents in the Netherlands

In this chapter, the regulations in the Netherlands will be discussed. There is one private institution in the Netherlands, the 'Koninklijke Nederlandse Voetbal Bond' (KNVB). It is the national football asso-

ciation in the Netherlands. Besides these regulations, the Dutch government also has some laws.

There are laws in the 'Burgerlijk wetboek'²², which are applicable to the sports agents, but also in the 'Wet Allocatie Arbeidskrachten Door Intermediars' (WAADI).²³ I will start with the regulations of the Dutch government and after that I will discuss the regulations set by the KNVB.

3.5.1. Dutch regulations

In this chapter, I will explain the regulations set by the Dutch government, but only the regulations which are important for the sports agent. The sports agents have to deal with some regulations set in the 'Burgerlijk Wetboek' and the WAADI.

3.5.1.1. 'Burgerlijk Wetboek'

The profession of sports agent is creating a service for professional athletes, by negotiating the contract on their behalf. In order to bargain about the contract, sports agent need to know the rules of setting the contract. The regulations are written in the 'Burgerlijk Wetboek Boek: 7 Titel: 10 Afdeling:

7' under the title 'Einde van de arbeidsovereenkomst'.²⁴ For readers who are interested in the details of the regulations, I would refer to the 'Burgerlijk Wetboek'. For the research, it is good to know that there are these regulations, but it is not of added value to know how the regulations work. The regulations set are mostly used for people in a normal profession, you can think of a plumber, electrician or banker. In the case of professional athletes, there are some differences with normal law.

For example, the duration of a contract in European football is four or five years, but as explained in the 'Burgerlijk Wetboek' normally a contract would be for an infinite period after three years. That is not the case in professional football, but it is a good guide for the sports agent in the bargaining process with a club. So, it is also included in the material of the exam for the license of sports agents.

Furthermore, every sports agent has the obligation to stay within the law in the country. It does not matter if it is the Dutch law or for example French law. A sports agent have to do everything the player wants him to do, as he is negotiating on his behalf, but the sports agent have to know if he is acting in a legitimate way in his country. So, the sports agent has to stay within the law like every other individual living in the Netherlands.

3.5.1.2. WAADI

The WAADI is more important for the sports agent in the Netherlands. There are some interesting regulations in the WAADI, which are the opposite of what the FIFA is saying in the players' agent regulations. The WAADI contains a regulation for job placement by third parties. It contains also regulation on making people available for work. The essence for the sports agents is in the first part, the job placement by third parties. The profession of sports agents falls under the job placement by third parties. (Siekmann et al., 2007, pp. 391-400)

One remarkable note can be made about the license. Since the introduction of the new WAADI regulation, it is not necessary for intermediaries to have a license. According to the FIFA regulation, the sports agents are obliged to get a license. There is the possibility in the WAADI to create specific rules for a group or sector.²⁵ So, this could be the case with the FIFA regulations.

For this research, it is important to know one rule. The WAADI says in article 3.1 that the person, who is seeking work, cannot pay for the services of an intermediary. To translate it to the case of sports agents, it means that a player do not have to pay for the services of a sports agent. The club has to pay the sports agents according to the WAADI. The FIFA regulations are saying that the player should pay himself for the services of a sports agent. The different regulations make it hard for the sports agent to act according the law, because the law is not straightforward.

²² This is the book, which contains all civil laws applicable in the Netherlands.

²⁴ In English: The end of the labor contract.

²³ In English: The Labor Market Intermediaries Act.

²⁵ It stands in article 4 of the WAADI.



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3.5.2. Regulations of the KNVB

The KNVB is also present in the regulations of the sports agent. A sports agent, who is active in the Dutch market of sports agents have to follow the rules of this association. One remark must be made, because a sports agent without a license is not obliged to follow the rules of the KNVB. The KNVB is an association with members, when you are a member then you are obliged to follow the rules. If not, then you are not obliged to follow the rules. It is important that the most sports agents have to follow the regulations of the KNVB.

The KNVB have some specific regulations towards the sports agent. It is not very different from the regulations set in the players' agent regulation by the FIFA. There are some differences, which are important for the sports agent. First, I will mention some things about the license in the Netherlands. After that, I will put some remarks by the 'Reglement Spelersmakelaars'.²⁶ This is the Dutch version of the players' agent regulations. Finally, I will mention some things about the 'CAO voor contractspelers'.

I will start with the license issued in the Netherlands. The license consists of 15 questions of the different FIFA regulations and the other 5 questions are made by the KNVB themselves. Some of the materials for these five questions are the 'Reglement spelersmakelaars', 'Burgerlijk Wetboek', 'CAO voor contractspelers' and other regulations set by the KNVB. These are some of the regulations, which are important for the sports agent active in the Netherlands. When a person is living in the Netherlands, he also has to apply for the exam at the KNVB. Now, I will discuss the 'reglement spelersmakelaars'.

The 'reglement spelersmakelaars' is based, for the greatest part, on the players' regulations set by the FIFA. The KNVB also implemented the reexamination rule that a sports agent have to take a re-exam after five years. It is since 2009 and not yet published in the public version of the regulations. So, in the regulations, there is still that the license is for an indefinite period. There is still resistance against this rule. Sports agents do not think this rule is fair, because they can lose their business. It would mean that sports agents, who received their license in the time that they could buy the license for an amount of money, also have to take the exam. For these sports agents, it would be hard to pass, because they never done such an exam before. In that way, the know-how of the regulations of the sports agents with a license, will increase

In the regulation by the KNVB, the sports agents are not permitted to do activities for young players under 16 years. So, in the Netherlands a sports agent cannot have clients under 16 years. The KNVB probably set this rule in order to decrease the transfers for players under the 16 years. If a player cannot use a sports agent, then he would not make a transfer on that age.

Now, there will be a short notice of the 'CAO voor contractspelers'. This is the result of the collectively bargaining process between the unions of players and the union of clubs. In this agreement, there are some rules, where the clubs and players have to act accordingly, about the secondary working conditions for players. There are some regulations set about the vacation of professional football players. For example, according article 10.1.c, the employee (the player) get two days off, without a decrease in his salary, when he is getting married. Besides this regulation, there are also some rules about the health care insurance.

The agreements are obligatory for the club and the player. They can make other arrangements in the contract, but only when the player benefits. The player is, like every collectively bargaining agreement, protected with the agreement. It is been agreed between the 'Federatie Betaald voetbal Organisaties' (FBO), 'Vereniging Voor Contractspelers' (VVCS) and ProProf. The FBO is the union for the clubs and all Dutch clubs are member of this organization. The VVCS and the ProProf are unions for the players, almost all players are member of one of these unions.²⁷ The 'CAO voor contractspelers' is there for every professional player in the Netherlands.

²⁶ In English: The regulation of Players Agents. It can be found in the appendix.

²⁷ The FBO, VVCS and ProProf will be explained extensively in chapter 4.2.

In appendix 6 of the 'CAO voor contractspelers', there is also a standard contract included, which every club has to use when signing a contract. In the standard contract, the sports agent also has to be included, it can be found in article 10 of the standard contract. There must be noted, who was the sports agent during the deal and the sports agent has to sign it.

3.6. Conclusion

As can be seen from the literature overview, there is a lot of academic literature available in the USA and about the American team sports. Europe has not been the area of research very often. One explanation is that the free agency in European football was introduced in 1995, and in the American team sports it was introduced in the mid 70's.

So, the emerging industry of sports agents was later in Europe. Nowadays, there is more research done to the sports agents in Europe than before. It does not mean that the literature from the USA is not useful for the cases in Europe, there are things to be learned from USA experience.

The license for sports agents was first introduced in the USA, but Europe followed quite quickly and now there are some real steps to take in order to get your license. There are some regulations in Europe and in the Netherlands and they are summarized in chapter 3.4 and 3.5. The Regulations Players' Agents has the most impact on the market of sports agent. Some important aspects are regulated like the introduction of a worldwide license. This is changing the complete environment of the sports agents. For the Dutch environment of the sports agents, the WAADI has also some important implications. As it is shown, the regulations are quite difficult and for a sports agent it is hard to follow every rule. A sports agent in the Netherlands cannot follow every rule applicable to him, because the players' agent regulation and the WAADI are contra dictionary with each other.

4. Summary

The research was explorative, as explained in chapter 1.3. In this research, I was not trying to find real evidence, but I was hoping to create some interesting hypotheses about the regulation in the market of sports agents. I started with an overview of the literature available about this topic. It was clear that there was not much research done in Europe, but in the USA there is a lot of literature available. In chapter 1.2 is explained, why the literature of the USA is not completely applicable to Europe. There are some important differences between the USA and Europe. In the overview of the literature, there are references to the literature of the USA, but I tried to explain what it means for sports agents active in Europe. In the beginning I explained, what the different functions are for the sports agents. In total there were five functions, nowadays there is much attention to the fifth function. Players are at a younger age with a sports agent, which has lead to the new term 'babysitting'. Not everyone in the market is supporting this new trend.

Not everyone is convinced of the role of sports agents, but I tried to explain the importance of the sports agent in chapter 2.2. A sports agent has an important function, because he has to protect the players from the more powerful clubs. Especially young players, they need a sports agent in the bargaining process. The clubs could use their power in the bargaining process, but the sports agent can protect the player with the use of his expertise and knowledge of the market and regulations. Another important function of the sports agent is the insulating function they have. The critics of the club will be addressed to the sports agent and not towards the player himself. The club is doing this in order to get a lower salary, but with the use of a sports agent it will not affect the player's performance on the field. It became clear that the sports agents are necessary in the market of professional sports.

Besides the literature overview, there are some economic theories explained. They could be in place in the market of sports agents. A good example is the winner's curse between clubs. The winner's curse is the difference between the highest bid and the second-best offer. The bidding process between clubs is almost the same as a sealed-bid auction. They also have information asymmetry amongst clubs. The

chance that clubs are contracting free agents for a higher salary than the marginal product of labor is bigger. It will lead to higher commissions to the sports agents and it will lead to even more entrants, who are willing to join the market.

The literature makes clear that the sports agents are needed in the market of professional sports. The sports agents have some important functions, which solve market failures. Moral hazard and adverse selection will create market failures in the market of sports agents, but this can be solved by the license. Furthermore, the supply of sports agents will be enough. The high commissions, sports agents receive, will attract a lot of entrants in the market.

The overview of the academic literature makes clear that there used to be a two-way relationship between the club and the player. Nowadays, this relationship evolved towards a three-way relationship, because the sports agents are included in the relationship. The clubs and players are accepting the role of the sports agents in the bargaining process.

In the beginning of chapter 3, there is an overview of the different literature available in this field of research. The literature is explained by three topics: labor market of professional sports, business of sports agents and regulations of sports agents. It gives some interesting findings and it gives a good starting point for the empiric research. An example is that the athletes needed protection against the clubs, because they were the weaker participant in the negotiations. By the introduction of sports agents the protection was created, but nowadays the athletes also need protection against the sports agents. (Wilde, 1992)

When the academic literature has been discussed, I gave an overview of the regulations applicable to the sports agents in the Netherlands. It has been divided in Europe regulation and Dutch regulation, in this overview every regulation on the sports agent is included. There was an interesting difference in two laws applicable to the sports agent. In the WAADI, the club was obliged to pay to the sports agent. In players' agents regulations of the FIFA, there was obliged that the player has to pay to the sports agent. So, it is hard for sports agents in Netherlands to obey every rule, because they are contra dictionary with each other.

The results are given in chapter 4. In this chapter, a summary of all the interviews are given. At the beginning, I have set 6 hypotheses. These hypotheses were used during the interviews with the different actors. They could give their view and opinion about the subject. The clubs, sports agents and the unions were interviewed. They all serve different interests, which lead to contra dictionary statements. There are some interesting things pointed out, but everyone is clear about one thing. The sports agents need to be regulated, in order to keep the worse sports agents out of the market. If this is not the case, a lot of new entrants will go onto the market. They do not have the right incentives and do not want to serve the interest of the player. The bad quality sports agents are only looking to their own profits. The sports agent has an important role, according to the theory, but also according the different actors in the market. They are in place to protect the player from the power of the clubs. The sports agent needs to do function one until five, which are explained in chapter 2.1. At the end of the interviews I was able to create five new hypotheses. These are supported by some of the actors in the market or all the actors in the market.

Hypothesis 1: On this moment, the quality of the active sports agents is too low. Sports agents should be stimulated in the creation of big companies, because these companies can increase the quality on the market.

Hypothesis 2: The transparency on the market of sports agents should be increased, especially towards the actors on the market. Towards the public opinion, the transparency should be moderated.

Hypothesis 3: The license, issued by the FIFA, is necessary to keep some control on the market, but the present license system is not good enough. There must be a change in the license system, to give more value to the license.

Hypothesis 4: On this moment, the KNVB is not good in his monitoring role, which they possess in the market of sports agents. There must be more attention in the compliance towards the regulations.

Hypothesis 5: The European Commission must create new regula-

tions, which the sports agents have to obey. This will lead to the creation of European regulations and all member states have to accept this new regulation. In this way, uniform regulations can be created. There must be a license included in the new regulations, because it is necessary to make a qualitative selection and not a quantitative selection. The license could be linked with permanent education and this could be given by the different unions of the sports agents.

I did not test these hypotheses in this research, but it could be an option for further research. I also did not include the players and the KNVB, but it would be interesting to include these actors as well in the research.

From this research, it is clear that the regulations in place are not sufficient. There is a lot of confusion, which rules must be obeyed. This leads to the conclusion that there is a need for a new set of regulations, it is also explained in hypothesis 5. The European Commission is needed in the creation of the new regulations. If the rumor is true and all the regulations from the FIFA towards the sports agent will be abolished, then the quality of the sports agents will decrease. Unethical behavior or even criminal behavior will be in the market again. It will lead to an even worse situation than the situation is nowadays. So, it is important to create a new regulation system as explained in hypothesis 5 and the elimination of all regulations will not solve the problems in the market.

References

- Akerlof, G. A. (1970). *The market for "lemons": quality uncertainty and the market mechanism*. The Quarterly Journal of Economics, Vol. 84, No. 3, pp. 488-500
- Arrow, K. J. (1963). *Uncertainty and the welfare economics of medical care*. The American Economic Review, Vol. 53, No. 5, pp. 941-973
- Arrow, K. J. (1970). *Essays in the theory of risk-bearing*. North-Holland publishing company
- Bebchuk, L. & Fried, J. (2004). *Pay without performance*. Cambridge, Massachusetts: Harvard University Press.
- CAO voor contractspelers 2008-2011
- Ehrenberg and Smith (2006). *Modern Labor Economics: Theory and Public Policy*. Pearson Education
- Eisenhardt, K. M. (1989). *Agency Theory: an assessment and review*. The Academy of Management Review, 14(1), pp 57-74.
- Fama, E. F. & Jensen, M. C. (1983). *Separation of Ownership and Control*. Journal of Law and Economics, vol. XXVI, June 1983.
- Fort, R. D. & Quirk, J. (1995). *Cross-Subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*. Journal of Economic Literature, Vol. 33, No. 3 (Sep., 1995), pp. 1265-1299.
- Groot, L. (2008). *Economics, uncertainty and European football: trends in competitive balance*. Ewald Elgar Publishing Limited
- Holmstrom, B. (1979). Moral hazard and Observability. *The Bell Journal of Economics*, 10, 74-91.
- Jones, A. & Sufrin, B. (2008). *EC Competition Law: text, cases and materials*. Oxford University Press
- Kahn, L. M. (2000). *The sports business as a labor market laboratory*. The journal of economic perspectives, vol. 14, no. 3, pp. 75-94.
- Quirk, J. & Fort, R. D. (1999). *Hard Ball. The Abuse of Power in Pro Team Sports*. Princeton: Princeton UP.
- Regulations Player's agents
- Regulations on the Status and Transfer of Players
- Rosen, S. (1981). *The economics of superstars*. The American Economic Review, Vol. 71, No. 5, pp. 845-858.
- Rosen, S. & Sanderson, A. (2001). *Labour markets in professional sports*. The economic journal, vol. 111, no. 469, pp. F47-F68
- Rottenberg, S. (1956). *The baseball players' labor market*. The Journal of Political Economy, Vol. 64, No. 3, pp. 242-258.
- Sandy, R., Sloane P. J. & Rosentraub, M. S. (2004). *The economics of sport: an international perspective*. Palgrave Macmillan
- Shrophshire, K. L. & Davis, T. (2003). *The business of sport agents*. Philadelphia: University of Pennsylvania Press.

- Siekmann, R.C.R., Parrish, R., Branco Martins, R. & Soek, J. (2007). *Players' Agents Worldwide: Legal Aspects*. T.M.C. Asser Press
- Sobel, L. S. (1987). *The regulation of sports agents: an analytical primer*. Hein online, 39 Baylor law review, pp. 701-786.
- Staudohar, P. D. (1996). *Playing for Dollars. Labor Relations and the Sports Business*. New York: Cornell University Press.
- Staudohar & J.A. Mangan, (eds.). *The Business of Professional Sports*. Chicago: University of Illinois Press, pp. 247-263.
- Stein, M. (2006). *How To Be a Sports Agent*. New York: Oldcastle Publishing.
- Voetbal International
- Wilde, T. J. (1992). *The regulation of athlete-agents*. Journal of legal aspects of sports, vol. 2, no. 2, pp. 18-29.

Appendix: FIFA Players' Agents Regulations

DEFINITIONS

The following regulations have been issued in accordance with article 14 of the Regulations Governing the Application of the FIFA Statutes:

1. Players' agent: a natural person who, for a fee, introduces players to clubs with a view to negotiating or renegotiating an employment contract or introduces two clubs to one another with a view to concluding a transfer agreement, in compliance with the provisions set forth in these regulations.
2. Licence: an official certificate issued by the relevant association enabling a natural person to act as a players' agent.
3. Applicant: a natural person wishing to obtain a licence enabling him to act as a players' agent.

Reference is also made to the Definitions section in the FIFA Statutes and Regulations on the Status and Transfer of Players.

NB: Terms referring to natural persons are applicable to both genders. Any term in the singular applies to the plural and vice-versa.

I. INTRODUCTORY PROVISION

Article 1 Scope

1. These regulations govern the occupation of players' agents who introduce players to clubs with a view to negotiating or renegotiating an employment contract or introduce two clubs to one another with a view to concluding a transfer agreement within one association or from one association to another.
2. The application of these regulations is strictly limited to the players' agents' activities described in the paragraph above.
3. In particular, these regulations do not cover any services which may be provided by players' agents to other parties such as managers or coaches. Such activity is regulated by the laws applicable in the territory of the association.
4. These regulations shall also ensure the appropriate training and standard of players' agents.
5. The associations are required to implement and enforce these regulations in accordance with the duties assigned herein. In addition, they shall draw up their own regulations which shall incorporate the principles established in these regulations and may only deviate from these regulations where the provisions of the latter do not comply with the laws applicable in the territory of the association. The association shall submit its regulations and any relevant amendments to the FIFA Players' Status Committee for prior approval within two years of the present regulations coming into force.

II. ADMISSIBILITY OF PLAYERS' AGENTS' ACTIVITY

Article 2 General

1. Both players and clubs are entitled to engage the services of a licensed players' agent in connection with a transfer or with a view to negotiating or renegotiating an employment contract. The players' agent is entitled to be remunerated for the service he provides. In authorising the activity of players' agents, these regulations do not release a players' agent from his obligation to comply with the laws applicable in the territory of the association, in particular those relating to job placement.
2. Subject to articles 4.1 and 4.2, players and clubs are forbidden from using the services of a unlicensed players' agent.

Article 3 Admissibility of licensed players' agents

1. Players' agents' activity may only be carried out by natural persons who are licensed by the relevant association to carry out such activity.
2. A players' agent may organise his occupation as a business as long as his employees' work is restricted to administrative duties connected with the business activity of a players' agent. Only the players' agent himself is entitled to represent and promote the interests of players and/or clubs in connection with other players and/or clubs.

Article 4 Exempt individuals

1. The parents, siblings or spouse of the player may represent him in the negotiation or renegotiation of an employment contract.
2. A legally authorised practising lawyer in compliance with the rules in force in his country of domicile may represent a player or a club in the negotiation of a transfer or employment contract.
3. The activity of such exempt individuals does not fall under the jurisdiction of FIFA.

III. ACQUISITION AND LOSS OF PLAYERS' AGENT LICENCE

Article 5 Responsibility for issuing a licence

1. Players' agent licences are issued by the association of the country of which the applicant is a national; in the case of applicants with dual or multiple nationality, this means the nationality most recently acquired. If the applicant has been continuously resident in another country for two years or more, only this association, and not the one of the country of which the applicant is a national, is responsible for issuing the licence.
2. If an applicant resides in a different EU/EEA country from the country of which he is a national, he shall send a written application

to the association of his country of domicile without the obligation to have resided there continuously for at least two years.

Article 6 Prerequisites for application

1. The applicant is required to submit a written application for a players' agent licence to the relevant association. The applicant must be a natural person with an impeccable reputation. An applicant is deemed to have an impeccable reputation if no criminal sentence for a financial or violent crime has ever been passed against him.
2. An applicant may not, under any circumstances, hold a position as an official, employee, etc. at FIFA, a confederation, an association, a league, a club or any organisation connected with such organisations and entities.
3. Such prerequisites for applying for a licence must be satisfied at all times throughout the players' agent's entire career (cf. article 15).
4. By the act of applying, an applicant agrees to abide by the statutes, regulations, directives and decisions of the competent bodies of FIFA as well as of the relevant confederations and associations.

III. ACQUISITION AND LOSS OF PLAYERS' AGENT LICENCE

Article 7 Application

The association is responsible for ascertaining that an application satisfies the relevant prerequisites. If any prerequisite is not met, the application shall be rejected. In such cases, the applicant may submit all the relevant documents to the FIFA Players' Status Committee and request a reassessment of whether his application fulfils the relevant prerequisites. If the prerequisites are deemed to have been satisfied, FIFA shall instruct the relevant association to continue with the licensing procedure. If the applicant is not eligible to be issued with a licence, he may subsequently reapply for a licence at such time as he is able to fulfil the prerequisites for applying.

Article 8 Examination procedure

1. If an application satisfies the relevant prerequisites, the association shall invite the applicant to take a written examination. The associations may hold examinations twice a year in the months of March and September. The exact dates shall be determined by FIFA in January and June of each year. The examination is organised by the association and held under the general supervision of FIFA. FIFA reserves the right to execute spot checks at the associations with regard to the examination procedure.
2. If, for any reason, an association is not able

to hold an examination on the set date, it may decide not to hold an examination at all, but it shall announce its decision not to do so in advance through its official communication channels. In any case, an association is only permitted to decide not to organise an examination for two consecutive sessions.

3. The association may charge the applicant an appropriate fee, but exclusively in order to cover the costs of organising and holding the examination. Said fee may not exceed these costs.
4. The examination shall be set as a multiple-choice test. The applicant shall be considered to have passed the examination if he attains the minimum mark set by FIFA.
5. Each applicant shall be tested on the following subjects:
 - a) knowledge of the current football regulations, especially in connection with transfers (the statutes and regulations of FIFA, the confederations and the association in whose country the applicant is taking the examination);
 - b) knowledge of civil law (basic principles of personal rights) and the law of obligations (law of contract).
6. Each examination shall consist of twenty questions, fifteen on international regulations and five on national regulations. The applicants shall have between 60 and 90 minutes to complete the examination. Associations are free to fix the exact duration of the examination within these parameters.
7. Each association shall set its own questions on national subjects, whereas FIFA shall set the questions on its own statutes and regulations and provide the association with the relevant examination paper.
8. The part of the examination referred to in the previous paragraph must be carried out by using the questionnaire supplied by FIFA. One such questionnaire shall be presented to each applicant.
9. FIFA shall set the minimum mark required to pass the examination. Each correct answer shall be awarded one point only.
10. Before they take the examination, the associations shall inform the applicants of the maximum time at their disposal as well as the minimum mark to be attained.
11. After the examination, the examination papers shall be marked in due course and without delay and the applicant shall be informed of the outcome.
12. An applicant who fails to attain the minimum mark may apply to retake the examination on the next available date.
13. If an applicant fails to attain the minimum mark at the second attempt, he may not retake the examination until the next calendar year has elapsed. Only then may he apply to take the examination a third time, in which case he may choose to be examined by the association concerned or by FIFA.
14. Any applicant who fails to attain the minimum mark at the third attempt may not take the examination again for another two years.
15. Enquiries concerning the results of the

examination may be referred to the relevant association or to FIFA via the relevant association within six months of the date of the relevant examination.

Article 9 Conclusion of liability insurance

1. If the applicant passes the written examination, the association shall request him to conclude (subject to article 10 of these regulations) professional liability insurance in his own name (cf. Annexe 2) with a reputable insurance company, preferably in his country. The insurance shall adequately cover any risks that may arise from the players' agent's activity. The insurance shall also cover any damages that may be incurred after the termination of the players' agent's activity but that were caused by such activity. The policy shall therefore be worded in such a way that every possible risk connected with the players' agent's occupation is covered.
2. It is the responsibility of the association issuing the licence to check the compliance of the professional liability insurance with these regulations.

Article 10 Issue of bank guarantee

Instead of the professional liability insurance policy referred to in article 9 above, the applicant may provide a bank guarantee from a Swiss bank for a minimum amount of CHF 100,000 under the limitations set out in Annexe 2. The bank guarantee shall be issued by a Swiss bank and accompanied by an irrevocable statement that the guaranteed amount shall be paid out unconditionally if a judgment is passed by a court, a tribunal and/or by the relevant football authorities in favour of a player, a club or another players' agent who has suffered damages as a result of the players' agent's activity.

Article 11 Compliance with Code of Professional Conduct and football regulations

The successful applicant shall sign the Code of Professional Conduct (cf. Annexe 1) governing his activity and agree to comply with that Code of Professional Conduct. The association must keep the original of the signed Code of Professional Conduct.

Article 12 Issue of licence

1. If all of the prerequisites for the issue of a players' agent licence are satisfied, including the signing of the Code of Professional Conduct and the conclusion of professional liability insurance or bank guarantee (where applicable), the association shall issue the licence. The licence is strictly personal and non-transferable. Essentially, it allows the players' agent to conduct his work in organised football on a worldwide basis, with due respect to the laws applicable in the territory of the association (cf. article 2.1).
2. After the player's agent has received his licence, he may add the following title to his name: "Players' agent licensed by the football association of [country]".
3. If an applicant does not fulfil all prerequisites within six months of the date he took the examination, he shall have to resit the examination.

Article 13 Publication

1. Each association is obliged to keep an up-to-date list of all the players' agents to which it has issued a licence and publish it in an appropriate form (internet, circular letter, etc.). A copy of this register shall be submitted to FIFA after every examination date; any amendment, such as the withdrawal or return of a licence, shall also be communicated to FIFA immediately. Furthermore, the association shall also inform FIFA of any sanction proceedings (cf. Chapter VII) that are instituted and their outcome.
2. Each association has until 30 June of each year to submit to FIFA a report on the activity of players' agents in its territory in the previous year including statistics and sensitive information, such as the number of players' agents, details of players' agents commencing and ending their activity, sanctions imposed on players' agents, their criminal record, including pending proceedings, and any possible circumstance having an effect on the players' agents' reputations.

Article 14 Loss of licence

A licence is lost when it is withdrawn because the players' agent no longer fulfils the relevant prerequisites (cf. articles 6, 9 and 10), returned as a result of the termination of the activity (cf. article 18) or as a result of a sanction (cf. Chapter VII).

Article 15 Withdrawal of licence due to failure to meet prerequisites

If a players' agent no longer fulfils the prerequisites for holding a licence (i.e. any of the prerequisites specified in articles 6, 9 and 10), the relevant association shall withdraw his licence. If the unfulfilled prerequisite can be remedied, the appropriate body at the association shall set the players' agent a reasonable time limit in which to satisfy the relevant requirements. If, at the expiry of such a time limit, the requirements are still not satisfied, the licence shall be definitively withdrawn.

Article 16 Examination of prerequisites

The association shall monitor on an ongoing basis whether players' agents still fulfil the prerequisites for holding a licence.

Article 17 Re-examination

1. The licence expires five years after its date of issue.
2. The players' agent shall send a written application to the relevant association to resit the exam before the date on which his licence is due to expire, in accordance with article 5 above. If the players' agent does not send a written application to resit the exam within five years of the date of issue of the licence, his licence shall be automatically suspended.
3. If the players' agent meets the deadline set out in paragraph 2 above, his licence shall remain valid until the date of the next available examination.
4. If the players' agent fails this examination, his licence shall be automatically suspended until such time as he passes it.
5. The players' agent may retake the examination at the next available session. There is no

limit on the number of times a players' agent may retake the examination.

Article 18 Termination of activity

1. Any players' agent who decides to terminate his activity is obliged to return his licence to the association that issued it. Failure to comply with this provision shall entail the cancellation of the licence and publication of this decision.
2. The association shall publish the names of those players' agents who have terminated their activity and notify FIFA without delay.

IV. RIGHTS AND OBLIGATIONS OF PLAYERS' AGENTS

Article 19 Representation contract

1. A players' agent shall be permitted to represent a player or a club only by concluding the relevant written representation contract with that player or club.
2. If the player is a minor, the player's legal guardian(s) shall also sign the representation contract in compliance with the national law of the country in which the player is domiciled.
3. The representation contract shall be valid for a maximum period of two years. It may be extended for another maximum period of two years by a new written agreement and may not be tacitly prolonged.
4. The representation contract shall explicitly state who is responsible for paying the players' agent and in what manner. Any laws applicable in the territory of the association shall be taken into account. Payment shall be made exclusively by the client of the players' agent directly to the players' agent. However, after the conclusion of the relevant transaction, the player may give his written consent for the club to pay the player's agent on his behalf. The payment made on behalf of the player must reflect the general terms of payment agreed between the player and the player's agent.
5. Such a representation contract must contain the following minimum details: the names of the parties; the duration and the remuneration due to the players' agent; the general terms of payment; the date of completion and the signature of the parties.
6. The representation contract shall be issued in four originals which shall be duly signed by both parties. The player or the club shall keep the first copy and the players' agent the second. For registration purposes, the players' agent is advised to send the third and fourth copies to his association and the association to which the player or club belongs within 30 days of their having been signed.
7. The provisions set out in this article are without prejudice to the client's right to conclude an employment contract or a transfer agreement without the assistance of a representative.
8. Players' agents shall avoid all conflicts of interest in the course of their activity. A players' agent may only represent the interests of one party per transaction. In particular, a players' agent is forbidden from having a representation contract, a cooperation agreement or shared interests with one of the other parties or with one of the other parties' play-

ers' agents involved in the player's transfer or in the completion of the employment contract.

Article 20 Remuneration

1. The amount of remuneration due to a players' agent who has been engaged to act on a player's behalf is calculated on the basis of the player's annual basic gross income, including any signing-on fee that the players' agent has negotiated for him in the employment contract. Such amount shall not include the player's other benefits such as a car, a flat, point premiums and/or any kind of bonus or privilege which is not guaranteed.
2. The players' agent and the player shall decide in advance whether the player shall remunerate the players' agent with a lump sum payment at the start of the employment contract that the players' agent has negotiated for the player or whether he shall pay annual instalments at the end of each contractual year.
3. If the players' agent and the player do not decide on a lump sum payment and the player's employment contract negotiated by the players' agent on his behalf lasts longer than the representation contract between the players' agent and the player, the players' agent is entitled to annual remuneration even after expiry of the representation contract. This entitlement lasts until the relevant player's employment contract expires or the player signs a new employment contract without the involvement of the same players' agent.
4. If the players' agent and the player cannot reach agreement on the amount of remuneration to be paid or if the representation contract does not provide for such remuneration, the players' agent is entitled to payment of compensation amounting to three per cent of the basic income described in paragraph 1 above which the player is due to receive from the employment contract negotiated or renegotiated by the players' agent on his behalf.
5. A players' agent who has been contracted by a club shall be remunerated for his services by payment of a lump sum that has been agreed upon in advance.

Article 21 Standard representation contract

1. FIFA shall provide the associations with a standard representation contract (cf. Annex 3).
2. Every players' agent is advised to use this standard contract. The parties to the contract are at liberty to enter into additional agreements and to supplement the standard contract accordingly, provided that the laws applicable in the territory of the association for arranging employment in the country concerned are duly complied with.

Article 22 Right to make contact, prohibition on approaches

1. Licensed players' agents have the right to:
 - a) contact every player who is not, or is no longer, under an exclusive representation contract with another players' agent;
 - b) represent the interests of any player or club that requests him to negotiate or renegotiate contracts on his/its behalf;

c) take care of the interests of any player who requests him to do so; d) take care of the interests of any club which requests him to do so.

2. Players' agents are prohibited from approaching any player who is under contract to a club with the aim of persuading him to terminate his contract prematurely or to violate any obligations stipulated in the employment contract. It shall be presumed, unless established to the contrary, that any players' agent involved in a contractual breach committed by the player without just cause has induced such breach of contract.
3. Every players' agent shall ensure that his name, signature and the name of his client appear in any contracts resulting from transactions in which he is involved.

Article 23 Adherence to statutes, regulations and laws applicable in the territory of the association

1. Players' agents shall respect and adhere to the statutes, regulations, directives and decisions of the competent bodies of FIFA, the confederations and the associations, as well as the laws governing job placement applicable in the territory of the association.
2. Players' agents shall ensure that every transaction concluded as a result of their involvement complies with the provisions of the aforementioned statutes, regulations, directives and decisions of the competent bodies of FIFA, the confederations and the associations, as well as the laws applicable in the territory of the association.

Article 24 Adherence to Code of Professional Conduct

1. Players' agents shall abide by the principles described in the Code of Professional Conduct (cf. article 11).
2. In particular, upon request players' agents shall give the relevant body of each association and/or FIFA all of the requisite information and submit the necessary papers.

V. RIGHTS AND OBLIGATIONS OF PLAYERS

Article 25 Engagement of licensed players' agents

1. A player may only engage the services of a licensed players' agent to represent him in the negotiation or renegotiation of an employment contract.
2. A player is obliged, if he himself does not negotiate directly with clubs, only to work with licensed players' agents, subject to the exceptions listed under article 4.
3. It is the player's duty to satisfy himself that a players' agent is appropriately licensed prior to signing the relevant representation contract.

Article 26 Reference in negotiated contracts

1. Any contract concluded as a result of negotiations conducted by a licensed players' agent who was engaged by the player concerned shall specify the players' agent's name.
2. If a player does not use the services of a players' agent, this fact shall also be explicitly stated in the relevant employment contract.

VI. RIGHTS AND OBLIGATIONS OF CLUBS

Article 27 Engagement of licensed players' agents

1. Clubs are entitled to engage the services of licensed players' agents to represent them in negotiations relating to player transfers or employment contracts.
2. Clubs are obliged, if they themselves do not negotiate directly with players, only to work with licensed players' agents, subject to the exceptions listed under article 4.2.
3. It is the clubs' duty to satisfy themselves that a players' agent is appropriately licensed prior to signing the relevant representation contract.

Article 28 Reference in negotiated contracts

1. Any contract concluded as a result of negotiations conducted by a licensed players' agent who was engaged by the club concerned shall specify the players' agent's name.
2. If the club does not use the services of a players' agent, this fact shall also be explicitly mentioned in the relevant transfer and/or employment contract(s).

Article 29 Payment restrictions and assignment of rights and claims

1. No compensation payment, including transfer compensation, training compensation or solidarity contribution, that is payable in connection with a player's transfer between clubs, may be paid in full or part, by the debtor (club) to the players' agent, not even to clear an amount owed to the players' agent by the club by which he was engaged in its capacity as a creditor. This includes, but is not limited to, owning any interest in any transfer compensation or future transfer value of a player.
2. Within the scope of a player's transfer, players' agents are forbidden from receiving any remuneration other than in the cases provided under Chapter IV of the present regulations.
3. If the association concerned so requires, payments in favour of players' agents shall be made through a bank account designated by the relevant association.

VII. DISPUTES IN CONNECTION WITH PLAYERS' AGENTS' ACTIVITY

Article 30 General provisions

1. To deal with domestic disputes in connection with players' agents' activity, the associations shall as a last resort refer any dispute arising from or relating to national players' agents regulations to an independent, duly constituted and impartial court of arbitration, while taking into account the FIFA Statutes and the laws applicable in the territory of the association.
2. In the case of international disputes in connection with the activity of players' agents, a request for arbitration proceedings may be lodged with the FIFA Players' Status Committee.
3. If there is reason to believe that a case raises a disciplinary issue, the Players' Status Committee or single judge (as the case may be) shall submit the file to the Disciplinary Committee together with the request for the

commencement of disciplinary proceedings, in accordance with the FIFA Disciplinary Code and Chapter VIII below.

4. The Players' Status Committee or single judge (as the case may be) shall not hear any case subject to these regulations if more than two years have elapsed from the event giving rise to the dispute or more than six months have elapsed since the players' agent concerned has terminated his activity. The application of this time limit shall be examined *ex officio* in each individual case.
5. The detailed procedures for the resolution of disputes in connection with the activity of players' agents are further outlined in the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

VIII. SANCTIONS

Article 31 General provision

Sanctions may be imposed on any players' agent, player, club or association that violates these regulations, their annexes or the statutes or other regulations of FIFA, the confederations or the associations.

Article 32 Competence, limitation and costs

1. In domestic transactions, the relevant association is responsible for imposing sanctions. This responsibility, however, does not preclude the competence of the FIFA Disciplinary Committee to impose sanctions on a players' agent involved in a domestic transfer within an association other than the one that issued his players' agent licence.
2. In international transactions, the FIFA Disciplinary Committee is responsible for imposing sanctions in accordance with the FIFA Disciplinary Code.
3. In the event of any uncertainty or dispute regarding competence, the FIFA Disciplinary Committee shall decide who is responsible for imposing sanctions.
4. Each association shall appoint a body responsible for sanctioning players' agents, players and clubs. The associations shall ensure that after every channel at association level has been exhausted, parties sanctioned on the grounds of these regulations have the opportunity to lodge an appeal with an independent, duly constituted and impartial court of arbitration enabled to pass judgment.
5. Sanction proceedings may be initiated by the relevant association or by FIFA, either on its own initiative or upon request.

Article 33 Sanctions on players' agents

1. The following sanctions may be imposed on players' agents for violation of these regulations and their annexes in accordance with the FIFA Disciplinary Code:
 - a reprimand or a warning;
 - a fine of at least CHF 5,000;
 - a suspension of licence for up to 12 months;
 - a licence withdrawal;
 - a ban on taking part in any football-related activity.These sanctions may be imposed separately or in combination.
2. In particular, the licence shall be withdrawn if the players' agent repeatedly or seriously

infringes the statutes and regulations of FIFA, the confederations or the associations.

3. Only the association issuing the licence may suspend or withdraw a players' agent licence. If FIFA decides to suspend or withdraw a players' agent licence, it shall, once its decision has legally come into force, address the necessary directive to the association that issued the licence.

Article 34 Sanctions on players

The following sanctions may be imposed on players for violation of these regulations and their annexes in accordance with the FIFA Disciplinary Code:

- a reprimand or a warning;
- a fine of at least CHF 5,000;
- a match suspension;
- a ban on taking part in any football-related activity.

These sanctions may be imposed separately or in combination.

VIII. SANCTIONS

Article 35 Sanctions on clubs

The following sanctions may be imposed on clubs for violation of these regulations and their annexes in accordance with the FIFA Disciplinary Code:

- a reprimand or a warning;
- a fine of at least CHF 10,000;
- a transfer ban;
- a deduction of points;
- demotion to a lower division.

These sanctions may be imposed separately or in combination.

Article 36 Sanctions on associations

The following sanctions may be imposed on associations for violation of these regulations and their annexes in accordance with the FIFA Disciplinary Code:

- a reprimand or a warning;
- a fine of at least CHF 30,000;
- exclusion from a competition.

IX. INTERPRETATION AND OMISSIONS

Article 37 Official languages

In the case of any discrepancy in the interpretation of the English, French, Spanish or German texts of these regulations, the English text shall be authoritative.

Article 38 Matters not provided for

Matters not provided for in these regulations and cases of *force majeure* shall be decided by the FIFA Executive Committee, whose decisions are final.

X. TRANSITIONAL PROVISIONS AND ENFORCEMENT

Article 39 Transitional provisions

1. Any case that is pending at FIFA when these regulations come into force shall be dealt with in accordance with the Players' Agents Regulations dated 10 December 2000.
2. All applications for a players' agent licence shall be dealt with in accordance with these regulations.
3. Agents who hold a licence when these regulations come into force are equally subject to these regulations.
4. All other cases shall be assessed according

to these regulations. This refers, in particular, to article 17 of these regulations.

Article 40 Enforcement

1. These regulations were adopted by the FIFA Executive Committee on 29 October 2007 and come into force on 1 January 2008.
2. The new provisions introduced by these regulations shall be enforced by the associations by no later than 31 December 2009.

Notwithstanding this, each association shall implement Chapter III of these regulations from 1 January 2008.

Zurich, 29 October 2007
For the FIFA Executive Committee
President: General Secretary:
Joseph S. Blatter Jérôme Valcke

ANNEXE 1

Code of Professional Conduct

1. The players' agent is required to perform his activities conscientiously and conduct himself in his profession and other business practices in a manner worthy of respect and befitting his profession.
2. The players' agent agrees unconditionally to abide by the statutes, regulations, directives and decisions of the competent bodies of FIFA, the confederations and the relevant associations.
3. The players' agent shall always adhere to the truth, clarity and objectivity in his dealings with his client, negotiating partners and other parties.
4. The players' agent shall protect the interests of his client in compliance with the law and a sense of fairness, while creating clear legal relations.
5. The players' agent shall, without fail, respect the rights of his negotiating partners and third parties. In particular, he shall respect the contractual relations of his professional colleagues and shall refrain from any action that could entice clients away from other parties.
6.
 - a) The players' agent shall conduct a minimum of bookkeeping on his business activity. In particular, he shall ensure that he can provide evidence of his activity at any time by means of documents and other records.
 - b) He shall keep all of the books conscientiously and detail his business activity faithfully in other records.
 - c) At the request of any authorities conducting an investigation into disciplinary cases and other disputes, the players' agent is required to produce books and records directly connected with the case in point.
 - d) The players' agent shall produce an invoice showing his fees, expenses and any other charges upon first demand from his client.
7. The players' agent is prohibited from taking a dispute to ordinary courts of law as stipulated in the FIFA Statutes and is required to submit any claim to the jurisdiction of the association or FIFA.

With his signature, the players' agent accepts the above.

Place and date:

.....

The players' agent:

.....

For the association:

.....

(stamp and signature)

ANNEXE 2

Insurance policy and bank guarantee

1. The amount covered by the insurance policy shall be fixed on the basis of the players' agent's turnover. Such amount shall in any case not be less than CHF 100,000.
2. The professional liability insurance policy shall also cover claims made after expiry of the policy for events that occurred during the period of the policy.
3. The players' agent is required to renew the insurance policy upon its expiry and automatically send the relevant documents to the association concerned.
4. The aim of the insurance is to cover any claims for compensation from a player, a club or another players' agent arising from the players' agent's activity which, in the opinion of the association and/or FIFA, contravenes the principles of these regulations and/or the relevant association's regulations.
5. Only in the event that it is not possible for a players' agent to conclude a professional liability insurance policy in compliance with article 9 of these regulations may the players' agent deposit a bank guarantee for the minimum amount of CHF 100,000.
6. Where it is not possible to conclude a professional liability insurance policy in the territory of a particular association, that association shall inform FIFA and make a formal request to allow a bank guarantee.
7. Only FIFA has access to this bank guarantee. The bank guarantee has the same purpose as that of professional liability insurance. The amount of the guarantee (minimum CHF 100,000) does not represent the maximum amount which may be due to any party claiming damages.
8. If the amount of the guarantee is reduced by a payment from the bank in response to a claim for damages against the players' agent, his licence shall be suspended until the amount of the guarantee has been increased to the initial amount (minimum CHF 100,000).
9. Players' associations that are officially recognised by the associations and that wish to provide a job placement service to their member players may conclude their own joint professional liability insurance policy with a reputable insurance company, preferably in the country where they operate.
10. In such cases, this insurance shall be limited to covering risks in connection with no more than five licences. The licence holders shall, however, be bona fide members of the associations concerned, have passed the written examination in accordance with article 8 herein and have personally signed the Code of Professional Conduct (cf. article 11).

The names of the applicants who have received a licence shall also be listed in the insurance policy.

11. The players' agent may not cancel his professional liability insurance policy until he has terminated his activities (the licence has either been returned or withdrawn). The players' agent shall, however, ensure that any claim for compensation made after termination of his occupation which originates from his former activity as a players' agent is covered by the insurance (cf. article 9).

ANNEXE 3

Standard representation contract

The parties

.....
.....

(Players' agent's first name, surname, exact address and name of company, if applicable)

.....

.... (hereinafter: the players' agent)

and

.....
.....

(Player's first name (and nickname, if applicable), surname, exact address and date of birth or club's

name and exact address)

.....
.... (hereinafter: the client)

have agreed to conclude a representation contract as follows:

1) DURATION

This contract shall be valid for

.....

(no. of months, maximum 24)

It shall take effect on and

terminate on

(exact date) (exact date)

2) REMUNERATION

Only the client may remunerate the players' agent for the work he has accomplished.

a) Player as client

The players' agent shall receive commission amounting to % of the annual gross basic salary due to the player as a result of employment contracts negotiated or renegotiated by the players' agent, payable as follows:

- a lump sum payment at the start of the employment contract:

- annual payments at the end of each contractual year:

(mark as appropriate)

b) Club as client

The players' agent shall receive commission amounting to
in one lump sum. (exact amount and currency)

3) EXCLUSIVITY

The parties agree that the placement rights be transferred exclusively:

non-exclusively:

(mark as appropriate)

to the players' agent.

4) OTHER AGREEMENTS

Any other special arrangements that comply with the principles contained in the players' agents regulations shall be enclosed with this contract and deposited with the relevant association.

5) MANDATORY LEGISLATION

The parties agree to adhere to the statutes, regulations, directives and decisions of the competent bodies of FIFA, the confederations and the

relevant associations, as well as public law provisions governing job placement and other laws applicable in the territory of the association, as well as international law and applicable treaties. The parties agree to submit any claim to the jurisdiction of the association or FIFA. Recourse to ordinary courts is prohibited unless specifically provided for in the FIFA regulations.

6) FINAL NOTES

This contract has been signed in fourfold and the copies have been distributed as follows:

1. Association with which the players' agent is registered:
.....
(exact name)
2. Association with which the client is registered:
.....

- (exact name)
3. Players' agent
 4. Client
- Place and date:
- Players' agent: Client:
.....
.....
- (signature) (signature)
- Confirmation of receipt of contract:
Place and date:
- The players' agent's association: The client's association:
.....
.....
- (stamp and signature) (stamp and signature)



Betting in Sports Events: Gambling in Italy

by Felice Antignani, Michele Colucci and Felix Majani*

1. Introduction

The purpose of this study is to conduct an analysis on the betting games' sector. To begin with, this article shall underline the dominant role of the Italian State in the past years and how the state is slowly losing its grip and role in relation to gambling in sports as a result of the increasing flexibilities of internet. We shall thereafter highlight the key economic consequences produced by betting on all the parties involved in these activities.

How can we define betting in sporting events? How can we distinguish legal betting from illegal gambling? How can we combine the needs of the State with its desire to exercise and manage the betting system with the globalisation of the market?

We shall try to give some answers to these questions through conducting a study on the Italian "grants system", and how this system has been modified over the years, from 1948 up to December 2008. The definition of "gambling" has been modified too; a strict definition of gambling can be found from the Italian Criminal Code and in a particular Act (L. n.401/1989) which is directed at preserving the State's control and monopoly over gambling laws despite rulings from the European Court of Justice to the effect that the Italian national laws are contrary to the European principles on freedom of establishment and freedom of providing services.

The second part of our study shall focus on the AAMS, its structure, its functions, the evolution of its role and its aims for the future. At the same time, we shall distinguish between sporting and non sporting related betting events¹.

2. The Definition of gambling as a criminal offence

The definition of gambling can be found in the "Study of Gambling Services in the Internal Market of the European Union" of 2006, wherein gambling has been defined as "any service, including any

information society service, which involves wagering a stake with a monetary value in games of chance, including lotteries and betting transactions"².

This definition has more or less been adopted in the same breath in Article 721 of the Italian Criminal Code, which aims to punish gambling activities which are conducted in a public area and/or private clubs. Art. 721 states that: "Gambling is playing games for a personal profit when the results are completely based on uncertain events".

Over the previous years, Italian doctrine³ has been established and evolved for purposes of distinguishing gambling from simple betting games. The above mentioned list is based on the two criteria described under Article 721, these criteria being i) the personal profit and ii) the results coming from uncertain events. On this basis, gambling includes:

Bingo, black jack, lottery, roulette, slot machines, video poker,

Simple betting includes: betting on sports events, betting on horse races, poker, bridge, and flipper. It is important to underline that the players' personal abilities to contribute in the game being played fall under the second group⁴.

2.1. Legal Gambling

As earlier highlighted, Article.718 of the Italian criminal code punishes gambling activities which take place in public and/or private clubs. However it is important to note that gambling can sometimes be legal, and especially in situations where there is public authorisation. Public authorisations serve various purposes; for instance, through the grant coming from the State, the possibility of injecting revenues is made higher. We shall revisit this discussion during our study on the evolution of the "grant system" in Italy.

3. Act No. 401/1989 and the European reaction in the "Gambelli" and "Placanica" cases

As earlier seen, betting on sports events does not amount to illegal gambling. However, Italian judges have on some occasions tried to subject such types of betting to the rules of Article 718. A classic example involves "Tontero", which is an unauthorised betting activity in Italy, whose authors faced criminal consequences. The decision of the Italian judges to the "Tontero" case however did not root out the problems related to betting and gaming. This prompted the Italian law makers to deliver a new Act addressing the issue of illegal exercise of betting activities in sports events⁵.

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1 All the relevant information has been taken from the Italian AAMS' annuary (website www.aams.it/news/ site.php?page=2006011215265996)

2 The above described definition has been taken from F. FILPO, Il gioco d'azzardo tra la direttiva dei servizi e la sentenza Placanica, in *Contratto e Impresa Europa*, 2007, II, 1016.

3 See U. PIOLETTI, Il gioco nel diritto penale, Milano, 1970, 30.

4 See V. Manzini, Trattato di diritto penale, Torino, 1948, X, 868.

5 See S. Beltrani, La disciplina penale dei giochi e delle scommesse, Milano, 1999, 140.

Article 4 of the Act No. 401/1989 provides criminal sanctions in cases of:

Illegal exercise of the game "lotto" and the other games controlled by the State or granter societies;
Illegal exercises of the games controlled by CONI and/or UNIRE;
Illegal exercises of other examples of betting in relation to human beings and/or animals.

Article 4, co. 4 bis, imposes criminal sanctions on anyone who exercises, controls and manages betting without the public and specific authorisation whether the said person is Italian or otherwise. In essence, this law places betting games under the control and direction of the Italian State.

For this specific reason, Italian legislation has been heavily criticised by the European Court of Justice which has on occasion declared that it violates Articles 43 EC and 49 EC (the "Gambelli"⁶ and "Placanica"⁷ judgements). In the eyes of the European Court of Justice, the criminal penalties imposed by the Italian laws and the overall restrictions directed towards the foreign betting agencies, go against the freedom of establishment and provision of services. According to the ECJ, the Italian state may control betting activities but it cannot at the same time retain a monopoly whereby it is the only institution which provides and manages betting games.

On the same breath and direction the award No. 284/2007, delivered by the Italian Constitutional Court; states that Italian judges shall not apply the national legislation for the reasons mentioned hereinabove⁸.

3.1. The Piergiorgio Gambelli case

By order dated 30 March 2001, issued by the European Court of Justice on 22 June 2001, the Tribunale di Ascoli Piceno referred an issue for the interpretation of Articles 43 and 49 EC to the Court for a preliminary ruling under article 234 EC.

This issue was raised in criminal proceedings brought against Mr Gambelli and 137 other defendants, who were accused of having illegally organised clandestine bets and of being the proprietors of centres carrying on the activity of collecting and transmitting betting data, which constitutes an offence of fraud against the State. In particular, the Public Prosecutor and the investigating judge at the Tribunale di Fermo established the existence of a complex organisation of Italian agencies linked through internet to the English bookmaker Stanley International Betting Ltd (Stanley), established in Liverpool, and to which company Gambelli and the other defendants belonged to. On this basis, they were accused of having collaborated in Italy with an overseas bookmaker in the activity of collecting bets which is normally reserved by law to the State, thereby infringing Law n. 401/1989.

Such an activity, in the eyes of Italian legislation, was considered as being incompatible with the monopoly on sporting bets which is managed by the CONI (Italian National Olympic Committee) and for this reason it could constitute a criminal offence under article 4 of Law n. 401/1989.

It is important to underline that the Court has been called to interpret the compatibility of the Italian criminal legislation regarding betting games with the European law.

In the eyes of the European the Court, the Italian legislation was held to constitute a restriction on the freedom of establishment, which includes restrictions on the setting up of agencies, branches or subsidiaries, prohibited by Article 43 EC. In particular, the court emphasised that "where a company established in a Member State (such as Stanley) pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State (such as the defendants in the main proceedings), any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment"⁹.

Furthermore, the Italian legislation constitutes a restriction on the freedom to provide services. Article 49 EC prohibits restriction on freedom to provide services within the Community for nationals of Member States who are established in a Member State other than the State of the person for whom the services are intended. However, Article 49 EC "covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established"¹⁰.

In light of these considerations, the Court stated that: "National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on freedom of establishment and the freedom to provide services provided for in Articles 43 EC and 49 EC respectively, which, to be justified, must be based on imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it and be applied without discrimination. In that connection, it is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those objectives.

In particular, in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings. Furthermore, where a criminal penalty was imposed on any person who from his home in a Member State connects by internet to a bookmaker established in another Member State the national court must consider whether this constitutes a disproportionate penalty".

This position had been previously confirmed in 2007 in another criminal case, the "Placanica" judgement, where the Italian legislation declared beyond any doubt as being incompatible with the European principles on freedom of establishment and freedom to provide services within the Community.

3.2. The Massimiliano Placanica case

This issue arose as a result of the decision of Stanley Leisure plc, one of the biggest bookmakers in the UK to engage in the collection of bets through the use of Mr Placanica and Mr Sorriccio as their Data Transmission Centres (or agents) in Italy because the Italian laws on tendering procedures prohibited companies such as Stanley Leisure plc from directly engaging in betting games in Italy because Stanley Leisure plc was part of a group which had been quoted on the Italian regulated markets.

The central issue in this case concerned whether Mr Placanica, Mr Palazzese and Mr Sorriccio had violated the Italian criminal laws¹¹, in particular Article 4 (4a) of law No. 401/89 by pursuing the organised activity of collecting bets without possession of a licence or police authorisation¹² as required of Italian law through as Stanley Leisure plc.

The EC was called upon to decide whether these Italian laws were contrary to Articles 43 EC and 49.

The Court made specific reference to the ruling in *Gambelli* and reiterated that where national legislations prohibit on the pain of criminal penalties, the pursuit of activities in the betting and gaming sector without a licence or police authorisation issued by the state,

6 ECJ, Judgment of 6 November 2003, Case C-243/01, Criminal proceedings against Piergiorgio Gambelli and Others, ECR 2003, I-13031; see I. Zagato, *Caso Gambelli: la Corte di Giustizia riformula il proprio giudizio sulla disciplina italiana in tema di scommesse, in Europa e diritto privato*, 2005, I, 206.

7 ECJ, Judgment of 6 March 2007, Joined cases C-338/04, C-359/04 and C-360/04, Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04), ECR 2007, I-1891.

8 See A. Montagna, *La svolta della*

Cassazione sulla raccolta di scommesse ed allibratori esteri, una soluzione possibile, un percorso non del tutto condivisibile, in *Cassazione penale*, X, 2007, 3653.

9 ECJ, C-243/01 paragraph 46.

10 See Case C-384/93 *Alpine Investments*, paragraph 22.

11 This law provided for imprisonment for a period of between 6 months and 3 years.

12 Article 88 if the Italian Royal Decree required No 773 required applications to be filed before the Italian police for licensing and authorisation to carry out betting activities.

then such a law constitutes a restriction on the freedom of establishment and the freedom to provide services.

It however said that where national laws impose restrictive measures on the ability to engage in the collection of bets, such restrictions must be assessed on a case by case basis in order to determine whether they are suitable for purposes of achieving the objective(s) invoked by the member state concerned and whether they do not go beyond what is necessary in order to achieve these objectives¹³.

The Court reiterated the need to distinguish on one hand, between the objective of reducing gambling opportunities in so far as games of chance are permitted, and on the other hand, the objective of combating crime by making the operators who were active in the gaming sector subject to control and channelling the activities of betting and gaming. See Para 52.

In applying this criteria to the case beforehand, the court went on to find on paragraph 54 of its ruling that "(...) in the present case, according to the case law of the "Corte suprema di cassazione" (the Italian Supreme Court) that the Italian legislature is pursuing a policy of expanding activity in the betting and gaming sector, with the aim of increasing tax revenue, and that no justification for the Italian legislation is to be found in the objectives of limiting the propensity of consumers to gamble or of curtailing the availability of gambling"

The Court referred to the decision of the Tribunale di Teramo in cases C-359/04 and C-360/04 which expressly excluded companies such as the defendants whose individual shareholders could not be easily identified from the tender licensing process and reiterated on paragraph 64 that "Articles 43 EC and 49 EC must therefore be interpreted as precluding national legislation such as that at issue in the main proceedings, which excludes - and, moreover, continues to exclude - from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets"

In relation to the need to obtain police authorisation, the court stated that member states cannot apply criminal penalties for failure to complete an administrative formality where such completion has been refused or rendered impossible by the Member State concerned, in infringement of Community¹⁴. It came to the conclusion that the defendants "had no way of being able to obtain the licences or police authorisation required under Italian legislation because, contrary to Community law, Italy makes the grant of police authorisations subject to possession of a licence and, at the time of the last tender procedure in the case which is the subject of the main proceedings, had refused to award licences to companies quoted on the regulated markets. In consequence, Italy cannot apply criminal penalties to persons such as the defendants in the main proceedings for pursuing the organised activity of collecting bets without a licence or a police authorisation" ¹⁵

The precedent issued by this court was to the effect that:

Articles 43 EC and 49 EC had to be interpreted as precluding national legislation which excludes - and, moreover, continues to exclude - from the betting and gaming sector operators in the form of companies whose shares are quoted on the regulated markets.

Articles 43 EC and 49 EC preclude national legislation, which impose criminal penalties on persons such for pursuing the organised activity of collecting bets without a licence or a police authorisation as required under the national legislation, where such persons were unable to obtain licences or authorisations because that Member State, in breach of Community law, refused to grant licences or authorisations to them.

4. History and features of the Italian "Granting System"

The expression "granting system" means the system through which the AAMS grants third parties the licence to control activities and purposes related to betting on sports event or not.

The granting system was initiated in 1948¹⁶, and has over the years, undergone several amendments and modifications. The main important feature of the system regards AAMS and its functional purposes. AAMS can in particular sub- lease the licence to a third party, or a private society, thereby enabling this 3rd party to exercise and control of

a particular type of betting. This grant feature relates to sports events and other different games, such as numbers-based games.

This system, together with the limitations and restrictions coming from the criminal legislation (Act n. 401/1989) ensured that state monopoly on betting games was maintained until the ECJ decided to intervene. In order to observe and respect the European Community law as well as the ECJ case law, the grant system was amended in detail in 2006.

The legal relationships between AAMS and the society or party receiving the grant then became defined in depth in Act D.L. No. 223/2006, called the "Decreto Bersani). Under this Act, the parties (AAMS and the private society) are specifically required to stipulate a legal model contract, wherein the rights and obligations between them. are established. The new "grant system" is characterised by:

More betting agencies; less obligations and overall restrictions on who can organise and manage the betting games; less control and involvement from the State.¹⁷.

Finally, we can say that the new granting system is directed to observe, respect and implement the European needs and solutions¹⁸ as put forward in the "Gambelli" and "Placanic" rulings.

4.1. The New rules on the "granting system"

The introduction of the "new granting system" in 2006 has not solved all the legal problems Italy faces with the European Court of Justices' decisions on betting. The D.L. No. 149/2008 contains rules aimed at implementing the statements and decisions from the ECJ. In particular, it:

Maintains the same concession for the game called "Lotto"; Establishes the procedural and economic rules for the selection of the new granter of betting on horse races; Creates a money fund for CONI and UNIRE in order to improve the quality and health of competitors., and establishes contractual and economic rules for the granting of betting machines such as video pokers etc.

5. The Administrative autonomy of the State - AAMS

The Administrative autonomy of the State - AAMS - manages the activities related to the regulation and control of the entire gaming market. AAMS was gradually assigned these functions of control as legislation in this sector continued to develop. At the same time, the AAMS carried on maintaining some of its more traditional responsibilities in the tobacco manufacturing sector¹⁹.

The participation of the Italian Government in both the gaming and tobacco manufacturing sectors played a big rile in maintaining a balance between the collection of tax revenues and the safeguarding of other important activities of public interest like consumer protection and the fight against illegal gaming. Through its role in promoting business cooperation's and networking, AAMS has managed to create a significant pool of wealth and employment. in Italy as a whole.

The key role played by AAM in the gaming sphere involves the drafting of guidelines for purposes of ensuring the dynamic and rational development of the gaming. It also ensures that all the concessions licensed by it act in accordance with the rules and regulations. AAMS continues to compare and contrast up and coming illegal gaming practices in today's world, and takes foresees the maximum collection of revenues collected by the Government in this sector.

AAMS is in charge of collecting tax and excise duties in the tobacco industry, whose distribution, tariff and retail price it regulates. In addition to this, the AAMS carries out frequent operations to detect

13 Paragraph 49 of the decision.

14 Reference was made to Case 5/83 Rieken [1983] ECR 4233, paragraphs 10 and 11.

15 See paragraph 70 of the decision.

16 Before the institution of the « granting system » the Italian State managed all the betting games as a monopolist.

17 See A. Corrado, Commento alla sentenza Gambelli, in Guida al diritto, 2003, 97.

18 In that direction G.M. Ruotolo, Il regime italiano del gambling all'esame della Corte di Giustizia: rien ne va plus?, in Diritto pubblico comparato ed europeo, 2007, 1399.

19 The relevant information and data concerning the AAMS as reported in the present articles has been taken from the AAMS website, www.aams.it (visited on 11 February 2009).

any tax evasions. Added to this is the responsibility to perform technical tests on the tobacco to ensure that its quality is in compliance with the Italian and EU standards and regulations.

Despite the State involving itself in this sector, both the public and private entities have in no way been exempted from taking part as well. The major objective which the State targets by participating through the AAMS is to ensure that the market is increasingly open and competitive and compliant with the regulations²⁰. This has been achieved through the joint cooperation between public and private sectors which has made it possible to guarantee a high quality offering for consumers.

AAMS's role in the gaming sphere has continued to expand, more so through its newly formed operation model of the public gaming market. Under this model, the State continues to control and manage the infrastructural network while assigning the rights to market the games to a variety of subjects, who compete amongst themselves in delivering high quality services, thereby ensuring a safe and fully competitive market.

In essence, Italy can only triumph in its fight against illegal gaming if it adopts the twofold action plan of compliance and repression, which the AAMS has recently put into place. Through this action plan of compliance and repression, AAMS has directed its efforts towards taking preventive action through extending and improving its offers to the market with a view to putting it as close as possible in line with the hopes and expectations of consumers and the general public. At the same time AAMS has not relinquished its commitment to taking swift and effective repressive measures.

It is against this background, that the initiative launched in cooperation with the Italian Ministry of Communications regulates the technical procedures directed at blocking access to sites which offer gaming services without any concession or authorisation.

Besides prohibiting the development of the illegal gaming market, the adoption of clearly focused repressive measures has played a big role in curbing the undesired effects of service black-outs which are not directly linked to the provision of illegal gaming solutions. In addition, the information contained on the redirecting affected the dissemination of information related to gaming laws and the institutional role of AAMS. Public and consumer awareness of gaming and related laws has therefore increased tremendously thanks to the initiatives of the AAMS.

6. Cultural background

The AAMS has played a major role in the history of Italian legislation, not to mention the gaming industry.

6.1. Historical background

AAMS is a creature of the economic system of state monopolies which were created to meet the public's need for security, order and social safeguards, while filling a regulatory role meant to guarantee the use and the enjoyment of primary needs. State monopolies were initially developed by the Greeks, who applied this system to olive oil, salt, papyrus, fishing products, mines and banks. Italy established its first monopoly in the minting of coins in the 1st century, extending it to salt, cinnabars, and mining products, as well as the services of heralds, barbers, cobblers and others, in the 4th century.

State and private monopolies (in the form of tendered concessions) then took over towards the middle age, minting of coins, in addition to producing and selling salt. Kings also distributed, at their discretion, monopoly-like privileges in the sectors of production, purchases and sales. One major private monopoly which was established in Italy in the 15th century was set up in Florence, by the Medici family to engage in alum exportation.

Between the end of the 16th century and the middle of the 18th, monopolies prospered more or less everywhere: the State mono-

polised tobacco products, gun powder, chemical products and other items of mass consumption.

In 1862, the Italian State placed a monopoly on the production and distribution of salt and tobacco products in order to maximise state revenues from these economic activities. Since then the state has managed its monopoly over tobacco with the help of subsidiary bodies.

The exclusive concessions on salt and the monopoly on quinine were of great assistance to the public, as this was exercised on a non-profit basis for social medical objectives. The monopoly on tobacco, on the other hand, has always been tied to changing social customs and to please the consumer, thereby making a noteworthy contribution to the satisfaction of the State's economic needs.

6.2. The projects and activities of AAMS

AAMS has forged its activities and identified itself through the history and culture outlined above as an institution which has played a central role at guaranteeing the production and distribution of goods and services in wide demand among the general public.

AAMS initially carried out its activities directly, by being solely responsible for the production of merchandise. It plays a slightly different role today; coordinating and controlling, those services typical to affluent societies, i.e. Gaming activities.

AAMS has always shown a special, ability to create value for Italy, in line with the times. This role was seen during both post-industrial and industrial Italy, and while it may appear less evident at present, in the so-called post-industrial Italy, in large part due to the fact that the momentous changes dealt with by this Administration are still quite recent, there can be no denying that the AAMS has already modified its identity, focussing the majority of its energies on its new role as the regulator of the gaming market, while introducing significant new developments in its traditional operations involving monopoly goods.

The social benefits produced new contributions which corroborate those which were traditionally provided by the AAMS and consist primarily of:

- Fighting against illegal gaming, through supporting efforts to suppress it and through constantly improving the supply of public gaming activities;

- Maintaining the trust of the general public and safeguarding the legitimate interests of consumers;

- Regulating the gaming market;

- Providing occasions for leisure time which act as diversions are compatible with broader interests of the individual and the general public.

6.3. Organisation

We shall now assess the structure and composition of AAMS.

6.3.1. The Central Offices

The current organisational structure of AAMS was introduced in 2003, primarily in the sector of public gaming regulation.

The office of the Director General carries out the activities of directing and controlling, in accordance with the guidelines set out in the "General Directives for administration and management".

The Director General's Office is also responsible for the main institutional relations, the external relations and issues related to news and broadcasting organisations, thereby ensuring liaison with the Minister's press office.

6.3.2. The Excise Duties Department.

This department deals with the distribution of manufactured tobacco products. It is responsible for, among other things, granting administrative concessions in the manufactured tobacco sector and ensuring that smoking products comply with national and regulation of tax payments and the accounting of tax revenues.

Its organisational structure consists of a Director General's Office and four General Managerial Offices: the Strategic Department, the Gaming Department, the Excise Duties Department and the Department for the Organisation and Management of Resources.

²⁰ See E. De Feo, *La privatizzazione dell'Amministrazione Autonoma dei Monopoli di Stato*, on

www.filodiritto.com/diritto_publico/amministrativo/privatizzazione_monopolidefeo.htm

6.3.3 *The Gaming Department*

It supervises the organisation and management of all games, oversees the management of gaming concessions, ensures that tax revenues are correct and regular and formulates directives and regulations. It also coordinates the procedures involved in granting new concessions by establishing guidelines in relation to their assignment and managing the relative public tenders.

6.3.4 *The Department for the Organisation and Management of Resources*

This office manages the human, capital, logistical and IT resources which are necessary to enable AAMS to carry out the role and tasks assigned to it. It is responsible for developing its IT system and its on line network. It defines the guidelines and procedures for managing its real estate, staff training, labour relations and collective bargaining negotiations.

7. Numbers-based games

7.1. **Lotto and SuperEnalotto.**

Lotto is a popular, traditional and customary Italian game. It has the potential of developing and meeting the requirements of the changing habits and psychological motivations of Lotto players, despite its lengthy history. A number of innovations were recently introduced, to it, including automated extraction, focussed extraction, the national draw ("ruota") and the third weekly extraction, while another brand-new feature, Instant Lotto, was added in 2006.

SuperEnalotto is another game invented in 1997. It involves foretelling the first numbers extracted in the draws of Bari, Florence, Milan, Naples, Palermo and Rome. The first number extracted in the draw of Venice serves as the "joker" number.

Fabulous winnings have firmly entrenched SuperEnalotto in Italy's collective imagination, such as the amazing record of 72 million euros set in 2005. Since 2006, the fans of SuperEnalotto have been using presented with a brand-new logo, a new playing sheet and a new optional, related game: SuperStar.

SuperStar is a new optional, tie-in game coupled with SuperEnalotto. A random number between one and ninety is generated by the terminal at the moment the wager is confirmed, the number becomes the winner number if it matches the first number drawn on the national Lotto draw.

7.2. **Lottery**

National lotteries are one of the oldest and most popular forms of traditional gaming in the world. They are associated with one or more historical, artistic or cultural events, or other types of local initiatives, and combine the diversion of gaming activity with the promotion of our country's artistic and cultural resources. The most important lottery in Italy is the "Lotteria Italia", which has been held since the 1960's and given extensive media coverage. The draw for the winners is usually held on January 6 of each year.

In recent years, in line with changing lifestyles increasingly characterised by speed and immediacy, there has been a growing desire for immediate victory, regardless of the amount at stake.. This led to the creation of instant lotteries and drawings, known in Italy in the famously known name of "Gratta e vinci" ("Scratch and Win"), a title that summarises the mechanics of the game.

In the year 2003, they launched a third type of lottery. Tied in with the traditional lotteries, this new form of gaming utilises telephone communications.

7.3. **Bingo**

It involves the extraction of ninety numbers, and was introduced in Italy in 2001. It resembles the traditional "tombola" game played by Italian families from time immemorial. Bingo is played in specially equipped Bingo Halls that offer hospitality and entertainment services to promote friendly encounters and socialisation, thus making it a pleasant pastime.

One unique feature of Bingo from the other games relates to the

individual behaviour of the participants and the distance, in terms of both space and time, between the moment when the game is played and the moment of the winnings. Since 2005, it has been possible to play Bingo through the creation of a single "virtual bingo hall" on a national level making for extractions that produce sizeable prizes even in the smallest "real" halls.

8. Games based on sports and horse racing.

This activity pools betting games based on forecasting sports results are time-honoured favourites in Italian popular culture, currently distributed through a vast and widespread network of betting points connected with the Totalisator, which registers all the wagers in real time and with the utmost security.

One such game goes by the name Totocalcio, which involves forecasting the outcomes of soccer matches (currently 124). From the moment it was introduced, in 1946, the game has been a fixture for all Italians, even those with less enthusiasm for soccer and less gaming ability, thus giving it a privileged place in the country's collective imagination. Innovative elements have subsequently been introduced: the Totogol game (in which the number of goals scored in each of the games listed on the betting slip must be forecasted), plus a new game, "9", coupled with Totocalcio.

The Totip pools game (based on horse races) is one of the oldest and most traditional games, still constituting a very well known brand. The Tris bet (in which the first three finishers of a race must be forecast) is a betting outlet game, played with a betting slip and aimed primarily at public affiliates, even though its widespread use and simplicity make it suitable for all players. In 2006, further new competitions were added under the name of "Ippica Nazionale" ("National Horse Racing").

In the past, bets were viewed as illegal gambling, though, as the government placed greater attention to its practice. This paved way for laws governing these activities, starting with betting on horses. Since 2002, all bets have been placed under the control of the AAMS.

Bets are placed on competitions involving Olympic sports (basketball, soccer, bicycle racing, downhill and cross-country skiing, tennis, sailing and volleyball), as well as motor sports (car and motorcycle racing) and horse races organised as part of the official programs of Italian and foreign racetracks.

There are traditionally two types of betting: totaliser-based and fixed rate. In the case of totaliser betting, "pots" of winnings are divided among those who have correctly forecast all the events being bet on. With fixed-rate bets, on the other hand, the bettor is playing against the "bank", managed by concession holders, with the outcome depending on the results of individual events or of a sequence of linked events. Winners are paid an amount equal to the wager, multiplied by the fixed rate at the moment the bet was made.

Also enhancing these offers are the new betting methods which have recently been introduced in the scene: "live" bets on sports events, meaning that wagers can be laid "during" the competition, until just before its conclusion (for example, up until the last lap in a motor racing event).

9. Gaming machines

They originated in Italy from the 1900's onwards. In 2002; the Italian Parliament defined the "legal" types of machines and methods of play, also regulating the possibility of winning small sums of money. Gaming machines that do not provide winnings in money can be divided into two different categories, respectively characterised by:

The ability to receive an object as a prize (crane games, draws that require skill etc...);

Pure entertainment (video games and mechanical and electro-mechanical devices, such as billiards, table football, pinball etc...).

The machines, known as "Newslot" are the only AWP machines authorised by the AAMS and are characterized for skill or entertainment elements combined with chance. The ongoing development of AWP machines is taking advantage of improvements in information and communications technologies in order to heighten the attraction of

the machines while, at the same time, safeguarding the gamblers and the levels of revenue of legal operators. One of the most significant security features of the new machines is that they only function when connected to the AAMS computerized network, with any tampering leading to an automatic shutdown.

10. The performance of the gaming market.

The public gaming market recorded extremely positive results in 2006, confirming the effectiveness of the initiatives which were launched in 2003. This slowly popularised the gaming portfolio and the rationalization of sales network. The sector has reported a turnover of over 35.2 billion euros. This is an increase of about 24% on 2005, and of 127% when compared to 2003.

At the same time, tax revenues from games have reached 6.7 billion euros (+9% up from the 2005 revenues and + 91.7% compared with the revenues recorded in 2003). This result, becomes considering the fact that the average rate of taxation on gaming has dropped from 28% in 2002 to 19.1% in 2006, and that the risk for the Treasury has decreased significantly, owing on the one hand to the diversification of revenue sources (56% of the total turnover of this sector came from the Lotto in 2002) and on the other, to the shift - for what concerns revenues - to games that have by their very nature more stable trends (the gaming machines), once they have fully established themselves on the market.

Conclusion

In general, the Italian State does have some form of control over the laws on betting in sports events, and through its laws, Article 4 of the Act No. 401/1989, imposes criminal sanctions on persons who engage in betting activities without licences and police authorisations. But these regulations, as we have seen, have been ruled as being contrary to the EC laws on freedom of establishment and provision of services.

Through the AAMS, Italy is slowly streamlining its laws on betting and gambling in order to involve both the public and the private community in these practices without unnecessary or complicated legal restrictions.

With the increasing popularity, internet access and creation of new games in betting, it is only a matter of time before Italy, with the help of more tranquilised legislations, maximises its income as a State from betting collections.

One important solution and recommendation for the progressive development of betting could be the creation of a "Betting Code", whose provisions combine the national, European and international law principles and jurisprudences.

A good example of a law with such principles and combinations is the English Gambling Act which enshrines the European principles on freedom of establishment and freedom to provide services.

The current Italian system legislation is entirely different from the previous provisions and has, through the "Decreto - Bersani" improved the possibilities of private companies to take over and manage sports betting through public tenders. This could more importantly create more competition and vibrate the entire Italian betting and general economic market.

Bibliography

- B. Belotti, *Giuoco*, in Dig. It., Torino, 1964.
 S. Beltrani, *La disciplina penale dei giochi e delle scommesse*, Milano, 1999.
 A. Boselli, *Rischio, alea e alea normale del contratto*, in Riv. trim. dir. proc. civ., 1947.
 A. Corrado, *Commento alla sentenza Gambelli*, in Guida al diritto, 2003.
 E. De Feo, *La privatizzazione dell'Amministrazione Autonoma dei Monopoli di Stato*, on www.filodiritto.com/diritto pubblico/amministrativo/privatizzazione monopolidefeo.htm.
 F. Filpo, *Il gioco d'azzardo tra la direttiva dei servizi e la sentenza Placanica*, in Contratto e Impresa Europa, 2007, II.
 C.A. Funaioli, *La disciplina giuridica delle lotterie*, in Riv. dir. sportivo, 1955.
 C. Furno, *Note critiche in tema di giochi, scommesse e arbitraggi sportivi*, in Riv. trim. dir. proc. civ., 1952.
 E. Gualazzini, voce *Giuochi e scommesse (storia)*, in Enc. dir., 1970.
 A. Guarino, *Questioni di gioco*, in Dir. e giur., 1946.
 V. Manzini, *Trattato di diritto penale*, Torino, 1948.
 I. Marani Toro, *Dalla Sisal al Totocalcio*, in Riv. dir. sportivo, 1996.
 A. Montagna, *La svolta della Cassazione sulla raccolta di scommesse ed allibratori esteri, una soluzione possibile, un percorso non del tutto condivisibile*, in Cassazione penale, X, 2007.
 A. Natalini, *Grazie alla giurisprudenza comunitaria cade una norma disapplicata da anni*, in Guida al diritto, 2007.
 M. Paradiso, *I contratti di gioco e scommessa*, Milano, 2003.
 U. Pioletti, *Il gioco nel diritto penale*, Milano, 1970, 30.
 P. Rescigno, *Gioco e scommessa*, in Dig.disc. priv., 1993.
 G. M. Ruotolo, *Il regime italiano del gambling all'esame della Corte di Giustizia: rien ne va plus?*, in Diritto pubblico comparato ed europeo, 2007.
 E. Valsecchi, *Appunti in tema di giuoco*, in Riv. dir. comm., 1949.
 E. Valsecchi, *Giuoco e scommessa. La transazione*, in Trattato di diritto civile e commerciale, 1986.
 L. Zagato, *Caso Gambelli : la Corte di Giustizia riformula il proprio giudizio sulla disciplina italiana in tema di scommesse*, in Europa e diritto privato, 2005, I.



In front: Joko Driyono, Director of the Football League of Indonesia, Robert Siekmann, Roberto Branco Martins (both ASSER International Sports Law Centre), and Hinca Pandjaitan, Director of the Indonesia Lex Sportiva Institute, and the CEOs of the Super League of Indonesia clubs, at the international sports law short course on "Professionalizing Football in Indonesia" in Makassar, Indonesia, 6 October 2009.

Legal Regulation of Sports Betting in Spain and its History

by Yago Vázquez, Jordi López and José Juan Pintó*

I.- Introduction

Anyone who knows about the messy and confusing regulation in force in Spain regarding sports betting could think that this is not the best moment for drawing up an introductory article regarding the legal regime for sports betting in Spain. And this is logical considering the fact that we are currently in a period of transition, in which an out of date, messy and dysfunctional legal regime is still in force although we can reasonably expect the introduction of a new set of regulations that we hope will face the real legal problems that arise these days with regard to sports betting¹.

However, from an European perspective, perhaps it is a good moment to face it if we take into account the fact that this regulatory provisional status also applies to the European framework as a consequence of the recent and continuous pre-legislative work within the European Community (not yet moulded into a specific Directive or into a European Regulation regarding this aspect of European Law), in part due to the important and conclusive case law of the Court of Justice of the European Communities (hereinafter "ECJ") in this area (in particular, the Decisions regarding the cases of "Gambelli"² and "Placanica"³). This Case Law results from a long series of decisions regarding the regulation of gambling, in which the ECJ adopted its current doctrine with a view to achieving better harmonisation of national law with European regulations.

It is true that the European High Court has restricted the application of the initial doctrine which, for example in the case of sports betting, we can find in case C-67/98 (*Questore di Verona/Diego Zenatti*). In the decision that resolved this matter, the ECJ declared that the provisions of the EU Treaty regarding the free provision of services did not conflict with national legislation (Italian in this case) allowing certain bodies to reserve the right to collect bets on sporting events, when this legislation is properly justified by social policy objectives designed to limit the negative effects of these activities and as long as the restrictions imposed are not disproportionate with regard to these objectives.

However, this doctrine was modified soon afterwards by the ECJ in the aforementioned *Gambelli* Decision, according to which the moral, religious or cultural characteristics of states as well as the negative consequences for individuals and society that, from a moral and financial point of view, could result from gambling and betting, may justify the retention by the national authorities of the power to restrict this type of activities⁴, but that in all cases *these restrictions must be fully justified and must be proportionate*.

Therefore, regarding the frequent monopolistic regulation of gambling by European states (which, it should not be forgotten, is due to both historic and social policy causes), the ECJ has declared that, as in other areas of Law, the gambling rights of each State (and consequently, rights related to sports betting) must respect the principles of free circulation of people and services that the EC Treaty proclaims in its articles 43 and 49 and that any restriction of these principles must be fully justified.

This is why perhaps, *lege ferenda*, it is the best time to analyse the legal regime for sports betting in Spain in order to look at where we have come from, where we are and where we are going.

II.- History of Sports Betting in Spain

Apart from games of chance, the history of sports betting in Spain is linked to the appearance of a game known as "*La Quiniela*" (The Pools), which has been played in this country since the second decade of the 20th Century and which can be defined (currently) as a mutual bet in which the betters make predictions about the results of 15 football games that appear in competitions authorised by the Royal Spanish Football Federation or other national or international institutions (normally 10 teams from the 1st Division and 5 from the 2nd Division), these 15 predictions forming a single bet (combinations of bets can also be made).

Although *La Quiniela* started officially on 22nd September 1946 (soon after, as described later, the "*Patronato de Apuestas Mutuas Deportivas Benéficas*" - Charitable Sports Pari-Mutuel Betting Board - was created), the truth is that Spaniards had been playing *La Quiniela* since long before then. According to an article written by the journalist Tomás González-Martín entitled "*La Quiniela is sixty years old, but it was born at the age of fifteen*," which was published in the newspaper ABC on 28th September 2006, people have been playing *La Quiniela* since 1929 and there is documentary evidence dating from the League championship in 1931-1932⁵.

According to the records kept, on this first day of *La Quiniela* in 1946 a total of 38,530 tickets were purchased generating an income of 77,060 pesetas, of which 34,677 pesetas were used for prizes (45% of the income, as shall be explained later) distributed amongst the holders of 62 winning tickets.

Those that have studied the history of *La Quiniela* agree that the game was invented by Manuel González Lavín, who had the idea in 1929 following the launch of the Spanish Football League. In fact, the first place in which his invention was exploited or marketed was "*Bar la Callealtera, Casa Sota*" that he managed, at number 22 in Calle Alta in the city of Santander.

La Quiniela was so successful that it crossed borders, expanding to cover not only the rest of Spain but also America, through the sailors that left the port of Santander for the American continent. The game also now had a printed set of rules that determined the distribution of prize money and even envisaged incidents such as, for example, what happened in the event of suspension of a League game.

Initially, 95% of the income was used for prizes and the Tax Department only taxed the remaining 5%, which was used for the administration of *La Quiniela*. Later, this percentage was increased to 10%, as can be seen on a ticket from 1931 that still exists today and that has the seal of the Spanish Tax Department showing the application of this rate of tax. This shows, undoubtedly, the normality with which the game was played then, even before the existence of specific regulation regarding sports betting, obviously apart from the general regulations applicable to gambling, which the Civil Code regulates in articles 1,789 to 1,801. Similarly, it is clear that the State immediately

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1 It should be taken into account that, despite the obvious relevance to this subject, this work's scope does not include an analysis of the implications of sports betting with regard to (i) problems related to sport-related fraud, (ii) regulations regarding money laundering, (iii) Data Protection regulations, (iv) regulations for the protection of consumers and users, (v) regulations regarding intellectual property, image rights and competition law, etc... Please note that this work is focussed exclusively on the analysis of administrative regulation of sports betting in Spain.

2 Decision of the ECJ on 6th November 2003, resolving case C-243/01.

3 Decision of the ECJ on 6th March 2007, resolving cases C-388/04 and C-360/04.

4 As stated by the ECJ in section 60 of the Schindler decision, the ECJ stressed that these moral, cultural or religious considerations, together with the fact that these activities move large amounts of money that could be linked to crime and fraud, justify the national authorities having the power to determine the requirements that must be fulfilled by this activity.

5 According to the data provided in this article, the first ticket kept dates from 22nd November 1931.

saw sports betting as an easy way to gain a large amount of income for state coffers.

Success always has a lot of parents whilst failure is an orphan and so, soon, lots of parties wanted part of the loot. The first was the Town Council of the city of Santander, which in 1932 managed to gain 3% of the revenue, thereby reducing the prize money to 82%. Soon afterwards, it was agreed to give another 2% to charity. This led, almost by surprise, to the creation of an efficient and highly advanced private gambling organisation, which was a pioneer in Spain and Europe but that, like so many other things, was interrupted by the outbreak of the Spanish Civil War on 17th July 1936.

Following the war⁶, in the league's 1939-1940 season the management of *La Quiniela* (which was renamed "*Bolsa del Fútbol*") was handed over to the religious order San Juan de Dios and it was decided that 50% of the revenue would be used for prize money, 5% for administration and the remaining 45% would go to the religious order in order for it to carry out its own purposes. Finally, and after certain scandals that took place during these years, the State decided to take over its management (thereby appropriating the invention), for which it promulgated the Decree-Law dated 12th April 1946, creating the *Patronato de Apuestas Deportivas Benéficas* (hereinafter, the "*Patronato*"). It was at this time that what was initially a strictly private business became property of the State, which monopolised its management and exploitation and forbade private organisations from carrying out this type of activity, under penalty of being accused of committing a smuggling offence. It is curious that what was initially designed as a private business ended up becoming a state monopoly that, notwithstanding certain changes, has survived right up to the present day.

As explained in the preamble of the aforementioned Decree-Law, "*The extraordinary level of interest that currently exists in sport (and football in particular), along with the enormous popularity of this game with regard to football, has given rise to the appearance of numerous bets in which the State is not involved at all in terms of regulation or financial exploitation, as all of these bets are made and exploited by private citizens or entities.*" It can therefore be seen that the aim of this rule was not so much to regulate but rather to give the State a monopoly over sports betting, even though the money was given to charity.

This is the intention of the legislator, for whom "*State intervention would provide an appropriate guarantee to betters and would give the considerable financial product of these bets to public charity. These are the circumstances that advise the creation of an independent state Body to centralise the placing of these bets, which shall be established exclusively in order to provide considerable new revenue to charity.*"

And this is how the state monopoly of sports betting in Spain began which, as can be seen, was initially limited to the world of football. In this sense, the first Article of the aforementioned Decree-Law stated that "*With the guarantee and intervention of the State, the Patronato de Apuestas Mutuas Deportivas Benéficas shall be established in Spain, which initially shall only cover football, without prejudice to the fact that in the future, if it is considered appropriate, it may also be applied to other sports.*"

This regulation of paramount importance later on, as it defined the legal framework for betting during the years of the dictatorial regime of General Franco (a state monopoly), and which, as explained below, was inherited by democratic Spain through the creation of the *Organización Nacional de Loterías y Apuestas del Estado* (National State Lottery and Betting Organisation).

As a consequence of this monopolistic purpose, the Decree-Law prohibits other sports betting in its article 7, stating that "*As the entire net product of these bets is meant for charity, any bets related to football that are established or may be established in the future are forbidden whenever, when making the bets, it is necessary to risk any amount of money.*" And this is accompanied by a warning⁷ that "*Anyone that*

breaches this provision shall be punished in accordance with the current Smuggling and Fraud Law."

This regulation established the distribution of the income from sports betting as follows:

- a) 45% would be used for prize money payable to betters.
- b) Another 45% would be used for charity and social projects.
- c) The remaining 10% would be reserved to cover the expenses of the service provided by the *Patronato*.

Regarding the form in which the activity should be carried out, the regulation stated that "*The issuance of tickets and the payment of the corresponding prizes shall be carried out by Lottery Offices, Subordinate Offices of Tabacalera S.L. and Tobacconists, which shall receive a commission or "issue premium" for these services.*"

The importance of this regulation is based on the fact that, as we shall study further below, it established the following premises in the Spanish legal and political system, which the legislation regulating gambling and betting has respected (with the corresponding variations) up to the present day:

1. Gambling and betting is a state monopoly (which is now shared with the Autonomous Communities). There is no doubt in this regard. So much so that the subsequent Decree dated 23rd March 1956, approving the Lottery Directive, declared in article 1 that "*The National Lottery is an ordinary resource of the income budget and a State monopoly, which guarantees the payment of prizes.*" Therefore, there can be no doubt as to whether or not gambling and betting in Spain has been a state monopoly.
2. Anyone that carries out these activities without the authorisation of the public authorities is considered to have committed a *smuggling offence*.
3. Part of the income from games of chance and sports betting must be used for public interest purposes (for charity in 1949 and today for the promotion of sport and other social purposes).
4. The distribution of tickets and the payment of prizes are carried out exclusively through Lottery Offices and Tobacconists. Because of this, Spaniards have historically made their bets at Lottery Offices and Tobacconists.

The *Patronato* continued to operate as an independent body reporting to the Tax Department until the restoration of democracy in Spain, and its activity has always focussed on sports betting. In this sense, for example, its most recent regulations (in particular, the Resolution of the *Patronato's* Board of Directors, approving the regulations governing betting competitions from 1st September 1979 onwards), state that the purpose of this body is not only to organise betting competitions (defined as competitions that "*are organised based on the results of a game or various games of football that appear in competitions authorised by the Royal Spanish Football Federation or that have an international nature*"), but rather to subject these to an administrative Law regime in order to better guarantee "*the important public interests affected by these competitions.*" That is to say, in 1979 betting continued to be based on football and it continued to be an authentic state monopoly.

As stated previously, within the entry into force of the Spanish Constitution on 29th December 1978, the rigid state monopoly on gambling gave way to a new (but not necessarily any less rigid) legal regime in which the monopoly was shared between the State (when the bets or games are on a state-wide level) and the different Autonomous Communities recognised in the Constitution⁸. This was when the government, in order to unify the state bodies that managed gambling and sports betting, in 1984 and by means of the 1985 General State Budget Law (Law 50/1984, dated 30th December), created the *Organización Nacional de Loterías y Apuestas del Estado* - National State Lottery and Betting Organisation - (hereinafter ONLAE), which included and unified the institutions that had managed state-wide gambling up until this time, i.e. the *Patronato de Apuestas Mutuas Deportivas Benéficas* and the *Servicio Nacional de Lotería*⁹ (National Lottery Service) created after the *Patronato*.

⁶ With regard to any intellectual property rights that the creator of *La Quiniela* might have had, it is sufficient to say that Manuel González Lavín ended his days at a concentration camp in Sant Cyprien (France).

⁷ As discussed later, this is maintained in current regulations.

⁸ Based on the powers that, respectively, the Spanish Constitution granted to each of them.

This organisation brought together the state's jurisdiction in terms of gambling and betting, whilst respecting the jurisdiction corresponding to each of the Autonomous Communities recognised by the Constitution. The ONLAE was thereby given

“responsibility for the organisation and management of lotteries, betting and gambling that are within the State's jurisdiction, assuming the jurisdiction currently granted to the Servicio Nacional de Loterías regarding the holding and authorisation of draws, lotteries, raffles, random combinations, gambling and betting that covers all of the national territory and that is currently the jurisdiction of the Patronato de Apuestas Mutuas Deportivas Benéficas with regard to the exclusive organisation and distribution of football pools and any other betting competitions that take place based on the results of sporting events.”

The structure, composition and functions of the ONLAE was initially established by means of Royal Decree 904/1985, dated 11th June, that was subsequently amended by Royal Decree 1651/1995, dated 13th October, which shall not be explained here for obvious reasons. However it is worthwhile to briefly describe the current regime of ONLAE (currently named LAE, *“Loterías y Apuestas del Estado”*), which is defined by Royal Decree 2069/1999, dated 30th December, approving the Articles of Association of the public owned company *Loterías y Apuestas del Estado* (LAE), and modified by Royal Decree 1029/2007.

The objective of this new regulation is to modernise ONLAE, modifying its structure and adapting it to its current functions in order to achieve efficient management that is able to achieve the goals set. Essentially, the main novelties in this new regulation were:

1. ONLAE was converted into a public owned company called *Loterías y Apuestas del Estado* (LAE), assigned to the Ministry of Finance and Taxation⁹.
2. LAE would be governed by Private Law, apart from matters relating to the regulation of games within the state's jurisdiction and with regard to the authorisation regime granted by the state, which would be governed by administrative law.
3. Regarding the subject in hand, one of the functions entrusted to LAE (article 41.b of its articles of association) was the *“management, exploitation and marketing of charitable sports pari-mutuel betting, in any of its forms, as well as any other betting competitions that are held based on the results of sporting events.”*
4. Furthermore, one of the most important functions attributed to LAE was the *granting of authorisations for the organisation of betting* (and other games) that exceeded the limits of an Autonomous Community (such as, for example, sports betting related to the Spanish League Championship). In this sense, article 5 of its articles of association states that *“The public owned company Loterías y Apuestas del Estado is exclusively responsible for the authorisation of the organisation and holding of draws, lotteries, raffles, random combinations and, in general any bet whose area of development or application exceeds the territorial limits of a specific Autonomous Community and sports betting, regardless of their territorial scope, as well as payment of the corresponding fees.”* This is one of the controversial powers of LAE as it makes it, apart from a provider of these services, both a judge and party of the sports betting sector.

The truth is that, according to the most recent data published by LAE, the eighty year-old *La Quiniela* is still in very good health, as in

the business year 2008 sales of *La Quiniela* amounted to 557 million Euros, with an average of approximately two and a half million bets made per week.

III.- Sport and Sports Betting

As has already been explained (remember that the income obtained from the activities of the *Patronato* was almost entirely given to charity), as in many other neighbouring countries, the State has always intended to use part (if not all) of the income it receives from gambling (and, in particular, regarding the matter in hand, from sports betting), for social purposes and public work (although it is fair to say that this percentage is increasingly small) and, namely, the promotion of Sport (which is an obligation that the Constitution imposes on the public authorities in its article 43, which proclaims that *“The public authorities shall promote health education, physical education and sport”*¹¹).

In that sense, even the ECJ, in the aforementioned Schindler¹² case, stated that *“it is worth highlighting that lotteries can make a significant contribution to the financing of philanthropic or general interest activities such as social work, charity work, sport or culture.”* Precisely because of this, it is justifiable (as long as it is not discriminatory) for national authorities to not only restrict this activity but also to determine the allocation of the profits made.

An example of the foregoing is the historic concession that the *Organización Nacional de Ciegos Españoles* - National Organisation for the Blind - (hereinafter *“ONCE”*¹³), has with regard to the *“prociegos”* coupon. As explained by case law at court¹⁴, *“the justification for the concession that has historically been maintained regarding the exploitation of the prociegos coupon as a source of financial resources for the entity resides in the need to provide it with sufficient financial resources for it to fulfil the relevant public interests that it has assumed since its creation and continues to assume; these funds are allocated by the State through the authorisation of this draw rather than by assigning an amount charged to the State budget and it therefore constitutes a source of income for the ONCE that is essential for the performance of the activities that it carries out in the public interest.”*

In this sense, regarding sports betting and Sport, when the National Professional Football League (hereinafter *“LFP”*) was created in 1983 during a period of serious financial crisis at Spanish football clubs¹⁵, the government (through the National Sports Council), intending to heal the football clubs' accounts, signed an agreement with the LFP that determined the debt of Spanish football clubs and established the way in which it should be financed: namely, with 2.5% of the revenue for *La Quiniela*. Therefore, the form envisaged to solve the financial problems of Spanish football was partially based on the revenue obtained from sports betting through *“La Quiniela”* (The Pools).

Unfortunately, this first attempt at solving the financial problems of Spanish football was unsuccessful and therefore, at the end of the 80s, the government took further measures to deal with the problem by promulgating Law 10/1990, dated 15th October, regarding *Sport* (hereinafter, the *“Sport Law”*). It should be taken into account that when this Law was published, the football clubs' accounts had accumulated a debt of 35,000 million pesetas.

For this purpose the Sport Law envisaged the implementation of the so-called Second Corrective Plan¹⁶, which would take place in two specific areas. On the one hand, in order to eliminate the debt accu-

9 In its article 87.5, the Law resolves to create *“The Organización Nacional de Loterías y Apuestas del Estado, reporting to the Ministry of Finance and Taxation, which shall be made up of the former Patronato de Apuestas Mutuas Deportivas Benéficas and the current Servicio Nacional de Loterías, reporting to the Ministry of Finance and Taxation.”*

10 As shall be analysed later, it is worth noting the close link that has always existed between the jurisdictions related to the Tax Department and this game, which corresponds to its status as a state monopoly.

11 Which, on the other hand, in article 148.1.19 envisages that Autonomous Communities can assume jurisdiction in this area (The Autonomous Communities can assume jurisdiction related to the *“promotion of sport and proper use of leisure facilities”* as stated literally in this regulation).

12 Decision of the Court of Justice passed on 24th March 1994, Schindler (C-275/92, Rec. p. I-1039).

13 The ONCE is a non-profit corporation whose aim is to improve the quality of life of blind people and people with visu-

al disabilities in Spain. It is a type of social welfare institution. Some of its charitable activities are carried out through its Foundation, which is funded with 3% of the gross sales revenue from the gambling products that the Organisation exploits with the State's administrative authorisation. The gambling products are the ONCE's financial powerhouse and directly or indirectly support almost 110,000 people.

14 Decision number 1162/2002, dated 24th October, of the Madrid High Court of Justice (Administrative Disputes

Chamber, Section 9).

15 Which, due to the World Cup held in Spain in 1982, were obliged to invest millions in their stadiums leading to a debt, by the middle of the 80s, of more than 20,000 million pesetas.

16 In its Additional Provision 15, the Sport Law stated that *“In order to rectify the financial situation of the professional football clubs, the National Sports Council shall formulate a Corrective Plan that shall include an agreement to be signed between this body and the National Professional Football League.”*

mulated by football clubs, it was agreed that these debts (part of which were due to the expenses resulting from the renovation of stadiums for the World Cup held in Spain in 1982) would be made the responsibility of the LFP. Furthermore, in order to guarantee the sport's economic success and recapitalise the football clubs, all of the football clubs were forced to become limited sporting companies (*sociedades anónimas deportivas*, SAD¹⁷).

Whilst on one hand the LFP took responsibility for the payment of this debt, on the other hand it centralised the charging of television transmission rights and the percentage received from *La Quiniela*¹⁸, which would be used for the payment of the debts that it had taken over from its affiliated clubs. Furthermore, during the business years 1991 and 1992, 7 % of ONLAE's total annual revenue was used to fund the "Barcelona 92" Olympic Games¹⁹.

And this is how things worked in Spain until finally, in 1997 the LFP early cancelled the Corrective Plan that was still in force by funding the debt remaining as a result of this Plan with its own financing resources (specifically, by means of a loan of 20,000 million pesetas granted by a Savings Bank), gaining in return a better assignation of the distribution of money from *La Quiniela* (which was increased to 10%²⁰, which is maintained today) whilst guaranteeing the fulfilment of the objectives of the previous Corrective Plan.

And this is the current legal regime regarding the distribution of the profits from sports betting, which is regulated by Royal Decree 419/1991, dated 27th March, regulating the distribution of the revenue and prize money from sports betting controlled by the State and other games managed by the ONLAE (in the version resulting from the modification made by the subsequent Royal Decree 258/1998, dated 20th February). According to article 1 of this Royal Decree:

"The total weekly revenue obtained by the National State Lottery and Betting Organisation from Charitable Sports Betting shall be distributed as follows:

- a) 55 percent for prizes.
- b) 10.98 percent for Provincial Councils, through the respective Autonomous Communities or for these, if they only contain one province.
- c) 10 percent for the National Professional Football League.
- d) 1 percent for the National Sports Council, to be used for non-professional football.
- e) *Whatever is left over after each business year, having deducted the Administration expenses and the Commissions payable to Receivers, shall be given to the Public Treasury."*

Therefore, as can be seen above, the revenue from sports betting is still used today to finance the promotion and stability of sport in Spain.

IV.- Present Situation: Appearance of New Forms of Exploitation

Nobody today doubts about the importance of the game (in all of its forms) to the Spanish economy. Together with traditional games such as *La Quiniela* and the Lottery, new times have brought with them several variants that have enabled those that exploit this business (up to this day and officially, the State through the LAE and the ONCE, along with various private companies, that have been granted administrative authorisation by the Autonomous Communities, in the different leisure locations concerned such as casinos, bingo halls, gambling rooms, etc), to exponentially increase their profits and results. In this sense, a look at the latest data published by the Interior Ministry shows the financial importance of the sector. In its last

*Annual Report on Gambling in Spain*²¹ (2007), the Ministry states that the total amount played in 2007 amounts to 30,989.59 million Euro, which indicates the importance of the gambling sector to the Spanish economy. Furthermore, the report states that the average amount played per inhabitant amounted to 685.61 Euro, which is no small figure.

However, despite the success of games of chance, the fact is that Spanish legislation has left out certain formats or types of games (particularly with regard to *online* sports betting), causing a situation of legal uncertainty which leaves the various operators and users in a sort of legal limbo that they can only get out of in two ways: either by giving up the exploitation of these formats (because, it could be said that these are actually illegal types of games because they do not have the corresponding administrative authorisation) or by waiting for the State and the Autonomous Communities to define a new legal framework in which these new activities can be carried out. Of course, there is also the option of operating illegally from another location.

By way of example, in its Report, the Ministry divides the existing (and, of course, legal) games into three main groups, depending on the way they are organised:

1. Games organised by private companies that have administrative authorisation, which are carried out at establishments that are appropriate for this purpose such as casinos, bingo halls, gambling rooms (*slot machines*), etc.
2. Games managed by the State, entrusted to the public owned company Loterías y Apuestas del Estado (LAE) including Lotteries, Primitivas (Primary Lotteries) and *La Quiniela* (in its various current versions).
3. Games managed under special administrative authorisation by ONCE, including the various games involving the popular "cupón" (coupon).

As can be seen, apart from certain *online* versions of the games exploited by the LAE (which shall be referred to later), the Report does not contemplate the games and sports betting that have been developed over the last few years through web platforms, i.e. what is now known worldwide as *Online Gambling* or *Online Betting*, depending on the type of game.

Put simply, this is because the *current legislation* (notwithstanding what it will be explained later) *does not contemplate the exploitation of games of chance or sports betting that is carried out online, and therefore these cannot be authorised*. And it, is because it is not possible "to grant authorisation for a type of gambling or betting in the absence of the technical regulations necessary for its conduction and practice"²², an essential requirement that, with the current regulations, prevents the granting of this type of authorisations.

At the same time, gambling activities that do not have the corresponding administrative authorisation are considered illicit and are punished according to Spanish Law as a smuggling offence. This results in private operators that want to carry out this type of activities in Spain having to choose between doing it by clandestine means from tax paradises such as Antigua and Barbuda, Turks & Caicos, Gibraltar, or from nearby countries in which this activity is legal, such as the United Kingdom, Malta, etc; or give up the idea of carrying out this activity in Spain (which obviously does not happen very often).

As shall be analysed in the corresponding chapter, before beginning their activities some of the sports betting establishments that currently operate in Spain requested administrative authorisation to carry out

17 With the only exception of the 4 football clubs that had a positive net balance at the time of approval of the Sport Law (Real Madrid FC, FC Barcelona, Athletic Club de Bilbao and Club Atlético Osasuna).

18 In accordance with the Transitory Provision 3 of the Sport Law, "During the period of validity of the agreement and until the total extinction of the debt, the professional League shall receive and manage the following financial rights:

a. *Those that, for any purpose, are generated by the television broadcasting of the competitions organised by the League (by itself or in conjunction with other club associations).*

b. *Those corresponding to the general sponsorship of these competitions.*

c. *The 1% of the total income from sports betting controlled by the State recognised by current legislation as being assigned to the professional League."*

19 In accordance with the Transitory Provision of Royal Decree 419/1991, dated 27th March.

20 This being ruled afterwards by virtue of Royal Decree 258/1998, dated 23rd February, partially modifying Royal Decree 419/1991, dated 27th March, regulating the distribution of the revenue and prize money from sports betting controlled by the State and other games

managed by the ONLAE and adding additional regulations.

21 Accessible at http://www.mir.es/SGACAVT/juego/memorias_de_juego/informeAnualJuego2007.pdf

22 Decision number 1368/2000, dated 2nd November, of the Galician High Court of Justice (Administrative Disputes Chamber, Section 2), regarding the appeal made by Eurobets International Sports Betting S.A.

their activities, being it always refused for the reasons that we will study later.

Obviously, like any other activity that is carried out outside the Law, this situation does not benefit anyone, as it not only generates insecurity (relative, because in fact the activity without authorisation is simply illegal) and lack of the appropriate legal guarantees, but it also means (from a financial point of view) that the Tax Department loses the taxes corresponding to this economic activity.

However, as always, reality moves faster than Law and therefore, despite the obstacles presented by Spanish legislation, the business of sports betting over the Internet already moves millions of Euros in Spain. According to the latest data published by the Telecommunications Market Commission (an independent public body that regulates the Spanish electronics and communications markets, which reports to the Ministry of Science and Technology) in its *Annual Report on Electronic Commerce in Spain through form of payment entities in 2008*²³, in the fourth quarter of this year it can be seen that:

1. The total turnover in 2008 amounted to 5,183,816,091 Euro.
2. Games of chance and betting represent 7.1% of this total turnover, occupying the 4th position²⁴ by sector, after air transport (1st), direct marketing (2nd) and travel agencies and tour operators (3rd).
3. Regarding the total number of financial transactions, games of chance and betting took 2nd place, with 8.3% of the total.
4. It is also significant that, if we analyse the data regarding the distribution of the turnover of electronic commerce involving money sent abroad from Spain, *games of chance and betting are in 1st place*, with 12.3 % of the total. This is also the case for the number of transactions involving money sent abroad from Spain, of which gambling and betting also occupy first place, with 13.3 % of the total.
5. On the other hand, analysing data in the opposite direction with regard to the turnover sent from abroad to Spain, *games of chance and betting are in last place*, together with health services, representing just 0.2% of the total.

In short, almost all of the turnover from games of chance (gambling) and online betting in Spain is sent abroad from Spain, with Spaniards using web pages located outside of Spain.

V. Legislative Framework: Jurisdiction of the State and Autonomous Communities

A. State Legislation

A.1. Initial regulation: the transposition of Directive 2003/31/CE, of the European Parliament and Council, dated 8th June, into Spanish Law.

Spain incorporated European Directive 2000/31/CE, regarding certain legal aspects of information society services, in particular electronic commerce in the domestic market (hereinafter “the Directive on electronic commerce”), by means of Law 34/2002, dated 11th July, regarding *Information Society Services and Electronic Commerce* (hereinafter, “LSSI”).

Strangely, although article 1.5.d) of the Directive on electronic commerce excluded from its scope of application “*games of chance that involve bets of monetary value including lotteries and betting*,” the Spanish legislators decided to include these services within the scope of application of the Spanish law. In this sense, in article 5.2 of the LSSI (“Services excluded from the scope of application of the Law”), it is stated that “*The provisions of this Law, with the exception of the provisions of article 7.1, shall apply to information society services related to games of chance that involve bets of a financial value, without prejudice to the provisions of specific State or Autonomous Community legislation.*”

²³ Accessible at www.cmt.es/cmt_ptl_ext/SelectOption.do?nav=publi_info_comercio_elect

²⁴ Furthermore, according to data provided by the sector (specifically, the Spanish Association of Internet Bettors, AEDAPI), during the year 2007 a total of 650 million Euro were played in Spain

and in business year 2008, the Internet betting business obtained results of over 200 million Euro in Spain. Furthermore, there was a noticeable increase in the importance of sports betting, which in 2009 (according to these estimates) will increase almost 30%.

However, although the LSSI is based on the principle of the free provision of services without the need for prior authorisation, a full analysis of the Law reveals that it does in fact permit the restriction of this type of services through several of the regulation's articles. I.e. although article 7 of the LSSI declares that “*the provision of information society services by a provider established in a member State of the European Union or the European Economic Area shall be carried out under the regime of free provision of services, and no restrictions may be established due to reasons deriving from the coordinated regulatory framework*”, this general principle, with regard to sports betting, is contradicted as these services may be interrupted when they go against or may go against the following principles (among others):

- The safeguarding of public order.
- The protection of individuals that are considered consumers.
- The protection of young people.

These are all principles that are closely related to gambling and betting, which can be used to prevent the provision of online services related to gambling. But the most important part is the final part of article 5.2 (“*without prejudice to the provisions of specific legislation*”), as this is what prevents the provision of online sports betting services in Spain on a national level, as the corresponding service providers do not have the administrative authorisation required to do so. This leads us to think that the inclusion of betting in the scope of this Law, but with all of the options for restrictions described, was only done (at least temporarily) so that the LAE could, as described later, carry out its activities over the Internet.

A.2. Authorisation of the LAE for the online exploitation of games of chance and betting.

Given the unstoppable growth of the business of online sports betting, in 2005 the Spanish government adapted the regulations for Loterías y Apuestas del Estado (which, as we have seen, manages and exploits gambling within the State's jurisdiction) to the Internet, so that this organisation could exploit its business by means of this medium. For this purpose, it issued order EHA/2566/2005, dated 20th July, of the Ministry of Finance and Taxation, authorising Loterías y Apuestas del Estado to market and exploit its products via the Internet or other interactive systems.

As stated by the regulation in its preamble, “*the rise of information technology, particularly the Internet, has resulted in the appearance of a series of environments whose main characteristic is the provision of goods and services remotely*” and therefore Loterías y Apuestas del Estado “*must not ignore the evolution of technologies and the needs and demands of the public, but rather, as most countries in the European Union have done, it must adapt the marketing of its products to these new criteria.*”

By doing so, the Ministry intended to fulfil two objectives: on the one hand, authorise the exploitation via the Internet of government controlled gambling and betting on a national level and, on the other hand, *eliminate or reduce the number of illegal games or bets that take place via the Internet* (“*the existence of this new form of participation, based on the aforementioned requirements in terms of guarantees and security, shall result in the reduction and even the disappearance of a high number of illegal games or bets that take place via the Internet*” is the literal text of this rule). That is to say, the ministerial order is declaring that the only legal bets that can be made in Spain on a national level are those that are made through the LAE or by any other organisation that it authorises.

It is worth highlighting that the Order expressly prohibits the LAE from marketing these betting services on a cross-border basis, which must be guaranteed by means of technological devices that prevent bets from being made from abroad. In this sense, point 3 of its article 3 states that “*In order to avoid cross-border betting, the operation for validation by Internet or other interactive means must establish the system necessary to ensure that participation is only possible within national territory.*”

However, although the different forms of gambling and betting were marketed over the Internet, the rights and obligations deriving from participation “are those established in the corresponding regula-

tions,” which means that there were no changes to the legal regime for each type of gambling and betting.

Subsequently, the LAE developed this ministerial order (approving the conditions for the marketing of the service, mainly in order to avoid the participation of minors and to restrict participation to Spanish territory) by means of a resolution passed on 23rd August of the same year. Recently, this resolution was derogated by virtue of the latest step taken by LAE regarding this matter, through its Resolution passed on 18th June 2008, regulating the validation over the Internet of the different types of betting competitions.

This recent resolution regulates the procedural requirements that online betting and gambling must fulfil in order to comply with Spanish legislation (it may, in the future, serve as a model for future general regulations). In this sense, the main regulatory provisions state that:

- This type of bets must be made via the web page of LAE (www.loteriasypuestas.es) and may be of any of the types envisaged and classified on this web page: La Quiniela (football pools), El quiniol (football betting), Lototurf (horse racing), Quintuple Plus (horse-racing), La primitiva (primary lottery), and other lottery games (Euromillón and El Gordo).
- In order to participate, players must be registered in LAE's web page. This rule states that this record of players must comply with legislation applicable to the personal data protection (Organic Law 15/1999, dated 13th December, regarding Personal Data Protection).
- In order to guarantee that bets are made by adults and in order to avoid international bets, the regulations state that money for betting can only be placed by means of a credit or debit card linked to a Spanish bank account, and that this bank account must correspond to a Spanish natural person that has its main residence in Spanish territory.
- Participants shall manage their money through an “e-wallet” (the so called “*loto-bolsa*”), which shall be used not only to place bets but also for the payment of the winnings. This e-wallet should have a maximum balance of €200.
- The maximum bet should be €200.
- If, as a consequence of the payment of prize money, the e-wallet's balance exceeds €200, the system shall automatically make a deposit in the bank account designated by the participant.
- Prizes of less than €600 are paid directly to the e-wallet (unless the existing balance plus the prizes won exceed €200), in which case this amount shall be deposited into the designated bank account. If the prizes obtained exceed €600, the participant must make a collection request by means of the procedure established for this purpose.

According to LAE²⁵, in 2008 sports bets placed via the Computerised Betting system grew by 31.32%.

A.3. Subsequent repressive measures against online betting: the Law for the repression of smuggling.

Following the order EHA/2566/2005 described above, which authorised the LAE to operate online, given the increase in online sports betting and (we assume) given the amount of tax fraud that foreign betting establishments operating in Spain were committing (prohibited activities, of course, do not pay taxes), in order to try to prevent this situation (and perhaps inspired by the repressive actions of the governments of the United States, France, etc.), firstly in the General State Budget Law for the year 2006 (Law 30/2005) and, more decidedly, by means of Law 42/2006, dated 28th December, regarding the General State Budget for the year 2007 (hereinafter “Budget Law”), the government repeated the pre-existing prohibition of sports betting over the Internet, this time specifically mentioning those organised “by foreign entities” and adding that this prohibition also applies to entities that give publicity to these entities. This measure also reaffirmed LAE's monopoly of online gambling in Spain.

In particular, the Budget Law carries out this repression of online betting by means of its Final Provision 14, including these activities (whenever they are carried out without authorisation) within the scope of Organic Law 12/1995, dated 12th December, regarding The Repression of Smuggling. This Final Provision states that:

“One. For the purposes of the provisions of articles 1.7 and 2.1.d of Organic Law 12/1995, dated 12th December, regarding The Repression of Smuggling, it is considered forbidden to distribute, trade, hold or produce tickets, coupons, stamps, cards, receipts, machines or any other item, (including technical or computer equipment) that is used for the practice of games of chance, draws, lotteries, betting and football pools. It is forbidden, without authorisation of the competent administrative body, to hold raffles, tombolas, random combinations and, in general any competitions in which participation is not free and prizes are given by means of any random formula in which chance is a form of selection.

The conduction of the activities envisaged in the preceding section b.1 without the corresponding administrative authorisation or in conditions that differ from those authorised, shall be subject to the penalty system established for smuggling infractions in Volume II of Organic Law 12/1995, dated 12th December, regarding The Repression of Smuggling, regardless of the total amount of goods, merchandise, bills or the medium used to carry out the activity. These infractions shall be processed in accordance with the procedure established in Royal Decree 1649/1998, dated 24th July, which develops Volume II of Organic Law 12/1995, dated 12th December, regarding The Repression of Smuggling, and in any case the legal authority to impose penalties shall correspond to the Director of the Department of Customs and Excise of the National Tax Administration Agency.

The Ministry of Finance and Taxation is authorised to define and regulate the activities referred to in the first point of letter b of this section. Two. With effects from 1st January 2007 and with an unlimited period of validity, a modification is made to the additional provision 19 of Law 46/1985, dated 27th December, regarding the General State Budget for 1986, which shall read as follows:

One. In accordance with Organic Law 12/1995, dated 12th December, regarding The Repression of Smuggling, it is prohibited in the whole national territory to sell, import, distribute and produce tickets, coupons, stamps or any other item used for lotteries, betting and other games organised or issued by foreign persons or Entities.

Two. [...]

This criminalisation of the activity (and its advertising, which the Law prohibits in section 2.2²⁶), includes sports betting as one of the items prohibited by the Law of Repression of Smuggling. Basically, a crime is considered to have been committed by anyone that “Carries out operations involving the importation, exportation, production,, trading, possession, distribution or rehabilitation of restricted or prohibited items, without fulfilling the requirements established by Law” (article 2.1.d) of this regulation).

Or, as expressly stated in the new regulation, anyone that carries out this type of activities (in our case, online sports betting) “without the corresponding administrative authorisation, or in conditions that differ from those authorised” shall be subject to the “penalty system established for smuggling infractions.”

As this activity requires authorisation and, apart from the exceptions that we will examine later in the Autonomous Communities of Madrid and Euskadi (Basque Country), this activity is not properly regulated and it is impossible to fulfil these legal requirements or be authorised to operate, which means that operators cannot avoid committing a smuggling offence.

On the other hand, despite the fact that the Spanish press has published that the Tax Authorities, in conjunction with the anticorruption prosecutor, has already opened an investigation to study a possible case of tax fraud by betting establishments (which could, according to this information, amount to 500 million Euros), the fact is that so far there is no evidence that penalties for smuggling offences have been applied to any of the foreign companies that offer sports betting

²⁵ Accessible at www.onlae.es/contenidos/1116/file/np20090303laquinielaen_2008.pdf

²⁶ Which is not transcribed herein, as it does not fall within the object of this article.

in Spain over the Internet or anyone that advertises them (we shall be aware, for example, that even some of the most important football clubs in the League Championship advertise these betting establishments), which perhaps demonstrates the possible voluntary ingenuity of the Spanish legislator when regulating this activity.

A.4. The “mandate” to the Government contained in the Law on Measures to Promote the Information Society.

In these circumstances, taking advantage of a legislative reform to promote the so-called Information Society, the legislator stated that the government should formulate a Law to regulate gambling and betting activities in Spain, particularly those carried out over the Internet. Realistically, this is not exactly a mandate but rather a *desideratum* or a reminder by the legislator to the government to regulate and update the regulations regarding gambling and betting (because so far no Law has been promulgated regarding this matter and no project has been drawn up for this purpose).

In this sense, by means of the Additional Provision 20 (entitled “Regulation of gambling”) of Law 56/2007, dated 28th December, regarding *Measures for Promoting the Information Society*, it is stated that:

“The Government should present a Project of Law to regulate gambling and betting activities, in particular those carried out by means of interactive systems based on electronic communications, which should be based on the following principles:

1. *It should ensure the compatibility of the new regulations with the legislation applicable to other areas linked to the provision of this type of services, and, in particular, the regulations for the protection of minors, young people, groups of users that are particularly sensitive as well as consumers in general, apart from the area of personal data protection and services of the Information Society.*
2. *It should establish regulations regarding the exploitation of gambling activities by interactive systems in accordance with the principles of general European Union law.*
3. *It should create a system for the control of gambling and betting services via interactive systems that guarantees market conditions that are fully safe and fair for the operators of these systems and that provide an adequate level of protection to users. In particular, it should regulate the activities of those operators that already have authorisation for the provision of the aforementioned services granted by the authorities of any of the member States of the European Union.*
4. *It should establish a system for the taxing of gambling and betting services via interactive systems based on the origin of the operations subject to taxation. The regulation must also envisage a system for the distribution of taxes collected as a consequence of the exploitation of gambling and betting services by electronic means in Spain between the State Government and the Autonomous Communities, taking into account the special tax system in Special Autonomous Regions.*
5. *The activity of gambling and betting through interactive systems based on electronic communications may only be carried out by operators authorised to do so by the competent Public Authority, by means of the granting of an authorisation following fulfilment of the conditions and requirements established. Anyone that does not have this authorisation may not carry out any activity related to interactive gambling and betting. In particular, the necessary measures should be taken to prevent the conduction of advertising by any means and to prohibit the use of any method of payment existing in Spain. Furthermore, the penalties envisaged in legislation regarding the repression of smuggling should be applied to any gambling and*

betting activities carried out via interactive systems without the corresponding authorisation.

6. *Jurisdiction for the regulation of gambling and betting activities carried out via interactive systems shall correspond to the General State Government when it covers the whole of the national territory or more than one Autonomous Community.”*

That is to say, the wish stated by the legislator is that the future Law regulating gambling and betting activities:

- a) Tends to protect the rights of minors, young people and particularly sensitive groups such as consumers and users.
- b) Incorporates the standards and principles of European Union Law regarding this matter.
- c) Regulates the activity in Spain of operators that have authorisation from a State in the European Union.
- d) Establishes a system of tax collection and distribution and sharing of these taxes between the State and the Autonomous Communities.
- e) Respects the premise that only those authorised by the competent authority may operate and that anyone that operates without authorisation shall be punished in accordance with the regulations regarding the repression of smuggling (in accordance with the terms stated previously).

Finally (as stated in other previous regulations), this Provision defines the area of jurisdiction that corresponds to the State and the Autonomous Communities. I.e.: when an operator wishes to cover the territory of more than one Autonomous Community or the whole of the national territory, the jurisdiction to authorize this activity shall rest with the General State Government.

B. Autonomous Community Regulations

As stated previously, article 149.1 of the Spanish Constitution (which specifies the exclusive powers of the State) does not grant the State exclusive jurisdiction over gambling. This being the case, how is it possible to justify that in Spain gambling is controlled by a State monopoly? As recognised by the Spanish Constitutional Court in its Decision dated 23rd July 1998:

“despite the lack of express mention of Gambling in articles 148.1 and 149.1 of the Spanish Constitution in the Statutes of Autonomy, the constitutional system of powers has attributed this area to the Autonomous Communities [...]. Therefore, in accordance with article 149.3 of the Spanish Constitution²⁷ and given that in article 149.1 the State does not expressly reserve this matter, it may be stated that “the Autonomous Government of Catalonia, in accordance with article 9.32 EAC, has exclusive jurisdiction over casinos, gambling and betting, except Charitable Sports Pari-Mutuel Betting (STC 52/1988, point 4 of the legal grounds) and this includes jurisdiction over the organisation and authorisation of gambling in the territory of the Autonomous Community” (SSTC 163/1994, point 3 of the legal grounds and 164/1994, point 4 of the legal grounds), in this territory but not, obviously, that of any game in the whole of the national territory given that article 25.1 of the Statute of Autonomy limits the area in which it may exercise its powers to the territory of the Autonomous Community. Furthermore, neither the silence of article 149.1 of the Spanish Constitution regarding gambling nor the fact that the Statutes of Autonomy, including that of Catalonia, state that they have exclusive jurisdiction over gambling and betting can be interpreted as a total revocation of the State’s powers in this area, as certain activities that other provisions of article 149.1 of the Spanish Constitution attributes to the former²⁸ are closely linked to gambling in general, not just that reserved in article 149.1.14 of the Constitution regarding the management and exploitation of the National Lottery Monopoly in the whole of the national territory, [...] In order to determine, therefore, the jurisdiction regarding this matter, it is useful to remember that [...] “the tax monopoly [...] over the Lottery extends to all other games of chance that may be related to it and it assumes jurisdiction to authorise them.” And as “an ordinary resource of the income budget and State Monopoly”.. it falls within its jurisdiction by virtue of its control of the General Tax Authorities, [...]

²⁷ “Areas not expressly attributed to the State by this Constitution may correspond to the Autonomous Communities, by virtue of their respective Statutes. Jurisdiction over areas that have not been assumed in the Statutes of Autonomy shall correspond to the State, whose regulations shall prevail, in the event of dis-

crepancies, over those of the Autonomous Communities regarding any matters over which they do not have exclusive jurisdiction. State law shall be, in any event, complementary to the Law of the Autonomous Communities.”

²⁸ This refers to the Tax Authorities.

which includes the state monopoly as a historically defined institution, and therefore the State Government is responsible for the management and exploitation of the Lottery in the whole of the national territory. This determines, in turn, by virtue of the aforementioned monopoly system regarding this game of chance, the prohibition of lotteries, draws, raffles, betting and other similar games without the authorisation of the State Government [...]

This is why we stated that, in accordance with article 149.1.14 of the Spanish Constitution, the State is responsible "due to its consideration as a source of state Tax Authority, for the management of the National Lottery Monopoly and the power to organise lotteries with a national scope," as well as "as far as they imply a derogation of the monopoly established in favour of the State, to grant concessions or administrative authorisations for the holding of draws, lotteries, raffles, betting and random combinations only when their scope covers the whole of the State's territory" (SSTC 163/1994, point 8 of the legal grounds); and 216/1994, point 2 of the legal grounds).

The foregoing means that this jurisdiction regarding gambling is shared with each of the Spanish Autonomous Communities that, except Ceuta and Melilla, have exclusively assumed, in their Statutes of Autonomy, jurisdiction for gambling²⁹ in their territory. Furthermore, the relationship between State regulations and Autonomous Community regulations, in this case, is based on the principle of regulatory jurisdiction rather than regulatory hierarchy, which means that the regulations of the State do not prevail over those of the Autonomous Communities and each are only valid within their area of application.

Therefore, the State has jurisdiction regarding gambling and betting when these exceed the territorial scope of an Autonomous Community or when these have a national scope, and the Autonomous Communities have exclusive jurisdiction regarding gambling and betting when its scope is limited to their territory (excluding charitable sports parimutuel betting, as they do not have jurisdiction on it).

Up to this date, of the 17 Autonomous Communities that make up Spain, only two of them (the Autonomous Community of Madrid and the Autonomous Community of the Basque Country) have expressly regulated the activity of the so-called "betting establishments." This regulation is that contained in Decree 106/2006, dated 30th November, approving the Regulation of Betting in the Community of Madrid and Decree 95/2005, dated 19th April, approving the Regulation of Betting in the Autonomous Community of Euskadi, respectively.

By way of summary:

B.1. The regulations of the Community of Madrid:

1. Regulate, within the territory of the Autonomous Community, "bets on sporting events, competitions or other previously determined events."
2. Grant the corresponding autonomous body the power to "authorise the organisation and marketing of betting, as well as betting establishments and areas."
3. Ban the participation of minors, the participations of those for whom a prohibition from accessing games has been applied for, as well as the participation of professional sportsmen and women and trainers (to avoid sport-related fraud), managers and staff of betting establishments, directors of the entities participating in the event that is the object of the bets, referees and judges involved in the competition, etc...

²⁹ For example, article 9.32 of the Statute of Autonomy of Catalonia approved in 1979 established its exclusive jurisdiction with regard to "Casinos, gambling and betting, excluding Charitable Sports Parimutuel Betting." In turn, the new Statute of Autonomy of Catalonia approved in 2006 states, in its article 141.1, that "The Autonomous Government of Catalonia has exclusive

jurisdiction regarding gambling, betting and casinos, if the activity is carried out exclusively in Catalonia, including," among others powers, "the creation and authorisation of gambling and betting, as well as its regulation."

³⁰ One of main criticisms of these regulations is that it is technically very difficult, if not impossible, to fulfil this requirement.

4. Require that companies that wish to obtain authorisation to organise and market betting must fulfil the requirements of the Decree (among others, have Spanish nationality or that of any of the member states of the EU, have a tax address in the Community of Madrid, provide a deposit of 12 million Euro, etc...
 5. With regard to the remote provision of these services, it is stated that providers of this service must have a secure computer system for the organisation and marketing of bets that is capable of ensuring that the terms of this Decree are respected. I.e. among other things, they must guarantee that bets are not placed outside the territory of the Community of Madrid³⁰.
- #### **B.2. Regulations of the Autonomous Community of Euskadi:**
1. Aim to regulate, within the territory of the Autonomous Community, bets on the events included in the catalogue attached to the regulations.
 2. Include prohibitions on betting that are similar to those described in the preceding section a).
 3. Prohibit bets that are made without authorisation or based on events that are not included in the catalogue attached to the regulations.
 4. State that the adjudication of authorisations shall be carried out by public tender.
 5. State that the awardees of the tender must have a share capital of at least 1 million Euros, be from a country that is a member of the EU, have their registered address in the Autonomous Community of the Basque Country, etc... Furthermore, the awardees must provide a guarantee of 500,000 Euro.
 6. The authorisations shall be granted for a period of 10 years.

It can be seen that both Decrees regulate the activity of betting in a very similar way. Perhaps the most noticeable difference is the fact that the Community of Madrid's regulations are based on the principle of free competition whilst the Basque Country's regulations are based on administrative concession with a limited number of licenses (during the first public tender, held on 2nd May 2007, only 3 licenses were granted).

According to the AEDAPI, so far in Madrid the first companies to open betting establishments have been Victoria (owned by Codere and William Hill), Sportium (Cirsa and Ladbrokes), Intralot Iberia and Winners (an Alliance between Bwin and Betbull). For its part, in the Basque Country, the companies that have obtained a license have been Victoria (Codere, William Hill and Gabascar), Reta (made up of Basque gambling operators) and Kiroljokoa (also made up of Basque operators, linked to the Basque Ball game).

It seems fair to say that these disorganised Autonomous Community regulations will never be enough to regulate the betting sector in Spain and, in any event, they will limit the growth of the sector, preventing it from equally competing with foreign markets. Now that we live in a "Global Village", as famously expressed by McLuhan, it is absurd to consider regulation that divide the sector by Autonomous Communities, in which a single operator cannot operate in the whole of the country unless it obtains authorisations from each of the 17 Autonomous Communities. The truth is that this does not look like a very logical or efficient solution.

VI.- Examples of Case Law

In contrast to the situation in other countries, it could be said that in Spain there have not been any large legal disputes regarding sports betting. Perhaps this is due to the regulatory situation described and the reduced flexibility of the Spanish system. However, pursuant to the content of this work, it might be useful to highlight the following cases (some are related to gambling in general rather than sports betting), which confirm the regulatory situation described above:

A. Regarding requests for authorisation to exploit sports betting made by some private operators in Spain.

A.1. Judicial Review number 1183/1997, filed by the company EUROBETS INTERNATIONAL SPORTS BETTING S.A. against the refusal of authorisation for the exercise of its activity.

Eurobets International Sports Betting S.A. (hereinafter, “the company”), filed a judicial review against the Resolution dated 9th May 1997, of the Sub-secretariat of the Ministry of Finance and Taxation, rejecting its previous appeal against ONLAE’s Resolution dated 3rd January 1997, which denied authorisation “for the exercise of the activity of national and international betting brokerage on sporting competitions.”

The basis for the case is that in 1996 the company filed 3 requests for authorisation to open 3 betting brokers dealing with all types of sporting competitions “through any of the existing forms of communication,” including data transmission, with a nationwide scope (two of the requests related to the Autonomous Communities of Madrid and Aragón, but with nationwide scope). These 3 requests were rejected by the ONLAE. This decision was subsequently ratified by the Ministry of Finance and Taxation, as stated above.

The judicial review was resolved by the Madrid High Court of Justice (Section 8 of the Administrative Disputes Chamber) in Decision number 266/2000, dated 16th March of this year. In its resolution, the Court rejected the company’s appeal, stating that:

- As a brokerage with nationwide scope was requested, “the public body with jurisdiction to decide whether to authorise the request is the ONLAE” and not the Interior Ministry or the Autonomous Communities of Aragón and Madrid.
- The resolutions that reject the request for authorisation to exploit the business of sports betting do not infringe the right of free enterprise proclaimed in article 38 of the Spanish Constitution, as “the Administration has ruled against the wishes of the applicant because this is permitted by the national legislation applicable to this area, which is the exclusive jurisdiction of the State.”

A.2. Judicial Review number 579/1997, filed by the company EURO-BETS INTERNATIONAL SPORTS BETTING, S.A. against the refusal of authorisation for the exercise of its activity.

In this case, the company filed a judicial review against the resolution of the Ministry of Finance and Taxation of the Balearic Government, dated 7th April 1997, which also rejected the request for an authorisation “to establish a national betting broker dealing with all types of sporting competitions through any of the existing forms of communication (fax, computer, telephone, post, etc.) either directly or through the different centres that offer the Data Transmission service throughout national territory.” These bets were intended to be made between private individuals regarding the results of all types of sporting events, both within the country and in the rest of the world.

The judicial review was ruled by the Balearic Islands High Court of Justice (Administrative Disputes Chamber, Sole Section) by virtue of its Decision number 365/2000, dated 15th May of such year. In its resolution, the Court rejected the company’s appeal, stating that:

- The request formulated by the company trespass the territorial limitation to the jurisdiction of the Autonomous Community of the Balearic Islands (and any other Autonomous Community, as it requests authorisation with nationwide scope).
- Furthermore, the Royal Decree that regulates the transfer of jurisdiction to the Autonomous Community of the Balearic Islands expressly declares that the following shall continue to fall within the jurisdiction of the State Government: (i) Charitable Sports Pari-Mutuel Betting, national lotteries and gambling on a state-wide level and (ii) the authorisation and inscription of companies operating on a state-wide level; and therefore the Autonomous Community does not have jurisdiction in this area.
- The jurisdiction to resolve this request is held by the ONLAE.
- The resolution appealed against does not contravene the right of free enterprise because “the business activity of exploitation of gambling is subject to a legal framework involving limitations and a level of government intervention envisaged by law and therefore the prior requirement for licenses and authorisations does not eliminate or alter the principle of free enterprise, but rather adapts it to the particular characteristics of this activity.” Furthermore, the Court “considers that there is no need to obtain the verdict of the Luxembourg Court of Justice.

A.3. Judicial Review number 4593/1997, filed by the company EURO-BETS INTERNATIONAL SPORTS BETTING, S.A. following refusal of authorisation for the exercise of its activity.

On this occasion the company filed a judicial review against the Resolution by the General Bureau for Home Affairs of the Department of Justice of the Government of Galicia, dated 8th January 1997, refusing its request for administrative authorisation (presented on 22nd November 1996) to carry out the activity of national and international brokerage, in the terms stated in the preceding sections A.1 and A.2.

The judicial review was ruled by the Galician High Court of Justice (Administrative Disputes Chamber, Section 2), by virtue of its Decision number 1368/2000, pronounced on 2nd November of this year. In its resolution, the Court rejected the company’s appeal, stating that:

- In order to grant the corresponding administrative authorisation, Autonomous Community Law 14/1985, regulating gambling and betting in Galicia, demands that the type of bet or game is included in the Autonomous Community’s catalogue of games (which is approved by Decree). This catalogue of games shall specify, for each game or bet, the names, types, items necessary, rules, conditions and prohibitions and the corresponding technical regulations.
- Therefore, taking into account the terms of the request formulated by the company, “it is not possible to grant authorisation for a type of gambling or betting in the absence of the technical regulations necessary for its conduction and practice,” as is the case here.

B. Regarding the application of the aforementioned Organic Law 12/1995, dated 12th December, regarding The Repression of Smuggling. B.1. Decision number 81/1999, dated 29th September, of the Provincial Court of Cuenca (Sole Section)

The Resolution accepted the appeal filed by the ONCE against the Resolution of the Court of First Instance, which rejected a claim made by this organisation against the association called *Organización Impulsora de discapacitados* (OID), which carried out the production and sale of tickets to participate in a daily draw, giving prizes to holders of tickets that coincided with the results of the ONCE’s draw.

The Provincial Court declared that there was sufficient evidence to believe that the events reported were illegal and therefore ordered continuation of criminal proceedings. This was based on the following:

- Article 2d) of the Law for the repression of smuggling applies penalties to anyone that operates with forbidden items (including unauthorised gambling).
- The Constitutional Court has declared on several occasions “that the modalities of lotteries with a nationwide scope, due to their status as a state monopoly, are an ordinary resource of the state budget which therefore makes them part of the General Tax Department and the exclusive jurisdiction of the Central Government.”
- The State is responsible for the management and exploitation within the whole of the national territory of the National Lottery Monopoly, which includes any other games of chance related to it.
- This state monopoly is managed by ONLAE.

Therefore, without making a definitive judgement regarding the matter (due to the procedural phase during which the aforementioned resolution was issued), the Court considered that there was enough evidence to believe that the activity of the OID was not authorised and, this being the case, the tickets that OID marketed were a restricted item (that the Smuggling Repression Law defines as “articles, products or substances whose production, purchase, distribution or any other activity is allocated by Law to the State”), so it were forbidden.

B.2. Decision number 403/2005, dated 24th June, issued by the Provincial Court of Granada (Section 1).

This decision resolved an appeal filed by the Public Prosecutor and the accused parties against a decision issued by Granada Criminal Court number 5, by virtue of which certain representatives of the Andalusian Association for Disabled People (Federación Andaluza de Minusválidos, FAMA) were sentenced “as the authors of a smuggling offence relating to

restricted items” and, together with other pronouncements, ordered to pay “a fine of 2,620,296,000 million pesetas (15,748,296.13 Euros) each.

Basically, the events judged (and proven) consisted in that, between the months of March 1992 and September 1993, the aforementioned association FAMA sold coupons of the so-called “cupón del minusválido³¹” (disabled person’s coupon), which consisted in handing over cash prizes to the holder of the winning ticket in combination with the draw of the ONCE’s coupon.

By virtue of its Decision, the Court confirmed the Decision of the Court of First Instance, declaring (among other pronouncements) that:

- “The conduct attributed to the accused is the marketing of tickets for lottery draws without any authorisation and with full knowledge of the illegal nature of this activity.”
- “These tickets are restricted items in accordance with the Organic Law regarding the Repression of Smuggling.”
- “The issue and sale of lottery tickets, draws and all activities related to them are a state monopoly and, therefore, their marketing without legal authorisation constitutes the criminal offence examined.”
- “The Lottery business is a state monopoly and the regulation that, consequentially, prohibits the activities carried out by the accused does not contravene the Treaty of Rome dated 25/03/1957 or the EU Treaty of 1992.”
- In the Decision of the ECJ dated 24/03/1994 (the Schindler case) it is declared that “the establishment of prohibitions or restrictions to the free provision of this service is compatible with the aforementioned article 59 of the Treaty.”
- “The exclusivity of the game in the hands of the Tax Department determines the prohibition of the sale of foreign lottery tickets.”

For all these reasons the Court confirmed the previous decision issued by the Court of First Instance.

VII.- Conclusions

Many voices have been raised in favour of a state-wide legislative solution that regulates the gambling sector in its entirety, enabling those that are interested in exploiting this type of activity to compete equally (which means, among other things, ending LAE’s monopoly) and carry out their activity in the whole of the State. Ultimately, from the government’s point of view, we understand that the real problem is not so much the terms in which betting activity should be regulated on a national level but rather the form in which the taxes resulting from this activity would be distributed between each of the Autonomous Communities and the State.

Up to this date, none of these initiatives has resulted in a Law regulating the sector. In fact, despite the fact that in 1999 the Gambling Sector Conference³² was created, whose functions include serving as a channel for co-operation and communication between the public authorities with jurisdiction over gambling and proposing the adoption of certain common criteria for action... the fact is that since its creation ten years ago, the Gambling Sector Conference has only met once, on the day of its creation... This exemplifies the regulatory situation that exists today in Spain regarding sports betting.

However, this situation looks like it is about to change given that, apart from the government mandate contained in the aforementioned Additional Provision 20 of Law 56/2007, various bodies with political power within the State have started to promote initiatives to achieve this regulation. In fact, on 23rd December 2008, the PP Parliamentary Group in Congress presented a Non-Legislative Motion³³ regarding interactive gambling for debate during the Session. According to this Non-Legislative Motion:

1. *Additional Provision 20 of Law 56/2007, dated 28th December, regarding Measures for Promoting the Information Society, mandated the government to prepare and present to Parliament a Project of Law regulating gambling and betting activities, in particular those carried out by means of interactive systems based on electronic communications.*
2. *The basic principles of this Project of Law were agreed by all of the parliamentary groups, which voted unanimously in favour of the transactional amendment to this Law.*
3. *Given the time that has passed since the approval of this Law (now almost a year) without the Government having fulfilled this mandate and the fact that it is not just useful, but rather absolutely urgent to have a new regulatory framework regarding gambling and betting activities carried out by means of interactive systems, it is necessary to insist that new legislation should be proposed establishing the basic principles for regulating a situation that exists without any type of administrative control, without any tax being paid on the earnings made and, even more seriously, without guarantees regarding the protection of users in general and those that most require protection in particular, such as minors.*

Because of this, the PP Parliamentary Group in Congress presents the following Non-Legislative Motion for debate during the Session:

The Congress of Deputies urges the Government, within a period of three months, to submit to the General Courts a Project of Law regarding interactive gambling, based on the provisions of Additional Provision 20 of Law 56/2007, dated 28th December, regarding Measures for Promoting the Information Society.”

This is why it does not appear unreasonable to think that, within a reasonable period of time, the government shall begin the corresponding procedures for the promulgation of a Law that, in accordance with the reiterated Additional Provision 20 of Law 56/2007, regulates and establishes the regulatory framework for the conduction, on a national scale, of sports betting, either in its traditional form (at premises prepared for this purpose) or using new technologies via online betting establishments. We will see if time proves us right. *Alea iacta est.*

31 Clearly intending to make people confuse it with the ONCE’s coupon called “pro-ciegos”.

32 Created on 5th May 1999, according to the Resolution dated 24th June 1999, of the Technical General Secretariat of the Interior Ministry.

33 [www.congreso.es/portal/page/portal/Congreso/PopUpCGP?CMD=VERLST&BASE=puw9&DOCS=1-1&DOCORDER=LIFO&QUERY=%28CDD200902020139.CODI.%29#\(Páginari\)](http://www.congreso.es/portal/page/portal/Congreso/PopUpCGP?CMD=VERLST&BASE=puw9&DOCS=1-1&DOCORDER=LIFO&QUERY=%28CDD200902020139.CODI.%29#(Páginari))



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Estonia: Regulation of Sports Betting under the New Gambling Act

by Katarina Pijetlovic*

1. Introduction

One has to appreciate the history of Estonia when it comes to the subject of sports betting. Gambling of any kind was prohibited in the Soviet Union, although in all bigger cities the casino businesses were illegally organized even during the darkest days of communism. Therefore, the historical account of the legal regulation of gambling can be taken with regard to the past 14 years only, i.e., since the adoption of the first Lottery Act in 1994 (*Loteriiseadus*) and the first Gambling Act in 1995 (*Hasartmänguseadus*) by Estonian Parliament (*Riigikogu*).

Whether as a consequence of the mentality imposed by this history or due to certain other factors, the problem of gambling addiction is routinely overstated in Estonian society. Casino operators are frowned upon and it is not uncommon to hear the word 'mafia' used as an adjective to describe the gambling business, casinos in particular. The legal regulation of gambling was insufficient and inadequate up until 2009 when the new Gambling Act entered into force. Taking into consideration that the legislation was widely opened to criticism, and the social attitudes, the lack of any more comprehensive academic writing on the matter is surprising. The only substantial treatment of the subject is provided by the student Master Thesis submitted by Peedu in 2008, alas, dealing mostly with the provisions of the old Gambling Act of 1995 and the cases decided under it.¹ With a population of 1.4 million, and the short history of legislative action and enforcement in the field, Estonian courts have not had many opportunities to rule on this subject either. There are no English or any foreign language translations available for the new Gambling Act or for any of the national court decisions.

On May 1, 2004, Estonia joined the European Union. Gambling activity is an area that was not directly discussed at the accession negotiations. However, it is an economic activity within the meaning of the EC Treaty and is as such affected by the accession. This means that the gambling legislation of the Member States should be in conformity with the Community legislation, in particular the internal market and competition rules.

This article will focus on the provisions of, and requirements placed upon, the organizers of gambling under the new Gambling Act and will, *inter alia*, place the emphasis on licensing of remote gambling and the activities of several offshore companies that create the legal problems for supervisory officials in Estonia. Other types of gambling and the key changes in their legal regulation will also be discussed. Lotteries, in respect to which the state has reserved a monopoly for itself,² are outside of the scope of this chapter but will be mentioned to the extent necessary for general understanding of their place in the organization of gambling.

2. The Problem of Gambling in Estonian Society

Due to several media scandals and the lack of proper lobbying in the government, the status of gambling, in particular the casino business in Estonia, is quite low in the eyes of the general public. There are two lobbying groups working at the opposite ends of the cause: *Eesti Kasiinovastased* (Estonian Anti-Casino Movement, hereinafter *Kasiinovastased*) supported by *Eesti Hasartmängusõltlaste Ühing* (Estonian Union of Gambling Addicts); and *Eesti Hasartmängude Korraldajate Liit* (Estonian Association of Gambling Operators, hereinafter EHKL).

Statistics about the number of the addicted gamblers differ substantially between the two interest groups. Whereas the biggest casino owner in Estonia says that the number amounts to 26,000 and that this is the number that includes not just casino gambling, it also those addicted to all other forms of gambling, *Kasiinovastased* puts that number at 50,000 compulsive *casino* gamblers. The respectable daily business newspaper *Ärileht* talks of 70,000 casino addicts. They also point out that "casinos have caused the suicide of hundreds of people in Estonia, even murders of members of their family, including children. 42% of the dependants are considering suicide. In 2007 the research carried out by *AS Turuuuring* (Market Research) showed that 76% of Estonians and 81% of residents of Tallinn are in favour of banning casinos."³

Whereas it is not difficult to sympathise with the cause, there is another equally valid side of the story. Gambling, much like drinking alcohol and smoking cigarettes is a personal choice. As long as properly regulated and supervised in order to prevent the illegal use of profits and money laundering, there is no compelling reason to create further pressures on the government. In a letter addressed to the Minister of Finance in March 2008 *Kasiinovastased* expressed a serious concern in relation to the repercussions that may materialize because, in its view, the new Gambling Act favors casino interest groups. In mid-April 2008 they visited EU Parliament, European Commission representatives and NATO headquarters trying to draw the attention to their concern that there is no adequate control over the casino business and gambling market in many new EU and NATO Member States. This, in their opinion, leads to money laundering and other crimes, and possibly even provides support for terrorist activities.⁴ On April 29, 2008, in the center of Tallinn Estonian anti-casino protest was organized with the purpose of bringing the entire casino business in Estonia under the control of the state.⁵

It is important to mention that sports betting and the lottery have not been the direct cause for these kinds of concerns and attacks as they are considered less socially harmful.

3. Relevant Legislation

Prior to the adoption of the new Gambling Act ('the Act')⁶ two separate laws used to regulate the field: the Lotteries Act of 1994 and the Gambling Act of 1995. They provided for imperfect mechanisms of regulation and control in particular due to their inability to cope with the changes in the organization of the gambling industry. The practical problems that were unresolved were many, most notably the lack of regulation of remote gambling. The new Gambling Act was in the form of a draft proposal and a subject of debate over four years. The European Commission was informed of the draft legislation in the beginning of 2008 and *Riigikogu* finally adopted the new Gambling Act on October 15, 2008.

The objectives of the new Gambling Act are to impose stricter requirements for organizing gambling games in order to improve the quality of gambling services, enact measures for protection of players, and to decrease the negative consequences of the gambling and its

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1 The work is available at <http://dspace.utlib.ee/dspace/bitstream/10062/6835/1/peeduagriss.pdf>. Its author is a senior lawyer at the Estonian Tax and Customs Board, the authority in charge of licensing gambling operators.

2 This follows from the Article 9(5) which provides that 'Lotteries, except for promotional lotteries, may be organised by a completely state-owned public limited company founded for that purpose by the Government of the Republic whose

share capital is at least 1,000,000 Euros and whose shares are completely state-owned'.

3 Source: <http://www.arileht.ee/uudised/434954>.

4 Source: maxkaur.blogspot.com/2008/04/uus-hasartmänguseadus-snnib.html.

5 The video of a later *Kasiinovastased* protest which took place in July 2008 in front of the building of Olympic Entertainment Group, the owner of Olympic Casino, is available at <http://www.nuffi.ee/video/hlzc88eG-QM>.

6 State Gazette RTI, 06.II.2008, 47, 261. Available at www.riigiteataja.ee/ert/act.jsp?id=13060644.

influence on the society.⁷ Amendments were made in order to effectively cope with the changed situation in the gambling sector and to make use of novel possibilities to supervise gambling organizers.

Entry into force of the act is split into three stages. Most of the provisions are already in force as of January 1, 2009. The next set of provisions, which will become effective on January 1, 2010, is the most important in the context of online sports betting. The organizers of remote gambling are given more time to study the impact of the new legal regime. For offshore companies offering online sports betting services to their clients in Estonia the impact will be profound. These provisions and their contribution to the regulation of remote gambling will be addressed later in detail.⁸ Finally, provisions regulating electronic reporting and supervision of gambling systems, as well as those that set forth the requirements for games of chance machines will enter into force on January 1, 2011.

Apart from the new Gambling Act, which repealed the 1994 Lottery Act and 1995 Gambling Act, the relevant legislation includes a new Advertising Act⁹ and a Gambling Tax Act that is currently undergoing review.¹⁰

4. Definition, Categories and Sub-Categories of Gambling

4.1. Definition

The Act defines gambling as having all of the following characteristics: a stake made by the player is the condition for participating in a game; players may win prizes as a result of the game; the result of the game is determined completely or partially by actions based on chance; or depends on the occurrence of an event not known in advance.¹¹ So there are three elements that need to be present; stake, prize and chance. If one of the elements is not present then we are not dealing with gambling. Additionally, Article 2(5) excludes games of skill in which the only prize is the opportunity to play again in the same game, as well as sports competitions, lotteries whose prize has a value of up to EUR1000, and promotional lotteries with a prize fund of up to EUR10.000. All are excluded from the definition of gambling within the meaning of the Article 2(1) of the Act. All other lotteries must be organized by state-owned monopoly.¹²

The basic three-element definition has not changed substantially in comparison to the old Gambling Act, thus, the Supreme Court decisions on the definition of gambling are applicable in relation to the new Act as well.

4.1.1. Stake

The Act defines a stake as “a sum of money paid for participation in a game or a monetarily appraisable obligation taken in return for the right to participate in gambling.”¹³ Before the Act came into force, the same concept was defined by the Supreme Court in the case 3-1-1-7-06 (p-d 9.3-9.5).¹⁴ Accordingly, a stake, within the meaning of Article 3 of the old Gambling Act, is the value of the object that the participant bets, in return for the right to participate in the game, and that he or she will lose on the basis of chance in case they do not get the said prize. The sums paid to acquire the right to participate in a draw do not amount to stake within the meaning of Article 3 of the old Gambling Act, if as a consequence of the draw the value of the personal assets placed as stakes to obtain the right to participate cannot

be reduced. Only if there is a risk of reducing the value of assets of a player will there be a “stake.”

Furthermore, according to the General Part of the Civil Code Act of 2002¹⁵, Article 66, property is “a set of monetarily appraisable rights and obligations belonging to a person unless otherwise provided by law.” Article 65 of this Code provides that the value of an object is its usual value, meaning its average local selling price (market price). Furthermore, “objects are things, rights, and other benefits which can be the object of a right.”¹⁶ Therefore, betting a sum of money in return for which a participant receives the object or rights of the same value, or the exception from obligations of the same value, will not constitute the decrease in the value of asset and will not constitute a “stake.”

4.1.2. Chance

The concept of chance under the new Gambling Act does not rely on a predominance test; instead, not only in the games in which the result is entirely dependant on chance (such as slot machines), but also in the games in which the result depends partly on chance (and partly on skill), will there be a “chance” within the meaning of the Act. In addition, the element of chance does not have to dominate over the skill to determine its outcome. This approach is reflected in the express language of the Article 3(4) that defines games of skill as games whose outcome depends predominantly on the physical skilfulness or skills and knowledge of the player. Thus, only a certain element of chance needs to be present for there to be a “chance.” However, sports competitions (which by nature of sport industry always contain a certain degree of chance) are excluded from the categories of gambling.

4.1.3. Prize

The Act defines the prize as the right of a player to acquire money or other benefits having a monetarily appraisable value.¹⁷ As should already be clear from the definition of gambling, Article 2(5) excludes certain types of prizes from the scope of the Act. In addition, Article 41 provides that the prize for a game of skill organized on a machine for a game of skill shall be an object that is not money and whose value is a maximum of EUR 50. The prize in an online game of skill cannot exceed EUR 50.

Once it has been ascertained that all the elements are present and that the case involves gambling within the meaning of Article 2 of the Act, the next step is to identify the category and sub-category of gambling in question.

4.2. Categories and sub-categories of gambling

The Act encompasses types of gambling that were previously insufficiently regulated or not regulated all. As a novel element lotteries and games based on “mental skills” are included in the Act as forms of gambling. Remote gambling is now specially regulated, and so are promotional lotteries.

According to Article 3 the categories of gambling are: 1) *games of chance* - games whose result depends on chance and which take place using a mechanical or electronic apparatus or through the agency of a game organiser; 2) *lotteries* - games whose result is determined completely by chance, where the prize fund forms up to 80 per cent of the sales price of the lottery ticket print run and results are revealed a maximum of three times a day or results or are revealed upon uncovering a field on a lottery ticket; 3) *totos* - games whose result depends on the prediction by the player of the occurrence, non-occurrence, or the manner of occurrence of an event, where the event with regard to which the player enters a stake is beyond the control of the organizer of the gambling, receiving the prize depends on whether the prediction comes true, the amount of the prize depends on the size of the stake and on the winning coefficient determined before the stake was placed (betting), or on the percentage of the stake pool determined by the organiser of gambling, the number of persons making the correct prediction, and the sizes of their stakes (totalisator), and; 4) *games of skill* - games whose outcome depends predominantly on the physical skilfulness or skills and knowledge of the player, and that are organized by using a mechanical or electronic tool.

7 Article 1 of the Act.

8 See the paragraphs on online sports betting *infra*.

9 State Gazette RT I 2002, 28, 158. Available at <https://www.riigiteataja.ee/ert/act.jsp?id=13061981>.

10 State Gazette RT I 2008, 15, 108. Available at <http://www.riigiteataja.ee/ert/act.jsp?id=1040649>.

11 Article 2(1) of the Act.

12 Eesti Loto is the state-owned public limited company that organises lottery games in Estonia. For more on the company see www.eestiloto.ee.

13 Article 2(2) of the Act.

14 The decision is available at <http://www.riigikohus.ee/?id=11&tekst=RK/3-1-1-7-06>. It is worth mentioning that the concept of stake in this particular case was defined in relation to lotteries.

15 State Gazette RT I 2002, 35, 216. Available at <https://www.riigiteataja.ee/ert/act.jsp?id=13111425>.

16 Article 48 of the General Part of the Civil Code Act.

17 Article 2(3) of the Act.

The subcategories of games of chance are: 1) games organized on gambling tables and gambling machines to determine the outcome of which an electronic, mechanical or electromechanical device made for organizing gambling or the assistance of the game organizer is used, and 2) additional games of chance - which upon compliance with the conditions provided in the rules of the game afford the player at the gambling machine or gambling table the opportunity for a prize collected from the stakes from gambling machines or gambling tables, or otherwise predetermined prize.

The subcategories of lotteries are: 1) classical lotteries - lotteries where the results depend completely on chance and where the results of the lottery are revealed after the lottery organizer ceases to allow participation in the lottery; and 2) instant lottery - lotteries whose results are randomly determined on tickets before the lottery tickets are acquired by a player and whose result becomes known to the player upon uncovering the playing field after they acquire the lottery ticket.

Promotional lottery, which is not within a state monopoly and is not a category of gambling as long as it does not exceed EUR 10,000, and is a classical or instant lottery organized by a trader for the purposes of advancing the sales of goods or services, or for promoting goods, services or their providers.¹⁸ Most importantly, the new Act thoroughly regulates remote gambling. Article 5 defines it as “the organisation of gambling in such a manner where the result of gambling is ascertained using electronic appliances and in which the player can take part via electronic device, including telephone, Internet and broadcasting.” The court practice has confirmed that remote gambling is not an independent category or subcategory of gambling.¹⁹ Instead, it is a manner in which organizers provide gambling services.

5. Share and Reserve Capital Requirements for Gambling Organisers

5.1. Share capital

According to Article 9 of the Act, games of chance may be organized by a public or private limited company whose share capital is at least EUR 1 million. Lotteries, except for promotional lotteries, may be organized by a completely state-owned public limited company founded for that purpose by the Government of the Republic whose share capital is at least EUR 1 million and whose shares are completely state-owned. Games of skill may be organized by a public or private limited company whose share capital is at least EUR 25,000. Totos may be organized by a public or private limited company whose share capital amounts to at least EUR 130,000.

However, more important than the share capital requirement is the requirement as to the specific legal form of company that can organize gambling. Public or private limited companies are not the only forms of company, and therefore, it would appear *expressis verbis* that the license would be refused to any undertaking that is not complying with the condition related to legal form. If a company from another Member State would be refused the license on the basis of lacking the required legal form it could possibly create the problems of compatibility with the EU internal market rules.

5.2. Reserve capital

The new Gambling Act obliges gambling organizers to create the supplementary reserve capital from annual net profit transfers or other transfers to reserve on the basis of legislation or articles of association.

The minimal size of the reserve capital is set to one third of share capital. The lawmakers have released from this obligation organizers of totos in relation to the events in which the players place the stakes on the outcome of a horse race, and who are non-profit organizations specified by the Government of the Republic, the only statutory purpose of which are equestrian and equine related activities. Instead of requirements to create additional reserve capital, the net capital reflected in such non-profit organization's balance sheets has to constitute at least 2/5 of the value of their assets.²⁰

6. Licensing Requirements

According to Article 2 of the old Gambling Act, the right to organize gambling belonged to the State, and it could then transfer this right in accordance with the conditions set forth in the old Act, including the issuance of the licenses. The new Act has deleted this article but the state licensing requirements as means of control have remained. In order to legally provide gambling services in Estonia, a person has to first obtain an activity license, and after that an operating license.²¹ The decision of Administrative Court confirms that activity and operating licenses are interconnected and that without the operating license it is not possible to legally provide gambling services at a specific location.²²

6.1. Activity license for organizing gambling

Applications for activity licenses are addressed to the Tax and Customs Board who decide within four months whether to issue or deny the license. According to Article 16 of the Act, an activity license entitles a person to apply for an operating license for organizing of the gambling. The activity license is issued for an unspecified term and is not transferable. A separate activity license is issued for games of chance, totos, and games of skill. This means that if one attempts to organize different types of gambling each one will be required to be licensed separately. It should be noted that there is no requirement to obtain an activity license for the organization of lotteries.

6.2. Gambling operating license

Article 22 of the Act provides that a separate operating license is issued for the period of 20 years: 1) for organizing one category of a game of chance at the address or ship of a gambling venue to be opened, to be marked in the decision on granting operating license; 2) for organizing toto, or at the address or ship of a gambling venue to be opened, to be marked in the decision on granting operating license; 3) for organizing games of skill at the address or ship of a gambling venue to be opened, to be marked in the decision on granting operating license; 4) for organizing a category or subcategory of gambling as online gambling; 5) for organizing a lottery, except a promotional lottery.

The operating license, except for the operating license granted for organizing lotteries and totos for non-profit associations specified in Article 9 (7),²³ shall be granted solely to the holder of an activity license.²⁴ An operating license for online gambling is granted for five years and instead of the requirement to provide an address for the venue in the application form, the online service providers have to supply the address of the server containing the software used for organizing gambling. The decision to grant or deny an operating license is made by the Tax and Customs Board, normally within two months.

6.3. State fees

The new Gambling Act has amended the State Fees Act.²⁵ Hence, Article 219 of the State Fees Act sets the amount to be paid at EEK 750,000 for organizing a game of chance, EEK 500,000 for organizing pari-mutuel betting, and EEK 50,000 for organizing a game of skill.²⁶ Article 220 of the State Fees Act provides that for reviewing an application for a gambling operating license, except in the case of a lottery, a state fee of EEK 50,000 shall be paid. In addition, for reviewing an application for operating license for lottery, a state fee of EEK 10,000 shall be paid. The fees have not changed significantly except for in the case of organization of totos where it has decreased by 33%.

18 Definition under Article 6 of the Act. This type of lottery can go unregulated as long as its prize fund does not exceed EUR 10,000. See Article 2(5).

19 Decision of Tallinna Halduskohus (Administrative Court) of 28 June 2007 in the case 3-06-1582.

20 This follows from the Articles 9(7) and 10(1) of the Act.

21 Articles 19-32 of the Act.

22 Decision of Halduskohus (Administrative Court) in case 3-06-1582.

23 'Non-profit organisations specified by the Government of the Republic the only statutory purpose of which are equestrian and equine related activities.'

24 Article 22(2) of the Act.

25 State Gazette RT I 2006, 58, 439.

Available at <https://www.riigiteataja.ee/ert/act.jsp?id=13160293>.

26 1 EUR is equal to 15.64 EEK (Estonian krooni). Official exchange rates by Bank of Estonia.

6.4. Compatibility with Article 49 EC Treaty

While Estonian rules on licensing are applicable without distinction to domestic and foreign providers of gambling services, it remains a question as to whether the requirement to obtain an activity license for each category of gambling separately is compatible with the market access approach. Namely, it is not clear whether foreign service providers that are legally established in another Member State, and that already comply with the licensing requirements in their home state, would be the subject to an activity license only in respect to categories of gambling that they do not have a license for in their home state, or to double licensing requirements, i.e., in relation to categories already licensed at home. Looking at the practice of the Tax and Customs Board, who has investigated the case of triobet.com and inquired into the licenses issued by the Isle of Man, it would appear that the principle of mutual recognition would be respected as far as the situation where identical activity licenses are issued by the home states. However, given that the investigation took place at the time the legislation did not provide the powers to supervisory officials to block the sites of foreign remote gambling service providers, it does not follow that the investigation would cease without any results after January 1, 2010, and entry into force of the provisions of the Act related to remote gambling.²⁷ Furthermore, it also remains unclear whether Estonian legislation requiring separate licenses for different categories of gambling is justified and proportionate, and whether it would serve more than financial objectives. The complete lack of consideration for the control exercised by another Member States would probably be in contradiction to the basic substance of the economic freedoms in the internal market, unless justified and proportionate. This concern has also been voiced by the European Commission in the course of their review of the proposal for the new Gambling Act.

7. State Supervision and Reporting

Supervision over the organization of gambling is performed by police officials and Tax and Customs Board officials. An organizer of gambling must submit a report in electronic form on the organization of gambling every three months to the Tax and Customs Board.²⁸ The Act has made use of the novel possibilities to supervise the organizers via an electronic calculation and control system.²⁹ It is an electronic communication network connecting the gambling machines, or additional games of chance for organizing other gambling of the organizer of gambling, with electronic game equipment or game equipment used for organizing gambling in the form of remote gambling. The gambling table must be connected with an electronic calculation and control system, where settlements, or the game, are partially made by using electronic devices. The electronic calculation and control system is intended to guarantee registration and recording of information in a way that enables calculation of the organizer of gambling at any time, as well as the percents of payments made to players from the total amount of stakes for every gambling machine, gambling table connected to the system, and online gambling game.³⁰ Where the electronic calculation and control system of the organizer of gambling and the information system of the Tax and Customs Board are connected as described above, and in the case of promotional lotteries, there is no requirement to submit a report on the organization of gambling.³¹

In order to inspect the legality of an organization of gambling, supervisory officials are entitled to perform on-the-spot inspection of the organizers of gambling at its location or place of activity.³² Civil

and criminal sanctions are prescribed for violations of these provisions of the Act.³³

8. Taxation under Gambling Tax Act

A gambling tax is paid by organizers of gambling.³⁴ Article 1 of the Gambling Tax Act provides that the gambling tax shall be imposed on amounts received as stakes in games of skill, totalisators, or betting provided for in the Gambling Act; gambling tables and gambling machines used for organizing games of chance provided for in the Gambling Act; amounts received as stakes in games of chance that are not organized on gambling tables or gambling machines; and, amounts received from the sale of lottery tickets when lotteries provided for in the Lotteries Act are organized. The reference to the Lottery Act here is obsolete as it is no longer in force. Gambling organizers argue that the term "amounts received as stakes" should be interpreted according to the net principle, i.e., that the prize money should be subtracted from the amount of stakes received in order to arrive at the taxable base. However, the proposition has no support in law, namely, in the explanatory memorandum to the Gambling Tax Act³⁵ that provides for the application of a gross-profit principle, meaning taxation of the amount of stakes without any such subtractions. This approach aims to avoid a situation where the entire amount received from a stake is paid out as prize money and there is no taxable amount left.

The Gambling Tax Act is currently undergoing review to align it with the new Gambling Act.

The tax period is one calendar month for lotteries and games of chance or skill. The taxable period for organizing betting or a totalisator shall be the period during which the betting or totalisator is organized, starting on the first day set out in the rules of the game for placing stakes, and ending on the last day set out in the rules of the game for awarding prizes. Tax declaration (even if it is not a taxable income) and tax settlement are due by 15th day of calendar month following tax period.

Specific rates are given in Article 6 of the Gambling Tax Act. The rate for organizing games of chance is EEK 7,000 per one gambling machine and EEK 20,000 per one gambling table. The tax rate for betting is 5%; for totalisator 5%; for a game of skill 18%; 18% for a game of chance that is not organized on a gambling table or a gambling machine; 18% for a passive lottery; 18% for an instant lottery; and, 10% for a numbers lottery. As has already been mentioned, the sports betting sites offering their services in Estonia, other than www.spordiennustus.ee, avoid paying these taxes as they are not in possession of an activity license, and are based in tax havens such as the Isle of Man and Malta.

Gambling taxes are paid into the state budget. It is the only tax collected by the Estonian Government which is 100% invested into different social causes and charitable purposes. Of the amount of the gambling tax paid into the state budget: 46% is transferred to the Cultural Endowment of Estonia and 63% of this amount is allocated for cultural buildings; 3.9% is transferred to the Estonian Red Cross; 12.7% is intended for regional investment aid programme which supports projects related to children, young people, families, elderly persons and disabled persons; and 37.4% is allocated for supporting projects related to sports, science, education, children, young people, families, medicine, welfare, elderly persons and disabled persons out of which 31.8% is meant for supporting projects related to science, education, children and young people, 22% for Olympic preparation projects, 10% for supporting other sports projects, 32% for projects related to families, medicine, welfare, elderly persons and disabled persons, and 4% for supporting cultural projects. The tax is administered by the Estonian Tax and Customs Board. In 2007, the amount of tax collected from gambling was EEK 403 million.³⁶ At this very moment over EEK 100 million in gambling taxes from casinos alone has gone to the state budget.³⁷

9. Advertising of Gambling Services, Premises and Organisers

The new Advertising Act came into force on November 1, 2008. In comparison to the repealed act, additional restrictions have been placed on the advertising of alcohol products and financial services,

27 Discussed further below under paragraphs dedicated to regulation of remote gambling.

28 Article 57(1) of the Act.

29 The relevant provisions will enter into force on 1 January 2011 separately from the rest of the Act.

30 Articles 58(1) and (2) of the Act.

31 Article 57(2) of the Act.

32 For more on the investigative power of the supervisory officials see Articles 66-73 of the Act.

33 See Articles 74 - 101 of the Act.

34 Article 2 of the Gambling Tax Act.

35 861 SE Available at web.riigikogu.ee/ems/plsql/motions.show?assembly=9&id=861&t=E.

36 According to the Tax and Custom Board official statistics. See www.emta.ee/?id=14183.

37 The Estonian Association of Gambling Operators has an instant calculator on its website <http://www.ehk.ee> visited on 6 April 2009.

while exemptions have been added to the advertising regulation of tobacco products and gambling. Article 21 of the Advertising Act regulates the advertising of gambling, gambling premises, and gambling organisers,³⁸ all of which are, according to its first paragraph, prohibited. However, the same provision goes on to add an exception for the commercials placed at: the premises of the gambling organizers; on board aircrafts and ships, as well as at airports and ports providing international transportation services; gambling locations in hotels; websites of gambling organizers; and, places of live sports events to which bets on the basis of totos can be made. In the case of lotteries, the exception applies for the lottery sales points and for advertising by means of broadcasting directly before or after the lottery program or during the commercial breaks of that program.

Trademarks of gambling may be exhibited outside of the above-mentioned sites, inasmuch as gambling, gambling locations, or winning chances, are not depicted or referred to expressly on the trademark.³⁹ It is prohibited in advertisements to present gambling as something that is beneficial and in the public interest, or to imply that gambling enhances social status. Gambling advertisements must not call for participating in gambling or visiting gambling locations.⁴⁰ The new Advertising Act constitutes an improvement in regulation considering that the repelled act provided only that “advertising of gambling and casinos is prohibited except in locations where gambling is held” and that “advertising of gambling shall be understandable and unambiguous and shall not contain a direct appeal to participate in gambling.”⁴¹

10. Regulation of Remote Gambling: Online Sports Betting

According to the classification provided by Schriever and Aronovich⁴² it appears that Estonia employs a partly “protectionist prohibitive system” in relation to remote gambling.⁴³ This conclusion follows from Articles 16, 22, 52 and 56 of the Act, which taken together provide that an organizer of gambling needs to be in possession of both an activity and operating license; that the server containing software used for organizing online gambling must be located in Estonia and its proprietor must ensure supervision officials unhindered access to the server; that persons providing public data network transmission service or public data transmission network access service are obliged to prevent access through communications devices to online gambling without delay, upon learning of the illegality of the aforementioned gambling; and that persons intermediating payment are, upon learning of the illegality of the aforementioned gambling, prohibited from transferring payments to organizers of online gambling that do not conform to the requirements of the Act.

10.1. Industry

In the beginning of 2008 there were close to 700.00 Internet users in Estonia between the ages of 15-76, which means some 66% of the population in that age group.⁴⁴ The first attempt to deliver online sports betting services to the Estonian market was done by a company, Megapanus, that tried to establish a foothold in the Estonian gaming industry in 2001 but failed. The problem with Megapanus was

that it offered only two or three games once or twice a week, which is not enough to develop and sustain gamblers’ interest. The Estonian Olympic Committee (EOK) purchased Megapanus and from it created AS Spordiennustus. In close cooperation with Ålands Penningautomatförening that owns 20% of the AS Spordiennustus, European Game & Entertainment Technology Ltd Ab, a Finnish supplier of Internet gaming solutions, has successfully delivered an Internet sports betting solution to the subsidiary of the EOK.

The company started its activities in the beginning of April 2004 with the two week test period investing EEK 10 million for the launch of the system. Its target group are young or middle-aged men in Estonia interested in sports and with average or above-average income. People aged 21 and over that have a personal code and a bank account in Estonia can register at AS Spordiennustus site www.fortuuna.ee and place bets on any sport event. Although in the initial period there were talks about plans to expand to the markets of two other Baltic states, the portal still remains in only the Estonian and Russian languages. In the first 19 days of its activity, AS Spordiennustus has paid out EEK 300,000 in prize money, and registered 1203 players. Today, there are 2300 registered users in Estonia out of which 70% are active, i.e., play at least once a week. EOK transfers all the profits directly to the development of sports in Estonia, and therefore, the portal can be seen as a supplementary means of support for EOK, and in turn, for Estonian sports. The share capital of AS Spordiennustus is just over EEK 2 million. The subsidiary has cooperation agreements with 10 media channels in Estonia, Basketball and Volleyball Associations, and with Phillips.

10.2. Licensing fiasco

The old Gambling Act did not allow for the organization of totos or any other gambling category on the internet, and it did not contain any provisions related to remote gambling. However, in April 2004 this lack of legal basis did not prevent the Financial Ministry from issuing a license to operate internet-based totos to AS Spordiennustus. Later on, when the organizer of triobet.com asked for the license, it was refused due to the lack of legal basis.⁴⁵ Recently, however, the AS Spordiennustus had its license for fortuuna.ee renewed until May 8, 2018, on the basis of Article 27 of the Act, which gives the power to local governments to consent to the opening of a gambling venue.⁴⁶

The only company in Estonia that provides online sports betting services and that has a license to operate is AS Spordiennustus. The remaining operators, such as owners of Unibet, Bwin, Bet24, Triobet (with shares owned by Baltic football leagues) and others, are offshore companies and they are not in possession of such licenses. They do not pay any taxes in Estonia either. On the one hand, these companies are doing nothing more than exploiting the benefits of the EU internal market. On a closer look they are exploiting far more than that. They make the prohibition to operate without a license obsolete for the companies registered abroad, but this is enabled by the technology in the sector the regulation of which is considered to be without the satisfactory solution anywhere in Europe. However, the most disturbing part concerning the arrangements in the online sports bet-

38 Concepts which are interpreted in accordance with the Gambling Act. See Article 21(2) of the Advertising Act.

39 Article 21(4) of the Advertising Act.

40 Article 21(3) of the Advertising Act. Nevertheless, the commercials of illegal sports betting sites such as unibet.com, trioebet.com and bwin.com are shown on the Estonian TV all the time, inviting people to participate! This is clearly in violation of the Article 21 of the Advertising Act. See paragraphs below on regulation of remote gambling.

41 Article 19 of the repelled Advertising Act of 1997, as amended.

42 E. Schriever and A.M. Aronovich “Cross-Border Gambling on the Internet: Challenging National and International

Law” Publications of Swiss Institute of Comparative Law, Genf: Schulthess Juristische Medien AG, 2004, pp. 105-141.

43 This system is employed also by countries such as Denmark, Norway, Austria, Finland, and some others. Its defining characteristic is that the organisation of gambling is allowed only on the basis of the license issued by the competent body of that state and the online gambling services provided from foreign countries by organisers which are not in possession of such license are considered illegal.

44 See www.riso.ee/et/infoyhiskond/statistika/kronoloogiliselt_nov2007_e-seire.

45 Source: www.ohtuleht.ee/

index.aspx?id=212406. Consider also the provisions of Article 372 of the Penal Code: (1) Economic activities in a field subject to a special prohibition, or activities without an activity licence, other licence, registration or through an unapproved enterprise in a field where such activity licence, other licence, registration or approval of enterprises is required, are punishable by a fine of up to 300 fine units or detention. (2) Same act, if: 1) it is committed by a person who has previously been punished by such act; 2) danger to the life or health of numerous people is caused thereby; or 3) it is committed within a field of activity related to health services, handling of infectious materials, aviation, railway traffic or pro-

vision of credit, insurance or financial services, is punishable by a pecuniary punishment or up to 3 years’ imprisonment. (3) An act provided for in subsection (1) of this section, if committed by a legal person, is punishable by a fine of up to 500 000 kroons. (4) An act specified in subsection (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment. (5) A court may, pursuant to the provisions of § 83 of this Code, apply confiscation of a substance or object which was the direct object of the commission of an offence provided for in this section.

46 The document available at tallinn.andmevara.ee/oa/page.Tavakasutaja?c=1.1.1.1&id=113617.

ting market is the fact that most of the companies flagrantly breach Article 21 of the Advertising Act. Even more disturbing is that the Estonian Consumer Protection Board (*Tarbijakaitseamet*), an authority in charge of supervision over the enforcement of the Advertising Act, is doing nothing to get the completely illegal commercials off the television. The aggressive advertising campaign coupled by the inactivity of the Consumer Protection Board that is aware of the breach but does nothing about it, places the only law abiding and ethical company, AS Spordiennustus, in a competitive disadvantage. Therefore, the breach of the Advertising Act has implications not just for mandatory provisions related to consumer protection, but also constitutes market distortion and significantly decreases the amount of profits to be invested into the development of local sports.

The Ministry of Finance, Tax and Customs Board, and the Office of Public Prosecutor do not hide that the situation is indeed problematic:⁴⁷

The Public Prosecutor's Office explained (in response to the inquiry of the Estonian Tax and Customs Board, 19.07.2006), that the Public Prosecutor's Office is of the same opinion as given to the Ministry of Finance in 2004 (considering www.bet24.com): the territorial applicability does not extend to remote gambling, and the prosecutor's office will not commence any criminal proceedings against sports operators.

Therefore, at present the Estonian authorities do not have any legal bases to hinder those operators (such as www.triobet.com). According to the response of the Public Prosecutor's Office (to the Tax and Customs Board, 21.06.2006 and to the Ministry of Finance, 27.09.2004) it does not matter that the web-site can be also found in the Estonian language. The language used does not prove that remote gambling is being operated in Estonia.⁴⁸

The Estonian Tax and Customs Board asked the police to commence misdemeanour proceedings against www.triobet.com. Northern Police Prefecture did commence misdemeanour proceedings against www.triobet.com on 29.08.2007, but till now the Tax and Customs Board has not received any notice considering the proceedings. But because of the statements already given by the Prosecutor's Office, it is clear that it is not possible to hinder those operators at present.

According to the Constitution of the Republic of Estonia the courts remain the only institution with the competence necessary to provide authoritative interpretations on such matters.⁴⁹ Article 3 of the Constitution provides that "the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith." There is no doubt that this limit on the powers of the state includes limits on the exercise of powers of administrative organs in carrying out their duty to implement the Act. As a matter of the simple constitutional doctrine of separation of powers, the lawmakers decide on all important questions, and the executive branch does not have a power to intervene into matters falling under the competence of legislative branch. This basic rule extends also to the issue of licensing the operators of remote gambling services. The question of the possibility to organize remote gambling in Estonia was a subject of

two court decisions, alas, without any clear answers to remove the confusion and stop the debates.⁵⁰

It remains to be acknowledged that the questions on legality and licensing of remote gambling are very soon going to become a thing of the past. Articles 52-56 of the Act will enter into force on January 1, 2010, separately from the rest of the Act, and will provide the legal basis for supervising officials to block the sites whose servers are located in another country using the help of banks and internet service providers. New questions relating to compatibility with EU internal market law are then likely to replace the current debates on legality and licensing of remote gambling.

11. Requirements for Games of Chance Operators and their Premises: Effects on the Casino Industry

A closer look at the changes brought by the provisions of the new Gambling Act reveals more stringent requirements for the organization and operation of casinos. At the same time, compliance with the new requirements favors big casinos and will force the small casino operators to close down. First, games of chance can no longer be located in residential houses. As required by Article 37(1) of the Act they would have to relocate to a separate building, or move to a premise in hotel, conference or entertainment center, or shopping centers that are not also residential buildings.⁵¹ However, small gaming halls are often located in apartment buildings or basements. The explanatory memorandum to the new Gambling Act says that "casinos can be compared to theatres or cinemas in nature but not to the 'milk shops' which must be as close to home as possible." Venue requirements belong to the set of provisions that will come into force on January 1, 2010.

Second, Article 9(4) requires that all games of chance operators must increase their share capital to EUR 1 million, instead of EEK 2 million (ca. EUR128.000), which was applicable under the old Gambling Act. Organizers of gambling acting on the basis of activity licences granted must bring their share capital in line with the new requirements prior to the entry into force of the new act, by January 1, 2015 at the latest.

Third, Article 37(8) obliges the operators of the games of chance to register the players who enter their premises at the door. They have to ask for the identification card and record *inter alia* the player's name, personal ID number, and the date and time of arrival. The information thus collected is to be stored in the database for a period of five years. The operators will also have to install video surveillance inside and outside the premises. This requirement also plays into the hands of the big firms: the casinos currently complying with the minimum allowed size (8 slot machines) would have comparatively much higher costs to install this system of control and surveillance.

Finally, in comparison to the old Gambling Act of 1995 that imposed a requirement to have at least 8 slot machines in every casino, the new Gambling Act requires at least 40 slot machines. Taking into consideration that a slot machine costs about EEK 200,000, and that there are gambling taxes in amount of EEK 7,000 a month for each of them as opposed to the previous EEK 5,000, it seems pretty obvious that many places will not be able to comply with this requirement. Even if investment into the new slot machines and the taxes could be complied with, as a practical matter, the smaller casinos normally have no extra space for the new machines and would have to relocate to the premises prescribed under Article 37(1). The explanatory memorandum notes that the new minimum requirement could bring about the closing of 20 places. However, it was the opinion of the managing director of the EHKL that shortly after the law comes into force only half of the casinos in Estonia will remain on the market. The number of the casinos has fallen from 170 in December, 2007, to 148 in January, 2009, 143 in February, 2009, and 134 in March, 2009. Due to the economic crisis and the impact it has on the number of casino clients, this decrease seems to be the trend that is unlikely to be reversed any time soon. The shares of Olympic Entertainment Group, the owner company of the biggest casino operator in Estonia, on Tallinn Stock Exchange (*Tallina Börs*) have plum-

47 The following paragraphs are excerpt from email correspondence with Agris Peedu, senior lawyer at the Estonian Tax and Customs Board. 6 April 2009.

48 In my response to this email I have pointed out that providing services in Estonian language coupled by the aggressive advertising on top Estonian TV channels in Estonian language should be sufficient evidence that the service is targeting the clients in Estonia. This was accepted as true, but the fact of lack of clear legal basis still remained.

49 Available at <http://www.president.ee/en/estonia/constitution.php>.

50 Namely, the decisions of Halduskohus (Administrative Court) in case 3-

639/2002 and of Tallinn Ringkonnakohus (District Court) in case 2-3/100/2003.

51 In addition, Article 37(2) provides that 'it is prohibited to open a venue for games of chance, pari-mutuel betting or games of skill in an immovable used by a preschool establishment, basic school, upper secondary school, vocational educational institution, hobby school, youth camp, children's welfare institution or youth work institution.

52 For example, Olympic Casino bought Kristiine Casino and Monte Carlo bought Kasiino Paradiis.

meted. On June 23, 2006, the market value of the undertaking was EEK 6.61 billion, on July 10, 2007, it rose to EEK 15.2 billion, and on September 2, 2008, it sharply dropped to EEK 4.9 billion. The managing director of the EHKL might eventually get closer to the truth than the drafters of the explanatory memorandum. At the same, the Estonian casino market will become more difficult to penetrate for new entrants.

Casino firms have started to prepare for the changes ever since the proposal. Some restructuring and merger activity has taken place already even before the adoption of the Act while it was still in the form of legislative proposal.²

12. Conclusions

The new Gambling Act aims to provide an attractive and trustworthy business environment for the organization of remote online gambling from Estonia. However, the possibility of banning access to the services by internet service providers and restrictions on transferring funds to locally unlicensed remote gambling operators, as well as the requirement for remote gambling operators to have a server physically located in Estonia, put in question the attractiveness of Estonia as a small market for foreign online gambling operators. Whether such restrictions are in accordance with EU internal market law, Article 49 in particular, is another question and the one that poses a legal problem that is by no means confined to Estonia.

Sports Betting in Latvia: Law and Policy

by Sarmis Spilbergs and Reinis Pavars*

1. Introduction

As in most jurisdictions worldwide, sports' betting in Latvia is regarded as a gambling activity. Under Latvian law betting is defined as depositing a stake on the possibility or impossibility of any event and the amount of the gain depends on the accuracy of the player's forecast, deposited stake, as well as on the index for calculation of the gain, which is fixed by the rules of game.¹ Sports' betting is where a person wagers on the results of a sports event and the amount of the possible winning is determined by the stake-winnings ratio set by the betting service provider. In the case of a totalizator, the prize is determined according to the total amount of pre-paid stakes.²

Since the time Latvia regained its independence from the Soviet Union in 1991, the gambling industry has witnessed a significant growth. Sports betting and bookmaking, which constitutes a certain part of the industry, has also developed significantly. In the early nineties, due to the lack of gambling regulations, the growth of the gambling industry was spontaneous and uncoordinated. However, even without specific regulation, sports betting did not become very popular. In 1994, when the first gambling regulation was introduced,³ sports betting as a service almost ceased to exist due to its low popularity and the newly adopted regulation, which made the service more complicated to provide. However, in the late nineties, along with economic growth, the emergence of casinos, and the increasing popularity of slot machines, sports betting also became more popular. The growth in the industry brought light to different types of wagering and bookmaking, but sports betting became the most popular of them. Consequently betting reception centers were opened throughout the largest cities of Latvia.

Currently the rivalry from foreign online betting organizers, usually operating in more favorable regulatory environments, has led to a situation where there is only a single enterprise licensed in Latvia to provide the traditional and interactive sports betting services. The Latvian licensing regime imposes the same capital, establishment and

other requirements on the sports betting organizers that a "brick and mortar" casino operator is faced with. Companies wishing to provide only sports betting services might see this as quite harsh compared to regimes in some other jurisdictions. The Internet and the evolution of other technologies has allowed many operators to establish and get licensed elsewhere, but still enter the Latvian market via electronic communication means. Recent trends indicate that foreign operators are capable of adapting to local markets not only by offering to bet on sports events, but also on a range of different Latvian social, cultural and political events.

2. Regulation of and supervision of sports betting in Latvia

The "Law on Lotteries and Gambling" was adopted by Saeima (the Latvian Parliament) on June 16, 1994, and during the next decade it was amended nine times before being replaced on November 17, 2005, with the current Gambling and Lotteries Law (hereinafter the Gambling Law). The regulation of betting has evolved slowly over time, including in relation to the licensing requirements, the supervision mechanism, the regulated forms of gambling (traditional, interactive), and the rules on protection of gamblers' rights and public interests.

The supervision authority over gambling organizers is the Lotteries and Gambling Supervisory Inspection (hereinafter the Inspection), however, the State Revenue Service and the State Police also exercise control, for example with respect to taxation, underage gambling, etc.⁴ The Inspection is the competent authority in key matters of compliance with the law and regulations, licensing, control and supervision, development of legal acts and surveillance of the market.⁵ The Inspection also ensures the protection of gamblers' rights and aims to reduce the eventual social risks related to gambling. From the latest annual reports of the Inspection, one of Latvia's policies in the field continues to be the limitation of the organization of gambling in the interests of the general public.⁶ The Inspection constantly gathers and analyses market data and based on its conclusions as to whether the state policy is being implemented successfully it decides whether additional legislative initiatives are necessary.

2.1. Licensing - General

For a company to be able to render sports betting services, general and special licences must be obtained in accordance with the Gambling law. Licences may only be received by capital companies (a Limited Liability Company or a Joint Stock Company) established in Latvia with no less than 51% local shareholding (EU investors are regarded

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¹ Gambling and Lotteries Law of Republic of Latvia, adopted on 17 November 2005, article 1.5;

² *Ibid.*, article 1.18;

³ Law on Lotteries and Gambling of Republic of Latvia, adopted on 16 June 1994;

⁴ *Supra* note 1, art.81;

⁵ *Ibid.*, art 82;

⁶ Annual Public Report 2008 of the Lotteries and Gambling Supervisory Inspection, approved by the decree No 7 of June 29, 2009, page 20, available at www.iaui.gov.lv/Gada_Parskatil/default.htm last accessed on 20 July 2009;

as local).⁷ The amount of the paid up share capital has to be at least 1 million LVL.⁸

In order to obtain the general licence, certain information and documents must be filed with the Inspection. These include the annual report, the report for past quarters of the current year, information about credit liabilities, information about the sources of capital financing, a development plan for the next year activities, indication of the planned kinds of gambling activities, the expected amount and allocation of income and expenditure, the foreseeable profit and its application, information about the shareholders of the applicant, confirmation that at least one half of the members of the supervisory board and the board of directors of the company are domestic taxpayers of Latvia and have an unimpeachable reputation.⁹ The Inspection is also entitled to request additional information if it finds that the filed documents do not provide a complete and clear picture of the sources of financing, plans of activity, etc.¹⁰ The decision to issue the licence is adopted within ninety days from the day of submission or from the day additional information was submitted to the Inspection upon its request.¹¹ The licence is granted to the company subject to payment of the state duty of LVL 300'000¹² (three hundred thousand Latvian lats). Although the license is perpetual, it is subject to re-registration at the Inspection on an annual basis.¹³

2.2. Licensing-Special

In addition to the general gambling organizers' licence described above, a separate special licence is needed with respect to each gambling site the organizer wishes to open. Thus, the general licence merely gives the company a status of "gambling organizer," but each type of gambling activity has to be licensed further. Depending on the type of intended operations, the organizer can apply either for a casino, gaming hall, bingo hall, or totalizator and betting hall licence.¹⁴ The organizer may also apply for an interactive gambling (i.e. online) licence or licence for games of chance over the phone if a "brick and mortar" site is not planned.¹⁵

2.2.1. Brick and mortar betting halls

The documents that are required for a totalizator and betting hall licence include documents regarding the building of the intended premises and description of the intended activities and development plan, but the most burdensome to obtain might turn out to be the local municipality permission.¹⁶

Under the Gambling Law there are certain locations where gambling cannot be organized. Among these are state and municipality institutions, churches, health care and educational institutions, pharmacies, post departments, credit institutions, public markets, and others.¹⁷ Please note though that the restrictions also vary depending on the gaming activity in question and with respect to betting halls the restrictions are the least severe. For example, unlike any other gambling activity, betting can be organized in public events locations, in shops, cultural institutions, railroad and bus stations, ports and airports (with separate entrance from outside), as well as in bars and cafeterias.¹⁸ Yet again, even if the intended location does not fall within the predefined restricted areas, the municipality is still entitled to refuse its permission if it finds that gambling in the particular location would be "detrimental to public interests."¹⁹ There are no objective criteria laid out under which the assessment for "detriment to public interests" should be made, thus the municipalities have rather wide discretion to implement the gambling policy they stand for. The atti-

tude may vary from municipality to municipality, but as regards the Riga city municipality (approx. 750,000 residents out of 2,3 million total in Latvia), since the adoption of the Gambling law, which introduced the requirement of municipality permissions, it has not issued any permissions for new gambling locations. The existing gambling organizers, licensed under the previous system, are the ones that have managed to maintain their business in the same location and their leases to the premises have not expired.²⁰

If the required documents have been gathered and filed with the Inspection, the Inspection adopts the decision within thirty days and issues the licence to the organizer subject to payment of state duty in amount of LVL 30'000²¹ (thirty thousand lats).²² The special licence is also perpetual, but subject to annual re-registration (fee LVL 30'000 (thirty thousand lats)).²³

2.2.2 Interactive (online) licence

Given the ample restrictions on locations where betting halls can be operated and the uncertainty with municipality permissions, the potential sports betting organizers might have lost their interest to run a fixed location. Electronic communication means have proven to be a much more convenient way for people to wager their stakes. It also allows targeting much wider client auditory in a more cost efficient way for the organizer. Given that the local municipality permission is not required, the licensing regime is also more favorable.

In order to obtain the interactive gambling licence, which, among others, allows engaging in sports betting, information regarding rules of the games/services has to be provided, in addition to notice on a Latvian bank account for dealings with customers, description of the software and software test results,²⁴ location in Latvia where the hardware used for sports betting will be placed, a description of the planned security measures to prevent third party interference, information on measures to be implemented for customer personal data protection, webpage to be used if the sports betting is organized via the Internet, and information about the person in charge of the operations.²⁵

The application is examined and a decision regarding the interactive licence, if it concerns only sports betting, is taken within thirty days from the receipt of full information at the Inspection, whereas if other gambling services are rendered as well (i.e. card games, roulette, etc.), the decision is taken within sixty days.²⁶ Although the law does not refer to any fees or re-registration obligations for interactive licences, the Inspection treats it the same as a regular betting hall licence - i.e. 30.000 LVL are payable annually.

In addition to the Gambling law, which lays down the general requirements that the interactive gambling organizer must comply with (player registration, dealings only with Latvian banks, personal data protection, warnings regarding addictive nature, reporting, bookkeeping, etc.), there are several Cabinet of Ministers Regulations that specify these requirements in more detail.

3. Promotion prohibition

Since January 1, 2006, along with entry into force of the current Gambling Law, all forms of gambling promotion (advertisements) outside the gambling locations are prohibited.²⁷ Consequently, there should be no public activities related to promotion of sports betting in Latvia. However, the reality is that promotion of sports betting in Latvia still exists. The organizers are constantly looking for ways to bypass the restriction. In fact, judging from the available decisions of

7 *Supra* note 1, art 1.3 and article 8;

8 1 EUR = 0.702804 LVL. Amount of 1 million LVL constitutes approximately 1.42 million EUR.

9 *Supra* note 1, article 11;

10 *Ibid.*, article 12;

11 *Ibid.*, article 13;

12 *Ibid.*, article 14, and Law on Lotteries and Gambling Tax and Fee, adopted on 16 June 1994, article 2, (- 430'000 EUR);

13 *Ibid.*, article 16;

14 *Ibid.*, article 20;

15 *Ibid.*, article 46;

16 *Ibid.*, article 27;

17 *Ibid.*, article 41.2;

18 *Ibid.*;

19 *Ibid.*, article 42.1.3;

20 *Supra* note 6, Annual Public Report 2008, page 18;

21 Approximately 43'000 EUR;

22 *Supra* note 1, article 28 and the Law on

Lotteries and Gambling Tax and Fee,

adopted on 16 June 1994, article 2;

23 *Ibid.* article 33 and the Law on Lotteries and Gambling Tax and Fee, adopted on 16 June 1994, article 2;

24 In accordance with the rules of Cabinet of Ministers, No. 113, Rules on Independent and Internationally Recognized Laboratories to Issue Opinions on Software Used in Organisation of Interactive Gambling,

adopted on 07.02.2006, only two institutions are allowed to issue such opinions: the Gaming Laboratories International Europe BV (Netherlands) and SMI Software & Messtechnik Institut GmbH (Austria).

25 *Supra* note 1, article 47;

26 *Ibid.*, article 48;

27 *Supra* note 1, art 41.5;

the competent authorities, among all the possible gambling types, usually sports' betting organizers are the ones that are involved in the violations of the said restriction. The industry has also developed certain practices to deal with the restrictions and enforcement authorities are facing certain issues to strike them down effectively.

The Gambling Law only provides the general restriction on "gambling advertising." It does not elaborate on the meaning of the term "advertising." In those circumstances the general definition of advertising from the Advertising law²⁸ has to be applied to understand how extensive the restriction on gambling advertising is. Advertising is defined as any form or any mode of announcement or endeavour associated with economic or professional activity, intended to promote the popularity of or demand for goods or services.²⁹ Given the broad wording, the definition could apply to anything the organizer does outside its registered gambling site, as long as it can be shown that the actual purpose of the particular activity is to promote the gambling services rendered by the gambling organizer. For the detriment of the organizers, the competent authorities tend to look at the restriction in its broadest way.

Usually the sports betting organizers would place a banner in the most popular Latvian online sports portals, in the sports federation web page or in the sports halls/arenas during sporting events. In all the publicly available violation cases³⁰ so far, it has always been a sports betting site registered abroad that is advertised. The compliance with the Advertising law is enforced by the Consumer Rights Protection Centre (hereinafter the CRPC).³¹ The CRPC is entitled to initiate a case either on the basis of a third party application (i.e. complaint), information provided by another institution, or on its own initiative.³² Of the five sports betting advertising cases, three were initiated by third party applications, and two of these by the only Latvian sports betting organizer. Hence, the locally licensed operator is keeping an eye on the activities of competitors. Given the involvement of foreign online operators, which brings up jurisdictional and enforcement issues, none of the cases have been initiated against the actual gambling organizer, instead they are all against the advertising channel. Four cases deal with Internet portals containing sports betting banners and one case was against the operator of the largest sports arena in Latvia. These decisions are relatively recent, i.e. in the period from May 2007 until November 2008. In all the cases CPRC established a violation, in two instances a monetary fine of LVL 2000 was imposed, and in the remaining three an order was issued to terminate the violation.

In all cases the parties who were accused of violating the advertising prohibition used similar defense arguments. The CRPC rebutted the argumentation in the same manner. A case against the largest sports hall "Arena Riga" illustrates the common argument that advertising of the brand or trademark of the sports betting organizer itself does not amount to "gambling advertising."³³ "Arena Riga" claimed that no particular gambling activity was being advertised and a restriction on advertising the logo of the company would be too broad. They argued that the company could also be rendering non-gambling services that are not subject to advertising restrictions. The CRPC did not uphold this argument, instead it explained that the trademark "betway|COM" indicates a link to a certain Internet domain and such practice falls within the advertising definition. The main economic activity of the Internet site is gambling services, which are prohibited from being advertised.

Another interesting aspect in a similar case against one of the largest Internet news portals "Delfi" indicates that the same offense may lead to a double penalty.³⁴ The CPRC imposed a penalty of LVL

2000, despite the fact that the Inspection had already imposed a penalty in of LVL 100. As noted before, the CPRC is the competent authority with regard to enforcement of the Advertising law, whereas the Inspection is the competent authority with regard to the Gambling law. The Code of Administrative offenses allows the Inspection to impose a penalty up to LVL 1000 for violations of the Gambling law, whereas the CPRC is entitled to impose a penalty of up to LVL 10'000 for breach of the Advertising law.³⁵ Although the gambling advertising restriction is stipulated in the Gambling law, the Advertising law contains a more general prohibition - to disseminate legally prohibited advertising.³⁶ Hence, each authority qualified the same event as a violation of the law that was in its competence to enforce. Clearly, Delfi was not satisfied with such a resolution and the CRPC has informally confirmed that not only Delfi, but all other decisions with respect to sports betting advertising, have been appealed in the administrative courts.

None of the cases have yet been examined. While the rulings are pending, the conclusion is that the CPRC decisions have not resulted in the desired effect. Some of these websites are still carrying banners with sports betting sites and promotional activities can still be noticed during sports events. Hence, either the Internet portals and the sports betting organizers are simply buying time with the appeals, hoping that the penalties would outweigh the gains during the litigation period, or they are strongly convinced that the practice indeed does not amount to gambling advertising. The court rulings are keenly awaited to cast certainty on this issue.

Another trend, which shows at least some respect to the advertising ban by the betting organizers, is the practice of "alibi sites." To avoid the advertising prohibition, a double link advert is created. The banner on a popular Latvian portal (.lv) advertises a ".com" or ".net" site which itself does not contain any games of chance, however its main purpose is to bring the person to a site that does. The "alibi site" may contain some games of skill or similar entertainment, but not sports betting, only its advertisements. Taking into account that these are ".com" or ".net" sites, the Latvian authorities cannot control their advertising content. Furthermore, given that they are not providing sports betting services themselves, these sites cannot be restricted from advertising in Latvia. So far there have been no cases where the legality of this practice would be analyzed and the view of the Inspection and the only Latvian sports betting organizer regarding this practice is also unknown.

The advertising restriction is in fact a two-fold issue. On the one hand, the government tries to protect the general public from the potential harms of gambling; on the other hand, the restriction leads to complications that make Latvia less attractive as a potential venue for international sporting events. The sports betting organizers tend to be frequent sponsors of international sporting leagues and they reasonably expect that their logo will at least be displayed during the events the league organizes. The intentional nature of these events allows for significant attention, revenues from ticket sales, increased tourism and publicity. Hence, not only the sports industry, but also municipalities and the State itself are interested in encouraging major international sports events to be hosted in Latvia. However, if the league cannot ensure that its sponsors' logo is displayed, it risks losing the sponsor and may not consider Latvia as a one of the possible locations for the venue. Losing these events also would not be in best interest of the general public.

Latvia's case shows that despite the restriction, sports betting sites are still being promoted on Internet portals and during sporting events either directly or through "alibi sites." The competent authorities, despite viewing this as violation, have not managed to make these advertisements disappear. As a result, foreign online gambling organizers gain competitive advantage over the ones that are locally licensed. The Inspection cannot ensure that consumer interests are fully protected and possible tax revenues flow out of the country. Hence, the current inability to effectively enforce the restriction, which puts the local companies in a disadvantageous position, calls at least for a debate as to whether the restriction should not be reassessed. A reasonable balance must be found. Interpreting the

28 Advertising law of Republic of Latvia, adopted 20 December 1999;

29 *Ibid.*, article 1;

30 CPRC Decisions No 2-r (11 May 2007); No 5-r (16 May 2007); No 15-r (20 July 2007); No. E03-RIG-372 (01 September 2008); and No. E03-RIG-453;

31 *Supra* note 28, article 13;

32 *Ibid.*, article 14;

33 See CRPC Decision No. 2-r on advertisement, 11 May 2007;

34 See CPRC Decision No. E03-RIG-372, 01 September 2008;

35 Code of Administrative offenses of Republic of Latvia, adopted 07 December 1984, articles 166.13 and 204.5;

36 *Supra* note 28, article 12.4;

restriction in the most extensive way after all may not be in the best interests of the general public.

4. The market

Given the comparatively “heavy” regulation of the industry and taking into account the overall population (i.e. size of the market) of Latvia, it comes as no surprise that there is only one operator of sports betting licensed in Latvia.³⁷ The general trend in the sports betting market is that betting is done interactively, i.e., via Internet, telephone, television, radio, or by any other type of electronic communications means. Thus, the only sports betting organizer in Latvia, in addition to the 17 fixed locations it runs, has also taken out the interactive gambling licence.

Unlike in several other countries, Latvia imposes no prohibitions in relation to online gambling. There is an explicit regulation, which shows that Latvia considers it to be a legitimate business activity. Furthermore, despite that the E-Commerce directive³⁸ allows restricting online gambling services originating from other EU Member States, Latvia has neither restricted its residents from gambling on foreign websites, nor has it restricted access to such sites. Consequently, not only sports betting organizers from other EU Member States, but also from third countries, are able to render and target their services to the Latvian public. Given that these websites operate according to the laws of their registration countries and are not controlled by the Inspection, the Latvian consumers using these services do so at their own risk. Nevertheless, judging from the frequency of the advertisements these foreign gambling sites place in the Latvian portals, it must be concluded that consumers do not find the lack of Inspection back-up as a major factor and are using these services at least to the extent that it makes economic sense for the operators to be present on the market. In fact there has not been much public turmoil regarding any fraudulent cases by these foreign operators and, although the Inspection might have received some complaints from consumers, as of today it has not published any “black lists” or warnings regarding particular sites which should be avoided. Hence, it would be fair to say that the Latvian sports betting market consists of two parts - the locally licensed and the foreign online operators.

In these circumstances it is hard to tell the actual value and size of the market. Although the Inspection publishes statistics on the betting market, given that there is only one licensed operator in Latvia, these figures basically reflect the revenues of this company. It would be incorrect to assume that the company has a 100% market share, but on the other hand, it is also difficult to tell what the actual market share might be. There is no information as to the total market share the foreign operators have managed to obtain. Nevertheless, according to the most recent data published by the Inspection,³⁹ in the first quarter of 2009 (January-March), the turnover of the one betting organizer in Latvia was 2,7 [PA1]million LVL. Such turnover makes it the third largest gambling company by turnover in the whole industry. In year 2008 the total turnover from games of chance was 154 million LVL, of which betting accounted for 10 million LVL. It was the fourth largest turnover by companies in the gambling sector. In fact, given the economic downturn, out of all games of chance only the betting sector has demonstrated an increase if compared to results of 2007 (8,2 [PA2]million LVL). The same tendency is visible comparing the turnovers in the first quarter of 2008 (2,3 [PA3]million

LVL) to the first quarter of 2009 (2,7 [PA4]million LVL). Given the ~ 10 million LVL annual turnover for a single company, and the number of foreign online sites actively advertising on the market (bwin.com, betway.com, triobet.com, expekt.com, betsafes.com, etc), the actual size must be at least double of that.

5. Taxation

Currently in Latvia the gambling tax and its payment order is regulated by the law “On Lotteries and Gambling Tax and Fee” (hereinafter the Law on Gambling Tax), adopted on June 16, 1994. The Law on Gambling Tax has had thirteen amendments, which together determine the tax and duties rates to be paid by enterprises that have received gambling licenses. The quantity of the amendments is inter-related with the growth of the gambling industry and its turnover. Initially the gambling tax was levied as a fixed rate on particular type of gambling. However with amendments adopted on September 19, 2003, the tax on the organization and operation of totalizer and betting was set as a percentage of the income from the activity.

The gambling tax, along with the excise tax for tobacco and alcohol, is usually the first to be reviewed when the government needs to raise revenue for the state budget. On the other hand, even when the economy is in a decent shape, the tax rates are still increased to implement the defined Latvia's policy - i.e. to control the growth of the industry. Considering the present economical downturn, Saeima has adopted yet another amendment to the Law on Gambling Tax, which came in force on July 1, 2009.⁴⁰ The tax rate for sports betting has been raised to 15% from the organizers income, instead of the 10% rate that was applicable before. The Law on Gambling Tax prescribes that the tax payment is made on a monthly basis as 1/12 of the total yearly tax rate. In the case if the tax amount is indicated incorrectly or the tax payment is delayed the State Revenue Service is empowered to impose strict sanctions, e.g., including disputeless tax recovery, legal penalties up to 250% from the payable tax amount and the annulment of gambling organizers' licence.⁴¹

Unfortunately there are no statistics available as to the taxes collected in particular from betting activities, however, in the first quarter of 2009 the collected gambling tax from the whole gambling industry amounted to 5,2 [PA5]million LVL in the state budget and additional 1,5 [PA6]million LVL in the municipality budgets. In addition to the gambling tax the companies also pay corporate income tax, social contributions, VAT and other taxes which in the first quarter of 2009 amounted to 2,8 [PA7]million LVL. Altogether in 2008 the industry paid 23,8 [PA8]million LVL as a gambling tax in the state budget, 6,9 [PA9]million in municipality budget and the other taxes amounted to 18,2 [PA10]million LVL.⁴² Comparing the 2008 results to 2007 results there is a slight drop and the same is true if comparing the first quarter of 2009 and the first quarter of 2008. The results of the third quarter of 2009 should indicate whether the new tax rates in force as of July 1, 2009, will increase the tax revenues or will slow down the industry even more.

The last taxation aspect to be mentioned is that any winnings from a gambling activity are taxable personal income (23% rate).⁴³ In accordance with Latvian tax law, the gambling organizers are obliged to withhold personal income tax and make respective contributions into the state budget on behalf of that person for any winnings above 500 LVL.⁴⁴ Although the average winnings from sports betting might not reach 500 LVL, if they do, the foreign online sports betting organizers are once again in an advantageous situation if compared to the local organizer. That is, they are not bound by this obligation and are able to remit the whole winning to the person without any withholdings. In such case, and also in cases where the winnings do not reach LVL 500, the Latvian resident itself is expected to declare such income and make the tax payments.

6. Conclusion

Despite the economic downturn, the results of the sole sports betting organizer show that the market is still reasonably active. The fact that there is only one company licensed should not lead to false assumptions that the market is unattractive for other companies. On the con-

37 SIA Tele Toto, Br v bas iela 99, R ga LV-1001, Latvia, www.optibet.lv;

38 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), Official Journal L 178 , 17/07/2000 P. 0001 - 0016, article 1.5.c;

39 *Supra* note 6, Annual Public Report 2008;

40 Amendments to the Law „On Lotteries

and Gambling Tax and Fee”; adopted 16 June 2009;

41 Latvian Law on Lotteries and Gambling Tax and Fee, adopted on 16 June 1994, articles 13 and 14;

42 *Supra* note 6, Annual Public Report 2008;

43 Law on Personal Income tax of Republic of Latvia, adopted 11 May 1993, article 3.16 and art. 17.10.10;

44 Cabinet of Ministers Regulations No 233, adopted 01 July 1997, „Procedures how personal income tax is levied on persons' income from lotteries and gambling”, article 3.2;

trary, it could be the licensing and regulatory environment that makes sports betting organizers consider operating from abroad. The possibilities of electronic communication means allows them to shop for the most beneficial jurisdiction to establish and licence themselves (if at all) and then serve the Latvian clients online. The number of such companies seems to be only increasing over the years. The trend that the whole gambling industry is moving more to the online environment has also been recognized at the EU level.

The European Parliament recently adopted a non-legislative resolution on the Integrity of Online Gambling.⁴⁵ The European Parliament has recognized many of the issues that the Member States face with online gambling and calls for closer cooperation not only between Member States, but also EU institutions to deal with them and form a “common position.” The uniqueness of the industry has also been recognized, which makes the pure internal market approach inappropriate in this area, recognizing the rights of each Member State to regulate the area according to its traditions and culture, including the right to legitimately restrict the freedom to provide the

⁴⁵ “Integrity of online gambling”, reference INI/2008/2215; available at www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2008/2215 last accessed 20 July 2009;

⁴⁶ Reference for a preliminary ruling from the Hoge Raad der Nederlanden, lodged on 18 June 2008 - Ladbrokes Betting &

Gaming Ltd and Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator, (Case C-258/08), (2008/C 223/41); and „BETFAIR STARTS LEGAL ACTION AGAINST DUTCH GOVERNMENT”, available at corporate.betfair.com/power-scourt-pr-betfair-and-dutch-government-6-5-09.pdf, last accessed on 17 July 2009

online gambling services. Hence, on the one hand the European Parliament calls for cooperation to deal with the current concerns, but on the other it is not trying to impose certain level of harmonization among Member States. Harmonization, however, seems to be something that the industry might be willing to see. There are at least two requests for preliminary rulings to the European Court of Justice seeking a response whether Member States shall recognize each other's licensing regime.⁴⁶ These decisions will once again show where the balance of competence to regulate in the gambling sector is to be found, or whether it is the absolute competence of each Member State.

Returning to the case of Latvia, although the regulations might seem to be quite strict, at least the sports betting sector and online betting remains a relatively open market. There are no prohibitions for online gambling, nor are the activities restricted to state monopolies. The question whether the Latvian legal environment is attractive for potential operators is a different debate. So far there has been no domestic case law regarding the interpretation of the Gambling law in relation to sports betting. There have only been rumors of match-fixing, but no real court cases. The current greatest challenge for the Inspection and the CRCP is to achieve effective enforcement of the advertising restriction. Depending on how successful this battle will be, the results will tell whether the restriction does not need to be reassessed in general. The current market data shows that despite the economic downturn, the betting sector is still holding up and demonstrating a slight growth.

Sports Betting in Lithuania

by Jaunius Gumbis and Liudas Karnickas*

Historical perspective

In 1990, when the independence of Lithuania was restored, the law legalising gambling games in Lithuania was adopted. However, already in 1994 total ban on all forms of gambling was introduced. It was only in 2001, when the new Law on Gambling (the “Gambling Law”) came into force and reset the legal framework for gambling, including sports betting activities. The main reason to repeatedly legalize gambling, including sports betting, was the need for additional income in the state budget in the form of various fees and taxes related to gambling activities. The first sports betting companies started their activities as soon as the new Gambling Law was established. As of 2009, four companies engaged in sports betting activities are established in Lithuania.

Applicable legislation

No special legislation regulating sports betting has been adopted in Lithuania. However, sports betting is organized within the general framework of gambling and the particular framework of betting. The Gambling Law is the main legal act regulating gambling in Lithuania, setting forth the main requirements for gambling companies, restrictions and prohibitions related to the organization of gambling and supervision of gambling activities. Civil relationships, i.e. the basic rights and obligations of an organizer of gambling and a gambler, are also briefly regulated by the Civil Code of 2001. The Civil Code sets forth that betting has to be organized under the established procedure in order to have any legal effect for the parties involved. Pursuant to the

Civil Code, the ticket, check, or other document specified in the rules of the game, is regarded as the contract between the organizer of gambling and a gambler. The Law on Lottery and Gambling Tax of 2001 applies to taxation matters related to sports betting. The Rules on Licensing of Gambling, adopted by the Government of Lithuania establish the procedure for granting licenses to organise gambling activities. Totalisator and betting centres are established according to the Procedure on Establishment of Totalisator and Betting Centres, adopted by the State Gaming Control Commission (the “Commission”). It should also be noted that the draft of the Gambling Law (the “Draft Gambling Law”) has been under preparation since 2006 and is to be adopted in the foreseeable future.

Concept of gambling and betting

The Gambling Law defines gambling as a game or mutual betting that is organized under the established regulation, where the participants seek to win money by voluntarily risking a stake, and where wins or losses depend on chance or the outcome of any event or sports match. Betting is regarded as one of five forms of gambling, and is understood as mutual betting on the outcome of an event based on guessing, where the amount of the win depends on the amount of the bet made and the odds fixed in advance by the betting intermediary. It should be noted that the Draft Gambling Law introduces the parties of betting with the additional possibility of agreeing on the odds on a case by case basis. The other four forms of gambling are machine gaming, bingo, table games, and totalisator. The organisation of any of the aforementioned gambling games requires a separate license. All five licenses can be obtained by a single company. Lithuanian legislation does not provide any other particular definitions or features of sports betting.

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Conditions for organizing sports betting

In Lithuania sports betting can be organized by any company acting in accordance with the Law on Companies, possessing a betting license granted by the Commission, and betting regulations approved by the Commission. The authorized and paid capital of the company specified in its articles of association cannot be less than LTL 1 million (approx. EUR 286 000). All shares of the company have to be registered. In order to obtain a license the company has to provide the Commission with a number of documents related to its authorized capital, financial status, shareholders, managing persons, nature of funds used to pay for the company's shares, etc. In order to grant a license the Commission has to receive reports from the State Security Department, the Financial Crime Investigation Service, the Special Investigation Service, and the Police Department. The license to organize betting is granted for an indefinite period of time. The company possessing a license to organize betting is entitled to start betting activities only after the Commission approves the company's betting regulation, which includes main betting rules, procedures for setting up and winning the cumulative fund, paying out wins, submission and settlement of claims, etc. The prior permission of the Commission is necessary to establish any sports betting centre. The licence to organize betting is cancelled under the request of the holder, in instances when the company ceases its activities due to reorganization or liquidation, when the company fails to eliminate identified infringements of rules governing licensed betting activities, etc.

Main restrictions and prohibitions

Companies organizing sports betting activities are not allowed to perform other commercial activities except rental of its premises for restaurants, bars, musical performances, or currency exchange. Sports betting licence holders cannot be incorporators or shareholders of other companies as well. It is forbidden to organize sports betting activities in residential buildings (with certain exceptions), educational, health care, cultural, financial, post, state or municipal institutions, supermarkets (with certain exceptions), railway or bus stations, airports and seaports. Certain requirements for premises to execute sports betting activities were introduced aiming to limit the access of underaged persons and other sensitive social groups to sports betting activities. Advertising of sports betting is forbidden in Lithuania, except for the names and addresses of betting licence holders and betting centres.

Main obligations

The shareholders of the company have to notify the Commission of every transfer of the shares, and the Commission in such a case has to

decide on re-registration of the company's licence. Sports betting companies are responsible for ensuring that persons under 18 years of age would be precluded from betting. Sports betting companies have an obligation to register every person who makes bets or wins amounts equal to LTL 3 500 (approx. EUR 1 000). Companies organizing sports betting are also obliged to annually provide the Commission with their annual financial statement and auditors report. Financial statements of sports betting licence holders are made publicly available.

Supervision and liability

In Lithuania, the Commission is entitled to execute supervision of gambling companies, including sports betting companies. The Commission is granted the right to obtain necessary information, to examine financial activities of sports betting companies, to inspect the premises where sports betting is organized, to request explanations on the organization of sports betting activities from the companies, to impose sanctions, etc. Under the Lithuanian legislation the infringement of gambling organization procedure or betting regulations is regarded as an administrative offense and incurs a fine in the amount of LTL 5,000 (approx. EUR 1 429) to LTL 25,000 (approx. EUR 7 250).

Future legislative developments

According to applicable legislation the organization of any gambling activities (including sports betting or totalisator) via the internet, telephone or other mobile devices, is prohibited. However, it is likely that in the foreseeable future this restriction will be eliminated since the main provisions to be introduced by the Draft Gambling Law relate to the possibility of operating online gambling (as well as sports betting and totalisator) activities. The proposed model for online sports betting and totalisator is highly related to the physical establishment of such operators and is only allowed for subjects meeting special licensing requirements. Moreover, strict requirements are proposed for the identification of persons betting online. The Draft Gambling Law requires that written contracts be entered into with persons willing to bet online. Only after the conclusion of such contracts, and after issuing the password, can the person become eligible to bet online. As mentioned, the Draft Gambling Law is under preparation as of 2006 and is still in the process of constant changes and negotiations. Although provisions concerning online gambling are likely to be adopted in the near future, tight restrictions are likely to apply for organizing online sports betting and totalisator activities since Lithuanian authorities are quite conservative on gambling issues.

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Sports Betting in the United States

by John T. Wolohan*

Introduction

In late August 2009, the United State Court of Appeals for the Third Circuit ruled that the State of Delaware's proposal to allow single game sports betting would violate a 1992 federal ban on such wagering.¹ The ruling, which essentially halted Delaware's plan was applauded by the professional sports leagues in the United States: the National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA) and the National Hockey League (NHL), as well as the National Collegiate Athletic Association (NCAA), which claimed that the new proposal would not only violate the federal Professional and Amateur Sports Protection Act, but that it would also harm their reputations and expose young people to gambling.

With more and more states looking at legalized gambling as a means to make up for financial shortfalls in their state budgets, the purpose of this paper is to examine current state of legalized sports betting in the United States. The paper will begin with a brief history of sports betting in United States. Next, as a result of some high profile betting scandals surrounding match fixing, the paper examines the various laws passed to regulate the industry. The paper concludes by examining the Delaware case and why Delaware believed that it could use sport betting to help balance the state's budget and what impact.

I. History of Sports Betting in United States

Like many people in the World, Americans enjoy gambling in a variety of forms, ranging from state run lotteries, bingo, card rooms and casino games. In fact, gambling has been a part of America since colonial times when each of the original thirteen colonies employed lotteries to raise revenue.² Today, gambling is so popular, that in 2007 the Gross Gambling Revenues in the United States topped \$92 billion.³ Although illegal in every state except Nevada, one of the most popular forms of gambling is betting on the outcome of sporting events. It should be noted, however, that while Nevada is the only state that allows betting on specific games, Oregon, Montana and Delaware allow limited betting on sports via a lottery. In 2008, over \$2.5 billion was legally wagered in Nevada's sports books, while according to the National Gambling Impact Study Commission (NGISC) as much as \$380 billion is bet illegally annually. The most popular sporting event to bet on, or the event that attracts the most bets, is the NFL's annual Super Bowl. In 2009, approximately \$81.5 million was wagered at the Nevada's sports books on the Super Bowl; down from the \$92 million wagered on the 2008 Super Bowl.⁴ It is estimated, however, that only a small amount of the total money bet on the game, about 1.5 percent, is actually wagered legally in at the Nevada's sports books.

With so much money being wagered legally and illegally on sports, it is not surprising that there have been a series of match fixing and gambling scandals. For example, Major League Baseball's history with match fixing and illegal gamblers goes all the way back to 1914, when it was rumored that the heavily favored Philadelphia Athletics

intentionally lost the World Series to Boston.⁵ The most infamous scandal in baseball, however, occurred in 1919. Known as the Black Sox Scandal, eight members of the Chicago White Sox accepted money to lose that year's World Series against Cincinnati.⁶ When the newspapers broke the story in 1920, all eight of the players were arrested eventually tried in criminal court. Although as least two of the players had signed confessions admitting to their part in the scandal, none of the players were convicted of criminal charges. All of the players, however, were eventually banned for life from playing professional baseball.

Baseball was forced to endure another black eye from a betting scandal in 1989, when Pete Rose, baseball's all-time leader in hits, agreed to a lifetime ban in return for MLB ending its' investigation into his gambling. Although Rose denied betting on baseball for many years, in his 2004 book, Rose finally admitted to gambling on baseball games in which he played and managed. Rose justified his actions, however, by stated that he only bet on his teams to win.

In addition to professional sports, college sports have also suffered a series of scandals involving gambling and match fixing. Since college athletes are not paid to play, it is not surprising that gamblers have been able to entice athletes to fix matches for money. In fact, the only thing surprising is that it does not happen more often. Probably the most famous instance of match fixing in college sports happened between 1947 and 1951, when at least 86 college basketball games were fixed by at least thirty-five college players from a number of colleges in the New York City area and the University of Kentucky. Twenty of the players, and fourteen gamblers, were eventually arrested and served time in prison. Despite all the efforts by the NCAA and the criminal penalties handed down to the players, match fixing scandals have continued to the current days.⁷

The most recent match fixing scandal involved the NBA and one of it's referees. NBA referee Tim Donaghy was convicted in 2008 of illegally betting tens of thousands of dollars on games, some of which he worked, during the 2005-06 and 2006-07 NBA seasons. In addition, Donaghy also passed critical information about games to bookies, which allowed them to adjust the point spread. In 2008, Donaghy was sentenced to 15 months in prison.⁸

II. Federal Legislation Regulating Sports Betting

With the current recession causing havoc with local and state budgets, it was not surprising that governments at all levels are starting to look at legalized gambling as a means of making up some of their budget shortfalls. As a result, in the United States, 48 of 50 states have revised their state laws to allow some form of limited legalized gaming, including regulated casino-style games and state-run lotteries.⁹

The first state to legalize gambling on sports was Nevada in 1931. It was not until the 1976 that a second state legalized a form of sports gambling, when Delaware introduced a Scoreboard lottery, a form of parlay card wagering.¹⁰ In order to win, the Delaware game required bettors to pick seven winners in seven selected NFL games. Unlike Nevada, the game did not allow betting on individual games.

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1 A.J. Perez, *Court foils Delaware sports*

betting plan, USA Today, August 25, 2009, at 1C

2 Macchiarola, M.C., Dec. 2008). *Securities Linked to the Performance of Tiger Woods? Not Such a Long Shot*, 42 Creighton Law Review 29.

3 American Gaming Association (2009). *Gaming revenue: 10-Year trends*. Retrieved August 30, 2009, from http://www.americangaming.org/Industry/factsheets/statistics_detail.cfv?id=8

4 American Gaming Association (2009). *Sports Wagering*. Retrieved August 30,

2009, from http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=16

5 Cabot, A.N. and Faiss, R.D., (Spring 2002). *Gaming Law Symposium: Sports Gambling in the Cyberspace Era*, 5 Chapman Law Review 1.

6 Eliot Asinof, *Eight Men Out: The Black Sox and the 1919 World Series* (1963).

7 Udovicic, A.E., (1998). *Special Report: Sports and Gambling a Good Mix? I Wouldn't Bet on It*, 8 Marquette Sports Law Journal 401.

8 M.S. Schmidt, *Referee Gets 15 Months for His Role in Gambling Ring*, N.Y. Times, July 30, 2008, at D7.

9 Dunstan, R. (1997). *Gambling in California*. Sacramento, CA: California Research Bureau, California State Library. Retrieved August 31, 2009, from <http://www.library.ca.gov/CRB/97/03/97003a.pdf>.

10 NFL v. Governor of Delaware, 435 F. Supp. 1372 (Del. 1977).

Although Delaware discontinued its football lottery game after only one year, Oregon initiated a similar game in 1989. Faced with the growing popularity of sports gambling, in the early 1990s more and more states began to consider legalizing some form of sports wagering. Worried that a sudden proliferation of sports-based lotteries would pose a significant threat to the integrity of their sports, the major sports leagues petitioned Congress for assistance.¹¹

The following section examines some of attempts by Congress to regulate gambling and sports betting in the United States.

1. The Gambling Devices Act of 1951

While Congress has generally left it to each state to regulate the gambling activities within each state, the federal government has passed a series of laws designed to assist the states regulate illegal gambling within the state. The first such law passed by Congress at the federal level was the Gambling Devices Act of 1951. The Act, which sought to assist states in eliminating the role of organized crime in the gambling industry, made it a crime to transport gambling devices across state lines to locations not specifically exempted by local or state law.¹² While the law has little to do with sports gambling, it is important, because it shows Congress' willingness to regulate gambling activities and get involved in something that up until then was seen purely as a state matter.

2. The Wire Communications Act of 1961

The next legislation passed by Congress "to assist the various States, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities"¹³ was the Wire Communications Act of 1961 (Wire Act).¹⁴

The statute states that:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than \$ 10,000 or imprisoned not more than two years, or both.¹⁵

The Wire Act, therefore, makes it illegal to transmit via the telephone bets or wagers, use information assisting betting or wagering on a sports event or contest, or to engage in any communication that entitles the recipient to receive money or credit resulting from betting or wagering. In order to be convicted of violating the Wire Act, the government must show that an individual: (i) transmitted information through interstate wire facilities (this would encompass almost all forms of communication, from telephones, to more modern forms of communication like email and texting) that assisted in the placing of wagers; and (ii) the defendant was involved in the business of wagering or betting.¹⁶

Federal prosecutions of gamblers under the Wire Act has been somewhat limited, however, because of the court's interpretation of the business of wagering or betting. Before convicting someone, the federal courts require that the defendant be a bookie (i.e. engaged in the business of receiving or taking bets), and not such a gambler or someone who simply bets on sports.¹⁷

3. The Illegal Gambling Business Act of 1970

In 1970, as part of the Organized Crime Control Act,¹⁸ Congress passed the Illegal Gambling Business Act, a law prohibiting people from running an illegal gambling business.¹⁹ In order to establish criminal activity under the Act, the government must establish the existence of a gambling business that: (i) violates state or local law, (ii) involves five or more people that conduct, finance, manage, supervise, direct, or own all or part of the business, and (iii) remains in substantially continuous operation for more than thirty days or has a gross revenue of \$ 2000 in any single day.²⁰

While Congress did not intend for individuals placing bets be counted as part of the five or more persons requirement, Congress did want to the courts to liberally count anyone engaged in the operation of the illegal gambling business "regardless of how minor their roles."²¹ The Act also does not require absolute or total continuity in the gambling operations. Instead, the courts interpret the phrase substantially continuous to mean an operation conducted with some degree of regularity.²²

In addition, the Illegal Gambling Business Act was part of the Organized Crime Control Act which included the Racketeer Influenced and Corrupt Organizations Act (RICO).²³ RICO was designed to eradicate organized crime by attacking the sources of its revenue, including syndicated gambling and bookmaking. RICO subjects an individual who engages in prohibited activities to criminal and civil penalty.²⁴

4. The Professional and Amateur Sports Protection Act of 1992

The next major piece of federal legislation passed by Congress is the Professional and Amateur Sports Protection Act (Sports Protection Act).²⁵ Passed in 1992 in response to the professional sports leagues' concerns that Delaware and Oregon's sports-based lotteries posed a significant threat to the integrity of their sports, the Sports Protection Act is designed to stop the spread of State-sponsored sports gambling.²⁶ This was significant since there were at least an additional thirteen states considering some form of legalize state-sponsored sports betting at the time the Act was passed.²⁷

The Sports Protection Act states that:

It shall be unlawful for-

- 1 a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
- 2 a person to sponsor, operate, advertise, promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.²⁸

Since at the time the law was passed, four states (Nevada, Oregon, Montana, and Delaware) had or previously had state statutes allowing sports betting, the four were exempt from the Act. Therefore, Nevada was allowed to continue to offer legalized sports betting and Oregon and Montana were allowed to continue their sports lotteries. As will be discussed in the last section of this paper, it is this exemption that Delaware bases its' attempt to introduce a new sport betting game.

III. State Legislation Regulating Sports Betting

Before passage of the Sports Protection Act, Congress had traditionally let individual states regulate gambling within their own jurisdictions. In taking this hands-off approach, Congress cited the Tenth

11 Cabot, A.N. and Faiss, R.D., (Spring 2002). *Gaming Law Symposium: Sports Gambling in the Cyberspace Era*, 5 *Chapman Law Review* 1.

12 *Gambling Devices Transportation Act*, 15 U.S.C. §1171, et. seq. (2009).

13 *Martin v. United States*, 389 F.2d 895 (5th Cir. 1968)

14 18 U.S.C. §1084 (2009)

15 18 U.S.C. § 1084(a).

16 *United States v. Alpirn*, 307 F. Supp. 452 (S.D.N.Y. 1969)

17 *United States v. Tomeo*, 459 F.2d 445 (10th Cir. 1972)

18 Pub. L. 91-452, 84 Stat. 922 (1970).

19 *Illegal Gambling Business Act*, 18 U.S.C. §1955 (2009).

20 *United States v. Sacco*, 491 F.2d 995 (9th Cir. 1974).

21 *United States v. Schullo*, 363 F.Supp. 246

(D.Minn. 1973).

22 *United States v. Trupiano*, 11 F.3d 769, 773 (8th Cir. 1993).

23 Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970).

24 18 U.S.C. §§1963, 1964 (2006).

25 *Professional and Amateur Sports Protection Act*, 28 U.S.C. §3701, et. seq., (2009).

26 Cabot, A.N. and Faiss, R.D., (Spring

2002). *Gaming Law Symposium: Sports Gambling in the Cyberspace Era*, 5 *Chapman Law Review* 1.

27 Bradley, B. (1992). *The Professional and Amateur Sports Protection Act - Policy Concerns Behind Senate Bill 474*, 2 *Seton Hall Journal of Sport Law* 5.

28 28 U.S.C. §3701, et. seq., (2009).

Amendment to the United States Constitution which states that: the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.²⁹ As a result, every state has laws regulating gambling, with the majority of states outlawing all forms of sports betting.

As mentioned above, however, there are some exceptions to the Sports Protection Act that allows four states to offer some form of legalized sports gambling. For example, Nevada allows “the business of accepting wagers on sporting events by any system or method of wagering.”³⁰ Oregon allows betting on football games through a game called Sports Action, which is a part of the Oregon Lottery. While Oregon allows individuals to bet on sports via the lottery, unlike Nevada, Oregon does not allow individuals to bet on individual sports event. In addition to Oregon, Montana also has authorized a sports pool game called Montana Sports Action.³¹ Montana, just like Oregon, prohibits individuals from betting or wagering on individual sports event.³²

IV. Delaware and the Move to Expand Legalized Sports Betting

While it is clear that the Sports Protection Act prohibits the creation of new state sponsored sports gambling programs, the Act also specifically exempted four states that had or previously had already offered sports gambling, including Delaware. Faced with an unprecedented shortfall in state tax revenues, Delaware in early 2009 proposed a lottery game to help balance the state’s \$3 billion budget. The new game would allow individuals to not only bet on single games, but also sports other than the NFL.

As a result of the proposed new lottery game, the NFL, as well as the other professional leagues and the NCAA, filed a motion for a preliminary injunction in the United States District Court for the District of Delaware seeking to enjoin the state of Delaware from commencing any “sports lottery” that permits: “(i) single-game sports betting, (ii) betting on sports other than professional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976.”³³ In particular, the leagues argued that the Delaware Sports Lottery Act,³⁴ and the regulations proposed pursuant to the Act violated the Sports Protection Act since it went beyond what was allowed by the exemption by not only allowing single-game betting, but also betting on sports other than professional football.³⁵

On August 10, 2009, the District Court for the District of Delaware rejected the sports leagues’ motion for a preliminary injunction.³⁶ In support of its’ decision, the court held that based on the record, it was not convinced that the sports leagues would suffer irreparable harm without an injunction, that the state would not be irreparably harmed with it, or that the injunction would be in the public interest. Therefore, the court held that considering and balancing the preliminary injunction factors, and in light of the present record, at this early stage of the case, a preliminary injunction was not appropriate.³⁷

With Delaware’s three race tracks /casinos working to open sports books in time for the NFL’s opening game on September 10, 2009, the sports leagues appealed the District Court’s decision to the United



Foreign speakers Genevieve Gordon, Birkbeck College, London University (United Kingdom) and Prof. John Wolohan, Ithaca College, New York (United States of America) at the ninth Asser International Sports Law Lecture on “Sports Betting in a European and International Legal Perspective: Law and Policy”, The Hague, 16 september 2009.

States Court of Appeals for the Third Circuit. In a somewhat surprising decision, the three-judge panel of the Third Circuit Court of Appeals instead of just ruling on the NFL’s preliminary injunction request, leapfrogged the injunction request and ruled that Delaware’s betting plan violated the Sports Protection Act.³⁸ Although a written opinion of the decision and the judges’ reasoning was not available at the time this article went to press, the decision basically ended Delaware’s plan.

Conclusion

At the time this article went to press, Delaware Governor Jack Markell was waiting for the Third Circuit Court’s written decision before deciding whether to appeal. However, needing the additional tax revenue, Markell did say that Delaware would likely offer some form of parlay wagering involving the outcome of two or more games when the NFL season started.

While the NFL and the other leagues may have won the case, it was interesting to note that one of the main arguments made by the leagues was that any gambling on its games would damage the sports good will and reputation for integrity. However, as the District Court noted, sports and gambling are already intertwined. In support of this conclusion, the District Court noted that the NHL not only hosted its 2009 Player Awards in the Palms Casino, but allows the co-owner of the Detroit Red Wings, Marian Ilitch to also own the Motorcity Casino. In baseball, Marian Ilitch’s husband Michael owns the Detroit Tigers. In addition, the court noted that the MLB recently loosened its policy on casino and gambling sponsorship, so Harrah’s Casino is a signature partner of the New York Mets and the Mohegan Sun Hotel & Casino operates a Mohegan Sports Bar at Yankee Stadium. In the NBA, the Sacramento Kings are owned by the same people who own the Palms Casino in Las Vegas, while the Chairman and CEO of Harrah’s owns a stake in the Boston Celtics. In the NFL, the league allows broadcast affiliates to broadcast betting information, betting lines, injury reports. In addition, NFL teams are allowing their team names to be used on state lottery games. For example, Massachusetts, not one of the four states exempt from the Sports Protection Act, is selling the instance scratch tickets with the New England Patriots team logo.

By going into court to prevent Delaware from starting the new betting program, the professional sports leagues, therefore, seem to be more interested in guarding their own revenue streams, than protecting the good will and reputation for integrity of the sports. If the sports leagues were really worried about their good will and the integrity of the sports they would ban all associations with gambling and state lotteries. Instead of allowing it only when it is profitable to them.

²⁹ United States Constitution, Amendment X

³⁰ Nev. Rev. Stat. Ann. §463.0193, (2009)

³¹ Mont. Code Ann., §23-5-502, (2009)

³² Mont. Code Anno., §23-5-806, (2009)

³³ The Office of the Commissioner of Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, and the National Hockey League, v. Markell, 2009 U.S. Dist. LEXIS 69816

³⁴ 29 Del. C. § 4825

³⁵ The Office of the Commissioner of Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, and the National

Hockey League, v. Markell, 2009 U.S. Dist. LEXIS 69816

³⁶ The Office of the Commissioner of Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, and the National Hockey League, v. Markell, 2009 U.S. Dist. LEXIS 69816

³⁷ The Office of the Commissioner of Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, and the National Hockey League, v. Markell, 2009 U.S. Dist. LEXIS 69816

³⁸ A.J. Perez, *Court foils Delaware sports betting plan*, USA Today, August 25, 2009, at 1C

Sports Betting: Law and Policy. A UK Perspective

by Genevieve Gordon*

Gambling and Sport

Gambling or betting and sport have almost been inseparable and gambling has been subject to considerable regulation by the State. Gambling has close links with the general commercialisation of sport and with corrupt practices in sport which can be illustrated by such affairs as the Hansie Cronje Affair, 2020 cricket issues surrounding Alan Stamford and other cases such as *Bradley*¹ in horse racing. With two very distinct issues in discussion in this paper we will be looking at the laws governing the gambling and betting in the UK combined with a number of social policy issues detailing measures to regulate betting for the benefit of society. The National Lottery will not be expanded on other than to say an independent study, British Survey of Children, the National Lottery and Gambling 2008-09, is the only British underage research of its kind and was commissioned by the National Lottery Commission to test the effectiveness of Camelot's child protection measures. The survey of nearly 9,000 children aged between 12 and 15 in England and Wales was conducted by Ipsos MORI and the Centre for the Study of Gambling at the University of Salford.²

A Brief History of Sports Betting in the UK

Gambling has always been a part of the modern sporting world, although the public response to it has varied from one period to another. Gambling was endemic in the 18th Century Britain, but before 1850 a puritanical reaction had begun, aimed at working class betting. The greatest achievement of the anti-gambling lobby was probably the Street Betting Act 1906, but it remained a powerful and influential opponent certainly up until the second Royal Commission on the subject in 1949. Since then gambling on sport has been increasingly raided by governments to provide income for the State and has also played a crucial role in the financing of the major sports of football and horse racing.³

Betting had always been part of rural sports, both those involving animals and those involving contests between men. Pedestrianism⁴ probably began in the 17th Century.

Betting on horses was also commonplace, often taking the form of individual challenges between members of the landed gentry. Betting added another dimension of excitement to the uncertainty of sport itself and it was excitement, which the leisured rural classes were especially seeking, particularly in a countryside whose range of more conventional pursuits soon began to pall in the eyes of the young, married, leisured males.

Cricket was another rural pastime that the landed bucks found

attractive. With money at stake it was important to reduce the chances of disagreement by drawing up a body of rules and regulations by which both sides would abide.

Football was a very attractive proposition both to the bookmakers and punters, before 1900 some newspapers had offered prizes for forecasting the correct scores as well as the results of a small number of matches and early in the 20th century a system of betting on football coupons at fixed odds had developed in the north of England.

Newspapers began publishing their own pool coupons (until the Courts declared the practice illegal in 1928) and individual bookmakers offered a variety of betting opportunities. By the end of the 1920's, the football pools, and particularly Littlewoods⁵ under the entrepreneurial guidance of the Moores brothers, had begun to thrive. The pool for one week in 1929-30 reached £19,000.⁶ By the mid-1930's the pool was sponsoring programmes on Radio Luxembourg which broadcast the results of matches on Saturdays and Sundays. In 1934 those companies founding the Pools Promoters' Association had a turnover of about £8 million which had increased by 1938 to £22 million of which the promoters retained a little over 20%.

By the mid-19th century betting and sport were firmly established. Gambling was typical of a corrupt aristocracy and it was simply up to them if they chose to lose 'everything' gambling. When the poor were led to emulate them however it was widely agreed that something had to be done. By 1850 the State was being pressurised into doing it. Betting by the poor led to debt which in turn led to crime. As The Times put it in the 1890's, it 'eats the heart out of honest labour. It produces an impression that life is governed by chance and not by laws'.

The anti-gamblers' first legislative success was an Act of 1853 to suppress betting houses and betting shops, which had been springing up in places, often within public houses. A House of Lords Select Committee first examined the matter in 1901-02. In 1906 came the legislation.

The Street Betting Act of 1906 has gained some notoriety as an example of class biased legislation. It was aimed at all off-course betting. A person who could afford an account with a bookmaker who knew his financial circumstances well enough to allow him to bet on credit did not have a problem. Obviously this ruled out many of the working class men and women.

By 1929 the police were very critical of both the law and their role in enforcing it and said as much to the Royal Commission which at the time was examining the police services. The Second World War and the relatively buoyant economy succeeded it to bring about a more relaxed attitude to gambling. This was also facilitated by the Royal Commission of 1949-51 having relatively sophisticated economic and statistical apparatus which enabled it to show that personal expenditure on gambling was only about 1% of total personal expenditure, that gambling was then absorbing only about 0.5% of the total resources of the country and that it was by then rare for it to be a cause of poverty in individual households.

The Royal Commission was in favour of the provisions of legal facilities for betting off the course and the licence betting shop reappeared in 1960, 107 years after it had first been made illegal. Six years later the government's betting duty reappeared too.

Gambling's relationship with sport has been significant in two other respects: as a motive for malpractice and corruption and as a source of finance for sporting activities. Today the Test and County Cricket Board (TCCB) has a regulation forbidding players to gamble on matches in which they take part.⁷ Football has occasionally been shaken by allegations that matches have been thrown, usually in the

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1 *Bradley v The Jockey Club* (2004) EWHC 2164.
2 According to Dr Anne Wright CBE, Chair of the National Lottery Commission there is a continuing decline in underage play which shows an effective regulatory framework together with a socially responsible operator mak-

ing it very difficult for children to access National Lottery products.

3 Gardiner, S., James, M., O'Leary, J. and Welch, R., *Sports Law* (2005), 3rd Ed, Cavendish Publishing

4 Aristocrats bet on their footmen and promoted the races.

5 A Littlewoods bookmaker would collect your pools each week going from door to door.

6 The average price of a 3 bedroom detached house in East Sussex with 2 acres of land in 1976.

7 It is somewhat unclear whether under the regulations whether they can gamble on matches they are not competing - this however would have ethical and insider dealing considerations.

context of championship games, promotion or regulation issues. Attempts to fix the results of matches in order to bring off betting coups appear to have been very rare but in 1964, 10 players received prison sentences for their part in a so-called betting ring. The treatment of football was different to the treatment of horse racing. The government did not introduce a tax on gambling on horse racing until 1966. In 1985 it was still being levied at only 8%. The tax on pools betting came much earlier and was much higher at 42% in 1985. When betting shops were legalised the government established a Horseracing Betting Levy Board, allegedly to compensate racecourses for the fall in attendance that would come.⁸

Growth in Popularity

Betting on sport is growing in popularity, with many new forms such as spread betting.⁹ Specialist companies now operate to give advice and odds.¹⁰ Until recently the law on betting was to be found in the Betting, Gaming and Lotteries Act 1963, which, despite its title, no longer deals with gaming and lotteries. Betting is not defined by statute, but is generally regarded as entering into a contract by which each party undertakes to forfeit to the other, money or money's worth if an issue in doubt at the time of the contract, is determined in accordance with that other party's forecast. Unlike a lottery, a bet may involve skill or judgement. No person may act as a bookmaker without the authority of a permit issued by the licensing justices which currently stand at £200 per year for General betting - limited under category A to £443,526 a year for Casinos running under the Casino Act 1968 under category E. The essential test applied by the licensing justices in considering an application is whether or not the applicant is a fit and proper person. A bookmaker operating from a betting office requires a licence for the premises issued by the licensing justices. From 1 September 1997 the duration of betting permits and licenses has been extended from one to three years. A licence may be refused on the grounds that there are already sufficient licensed betting offices in the locality to meet the demand for betting. No person under 18 years of age may be admitted to a betting office.

The regulatory framework of the British betting industry has been liberalised during the first half of the 1990's. The advertising of individual betting offices and their facilities was originally prohibited under the 1963 Act but from 1997 the ban has been relaxed to allow advertisements in material form, for example, in newspapers, journals and posters. The ban remains on broadcast advertising of betting offices.

The Government set up a Gambling Review Body in 1999 under the chairmanship of Sir Alan Budd¹¹ looking at a wide range of the legislation on gambling in Britain with its report submitted in June 2001. New legislation was introduced in the autumn of 2004 to liberalise the regulatory framework in the UK. It has three main objectives:

1. Gambling remains crime free;
2. Players know what to expect and are not exploited; and
3. There is protection for children and vulnerable people

The new legislation has gone some way to assist continued and escalating concerns in the gambling and betting world.

A continued worry in horse racing has been the relationship between gambling and organised crime with the Jockey Club issuing a statement to the Gambling Review Body:

"The Jockey Club is concerned about the vulnerability of horseracing to criminal behaviour and other undesirable activity as a consequence of betting, and changes to the criminal law so as to maintain the public's confidence in the integrity of the sport. Principal concerns stem from the fact that, by comparison with other forms of gaming and

gambling, the business of bookmaking (including spread betting) is under-regulated and lacks the necessary measures to deter corruption and thus renders racing vulnerable to malpractice.

There is evidence that racing is being used for money laundering purposes. The police have indicated that there is some corruption within racing by criminals and that illegal betting, to the detriment of both government and racing revenues, is being carried out on a large scale."¹²

Sports related gambling has exploited new technologies with internet betting exchanges having proliferated together with the opportunities provided by interactive services via digital television and further new IT based services through websites owned by companies such as ESPN giving advice and regular updates relating to betting through for example their ESPN SoccerNet Betting Zone website.¹³

Gardiner, S and Gray, J, 'Can Sport Control its Betting Habit?'

Since the dawn of sport, gambling has been in its constant champion. Ancient drawings on primitive cave walls find that gambling has existed for thousands of years. During modern times, sports betting is the most popular form of gambling worldwide, with Internet-related gambling generating over \$3 billion in annual reserves in 2002.

Gambling and sports creates an 'unholy alliance.' Gambling has enhanced sport's popularity, particularly on television whereby bettors are more interested in the point spread, not the outcome of a contest. While sports leagues welcome the popularity that gambling provides, they must guard against match fixing, point shaving and bribery of athletes and referees because the public appeal of sport also rests on the integrity of the contest.

Computers, technologies and the Internet have facilitated a sophisticated and popular way to gamble on sports events known as 'betting exchanges.' In essence, betting exchanges allows people to swap bets. For instance, one can serve as a 'bookmaker', offering odds to other Internet users concerning a sports competition or event. Betting exchanges have created a fundamental change in gambling because now anyone with a credit card can make money from either a horse, a player, or a team offering odds on the website and then keeping the stakes when people fail to beat the odds. However, there is a realistic fear that people who have privileged or 'insider' information - knowing for certain that a horse, a player or a team is going to lose - are offering odds on betting exchanges then maximising their revenues on unsuspecting gambling customers.

In the United Kingdom, the market leader is Betfair.com. This website claims to be 'the world's largest online betting company' with an estimated turnover of £50 million per week. Betfair simply serves as a broker, matching people who want to bet with people prepared to offer odds and bringing them together on its website. Betfair makes its money by charging a commission to those who win their bets.

Horseracing is a major attraction for Internet betting exchange gambling. Recently in the United Kingdom, as a result of horseracing betting exchange abuses, there has been a succession of inquiries by the Jockey Club into suspicious betting practices around horse races. Similarly, it has been reported that the Association of Tennis Professionals ('ATP') has discovered that bets of up to £80,000 were being placed on individual matches and that there had been irregular betting patterns around matches involving players not ranked in the top 100. It is alleged that tennis players have been able to profit from insider information concerning their matches.

Betfair has responded to these concerns by signing a 'Memorandum of Understanding' with several sports governing bodies. This has included the Jockey Club and ATP, whose security departments will have access to individual identities and betting records of Betfair gamblers when a race or match produces unusual betting patterns or competition results.

Betfair points out that by developing internal policing relationships with relevant sport governing bodies, sports corruption will be

8 Mason, T, *Sport in Britain* (1988), London: Faber & Faber, pp 59-68.

9 'Bookies bet on football bonanza' The Observer, 7 January 1996, p 6.

10 See Hunter, W, *Football Fortunes: Results, Forecasting, Gambling and Computing* (1996), Harpenden:

Oldcastle; 'A good bet', Fair Game, Channel 4, 22 May 1995.

11 *Gambling Review Report* (2001), London: The Stationary Office.

12 www.thejockeyclub.co.uk/jockeyclub/html/racing/gambling.htm.

13 soccernet.espn.go.com/zoneindex?cc=5739.

deterred because electronic transactional records will help investigators catch any wrongdoers, and, therefore create 'safe' Internet gambling sites. The downside is that if an exclusive commission is paid to sport governing bodies when they recommend that gamblers deal with 'official' or 'approved' betting exchanges a conflict of interest is created where a sports contest integrity is sacrificed in order to maximise sports related gambling revenues.

As with the regulation of gambling generally, there are a number of differing regulatory regimes ranging from prohibition, on the one hand, through to very liberal licensing. Since 2001, for example, in the United Kingdom, an extensive consultation process has taken place that generally supports a more liberal regime. Further, in April 2003, the Department for Culture, Media and Sport produced a position paper, 'The Future Regulation of Remote Gambling' (see www.dcms.gov.uk). The stated objective is to have 'effective regulation [that will] see Britain become a world leader in the field of on-line gambling.'

In contrast, the United States has passed federal anti-gambling legislation. This includes the Professional and Amateur Sports Protection Act of 1992 (28 USC ss3702) that prohibits the expansion of state-sanctioned, authorised, or licensed gambling on amateur and professional sporting events in the United States. Similarly, the Comprehensive Internet Gambling Prohibition Act of 2002 (s 3006) was proposed to prohibit all Internet gambling. Striking a balance between sports competition and Internet gambling is a tricky position. The early indication is that Internet betting exchanges are creating opportunities for lucrative 'remote gambling' while resulting in gambling anonymity that may ultimately endanger the integrity of sports competition.¹⁴

The match fixing scandal(s) in cricket shows that there is a need for an effective regulatory framework concerning gambling and sport. In some countries around the world, gambling is essentially prohibited. It of course flourishes as an 'illegal underground activity'. It is prohibited in some areas and regulated in others through strong and enforceable government legislation. In the United States, there are many instances of specific sports gambling legislation to govern the behaviour of people within and outside sports. In a third grouping of countries a liberal regulatory framework exists. In Britain, over the last few years an increasingly liberal approach has been adopted. However as discussed and with new laws and regulations in place law and policy in betting is once again under the spotlight.

At a time when the administration of sport has become complex coupled with the vast amount of money flowing into sport and generating from sport, it is essential that more effective regulatory frameworks are developed in the sporting world to counter the impact of gambling on particular sports and players. It is also vital that there is effective policing of these new regulatory frameworks.

With this in mind there have been a number of changes made to legislation relating to gambling recently.

Current Legislation and Policy in the UK

The gambling laws in the UK may have relaxed however new changes will have a big impact on the gaming industry especially for bookmakers.

Probably the most important change affecting bookmakers in regards to the new gambling laws in the UK is the establishment of a new single regulatory authority, the Gambling Commission whose remit is:

1. The Gambling Commission (the Commission) regulates gambling in the public interest. It does so by keeping crime out of gambling, by ensuring that gambling is conducted fairly and openly, and by protecting children and vulnerable people from being harmed or

exploited by gambling. The Commission also provides independent advice to government on gambling in Britain.

2. The Commission is responsible for licensing and regulating gambling in Great Britain other than the National Lottery and spread betting, which are the responsibility of the National Lottery Commission and the Financial Services Authority (FSA) respectively.¹⁵

Under new gambling laws in the UK the Gambling Commission are to licence all gambling operators and key workers.

As part of the new gambling laws in the UK the Gambling Commission will have a wider remit than the Gaming Board, which will extend to betting and online gambling. They will also have broader powers including powers to impose fines and commence prosecution under the new gambling laws in the UK.

Under these new laws in the UK betting operators will require an operating licence from the Gambling Commission. To acquire this they will have to undergo a three part "fit and proper" test along the lines now applicable to casinos.

The first part of the "fit and proper" test issued under new gambling laws is to do with probability. Is the applicant suitable to take a role in the industry? Secondly, does the applicant have adequate financial resources? Thirdly, is the applicant appropriately knowledgeable and professionally competent?

So far as corporate clients are concerned, the test will be applied to the directors and other persons holding positions of authority or influence over it. Under the new gambling laws in the UK vetting will be thorough, involving completion of forms, investigation and review by the Commission's Inspectorate and other staff, and where appropriate, interviews.

Once the licence is appointed under the new gambling laws in the UK, operators will be subject to ongoing monitoring and inspection.

Online Gambling

It is now a legal requirement that all online gambling sites dealing with real money gaming must be regulated by the government of where the games are hosted - for example; many online bookmakers operate out of countries such as Gibraltar due to laxer tax laws, as well as lower taxes and are therefore under the jurisdiction of the Gibraltar authorities for remote gambling. Many of the larger online bookmakers are proud to boast they host their servers in countries such as the UK or Australia, and are therefore more heavily regulated by the stricter laws and regulations of these countries.

Laws and restrictions vary from country to country - some may let members bet higher or more over a period of time, where they may be limits in some countries due to the worry of developing gambling addictions or debt. As well as this, there is the key issue of the age restrictions on a gambler - a player must be over the age of 18 to legally gamble in the UK, but lax variations and the ability for younger and younger people to possess credit cards has caused great ripples in the online gambling world, with reports recently of children as young as 11 having the ability to sign up to online gambling sites.

There are several regulators based in the UK that handle all issues relating to online gambling and their restrictions. As well as this, there are several charities and Government run schemes that are available to help gamblers that may have an issue with gambling, or more importantly relating to laws of gambling, suspect foul play in a UK based online bookmakers. Organisations include The Financial Services Authority,¹⁶ The British Horseracing Authority,¹⁷ The National Lottery Commission,¹⁸ Ofcom¹⁹ and the Gambling Appeals Tribunal.²⁰

Fee and Licence Changes from 1 August 2009

Following the joint consultation by the Gambling Commission (the Commission) and the Department for Culture, Media and Sport (DCMS) on proposals for Commission fees, Ministers have agreed changes to the application, annual and variation fees payable in a number of licence types and categories. The planned fee increases are introduced by statutory instrument which was laid on 9 July 2009 and, following Parliamentary process, are intended to come into force on 1 August 2009.

14 Gardiner, S and Gray, J, 'Can sport control its betting habit?' (2004) 89Sports Business International 55.

15 www.gamblingcommission.gov.uk.
16 www.fsa.gov.uk.

17 www.britisshorseracing.com

18 www.natlotcomm.gov.uk

19 www.ofcom.gov.uk

20 www.gamblingappealtribunal.gov.uk

In addition to the introduction of revised arrangements for operators who provide facilities for a remote casino, remote bingo and remote betting on virtual events, there are additional changes to fee bandings and for calculating working days for on-course greyhound bookmakers. A new fee arrangement is introduced for off-course bookmakers who do not provide gaming machines on their licensed betting premises.

Each licence holder will receive notice of the change to the annual fee in writing from the Commission. Any operator who considers the changes detailed below will alter their licence category or type are able to contact the Commission.

Employees in the bingo and casino industry who still hold certificates of approval, issued under section 19 of the Gambling Act 1968 known as section 19 certificates must have applied for their new personal licence before the end of August 2009 in order to guarantee their application is determined by the end of the year. Any existing section 19 certificates will cease to have legal effect on 31 December 2009.²¹

It has been well document that there are still a number of licensees working without a licence. The Commission's Director of Regulation, Nick Tofiluk said in a press release in August:

"We have already received hundreds of applications but we believe there are still people out there who need to apply. Any bingo or casino worker still operating under the permissions granted prior to September 2007 under a section 19 certificate will put their employment status at risk if they do not get their application to the Commission..."²²

Changes to Fees

The operator licence application fees from 1st August 2009 have been reduced by 5% to reflect increased efficiency and two new types of licence have been introduced.

New Types of Licence

A new remote licence type will be available for operators who provide facilities for remote betting on the outcome of a virtual game, race or other event or process. This licence type is known as General betting standard (virtual events only). For clarity the previous remote licence type, General betting standard, is now known as General betting standard (real events).

Betting operators who in addition to betting on real events such as sports events, offer virtual racing through means of remote communication will now require both a General betting standard (virtual events) and a General betting standard (real events) licence.

The fee categories for this type of licence will be based on annual gross gambling yield.

New Licence Fee Categories and Changes in Banding

The new fees include revised arrangements for calculating working days for General betting (limited) licence holders. This is to recognise the anomalous market conditions faced by operators standing at Bookmakers' Afternoon Greyhound Service (BAGS) greyhound meetings staged for broadcast to the off-course betting industry, rather than to satisfy local market demand.

An operator who stands at a meeting televised and shown at a bet-

ting premises run by a Commission operating licence holder which starts after 8am and ends after 7pm at, for example, a BAGS meeting, need not count that meeting towards the overall total number of days in determining the appropriate banding for a General betting (limited) licence.

The annual fee for general betting standard licence holders in categories A-C who do not provide gaming machines on their licensed betting premises will be held at 2008 levels. Application fees for general betting standard licence holders in categories A-C are set at the same level for those providing gaming machines and those who don't.

All fee bandings that are set with reference to gross gambling yield, gross gaming yield and gross value of sales will be increased by 10% to reflect changes in prices since their original establishment. There has been a 10% increase in the fee bandings for external lottery managers and an anomaly in them has been corrected.

Multiple Licences

The discount on annual fees for each licence applied to operators holding multiple licence types will be reduced from 10% to 5% to reflect the actual cost of delivering compliance and enforcement work.

Personal Licences

Personal licences increases are to reflect increased costs, in particular those relating to processing Criminal Records Bureau (CRB) checks.²³

The changes to personal licence fees set out in consultation proposals, will take effect on 11 August 2009. The Personal Functional Licence application fee rises from £165 to £185 and the Personal Management Licence application fee increases from £330 to £370.

The ultimate aim of the Department for Culture, Media and Sport and the Gambling Commission is to keep gambling fair and safe for all.

The Gambling Commission carries out a rolling programme of mystery shopping exercises as part of its ongoing compliance programme. The programme looks at various aspects of social responsibility and the Commission will be retesting betting operators who have previously been found wanting or are suspected of foul play.

In May 2009 a mystery shopping exercise undertaken by the Commission throughout England revealed a disturbing failure rate. The exercise covered all the major betting operators, accounting for around 80% of betting shops, and the initial results showed that in 98% of the 100 shops visited a 17 year old was allowed to place a bet at the counter.

As a result senior executives at the companies involved were called in and asked to take immediate action to improve matters. The operators concerned have already taken significant action to address the situation including working with the Association of British Bookmakers (ABB) to produce an action plan and supplementary code of practice on age verification. The Commission also wrote to all other betting operators highlighting their findings and subsequent concerns.

As a continuing programme the Commission will be conducting mystery shopping exercises at a number of licensed betting operator's premises in the future. These exercise will revisit operators already tested and also test a number of smaller betting operators. As part of the ongoing programme, the Commission is planning a similar exercise on Adult Gaming Centres.²⁴

Betting put to good use

The Levy Board is a public body that raises money for the improvement of horseracing and the advancement of veterinary science and education. It does this through collecting a statutory levy from bookmakers.

Recently Paul Lee, a senior partner and Board Chairman at Addleshaw Goddard LLP, was appointed as the new Chair of the Horserace Betting Levy Board taking up over the post from Robert Hughes CBE on 1 October 2009 for a four year term.

Saying of his appointment:

"I am delighted to be joining the Levy Board, particularly at a chal-

²¹ Section 19 certificates were issued to people working in specified roles within the bingo and casino industries. On 1 September 2007 the previous arrangements were replaced by the Gambling Act 2005 which introduced personal management licence (PML) and personal function licences (PFL). Existing section 19 certificate holders were given two years to make their personal licence applications to the Commission.

²² August deadline only three weeks away for section 19 certificate holders; Press release, 11 August 2009, The Gambling Commission.

²³ Currently costing on average £ payable directly to the Criminal Records Bureau.

²⁴ The rolling programme of mystery shopping exercises is one feature of the Commission's ongoing compliance activity. It covers on line gambling, betting shops and AGCs and works closely with LACORS and individual local authorities to ensure compliance. The mystery shopping exercises use age volunteers (with parental consent) as permitted under Section 64 of the Gambling Act 2005 to assess whether effective controls are in place to prevent under age gambling.

lenging time for the industry. As a keen race-goer, I will relish the opportunity to make a contribution to the sport. I look forward to working with both racing and bookmakers and am hopeful that we can work together to ensure that the Levy system continues to benefit all those with an interest in racing.”²⁵

Sports Minister Gerry Sutcliffe announced on 9 June 2009 a new voluntary funding arrangement to bring in at least £15 million over the next three years for research, education and treatment of problem gambling.

The Responsibility in Gambling Trust (RIGIT)²⁶ will continue to raise funds from the gambling industry and are committed to rising over £5 million every year from now until 2012/13. A new body the Responsible Gambling Fund has been set up to distribute the money wisely and effectively in line with public policies set by the Department for Culture, Media and Sport.

²⁵ New Levy Board Chair Appointed, No 111/09, 5 August 2009; Horserace Betting Levy Board.

²⁶ The Responsibility in Gambling Trust (RIGIT) was established in 2002 and since May 2009, following an organisational

restructure, it has concentrated solely on fundraising. It will continue to collect donations from gambling licence holders as well as from industries that profit from gambling.

In a press release issued by the Department for Culture, Media and Sport on 9 June 2009 detailing the new regime Mr Sutcliffe said:

“I am confident that the new structure will be successful. But if, in the coming months, it becomes clear that it is not working then I will not hesitate to bring in a statutory levy. The protection of vulnerable people remains my number one priority and I will not be giving the industry a second chance to put this right.”

The recently created Responsible Gambling Strategy Board (RGSB), chaired by Baroness Julie Neuberger, will work with the new distributor and will set priorities for research, education and treatment.

A “Golden decade” lies ahead for British sport according to Nick Harris of the Independent, a UK broadsheet newspaper. London will host the 2012 Olympics, Glasgow has the 2014 Commonwealth Games and England is bidding to host the 2018 World Cup. With this in mind the all efforts from the Department for Culture, Media and Sport and the Commission together with all other regulating and assisting bodies must work proactively and together to minimise the possibility of corruption in sport from inside the game to the lay person.



Call for papers:

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ment; sport facilities: economic boom or white elephants; and the structure of the IOC.

The Olympic Movement - Potential topics include, but are not limited to: the history of the Ancient Olympic Games; the legacies of the modern Olympic Games; the Future of the Olympic Games; and the politics of Olympic site selection.

The conference will feature keynote addresses by international sport leaders and scholars, as well as open paper sessions. Conference organizers encourage the submission of both individual presentations and panel session topics. Abstracts should be no longer than 250 words and should include the paper/session title, and presenter's name, affiliation and email address.

Deadline for the submission of abstracts is: December 15, 2009.

Accepted presentations will be notified by: February 1, 2010.

All abstracts and questions should be sent to the Conference Organizers:

Bill Sheasgreen: wsheasgreen@ithaca.edu

or

Genevieve Gordon: sportslaw@venire.co.uk

For more information, please visit: <http://www.ithaca.edu/hshp/depts/smm/Conference>

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Chair day 1 and day 2

Prof. Ian Blackshaw
International Sports Lawyer, Member of the Court of Arbitration for Sport, Lausanne, Switzerland

Country representatives

- France and Monaco Mr. Pierre-Jean Douvri, partner Bureau Francis Lefebvre, Paris
- Germany Dr. Harald Grams, partner Grams und Partner, Bielefeld
- Netherlands Dr. Dick Molenaar, partner AT Arts Tax Advisors, Rotterdam
- Portugal Mr. Ricardo da Palma Borges, Ricardo da Palma Borges & Associados - Sociedade de Advogados, R.L., Lisboa
- Spain Mr. Angel Jurerez, partner Jurerez Asociados, Barcelona - Madrid
- United Kingdom Mr. Steve Hackleton, senior manager, Deloitte LLP, Sportsbusiness group, London

Specialist speakers

- Prof. Ian Blackshaw
- Mr. Roberto Bianchi Martins, researcher Asser International Sports Law Centre, The Hague
- Dr. Rob Siekmann, director Asser International Sports Law Centre, The Hague
- Mr. Steven Kivella, partner Staley Austin LLP, Brussels
- Mr. Marinus Vromans, advocaat Vanden Eynde Legal, Brussel

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THURSDAY 3 DECEMBER 2009

- 8:30 - 9:00 Registration
- 9:00 - 9:15 Opening remarks chairman Prof. Ian Blackshaw
- 9:15 - 10:00 International taxation regimes for sportspersons and sports activities in the Netherlands, Dr. Dick Molenaar
- 10:00 - 10:45 International taxation regimes for sportspersons and sports activities in the United Kingdom, Mr. Peter Hackleton
- 10:45 - 11:15 Coffee and tea break
- 11:15 - 12:00 International taxation regimes for sportspersons and sports activities in Germany, Mr. Harald Grams
- 12:00 - 12:30 International taxation regimes for sportspersons and sports activities - EU developments and international developments
- Tax treatment of Vancouver Olympic Winter Games and Football World Championship South Africa
Dr. Dick Molenaar
- 12:30 - 14:00 Luncheon
- 14:00 - 14:45 EU Competition and Other Regulatory Developments, Mr. Stephen Kinsefa
- 14:45 - 15:30 Sports TV Rights, Prof. Ian Blackshaw
- 15:30 - 16:50 Coffee and tea break
- 16:00 - 16:45 Players Agents: Legal Aspects, Mr. Roberto Bianchi Martins
- 16:45 Closing remarks from Chairman

FRIDAY 4 DECEMBER 2009

- 8:30 - 9:00 Registration
- 9:00 - 9:15 Opening remarks chairman
- 9:15 - 10:00 International taxation regimes for sportspersons and sports activities in Spain, Mr. Angel Jurerez
- 10:00 - 10:45 International taxation regimes for sportspersons and sports activities in France and in Monaco, Mr. Pierre-Jean Douvri
- 10:45 - 11:15 Coffee and tea break
- 11:15 - 12:00 International taxation regimes for sportspersons and sports activities in Portugal, Mr. Ricardo da Palma Borges
- 12:00 - 12:30 Forum discussion and case studies
- 12:30 - 14:00 Luncheon
- 14:00 - 14:45 Sports Management and Marketing Agreements, Mr. Marinus Vromans
- 14:45 - 15:30 CAS recent case law and developments, Prof. Ian Blackshaw
- 15:30 - 16:00 Coffee and tea break
- 16:00 - 16:45 Regulation of sports betting activities, Dr. Rob Siekmann
- 16:45 Closing remarks from the Chairman

Money Laundering and Tax Evasion in Football

CAS Publishes the Decisions Rendered at the 2008 Beijing Olympic Games

English Premier League Clubs Win Important 'Cyber Squatting' Case

Two New Sports Added to the Olympics

English Premier League 'Fit and Proper Person' Rules: Are They Tough Enough and are They Being Strictly Applied and Enforced?

by Ian Blackshaw

Money Laundering and Tax Evasion in Football

Football is not only the world's favourite game, but also the world's most lucrative sport. In fact, according to Sepp Blatter, the President of FIFA, football's world governing body, it is actually a product in its own right. Therein lies its success and also the seeds of its potential downfall, if it loses touch with its sporting objectives and also its constituents - particularly its fans and players at the grass roots' level.

With so much money sloshing around and at stake - both on and off the field of play - it is not surprising that football is vulnerable or susceptible to exploitation by unscrupulous businessmen and criminals, as the July 1 2009 Report on Money Laundering and Tax Evasion in Football of the Financial Action Task Force (FATF) (the full FATF Report can be downloaded from their website at: 'www.fatf-gafi.org'), an international agency, responsible for tracking down the proceeds of crime, of the OECD - Organisation for Economic Cooperation and Development based in Paris - which has been waging war on money launderers and tax dodgers for several years - has pointed out. Money laundering, that is, turning 'black' unusable money resulting from criminal activities into 'white' usable money and tax evasion - not tax avoidance, which is so organising/arranging one's financial affairs as to reduce or mitigate the resulting tax burden, which is perfectly legal - are illegal. And, in fact, are complex criminal offences and punishable as such.

So, what has this Report, in the compiling of which both FIFA and UEFA, the governing body for European football, have been consulted and have cooperated, brought to light? And why are its findings so important for sport in general and football in particular?

Perhaps the best way of summarising the findings and the extent of the problem in football is to quote from the Report's so-called Executive Summary as follows:

"The study analyses several cases that illustrate the use of the football sector as a vehicle for laundering the proceeds of criminal activities. After this analysis, money laundering (ML) through the football sector is revealed to be deeper and more complex than previously understood. Indeed, this analysis appears to show that there is more than anecdotal evidence indicating that a variety of money flows and /or financial transactions may increase the risk of ML through football. These are related to the ownership of football clubs or players, the transfer market, betting activities, image rights and sponsorship or advertising arrangements. Other cases show that the football sector is also used as a vehicle for perpetrating various other criminal activities such as trafficking in human beings, corruption, drugs trafficking (doping) and tax offences. The ML techniques used vary from basic to complex techniques, including the use of cash, cross border transfers, tax havens, front companies, non-financial professionals and PEPs. In many cases, connections with other well-known ML typologies were identified such as trade-based ML, the use of non-financial professionals and NPOs for ML purposes, ML through the security sector, the real estate sector and the gaming sector. Various initiatives are taken by inter-

national and national actors in order to combat threats to the integrity of football, including ML. Looking ahead, there appear to be a number of areas that could be considered to improve the capacity to cope with the ML risks associated with the football sector."

One particular risk area highlighted by the Report is the use of players' image rights to evade tax, where payments are made to offshore tax havens, but, as mentioned above, certain legitimate avoidance schemes, such as the one upheld in the case of David Platt and Dennis Bergkamp of Arsenal FC (Sports Club plc v Inspector of Taxes [2000] STC (SCD) 443) is perfectly fair game! See page 11 of the Book 'Sports Image Rights in Europe', Blackshaw, Ian S and Siekmann, Robert C R (Eds.), 2005 TMC Asser Press, The Hague, The Netherlands, ISBN 90-6704-195-5. Although, it should be noted that the OECD is currently involved in a large-scale and coordinated crackdown on tax havens and, in particular, their secrecy arrangements.

Again, international football transfer deals, recent examples of which are breaking all previous financial records with the transfer in June, 2009 of Cristiano Ronaldo from Manchester United to Real Madrid for a sum of £80 million, are also vulnerable to money laundering and tax evasion schemes. And some specific examples of abuses of the transfer system in the UK are mentioned in the Report. As the UK Inland Revenue has been able to claw back substantial unpaid taxes and social security contributions in out of court settlements, the names of the players, agents and football clubs involved in these cases are not disclosed and will remain anonymous.

So, what is to be done to rid football of this scourge? It is clear that football needs to put its house in order to restore some integrity to the beautiful game - both as a sport and as a business. The Report recommends that a Code of Practice, similar to the one introduced by the English Football Association (FA) a year ago establishing some guidelines on money laundering, should be adopted. But will this work and be effective?

Self-regulation in sport, as in other fields of business and other human activities, has a mixed reputation and often gives rise to conflicts of interests' situations. For instance, it has long been felt that the regulatory functions of the FA should be separated from its commercial activities.

In other words, as the Roman poet, Juvenal, aptly expressed it many centuries ago in the following Latin tag: '*Quis custodiet ipsos custodes?*' In other words: 'Who will guard the guards themselves?'

CAS Publishes the Decisions Rendered at The 2008 Beijing Olympic Games

The Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, has just published (July, 2009) a Digest of the Awards made by its Ad Hoc Division (AHD) - a kind of circuit tribunal of the CAS - during the Beijing Olympic Games held from 8 - 24 August, 2008; and, as usual, they make very interesting reading. They are published in the two official languages of the CAS: English and French.

Writing in the Foreword, the President of the CAS AHD, Dr Robert Briner, had this to say:

"The caseload of the ad hoc Division was comparable to those of the last Games. The most important aspect of the role of the ad hoc Division of CAS in the Olympic Games is, however, not the number of cases decided but the fact that there exists an independent body which in a very short time is able to render an independent and fair judgment in the interests of the athletes and all other participants and thereby uphold the integrity of the Olympic Games. This was the seventh time CAS set up an ad hoc Division at Olympic Games. The presence and activity of CAS has therefore become a mature, traditional element of the Games. It has established and refined its working methods and is universally accepted throughout the Olympic Movement."

The CAS AHD has operated at all the Summer and Winter Games since and including those held in Atlanta in 1996 (the so-called 'COKE Games'); and will again be in session at the Winter and Summer Games in Vancouver and London in 2010 and 2012 respectively. Under the CAS AHD rules, the proceedings are free of charge and awards must be rendered within twenty-four hours of a case being brought before the CAS AHD. Of course, if the services of a lawyer or a translator are engaged in the proceedings, their fees must be paid by the party concerned.

The jurisdiction of the CAS AHD is derived from the provisions of article 59 of the Olympic Charter, the latest version of which dates from 7 July, 2007, as follows:

"Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-related Arbitration."

To give effect to these mandatory and exclusive provisions, the Supreme People's Court of the People's Republic of China issued on 10 June, 2008 to the relevant People's Court in Beijing and also to the co-host cities, with the exception of Hong Kong (SAR), the following directive:

"The period of the Beijing 2008 Olympic Games, pursuant to the stipulations under the Host City Contract for the Games of the XXIX Olympiad in the Year 2008 executed by and between us and the IOC, and provisions under the Olympic Charter, the Court of Arbitration for Sport will set up an ad hoc division in Beijing to conduct arbitra-

tion of three types of sports-related disputes concerning the events of the Beijing 2008 Olympic Games."

The types of disputes concerned are as follows:

- eligibility disputes;
- doping test results; and
- event results or referee penalties.

To guarantee the exclusive jurisdiction of the CAS AHD, the above directive also included the following provision:

"The People's Court will not accept any legal proceeding instituted in regard to the aforesaid disputes; provided that a party is dissatisfied with the arbitration award made by the Court of Arbitration for Sport in regard to the aforesaid disputes and thus requests that the People's Court withdraw such award or applies to the People's Court for enforcement, the People's Court shall not accept."

As far as the athletes and other participants in the Olympic Games are concerned, they are required, in their entry form, to submit all disputes to the CAS AHD whether they wish to do so or not; otherwise they will not be allowed to participate. Quare: is this a valid consent to arbitration? An interesting subject and one for another occasion!

Eleven cases were filed with the CAS AHD in Beijing; and, surprisingly, there were no doping cases. About half the cases raised eligibility issues and the other half concerned decisions taken by officials during the competitions. The sports concerned included field hockey; swimming; tennis; wrestling; and sailing.

The cases were handled by a team of 12 CAS arbitrators drawn from the five continents of the world and they were supported administratively by members of the CAS Office.

Two of the Awards made by the CAS AHD in Beijing were appealed - unsuccessfully - to the Swiss Federal Tribunal and the text of the Judgement of the Tribunal delivered on 22 January, 2009 is included in the CAS Digest. The Digest also usefully contains the AHD Rules for the Beijing Games and the CAS Application for AHD Arbitration Form.

A copy of the Digest of the Beijing CAS AHD Awards and further information on the CAS generally may be obtained from:

Court of Arbitration for Sport
Avenue de Beaumont 2
1012 Lausanne
Switzerland
Tel: + 44 21 613 50 00
Fax: + 44 21 613 50 01
E-Mail: info@tas-cas.org
Website: www.tas-cas.org

English Premier League Clubs Win Important 'Cyber Squatting' Case

Introductory Remarks

The Arbitration and Mediation Centre of the World Intellectual Property Organization (WIPO), a specialized agency of the UN based in Geneva, Switzerland, has recently delivered an important ruling in a 'cyber squatting' sports-related case brought by five leading English Premier League Football Clubs, including Manchester United, all of whom successfully claimed that their trademarks had been misused through the registration and commercial use of domain names incor-

porating them by an unassociated and unauthorized third party offering for sale so-called 'official' tickets to their matches.

To succeed in a 'cyber squatting' case, a Complainant is required to prove each of the following three conditions specified in paragraph 4(a) of the Uniform Domain Name Dispute Resolution Policy (the "Policy" or "UDRP") of 1999, namely that:

- i the Disputed Domain Names are identical or confusingly similar to trade marks in which the Complainants have rights; and

- ii the Respondent has no rights or legitimate interests in respect of the Disputed Domain Names; and
- iii the Disputed Domain Names have been registered and are being used in bad faith.

The present case citation is:

Fulham Football Club (1987) Limited, Tottenham Hotspur Public Limited, West Ham United Football Club PLC, Manchester United Limited, The Liverpool Football Club And Athletic Grounds Limited v. Domains by Proxy, Inc./ Official Tickets Ltd

And the reference is:

WIPO Case No. D2009-0331

Factual Background

The background to this case is as follows:

The Complainants are Fulham Football Club (1987) Limited, Tottenham Hotspur Public Limited, West Ham United Football Club PLC, Manchester United Limited, and Liverpool Football Club and Athletic Grounds Limited.

The Respondent is Domains by Proxy, Inc./ Official Tickets Ltd., of United States of America.

The Complainants are all professional football clubs playing in the English Premier League. The Complainants have become widely known throughout the world through advertising and media coverage.

The Complainants are the owners of a number of trade marks registered in the United Kingdom, the European Union and the United States of America including, but not limited to:

FULHAM FC;
TOTTENHAM HOTSPUR;
WEST HAM UNITED;
MANCHESTER UNITED; and
LIVERPOOL FOOTBALL CLUB.

The Complainants own domain names which incorporate the Complainants' registered trade marks. These include:

<fulhamfc.com>;
<tottenhamhotspur.com>;
<westhamunited.co.uk>;
<manchesterunited.com>; and
<liverpoolfc.com>.

The Respondent is Domains by Proxy, Inc. / Official Tickets Ltd. of the United States of America.

The Disputed Domain Names were registered by Official Tickets Ltd. on October 24, 2007. The Disputed Domain Names resolve to websites selling tickets to the Complainants' football matches and other events.

The Respondent is not affiliated with the Complainants, nor is it in any way - endorsed by the Complainants as an authorised distributor of tickets to the Complainants' football matches.

The Disputed Domain Names are:

<official-westham-tickets.com>;
<official-tottenham-tickets.com>;
<official-fulham-tickets.com>;
<official-manchester-tickets.com>; and
<official-liverpool-tickets.com>.

The Complainants' Contentions

The Complainants contended that they have registered trade marks in their respective names; and that the Disputed Domain Names are identical or confusingly similar to the trade marks or service marks in which the Complainants have rights.

The Complainants supported their contention by reference to the fact, for example, that the Domain Names <official-westham-tickets.com> and <official-tottenham-tickets.com> are similar to the respective Complainant's registered trade marks WEST HAM and TOTTENHAM.

The Complainants also argued that the addition of the generic terms "official" and "tickets" is not enough in law to distinguish the Disputed Domain Names from their registered trade marks. In other words, these terms are descriptive and not distinctive.

The Complainants also contended that the Respondent has no legitimate interests in respect of the Domain Names. The Complainants submitted that the Respondent is an unauthorized distributor and retailer of Premier League Tickets and that the Disputed Domain Names currently resolve to football ticket websites.

The Complainants further contended that the utilization of the fame and notoriety of the Complainants' respective trade marks and branding to promote and sell football team tickets and other sporting events and concerts is not a *bona fide* offering of goods and services within the scope of paragraph 4(c)(i) of the Policy.

The Complainants also submitted that the Respondent is selling unauthorized tickets, and, furthermore, that tickets purchased through the websites in question cannot be verified as being legitimate. The Complainants also claimed that the generation of revenue from the utilization of the Complainants' brand and mark in this manner does not constitute a legitimate non-commercial use of the Disputed Domain Names in accordance with the provisions of paragraph 4(c)(iii) of the Policy.

For these reasons, the Complainant claimed that the Respondent did not fulfill the requirements of paragraph 4(a)(ii) of the Policy.

The Complainants also contended that the Disputed Domain Names were registered and being used in bad faith. In support of this contention, the Complainants made reference to the fact that the Respondent was aware of the Complainants' legitimate websites when registering the Disputed Domain Names.

The Complainants further argued that the Respondent purposefully registered the Disputed Domain Names to disrupt the Complainants' businesses and subsequently to promote their own business by selling tickets to matches involving the Complainant clubs without authorization to do so. This, the Complainant claimed, constitutes behavior in accordance with paragraph 4(b)(iii) of the Policy.

The Complainants further submitted that the Respondent's use of the Complainants' registered trade marks, both in the Disputed Domain Names and throughout the websites to which the Disputed Domain Names resolve, combined with the use of the Complainants' team colors, fonts, images, logos and the consistent reference to the term "official", demonstrated the intentional attempt on the part of the Respondent to attract Internet users to their website by creating a likelihood of confusion with the Complainants' trade marks.

The Complainants also claimed that the Respondent did not satisfy the "bona fide reseller" test articulated by the panel in *Oki Data Americas, Inc. v. ASD Inc.*, WIPO Case No. D2001-0903.

The Complainants further argued that the Respondent was purposefully using a WhoIs privacy service to avoid detection and continue generating revenue without being identified. The Complainants submitted that the Respondent in the present proceedings is the same as the Respondent in the case of *The Arsenal Football Club Public Limited Company v. Official Tickets Ltd*, WIPO Case No. D2008-0842, and that the Respondent has utilized false and inaccurate registration information contrary to paragraph 2(a) of the Policy.

The Complainants further submitted that the Respondent purposefully registered the Disputed Domain Names to prevent the Complainants from reflecting their trade marks and has engaged in a pattern of such conduct in accordance with paragraph 4(b)(ii) of the Policy. The Complainants supported this contention by reference to the fact the Respondent has registered a series of domain names that wholly incorporate registered trade marks of which they are not the owner or licensee, and that the Respondent's use of these sites to sell tickets to sporting events and concerts cannot be verified as authentic or legitimate.

The Complainants requested the Panel, in accordance with paragraph 4(i) of the Policy, for the reasons summarized above and more particularly set out in the Complaint, that the Disputed Domain Names <official-westham-tickets.com>, <official-tottenham-

tickets.com>, <official-fulham-tickets.com>, <official-manchester-tickets.com> and <official-liverpool-tickets.com> be transferred to the Complainants.

The Respondent

The Respondent did not reply to the Complainants' contentions or take any other part in the proceedings.

The Findings of the Panel

The following are the grounds on which the Panel in the present case reached its Decision and found for the Complainants:

"If the Complainants are to succeed, they must prove each of the three elements referred to in paragraph 4(a) of the Uniform Domain Name Dispute Resolution Policy (the "Policy" or "UDRP") of 1999, namely that:

- i the Disputed Domain Names are identical or confusingly similar to trade marks in which the Complainants have rights; and
- ii the Respondent has no rights or legitimate interests in respect of the Disputed Domain Names; and
- iii the Disputed Domain Names have been registered and are being used in bad faith.

Paragraph 15(a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") requires the Panel to:

"decide a Complaint on the basis of the statements and documents submitted in accordance with the Policy, these Rules and any Rules and principles of law that it deems applicable".

If a Respondent does not submit a response, paragraph 5(e) of the Rules requires the Panel to "decide the dispute based on the Complaint". Under paragraph 14(b) of the Rules, the Panel may draw such inferences from a Respondent's failure to comply with the Rules (by failing to file a response), as the Panel considers appropriate.

The Panel will proceed to establish whether the Complainants have discharged the burden of proof in respect of the three elements referred to in paragraph 4(a) of the Policy.

(i) Identical or Confusingly Similar

It is necessary to divide the Disputed Domain Names into two categories for the purposes of addressing whether paragraph 4(a)(i) of the Policy is satisfied.

The first category consists of the Disputed Domain Names <official-westham-tickets.com> and <official-tottenham-tickets.com>. The Complainants, West Ham United Football Club PLC and Tottenham Hotspur Public Limited, have respectively established that they have registered trade mark rights in WEST HAM and TOTTENHAM.

The Disputed Domain Names are not identical to the Complainants' respective trade marks. The Panel is however satisfied that the Disputed Domain Names <official-westham-tickets.com> and <official-tottenham-tickets.com> are confusingly similar to the Complainants' respective registered trade marks.

The basis for finding that the Disputed Domain Names are confusingly similar is that they incorporate the Complainants' respective trade marks WEST HAM and TOTTENHAM in their entirety. The distinctive elements of the Disputed Domain Names are the names "West Ham" and "Tottenham". As the Panel held in *The Arsenal Football Club Public Limited Liability Company v. Official Tickets Ltd*, WIPO Case No. D2008-0842, the words "official", and "tickets" are generic, and do not reduce the confusing similarity between the Disputed Domain Name and the Complainant's mark. Further, in this case the use of the words "official" and "tickets" if anything increases the likelihood of confusion, as both words are suggestive of one of the Complainants' main business activities, namely the selling of "official tickets" to their respective matches.

The second category of Disputed Domain Names consists of <official-fulham-tickets.com>, <official-manchester-tickets.com> and <official-liverpool-tickets.com>. They can be distinguished from the first category on the basis that the Complainants' trade marks are geographic terms and by the fact the Disputed Domain Names do not

include the whole of the Complainants' respective registered trade marks.

The Complainants have respectively registered trade mark rights in Fulham FC, Liverpool FC and Manchester United. There is also considerable evidence of the respective Complainants' unregistered trade mark rights in the Fulham, Liverpool and Manchester United trade names or trade marks which are so well known and by such a large section of local and international communities, that when used in a football and sporting context, they have developed a secondary meaning which distinguishes their respective owners from the ordinary geographical reference of "Fulham", "Liverpool" or "Manchester".

The Disputed Domain Names in this category are not identical to the Complainants' trade marks. However on balance the Panel considers that the Disputed Domain Names in this category are confusingly similar to the respective parties' registered or unregistered marks. This is so in particular because of the unusually high degree of renown attaching to each of the marks and the likelihood that use of the respective Disputed Domain Names would lead people to mistakenly believe that these Disputed Domain Names are authorized by or associated with the respective Complainants. In the Panel's view this is so even in the case of the <official-manchester-tickets.com> Disputed Domain Name which even though it does not incorporate the whole MANCHESTER UNITED mark or name would still be likely to be perceived by people as referring to tickets provided by this particular football club, in circumstances that it is one of the most well known football clubs in the world.

For the foregoing reasons the Panel concludes that the Disputed Domain Names in question are confusingly similar to the Complainants' respective trade marks for the purposes of paragraph 4(a)(i) of the Policy.

(ii) Rights or Legitimate Interests

A Complainant is required to make out an initial *prima facie* case that the Respondent lacks rights or legitimate interests. Once such *prima facie* case is made, the Respondent carries the burden of demonstrating rights or legitimate interests in the Disputed Domain Name. If the Respondent fails to do so, the Complainant is deemed to have satisfied paragraph 4(a)(ii) of the Policy.

Paragraph 4(c) of the Policy sets out a number of circumstances which, without limitation, may be effective for a Respondent to demonstrate that it has rights to, or legitimate interests in, a Disputed Domain Name, for the purposes of paragraph 4(a)(ii) of the Policy. Those circumstances are:

- i Before any notice to the Respondent of the dispute, use by the Respondent of, or demonstrable preparations to use, the Disputed Domain Name or a name corresponding to the Disputed Domain Name in connection with a *bona fide* offering of goods or services; or
- ii Where the Respondent as an individual, business, or other organization, has been commonly known by the Disputed Domain Name, even if the Respondent has acquired no trade mark or service mark rights; or
- iii Where the Respondent is making a legitimate non-commercial use of the Disputed Domain Name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark or service mark at issue.

In this case the Complainants have clearly made out a *prima facie* case that the Respondent has no rights or legitimate interests:

Paragraph 4(c)(i) of the Policy is apparently not satisfied here as, for example, the Complainants have not authorized the Respondent to use their trade marks or trade name rights whether in a Domain Name or otherwise.

There is no evidence that the Respondent is a legitimate or authorized reseller of tickets. In determining whether the Disputed Domain Names have been used in connection with a *bona fide* offering of goods or services, the criteria set out in *Oki Data Americas, Inc. v. ASD, Inc.*, WIPO Case No. D2001-0903 are of use.

The *Oki Data* panel observed the following circumstances must be

present for an offering of goods or services to be bona fide for the purposes of paragraph 4(c)(i) of the Policy:

- i the respondent must actually be offering the complainant's goods or services at issue;
- ii the respondent must use the site to sell only the trade marked products; otherwise, the respondent could be using the trade mark to bait other internet users and then switch them to other goods;
- iii the web site must accurately disclose the respondent's relationship with trade mark owner;
- iv the respondent must not be allowed to corner the market in domain names that reflect that mark.

In the present case it is evident from reviewing the content of the Respondent's websites that the second of the above conditions is not met as the websites are being used to sell tickets to matches organized by other clubs and tickets to various other concerts and events. The third condition is also not met as the Disputed Domain Names improperly suggest that the reflected websites are official websites authorized to sell tickets. The consistent use of the word "official" throughout the Respondent's websites is further likely to mislead Internet users, causing them to mistakenly believe that they are purchasing official tickets.

There is evidence that the Respondent has, in circumstances similar to this case, registered a series of domain names that wholly incorporate the registered trade marks of well known European football clubs and major sporting events. These include: Juventus, Wimbledon, S.S. Lazio, Real Madrid, Champions League, Sevilla Football Club, Six Nations, UEFA Cup, A.S Roma, and The Olympics. Each of these Disputed Domain Names incorporates the words "official" and "tickets", and each appears to be designed to mislead Internet users into believing that the websites to which the Domain Names resolve are operated or authorized by the owners of the relevant trade mark rights. The websites to which these Domain Names resolve are similarly used to sell unofficial tickets to sporting events and concerts and would appear to form part of a scheme by the Respondent designed to promote the Respondents' online ticket store. The Panel finds that such a pattern of registration of domain names for the purposes of misleading Internet users in this way is not consistent with the bona fide offering of goods or services under paragraph 4(c)(i) of the Policy.

Paragraph 4(c)(ii) of the Policy is not satisfied as there is nothing to suggest that the Respondent might be commonly known by the Disputed Domain Names. It is instructive in this regard that the Respondent only registered the Disputed Domain Names in October 2007, when the Complainants trade marks were already extremely well known.

Neither is there any evidence that the Respondent has been making a non-commercial or fair use of the Disputed Domain Names, without intent for commercial gain.

The Respondent has not filed a Response to the Complaint, none of the grounds set out in paragraph 4(c) of the Policy are made out based on the evidence put before the Panel and all the circumstances point to the Respondent using the Disputed Domain Names to channel Internet traffic to its website where it sells unauthorized tickets to the Complainants' football matches.

In all the circumstances the Panel therefore finds the Respondent has no rights or legitimate interests in respect of the Disputed Domain Names and as such the Complainants have satisfied paragraph 4(a)(ii) of the Policy.

(iii) Registered and Used in Bad Faith

The Policy requires a complainant to prove both registration and use in bad faith.

Paragraph 4(b) of the Policy lists a number of circumstances which, without limitation, are deemed to be evidence of the registration and used of a domain name in bad faith. Those circumstances are:

- i circumstances indicating that the respondent has registered or acquired the domain name primarily for purpose of selling, renting, or otherwise transferring the domain name registration to the

complainant who is the owner of the trade mark or service mark or to a competitor of that complainant, for valuable consideration in excess of the respondent's documented out-of-pocket costs directly related to the domain name; or

- ii the respondent has registered the domain name in order to prevent the owner of the trade mark or service mark from reflecting the mark in a corresponding domain name, provided that the respondent has registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- iii the respondent has registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- iv by using the domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to the respondent's website or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the respondent's website or location or of a product or service on respondent's website or location.

The Panel accepts the Complainants' contention that the Respondent is unauthorized to sell tickets to their football matches and is the Complainants' competitor in the context of ticket sales. As the Panel has already noted, the Respondent has engaged in a pattern of registration of domain names incorporating trade marks in which the Respondent has no rights, combined with the generic words "official" and "tickets". The Panel accepts the Complainants' submission that, as in this case, these other domain names have been registered and used by the Respondent as a part of a scheme designed to promote the Respondent's online ticket store, by misleading Internet users seeking to purchase the official tickets of the relevant football club or sporting organizations. For these reasons, the Panel finds that this pattern of conduct is indicative of bad faith on the part of the Respondent.

For the purposes of paragraph 4(b)(iv) of the Policy the Complainants contend that the Respondent has used the Disputed Domain Names in an attempt to attract, for commercial gain, Internet users to the Respondent's websites by creating a likelihood of confusion with the Complainant's mark as to source, sponsorship, affiliation or endorsement.

As noted, the Complainants have developed substantial reputations in their respective trade marks. The Panel cannot objectively reason why the Respondent would use the Complainants' respective trade marks in the Disputed Domain Names in addition to the terms "official" and "tickets" for any other reason save as to create a likelihood of confusion amongst Internet users with the Complainants' trade marks. The fact that the Disputed Domain Names resolve to web sites that contain similar colors, fonts, images and logos to those of the Complainants' registered trade marks and contain the term "official" throughout while seeking to generate revenue through the sale of tickets to the Complainants football matches is likely to cause further confusion amongst Internet users with the Complainants' trade marks. In all the circumstances it appears to the Panel that the Disputed Domain Names and the websites to which they resolve were intended to confuse people as to the source, sponsorship, affiliation or endorsement of the Respondent's website.

The Panel finds that the Complainant has satisfied the requirements of paragraph 4(b)(iv) of the Policy and that accordingly the Disputed Domain Names were registered and used in bad faith under paragraph 4(a)(iii) of the Policy.

The Decision of the Panel

For all the foregoing reasons, in accordance with paragraphs 4(i) of the Policy and 15 of the Rules, the Panel orders that the Disputed Domain Names be transferred to the Complainants' respectively on the following basis:

1. <official-fulham-tickets.com> to Fulham Football Club (1987) Limited;
2. <official-liverpool-tickets.com> to The Liverpool Football Club And Athletic Grounds Limited;
3. <official-manchester-tickets.com> to Manchester United Limited;

4. <official-tottenham-tickets.com> to Tottenham Hostpur Public Limited;
5. <official-westham-tickets.com> to West Ham United Football Club PLC.

Alistair Payne
Sole Panelist

Dated: May 12, 2009”

Concluding Remarks

This case is a classic one of ‘cyber squatting’ and the misuse of valuable trademarks as part of domain names registered and used for commercial gains by a third party with no legal entitlement or authoriza-

tion to do so. The effect of such conduct is to cause confusion in the market place and mislead consumers seeking information on line of the services and products of the legitimate owners of the marks concerned.

The WIPO Arbitration and Mediation Center, as an accredited organization under the Uniform Domain Name Dispute Resolution Policy, offers a valuable service in resolving such disputes - not only in the sporting field but also in other business sectors -effectively, quickly and inexpensively since the introduction of this form of dispute resolution ten years ago.

For more information, log onto: www.wipo.int.

Two New Sports Added To the Olympics

Introductory

At the meeting of the Executive Board of the International Olympic Committee (IOC) in Berlin on 13 August, 2009, two new sports were proposed for inclusion in the Olympic programme with effect from 2016 - the Host City of that year’s Summer Olympics is still to be decided and announced. They are: golf and rugby-sevens; and were chosen from a shortlist of seven sports - already demonstration sports - competing for the honour. The other five contenders were: baseball; karate; softball; squash and roller sports.

The proposal to include golf and rugby-sevens in the Olympic programme will be submitted to the full IOC Session for a final decision at its meeting in Copenhagen on 3 - 5 October, 2009. Each of the seven sports gave presentations to the Executive Board at its last meeting in June, 2009; and an extensive evaluation was conducted by the IOC Olympic Programme Commission of the potential added value to the Games from each of the seven sports on the shortlist.

Background

The Olympic Games programme consists of 33 sports, 52 disciplines and nearly 400 events. For example, wrestling is a Summer Olympic sport, comprising two disciplines: Greco-Roman and Freestyle. It is further broken down into fourteen events for men and four events for women. These events are delineated by weight classes. The Summer Olympics programme currently includes 26 sports; whereas the Winter Olympics programme features only 7 sports.

Athletics, swimming, fencing, and artistic gymnastics are the only summer sports that have never been absent from the Olympic program. Cross-country skiing, figure skating, ice hockey, Nordic combined, ski jumping, and speed skating have been featured at every Winter Olympics program since it began in 1924.

Current Olympic sports, like badminton, basketball, and volleyball, first appeared on the programme as demonstration sports, and were later promoted to full Olympic sports. Some sports that were featured in earlier Games were later dropped from the programme.

All the Olympic sports are governed by the International Federations (IFs) recognized by the IOC as the global supervisors of those sports. There are 35 IFs represented at the IOC.

There are also a number of sports recognized by the IOC that are not included in the Olympic programme. These sports are not considered Olympic sports, but they can be promoted to this status during a programme revision that occurs at the first IOC Session following a celebration of the Olympic Games. During such revisions, sports can be excluded or included in the programme, based on a two-thirds majority vote of the members of the IOC. There are recognized sports that have never been included in an Olympic programme in any form. Some of these include tug of war, chess and surfing.

In October and November, 2004, the IOC established an Olympic Programme Commission, which was charged with reviewing the sports in the Olympic programme, as well as all non-Olympic recognized sports. The goal was to apply a systematic approach to establishing the Olympic programme for each celebration of the Olympic Games.

The Commission established seven criteria for determining whether a sport should be included in the Olympic programme. These criteria are:

- history and tradition of the sport;
- universality;
- popularity of the sport;
- image;
- athletes’ health;
- development of the International Federation that governs the sport; and
- costs of holding the sport.

In addition, there is a requirement that the sports in the programme must adhere to the World Anti Doping Agency Code.

Five recognized sports emerged as candidates for inclusion at the London 2012 Summer Olympics: golf, karate, rugby, roller sports and squash. These sports were reviewed by the IOC Executive Board and then referred to the IOC Session in Singapore in July 2005. Of the five sports recommended for inclusion, only two were selected as finalists: karate and squash. Neither sport attained the required two-thirds vote of the IOC members and, therefore, not promoted to the Olympic programme.

The 2002 IOC Session, limited the Summer Games programme to a maximum of 28 sports; 301 events; and 10,500 athletes. At the 2005 IOC Session, the first major programme revision occurred, resulting in the exclusion of baseball and softball from the official programme of the 2012 London Games. Since there was no agreement in promoting two other sports, the 2012 programme will feature only 26 sports.

Comments

As mentioned above, in deciding which sports qualify for inclusion in the Olympic programme, the IOC must take into account the value that the sports add to the Olympic Games. But what is meant by ‘value’? Is it sporting value? Or is it commercial value? Or is it both? I suspect that now that the Olympics are a multi million dollar money spinner for the IOC, the emphasis is more on what commercial value the sport concerned can bring to the Olympics in general and the IOC in particular! To continue the financial theme: it is interesting to note that, when Avery Brundage retired as President in 1972, the IOC had US\$2 million in assets; eight years later, the IOC coffers had swelled to US\$45 million, largely due to a deliberate policy by the IOC of attracting corporate sponsorship and also the sale of television rights. This upward trend in the financial fortunes of the IOC has continued, not least under former IOC President, Juan Antonio Samaranch, with his avowed intent to make the IOC financially independent.

Also, the criteria mentioned above, generally speaking, are rather vague and again cost comes into the equation. It would seem that it is a case of minimum financial effort for maximum financial return. Nice if you can get it! As Dick Pound has recently remarked, the IOC has been known over the years to come up with some strange deci-

sions and it is, therefore, difficult to understand or predict its corporate mind and how it has reached these decisions!

What golf and rugby will actually contribute to the Olympic programme remains to be seen, bearing in mind that both sports have their global money spinning events - the Open and three other major competitions and the Rugby World Cup respectively - and, therefore, their 'stars' are likely to concentrate on them rather than participating in the Olympics!

Rather than extending the Olympic programme, is it not time to reduce it. In my view, the Olympics have become too big and, to some extent, unmanageable - at least financially. Take the 2012 London Games, for example, they are already several billion pounds over budget!

As a traditionalist that cares for safeguarding the integrity of sport, is it not time that the Olympics got back to their Ancient Grecian grass roots and that only running, jumping and throwing sports were included in a slimmed down Olympic programme? At least, this would be more in keeping with the philosophy which inspired the founder of the modern Olympic Movement, Baron Pierre de Coubertin, when he revived the Olympics in 1896 in Athens, in which fewer than 250 athletes took part! His philosophy is still encapsulated in the Olympic motto:

"The most important thing in the Olympic Games is not to win but to take part, just as the most important thing in life is not the triumph but the struggle. The essential thing is not to have conquered but to have fought well."

Nowadays, this motto is more honoured in the breach than in the observance. Where winning amongst the athletes is more important and success amongst the sponsors of the Games is measured in purely monetary terms! The excessive and quite obscene spectacle of commercialism of the Centennial Games in Atlanta - quite rightly dubbed the 'Coke Games' largely through the sponsorship of Coca-Cola - is still fresh in the memory!

Again, to reduce the costs of staging the Games and to provide a

permanent legacy of them, is it not also time to provide a permanent venue for them? In this connection, a body of opinion to hold the games in Greece - perhaps in Olympia or Athens - is growing all the time and not, in my view, without some justification. Such a move would also add credibility and integrity to them, which they are seriously in danger of losing!

Is it not also time to get back to amateurism? Boxing is the only Olympic sport that is practised by amateurs! As far as Coubertin was concerned, the Olympics were always for amateurs and not professional sportsmen and women. He drew his inspiration from the English Public School system, which subscribed to the belief that sport formed an important part of education; an attitude summed up in the saying *mens sana in corpore sano* - a sound mind in a sound body. In this ethos, a gentleman was one who became an all-rounder, not the best at one specific thing. There was also a prevailing concept of fairness, in which practicing or training was considered tantamount to cheating. Those who practiced a sport professionally were considered to have an unfair advantage over those who practiced it merely as a hobby. Are these ideas and values too alien for the mores of the twenty-first century? I think not! In any case, at least the IOC has dropped the requirement of amateurism, which had become hypercritical, from the Olympic Charter and with it the 'shamateurism' of earlier years, which did not bring much credit on the Olympic Movement and Olympism and all that they are supposed to stand for!

Conclusion

The Olympic Games are in danger, as mentioned above, of becoming a victim of their own success! It is high time to reassess the organisation, the size and the costs of staging them in the interests of sporting integrity.

But will the IOC heed such calls? Probably not, because money - as usual - will be the determining factor. But watch out - for as someone once said: 'money is the root of all evil!'

English Premier League 'Fit and Proper Person' Rules: Are they Tough Enough and are they Being Strictly Applied and Enforced?

Introductory Remarks

Football is not only the world's favourite game, but it is also the world's most lucrative sport. Indeed, according to Sepp Blatter, the President of FIFA, football's world governing body, football is now a product in its own right. As such, the famous remark of Bill Shankly, the legendary former manager of Liverpool Football Club, when asked whether football was a matter of life and death, "*Oh no*" he said, "*it is much more important than that!*" is not so far away, nowadays, from the actual truth about the 'beautiful game'!

With so much money sloshing around the game, it is not surprising that football has attracted many investors, not least foreign ones, a number of whom are unscrupulous and out for their own ends and gains and not 'for the good of the game'. Indeed, some of them are down right criminals and could use their investments in football clubs for money laundering and tax evasion purposes (see the author's comments on the OECD Report of 1 July, 2009 on '*Money laundering and tax evasion in football*' published on the official website of the TMC Asser International Sports Law Centre on 17 August, 2009).

The English Premier League is not only the world's most popular League, but is also the world's most lucrative one. And, with the recent purchase of Portsmouth Football Club, by the Saudi, Ali al-Faraj, half of the twenty English Clubs comprising the Premier League are now owned by foreigners.

This fact and the controversial purchase and sale of Manchester City Football Club by the former Thai Prime Minister, Taxin Shinawatra, who is wanted in his own country on corruption charges, as well as the number of Football Clubs that have gone into liquidation,

through reckless financial arrangements (especially highly leveraged 'buy-outs' such as the one that brought the Glazer's to ownership of Manchester United Football Club), has prompted the English Football Authorities to introduce a 'fit and proper person' test to root out unsuitable investors in English Football Clubs.

So, what are the rules?

The Rules

The 'fit and proper persons test' was first introduced in 2004 with the intention of safeguarding clubs against falling in to the ownership of unscrupulous owners, with nothing in place before that time to stop those previously convicted of criminal offences, such as fraud, from buying and running clubs.

Rules were established jointly between the English Premier League, Football League and the Football Conference that any prospective director of a football club or someone looking to buy over 30 per cent of the club's shares needed to satisfy them that they were 'fit and proper' persons to do so.

The details of the test are detailed and complex but the most important points prohibit anyone with unspent criminal convictions relating to acts of dishonesty or someone who has taken a football club into administration twice from taking charge of a football club.

The only person currently known to have fallen foul of these rules is Dennis Coleman, who, as director of Rotherham United, was responsible for twice taking the Yorkshire club into administration (insolvency).

The exact criteria vary between the Premier League and the

Football League after government pressure saw the former tighten up its rules, whilst those of the latter remain in their 2004 form. However, the Football League's chairman, Lord Mawhinney, is currently seeking to reach agreement with other interested football bodies in order to correct this imbalance.

The Premier League now asks members to publicly declare the names of anyone who owns over 10 per cent of the club. The Football League asks for names of owners of clubs, but does not currently make them public. The Premier League also seeks assurances about where money is coming from to fund a club.

An important difference remains that the Premier League applies the test before a takeover is approved whereas the Football League gathers information only after a deal has been completed.

Premier League 'fit and proper person test' - disqualifying events:

Under the rules, a person will be disqualified from acting as a director and no club shall be permitted to have any person acting as a director of that club if:

- *Either directly or indirectly he is involved in or has any power to determine or influence the management or administration of another club or Football League club*
- *Either directly or indirectly he holds or acquires any Significant Interest in a club while he either directly or indirectly holds any interest in any class of shares of another club*
- *He becomes prohibited by law from being a director*
- *He is convicted on indictment of an offence set out in the Appendix 12 Schedule of Offences or he is convicted of a like offence by a competent court having jurisdiction outside England and Wales*
- *He makes an Individual Voluntary Arrangement or becomes the subject of an Interim Bankruptcy Restriction Order, a Bankruptcy Restriction Order or a Bankruptcy Order*
- *He is a director of a club which, while he has been a director of it, has suffered two or more unconnected events of insolvency*
- *He has been a director of two or more clubs or clubs each of which, while he has been a director of them, has suffered an Event of Insolvency.*

Appendix 12 of the Schedule of Offences:

The Schedule of Offences is as follows:

- Conspiracy to defraud: Criminal Justice Act 1987, section 12*
- Conspiracy to defraud: Common Law*
- Corrupt transactions with (public) agents, corruptly accepting consideration: Prevention of Corruption Act 1906, section 1*
- Insider dealing: Criminal Justice Act 1993, sections 52 and 61*
- Public servant soliciting or accepting a gift: Public Bodies (Corrupt Practices) Act 1889, section 1*
- Theft: Theft Act 1968, section 1*
- Obtaining by deception: Theft Act 1968, section 15*
- Obtaining a money transfer by deception: Theft Act 1968, section 15A + B*
- Obtaining a pecuniary advantage by deception: Theft Act 1968, section 16*
- False accounting: Theft Act 1968, section 17*
- False statements by Company Directors: Theft Act 1968, section 19*
- Suppression of (company) documents: Theft Act 1968, section 20*
- Retaining a wrongful credit: Theft Act 1968, section 24A*
- Obtaining services by deception: Theft Act 1978, section 1*
- Evasion of liability by deception: Theft Act 1978, section 2*
- Cheating the Public Revenue/Making false statements tending to defraud the public revenue: Common Law*
- Punishment for fraudulent training: Companies Act 1985, section 458*

Penalty for fraudulent evasion of duty etc: Customs & Excise Management Act 1979, section 170

Fraudulent evasion of VAT: Value Added Tax Act 1994 section 72

Person subject to a Banning order (as defined) : Football (Disorder) Act 2000, Schedule 1

Forgery: Forgery and Counterfeiting Act 1981, section 1

Copying a false instrument : Forgery and Counterfeiting Act 1981, section 2

Using a false instrument: Forgery and Counterfeiting Act 1981, section 3

Using a copy of a false instrument: Forgery and Counterfeiting Act 1981, section

Cheating the Public Revenue/ Making false statements tending to defraud the public revenue: Common Law

Punishment for fraudulent training: Companies Act 1985, section 458

Penalty for fraudulent evasion of duty etc: Customs & Excise

Management Act 1979, section 170

Fraudulent evasion of VAT: Value Added Tax Act 1994, section 72

Person subject to a Banning order (as defined): Football (Disorder) Act 2000, Schedule 1

Forgery: Forgery and Counterfeiting Act 1981, section 1

Copying a false instrument: Forgery and Counterfeiting Act 1981, section 2

Using a false instrument: Forgery and Counterfeiting Act 1981, section 3

Using a copy of a false instrument: Forgery and Counterfeiting Act 1981, section 4

Quite a list!

According to Richard Scudamore, the Chief Executive of the English Premier League, their rules on 'fit and proper persons' are very strict indeed and go beyond the normal rules in the Companies Act on the qualifications of directors, and criminal offences committed outside the United Kingdom are also to be taken into account.

One current case, which will be exercising the English Premier League executives and especially their lawyers is the case of the Italian Flavio Briatore, who has been banned for life from Formula One for race fixing in the Singapore Grand Prix and who is part owner of Queens Park Rangers Football Club. I would have thought that there was no case to answer: someone, who cheats in a high profile sport such as Formula One can hardly be described or characterised as a fit and proper person to be involved in a football club.

Another case is that of the Russian oligarch billionaire, Alisher Usmanov, with an allegedly dodgy criminal background, who reputedly is interested in taking over Arsenal Football Club, already having acquired a 15% stake in the Club.

Concluding Remarks

The only way to clean up football's financial act and restore some transparency and integrity to the 'beautiful game' is to apply the 'fit and proper person' rules strictly and without any fear or favour. Is this asking too much when someone comes along with a fistful of dollars to invest?

Although I am not holding my breath, given the case of al-Faraj and Portsmouth Football Club takeover, who was waved through even though it appears that he is something of a mystery man - no one seems to know who he actually is and where his money comes from! As a result, some commentators have described this case as a joke!

It will be interesting to see what actually happens in practice!



The Atlantic Raiders Affair*

by Chuck Korr and Marvin Close**

This is the true story of how the political prisoners of South Africa's infamous Robben Island turned football into an active force in their struggle for freedom. Despite torture, regular beatings and backbreaking labour, these extraordinary men defied all odds and played organized league football in one of the ugliest and most brutal bellholes on earth. Even more astonishingly, they played the game for nearly 20 years with strict adherence to FIFA rules.

Told through the eyes of former prisoners, this factual account chronicles their arrival on the island, their years of ceaseless campaigning to be allowed to play on an abandoned patch of land, the creation and success of the Makana Football Association and their triumph over the prison authorities every time their right to play the beautiful game was threatened. But as the football league grew in popularity, so did the challenges, forcing the prisoners to not only wrestle with the apartheid establishment, but also to manage themselves.

This incredible story celebrates bravery and heroism and shows how sport has the power to unite and overcome adversity.

'We lost to a hopeless side and we had to get some concessions for the sake of our pride.'
Benny Ntoele, Prisoner 287/63

In the prison kitchens, Freddie Simon was on the look-out for food to smuggle out. Now that the daily diet had improved a little on the island, thanks to pressure from prisoners and the International Red Cross, the men were occasionally given eggs and vegetables, and more of the fish and chicken that went into the drums of maize porridge was proper meat rather than fat, bone, and gristle, so the pickings were a lot richer.

They needed to be. Manong FC was holding a clandestine victory party, an extraordinary and unheard of event in the prison. It was to celebrate its triumph in the championship. Other prisoners had helped out with supplies too. A couple of guinea fowl had been caught, and a dozen or so sea gull's eggs had been foraged from the beach, but Freddie and his friends in the kitchens, sympathetic common-law prisoners, had been charged with providing the lion's share.

On the evening of the party, in June 1970, the smuggled food was distributed to the team and their guests across the various cell blocks, and there was a great deal of backslapping. How loud the celebrations became depended on which of the guards were on duty: some enjoyed supporting football on the island and turned a blind eye, but others were far less sympathetic, and would come down on the party like a ton of bricks. In the cell blocks they patrolled that night, the inmates kept the noise levels down.

The Manong players had made a point of inviting fellow prisoners to join in with their celebrations, and most took it in good humour - there were certainly few enough reasons to celebrate in Robben Island Prison. Some, however, saw the invitation as nothing more than a chance for Manong to show off. In their eyes, the club was getting above itself, and its arrogance was beginning to extend well beyond the pitch. Manong FC was taling itself up, the players saying just how much they themselves rated their skills and how far ahead they were of any other team on the island. They had a point: the statistics proved it, as did the consistently expansive style they'd employed throughout the season.

As they chattered and congratulated themselves and each other, the

seed of an idea began to develop. Manong's players decided they weren't being given the competition that their talents deserved. The solution they came up with would indirectly trigger a chain of events that would come close to destroying everything that the Makana Football Association was trying to create and cause disharmony among those in the prison community that would continue to rankle for thirty years.

One evening soon after the victory party, Tony Suze and a handful of fellow Manong club members sat down to compose a letter to the football association. They wrote that the team had been thinking for a long time about the quality of football on the island; it had improved, but the club wanted to encourage an even greater performance at the top level and suggested that a team be selected specifically to play against Manong. The implication was clear only a group of the best players chosen from across all the other teams would be fit to compete against Manong Football Club.

The MFA responded in measured tones, letting Manong know that, if any special match were to be played, the offer would come from the MFA. Privately, senior MFA officials such as Dikgang Moseneke and Indress Naidoo were disconcerted by the condescending attitude of some of the Manong club's members.

The letter sent by Manong didn't achieve the result it was aiming for, but it did focus attention on one thing that was becoming difficult to ignore: Manong's dominance was indeed becoming a problem. It was head and shoulders above the other teams, and this was not only making a mockery of the association's desire to offer meaningful sport at all levels of ability but was also, in some quarters, affecting the general level of enthusiasm for football.

By November 1970, the fight to win the A division's second championship seemed like an extended instance of déjà vu. Seven games into the season, six wins on the board, Manong was once again streets ahead at the top of the table - and this despite the absence of their star player, Tony Suze, out of the game due to a damaged knee, an injury sustained in a collision with the Ditsitsiri goalkeeper in an A-division match almost two months earlier.

The tone of the letter from Manong had annoyed the executives of the MFA, but they took the point that interest in football was lower than in the past. The MFA decided to take a dramatic step to revive enthusiasm by introducing a new knock-out cup competition. Players were to form their own teams from within their own cell blocks. Rather than creating a more level playing field, however, this decision was to have the unintended consequence of highlighting even more starkly the players' differences in ability and creating a situation that threatened the existence of the MFA.

As well as the Manong players, some of the best footballers from the other clubs lived in cell block C4. These players came together and formed a club, the Atlantic Raiders, for the new cup competition. It was made up of the cream of the island's players, all from the top five clubs in the league table, including Tony Suze, Freddie Simons, Benny Ntoele, Moses Masemola, and Ernest Malgas. It was never clear if the Atlantic Raiders represented cell block C4 or if they were a group of footballers who just happened to be sparing a cell together. This seemingly trivial distinction would cause a huge amount of distress for both the MFA and the island community over the next few months.

The Atlantic Raiders took it for granted that they would win the new competition. They had a greater ambition: they wanted to show the rest of the island how good they were as individual players and how spectacular they were as a team. Their intention was not just to win, but to win with flair.

There may have been a degree of hubris in their intent, but these were committed footballers playing matches behind razor wire after a week of punishing hard labour in a stone quarry. They had few opportunities to express themselves or to experience a sense of achievement.

* Chapter 6 of *More Than Just a Game: Football v. Apartheid*. HarperCollins Publishers, London, United Kingdom, pp. 117-143 (authors' permission).

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Mrvin Close is a dramatist and scriptwriter.

Football had given them a rare outlet. In terms of their own sense of self-respect, what happened out on the pitch was of massive importance.

In the first round the Atlantic Raiders were drawn against a team called Blue Rocks. Normally, betting in the cell blocks, with cigarettes and tobacco, was frenzied before big matches, but not this time. Only a fool would bet against the Raiders. Blue Rocks was a makeshift team of older, less talented players. One of the Raiders described their opponents as 'nobodies'. To make an analogy with the broader world of football, it was as if Manchester United, playing at full strength, had been drawn against the team from the local pub. The question was not whether the Atlantic Raiders would win, only by how many goals.

On the day of the match, the Blue Rocks players looked on with unease as the Raiders warmed up. Individually, the players had skills and tricks in abundance and, more than anything, they exuded total and complete confidence. Tony Suze was particularly pumped up, having just recently returned from two months on the sidelines. The assembled pavy settled down to watch the match, certain that it was going to be a walkover. Even before kick-off, everybody was feeling sorry for Blue Rocks.

The match started at 1 o'clock on 21 November 1970. Playing conditions were perfect: intermittent sunshine and blue skies. Against all the odds, a Blue Rocks breakaway in the first few minutes of the match ended up in a scrambled goal. The Raiders players protested passionately that the goal was clearly offside and had involved a handball. - and then the fun began. The older team was jubilant, and determined to hang on to their advantage.

They took up a 10-0-0 formation that brought new meaning to the phrase 'defensive rearguard action'. Blue Rocks packed their penalty area, and any Raiders ball that came into them was immediately hacked out into touch or as far up the field as possible. There was little pretence at playing football - with a totally unexpected goal in the bank against the best team on the island, Blue Rocks had decided their tactics: dogged survival. It wasn't pretty by any standards, and infuriated the footballing purists on the Atlantic Raiders team. As the crowd's cheers for the Blue Rocks grew louder, the Raiders players' tempers began to fray.

After repeated barracking, and renewed complaints from Raiders players about the alleged missed-handball decision, the referee decided he'd taken enough abuse and stormed off the pitch. A new match official was hastily brought on. In the chaos that ensued, it was never clear who had appointed the referee or even if he was qualified, but no one was paying any attention to that at the time. What was important was the spectacle that was unfolding and the possibility of a memorable result. After a lengthy delay, the match continued. Puffing and blowing as they threw their ageing bodies in front of wave after wave of Raiders attackers, the unlikely heroes of Blue Rocks hung on to win 1-0.

For the crowd, the whole thing was priceless. The old men of Blue Rocks had turned the best players on the island into a laughing stock. The Atlantic Raiders, however, were incensed. They surrounded the match officials, and continued their protests all the way back to the cell blocks. Their self-esteem had suffered a damaging blow. After all, they had a certain status in the prison as talented footballers, and were admired and supported by hundreds of other inmates. On top of that, the goal should not have been allowed. The Atlantic Raiders decided to make their complaint official.

The next day, they came out with all guns blazing. The opening salvo was a strongly worded letter sent to the MFA by Tony's good friend, Sedick Isaacs, now out of solitary and the non-playing secretary of the Raiders club. The letter displayed both Sedick's talent for wordplay and his bent towards litigation.

Knowing the FIFA rules as he did, Sedick was well aware that the Makena Football Association's constitution required that any complaint had to be registered immediately after the irregularity had been 'observed' - in other words, straight after the match. The Raiders captain Freddie Simon should have filed a protest when the whistle blew on the Blue Rocks game but, with all the angry post-match arguments and frustration, he had neglected to lodge his complaint.

Sedick's means of getting around this inconvenient truth was to refer to the Oxford Dictionary, which defines 'observe' as become conscious of'. The case for the Raiders was based on the assertion that it had taken them a matter of days fully to understand or 'observe' the gravity of the injustice inflicted upon them. In any case, they thought the issue was so important (and by extension, that the Raiders were so important) that any time limit should be waived by the MFA.

Sedick then turned to the facts in question and placed the blame on the referee for not applying the offside rule correctly and ignoring a handball violation. He accused the referee of treating the match as a joke and ignoring the decades-old protocols of organized football. After the referee had cost the Raiders a goal, Sedick wrote in the letter, he 'unceremoniously' walked off the field, leaving chaos in his wake. He had done everything he could to hurt the Raiders. Such conduct had to be addressed, and Isaacs claimed that FIFA regulations (Holy Scripture to the island football community) in this case demanded nothing less than a full replay of the match.

The letter expressed the Raiders' hope that the issue could be settled amicably but then took on a more threatening tone, warning the MFA that the Raiders were briefing a panel of men to act as their advocates. They wanted fair treatment and were prepared to go as far as it took to obtain it. When the officials of the MFA read the letter they were concerned that the Raiders were acting like lawyers, not sportsmen. They had no way of knowing that what the Raiders had in mind was something much more dramatic and unsettling than raising a mere legal challenge to the actions of a referee.

There was much more at stake for the Atlantic Raiders than that. The best players had been embarrassed. They had lost to what Benny Ntoele described as a 'bunch of nothings' and they didn't know how to cope with that. It didn't help that so many of their comrades on the island were so obviously delighted to have seen them lose to a team that had, comparatively, no talent and, apparently, no chance of winning. The Atlantic Raiders were going to fight their case to the end.

Given the raised passions, the best thing for all concerned would have been a cooling-off period. The Raiders would have had a chance to regain their composure, and officials could have looked further into the debacle with the referees. Unfortunately, just as the Raiders' letter was making its way to the MFA officials, the fixture list for the second round of the cup competition was delivered to each cell. The men in cell block C4 were outraged. There it was in black and white: Blue Rocks would be playing the Carlton team in the next round. It was obvious that there was no question of the match between the

Atlantic Raiders and Blue Rocks being replayed. Tony, Sedick, and the rest of the Raiders were furious.

For their part, the officials at the MFA could not understand why they should bend their procedures just to mollify the damaged pride of the Raiders. The MFA thought that any dispute would be handled in the course of events, while the Raiders thought that the issuing of the fixture list meant that the MFA had rendered a decision on their protest before even reading it.

On 28 November the Raiders fired off another letter to the MFA, this time accusing it of 'gross irregularity', of violating its own rules, and ignoring any evidence that supported the claims made by the Raiders.

Each action taken by the MFA seemed more dismissive than the previous one. The Raiders were convinced that the MFA had no intention of giving their case a fair hearing. Furthermore, their cellmates in C4 began to think of it as a struggle that should involve the whole of C4, not just the Raiders. It was becoming a matter of us versus them, 'them' being the executives of the football association the prisoners had fought so hard to create.

The Blue Rocks v Carlton game was scheduled for that coming Saturday, 5 December. The Raiders were, however, determined to get some satisfaction from the MFA. On 3 December Isaacs wrote a letter demanding a meeting before the second-round cup match was played. The letter concluded with a phrase that became the topic of fevered conversation among the prisoners for months: failing which, full methods of duress shall have to be employed'.

The last sentence of the letter was both ambiguous and threaten-

ing. It left MFA officials worried about what the Atlantic Raiders might have in mind. Instead of seeking a meeting with the Raiders as a whole, on the eve of the Blue Rocks v Carlton game, 4 December, they called the captain, Freddie Simon, and vice-captain, Lucas Mahlona, in for an interview, and asked them repeatedly what that phrase in the letter meant What were they planning? The men refused to enlighten the MFA. Uncertain about what the Raiders might do next, nonetheless the football association was not about to be blackmailed. Its officials pointed out to Simon and Mahlona that they would be held directly responsible for anything that might happen.

The next day, Mahlona withdrew from all team activities. He of course knew exactly what his comrades were planning, and he was starting to have serious misgivings.

Late in the morning on 5 December, the giant-killing Blue Rocks players trotted happily out for their second-round match in the new cup competition. They were pleased to see a big crowd of prisoners ringing the touchlines but, very quickly, they became aware that most of them weren't there to support Blue Rocks or, indeed, Carlton. Word had got around the cell blocks that something extraordinary was about to happen.

As the Blue Rocks players began to warm up, eight members of the Atlantic Raiders, including Tony Suze, Freddie Simon, and Benny Ntoele, strode out on to the pitch and lay face down in the centre circle. Both players and fans were stunned. This was an unprecedented and highly charged act of defiance - and a dangerous one at that. Up in the watchtowers, the guards had become aware of the protest and were starting to get twitchy. The seriousness of the situation slowly dawned on both the players and the assembled prisoners.

The true spectators, who had been looking forward to the week's match, were angry. They felt cheated. Not only that, there might be a brawl, a riot even and, if that happened, the Raiders' protest could turn really nasty. The guards on Robben Island had never been backward in resorting to violence and, under such provocation, anything could happen - and it could result in a total ban on football on the island. What were the Raiders doing?

The men understood that the Raiders players were making a peaceful protest but, equally, they knew that the prison authorities needed no excuse to wade in with batons and guns if the situation escalated. The protesters just had to hope against hope that those circling the pitch would control themselves. They were relying on their comrades who ringed the pitch to show the restraint that had become almost second nature to the prisoners. At any rate, what the Raiders were doing was a highly risky strategy.

The football officials present had three options. They could agree to negotiate with the Atlantic Raiders (unacceptable, as it would mean giving in to coercion and was against all the principles of sport). They could remove the men from the pitch by force (even more unacceptable, as it violated the iron-clad principle among political prisoners not to engage in physical conflict with one another, and it would give the guards an excuse to intervene). The MFA leadership chose the third course: they did nothing.

The stand-off lasted for forty-five tortuous minutes. The prison seemed to hold its collective breath, waiting to see what would happen next. Eventually, the Raiders gestured to one another and felt the field together. The crowd dispersed, the warders shepherded the prisoners back to their cell blocks, and that was the end of the football on Robben Island for the day.

The protest and its aftermath became the talk of the prison. Heated debate and discussion raged throughout the quarry and across the cell blocks. Was it just sour grapes on the part of the Atlantic Raiders or did the club have a legitimate complaint?

Benny Ntoele admitted years later that at the core of their protest, lay wounded pride. The Raiders had lost to a bunch of mahala (incompetents). They were the best players on the island and they had lost in the first match of the season to a hopeless side on a bad decision. They had to do something, if only to restore their dignity.

On 8 December officials of the Makana FA called a secret meeting behind a cell block to discuss what to do next. They decided to punish the first referee for leaving the pitch but at the same time make it

clear that nothing could possibly excuse the actions of the Raiders. The leadership of the MFA initiated disciplinary proceedings, which would lead to a formal indictment of the protesters. A tribunal would be established to pass judgement and, if the men were found guilty, to establish the penalties.

The Raiders were typically combative in response and once again demanded a meeting with the MFA's executive. The MFA received a memorandum signed by Tony Suze and witnessed by Sedick Isaacs sent on behalf of cell block C4 - not on behalf of the Atlantic Raiders.

Suddenly, the dynamic of the situation had changed. Tony, Freddie, Sedick, and the others had turned a dispute between football players and the disciplinary committee into one between a body representing authority (the Makana Football Association executive) and a group of prisoners who shared a common life in cell block C4.

The letter claimed to make a few simple points on behalf of the men of C4. They had the best interests of soccer at heart and were anxious to have a peaceful settlement of the dispute. The Raiders were not prepared to take responsibility or blame for what had happened but, by stating that they were looking forward to the re-fixtured Carlton v Blue Rocks game, it was clear that the men of cell block C4 were implicitly accepting that there would be no replay of the Raiders v Blue Rocks match. There would be no further demonstrations. The men were looking for a face-saving way to end the dispute: what they needed was some sign from the MFA that it recognized that the Raiders had a legitimate complaint. It was a diplomatic and non-committal letter. Sensing an opportunity for compromise, the MFA agreed to talk.

The meeting took place on the evening of 11 December in cell block C4. Four members of the MFA executive, including the chairman, Dikgang Moseneke, smuggled themselves into the building.

An observer was also brought in, Ike Mthimunya, someone who was respected throughout the community. The fact that they had invited an observer showed that both sides were keen to ensure that the larger community would be given an objective report of what happened. An interpreter was also on hand, to enable non-English speakers to follow the debates. Twenty-one prisoners had gathered to challenge the MFA quartet, which created a highly charged and intimidating atmosphere.

Tony Suze chaired the meeting and declared at the start that, in this cell, all inmates were free to talk. The temperature of the meeting rose. The controversy was no longer between just the Atlantic Raiders and the Makana FA. Frequent recesses had to be called to let tempers cool.

Pressure had begun to build on the Raiders and their friends throughout the prison. Other clubs and their players, officials, and fans were giving them a rough ride, disapproving of their actions. Tony Suze, Freddie Simon, and Benny Ntoele, among others, felt that the Makana FA had cast them in the role of villain and were hanging them out to dry. One thing that everyone did seem to agree on was that football on Robben Island was in a chaotic situation.

Benny Ntoele, who had become a spokesman for cell block C4, opened his statement to the meeting by saying that the actions of the association made him think that it did not care about them or want to listen to their complaints; that was what had forced them to take such extraordinary action. All the Atlantic Raiders wanted was justice.

Chairman Moseneke restated the MFA's position: the Raiders had not used the proper method to lodge their protest. This brought angry responses from the cell members, who accused the MFA of hiding behind bureaucratic formalities.

Another speaker, not one of the Raiders, expressed the fear that football might be disrupted for everyone on the island - and after so many people had worked so hard to provide the opportunity for all to enjoy it. He couldn't understand how the association had let things get to this point. When he said that the hostility some of the prisoners felt towards cell block C4 was the fault of the MFA, it brought an angry reply from Moseneke.

He pointed out that it was the Atlantic Raiders who had tried to use hair-splitting definitions and legalistic ploys to draw attention to their protest. It was they who had handled things badly and they would have to take the consequences.

Moseneke wanted everyone to understand that the pressing issue now was not the result of a football match, it was the illegal action members of the Atlantic Raiders had carried out on the pitch on 5 December. He conceded that mistakes may have been made in the administration of the first match, but that didn't excuse the subsequent actions of the Raiders. He insisted that the association had done everything in its power to avoid the implementation of 'duress' when it had called in the captain and vice-captain for interview.

Tony replied angrily that it seemed to him that the leadership of the association had almost deliberately baited the members of the Atlantic Raiders into showing what they had meant by 'duress'.

The meeting was closed with a statement by Ike Mthimunye, the observer. The demonstration had 'disturbed the peace here on the island' and 'reactions were very high'. It seemed to him that the association and the Atlantic Raiders were facing one another 'with swords drawn'.

The discussions had ended in deadlock. For the next seven days, there was a distinctly tense atmosphere in the quarry and the cell blocks, with antagonism and bad feeling bubbling away on all sides. The Atlantic Raiders affair was fast spiralling out of all proportion.

A week later, the men met once again with the MFA in cell block C4. There was some effort to deal with the events that had taken place in the original match but, now, the dispute with the MFA had turned intensely personal and extended beyond issues concerning either the match against Blue Rocks or the demonstration on the pitch. While the dispute had simmered on, the MFA had tried to diffuse tensions within the prison by organizing a series of friendly games. Prisoners in C4 now claimed that the MFA had not chosen them to play in these friendlies because they had shown their support for the Atlantic Raiders.

The men also claimed that someone on the executive of the association had been going around the prison describing the inmates in cell block C4 as 'ruffians'. Since there had not yet been a hearing on the charges made against them, the men felt they were being singled out for castigation without due process. This called into question the possibility of a fair hearing.

In addition, the C4 cellmates accused the association of duplicity, of trying to use some of the provisions in the constitution to punish the demonstrators while ignoring other parts which might support the claims made by the Atlantic Raiders. Moseneke did his best to assure the assembled men that he regretted any aspersion that may have been levelled against anyone in C4. Speaking for the association, he reminded the meeting that the executive was made up of fallible men.

One prisoner, Mr Chilsane, probably captured the mood of the men in cell block C4 by sarcastically responding to this by saying how 'happy he was to get the statement that the association members are not demigods'. In a more conciliatory tone, he told the chairman that the association should recognize that the decision of the Raiders and their supporters not to stage any further demonstrations showed that their main interest was the continuation of football on Robben Island. If the association could meet them part way, the problem could be solved.

The discussion turned to how the judicial inquiry into the conduct of the Atlantic Raiders would proceed. Challenges were raised as to the impartiality of the men who would judge the case. Anxieties were expressed about the method in which evidence would be gathered, and whether the Raiders would have adequate time to formulate a robust defence. At one point Mr Chilsane asked for permission to leave the room because his emotions were running so high he was afraid he might resort to violence, should the MFA continue to play with words.

Matters had come to a head. The whole purpose of the meeting had been to find a way to bring about some agreement between the two parties and now the situation had been aggravated further.

Moseneke recognized the need to let the process work itself out in an orderly fashion that would seem fair to everyone. He decided that the only way to handle the situation at this stage 'might be to refer it to a higher body'. In both meetings speakers had made reference to an

underlying issue that was making it difficult to reach any kind of compromise: the association wanted the Atlantic Raiders to admit that it did not respect the association; the Raiders were demanding respect for their grievances. Now that each side was fighting for abstract principles such as pride, respect, and reputation, it had become that much harder to settle anything between the parties.

Days after the meeting, the higher body (a specially chosen panel of the MFA) ruled that the Atlantic Raiders players were guilty of bringing the game into disrepute.

The decision made it dear that the executive had nothing against protests per se (indeed it pointed to the civil disobedience of the Black Sash anti-apartheid organization in South Africa as a model the Raiders could have used) but felt that the men could have conducted themselves in a less inflammatory fashion. For example, they could have marched along the field, or moved on to and then off the field. Instead, they lay on their bellies. The pavvy was disturbed and the whole day's football greatly disrupted. That was not sportsmanship.

Each of the men was given a one-month ban from playing football.

The MFA hoped that this ruling would bring the Atlantic Raiders affair to an end but, to its chagrin, the Raiders dug in their heels and refused to accept the verdicts or the sentences. They immediately launched appeals, with Sedick and George Moffatt (a prisoner who went on to have a distinguished career as an attorney) acting as their lawyers.

Big Mo Masemola sent an impassioned letter to the Appeals Tribunal of the MFA. It became the model for the way in which most of the Raiders would formulate their individual appeals. In it, he raised procedural issues, and then reminded the committee that the trial had been delayed so long, he had missed the opportunity to play in a number of select side matches. Surely that was punishment enough - and one that had been levied even before he had been tried for his offence.

He wanted the tribunal to remember the circumstances surrounding both the match and the demonstration. The match had been the opening one in a new competition, and it had seemed that no one knew exactly how matters should be resolved. Why should a sportsman such as himself have to suffer because the Makana FA had not planned for potential problems? Furthermore, if the referee had not acted in an unprofessional manner, none of the subsequent events would have arisen.

Masemola claimed to be as much a victim of circumstances as the perpetrator of an offence. He was appealing against both the imposition of the sentence and its severity. He would be satisfied if the MFA would set aside its sentence in the interests of justice and restoring harmony to the community.

He concluded with sentiments that would have found an echo throughout the community 'this is a place where sports is a necessity, not a luxury' - and ended the letter with the phrase that was the hallmark of most of the sports-related correspondence between prisoners, words that were taken seriously: 'Yours in sport'.

The Atlantic Raiders affair would roll relentlessly on for another three months. Sedick Isaacs and George Moffatt put together lengthy arguments and submitted detailed reports to the Appeals Tribunal. As a man with such a mischievous sense of humour, Sedick revelled in the verbal jousting and legal point-scoring.

In an interview nearly forty years later Tony Suze asserted that, for Sedick, it was an adventure, a kind of spontaneous dramatic play, one without a predetermined ending. The whole affair engaged, absorbed, and involved people in an intense and passionate way, and that was one of the reasons for prolonging it. In some ways, it was an intellectual game, but with a serious intent.

Dikgang Moseneke abandoned his role as Chairman of the MFA to assume that of Appeals Tribunal prosecutor. To this day, Dikgang's comrades like to remind the Deputy Chief Justice of the Constitutional Court of South Africa that the Atlantic Raiders presented him with his first opportunity to write a detailed legal brief. He put forward a strong case and ensured that the court focused on the specifics of what had happened, giving a close reading of the relevant provisions in the constitution of the MFA.

Sedick was lead counsel for the defence. In addition to numerous references to the constitution of the Makana FA, his arguments included everything from references to FIFA regulations and the Magna Carta to Justice Blackstone and the constitution of the United

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One of Sedick's ploys showed marvellous originality and audacity. He presented a list of reasons why the members of the panel should excuse themselves and stand down. He concluded that the whole Robben Island community was against the Atlantic Raiders and, since the members of the tribunal were all members of the Robben Island community, they were not fit to adjudicate the matter.

Later in to the appeals, the Atlantic Raiders started on a parallel line of attack against the association and its affiliated clubs. Again, it was just the kind of action that suited what Tony Suze described as Sedick's 'special sense of humour'.

The secretary of the Makana FA received a beautifully written note. It was a bold attempt by the Raiders to join the MFA as a bona-fide full-time club. In normal circumstances, the secretary would have been delighted to receive an application from a prospective new team, but this was an outrageous demand, calculated to further muddy the waters.

The MFA sat on the note, unwilling to consider the application until the tribunals had finished but, a week later, they received another message from Sedick and the Raiders. The letter was headed with the newly selected and somewhat provocative Jolly Roger emblem of the Atlantic Raiders FC and was a formal application for affiliation to 'your esteemed organization'. Sedick submitted a list of players for membership. The first names were those of all the men indicted by the Makana FA for their centre-circle demonstration.

The letter was a model of precision and met every standard set down by the association for new clubs seeking membership to the MFA. The men had applied for cards to release them from their old clubs. The letter listed the officers of the club, its colours, and emblem. The motto was 'still to be chosen'.

In the letter the Raiders also suggested that the new club enter into friendly matches with MFA clubs and cheekily asked for a copy of the association's constitution - this request from men who had spent weeks arguing with the association about arcane provisions contained within that very document. They already knew it inside out.

The final paragraph of Sedick's letter reeked of irony. He hoped that the application would be most favourably considered because the Raiders were anxiously looking forward to assisting the MFA in the task of promoting football and contributing to the recreation of the community.

The formality of the letter was appropriate and the sentiments everything expected of a new applicant but, given the circumstances at the time, it must have enraged the MFA. How, though, could it respond, other than to accept the application? After all, the Atlantic Raiders were following the constitution to the letter.

What was going on in the creation of this new club? A joke, a way to raise their spirits? Or was it what one member of the executive of the association felt was an effort to form their own league? None of these. It was a combination of bluff and blackmail, an attempt to get the respect they thought they were owed and to have the punishments of the team members reduced. The men wanted to put the episode behind them but to come out of it with their pride intact.

Underlying this approach was the calculation that the Atlantic Raiders were in a position to put pressure on the association because of the quality of their players. Their clubs would not want to lose them. It was also assumed that the clubs would not want to see the creation of a virtual picked side as a single club. It would dominate the league even more than Manong had done, and the whole reason behind the new cup tournament had been to bring some relief from a league where one club was so superior.

The MFA was wrong-footed and stalled on making any kind of decision. This played into the hands of the Atlantic Raiders. If they had overdone it by staging the demonstration, it now seemed that the MFA's delays over granting permission to join the association were leading many of the prisoners to believe that the Raiders were indeed being victimized. Cranking up the pressure on the MFA even further, the Atlantic Raiders Football Club even announced that its maiden friendly match would take place on 31 January 1971.

It would never be played. The MFA had a surprise in store for the Raiders. It told the ever-meticulous Sedick that it had discovered a clause in the constitution that decreed that an application for admission could not be accepted while competition games were in progress. The only way to get around it would be for the Atlantic Raiders to rally enough clubs to vote to waive that clause - and any hope of that ended when the delegate for the Rangers FC had condemned the unsportsmanlike conditions under which the Raiders had been formed. He was not alone in his feelings.

The Atlantic Raiders' efforts had failed. The pressure they had tried to put on the existing clubs didn't work, as everyone knew that none of the Raiders players would want to wait until the following season to play another competitive match. Football mattered too much to them. In practical terms, waiting for the Raiders to become a club would cost them more time off the pitch than would accepting their punishment.

While the legal arguments played out, there were other, more important pressures brought to bear on the Raiders. Fellow prisoners appealed to them to end the crisis. The most telling of these was the efforts of the non-playing Chairman of Manong (the club that meant so much to Tony Suze) to convince Tony to do something to 'lead the men back to football'. The elderly chairman was noted for his wisdom and ability to act as a conciliator and those talents were evident in his conversations with the much younger Tony.

On 14 February 1971 the Raiders reluctantly and finally gave in. Sedick wrote a letter to the MFA stating that the Atlantic Raiders had 'peacefully passed away'.

He requested that a waiver be granted to allow its members to join their former clubs as soon as possible and concluded that the decision of the ARFC to disband had been taken in the light of complaints that it had been interfering with the standard of football. The Raiders were facing the reality of defeat and trying to salvage their dignity.

As the months had passed, it was clear that everyone was tired of the problems that had started with the giant-killing victory of the Blue Rocks. A compromise had to be reached; something had to be done to remove the wedge that had been driven between many of the

men and to repair the damage that had been caused to the enjoyment of football on the island.

The prisoners were being denied the pleasure of playing and watching football, and even the warders were missing the weekly matches. The guards were going up to the players they knew and asking impatiently, 'What's going on with you people? When are we going to see some football again?'

Implicit within the guards' confusion about why the players had stopped playing competitive matches was the fact that the prison regime knew little or nothing about the heated debates and meetings that were going on behind closed doors. Ironically, and as vexed and problematic as the Atlantic Raiders affair had been, this did illustrate quite how successful the prisoners had been in taking full control over an important area of their lives within the prison.

Finally, the various parties came to a pragmatic, face-saving agreement. The Appeals Tribunal of the Makana FA would change the sentence. The one-month ban from football would be suspended for six months, on condition that the men did not commit an offence involving violence and/or disobedience to association orders. The MFA also insisted that the Raiders players submit letters of apology to the association, as laid out in the trial court judgement.

One by one, the players acquiesced and penned their letters of apology. After five testy, bad-tempered months of to-ing and fro-ing between the two sides, the Atlantic Raiders affair was over. Its repercussions, however, would continue to resound for a long time to come. The consequences were felt not only in what was to happen in the Robben Island sporting community in the immediate years to follow, but also decades later, in the memories of those who had been involved.

Marcus Solomon, who put in a lot of time on the disciplinary committee, was appalled by the actions taken by the Atlantic Raiders. He still finds the lack of respect shown to the association, its establishment the result of so much effort by the men in the prison as a whole, upsetting. In a conversation that took place in 2000, one of Tony Suze's closest friends from childhood and a fellow prisoner told him that, though he loved him like a brother, he still hadn't forgiven him for all the trouble caused by the Atlantic Raiders affair.

The 1970 annual Makana FA report summed up the impact of the affair on football on Robben Island:

The very best of exhibition matches brought us the worst of sorrows ever told. Here our football society was shaken to its very soul. Literally all our bodies were shaken, involved, and immersed in this historic event. The individual referee in charge of the match was under fire. The Referees Union was declared the most inefficient body by The Raiders. The Protest and Misconduct Committee was insulted and cartooned in a manner unparalleled in our football history here. The Executive turned out to be the Prosecutors and the persecutors in the eyes of The Raiders ... the 'pavvy' was heaving with thick points of anger. And last yet not least, individual relationships with Raiders demonstrators were inconceivably strained. The volume of paper, time, and meetings on this issue alone is unbelievable to hear ... this matter has been settled and I leave it to you to learn from this catastrophe, which should never recur.

The Atlantic Raiders affair was one of the most dramatic episodes in the history of football on the island. The actions taken by the Raiders and the reaction to them demonstrated the men's passion for football,

and their all too human resistance to the harshness of the regime to which they had been subjected on the island. Years in prison had not turned them into passive, rule-bound robots or paragons of virtue. Men such as Sedick Isaacs and Dikgang Moseneke had retained and even honed their intellectual talent; others demonstrated a single-minded resolve to do what they believed was right.

Thanks to the series of hearings, the numerous tense meetings, and the dozens of memoranda and letters that were exchanged, hundreds of valuable sheets of foolscap paper were expended on the Atlantic Raiders affair. The transcript of the appeal proceedings alone took 129 pages, as it had to be produced in triplicate in order that all involved parties had access to it.

The most intriguing question is why the whole thing took the course it did. The men dearly had disrupted a match to the point that a week's programme of football had to be cancelled. What could be a more cut and dried case of violating the principles of sportsmanship and the rules of the Makana Football Association? On the other hand, why did it take so long to mete out the punishment that the Atlantic Raiders so clearly deserved?

Perhaps the answer is not so hard to find. Every one of the men on the island had been convicted by a judicial system whose major purpose was to protect a regime dedicated to the persecution of the majority of its citizens. It would have been impossible to convince any of the men on Robben Island that this system represented anything that even approached fairness and due process.

The behaviour of the Atlantic Raiders was a real annoyance and, for a while maybe, even a threat to the good-hearted continuation of football on the island, but there was an unspoken agreement among the prisoners that they would grant one another the rights the system outside the prison had denied them. The principles of justice had to be observed.

The behaviour of the Atlantic Raiders was a major annoyance, in retrospect, the events surrounding the Raiders has some qualities of farce. At the time, some of the men involved did see the humorous aspects of it, but they were a very small minority of the community. How it played out also showed the striking changes that had taken place amongst the prisoners. Two leaders of the Raiders were Tony Suze, a political prisoner dedicated to the PAC and Freddie Simon, a common-law criminal who had become an ANC member after his imprisonment. Any co-operation between men like them would have been unimaginable even a few years earlier. Football had brought them together and their wounded pride had made them allies in an ongoing drama.

For a while, the Raiders' actions and the responses to them represented a genuine threat to the good-hearted continuation of football amongst the prisoners. The desire to play football collided with the unstated assumption amongst the prisoners that they would grant one another the rights of appeal that the system outside the prison had denied to them. The principles of justice had to be observed even if that meant frayed tempers and postponing the pleasure of playing and watching football. The time and effort involved in resolving the case against the Atlantic Raiders is not as remarkable as the fact that the prisoners had developed a set of bureaucratic structure that enabled them to get past the problems caused by the Raiders and to keep the Makana Football Association intact.



The Legal Regime for a Permanent Olympic Site *

by Frederic C. Rich**

Legal conceptions must be the tools rather than the master of the architects of world institutions capable of responding to the challenge and opportunity of a dynamic age of unprecedented problems and potentialities.

C.W. Jenks¹

In the aftermath of the boycott of the 1980 Moscow Olympics, proposals to establish a permanent neutral enclave for the games have received widespread support.² This article examines the possible legal regimes for such an enclave and their precedents in international law. After describing the legal devices available to achieve the necessary autonomy, this article will examine the capacity of the International Olympic Committee (IOC) to enter into an agreement which will be binding on the forum state. Three aspects of the problem make it especially interesting for the international lawyer. It presents an opportunity to employ the traditional concepts and devices of international law creatively to achieve a practically obtainable and limited end. It highlights the unresolved issue of the international legal status and capacity of non-governmental international organizations (NGOs).³ Finally, the problem provides a unique point of contact between public and private international law and an opportunity to adapt some techniques of the latter to problems traditionally reserved for the former.⁴

I. Background

When Heracles established the Olympic games in 776 B.C., he chose the sacred site in part because it was located in the minor city-state of Elis.⁵ Because the municipal authorities managing the festival were relatively weak, "Athletes from all over the Greek world could safely compete ... without building up the prestige of a powerful host-community."⁶ The games were placed under "the inviolable law of Olympic Zeus," which included a "sacred truce" for the two months immediately preceding and following competition.⁷ While the truce did not cause the Hellenic states to cease their warfare, it insured safe conduct for the tens of thousands of athletes and spectators traveling to Olympia for the games.⁸ The site of the festival acquired the status

of a "pan-Hellenic centre" to which official "sacred embassies" were accredited.⁹ The arrangement was respected by all of the Hellenic States and represented an international legal norm of great potency.¹⁰

When Baron Pierre de Coubertin reestablished the Olympic games in 1894,¹¹ he insisted that the quadrennial festival be "ambulatory."¹² It seemed equitable that competitors should share the substantial burdens of international travel and that nations should share the pleasure of convenient spectation and honor of hosting the games.¹³ Furthermore, de Coubertin argued that the expenses of staging the competition would be too great for any one country to bear regularly.¹⁴

However, those involved in the Olympic movement were never unanimous in their dedication to the rotating site scheme. The Greek government lobbied for a permanent site in Athens¹⁵ beginning in 1896.¹⁶ The U.S. athletes participating in the first modern games joined a petition in favor of a permanent site in Greece.¹⁷ De Coubertin's opposition to these efforts was largely circumstantial and strategic. The Greek government was wracked by political and economic turmoil, and its conflict with Turkey effectively foreclosed the possibility of holding the 1900 games in Athens.¹⁸ Furthermore, in the early years of the Olympic movement, the Baron concluded that switching the site every four years would allow him to better control the games and the IOC to consolidate its power.¹⁹

However compelling the idea may have seemed to de Coubertin, eighty-five years' experience with "ambulatory" Olympics has demonstrated the fundamental flaws of that system. From the beginning, raising the funds to build the necessary facilities has been a heavy burden.²⁰ The contemporary costs of staging the games - estimated to approach one and one quarter billion dollars in Montreal²¹ - limit the possibility of hosting them to the world's wealthiest nations. Also, the selection of various host states has provoked a variety of political impediments to universal participation.²² The games scheduled for 1916, 1941 and 1944 were suspended due to international conflict, and the Moscow games demonstrated just how vulnerable the Olympics now are to international tensions far short of world war.²³ Finally, the modern revolutions in communications and transportation have eviscerated the original logic of rotating sites. Today, no site is more than

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1 C. Jenks, The Headquarters of International Institutions, A Study of Their Location and Status 75 (1945) [hereinafter "Jenks"].

2 This article sets forth the basic history and policy goals of the permanent site proposal. See notes 5-36 and accompanying text *infra*. Its purpose, however, is not to analyze all of the policy questions, but simply to address one aspect of the proposal, the legal regime for such a site. There may be a variety of non-legal grounds on which the permanent site proposal can be evaluated which are not discussed here.

3 The legal capacity of the International Olympic Committee (IOC) to conclude agreements cognizable under international law is a fundamental issue. See notes 157-212 and accompanying text *infra*.

4 The proposal made herein depends on the guarantee by a number of sovereign States of both the privileges of the IOC under a bilateral agreement with Greece and its debt. See notes 242-63 and accompanying text *infra*.

5 M. Finley & H. Pleket, The Olympic Games: The First Thousand Years 14-15, 22-28 (1976) [hereinafter "Finley & Pleket"]. See generally J. Kieran & A. Daley, The Story of the Olympic Games: 776 B.C.-1960 A.D. (1936).

6 Finley & Pleket, *supra* note 5, at 22-23. "Games everywhere were managed by local authorities, not by an international committee, and the weaker that authority the less the risk that the prestige of a great festival would enhance its political power." *Id.*

7 See Finley & Pleket, *supra* note 5, at 41, 98.

8 *Id.* at 98.

9 *Id.*

10 *Id.* at 1-5.

11 See R. Mandell, The First Modern Olympics 84-91 (1976) [hereinafter "Mandell"]. The games were revived after a gap of about 1500 years. See generally de Coubertin, *Le rétablissement des jeux olympiques, Revue de Paris*, at 170 (June 15, 1894), translated and reprinted in *The Re-establishment of the Olympic Games*, 19 The Chautauquan 696 (1894).

12 Mandell, *supra* note 11, at 89.

13 De Coubertin is quoted as arguing that if held permanently in Greece the games "would be Olympic, but we fear, not international." J. Lucas, The Modern Olympic Games 48 (1980) [hereinafter "Lucas"].

14 Mandell, *supra* note 11, at 89. Revenues which now result from sale of television rights and gate receipts would provide a substantial income to the IOC, making construction and operation of a permanent site by the IOC financially feasible.

15 The first modern games in 1896 were

held in Athens, not Olympia, for logistical reasons only. The lack of convenient transportation and communication facilities at Olympia made revival at the original site impossible. Finley & Pleket, *supra* note 5, at 4.

16 Lucas, *supra* note 13, at 48. In his parting toast to visiting athletes, King George of Greece announced his hope "[t]hat our guests, who have honored us with their presence, will select Athens as the peaceful meeting place of all nations, as the stable and permanent seat of the Olympic Games." Mandell, *supra* note 11, at 152.

17 Mandell, *supra* note 11, at 154.

18 Lucas, *supra* note 13, at 48; Mandell, *supra* note 11, at 154-55.

19 Mandell, *supra* note 11, at 170. As a result, "[i]n the early years he struggled against proposals to freeze the location of the modern Olympics in Greece, Sweden, or Switzerland." *Id.*

20 Lucas, *supra* note 13, at 38-40.

21 *Id.* at 212.

a day of jet travel for any competitor, and the pleasure of spectation is as accessible as the nearest television set.

A permanent neutral site under the control of the IOC²⁴ would, therefore, have many advantages. The quadrennial site selection process, which is expensive and divisive, would end. The unique facilities which are necessary for the games would not have to be rebuilt every four years and the reduction in costs would obviate the need for the extensive commercial involvement which has so tarnished the competition in recent years. Most fundamentally, a neutral forum in which only the IOC is "host"²⁵ would eliminate the political disruption which now threatens the survival of the Olympics. The participation of IOC-accredited athletes would not be subject to conflicting foreign policy considerations of a host state, and no state's domestic or foreign policies would be available as grounds on which other nations would feel compelled to boycott the games.²⁶

Although a variety of sites²⁷ have been suggested for this permanent Olympic enclave,²⁸ a site proximate to ancient Olympia is favored by most proponents. The historic tie of that site to the games for nearly twelve centuries is the most compelling argument for Olympia.²⁹ Repeating his 1976 offer of Olympia as the site of a permanent Olympic enclave,³⁰ the Greek Prime Minister in 1980 specifically offered 1250 acres of government-owned land southwest of the ancient precincts.³¹

In the aftermath of the Soviet invasion of Afghanistan, world-wide sentiment for accepting the Greek offer reached unprecedented levels,³² President Carter,³³ Congress³⁴ and sixty-two percent of U.S. citizens surveyed³⁵ supported the permanent site proposal.³⁶

The neutrality and autonomy of the Olympic enclave and the powers of the IOC within it are legal elements of the permanent site plan essential to the underlying policy rationales for the change.³⁷ Adoption of the plan without the full confidence of the IOC that these elements are fully satisfied is inconceivable. Nonetheless, public discussion and private correspondence indicate that these technical issues have not received the close analysis and careful definition that they deserve.³⁸ Proponents of a permanent site for the Olympic enclave have given that enclave various descriptions: "a sort of Olympic Vatican,"³⁹ "much as the site of the U.N. in New York"⁴⁰ and "neutral international territory."⁴¹ This article seeks to clarify this confusion by offering a systematic analysis of the options and proposing one possible legal regime and its manner of implementation.⁴²

II. The Functional Elements of Autonomy

All of the options to be explored⁴³ provide some degree of autonomy. This term, used throughout this discussion, is not a term of art in international law.⁴⁴ In most cases, however, it is understood to refer to

22 These impediments include host state attempts to prevent participation by certain athletes, use of the games for purposes of political propaganda, and boycotts by other states provoked by the policies or actions of the host. See, e.g., R. Mandell, *The Nazi Olympics* (1971). The best primary source material for twentieth-century political controversy is the archive of Avery Brundage's papers at the University of Illinois, Champaign-Urbana. See generally R. Espy, *The Politics of the Olympics Games* (1979) (hereinafter "Espy"); B. Henry, *An Approved History of the Olympic Games* (1948).

23 See Vlachos, *Return the Olympics to Greece Permanently. They Started There*, N.Y. Times, Aug. 12, 1979, § 4, at 21, col. 1 [hereinafter "Vlachos"].

24 Proponents of the proposal contemplate a profit-making Olympic center used for recreation and a variety of international sporting events between Olympic games. The site also would include the IOC headquarters and archives, and the Olympic Academy, an international training center for sports medicine, technology, and administration. See, e.g., Lucas, *supra* note 13, at 222.

25 Under the present system, the state in which the games are held is the "host" state. When referring to the state in which the permanent site would be located, the term "forum" state is used. In the later instance, the IOC is the "host."

26 See Lucas, *supra* note 13, at 173, 213-14.

27 For example, Professor John Lucas of the University of Pennsylvania has argued persistently for central Switzerland or western Scandinavia. See Letter from John R. Lucas to Frederic C. Rich (Sept. 20, 1980) (available in author's files).

28 The Winter Games would be established in another location with a juridically identical status. All of the legal arguments made herein apply equally to the permanent winter site.

29 Furthermore, Olympia is conveniently located in the western Peloponnese, only ten miles from the sea. The area is pastoral, enjoying a mild climate. The ancient remains could be protected, while providing a dramatic backdrop to the

modern Olympic village. See Finley & Pleket, *supra* note 5, at 14; Vlachos, *supra* note 23. Designs for permanent facilities at Olympia were completed by architects in separate projects at Princeton and Cambridge Universities. See Bernstein, *Designing a Permanent Olympic Site*, Princeton Alumni Weekly, May 23, 1977, at 9.

30 In 1976 Prime Minister Karamanlis proposed a return of the games to Greece at the close of the 21st Olympiad in Montreal. See Letter from Prime Minister Karamanlis to Lord Killanin, President, 100 (July 31, 1976), reprinted in Greece Proposed as Permanent Venue of the Olympic Games, Embassy of Greece Press Release (July 31, 1976).

31 The proposal was first made by Mr. Karamanlis in a speech in Athens on January 7, 1980. Greece Renews Permanent Olympic Site Proposal, Embassy of Greece Press Release No. 2/80, Jan. 9, 1980. The offer was made official in a letter to Lord Killanin dated February 2, 1980. The Prime Minister wrote:

Greece, perhaps more than any other country, is justifiably concerned by the ever-growing tendency to use the Olympic games for political and generally non-athletic purposes. Political, racial and ideological conflicts are rekindled every time the choice of a site for the game arises ... The Olympic idea ... has become a means of political rivalry and economic aspirations. It has also become a monopoly for a few countries, since small countries do not have the means to claim the honour and the responsibility. Letter from Prime Minister Karamanlis to Lord Killanin, President, IOC (Feb. 2, 1980), reprinted in Olympic Games: Permanent Site Offered by Greece at Ancient Olympia, Embassy of Greece Press Release (undated). See *Back to Olympia*, The Economist, Feb. 23, 1980, at 54 [hereinafter "Back to Olympia"].

32 The Prime Minister of Australia, the foreign ministers of West Germany and the United Kingdom, the President of the European Parliament, and the Secretary General of the Council of European Communities all have gone on record in

support of the plan. *The Olympic Idea*, Greece, Spring, 1980, at 2 (publication of the Greek National Tourist Organization); *Olympic Homecoming*, Greece, Feb.-Mar. 1980, at 1; *World Support Grows, Homecoming of the Olympics?*, Greece, Jan. 1980, at 1, 3.

33 "I call upon all nations to join in supporting a permanent site for the Summer Olympics in Greece, and to seek an appropriate permanent site for the Winter Olympics." Letter from President Carter to Robert Kane, President, U.S. Olympic Committee (Jan. 20, 1980), reprinted in 16 Weekly Comp. of Pres. Doe. 106 (Jan. 19, 1980).

34 H.R. Con. Res. 249, 96th Cong., 2d Sess. (1980). See also 126 Cong. Rec. S499 (daily ed. Jan. 29, 1980) (remarks and reprinted statement of Sens. Bradley). The first step toward an Olympics free of politics is to offer full support for permanent placement of the games in their ancient birthplace, the country of Greece. Urging the International Olympic Committee to establish a permanent site in Greece is a constructive approach. The permanent home would come to be identified with the Olympics as an institution. The Olympics no longer would be identified with the nationalistic displays of temporary hosts. *Id.* at S501.

35 *Olympic Homecoming*, Greece, Apr.-May 1980, at 2. The survey was a Gallup poll.

36 Washington Post, Feb. 20, 1981, at E1. A commission to investigate the Greek proposal was established and is headed by Louis Guirandou-N'Diaye, Ivory Coast Ambassador to Canada and IOC member for the Ivory Coast. Letter from Julian K. Roosevelt, IOC Member for the VS. to Frederic C. Rich (Sept. 18, 1980) (available in author's files).

37 At its 84th meeting in Baden-Baden in October 1981, the IOC deferred its decision on the permanent site proposal. The IOC resolved in part:

"Considering all aspects and, above all, the course of events during the next Olympiads for which the IOC has taken a commitment, the Greek proposal is of extreme importance and will be subject of a detailed study in which the IOC will

certainly be actively involved." United Press International (Oct. 1, 1981).

37 See notes 52-69 and accompanying text *infra*. Simply establishing a permanent site without taking measures to: (1) establish the IOC rather than the forum country as the host, or (2) prevent that country's interference with the games, would be no improvement over the present system, except with regard to construction expenses saved.

38 The most official statement on this issue appears in the 1980 Karamanlis letter to Lord Killanin:

This site could be characterized as neutral ground with an international agreement which would safeguard the rights to the installations, establish the inviolability of the area and recognize the decisive role of the International Olympic Committee in its athletic competencies. And, in any event, Greece would be prepared to discuss the arrangements the Committee would deem necessary for this purpose. Letter from Prime Minister Karamanlis to Lord Killanin, President, IOC (Feb. 2, 1980), reprinted in Olympic Games: Permanent Site Offered by Greece at Ancient Olympia, Embassy of Greece Press Release (undated).

39 Back to Olympia, *supra* note 31, at 60. *The Economist* also reported that Greece was prepared to "cede sovereignty" over the site at Olympia. *Id.*

40 *The Olympic Idea*, Greece, Spring, 1980, at 2 (publication of the Greek National Tourist Organization).

41 *Id.* "[T]here is no suggestion that Greece would exercise any kind of ional control." *Id.*

42 This article assumes that Greece will be the permanent forum state, and uses "Greece" and "forum State" interchangeably. The argument apply, however, to any forum State selected and to the state in which the permanent Winter Games site is located.

43 Some options are analyzed only because they have been mentioned in public commentary on the permanent site plan. See notes 39-41 and accompanying text *supra*.

the degree of “formal and actual independence” in decision-making and control over internal political and governmental affairs.⁴⁵ It is generally invoked in legal regimes designed to grant a degree of self-government to a local population.⁴⁶

The sense in which autonomy is relevant to this inquiry, therefore, is different. The end of autonomy in the case of the Olympic enclave is narrowly defined functional independence, where few of the functions are those involved in government of a population.⁴⁷ This distinction is a theme which runs throughout the following discussion of the applicability of various legal devices anti precedents.⁴⁸

It would be impossible to examine and choose legal devices to govern the status of an Olympic enclave without a clear sense of what the regime functionally must achieve.⁴⁹ As legal architects, our task is to manipulate the concepts at our disposal to design a structure peculiarly suited to the parties, functions and political realities in each instance. In the development of privileges and immunities under customary international law, necessity has been the dominant criterion.⁵⁰ “[I]t has been clear from the very birth of the [international] Organizations that the privileges and immunities with which they should be endowed should be those which are necessary for the maintenance of their independent status and the execution of their functions ...”⁵¹ Thus, the first step is to identify those privileges and immunities necessary for the Olympic enclave.

The politicization which the permanent site proposal is largely designed to eliminate occurs in two principal instances:

when some policy or action of the host state provokes boycotts by other countries⁵² and when some policy of the IOC - most probably regarding the accreditation of participating athletes - provokes interference with the games by the host state. To eliminate political incidents of the former type, the new regime must eliminate the concept of a national host. Neither political prestige nor economic advantage⁵³ should flow to the forum⁵⁴ state upon the occasion of the games. There must be no possibility that attendance or nonattendance at the festival has an impact on - and thus expresses approval or disapproval of - the forum state.⁵⁵ The IOC must be the only “host” and the only political entity in control of the games.

To eliminate the latter type of politicization, the forum state must be foreclosed from taking any action when conduct of the games would embarrass its relations with another state,⁵⁶ be otherwise inconsistent with its foreign policy⁵⁷ or have an adverse effect on the government’s domestic political position.⁵⁸ To prevent action so motivated on the part of the forum state, certain elements of privilege and autonomy must be granted to the Olympics in five principal areas.⁵⁹

The first is access to the site for competitors, spectators and officials. Any exclusions must result from a decision of the IOC;⁶⁰ the forum state must not have the power to deny access to the enclave by restricting travel into or across its territory.⁶¹

Second, the Olympic premises must be protected from forum state interference.⁶² Forum state police, military or security personnel must enter the enclave only with the consent of the Olympic authorities.⁶³ The IOC must be free to construct and maintain the physical premises and must have guarantees that vital supplies, such as water, energy and food will be available without interruption.

Third, both domestic legal capacity and limited immunities from legal process must be granted to the Olympic organization. Neither the forum state nor others acting through the forum state’s courts should be able to interfere with the free exercise of the IOC’s prerogatives within its area of competence.⁶⁴ The selected regime must effectively immunize the IOC from license requirements or other regulations which might be used to interfere with the IOC’s complete discretion with respect to management of the games and other activities within the enclave. The IOC should possess the privilege of extending certain personal immunities to certain officials or participants in situations where the integrity or the organization of the games requires it.⁶⁵

Fourth, certain fiscal and financial immunities must be granted. Property within the enclave cannot be subject to requisition, confiscation, expropriation or nationalization. The Olympic organization must be immune from income and property taxation, taxes on its international debt service, foreign exchange controls and all other fees or levies which are potential instruments of pressure for the forum state.⁶⁶ Finally, the IOC must have complete control over the sale of

44 *Procedural Aspects of International Law* Institute, *The Theory and Practice of Governmental Autonomy* 2-3 (Final Report for the Department of State 1980) [hereinafter “PAIL Study”].

45 *Id.*

46 Hannum & Lillich, *The Concept of Autonomy of International Law*, 74 *Am. J. Int’l L.* 858, 860 (1980). The PAIL Study summarized by Hannum & Lillich identified three principal categories of autonomous entities: federal states, internationalized areas and associated states. *Id.* at 859.

47 The PAIL Study did note a variety of precedents for limited autonomy. Limited cultural or religious independence was granted in the cases of Greenland, the Belgian linguistic communities, the Aland Islands, and the millet system of the Ottoman Empire. PAIL Study, *supra* note 44, at 2. These examples of limited or restrictive autonomy still involve governmental functions rather than the essentially non-governmental functions which must be guaranteed to the IOC.

48 Another such theme is the preferability of choosing a device or structure which not only affords technical legal protection, but serves to eliminate the motives for parties to act in the undesired manner. For example, arty arrangement which, by giving Greece some stake in the unimpeded operation of the games, makes the political or economic consequences of interference high, is especially desirable. 5cr text accompanying notes 260-62 *infra*.

49 See generally Fedder, *The Functional Basis of International Privileges and Immunities: A New Concept in International Law and Organization*. 9 *Am. U.L. Rev.* 60 (1960).

50 Brandon, *The Legal Status of the Premises of the United Nations*, 28 *Brit. Y.B. int’l L.* 90, 94 (1951) [hereinafter “Brandon”].

51 *Id.*

52 Examples of boycotts include the 1956 withdrawal of Switzerland and the Netherlands in protest of the Soviet invasion of Hungary; North Korea’s sudden pull-out from Tokyo in 1964; the Third World boycott of Montreal in 1976 because of the participation of New Zealand, which maintained close sporting ties with South Africa; and the Western boycott of Moscow in 1980. See 126 *Cong. Rec.* S499 (daily ed. Jan. 29, 1980) (statement of Sen. Bradley).

53 Economic advantage should not exceed that advantage naturally incident to the spending of spectators every four years en route to and around the permanent site.

54 See note 25 *supra*.

55 As anticipated by Senator Bradley, “The permanent home would come to be identified with the Olympics as an institution. The Olympics no longer would be identified with the nationalistic displays of temporary hosts.” 126 *Cong. Rec.* S501 (daily ed. Jan. 29, 1980).

56 Such embarrassment might be felt, for example, by the People’s Republic of China upon the participation of Taiwan.

57 Examples might include a nation’s foreign

policy with regard to South Africa or Israel.

58 An example would be when an element of the games’ conduct is a political issue domestically.

59 The threats to the integrity and neutrality of the games at a permanent site are analogous to the factors of political risk faced by an enterprise doing business in a foreign country. See generally P. Nevitt, *Project Financing* 113 (1978).

60 Rule 8 of the Olympic Charter provides in part: Only citizens or nations of a country may represent that country and compete in the Olympic Games ... In the final resort, questions in dispute shall be settled by the Executive Board. The expression “country” wherever used in these Rules shall mean any country, state, territory or part of territory which in its absolute discretion is accepted by the IOC as constituting the area of jurisdiction of a recognized NOC [National Olympic Committee]. Olympic Charter, Rule 8 (prov. ed. 1980).

61 There are numerous historical instances of host state attempts to restrict access. In 1956, Australia did not recognize the Soviet Union and wished to ban its athletes. In 1968, NATO regulations did not permit France to issue visas to East Germans. In 1972, U.N. sanctions seemed to require West Germany to ban Rhodesian competitors. In each of these instances, however, “a conflict of laws was settled by the waiver of municipal visa

requirements and the issuance of special clearance papers.” Nafziger, *The Regulation of Transnational Sports Competition: Down From Mount Olympus*, 5 *Vand. J. Transnat’l L.* 180, 203 (1971) [hereinafter “Nafziger”]. See also Comment, *Political Abuse of Olympic Sport: DeFrantz v. United States Olympic Committee*, 14 *N.Y.U. J. Int’l L. & Pol.* 155 (1981).

62 The concept of the inviolability of the premises of international institutions in international law evolved from the fiction of extraterritoriality with regard to legal premises. Jenks, *supra* note 1, at 41.

63 Since the IOC will, as a practical matter, depend on Greek personnel for its essential security services, it is equally important that those personnel be available at the request of the IOC.

64 The Olympic organization would not require immunity from judicial process with respect to ordinary commercial matters.

65 These personal immunities can be limited to those in respect to official acts, and should extend to Greek nationals serving in the international Olympic organization.

66 “Historically and technically [the] exemption of official international funds from national taxation derives from the sovereign immunities of the States contributing to such funds, but the essential justification for it rests on broad grounds of national public policy.” Jenks, *supra* note 1, at 43 (quoting Jenks, *Some Legal*

television rights to the games,⁶⁷ the issuance of press credentials and the flow of information from the Olympic site to the outside world.⁶⁸

Because the essential function of the Olympic enclave - the staging of a quadrennial international sports competition - is a narrow one, these minimum elements of functional autonomy are specific and limited. Based on the sound principle that functional necessity should govern the grant of privileges and immunities under international law,⁶⁹ the subsequent analysis will evaluate each proposed legal solution against its responsiveness to these elements of operational necessity.

III. Legal Devices for Autonomy: The Options and Precedents

A threshold question is why the Olympic site cannot simply be established by a grant or lease of land pursuant to municipal law. This is the most common procedure for the headquarters sites of most NGOs.⁷⁰ Three principal factors, however, distinguish the Olympic games. First, the functional demands of the games are significantly different from those of any other NGO activity. The Olympic presence in Greece would not simply be for the purposes of administration and decision-making, but to stage an enormously complex - and as presently constituted, political - international event. Second, the Olympic site would be distinguished by the size of the capital investment necessary to establish the facilities. The stakes are quantitatively higher. And third, the history of and motives for forum-state interference in the games make the Olympic organization unique among NGOs. All of these make a simple deed, lease, or agreement governed by Greek law - which the Greek parliament could abrogate unilaterally⁷¹ - unsatisfactory and necessitate the exploration of other options.

A. Fully Extraterritorial Sovereign Enclave

The earliest exercises in the granting of functional immunities on foreign soil concerned the premises of diplomatic missions.⁷² The classic solution was the legal fiction⁷³ of extraterritoriality, "complete independence from territorial authority."⁷⁴ This legal device was applied in a variety of situations to protect foreign property and nationals from all domestic jurisdiction.⁷⁵ One such use was to guarantee operational independence to the first international organizations.⁷⁶ The application of the notion to extraterritoriality to the regime governing legation premises and personnel was subject to substantial criticism⁷⁷ and has been largely replaced in international law by the concept of "diplomatic privileges and immunities."⁷⁸

Nonetheless, full exemption of the Olympic site from the territori-

al authority and jurisdiction of Greece is an intuitively simple and obvious solution and one mentioned by both the popular press and Greek authorities.⁷⁹ It seems to provide a solid legal foundation for the autonomy and neutrality of the games, a foundation which would be invulnerable to unilateral change by Greece or to renegotiation at her demand.⁸⁰ Additionally, proponents of this option can cite the familiar precedent of the Vatican City.

The Vatican City was created by a 1929 concordat between Italy and the Holy See which gives the latter "exclusive jurisdiction" within the territory of the city.⁸¹ At first, the parallel to the Olympic enclave may seem close. The Vatican City is "proximate" to a state in function,⁸² yet it has no population other than its resident functionaries.⁸³ "[U]nlike other States the Vatican City exists not to support its inhabitants but to provide a base for the central administration of a non-state entity."⁸⁴ The nature of the Holy See's "administration," however, distinguishes its functions from those of the IOC, and explains why a fully extraterritorial enclave is appropriate in the case of the former and not in the latter. The function of the Holy See is to exercise its spiritual power over and thus independently from all secular sovereignties. Its functions are carried out world-wide within the territorial jurisdiction of all secular sovereigns. The Vatican City was thus appropriate as "a territorial base for the exercise ... of the spiritual power of the Holy See" throughout the world.⁸⁵

While a fully extraterritorial sovereignty is appropriate to the broad range of international functions of the Holy See, it would be a blunt and overbroad instrument if applied to the Olympic enclave. The cost of that overbreadth would be high. With fully extraterritorial status and sovereignty, the IOC would be forced to establish and maintain the whole apparatus of government.⁸⁶ The burdens of establishing a body of law and a judiciary to enforce it, of administering internal policies and foreign relations and of meeting the other responsibilities of "statehood" would be great. Further, these would be beyond the competence or interest of the IOC. These factors, plus possible Greek political resistance to cession and the potential for local opposition, make this first option an unattractive one.

B. International Grant, Lease or Servitude

"A State may grant a right of exclusive use over part of its territory to another State, retaining sovereignty, but conceding the enjoyment of the liberties of the territorial sovereign."⁸⁷ The United Kingdom's ninety-nine-year lease of Hong Kong is a notable example of this concept.⁸⁸ Characterization of this sort of arrangement as a "lease," how-

Aspects of the Financing of International Institutions, The Grotius Society: Problems of Peace and War 87, 122 (1943)). The latter justification would apply, then, to an NGO like the IOC.

67 Television rights are a major source of revenue and would probably be pledged in part to the creditors to secure financing for the Olympic center. See text accompanying notes 259-63 *infra*. Rule 51 of the Olympic Charter provides in part: "The IOC may, subject to payment, grant the right to broadcast and/or distribute reports on the Olympic Games. The total amount ... shall be paid ... to the IOC which shall distribute [it], in accordance with the requirements set out in Rule 21." Olympic Charter, Rule 51 (prov. ed. 1980).

68 The Charter provides:

In order to ensure the fullest news coverage and the widest possible audience for the Olympic Games, the necessary steps shall be taken to accredit the representatives of the different mass media. ... The Executive Board of the IOC, whose decision shall be final and binding, reserves the right to grant or to refuse accreditation in the case of any applicant or to withdraw any accreditation already granted.

Olympic Charter, Rule 51 (prov. ed. 1980).

69 See notes 50-51 and accompanying text *supra*.

70 See R. Rodgers, Facilitation Problems of International Associations 39 (1960).

71 See notes 147-56 and accompanying text *infra*.

72 See generally E. Adair, The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries (1929).

73 It is a fiction because, in the case of diplomats, "[l]'agent diplomatique est censé n'avoir jamais quitté son propre pays." P. Cahier, Etude Des Accords de Siège Conclus Entre les Organisations Internationales et les Etats où Elles Résident 194 (1959).

74 Kunz, *Privileges and Immunities of International Organizations*, 41 Am. J. Int'l L. 828, 836 (1947) [hereinafter "Kunz"]; See also H. Grotius, De Jure Belli Ac Pacis Libri, Tres, chap. XVIII (1689).

75 See, e.g., W. Fishel, The End of Extraterritoriality in China (1952); G. Keeton, The Development of Extraterritoriality in China (1928). The best general survey of the extraterritoriality concept is G. Keeton, *Extraterritoriality*

in International and Comparative Law, 72 Recueil des Cours 283 (1948: 1).

76 See, e.g., Treaty of Berlin, July 13, 1878, arts. 53-56, reprinted in 8 Ministère des Affaires Etrangères, Documents Diplomatiques (1878). Article 53 grants the European Danube Commission "une complète indépendance de l'autorité territoriale." *Id.* art. 53.

77 But see C. Jenks, The Proper Law of International Organisations 139 (1962) [hereinafter "Jenks, Proper Law"]. Jenks acknowledges the view that extraterritoriality is a harmful fiction and thus that "the concept of extraterritoriality is either a mistake to be charitably ignored or an idle courtesy which can safely be assumed to be meaningless." *Id.* He questions this view: the extraterritoriality fiction "may be practically more satisfactory to both the international organisation and the host State than a functional formula which, while rationally more defensible, has not yet stood in the same manner the test of experience." *Id.*

78 Brandon, *supra* note 50, at 96-97. Local law and jurisdiction apply except as otherwise provided. *Id.*

79 See note 39 and accompanying text *supra*.

80 See generally Jenks, *supra* note 1, at 44-53

(discussion of advantages and disadvantages of granting to the headquarters of international institutions international status within national territory).

81 Treaty Establishing the Vatican State, Feb. 11, 1929, Holy See - Italy, art. 4, 130 Brit. & For. State Papers 793 (1929). See generally M. Falco, The Legal Position of the Holy See Before and After the Lateran Agreements (1935); 8. Williamson, The Treaty of the Lateran (1929); La Brière, La condition juridique de la cité du Vatican, Recueil des Cours 115 (1930: III).

82 I. Brownlie, Principles of Public International Law 67 (3d ed. 1979) [hereinafter "Brownlie"]. See M. Brazzola, La Cité Du Vatican Est-Elle un Etat? (1932).

83 It is the smallest "state," with a nominal population of approximately 1000. J. Crawford, The Creation of States in International Law 154 (1979) [hereinafter "Crawford"].

84 *Id.*

85 Jenks, *supra* note 1, at 72.

86 See *id.* at 45.

87 Brownlie, *supra* note 82, at 372.

88 Convention Respecting an Extension of Hong Kong Territory, June 9, 1898, China-Great Britain, 186 Parry's T.S. 310,

ever, is not precisely accurate. Brownlie argues that “where [grants of interest in territory] have been established by agreement the result is more akin to a contractual licence than it is to an interest in land in the English sense.”⁸⁹ The exact legal effect of these grants and servitudes and the precise nature of the grantor’s and grantee’s interests can only be determined by reference to the contractual language establishing them.⁹⁰ The concept which unifies them as a class and distinguishes them from fully extraterritorial sovereign enclaves is “residual sovereignty.” Pursuant to the U.S. lease of Guantanamo from Cuba, for example, the United States recognizes the “ultimate sovereignty” of Cuba, while Cuba consents to “complete jurisdiction and control” by the United States.⁹¹

Three principal problems impede the usefulness of this device for the Olympic enclave. First, these “international” grants, leases or servitudes are made by contractual arrangement between sovereigns. It is because one state grants land to another that the agreement falls under the purview of international law. As will be discussed at length,⁹² the IOC is not a State and does not have the legal capacity to accept this sort of sovereign interest. Second, the status of these agreements under international law is uncertain. If they are interpreted as a simple contractual interest in land, then they may be subject to unilateral termination by the grantor.⁹³ Third, and most fundamentally, all of the objections against the previous option apply here. This device gives the IOC too much responsibility and requires it to assume the governmental burdens of sovereignty unnecessarily.⁹⁴

C. Internationalized Area

A wide variety of juridically distinct entities can be considered “internationalized areas.”⁹⁵ They include Shanghai⁹⁶ and Tangier,⁹⁷ both established before World War I, and Alexandretta,⁹⁸ Saar,⁹⁹ Upper Silesia,¹⁰⁰ Memel,¹⁰¹ and Danzig,¹⁰² all established under the League of Nations. The concept of an internationalized territory was also used in U.N. proposals regarding Trieste¹⁰³ and Jerusalem.¹⁰⁴ Although these legal regimes differ significantly, all involve the creation of certain rights of autonomy vis-à-vis the territorial sovereign from which they are carved and the vesting of those rights in a public international organization or in two or more other states.¹⁰⁵ Among examples of the former, Danzig and Trieste were both created by multilateral

treaty and placed under the direct authority of the League of Nations and the U.N. Security Council respectively.¹⁰⁶ The plans were never implemented. Notwithstanding the formal internationalization of the territorial sovereignty, the Permanent International Court of Justice held that Danzig possessed an international personality and the legal capacities of a state.¹⁰⁷

An example of internationalization which was not made universal through an international organization, but was limited to a smaller group of states, is the international city of Tangier. Under its 1914 statute,¹⁰⁸ the municipality was granted extensive legislative and diplomatic authority, although ultimate sovereignty was reserved to the Sultan. The participating states shared that expanded municipal authority.¹⁰⁹ Although difficult to label, one scholar described the arrangement as “a sort of condominium between the Sultan and the Powers,” or as “an international protectorate.”¹¹⁰

Although interesting academically, none of these precedents is valuable for the design of an Olympic enclave. First, the concept of internationalization was designed for a very different end. The most thorough investigator of international territories concluded that, by definition, they include populated areas.¹¹¹ They usually were crafted to bring political autonomy to a persecuted minority or to neutralize a territory for political or military purposes. Second, the historical failure of the device to achieve these ends indicates that the device should be avoided.¹¹² Some contemporary scholars go so far as to assert that “internationalization” has ceased to be a recognized concept in international law.¹¹³ Finally, the effect of internationalization - bringing the area directly under the control of a highly political international forum similar to the United Nations - is exactly what the neutral site scheme seeks to avoid. The independence and neutrality of the IOC would be severely compromised.

D. Contractual Guaranty of Limited Autonomy

The final device, contractual agreement between the forum state and the IOC, may provide the functional privileges and immunities needed for an autonomous Olympic site. The headquarters agreements of intergovernmental international organizations (IGOs) generally take this form.¹¹⁴ The site remains under the territorial sovereignty of the forum state. Thus, this arrangement requires neither the fiction of

32 Martens Nouveau Recueil 2d 89 (1905). See generally L. Mills, *British Rule in Eastern Asia* 373 (1942).

89 Brownlie, *supra* note 82, at 372.

90 *Id.* at 115-16.

91 Agreement for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, United States-Cuba, art. III, 192 Parry’s T.S. 429, 430. See generally Montague, *A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem*, 50 Ky. L.J. 459 (1962).

92 See notes 157-212 and accompanying text *infra*.

93 Brownlie, *supra* note 82, at 116. “[T]he grantor’ has a right to revoke the ‘contractual license,’ and, after a reasonable time has elapsed, force may be employed to evict the trespasser.” *Id.*

94 See text accompanying note 86 *supra*.

95 Brownlie, *supra* note 82, at 63-64.

96 See Rules of Procedure of the International Mixed Court, reprinted in A. Kotenev, *Shanghai: Its Mixed Court and Council* 321 (1925). See generally Hudson, *The Rendition of the International Mixed Court at Shanghai*, 21 Am. J. Int’l L. 451 (1927).

97 Protectorate Treaty, Mar. 30, 1912, France-Morocco, 106 Brit. & For. State Papers 1023, 216 Parry’s T.S. 20. The convention was revised in 1923. Convention regarding the Organisation of the Statute of the Tangier Zone, Dec. 18, 1923, France-

Great Britain-Spain, 28 L.N.T.S. 541. See generally G. Stuart, *The International City of Tangier* (2d ed. 1955) [hereinafter “Stuart”]; Hudson, *The International Mixed Court of Tangier*, 21 Am. J. Int’l L. 231 (1927).

98 See Statute of the Sanjak of Alexandretta, May 29, 1937, 18 League of Nations O.J. 580 (1937). See generally Basdevant, *La question du Sandjak d’Alexandrette et de d’Antioche*, 19 Revue de Droit International et de Legislatiori Comparée 661 (1938).

99 See Treaty of Versailles, June 28, 1919, arts. 45-50, 225 Parry’s T.S. 189, 213-15, reprinted in *Major Peace Treaties of Modern History 1648-1967*, at 1296-99 (F. Israel ed. 1967). See generally M. Florinsky, *The Saar Struggle* (1934).

100 Convention for Establishing a Conventional Regime in Upper Silesia, May 15, 1922, Germany-Poland, 118 Brit. & For. State Papers 365. See generally G. Kaeckenbeek, *The International Experiment of Upper Silesia* (1942).

101 See Convention Concerning the Territory of Memel, May 8, 1924, 29 L.N.T.S. 85 (1924). See generally The Status of the Memel Territory, League of Nations Doc. C.159 M.39 1924 VII (1924).

102 Treaty of Versailles, June 28, 1919, arts. 100-08, 225 Parry’s T.S. 189, 246-49, reprinted in *Major Peace Treaties of Modern History 1648-1967*, at 1338-41 (F.

Israel ed. 1967). See generally J. Makowski, *La situation juridique du territoire de la Ville Libre de Danzig* (1925).

103 See Italian Peace Treaty, Feb. 10, 1947, Italy-Allied Powers, Annex VI, Permanent Statute of the Free Territory of Trieste, 49 U.N.T.S. 72, reprinted in *Major Peace Treaties of Modern History 1648-1967*, at 2479-90 (F. Israel ed. 1967). See generally M. Ydit, *Internationalised Territories from the “Free City of Cracow” to the “Free City of Berlin”* 231-72 (1961) [hereinafter “Ydit”].

104 See G.A. Res. 181 (II), UN. Doc. A/519, (1947). The resolution called for the creation of a “special international regime” under the direct control of the Trusteeship Council. See generally Ydit, *supra* note 103, at 273-315. The Trusteeship Council prepared a “Draft Constitution” for Jerusalem. See Question of an International Regime for the Jerusalem Area and Protection of the Holy Places, 5 UN. GAOR Supp. (No. 9), UN. Doc. A/1286 (1950).

105 Brownlie, *supra* note 82, at 55. See Ydit, *supra* note 103, at 21.

106 IOP, Ydit, *supra* note 103, at 50-51, 71-72.

107 Free City of Danzig and the International Labour Organisation (Pol. v. Free City of Danzig), 1930 P.C.I.J., ser. B, No. 18 (Advisory Opinion of Aug. 24); Treatment of Polish Nationals and

Other Persons of Polish Origin or Speech in the Danzig Territory (Pol. v. Free City of Danzig), 1932 P.C.I.J., ser. AF B, No. 44, at 23-24 (Advisory Opinion of Feb. 4).

108 See note 97 *supra*.

109 On November 14, 1911, Sir Edward Grey wrote to the French minister in London that “just as France stands for the Sultan’s authority in the French zone, and Spain in the Spanish zone, so the Treaty powers collectively shall stand for the Sultan’s authority in Tangier and its district.” *Documents Diplomatiques Français (1871-1914)*, 3d Series (1911-1914), Vol. No. 348, quoted in Stuart, *supra* note 97, at 59-60.

110 Stuart, *supra* note 97, at 182.

111 Ydit, *supra* note 103, at 21.

112 See *id.* at 11.

113 See, e.g., Crawford, *supra* note 83, at 160.

114 See, e.g., Agreement Regarding the Headquarters of the United Nations, June 26, 1947, United States-United Nations, 61 Stat. 3416, T.I.A.S. No. 1676 (entered into force Nov. 21, 1947) thereafter “U.N. Headquarters Agreement”; Agreement Regarding the Headquarters of the International Atomic Energy Agency, Dec. 11, 1957, International Atomic Energy Agency-Austria, 339 U.N.T.S. 152 (entered into force Mar. 1, 1958) [hereinafter “IAEA Agreement”]; Agreement Regarding the Headquarters of the Food & Agriculture Organization,

extraterritoriality nor a division of sovereignty.¹¹⁵ The headquarters of the United Nations in New York, for example, is part of the territorial United States.¹¹⁶ Title to the property is in the name of the United Nations and is filed and registered pursuant to New York laws.¹¹⁷

Within the enclaves, however, these agreements grant complete control to the organizations regarding matters in their areas of competence. Section 7 of the U.N. Headquarters Agreement provides that “the headquarters district shall be under the control and authority of the United Nations.”¹¹⁸ Similar clauses appear in most headquarters agreements. Austria covenanted with the International Atomic Energy Agency (IAEA) that the premises “shall be under the control and authority of the [IAEA].”¹¹⁹ Italy recognizes the right of the U.N. Food and Agriculture Organization (FAO) to fulfill its essential purpose and undertakes to “take all proper steps to ensure that no impediment is placed in the way.”¹²⁰ Although forum state civil and criminal laws generally govern within the headquarters district,¹²¹ these agreements often provide that no law inconsistent with a regulation of the organization will be enforced.¹²² Thus, these agreements could provide the operational independence which the IOC requires to govern and administer the Olympic games.

The immunities accorded to various IGOs under these headquarters agreements are similar. The agreements establish a “common pattern” which may be assuming the force of customary international law.¹²³ As early as 1952 one commentator could write, “Particular international law is thus being progressively created along ... well-developed lines. ...”¹²⁴ There is precedent in the headquarters agreements for each of the functional immunities the IOC requires.¹²⁵

1. Access

An undertaking by the host state that it shall not impose an impediment to transit to or from the headquarters district and that recognizes its positive duty to protect such transit is a standard clause in headquarters agreements.¹²⁶ The free transit provisions generally apply to certain enumerated parties and such “other persons invited” by the organization.¹²⁷ The U.N. headquarters agreement provides that the United States shall not apply its regulations regarding the entry of aliens in such a way as to interfere with transit to and from the site.

When visas are required for such persons, the United States covenants that “they shall be granted without charge as promptly as possible.”¹²⁸ A provision like section 12 of the U.N. Headquarters Agreement would be especially important for the Olympic enclave: “The provisions of section 11 [regarding free transit] shall be applicable irrespective of the relations between the Governments of the persons referred to in that section and the Government of the United States.”¹²⁹

2. Inviolability

Inviolability, based on the traditional rights of *franchise de l’hôtel* and *franchise de quartier* accorded to diplomatic premises, is a key provision of all headquarters agreements.¹³⁰ The first element of inviolability is immunity from search, requisition, confiscation, expropriation or any other form of interference.¹³¹ Officials of the host state are prohibited from entering the premises of the organization without its consent.¹³² In the U.N.-U.S., FAO-Italy and UNESCO-France agreements, the host governments undertake to protect the premises¹³³ and to ensure that they are continuously supplied with the “necessary public services.”¹³⁴ The former undertaking would be especially important for the IOC, which would require the right to demand from the forum state police and military assistance adequate to maintain the security of the games.

3. Legal Capacity and Limited Immunity from Legal Process

Most host governments recognize the organization as a body corporate and grant it capacity under municipal law to make contracts, buy and sell property and institute legal proceedings.¹³⁵ Approaches to immunities from legal process differ. One approach, taken by Italy and the FAO, is to grant complete immunity from all legal process, subject only to specific waiver by the organization.¹³⁶ Another is to grant the same immunities from suit as those granted to a foreign sovereign.¹³⁷ The latter approach may be an appropriate one for the IOC, which should be left accountable in local courts for the exercise of its powers in ordinary commercial transactions.¹³⁸

4. Fiscal and Financial Immunities

The agreements are uniform in granting a broad tax exemption to the

Oct. 31, 1950, FAO-Italy, U.N. Doc. ST/LEG/SER.B/1 1(1961), reprinted in II Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations 187 [hereinafter “FAO Agreement”]; Agreement Concerning the Legal Status of the International Labour Organisation after the Dissolution of the League of Nations Organization, Mar. 11, 1946, ILO-Switzerland, 15 U.N.T.S. 377 [hereinafter “ILO Agreement”]. These agreements generally are implemented through municipal legislation by the host state. See D. Bowett, *The Law of International Institutions* 310 (3d ed. 1975); note 152 and accompanying text *infra*.

115 *But see* FAO Agreement, *supra* note 114, § 6(a) (Italy “recognizes the extraterritoriality of Headquarters Seat ...”); ILO Agreement, *supra* note 114, art. 4 (“the Swiss Federal Council recognises the extraterritoriality of the grounds and buildings of the International Labour Organisation and of all buildings occupied by it in connection with meetings of the International Labor Conference ...”).

116 Kunz, *supra* note 74, at 850. See UN. Headquarters Agreement, *supra* note 114.

117 Jenks, *Proper Law*, *supra* note 77, at 137.

118 U.N. Headquarters Agreement, *supra* note 114, § 7(a). See Brandon, *supra* note 50, at 97-98.

119 IAEA Agreement, *supra* note 114, § 7.

120 FAO Agreement, *supra* note 114, § 15.

121 *E.g.*, UN. Headquarters Agreement, *supra* note 114, § 7(b) (“Except as otherwise provided in this agreement or in the General Convention, the federal, state and local law of the United States shall apply within the headquarters district.”). See Kunz, *supra* note 74, at 850.

122 Regulations so authorized are those “for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions.” U.N. Headquarters Agreement, *supra* note 114, § 8. See IAEA Agreement, *supra* note 114, § 8(a).

123 See Brandon, *supra* note 50, at 113. See also Convention on the Privileges and Immunities of the Specialized Agencies, U.N. Doc. ST/LEG./SER.B/1 1, reprinted in II Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations 101 (1961).

124 See Brandon, *supra* note 50, at 113.

125 See notes 43-69 and accompanying text *supra*.

126 *See, e.g.*, U.N. Headquarters Agreement, *supra* note 114, § 11 (“The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district. The appropriate American authorities shall afford any necessary protection to persons while in transit to or from the headquarters district.”); FAO Agreement, *supra* note 114, § 22;

IAEA Agreement, *supra* note 114, §§ 27(a), 28.

127 *See, e.g.*, UN. Headquarters Agreement, *supra* note 114, § 11; FAO Agreement, *supra* note 114, § 22(a)(vi); IAEA Agreement, *supra* note 114, § 27(a)(ix).

128 U.N. Headquarters Agreement, *supra* note 114, § 13 (free transit guarantee applies to persons “irrespective of their nationality”).

129 U.N. Headquarters Agreement, *supra* note 114, § 12.

130 Brandon, *supra* note 50, at 101-03.

131 *Id.* See, *e.g.*, Agreement Regarding the Headquarters of the International Civil Aviation Organization, Apr. 14, 1951,

ICAO-Canada, § 4(2), 96 U.N.T.S. 156 (entered into force May 1, 1951) [hereinafter “ICAO Agreement”]; FAO Agreement, *supra* note 114, §§ 7, 17, 18; ILO Agreement, *supra* note 114, art. 6, para. 2; U.N. Headquarters Agreement, *supra* note 114, § 9(a); IAEA Agreement, *supra* note 114, § 9(a).

132 The most common exception to this principle disallows use of the site for asylum. *See, e.g.*, ICAO Agreement, *supra* note 131, § 4(3); FAO Agreement, *supra* note 114, § 7(b); UN. Headquarters Agreement, *supra* note 114, § 9(b); IAEA Agreement, *supra* note 114, § 9(b). Cf. FAO Agreement, *supra* note 114, § 33; ILO Agreement, *supra* note 114, art. 25.

133 FAO Agreement, *supra* note 114, § 8(a); U.N. Headquarters Agreement, *supra* note 114, § 16(a); IAEA Agreement,

supra note 114, § 10. See Agreement Regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization in the French Territory, July 2, 1954, UNESCO-France, art. 17, 357 U.N.T.S. 3 (entered into force Nov. 23, 1955) [hereinafter “UNESCO Agreement”].

134 *See, e.g.*, UN. Headquarters Agreement, *supra* note 116, § 17 (“necessary public services” explicitly include electricity, water, gas, postal service, telephone, drainage, collection of refuse, fire protection, and snow removal); IAEA Agreement, *supra* note 114, § 12; FAO Agreement, *supra* note 114, at § 10.

135 *See, e.g.*, ICAO Agreement, *supra* note 131, § 2; IAEA Agreement, *supra* note 114, § 16; UNESCO Agreement, *supra* note 133, § 1.

136 FAO Agreement, *supra* note 114, § 16.

137 *See, e.g.*, ICAO Agreement, *supra* note 131, § 3.

138 In some states the restrictive standard applied to foreign sovereigns is not also applied to IGOs. Compare Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2) (1976) with International Organizations Immunities Act of 1945, 22 U.S.C. § 288a(b) (1976). *But cf.* Broadbent v. Organization of Am. States, 628 F.2d 27 (D.C. Cir. 1980). See generally Recent Developments, 20 Va. J. Int’l L. 913 (1980).

139 *See, e.g.*, FAO Agreement, *supra* note

organization, including exemptions from customs duties and levies and other “financial controls.”¹³⁹ Many provide that the organization shall have the right to hold various currencies and freely to transfer its funds abroad.¹⁴⁰ In view of the anticipated capital demands of the IOC and the importance of financing arrangements to the overall plan,¹⁴¹ payments of interest to foreign holders of the IOC’s debt obligations must be specifically exempted from any present or future Greek withholding taxes.¹⁴²

5. Free Information Flow

A variety of devices have been used to ensure the free flow of information to and from the headquarters site. The U.N. Headquarters Agreement provides that the organization may operate independent communications facilities.¹⁴³ Other provisions establish a most-favored-nation standard for telephone, radio and television transmission.¹⁴⁴ Additional clauses which should appear in the Olympic agreement include a covenant that “no censorship shall apply” to the communications of the organization¹⁴⁵ and that the forum state shall “permit and facilitate entry” of all press accredited by the organization.¹⁴⁶

All of the terms, therefore, which are required to provide the functional privileges and immunities necessary for the autonomy and neutrality of the Olympic site are represented in the headquarters agreements of IGOs. An agreement between Greece and the IOC modeled on these headquarters agreements would provide the necessary protections without the burdens attached to full or partial cession of territory or sovereignty. This, however, is only the first half of the necessary inquiry. The second is whether such an agreement would be

binding and enforceable in accordance with its terms, thus providing effective legal and actual protection to the Olympic games.

IV. Agreement between Greece and The IOC: The Problem of Creating Obligations that are Binding, Enforceable and not Subject to Unilateral Termination

All of the contractual precedents examined in the previous section were the headquarters agreements of intergovernmental organizations. Since public international organizations generally are accorded the capacity to make contracts under international law,¹⁴⁷ these agreements are considered by most to have the status of treaties¹⁴⁸ enforceable under international law.¹⁴⁹ Moreover, a variety of other circumstances give additional security to organizations which rely on these agreements for protection. First, the host state is usually a member of the IGO, and as such may have additional obligations regarding its privileges and immunities. Article 104 of the U.N. Charter, for example, provides that “[t]he Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”¹⁵⁰ Second, obligations under both membership and headquarters agreements may be supplemented by a multilateral convention on the privileges and immunities of the organization, as was done in the case of the United Nations.¹⁵¹ Third, these obligations generally are implemented by municipal legislation.¹⁵²

Together, these arrangements give confidence to IGOs that the obligations of host states to respect their functional autonomy are not only binding and enforceable under international law but will, as a practi-

114, §§ 19, 20; IAEA Agreement, *supra* note 114, §§ 22, 42; UNESCO Agreement, *supra* note 133, art. 15.
 140 See, e.g., ICAO Agreement, *supra* note 131, § 8; ILO Agreement, *supra* note 114, art. 11; IAEA Agreement, *supra* note 114, § 23.
 141 See notes 259-63 and accompanying text *supra*.
 142 In the United States, for example, non-resident holders of debt obligations are subject to a 30% withholding tax. I.R.C. §§ 1441-1442 (1976).
 143 UN. Headquarters Agreement, *supra* note 114, § 4. See IAEA Agreement, *supra* note 114, § 4.
 144 See, e.g., ICAO Agreement, *supra* note 131, § 9 (“not less favourable”); FAQ Agreement, *supra* note 114, § 11; IAEA Agreement, *supra* note 114, § 13; UNESCO Agreement, *supra* note 133, art. 10 (“at least as favourable”).
 145 See, e.g., ICAO Agreement, *supra* note 131, § 10; IAEA Agreement, *supra* note 114, § 15; UNESCO Agreement, *supra* note 133, art. 11; ILO Agreement, *supra* note 114, art. 13.
 146 See, e.g., ICAO Agreement, *supra* note 131, § 27(a); U.N. Headquarters Agreement, *supra* note 114, § 11. See also FAQ Agreement, *supra* note 114, § 22.
 147 See Reparations for Injuries Suffered in the Service of the United Nations (The Reparations Case), 1949 I.C.J. 174, 178-79 (Advisory Opinion of Apr. 11).
 148 See P. Cahier, Etude des accords de siège conclus entre les organisations internationales et les états où elles résident 208 (1959) [hereinafter “Cahier”]. But see Kunz, *supra* note 74, at 848. Kunz argues that the *accords de siège* are not real treaties. With reference to pre-U.N. headquarters agreements, specifically the *modus vivandi* of 1926 between Switzerland and the League of Nations, 7 League of Nations O.J. 1422 (1926), Kunz argues; “The legal nature of such

[an] agreement is doubtful; it is not an international treaty; both parties can at any time renounce it in part or as a whole. It leads only to an agreement with a single Member State and ‘fails to afford a solid legal foundation for the permanent independence of the international organization.’” Kunz, *supra* note 74, at 848 (quoting C. Jenks, The Headquarters of International Institutions, A Study of Their Location and Status 46(1945)). Cahier rejects this argument which relies on the possibility of unilateral modification, calling it “une distinction de forme plutôt que de fond. Si les accords de siège peuvent être révisés, c’est en vertu d’une clause de révision insérée dans l’accord.” Cahier, *supra* note 148, at 208. Modification clauses were inserted in the agreements relied upon by Kunz. Article 14 of the 1926 *modus vivandi* provides in part, “[the] rules of the *modus vivendi* can only be modified by agreement between the organisations of the League of Nations and the Federal Political Department. If, however, an agreement cannot be reached, it shall always be open to the Federal Government or to the organisations of the League of Nations to denounce the whole or part of the rules of the *modus vivendi*.” 7 League of Nations O.J. 1422, 1424 (1926). This clause, however, is rare in headquarters agreements concluded after the Second World War.

149 Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 26, UN. Doc. No. A/CONF. 39/27 (entered into force Jan. 27, 1980), *reprinted* in 8 I.L.M. 679, 690 (1969) (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”). See generally Hassan, *Good Faith in Treaty Formation*, 21 Va. J. Int’l L. 443 (1981).
 150 UN. Charter, art. 104. See also

Agreement Establishing the Inter-American Development Bank, Apr. 8, 1959, art. XI, § 1, *reprinted* in II Legislative Texts & Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations 387, Doe. ST/LEG/SER. B/II (1961) (“[T]he status, immunities, and privileges set forth in this article shall be accorded to the Bank in the territories of each member.”); Statute of the International Atomic Energy Agency, Oct. 26, 1956, art. 15, 276 U.N.T.S. 4 (“The Agency shall enjoy in the territory of each member ... such privileges and immunities as are necessary for the exercise of its functions.”); Constitution of the United Nations Education, Scientific and Cultural Organisation (UNESCO), Nov. 16, 1945, art. 12, 4 U.N.T.S. 275, 292 (UN. Charter obligations extended to UNESCO members); Convention on the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, arts. 50, 51, 289 U.N.T.S. 48, 70; Convention of the World Meteorological Organization, Oct. 11, 1947, art. 27, 77 U.N.T.S. 144, 162; Constitution of the World Health Organization, July 22, 1946, arts. 66-68, 14 U.N.T.S. 186, 200-01; Constitution of the Food and Agriculture Organization of the United Nations, Oct. 16, 1945, art. 15, [1946-47] U.N.Y.B. 693, 696; Convention on International Civil Aviation, Dec. 7, 1944, art. 47, 15 U.N.T.S. 295, 328 (obligation to recognize “legal capacity as may be necessary for the performance of its functions”); Constitution of the International Labour Organisation, art. 40, 15 U.N.T.S. 40, 102 (amended as of Oct. 9, 1946); Charter of the Organization of American States, Apr. 30, 1948, art. 103, 119 U.N.T.S. 48, 88 (“The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges

and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes”); *id.* art. 105 (“The juridical status of the Inter-American Specialized Organizations and the privileges and immunities that should be granted to them ... shall be determined in each case through agreements between the respective organizations and the Governments concerned.”).
 151 E.g., Agreement on the Privileges and Immunities of the International Energy Agency, July 1, 1959, *reprinted* in II Legislative Texts & Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations 357, Doe. ST/LEG/SER. B/II (1961); Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 48; Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 262.
 152 Such municipal legislation either applies generally to a group of public international organizations, e.g., International Organisations (Immunities and Privileges of the Council of Europe) Order in Council, 1950, 14 Geo. 6, ch. 14 (UK.); Act No. 72 of 7 Mar. 1952 Concerning Privileges and Immunities of International Organizations (Denmark), is extended to particular international organizations by regulation or appendix, e.g., International Organizations Immunities Act of 1945, 22 U.S.C. § 288a-288f (1976); Diplomatic Privileges and Immunities Act of 1968, No. 36, N.Z. Stat. 309 (1968), or applies to a single organization, e.g., Privileges and Immunities Act (United Nations Act), Can. Rev. Stat. ch. 219, § 1(1952); World Health Organization Act (Protection Act), No. 41, Ghana (1958).
 153 If an agreement between Greece and the

cal matter, deter interference of host states. If the contractual guaranties of autonomy from Greece are to give the Olympic games the same security as do those given to IGOs, the Greek guaranties must rise to the status of obligations under international law.¹⁵³ "In simplest terms, once a contract has moved to the international level, it cannot lawfully be affected by unilateral national legal action. ... [S]tates cannot invoke their sovereignty to abrogate an international treaty. ..."¹⁵⁴

The first hurdle facing the IOC in attempting to form such art international contract is that of establishing its status under international law. IGOs have the capacity to enter into agreements enforceable under international law; their headquarters agreements have the status of treaties.¹⁵⁵ If NGOs - and the Olympic organization in particular - have achieved a status similar to IGOs in respect to treaty-making capacity, then the obligations of Greece can be embodied in a bilateral contract with the status of a treaty. Alternatively, the subject matter and the nature of the agreement between Greece and the IOC may bring it under the purview of international law.

This possibility is suggested by a series of arbitral decisions that have "internationalized" concession agreements between states and foreign non-sovereign investors.¹⁵⁶ This second approach avoids the problem of determining whether the IOC possesses international legal personality.

A. International Legal Personality and the Capacity to Contract under International Law; The Status of NGOs

1. Introduction

The character of agreements concluded with NGOs largely depends upon the question whether [they] are allowed ... international competence according to public international law. ... As the formal elements of agreements concluded with NGOs [sic] are the same as those of a normal agreement, the international character of these agreements will largely depend upon the opinion about the [international legal personality] of NGOs.¹⁵⁷

"International legal personality" is not a well-defined concept in international law. But the various explanations of what constitutes it seem to share two essential elements. First, international personality is "neither derived from nor limited by the law of any one State."¹⁵⁸ Thus the presence of *national* character is a useful test. A national charter, for example, "by associating the [entity] with a particular state, detracts from its international status. ..."¹⁵⁹ Second, an international legal person is one with rights and duties under public international law.¹⁶⁰

International legal personality was first extended to IGOs on the theory of collective sovereignty.¹⁶¹ This fiction, that the organizations were the collective instruments of other sovereigns,¹⁶² helped to breach the barrier which had reserved international personality for territorial entities.¹⁶³ The contemporary basis for according international legal status to NGOs, and the one upon which the International Court of Justice recognized the status of the United Nations in the *Reparations Case*,¹⁶⁴ is a functional one: "If it was once the personality which made a function international, it is now the function which confers legal internationality to the entity which is engaged in such activity."¹⁶⁵

Although the International Court of Justice limited its decision in the *Reparations Case*,¹⁶⁶ to the capacities of the United Nations, it recognized that the class of international persons was no longer immutable:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life. ...¹⁶⁷

2. The Olympic Organization

An analysis of whether the IOC is an international person must begin with an examination of the IOC's structure and origin. Rule 11 of the present Olympic Charter states that the IOC "is a body corporate by international law having juridical status and perpetual succession, Its headquarters are in Switzerland."¹⁶⁸ The virtual dictator of the movement in its early days, Baron de Coubertin, conceived of the IOC as "independent, international, [and] sovereign."¹⁶⁹ Although a traditional NGO headquarters agreement was signed with the City of Lausanne on April 10, 1915,¹⁷⁰ when the IOC chose Lausanne as the site of its General Secretariat, the Committee has never compromised de Coubertin's vision and maintains its claim to international legal personality.

The constitutive document for an international organization ordinarily is accorded great weight in determining the legal status of that organization. However, Rule 11 cannot be considered to be so determinative. At least at present, there is no such entity as "a body corporate by international law." This, and the lack of formal incorporation pursuant to the laws of Switzerland,¹⁷¹ lead some to conclude that the IOC simply has "no legal status."¹⁷²

In light of the developing strength of the functional principle, the

IOC were implemented either through Greek legislation or as a bilateral contract governed by Greek law, it would not afford the IOC the protection it requires. Any municipal statute adopted by Greece could at any time be amended or repealed by the Greek Legislature. A bilateral agreement under municipal law "can accord an international institution a large measure of independence, but [it] will never make it master in its own house ... The contractual arrangements entered into may be honoured when the storm blows, or they may not." Jenks, *supra* note 1, at 52. See *id.* at 47; Kunz, *supra* note 74, at 847 (in the context of a *pre-Reparations Case* agreement).

154 A. Fatouros, *International Law and the Internationalized Contract*, 74 *Am. J. Int'l L.* 134, 136-37 (1980).

155 See text accompanying notes 147-49 *supra*.

156 See text accompanying notes 213-41 *infra*.

157 J. Schneider, *Treaty-Making Power of International Organizations* 98-99 (1959) [hereinafter "Schneider"].

158 Jenks, *supra* note 1, at 39. Jenks adds the caveat that "the conditions under which it may be exercised in a particular state

may sometimes properly be governed by the local law." *Id.*

159 Friedman, *International Public Corporations*, 6 *Mud. L. Rev.* 185, 203 (1942-43) (hereinafter "Friedman").

160 Lissitzyn, *Territorial Entities Other Than Independent States in the Law of Treaties*, 125 *Recueil des Cours* 1, 13 (1968; III) [hereinafter "Lissitzyn"]. If personality is itself a test for treaty-making capacity, then use of "rights and duties under public international law" as criteria for personality leads to a circular analysis. See also Schneider, *supra* note 157, at 129-33.

161 See Lissitzyn, *supra* note 160, at 13.

162 Jenks, *supra* note 1, at 66.

163 See Lissitzyn, *supra* note 160, at 7, 11-12.

Less-than-state territorial entities like Danzig, see *Access to German Minority Schools in Upper Silesia*, 1932 *P.C.I.J.*, ser. A/B, No. 44, at 23-25 (Rostworowski, Count, dissenting), and the Saar, see *Convention Regulating Air Navigation Between Switzerland and the Saar Territory*, Aug. 15, 1928, 81 *L.N.T.S.* 373; *Agreement Respecting Telephone Service Between Great Britain and Northern Ireland and the Saar Territory*, via France, Nov. 16, 1928, 92 *L.N.T.S.* 353, did exercise treaty-making capacity.

Cf *Payment of Various Serbian Loans Issued in France*, 1929 *P.C.I.J.*, ser. A., No. 20, at 41 ("Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country").

164 *Reparation for Injuries Suffered in the Service of the United Nations (The Reparations Case)*, 1949 *I.C.J.* 174, 178-79 (Advisory Opinion of Apr. 11).

165 J. Lador-Lederer, *International Non-Governmental Organizations and Economic Entities* 14 (1963) [hereinafter "Lador-Lederer"].

166 1949 *I.C.J.* 174.

167 *Id.* at 178. One commentator states: The growing variety, density and complexity of transnational concerns and interactions increasingly involve legal and administrative actions and their consequences on many different levels. Some of these concerns and interactions may be, and already are, must effectively handled on official levels below that of formal diplomatic relations ... It is not unreasonable to expect the development of new concepts and devices to meet the needs for greater flexibility and less formality in such interactions.

Lissitzyn, *supra* note 160, at 8.

One consequence of this extension is that it is no longer possible to suppose that the capacities of the various international persons must be equal. See text accompanying notes 200-01 *infra*.

168 "It is not formed for profit ... "Olympic Charter, Rule 11 (prov. ed. 1980).

169 Lucas, *supra* note 13, at 137.

170 *Id.* at 82.

171 The failure to incorporate or register in the headquarters country is unusual. "La nature juridique des Fédérations sportives internationales est en général celle d'associations privées douées de personnalité de droit interne dans l'ordre juridique de l'Etat où elles siègent." Leyendecker, *Les Fédérations Sportives Internationales dans le Domaine des Organisations Non-Gouvernementales*, *Annuaire de l'A.A.A.* [Yearbook of the Association of Attenders and Alumni of the Hague Academy of International Law] 41, 45 (1972-73) [hereinafter "Leyendecker"].

172 Lucas, *supra* note 13, at 136.

exercise of various international legal capacities by IGOs and the arguments for extension of similar capacities to NGOs when warranted,¹⁷³ the IOC may yet see its eighty-seven-year old claim accommodated by international law. This is because, more so than ever in its history, the Olympic organization “manifests traits and actions characteristic of international organizations.”¹⁷⁴

The purposes of the Olympic movement are broad and public in nature. They include: “to educate young people through sport in a spirit of better understanding ... and of friendship, thereby helping to build a better and more peaceful world,” and “to spread the Olympic principles throughout the world, thereby creating international goodwill.”¹⁷⁵ The organization is truly neutral in character. Political, racial and religious discrimination are explicitly prohibited in the Charter.¹⁷⁶

With members from over fifty countries, participation in the IOC is nearly universal. Among NGOs, the IOC is a unique example of a membership system in which the members are selected not as representatives of states or other international organizations, but as *the organization's* representatives to national and international organizations.¹⁷⁷ Rule 12 provides in part: “Members of the IOC are representatives of the IOC in their countries and not their delegates to the IOC. They may not accept from governments or from any organizations or individuals instructions which shall in any way bind them or interfere with the independence of their vote.”¹⁷⁸

The political structure of the Olympic organization is truly transnational. Although the IOC is the governing body, the organization also includes the Olympic Congress, the National Olympic Committees and International Sports Federations. National Committees are recognized by the IOC and required to be “autonomous and ... [to] resist all pressures of any kind whatsoever, whether of a political, religious, or economic nature.”¹⁷⁹ These Committees, representatives of the twenty-six International Sports Federations¹⁸⁰ and IOC members constitute the Olympic Congress.¹⁸¹

The Olympic organization makes its own rules, legislates and administrates within its area of competence. The movement has been largely transformed from one which relied upon “discretionary decision-making” to one which uses a “quasi-legal process of rule-creation and supervision.”¹⁸² The Charter now contains seventy-one rules, detailed by-laws and instructions to hosts of the games on every aspect of procedure and administration, all drafted by a “Legislation Commission” appointed by the IOC.¹⁸³

Finally, the IOC enforces its rules through judicial and arbitral proceedings. Rule 23 provides that “The IOC is the final authority on all questions concerning the Olympic Games and the Olympic movement.”¹⁸⁴ The by-laws provide for the delegation of authority, hearing procedures and penalties for breach of IOC rules.¹⁸⁵

Together, these characteristics and activities make the Olympic organization a significant transnational actor.¹⁸⁶ The relationships

between the IOC, the international sports federations and the national committees are governed only by IOC regulations. Yet they impose a potent transnational legal order on a distinct area of transnational sporting activity.¹⁸⁷ Functionally, the activities of the Olympic movement make it as much an international actor as most of the narrow purpose IGOs.

3. Current Legal Status of NGOs

Scholarship on the question of the legal status of NGOs is scarce. Many scholars holding a progressive view argue that the requirements of international life are now such that certain NGOs should be embraced as international persons; some maintain that they already are.¹⁸⁸ The great majority of lawyers and scholars, however, have concluded that NGOs are currently governed by their constitutive instruments and by the municipal law of the state pursuant to which they have been established.¹⁸⁹ But those who advance the argument that NGOs should be or are international entities make arguments worth examining.

Scholars holding a progressive view ask how the law can continue to deny international legal personality to NGOs, organizations that are functionally identical to IGOs and lack only the IGOs' imprimatur of sovereign membership. These scholars contend that the functional principle requires the disregard of the fiction of collective sovereignty that arises simply from an IGOs' sovereign membership. One response is that the fiction of collective sovereignty cannot be disregarded. Its continuing importance is manifested in the positive doctrine of international law that individuals, whether natural or corporate, cannot be the subjects of international law.¹⁹⁰ Although challenged by some scholars in connection with the development of human rights law,¹⁹¹ the old rule stands and is vehemently defended, especially by socialist international lawyers.¹⁹² One author believes this adherence to the old rule to be the principal barrier to the recognition of the international legal personality in NGOs.¹⁹³

Nonetheless, in advocating international legal status for NGOs, Brownlie notes that “Whilst due regard must be had to legal principle, the lawyer cannot afford to ignore entities which maintain some sort of existence on the international legal plane in spite of their anomalous character.”¹⁹⁴ In a similar vein, Lador-Lederer argues forcefully that the existence maintained by NGOs on the international plane reveals functional attributes identical with those which result in international personality for States and IGOs.¹⁹⁵ Based on an examination of NGOs like the Holy See¹⁹⁶ and the International Committee of the Red Cross,¹⁹⁷ he observes:

The organizations in question are seen to be within the law by virtue of their doing what constitutes statehood: by legislating within the range of their functions, by administering the law within the range of their authority, by adjudicating subjective rights within their jurisdiction, acting in the spirit of their legislation. ...

173 See text accompanying notes 188-212 *infra*.

174 Espy, *supra* note 22, at 9.

175 Olympic Charter, Rule 1 (prov. ed. 1980). The other aims set forth in Rule 1 are “to promote the development of those physical and moral qualities which are the basis of sport,” and to “bring together the athletes of the world in the great four-yearly sport festival, the Olympic Games.” *Id.*

176 Olympic Charter, Rule 3 (prov. ed. 1980). See Leyendecker, *supra* note 171, at 42.

177 See L. White, *International Non-Governmental Organizations* 199 (1951).

178 Olympic Charter, Rule 12 (prov. ed. 1980).

179 *Id.* Rule 24(C).

180 *Id.* Rule 45.

181 *Id.* Rule 17(C).

182 Nafziger, *supra* note 61, at 181 n. 2.

183 *Id.* at 190-91.

184 Olympic Charter, Rule 23 (prov. ed. 1980).

185 *Id.* By-laws to Rules 16 and 23.

186 Espy, *supra* note 22, at 16.

187 Leyendecker, *supra* note 171, at 48.

188 See, e.g., Lador-Lederer, *supra* note 165, at 14-15.

189 Leyendecker, *supra* note 171, at 42-43.

190 See 1 M. Whiteman, *Digest of International Law* 238 (1973). But see Brownlie, *supra* note 82, at 69. “There is no general rule that the individual cannot be a ‘subject of international law’ and in particular contexts he appears as a legal person on the international plane.” *Id.*

191 Dean, *Beyond Helsinki: The Soviet View of Human Rights in International Law*, 21 Va. J. Int'l L. 55, 72-74 (1980). See, e.g., W. Gormiey, *The Procedural Status of the Individual Before International and Supranational Tribunals* 30-31

(1966); H. Lauterpacht, *International Law and Human Rights* 27-35 (1968).

192 “[The extension of subject status to individuals] contradicts the very essence of International Law.” F. Kozevnikov, *International Law: A Textbook for Use in Law School* 89 (1957), quoted in Dean, *Beyond Helsinki: The Soviet View of Human Rights in International Law*, 21 Va. J. Int'l L. 55, 72-74 (1980).

193 ... [I] principal obstacle à la reconnaissance de cette même personnalité aux organisations internationales non-gouvernementales.” Leyendecker, *supra* note 171, at 43.

194 Brownlie, *supra* note 82, at 67.

“Furthermore, as elsewhere in the law, provided that no rule of *jus cogens* is broken, acquiescence, recognition, and the incidence of voluntary bilateral relations can do much to obviate the more negative consequences of anomaly.” *Id.* at 59.

195 Lador-Lederer, *supra* note 165, at 59-68. Similar functional attributes are shared by international public corporations. See generally Friedman, *supra* note 159.

These bodies, like the Bank for International Settlements, see Hague Convention, Jan. 20, 1930, 104 L.N.T.S. 441, are international in character, have managerial and financial autonomy, own their own funds, perform an international public service, and are constituted in a multinational convention. It is only in respect to the last characteristic that they differ from most NGOs. Friedman, *supra* note 159, at 186, 191; Kunz, *supra* note 74, at 850-51.

196 See, e.g., Lador-Lederer, *supra* note 165, at 29-32, 60, 210-11.

197 See generally Picot, *La Croix et les Conventions de Genève*, 76 Recueil des Cours 5 (1950: I).

Thus, International Law, once a law of inter-State relations only, is seen to have become the law of all those relations which, not being localized nationally and functionally ... involve intercourse among ... organizations which exist in the interstium between States, and are created independently of States.¹⁹⁸

Lador-Lederer is categorical in his conclusion: "Non-State organizations have been recognized as subjects of International Law, and it would be unrealistic to disregard the dynamic importance of this fact."¹⁹⁹

Although it may be unrealistic to disregard the arguments of Lador-Lederer, it would be reckless to accept his conclusion, especially insofar as it may imply treaty-making capacity. If the functional principle governs the recognition of international legal personality, it must also control the specific capacities granted to various types of international persons.²⁰⁰ When only states were international legal persons, it was apparent that all international legal persons possessed all international legal capacities. But now that lesser entities claim international personality, there is no logical reason to suppose that the capacities of the various international legal persons must be equal. Lissitzyn argues, "If an entity has treaty-making capacity, it is an 'international person,' but if we are told that an entity has 'international personality,' we cannot conclude that it has treaty-making capacity, since it may only possess some *other* capacity."²⁰¹

Treaty-making capacity has been traditionally reserved to states.²⁰² There is wide disagreement about whether an international person always has the capacity to make treaties.²⁰³

NGOs like the IOC have concluded various agreements which purport to be international in character. Italy, for example, concluded a variety of international "conventions" with the Order of St. Joan of Malta,²⁰⁴ and the occupation powers in Germany signed formal agreements with the International Red Cross in 1947.²⁰⁵ Most of the international agreements concluded by NGOs, however, have been with public international institutions.²⁰⁶ These include agreements between the United Nations and the Carnegie Foundation regarding use of the Peace Palace in the Hague,²⁰⁷ between the UNRPR and the International Committee of the Red Cross,²⁰⁸ and between the Organization of American States and the American International Institute for the Protection of Childhood.²⁰⁹ Although these agreements may be "on the borderline between international law and municipal law,"²¹⁰ their status is acknowledged by even the most sympathetic observers to be "problematical."²¹¹

If the progressive view prevails, the IOC may some day become the international person which its Charter declares it to be.²¹² But under established international law, NGOs are not fully international persons and the precedential value of NGO "treaty-making" is doubtful. Thus, the conclusion of an international agreement between the IOC and a sovereign state is at present an impossibility.

B. The "Internationalized Contract"

In his preparatory work for the Vienna Convention on the Law of Treaties, Brierly proposed an alternative analysis for certain types of agreements that does not focus on questions of status and capacity:

It is equally indisputable that an international person [*i.e.*, a State] may have relations *ex contractu* with an entity other than another such person. If transactions of this type are not referable to any system of domestic law, it appears that they must be considered to be contracts of international law. They are not, however, treaties.²¹³

Another commentator has suggested that the agreement between an NGO like the IOC and a state would not be referable to domestic law - and thus would be this sort of non-treaty international contract - if it were central to the purposes of the NGO, a contract made pursuant to the organization's international responsibilities and made by the NGO acting in its capacity as an international organization.²¹⁴ Although Brierly's proposal for these non-treaty contracts was not included in the final language of the Vienna Convention,²¹⁵ there is a growing body of international jurisprudence which suggests that international law may take cognizance of certain agreements regardless of the status or capacity of one of the parties.

Just as both public and private international organizations seek to protect their property and to preserve operational autonomy, private enterprises seek to insulate their long-term foreign investments from adverse actions by host governments. Although the environment may be favorable when the investment is made, "Foreign investors desire assurance that they will continue to receive definite protections, as specified in a binding legal instrument."²¹⁶ In the eighteenth and nineteenth centuries, states protected the economic activities of their foreign nationals with international servitudes embodied in interstate agreements.²¹⁷ In this century, the norm has been for host states to make contractual undertakings directly with the foreign enterprise. These undertakings take three principal forms: concession agreements, guaranty contracts and instruments of approval issued pursuant to national investment laws.²¹⁸

A concession agreement sets forth the general legal framework for the foreign investment. It grants the basic exploration, exploitation or production rights to a project's sponsors and fixes the form and amount of compensation to be paid to the host country.²¹⁹ It details tax treatment, exchange, import and export controls, applicability of local labor laws and all other matters relating to the foreign investor's freedom to control and operate the project.²²⁰ A typical term is one in which the host government promises that "no obligation will be placed" on the foreign enterprise that will "derogate from its right to own, operate, possess, use and realise the ... property held in connection with the project."²²¹

When a host country seeks to modify its obligations under a concession agreement, dispute settlement procedures which often lead to formal international arbitration are triggered.²²² The traditional rule

198 Lador-Lederer, *supra* note 165, at 14-15.

Other functions which characterize both NGOs and international persons are the delegation of authority, consultation with other international persons, technical assistance and propaganda. *Id.* at 64.
199 *Id.* at 210.

200 "[R]eference to the functions and powers of the organisation exercised on the international plane, and not to the abstract and variable notion of personality, will alone give guidance on what powers may properly be implied." D. Bowett, *The Law of International Institutions* 275 (1963).

201 Lissitzyn, *supra* note 160, at 15. See generally Schneider, *supra* note 157.

202 See, e.g., Case Concerning the Payment of Various Serbian Loans Issued in France (Serbian Loan Case), 1928-1930 P.C.I.J., Ser. A., Nos. 20-21, 41 (Judgment of July 12, 1929). See also Wengler, *Agreements of States with*

Other Parties than States in International Relations, 8 *Revue Hellenique de Droit International* 113, 118 (1954) [hereinafter "Wengler"].

203 Lissitzyn, *supra* note 160, at 5. See generally Schneider, *supra* note 157.

204 Wengler, *supra* note 202, at 113.

205 *Id.*

206 See Schneider, *supra* note 157, at 94-96.

207 [1946-1947] U.N.Y.B. 245.

208 Agreement between United Nations Relief & Rehabilitation Administration and American Friends Service Committee, International Committee of the Red Cross, and League of Red Cross Societies, [1948-1949] U.N.Y.B. 161, U.N. Doc. A/1905.

209 [1948-1949] U.N.Y.B. 703.

210 Wengler, *supra* note 202, at 115.

211 Schneider, *supra* note 157, at 117.

212 Olympic Charter, Rule 11 (prov. ed. 1980). See notes 168-187 and accompanying text *supra*.

213 J. Brierly, Report on the Law of Treaties 17, [1950] 2 Y.B. Int'l L. Comm'n 222, 229, U.N. Doc. A/CN.4/23 (1950).

214 Schneider, *supra* note 157, at 121.

215 Article 3 provides: "The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law ... shall not affect: (a) the legal force of such agreements ..."
Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 8 I.L.M. 679, 681-82 (1969), UN. Doc. A/CONF.39/27. Earlier drafts of the Convention had employed a definition of "treaty" which included international entities other than states. See [1962] 1 Y.B. Int'l L. Comm'n 164.

216 Note, *Arbitration of Economic Development Agreements: The Impact of Revere v. OPIC*, 20 Va. J. Int'l L. 861, 863 (1980) [hereinafter "Virginia Note"].

217 Wengler, *supra* note 202, at 127.

218 A. Fatouros, Government Guarantees to Foreign Investors 192 (1962) [hereinafter "Fatouros"]. If the host state participates in the project, then its undertakings are included in a joint venture agreement. See Berens, *Foreign Ventures - A Legal Anatomy*, 26 Bus. Law. 1527 (1971); Zaphiriou, *Methods of Cooperation Between Independent Enterprises (Joint Ventures)*, 26 Am. J. Int'l L. 245 (Supp. 1978).

219 R. Rendell, *International Project Financing*, in *International Financial Law* 39, 43 (1980) [hereinafter "Rendell"].

220 *Id.* at 45.

221 Concession agreement between Revere Jamaica Alumina, Ltd. and Jamaica, quoted in Revere Copper & Brass, Inc. v. Overseas Private Investment Corp., 56 I.L.R. 258, 263 (Haight, Wetzel & Bergan, arbs. 1978).

applied by arbitrators considering these concession agreements used to be dear: municipal law governs breaches of contract between alien investors and a host government.²²³ There was, of course, no question of “international personality” for the private enterprise party to the agreement. Recently, however, a series of important international arbitrations have held that although concession agreements lack the “wholly international” character of traditional state-to-state contracts, they are “basically international.”²²⁴ Because of the nature of the contract - and not because of the status of the non-state party - “[p]arliamentary supremacy and State sovereignty” of the host are held to have ceased to be the “decisive criteria.”²²⁵

In 1958, Swiss arbitrators in the case of *Saudi Arabia v. Arabian American Oil Co.*²²⁶ upheld the use of freezing clauses²²⁷ in concession agreements. The panel stated that “[n]othing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irrevocable rights.”²²⁸ In a subsequent case, the arbitrator found it “natural” that investors be protected from legislative changes which would alter the character of the contract.²²⁹ The arbitrator noted that such protection could not be guaranteed by the “outright application” of national law, since such law could be unilaterally changed by the state.²³⁰ Indeed, the inclusion of freezing clauses came to be seen as a key factor in removing the agreement from municipal law.²³¹

In *Revere Copper & Brass, Inc. v. Overseas Private Investment Corp.*,²³² a sole French arbitrator was able to cite sufficient arbitral precedent to call it an “international law rule” that “a government is bound by its contracts with foreign parties notwithstanding the power of [its] legislature under municipal law to alter the contract.”²³³ He joined previous panels²³⁴ in finding that a governmental contract should be “internationalized” and that the public international law principles, such as *pacta sunt servanda*, applied.²³⁵

The logic of these decisions seems to suggest that a similar result would be reached if the privileges and guaranties contained in a bilateral IOC-Greece agreement were ever brought to arbitration. The notion of internationalization seems to embody Brierly’s suggestion for non-treaty international agreements and would allow the IOC to create international obligations with Greece even though the IOC might lack the status and capacity normally required for international contracts. For several reasons, however, the IOC could not rely on these precedents alone to produce a similar result in case of a breach by Greece.

First, certain characteristics of these agreements other than the presence of freezing clauses were significant to the findings of “internationalization.” Some of these would not be present in a bilateral agreement between Greece and the IOC. The most significant of these characteristics is the purely economic nature of the concessions; all were well supported by consideration given by the concessionaires. The contracts were intimately associated with the host states’ economic and social development aspirations and were a part of the very

public process of North-South cooperation for development.²³⁶ Although locating the permanent Olympic site in Greece would result in substantial benefits to the Greek economy, the revenues produced by the games would not be shared with Greece²³⁷ and the arrangement could not fairly be characterized as an economic development agreement.²³⁸

Second, the principle of “internationalization” in the case of concession agreements is “by no means representative of an international legal consensus.”²³⁹ Recent U.N. Resolutions²⁴⁰ associated with the “New International Economic Order” that limit the legal protection of foreign investment reflect a contrary view. The international contract doctrine has been called “[a] disregard of State practice, in favor of doctrinal pronouncements and a small number of arbitral awards.”²⁴¹ The IOC would be ill-advised to rely on that doctrine to bring its bilateral agreement with Greece under the purview of international law.

V. A Suggested Solution: Participation of Third Party Guarantors and Integration of Financing Arrangements

If the policy ends of the permanent site proposal are to be realized, the obligations of Greece to respect the autonomy and neutrality of the Olympic site must be binding and enforceable in accordance with their terms and not susceptible to unilateral termination. This can be achieved only by making those obligations binding under international law.²⁴² Since, however, neither the status of the Olympic organization²⁴³ nor the subject matter²⁴⁴ of the contract bring the agreement under international law, the necessary conclusion is that no purely bilateral arrangement can give the IOC the same security enjoyed by IGOs under their headquarters agreements. The only alternative is to involve some third party which does possess the capacity to bind Greece under international law.

Third parties can be involved through the mechanism of treaties made for the benefit of third parties. Treaties for the benefit of third parties are recognized under public international law.²⁴⁵ Article 36 of the Vienna Convention provides that “A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right ... to the third State ... and the third State assents thereto. Its assent shall be presumed as long as the contrary is not indicated. ...”²⁴⁶ These treaties of guaranty have involved the guaranty of “the possession of specified territory,” “the demilitarization of a piece of territory” or permanent neutrality.²⁴⁷ Because these treaties have been made for the benefit of a third international legal person, they are not the best precedent for guaranty by treaty of the autonomy and neutrality of the Olympic site.

The better precedents are the guaranties made by states with respect to the long-term foreign investments of their nationals. States make these guaranties when, although they have no desire to become directly involved in financing or operating a project in a foreign country, they do have some interest in seeing such investment undertaken

222 Virginia Note, *supra* note 216, at 862.

223 *Revere Copper & Brass, Inc. v. Overseas Private Investment Corp.*, 56 I.L.R. at 258, 271 (Haight, Wetzel & Bergan, arbs. 1978); *Texaco Overseas Petroleum Co. [TOPCO] & California Asiatic Oil Co. v. Libyan Arab Republic*, 53 I.L.R. 389, 431-36 (Dupuy, arb. 1977).

224 56 I.L.R. at 271.

225 *Id.* at 272. See generally Delaume, *What is an International Contract? an American and Gallic Dilemma*, 28 *Int'l & Comp. L.Q.* 258 (1979).

226 27 I.L.R. 117 (1958).

227 “Freezing clauses” or “stabilization clauses” prohibit the host from changing the investor’s rights under the contract by changing or modifying the municipal law of the host country. 53 I.L.R. at 456-57.

228 27 I.L.R. at 168.

229 *Sapphire v. Internat'l Petroleum Ltd. v.*

Nat'l Iranian Oil Co., 35 I.L.R. 136, 171 (1967).

230 *Id.*

231 *Id.* at 174. See, e.g., 53 I.L.R. at 459-60.

232 56 I.L.R. 258 (Haight, Wetzel & Bergan, arbs. 1978).

233 *Id.* at 282. *But see BP Exploration Go. (Libya) v. Libyan Arab Republic*, 53 I.L.R. 297, 327-29 (Lagergren, arb. 1973-74).

234 See, e.g., 53 I.L.R. at 462; *Sapphire Int'l Petroleum Ltd. v. Nat'l Iranian Oil Co.*, 35 I.L.R. 136, 181 (Cavin, arb. 1963).

235 56 I.L.R. at 279-84.

236 See 53 I.L.R. at 456-57.

237 Indeed, such sharing would undermine the goal of isolating the IOC from the forum State. See text accompanying notes 43-69 *supra*.

238 Furthermore, concession agreements are limited to a term of years and the per-

manent site contract between the IOC and Greece would probably be open ended and perpetual. See, e.g., *Revere Copper & Brass, Inc. v. Overseas Private Investment Corp.*, 56 I.L.R. 258 (twenty-five year agreement).

239 Virginia Note, *supra* note 216, at 877.

240 See, e.g., *Permanent Sovereignty over Natural Resources*, GA. Res. 1803, 17 U.N. GAOR Supp. (No. 17) 15, UN. Doc. A/5217; *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, 29 UN. GAOR Supp. (No. 31) 50, U.N. Doc. A/9631 (1974). The latter provides that “where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless otherwise agreed between the parties.” *Id.* chap. 2, art. 2(2)(c).

241 Fatouros, *International Law and the*

Internationalized Contract, 74 *Am. J. Int'l L.* 134, 137 (1980).

242 See text accompanying note 153 *supra*.

243 See text accompanying notes 157-212 *supra*.

244 See text accompanying notes 213-41 *supra*.

245 McNair, *The Law of Treaties* 239-54 (1961).

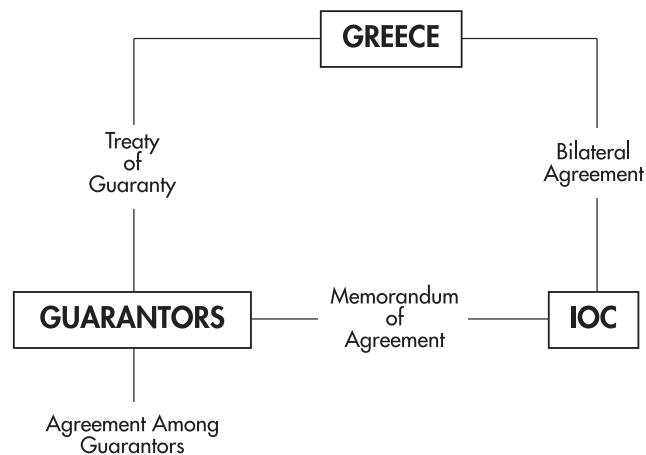
246 Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 36, 8 I.L.M. 679 (1969). Article 37(2) provides that, “When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.” *Id.* art. 37(2).

247 L. McNair, *The Law of Treaties* 239 (1961). See generally K. Idman, *Le Trait *

en.²⁴⁸ Typically, two separate contracts are involved.²⁴⁹ The guarantor state concludes a treaty with the host state in which each state agrees to protect the foreign investments of the other's nationals.²⁵⁰ The second contract is between the guarantor state and its nationals, insuring the latter against a variety of host State actions. An example is a U.S. Overseas Private Investment Corporation (OPIC) guaranty contract, which insures nationals against any action by the host state which prevents the enterprise from "exercising effective control over the use or disposition of [a] substantial portion of its property."²⁵¹ The guarantor state thus guarantees the foreign project not only against outright expropriation or nationalization, but against actions which constitute "creeping expropriation" and against any breach of the concession agreement between the enterprise and the host state.²⁵² Both the guaranty contract between the enterprise and the guarantor and the concession agreement between the enterprise and the host state are governed by municipal law, but the guaranty treaty between the guarantor and host state clearly creates obligations under international law.²⁵³

A. Basic Plan for Third-Party State Guaranties of the Permanent Olympic Site

Drawing on both the public treaties of guaranty and national practice with regard to investment guaranty agreements, a basic structure for achieving legal protection for the permanent Olympic site is suggested:



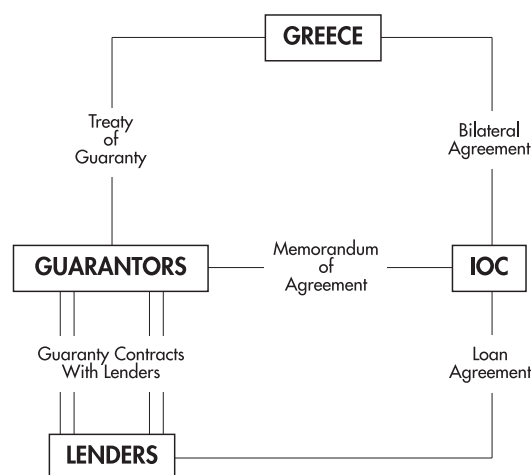
The essential legal framework for the site would be set forth in the Bilateral Agreement between Greece and the IOC.²⁵⁴ This agreement would be modeled on the headquarters agreements²⁵⁵ and would provide the privileges and immunities the IOC needs.²⁵⁶ As a condition precedent to the IOC's performance (principally the construction of the Olympic facilities and the conduct of the games at the site), Greece would enter into a Treaty of Guaranty with two or more other states. In this treaty Greece would covenant to abide by the terms of the Bilateral Agreement with the IOC.²⁵⁷

The IOC would be protected from the influence of the Guarantors

by the execution of two other agreements. An Agreement Among Guarantors would specify the rights and obligations of the Guarantors as against one another in the event of the repudiation or default of any one Guarantor. Also, the Guarantors and the IOC would conclude a Memorandum of Agreement in which the Guarantors reaffirm their joint and several obligations to invoke the Treaty's dispute resolution procedures²⁵⁸ on behalf of the IOC and explicitly recognize that their status as Guarantors gives them no special rights in or control over the site or administration of the games.

B. Integration of Financing into the Basic Plan

If the games are moved to a permanent site in Olympia, the IOC will require a large amount of capital to construct the necessary facilities.²⁵⁹ Lenders of the capital for that initial investment will be relying entirely on the revenues produced by the free and unimpeded operation of the games. Furthermore, the lenders, like all major foreign investors, would demand guaranties from the forum state with regard to the free operation of the games as a revenue-producing enterprise. These guaranties would be the same as those the IOC needs to achieve operational autonomy. Thus, the basic plan and the financing arrangements could be integrated by extending the guaranties made by the Guarantors for the benefit of the IOC's creditors:



Besides allowing the Olympic organization to raise the funds it requires in the private international capital markets,²⁶⁰ this arrangement strengthens the legal regime for the permanent site. First, it qualitatively increases the real security of the IOC by raising the cost to Greece of abrogation of the Bilateral Agreement by Greece. Participants in the multinational group of Guarantors could include various official creditor and guaranty agencies and perhaps even the World Bank. "The involvement of lenders from a number of countries and official international institutions should minimize the chances of arbitrary or politically motivated action by the host country ..."²⁶¹ The experience of sponsors and creditors of large foreign

de Garantie en Droit International (1913).

248 P. Nevitt, Project Financing 91(1980). The United States has had an investment guaranty program in operation since 1948. Fatouros, *supra* note 218, at 102.

249 These agreements are in addition to a concession agreement between the investor and the host state. See notes 219-25 and accompanying text *supra*; note 254 *infra*.

250 Fatouros, *supra* note 218, at 104-06. See, e.g., Treaty of Friendship, Commerce & Navigation, Dec. 23, 1957, Federal Republic of Germany-Dominican Republic [1959] Bundesgesetzblatt (II) 1168; Treaty of Friendship, Commerce

& Navigation, Feb. 2, 1948, U.S.-Italy, 63 Stat. 2255, T.I.A.S. No. 1965, 79 U.N.T.S. 171. See generally H.C. Hawkins, Commercial Treaties & Agreements; Principles and Practice (1951); R. Wilson, United States Commercial Treaties and International Law (2nd ed. 1960); Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805 (1958); Walker, *Provisions on Companies in U.S. Commercial Treaties*, 50 Am. J. Int'l L. 373 (1956).

251 *Revere Brass & Copper, Inc. v. Overseas Private Investment Corp.*, 56 J.L.R. 258, 261-62 (Haight, Wetzel & Bergan, arbs. 1978). See generally OPIC, Investment Insurance Handbook (1980).

252 See *Anaconda Co. & Chile Copper Co. v. OPIC*, 14 I.L.M. 1210, 1227-28 (Fuld, Sommers & Vagts, arbs. 1975); *Revere Brass*, 56 I.L.R. 258, 296. See generally Virginia Note, *supra* note 216, at 884.

253 Fatouros, *supra* note 218, at 191.

254 In foreign project financing, the concession agreement, or whatever contract is entered into between the sponsors and the host State, sets forth the basic legal framework for the project. Rendell, *supra* note 219, at 43.

255 See text accompanying notes 114-46 *supra*.

256 See text accompanying notes 43-69 *supra*. The IOC should consider negotiating a choice of law clause, similar to that commonly used in concession

agreements, providing for application of those principles of Greek law not inconsistent with international law. See, e.g., clause 28 of TOPCO's 1966 deed of concession with Libya:

This concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals. *Texaco Overseas Petroleum Co. [TOPCO] & California Asiatic Oil Co. v. Libyan Arab Republic*, 53 I.L.R. 389, 442 (Dupuy, arb. 1977).

projects is that “[h]ost governments ... cannot afford to ruin their credit with [these agencies].”²⁶² The integration of financing thus introduces a potent deterrent to Greece’s breach of its obligations to respect the autonomy of the games.

In addition, the integration of the financial arrangements provides a method for selecting the Guarantors. The IOC would simply select a lead bank, preferably from a neutral country like Switzerland, to put together the international lending syndicate. A condition to a bank participation in the syndicate would be the execution of a guaranty contract with its own government and the accession by its government to the Guaranty Treaty.

Finally, the focus of state participation as a Guarantor would be shifted from the political to the economic sphere. The apparatus for concluding the necessary agreements exists in many states. Both the United States and West Germany for example, have investment guaranty treaties with Greece.²⁶³ The guaranty contract may take the form of routine contracts like those made by OPIC with U.S. foreign investors. The decision to guarantee would appear to take the form of a routine economic decision - protection of the foreign investment of nationals with only contingent state liability - rather than a controversial political entanglement.

C. Dispute Resolution and Enforcement

A two-tiered system of dispute resolution and enforcement could be created by provisions in both the Bilateral Agreement and Guaranty Treaty. As a general rule, the IOC and Greece should be given every opportunity to discuss their differences before invoking involvement of the Guarantors. The arbitral provisions of the Treaty would be triggered only if Greece and the IOC failed to resolve their dispute under the procedures set forth in the Bilateral Agreement.

The Bilateral Agreement, like most of the IGO headquarter agreements,²⁶⁴ should provide that dispute resolution first be attempted by friendly consultation and negotiation between the parties. If this fails, then the parties should agree to submit their differences to binding arbitration. Arbitration has the advantage of being flexible, consensual, and generally fair.²⁶⁵ It is preferable to adjudication in Greek or other municipal courts for a variety of reasons, the most significant being the possibility of national bias and the difficulty of enforcing foreign judgments.²⁶⁶

The Bilateral Agreement should specify exactly on what grounds each party can force the other to go to arbitration. These grounds should include only those which go to the heart of the games’ integrity, for example, Greece’s denial of a visa to a participant accredited by the IOC. The Bilateral Agreement should also provide for the

appointment of judges and the arbitral forum. It is typical in the case of headquarters agreements for each party to appoint one arbitrator, to agree on the third or, in the absence of agreement, to consent to appointment by the President of the International Court of Justice.²⁶⁷

Once rendered, there is every reason to believe that the award will be enforceable in Greece. Since 1925 the Greek state and Greek state entities have been authorized by statute to enter into binding foreign arbitration with foreign entities.²⁶⁸ Article 903 of the Greek Code of Civil Procedure provides that “subject to the provisions of international conventions, a foreign arbitral award is *ipso jure* final and binding ...”²⁶⁹ Greece is party to a number of bilateral treaties which provide for the enforcement of foreign arbitral awards²⁷⁰ and has ratified²⁷¹ the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²⁷²

The New York Convention sets forth a number of grounds for legitimate refusal to enforce a foreign arbitral award.²⁷³ The most troubling of these allows a state to deny recognition and enforcement when the award is contrary to public policy.²⁷⁴ In the case of international agreements, however, courts have uniformly construed “public policy” to mean the international public order, and not purely domestic public policy.²⁷⁵ There is substantial precedent to suggest that “contractual commitments between a sovereign state and a foreign investor will be enforced against the state by an international arbitral tribunal,”²⁷⁶ and that the state against which that award is rendered will recognize it.²⁷⁷

Nonetheless, if a Greek government refused to recognize and abide by the arbitral award made pursuant to the Bilateral Agreement, the IOC would have the additional protection of its sovereign Guarantors. The Guaranty Treaty would specify that (with the exception of a few enumerated extreme actions) the principal event of default under the Treaty is failure to recognize an arbitral award issued pursuant to the Bilateral Agreement. Inter-sovereign binding arbitration pursuant to the Treaty and remedies under international law would, therefore, be triggered only upon failure of the dispute resolution mechanism set forth in the Bilateral Agreement.

The drafters of the Treaty will have a wide variety of possible remedies from which to choose. For example, default by Greece under the Treaty could trigger a substantial financial penalty sufficient to allow re-establishment of the games elsewhere. Since any outstanding debt would accelerate upon default, that amount would be immediately due and payable by Greece. Upon its failure to pay, the Guarantors would fulfill their obligation to the lenders and then proceed against Greek assets in their respective jurisdictions. Additionally, the

257 These guaranties also could be contained in a multilateral convention to which Greece would be just another party. This would follow the practice of Friendship, Commerce and Navigation treaties where all obligations are expressed as being mutual, even though one party has no prospect of investment or significant commercial activity in the other. See Fatouros, *supra* note 218, at 96, 98. This format has been rejected here as an awkward legal fiction which fails to reflect the actual arrangement.

258 The Guarantors would be obligated to bring Greece to binding arbitration in the event it refused to abide by an arbitral award issued pursuant to the Bilateral Agreement. See notes 268-77 and accompanying text *infra*.

259 Initial studies of the economic viability of the permanent site proposal indicated that the IOC’s revenues - principally from the quadrennial sale of television rights - would be sufficient to support the operation of the Olympic center, including debt service on the initial capital investment. See note 14 *supra*.

260 The loan would most probably be an

internationally syndicated Eurodollar bank loan with participating lenders from North America, Europe, the Middle East, and the Far East.

261 Rendell, *supra* note 219, at 41.

262 P. Nevitt, Project Financing III (1980).

263 See Treaty of Friendship, Commerce & Navigation, Aug. 3, 1951, U.S.-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057, 224 UN, T.S. 297; Treaty of Friendship, Commerce & Navigation, Nov. 11, 1953, West Germany-Greece, [1953] Bundesanzeiger No. 228.

264 See, e.g., L.N. Headquarters Agreement, *supra* note 114, § 21.

265 M. Laughlin, *Arbitration and Developing Countries*, 13 Int’l Law, 211, 212 (1979).

266 *Id.*

267 See, e.g., UN. Headquarters Agreement, *supra* note 114, § 21. The Bilateral Agreement also should provide explicitly that all interim arbitral awards shall be observed by the parties.

268 A. Foustoucos, *Greece*, 5 Y.B. Comm. Arb. 57, 61 (1980). See Code of Civil Procedure, bk. VII, arts. 867-903, Law, No. 958, Sept. 15, 1971 (Greece), *reprinted in* A. Foustoucos, L’arbitrage Interne

et international en droit privé hel- lenique, Appendix A, 321-30 (1976) [hereinafter “Foustoucos”]

269 Code of Civil Procedure, bk. VII, art. 903 (Greece), *reprinted in* Foustoucos, *supra* note 268, at 330.

270 These include treaties with the United States, West Germany, Yugoslavia and Czechoslovakia. Foustoucos, *supra* note 268, at 80-81.

271 Legislative Decree No. 4220 of 1961 (Greece). Greece agreed to the Convention terms subject to two reservations (allowed under article 1, subsection 3). Like France, Greece has limited application to those awards made in the territory of a contracting state and will only apply the Convention to differences arising under commercial legal relationships (under Greek law) See Foustoucos, *supra* note 268, at 182.

272 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (entered into force Dec. 29, 1970) [hereinafter “New York Convention”].

273 *Id.*, art. V. The grounds include invalidity of the arbitration agreement, inability of a party to present its case, noncompliance with the terms of submission, including terms regarding the appointment of arbitrators, and judicial action setting aside the award in the country in which it was rendered, *Id.*, see Sanders, *A Twenty Years’ Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 Int’l Law, 269, 270-72 (1979) [hereinafter “Sanders”].

274 New York Convention, *supra* note 272, art. V, subdv. 2(b). The public policy exception also applies if the subject matter of the arbitration is not capable of settlement by arbitration in the country of enforcement *Id.* at art. V, subdv. 2(a).

275 Sanders, *supra* note 273, at 270.

276 McLaughlin, *Arbitration and Developing Countries*, 13 Int’l Law, 211, 221 (1979).

277 In 100 cases applying the New York Convention all over the world, enforcement was denied on public policy grounds only three times. Sanders, *supra* note 273, at 271.

Guarantors would have undertaken to recognize the standing of the IOC to proceed against Greek assets in their jurisdictions, and the IOC would pursue its claim for the value of the facilities and damages suffered by the Olympic movement.

The basic plan described here is necessarily incomplete. It is not the purpose of this article to identify an exact contractual structure or to propose carefully integrated contractual provisions. Instead, the task has been to suggest those factors which are most relevant to the integrity of the permanent site plan and to demonstrate the tremendous flexibility of the legal tools at the disposal of its drafters.

The Olympic Congress may not adopt the permanent site plan in

the near future. But eventually, its compelling logic will defeat the dead weight of sentimental adherence to Baron de Coubertin's original scheme. Whenever the decision is made, the ability of lawyers to create a legal regime responsive to the functional needs of a permanent site will be a key factor in that decision. The present exercise reveals that, despite the impossibility or impracticality of many of the regimes mentioned by proponents and despite the formidable doctrinal obstacles still encountered by NGOs like the IOC, the narrowly-defined autonomy which is required can be achieved by the imaginative use of a combination of traditional public and private international law tools.



GENERAL AGREEMENT OF COOPERATION BETWEEN THE ASSER INTERNATIONAL SPORTS LAW CENTRE AND THE INDONESIA LEX SPORTIVA INSTITUTA

Considering the close, traditional ties between the Republic of Indonesia and the Kingdom of the Netherlands,

Considering that close cooperation in the field of international sports law between our institutions would be conducive to strengthening these ties,
Considering that close cooperation in the field of the education and research in international sports law between our institutions would be an important contribution to the promotion and development of international sports law - our Institutions being seated in the western and eastern hemisphere of the world respectively,

We have decided - by signing this Agreement - to create a framework for cooperation, in particular focusing on the following forms of cooperation:

- the exchange of information and library services;
- the joint organization of specialized courses;
- the joint organization of conferences, seminars and workshops on topical Issues of international sports law;
- the exchange of students and trainees;
- the joint undertaking of studies;
- the publication of books.

All decisions regarding this cooperation will be taken after mutual consultations between the institutions.

The Agreement is valid for a period of four years, to be renewed by mutual agreement.

The Hague, 18 June 2009

Dr Robert Siekmann
Director
ASSER International Sports Law Centre
The Hague
The Netherlands

Hinca IP Pandjaitan SH MH ACCS
Director
Indonesia Lex Sportiva Instituta
Jakarta
Indonesia



Hinca Pandjaitan, director of the Indonesia Lex Sportive Institute, Djakarta (left) and Robert Siekmann (right), after the signing of the Cooperation Agreement

EL Code of Conduct on Sports Betting*

For the purpose of this code of conduct the following words shall have the meaning as defined hereby:

“European Lotteries”: the “European Lotteries and Toto Association” is an independent European association composed of State Lottery and Toto companies established in Europe.

Gambling: all types of games, including lotteries and betting transactions, involving wagering a stake with monetary value in games in which participants may win, in full or in part, a monetary prize based, totally or partially, on chance or uncertainty of an outcome.

Sports betting: all sports betting-based games (i.e. fixed and running odds, totalisator/toto games, live betting, other games and football pools offered by sports betting operators, etc.) are included.

Sports: all physical human activities with specific rules, shared by a great number of participants, and involving competition among the different participants. Olympic sports, sports having as one's purpose to become Olympic sports and minor sports may be included in sports.

EL sports betting members: all members of “European Lotteries and Toto Association” involved in sports betting.

Regulator: local, regional or national authority giving explicit permission to operate one or various games on a specific territory or jurisdiction.

Official operator: organisation that has received explicit permission to operate one or various games on a specific territory or jurisdiction by a regulator or by the government.

FIFA: Fédération Internationale de Football Association

UEFA: Union of European Football Associations

EL: European Lotteries.

WLA: World Lottery Association.

Sports betting personnel: all employees of EL sports betting members in contact with sports betting (e.g. odds compilers, product managers and risk managers involved in sports betting, head of sports betting)

I - CONSIDERATIONS

Considering that seven important and basic elements unite the EL members operating sports betting:

- LAW: for EL sports betting members, an official operator abides by the law of each and every jurisdiction where he operates;
- REGULATION: for EL members, all games available to customers are in compliance with the regulatory authorisation issued in each country where such games are offered.

The supply is regulated in quantity so as not to stimulate gaming. The supply is regulated in intensity so as not to provoke addictive gaming. The supply is also regulated by taxation means;

- CONTROL: EL member's regulation is carried on by relevant State authorities, regulators and Government Audit Offices;
- ETHIC: EL members are driven by important ethical principles. For this reason, EL members operating sports betting will avoid any conflict of interest which could affect their mission;
- CUSTOMERS RESPECT: for EL members, players are not gamblers and betting addiction problems have to be avoided. EL sports betting members provide attractive games to a wide group of people betting reasonable stakes;
- SPORTS VALUES: EL members aim, in line with the European Sports policy, at serving grass root, amateur and professional sports without supporting excessive commercialisation. EL members fully respect sports integrity and values. EL members choose betting on sports events because they are fair and entertain the public, not for business purposes or without consideration to the risks they lead to;

* European Lotteries (EL) was created in May 1999 under Swiss law with its registered office in Lausanne, Switzerland. The association that represents the state licensed lotteries and toto compa-

nies in Europe. It has more than 70 members in more than 40 countries. In the Member States of the European Union (EU) there are about 50 members.

- STAKEHOLDERS: EL sports betting members' shareholders are States or reputable organisations that care about their civil and public obligations and role in society in a financially transparent and socially responsible way. As they fulfil their mission to channel the betting desire and to limit the private profits made with gambling, they are proud, as a natural consequence, to contribute to the general interest and to fund good causes in society.

II - CODE OF CONDUCT OBJECTIVES

The EL Code of Conduct on sports betting aims at satisfying the following objectives:

- to reaffirm that the mission of the EL members operating sports betting goes far beyond sports funding which is only an ancillary and pleasant consequence of the channelling gaming desire objective;
- to implement actual mechanisms to fight corruption in sport and money laundering, and to promote responsible gaming;
- in the event of a joint enterprise between several official operators (for example a coordinated European sports betting game), to ensure that all participating operators share the same values;
- to benefit other stakeholders in the sporting realm by acting as an example of sporting responsibility;
- to benefit all citizens by channelling the desire of gaming in a responsible manner, so avoiding the supply of sports betting in jurisdictions where operators are not properly and seriously regulated and licensed. In particular, offering games for the jurisdiction where local, regional and / or national authorities have given explicit permission to operate for the specific approved games.

This Code is taken in execution of and related to the “European Lotteries responsible gaming standards”.

The Code will also consider and apply the experience of the “Matchinfo Group” (a group of EL members offering sports betting).

Each signatory of the code undertakes to complete and send Appendix 1, which states the national details specific to the signatory for the various sections, to the EL office no later than three months after the ratification of this document. Any new measure or modification to be deployed within the official operators shall be in place no later than six months after.

III - FIGHTING AGAINST GAMBLING RISKS

3.1 Fighting against corruption in sport

3.1.1 Selecting fixtures and bet types

Signatories are committed to carefully select the fixtures, other sport events and bet types offered for sports betting. Thereby they will refrain from offering betting activities with regard to such championships, sport events or meetings with risks of corruption, derisory financial stakes or potentially in position to be influenced in an obvious way.

3.1.2 Conflicts of interest

The global development of sports betting, linked to the increased popularity of the internet, is creating additional risks that must be taken into account. Financial means and interests involved in gaming are often so great that they sometimes exceed the sporting issues. In these circumstances, rules must be put in place to prevent partners from stepping out of line in this area:

For the EL sports betting members having signed this code, this means:

- abstaining from acquiring a majority share in a sports club or links with a sportsperson;
- not being a significant (i.e. that may be able to influence) partner of a sports team (or of a sportsperson) that might be involved in sports used for the purpose of organising betting.

More particularly, this means that an official operator mainly sponsor-

ing a professional football club or other sports club (or team) must never have any influence on the sports decisions taken by the club (or team). Should this in fact be the case, it must make sure that it never includes the club (or sportsperson) in its sports betting offer;

- an operator which is a signatory of this code must not acquire a sportsperson on behalf of a professional team, or hire a sportsperson at its expense in a competition in which it organises wagers (for example an athletics meeting or a professional tennis tournament). However the signatories are entitled to use advertising with athletes or sportspersons, when there is no way to influence them in their sport activities;
- unless they exclude the sport in question from their sports betting offer, all official operators' sponsorship contracts must state that the official operator plays absolutely no role and has no direct influence on the sports relations and decisions taken by the team or the event.

In regards to the employees of EL sports betting members in contact with sports betting:

- employees working for an official operator and acting in the sports world must avoid ethical conflicts;
- sports betting personnel cannot be involved in the management of sports teams included in their betting offer. This means ownership, daily management, board members. If this is the case, the team cannot be offered for bets
- sports betting personnel involved in odds compiling of a particular league or an event cannot be present in the team squads. This means players, managers, trainers. If this is the case, the team cannot be offered for bets
- sports betting personnel cannot act as referees. If this is the case, the event cannot be offered for bets;
- sports betting personnel cannot bet on their fixed odds betting product. Signatories will support action from football organisers to prevent players, coaches or club managers from betting on their own teams (or any other team in the same championship), in line with the agreement signed by the European Lotteries and UEFA. Those signing are willing to help and advise sports organisations in issues related to betting and possible scenarios that undermine the integrity of sports due to betting.

3.1.3 Monitoring against betting irregularities and match-fixing

- European Lotteries and UEFA have signed a Memorandum of Understanding (cf. Appendix 2). The EL sports betting members involved will voluntarily provide UEFA with information on irregular betting patterns on UEFA competition matches.
- World Lotteries Association and FIFA have signed a Memorandum of Understanding. The EL sports betting members involved will voluntarily provide FIFA with information on irregular betting patterns on FIFA competition matches.
- Individual official operators have signed Memorandums of Understanding with the sports federations of their home country. Official operators work together on monitoring through the Matchinfo Group and have to report specific observations of irregular betting in their country to each other. For each incident an expert group within Matchinfo / European Lotteries will analyse the information and decide whether to report the incident to the relevant sports federation. The signatories undertake to participate in this monitoring network.

Escalation steps in monitoring:

- Rumours received either via the retailers or other specific information sources, totally independent from turnover figures.
- Slight turnover irregularity not causing direct action at the official operator but causing more awareness of the match.
- Strong turnover irregularity, may be connected with rumours about match-fixing, which lead to reactions like odds-changing.
- Very strong turnover irregularities may be connected with rumours about match fixing, which leads to heavy reactions like closure of betting on the match or outcomes or excluding retailers/customers.

- Changes in the official operator's weekly sports betting programme (taking away / closing matches), due to other reasons (pitch, illness etc.).

Under these conditions, where the likelihood of corruption or abnormality is high, the signatories shall undertake the following:

- for oddset games, immediately stop the validation of bets placed on the match in question;
- for pool games, each official operator will take necessary actions according to its specific national gaming rules.

3.2 Fighting against money laundering

Sports betting payout rates (mainly for oddset games) are generally higher than in other games. There is also a relatively high chance of winning, given the few possible outcomes of sports events.

Without proper controls official operator's products are likely to be used in money laundering transactions. And certain types of sports betting are more prone to it. Therefore, in sports betting it is more necessary to implement mechanisms to effectively counter this undesired potential outcome.

3.2.1 Anti-money laundering legislation:

Members shall assess the opportunities for financial misconduct arising from sports betting.

Members shall seek relevant advice and implement appropriate steps to minimise the risks identified, such as :

- provide best efforts to encourage adoption of laws fighting against money-laundering in their local jurisdiction and to comply with all aspects of the local jurisdiction;
- monitor unusual amounts of stakes (for example per retailer, per combination, or per betting slip);
- large amounts of prize money shall not be paid out in cash but through alternative means such as cheques or bank transfers.

3.2.2 Monitoring events:

Corrupted events (by sport players or referees) considerably increase the risk of money laundering. This matter was covered in 3.1.

An agreement must consequently be promoted between the main sports federations (following the example of the agreement entered into between EL and UEFA as well as WLA and FIFA) in order to limit this type of corruption (for example, through the implementation of a Code of Conduct, which prohibits players, referees, managers or agents from betting on their own club, or on championships in which their club participates).

3.2.3 Monitoring odds (for oddset games):

in order to limit the risk of money laundering, the signatories undertake to propose responsible odds for their oddset games.

IV - PROMOTING RESPONSIBLE GAMING

see European Lotteries responsible gaming standards

4.1 Prohibiting gaming by minors.

4.2 Prohibiting credit gaming.

4.3 Providing information to players.

4.4 Limiting stakes.

V - PROMOTING SPORTING VALUES

5.1 Sport funding and promotion

As a matter of fact and consequence of the Government policy, all signatories of the Code of Conduct contribute directly or indirectly to the funding of mass sporting activities (and not just spectator sports) in their respective countries.

As their sports betting activity also provides money for public welfare, they either give a defined percentage of their turnover directly to sports or make money for the public budget that could possibly be used for sports funding as well.

5.2 Undertaking to promote sport

Beyond its legal obligations, each official operator uses its best efforts

to support sports through various mechanisms (company foundations, sponsorship, advertising).

5.3 Developing sporting ethics

The signatories will study the ethical assessment of sports organisations in liaison and in association with the sporting movement.

Therefore the signatories promise to support all sports organisations in their effort to create sporting ethics or even a scoring scale for clubs / teams / persons concerning their public behaviour on the targets to strengthen sporting ethics. The aim could be to determine a scoring scale for sports organisations beyond sports and finance considerations.

Two principles govern this approach:

- As sports betting operators, it is necessary to select the events to be offered to players with a maximum of objective criteria in order to correctly perform our role as responsible operators (for example, refraining from offering bets on a third division football championship in a country reputed for cases of corruption). It is consequently appropriate to select only meetings with a genuine sporting purpose (see 3.2.1).
- For the majority of sports, sporting criteria are currently the only factors included in rankings. For example, in cycling, where the sporting system is somewhat flawed due to the predominance of doping, it may be appropriate to firstly deal with image-related issues. In football, violence and racism only exceptionally lead to sporting sanctions. Image issues may therefore be given more emphasis in the rankings.

Given these conditions, the EL sports betting members signing the Code of Conduct undertake to consider a system of rating sports organisations (mainly clubs), which takes into account various factors (following the example of sustainable development over recent years):

financial transparency; compliance with rules; training young people; campaigning against doping; attitude towards institutions and the media;

A methodology will be proposed by the signatories to the Ethics Committee, encompassing the following matters (if the proposals will generate costs, each signatory shall be free to decide whether to take part or not):

- understanding the functioning of companies specialising in company ratings;
- adapting their rating system to the sporting movement;
- determining a series of questions which could be put to sports bodies;
- testing these points in practice (for example with UEFA).

5.4 Distributing the Code to sporting partners

The signatories undertake to promote the values and rules of this Code to their partners (particularly sportspersons). The bodies and sporting events to which they may contribute financially (for example, the Intertoto Cup) should also comply with these values and rules.

VI - MONITORING THE UNDERTAKINGS SET FORTH IN THE CODE

The signatories shall set up an Ethics Committee responsible for ensuring compliance with the provisions hereof.

Chaired by an independent and respected personality, it shall bring together representatives of EL sports betting members, the sporting movement and qualified personalities from civil society.

The signatories shall provide it with the necessary means to operate under an approved budget and shall guarantee its independence.

Signed (date) in

For (operator)

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