The International Sports Law Journal

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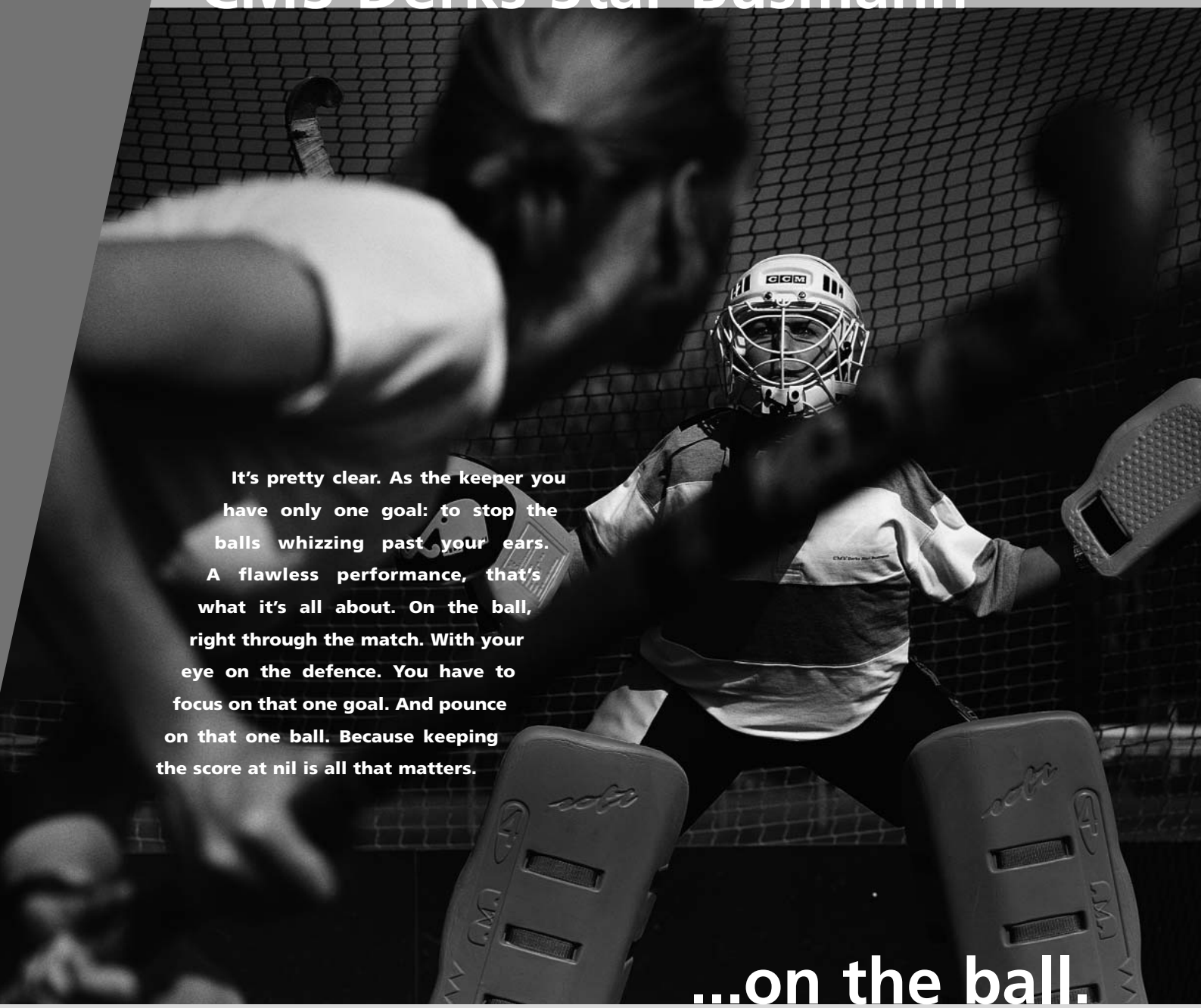

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In 2004, SENSE, the Sports & Entertainment NetworkS of Excellence, was established as a global network that offers its members the opportunity to acquire and exchange knowledge and expertise in the field of sports law in particular. As such, SENSE serves as a platform for international experts from different backgrounds and promotes contact between them. SENSE's aim is to continue to build and maintain an active and professionally managed global network of excellence that benefits its fellows, members and partners and international sports law in general. As the official network of the Asser International Sports Law Centre (AISLC), SENSE cooperates closely with the AISLC on an exclusive basis, thus assuring a strong link with the academic world. SENSE is committed to promoting the position of the ASSER International Sports Law Centre as an international leading research institution on sports law and to assist in presenting their services and products to the international sports sector. It also aims to safeguard and facilitate the continuity of the Centre's academic research.

Sports law is a rapidly expanding and developing area of legal debate and research. It is also an area of significant practitioner activity and of increasing academic analysis. Legal aspects are among the most important issues in the world of sports. The SENSE network is therefore targeted at legal practitioners, academics, government officials, sports officials, sponsors and other stakeholders in the world of sports, both amateur and professional. SENSE also intends to forge a relationship between the academic world and international sports practice.

Organisationally speaking, SENSE can be said to consist of two 'layers' with the ASSER International Sports Law Centre at its core. The first layer around the core consists of Fellows, i.e. distinguished legal experts or other persons involved in sports law at a strategic level. There are four categories of Fellows: practitioners, administrators, international sport officials, and academics. The position of Fellow is by invitation only.

The second layer of the network consists of Members, who are any persons with an interest in the field of sports law and the legal aspects of sports. One may become a Member by acceding to the network.

SENSE is currently developing an electronic network for knowledge exchange of which the SENSE website is the basis. All Fellows and Members have direct access to the network through this website (www.globalsense.net).

The information available at the ASSER International Sports Law Centre forms the main basis for the SENSE network in the field of sports law.

For this purpose, the SENSE website is directly linked to the website of the ASSER International Sports Law Centre (www.sportslaw.nl).

Additionally, SENSE supports the publication of books and reports, and organises conferences, seminars, workshops, lectures, etc., in support of the ASSER International Sports Law Centre. SENSE also assists in the management of The International Sports Law Journal (ISLJ).

The Editors

JANWILLEM SOEK, T.M.C. ASSER INSTITUUT

Panatheneum Stadium, Athens, Greece: *Stadium of the first modern Olympic Games of 1896 and finish of the Marathon race at the Olympic Games of 2004. On 25-27 November 2004, the International Association for Sports Law (IASL) organised its* 10*th, Jubilee Annual Conference in Athens, at the premises of the University of Athens.*

The Activities of the Japanese Sports Arbitration Agency

by **Masato Dogauchi***

1. Introduction

The Japanese Sports Arbitration Agency (hereinafter referred to as "JSAA") was established on 7 April 2003. It has been accepting requests for arbitration since 1 June 2003, and five arbitral awards have since been rendered. Although the JSAA might still be considered a newly formed organization, its work to date has already given rise to several issues worth reporting.

This article will first discuss the background of the establishment of the JSAA in Part I. In Part II, the organization, budget and staffing of the JSAA are explained. In Part III, the JSAA's arbitration rules and significant points concerning their application and administration by the Agency are introduced. There are two sets of rules: Sports Arbitration Rules and Special Sports Arbitration Rules (Sports Arbitration Rules for Cases Based on Specific Arbitration Agreements). The five cases which the Arbitration Panels have so far decided have all been based on the first set of rules mentioned. Summaries of these cases are presented in Part IV. Part V contains some comments on the developments to date and Part VI provides some conclusions.

2. Background of the establishment of the JSAA

1.2. Article 3 of the Judiciary Act

The need for an out-of-court dispute settlement mechanism to resolve sports disputes has been a topic of academic discussion during the meetings of the Japanese Sports Law Association.[1] One of the reasons that such a mechanism is necessary is that court proceedings, especially when followed by appellate proceedings, take a relatively long time to reach their conclusion when set off against the short period of time during which athletes are able to compete at peak physical condition. In addition, court proceedings often lead to high costs.

Apart from this, of the many types of sports disputes brought before the courts in Japan, some or nearly all are dismissed without ever reaching the stage where the merits of the dispute are examined. The reason is that sports disputes are not considered "legal disputes" in the sense of Article 3 (1) of the Judiciary Act of 1947,[2] which provides that courts are only competent to hear "legal disputes" unless exceptions are specially provided for in the Constitution. The term "legal disputes" here means disputes with respect to the rights and obligations of the parties which can be resolved by the application of the laws of a sovereign state. Disputes over sports associations' decisions as to the selection of athletes for competitions, disqualification or suspension, etc. are all the internal affair of the associations, and as such the associations' internal rules, rather than the narrowly defined sovereign state law, should apply to such disputes. Disputes concerning such decisions are considered as having to be resolved within the community of athletes itself. Reasons that are commonly cited to leave such disputes outside the subject-matter jurisdiction of the courts are that:

- judges on national courts are trained to apply sovereign state law;
- taxpayers who contribute towards the maintenance of the judicial system are not prepared to accept that resources are spent on the resolution of internal disputes among the members of a limited group or organization;
- the state should not intervene in such internal disputes, but should allow the group or organization to deal with them.

By such reasoning, the Tokyo District Court dismissed a case involving a sports dispute on 25 August 1994. The plaintiff was a racing car driver who was given a penalty in a particular race by an umpire committee. He appealed to the race's controlling body, but his appeal was dismissed. He subsequently started proceedings against the body in order to obtain nullification of its decision. In accordance with Article 3 of the Judiciary Act, however, the Tokyo District Court dismissed the claim without ever considering the merits of the case. The court held that, since the objective of the civil procedure system is to maintain the social order by providing a means of settlement of disputes or confrontations between private parties, the role of the courts is limited to promoting this objective and does not encompass addressing disputes of every kind that arise in daily life.[3]

2.2. Developments since 1998

A definite proposal for introducing a sports arbitration mechanism in Japan began to emerge along with the anti-doping movement. The Report on the Anti-Doping System in Japan (1998) which was drawn up by the Consultation Group on the Anti-Doping System[4] contained the first written assertion of the necessity for introducing a sports arbitration system in Japan. The main objective of the Report was to propose to establish an agency to enforce anti-doping rules in Japan[5] and it anticipated that strict enforcement of anti-doping rules would increase the number of disputes concerning the application of such rules. Hence, an appropriate mechanism to efficiently resolve such disputes was needed.[6]

In response to the Report, the Japanese Olympic Committee formed a study group on sports arbitration in December 1999.[7] The study group conducted research into the history and structure of the International Council of Arbitration for Sport (ICAS) and into the case law of the Court of Arbitration for Sport (CAS),[8] as well as sports-related arbitrations by the American Arbitration Association. It also examined the rules of commercial arbitration in order to gain insights that would benefit the preparation of prospective sports arbitration rules. Based upon this research, the study group elaborated a first draft of the sports arbitration rules.

While the study group was considering a prospective system of arbitration in June 2000, a dispute arose over the selection of an athlete for the Sydney Olympic swimming events. The Japanese Amateur Swimming Federation had excluded the swimmer Ms Suzu Chiba from the Japanese Olympic swimming team. Although there was no Federation rule present, nor any precedent which the Federation could rely on concerning how to deal with this kind of complaint, and although therefore the Federation was not under any obligation to accept arbitration, the swimmer filed a complaint to the CAS.

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1 The Japanese Sports Law Association was established in 1992. Dispute settlement is one of the issues discussed within this association.

2 Law No. 59 of 1947 as amended.

3 Similar decisions have been rendered regarding, among others, a dispute concerning religion (Supreme Court Judgment on 7 April 1981), and a dispute on the assessment of academic work (Tokyo District Court Judgment on 16 December 1992).

4 This Consultation Group was established by the Japanese Olympic Committee and the Japanese Amateur Sports Association in 1996.

5 In accordance with this proposal, the Japanese Anti-Doping Agency was established in September 2001.

6 The Report suggested as one solution that a branch of the Court of Arbitration for Sport could be established in Japan.

7 The members of this study group are law professors and practising lawyers, including the author of this article.

8 This was originally established in 1984 by the International Olympic Committee (IOC). In 1994, ICAS was created in order to make the CAS definitively independent from the IOC. See, http://www.tas-cas.org

Under the pressure of public opinion, especially as voiced by the mass media which extensively reported this incident involving a popular Olympic candidate, the Federation was practically forced to accept arbitration by the CAS, which decided to hold the proceedings in Japan before a sole Swiss arbitrator. In August, one month before the opening of the Olympic games, the CAS rendered its award to the effect that it dismissed the claim, but ordered the Federation to pay 10,000 Swiss Francs (around 656,500 Yen) to the claimant for the Federation's failure to make clear the criteria for selection beforehand. This was the first arbitration case in Japanese sports history and proved a good lesson for both Japanese athletes and officials of the sports associations. The athletes learned that there were means to contest unfavourable sports association decisions which were not sufficiently reasoned, while the sports associations learned that arbitration could be a useful mechanism to deal with baseless complaints as long as the associations made sure that their decisions were in accordance with good standards and procedures. Absent a proper mechanism, disputes between popular athletes like Ms Chiba and sports associations over major, attention-grabbing decisions would never cease to be discussed in the mass media which focus on the entertainment value of such disputes. A third-party decision would put a stop to such intense media coverage.

According to the outcome of a survey held by the study group in the autumn of 2000, many sport associations supported the idea of establishing an arbitration body in Japan.[9] In March 2001, the study group made public its report on the establishment of an independent arbitration body in Japan and distributed a draft of its arbitration rules. The reason that a Japanese arbitration body was opted for, was the fact the CAS procedure is to be conducted in accordance with Swiss law and that the working languages are in principle English or French[10] and this would considerably increase attorney's fees for both parties in cases between Japanese athletes and Japanese sport associations.[11] The group felt that such disputes should be conducted in Japanese and under Japanese law.

Based on the Report, the Japanese Olympic Committee (JOC), the Japanese Amateur Sports Association (JASA)[12] and the Japanese Sports Association for the Disabled (JSAD)[13] set up a committee in August 2002 to lay the foundation for the future Japanese Sports Arbitration Agency. This committee considered such details as the location of the Agency, internal operations, and a financial mechanism.

3. Structure of the JSAA

3.1. The Byelaws

On 7 April 2003, the JSAA was established. In accordance with the Byelaws of the Agency, its objective is "to support the development of sports by administering services to efficiently settle disputes between, among others, athletes and sports associations through arbitration" (Article 3).

It is important that the management of a decision-making body is organized properly and effectively. It was considered that the neutral position of the Agency within the sports world would be its most significant attribute. This implied that the composition of the Board of Directors, which is the highest-ranking organ in terms of control over the activities of the Agency, had to be sufficiently diverse. The Board consists of nine Directors (Article 13), from three different categories. At least three Directors have to be (former) athletes, three at the most have to be officials of sports associations, and the three remaining Directors are neutral persons. Since the establishment of the Agency was promoted by the JOC, JASA and JSAD as described above, these three associations were allowed to designate two Directors respectively, provided that at least one of the two designated persons was an athlete or ex-athlete (Article 14(1) and (2)). The six Directors designated in this manner in turn designate the three remaining neutral Directors (Article 14(3)). All decisions of the Board of Directors are rendered by majority vote (Article 23 (2)). This system makes it impossible for a collective consisting of all the Directors from a single interest group to decide any matter without the support of at least two other Directors. The nine Directors so designated appoint the President and two Auditors (Article 14(5) and (7)).

3.2. Financial Affairs

The three sports associations mentioned above provide financial support to the Agency. Each donates to the Agency 3,000,000 yen (approximately 30,000 US dollars) a year. The Agency utilizes 9,000,000 yen a year for promoting the rule of law in sports not only by providing arbitration services but also by providing information concerning sports law (Article 4).

3.3. Staffing

The author of the present article, who was a Professor of Law at the University of Tokyo at the time, was elected President by the Board of Directors and designated Mr Tadahiko Fukushima, who was a Director of the JOC at the time (and who has since, after his retirement from the JOC, been succeeded by Mr Joichi Okazaki, a Director of the JASA) and Mr Tetsuro Sugawara, attorney-at-law, as Standing Directors (Vice-Presidents). At present, two part-time employees perform daily administrative tasks in the Agency and serve as officers in arbitration proceedings. The office is located in the Tokyo Olympic Memorial Pool Building in Yoyogi, Tokyo. The office is open from 14:00 through 17:00 on weekdays. Almost all communication takes place by e-mail, for example as between the office and the parties and between the office and the arbitrators. In addition, there is a website for promoting the JSAA's activities and public relations (http://www.jsaa.jp).

4. Arbitration Rules of the JSAA

4.1. Two Sets of Arbitration Rules

The JSAA has two sets of arbitration rules: the Sports Arbitration Rules, and the Sports Arbitration Rules for Cases Based on Specific Arbitration Agreements (Special Sports Arbitration Rules). The former were adopted (as the first task to be completed by the Board of Directors) on 7 April 2003 and came into force on 1 June 2003, while the latter were adopted on 14 May 2004 and came into force on 1 September 2004.

The key difference between the two sets of rules is the scope of their subject-matter jurisdiction. The scope of application of the Sports Arbitration Rules is limited to cases involving athletes who fall under sports associations that are governed by the JOC, JASA and JSAD, while the Special Sports Arbitration Rules cover all sports disputes, including sports business disputes. Due to this difference, the application fee for cases brought under the former rules is nominal (approximately 500 US dollars), while under the latter rules, the fee is calculated in accordance with the amount of the claim brought by the applicant.

The main features of the respective rules will be introduced in the following sections.

4.2. Sports Arbitration Rules

(1) Subject-Matter Jurisdiction: Athletes v. Sports Associations Only

It would be highly desirable if the JSAA were able to deal with all manner of sports disputes, but considering the limited staff available to the JSAA and its budget, the JSAA has had to limit its subject-matter jurisdiction to disputes where athletes request arbitration against sports associations with regard to decisions taken by the JOC, JASA, JSAD or those sports associations which are members or quasi-members of one of the three (Article 8(1)). Judgments by umpires during

9 The Survey was held in November 2000 among 38 sports associations. Some 79% supported the idea of the establishment of an arbitration body.

10 Rule 29 of CAS Procedural Rules.

11 Athletes only pay 500 Swiss Francs in court fees in the case of a CAS procedure (Rule 65.2 of the CAS Procedural Rules). However, it was reported that Ms Suzu Chiba spent around 10,000,000 Yen (about 100,000 US Dollars) for her appeal including attorney's fee.

12 The JASA is responsible for organizing the National Sports Festival (Japan's biggest national sports event), which has been held every year since 1946.

13 The JSAD is responsible for selecting athletes for the Paralympics.

games are excluded from the scope of the Rules (Article 2(1)) in order to secure the uninterrupted administration of games under the control of umpires. Thus, typical cases concern decisions on the selection of athletes to such sporting events as the Olympic Games, National Sports Festivals or the Paralympic Games, or decisions disqualifying individuals for violations of anti-doping rules.

(2) Application Fee: 50,000 Yen
As the JSAA aims to achieve transparency in the sports world by providing a reasonable dispute settlement mechanism, the JSAA system works for the benefit of athletes who allege that they have been treated unfairly due to unreasonable decisions of sports associations. In order to enable athletes to file complaints to the JSAA, it was considered that financial requirements should be structured in the athletes' favour. As a result, athletes pay only 50,000 yen as a filing fee (Article 3 of the Rules on Application Fees), and the JSAA itself in principle[14] bears all costs involved in settling the disputes by arbitration. This cost burden to the JSAA is another reason for limiting the subject-matter jurisdiction of the Agency.

(3) Arbitration Agreements
In order for claims to be admissible, the athlete and the sports association must have concluded an arbitration agreement in writing or in some other manner which definitively represents an agreement between the parties (Article 2(2)). Where a sports association expressly states that it is willing to arbitrate a dispute with an athlete over one of its decisions, a presumed arbitration agreement is deemed to exist from the moment when the athlete files his complaint to the JSAA (Article 2(3)). Some sports associations have incorporated an arbitration clause into their byelaws to the effect that they agree to appear in arbitration proceedings whenever athletes file a request for arbitration with regard to their decisions.[15]

(4) Three Arbitrators in Principle, One Arbitrator in an Emergency
In ordinary cases, the applicant may choose one arbitrator and the respondent may choose another, and the two arbitrators so chosen designate the final arbitrator (Articles 21 and 22). These three arbitrators then make up the Arbitration Panel. However, in emergency cases, a single arbitrator may also decide the case (Article 50).[16] For instance, when only two or three days are left before the commencement of an event in which the applicant wishes to participate notwithstanding a decision to exclude him by the relevant association, a complaint against the association's decision must be heard and a decision must be delivered within this short period of time or the award would be in vain.

(5) List of Candidate Arbitrators
Because sports arbitration and sports law are relatively new subjects in Japan, it is difficult for parties to find an appropriate arbitrator without any guidance. In order to facilitate the selection of arbitrators, the JSAA maintains a list of candidates who could serve as arbitrators on its website. While at its inception there were only 31 candidates on the list, there are now 60. All candidates are lawyers (professors of law and attorneys-at-law) who are not only willing to serve as arbitrators, but also study sports law and the practical side of sports by attending regular Sports Law Research Meetings which are held by the JSAA three or four times a year.[17]

(6) Procedural Timeframe
In sports cases, considering the short period of athletes' competitive lives, it is important to render an award quickly. According to the Sports Arbitration Rules, athletes have to submit their claims to the JSAA within six months from when they were notified of the decisions in question, or in cases where they were not notified of the decisions, within a year from when the decisions were made. These time limits are mandatory in order to ensure the conclusiveness and finality of the decisions.

At least one hearing must be held in all cases. If a one-day hearing is not sufficient, there should be consecutive hearing days for as long as necessary.

In principle, the Arbitration Panel must render a reasoned decision within three weeks from the date of closing of the oral hearing. This rule is not mandatory, but simply a target standard for Arbitrators.

4.3 Special Sports Arbitration Rules (Sports Arbitration Rules for Cases Based on Specific Arbitration Agreements)

In addition to applications based on the Sports Arbitration Rules, the JSAA from 1 September 2004 accepts applications for arbitration concerning all possible sports-related disputes, provided that the parties have concluded an agreement to settle the dispute under the Sports Arbitration Rules for Cases Based on Specific Arbitration Agreements. These Rules apply to cases where a "specific" arbitration agreement exists between the parties. In reality, the cases under these Rules are "general" in terms of their scope, but the JSAA was already dealing with specifically limited cases under the Sports Arbitration Rules and therefore used the term "specific" in this second set of Rules. Of course, these Rules are also truly "specific" in the sense that the arbitration clauses in the rules of sports association do not apply to the cases dealt with under these second Rules. There must be a specific agreement for the settlement of disputes which may arise or have already arisen between the parties.

As mentioned above, the JSAA should ideally handle all cases relating to sports disputes, but in fact it only deals with a limited number of cases. The JSAA, at its inception, expressed its intention to play a major role as a dispute settlement body for the sports world. However, there is one significant difference between the first set of Rules that were adopted and the second set of Special Rules: athletes need only pay 50,000 yen as an application fee under the former, whereas they have to pay an amount calculated in accordance with a formula along the same lines as those used in commercial arbitration under the latter.[18] Because of the relatively high costs involved for the parties, cases to be dealt with under the Special Sports Arbitration Rules will commonly concern business disputes, such as broadcasting companies and organizers of sports events, or between famous athletes and their sponsors who use the athlete's name and image in marketing activities, or perhaps between professional players and the entity running their teams, etc.

At the time of writing, the JSAA had yet to accept cases under these Special Sports Arbitration Rules.

5. Cases

After two months of preparation, the JSAA as of 1 June 2003 began to accept applications for arbitration under the Sports Arbitration Rules. Since then, the Sports Arbitration Panels have delivered five awards (two cases in 2003 and three cases in 2004).

14 In exceptional cases, the decision taken by an association can be so defective that the arbitration panel may order the association to pay for all or part of the costs borne by the Agency (Article 44(2)).

15 On 31 December 2004, 34 sports associations had included such automatic arbitration clauses.

16 Of the five cases discussed in Part IV, two (the Taekwondo Case and the Equestrian Case) were dealt with under emergency rules.

17 In principle, the arbitrators' fee is 50,000 yen (about 500 US Dollars). The JSAA may increase the amount up to 100,000 yen depending on the complexity of the case, etc. This amount is only an honorary fee for a public service given the time and the energy which the arbitrators invest in solving cases (one arbitrator has said that he spent 50 hours on a particular case).

18 The JSAA adopted the formula of the Japanese Commercial Arbitration Association (JCAA), which is the best-known commercial arbitration body in Japan. The formula is somewhat complicated. When an applicant's claim cannot be calculated in terms of economic value, the application fee plus the administrative fee is 1,102,500 yen (about 11,00 US Dollars) (52,500 yen + 1,050,000 yen). In addition, parties must pay the arbitrators' fees (if the arbitrator's fee is 30,000 yen per hour and three arbitrators spend 25 hours each, the total amount of arbitrators' fees is 2,150,000 yen). Consequently, in this example, the parties must bear about 3,250,000 yen in costs, not counting attorneys' fees. However, according to the formula, when an applicant's claim is 1,000,000 yen, the administrative fee is 210,000 yen; when an applicant's claim is 10,000,000 yen, the administrative fee is 367,500 yen; when an applicant's claim is 100,000,000 yen, the administrative fee is 1,365,000 yen.

However, it should be noted that some cases were settled before they could actually be heard. In these cases, the sports associations in question after reading the athletes' complaints decided to alter their decisions in favour of the athletes.[19] By contrast, in three cases the sports associations refused to accept an arbitration agreement after applications to the JSAA by the athletes.[20]

Of the five cases in which the Arbitration Panel has rendered a decision, one concerned a dispute over disqualification and four concerned disputes over selection. In one case (the disqualification case) the athlete was successful, while the other four (all of the selection cases) were decided in favour of the sports associations involved. A summary of each case is given below.

5.1 Weightlifting Case (4 August 2003)

In this case the applicant was a coach, who at one time coached a women's weightlifting team at a university. During that period, a male weightlifter on the men's weightlifting team at the same university was arrested for possession of a prohibited drug in accordance with Japanese criminal law. The Weightlifting Association thereupon decided to impose a penalty on the persons responsible in the university's weightlifting team. The applicant was consequently disqualified from his duties as official coach for six months as the Association considered that he had been the person responsible for maintaining order within the team. The applicant asserted before the JSAA that he could not be held responsible for the activities of the arrested athlete on the men's weightlifting team, as the two teams did not even train in the same building and the training facilities for the women's team were far removed from the location where the men trained. The applicant also raised the question of whether coaches may reasonably be expected to be responsible for the personal lives of the athletes on his team, especially for violations of criminal law by these athletes. The Association agreed to the arbitration on an *ad hoc* basis, i.e. by giving its specific consent, as it had not included an arbitration clause in its byelaws.

The Panel found that the Association had failed to comply with fundamental principles of due process in many respects: it had not allowed the applicant any opportunity to assert his position, it had not notified the decision to the applicant directly, etc. Accordingly, the Panel annulled the decision, without examining the substantive questions on the merits. The Panel also ordered the Association to pay the applicant's application fee (50,000 yen).

5.2 Taekwondo Case (18 August 2003)

Two rival associations claimed to have exclusive competence concerning the sport of Taekwondo in Japan. With the selection of Taekwondo athletes for participation in the Universiade Games to be held in Taegu in Korea in mind, the JOC asked the associations whether they could discuss merging into a single Taekwondo association so as to be able to recommend appropriate athletes to the JOC unanimously. However, the associations were unable to agree and the JOC decided to proceed without their recommendations and selected one athlete and two coaches for the Universiade Games. A coach who had not been selected then filed an application for arbitration against the JOC arguing that if there were three vacancies, at least two athletes should be selected. The JOC had already automatically agreed to arbitration in accordance with a previous decision by its Board of Directors.[21]

As there was less than a week in which to settle the case,[22] JSAA decided to deal with it under the emergency provisions in the Sports Arbitration Rules.[23] A practising lawyer served as the sole arbitrator.

Immediately after the hearing,[24] the Panel dismissed the claim since it had found no defects in the JOC decision. The reason that two coaches had been selected was that the athlete in question after his selection switched from one association to the other. Hence, a second coach from his new association also had to be appointed. The Panel found the decision reasonable.

5.3 Disabled Swimmer Case (16 February 2004)

A disabled swimmer, who participated in the Sydney Olympics and won several gold medals, but was unable to participate in some races as she lost consciousness as a result of her condition, was not appointed by the Japanese Disabled Swimming Association as a specially appointed athlete for capacity-building. She suffered from nephrosis at the age of eleven and became partly paralyzed as a result of myelitis at the age of 23. At 48 years old at the time of her application, she had already been receiving treatment with steroids to maintain her physical condition for many years. The Association accepted to submit to arbitration on an *ad hoc* basis and appeared during the proceedings. The applicant and the respondent both relied on expert opinions from doctors in their favour. Instead of investigating the reliability of these opinions, the Arbitration Panel examined the process of decision-making based on the doctors' opinions from a legal point of view and found no illegality in this respect. Accordingly, the Panel dismissed the claim of the applicant.

5.4 Equestrian Case (14 July 2004)

An equestrian had not been included as a member of the Olympic team for the Games in Athens of 2004. The athletes in this field had been informed of certain minimum requirements for inclusion, including participation in specifically designated competitions in European countries. One of the officials of the Association travelled to Europe to evaluate the performance of the Japanese athletes. He submitted his evaluation report to the selection committee established within the Association which had to decide on the delegation to the Athens Olympic Games. According to the applicant, this report could not form the basis for the selection as the official who had written it had personal connections with some of the selected athletes. The Association accepted arbitration on an *ad hoc* basis.

The Panel found that the method of selection was indeed subjective and did not have the support of all athletes, but came to the conclusion that the inappropriateness of the process was not so significant as to render the decision invalid, especially since the Association had to be allowed a margin of discretion up to the point where the adopted method would stray outside a certain permissible range. For this reason, the applicant's claim was dismissed. However, considering the seriousness of the defects of the process, the Panel ordered the Association to pay to the applicant 50,000 yen to cover her arbitration fee and 500,000 yen to cover part of her attorney's fee.

5.5 Disabled Track and Field Athlete Case (26 August 2004)

A visually impaired 37-year old athlete participated in the Paralympic Games in Sydney in 2000 and won 6th place in the disabled triple jump. However, he failed to be selected for the Paralympic Games in Athens in 2004, whereupon he filed an application for arbitration against the Disabled Track and Field Sports Association, which agreed to submit the dispute to arbitration on an *ad hoc* basis. The applicant among other things asserted that the rules that had been applied to him went against the official rules for Track and Field Sports as published by the International Paralympic Committee and that the umpires and other officials were insufficiently aware of these rules.

19 This has happened in at least three cases.

20 These involved the sports of boxing, cycling and golfing respectively. In the case concerning boxing, the Amateur Boxing Association refused to appear in the arbitration proceedings. According to media reports, a spokesman of the association claimed that the dispute over the decision to suspend a boxer for the duration of one year from the official games which the Association organises due to the fact that the now 16-year old boxer had participated in a professional exhibition game when he was 14 and before becoming a member of the association had to be heard by an ordinary court, rather than by a panel of arbitrators. The spokesman also added (incorrectly) that the Agency listed candidate arbitrators who were not legally trained. The JSAA responded by declaring its regret and concern over the attitude of the association.

21 The JOC is one of the sports associations to have accepted the jurisdiction of any Panel of Arbitrators over decisions taken by it.

22 The application was filed on 13 August, while the Universiade Games were to be opened on 21 August with the Taekwondo competition still to be held in August.

23 Article 56 among other things provides that a sole arbitrator designated by the JSAA must render an award as promptly as possible. The decision may be given orally to be followed by a reasoned award afterwards.

24 The JOC, the respondent, filed its brief on 15 August, two days after the applicant, and the hearing was held on 18 August.

The Panel held that the incorrect application of the official rules, if any, by umpires during an event could not be the subject of arbitration in accordance with Article 2(1) of the Sports Arbitration Rules. Consequently, the Panel dismissed the case.

6. Some Observations

6.1 Case Law

Although only five cases have yet been decided by the JSAA, four of them concerned the selection of athletes. It might therefore be possible to provide the following tentative digest of case law in this respect.[25]

Sports associations have a certain margin of discretion to manage matters relating to the sports under their control and responsibility. Arbitration Panels in principle respect the decisions concerning the selection of athletes as made by the sports associations. However, Arbitration Panels may annul such decisions if they meet any one of the following criteria:

1) the sports association did not follow any rules of selection or followed rules which went against applicable national law or significantly failed the standard of reasonableness;
2) the sports association violated its own adopted rules;
3) the sports association did not violate its own rules, but its rules significantly failed the standard of reasonableness; or,
4) the process of decision making was defective.

The cases under the Sports Arbitration Rules are similar to cases in administrative law in the sense that the applicants are the parties whose interests were affected by the decisions of the respondents who have the power to control the groups of which the applicants are members. Accordingly, the principles applied in the cases described resemble the established rules in cases started by private individuals against decisions of public authorities.

6.2 Obiter dicta

In some of the awards, arbitrators added comments which were not directly related to the conclusions drawn, but were considered necessary to alert the successful party or the public to certain facts. For instance, in the Equestrian Case, the arbitrators mentioned as *obiter dicta* the inappropriate points in the process of selection by the Association and suggested that the Association amend them.

Opinion among lawyers is divided on this point: one half supports this practice as necessary to make the sports world aware of he rule of law, while the other half opposes it as unnecessarily arousing sentiments among the different groups in sport. Although the matter still has to be discussed more thoroughly, such *obiter dicta* seem necessary at the moment where the associations have not understood what the rule of law required of them in the exercise of their powers. However, Panels should also be careful not to harm the parties' interests unnecessarily by including *obiter dicta*. It is especially important to note that parties in the arbitration cannot raise any objections to *obiter dicta*. For this reason, *obiter dicta* should be based upon established facts after the parties have had an opportunity to argue these facts.

6.3 Public Acceptance

In the summer of 2004, a sports journalist wrote a bitter comment on the activities of JSAA, and especially on the award in the Equestrian Case.[26] The criticism was aimed at the fact that the Panel had dismissed the applicant's claim, even though it had found certain aspects of the Japanese Equestrian Association's selection process to be inappropriate. The following points were raised in particular:

- All sports associations should have learned the lesson taught them by the Chiba Case before the CAS in 2000,[27] where the association was ordered to pay the applicant 10,000 Swiss Francs (around 656,500 Yen) due to the inappropriateness of its selection process;
- The Japanese Equestrian Association, in particular, should take extreme care not to violate the due process of selection, given its shameful history (in 1996, all directors had to resign due to problems in the selection of athletes for the Olympic Games in Barcelona);[28]
- If the Arbitration Panel in this case felt itself unable to annul the decision of the Association based on mere legal interpretation with no eye for the evil reality, the JSAA had no right to exist.

In response to this article, the JSAA explained its position to the writer and the editor of the journal and published it on its website:

- Although the JSAA was not in a position to defend individual arbitral awards taken by independent Arbitration Panels, it considered it important to explain its position from a desire to gain public acceptance of its activities;
- The objective of the JSAA was to clarify the rule of law in sports and the JSAA considered that one direct or indirect result had already been that it had brought the law to wider attention in general;
- It should be noted that sports associations had even voluntarily amended their decisions when they found them inappropriate after considering assertions by athletes;[29]
- For this reason, no sweeping conclusions should be drawn from just the arbitral awards which had been made public, even though an athlete had only been successful in one of these;
- However, the JSAA recognized the importance of aiming to persuade more sports associations to include automatic arbitration clauses in their rules.

7. Conclusion

As people from every corner of society are interested in sports arbitration, especially in cases involving popular athletes, it is important to make clear to the public the significance of the role of a dispute settlement mechanism in sports. On 14 December 2004, therefore, the JSAA held a symposium together with a representative of the mass media.[30]

Although it is true that the Agency does not have the power to force unwilling sports associations to accept arbitration agreements with complaining athletes, the associations should also understand that court proceedings would in some cases be useless because of the limited subject-matter jurisdiction of the regular courts (legal disputes only) and the fact that court proceedings are very time-consuming, especially if followed by appeal proceedings, after which a one-year suspension will almost certainly have expired.

More importantly, considering that sports associations have a social responsibility when they make decisions that significantly affect the lives of athletes, they should not resist having their decisions evaluated from a legal point of view. Accordingly, the JSAA must endeavour to persuade sports associations to insert automatic arbitration clauses in their rules with regard to disputes over their decisions. This would make it clear to athletes whether the association they belong to can be relied upon to act in accordance with good practice.

25 Items 1) through 3) were established in the Weightlifting Case (2003), item 4) was added in the Disabled Swimmer Case. The Equestrian Case (2004) and the Disabled Track and Field Athlete Case (2004) followed all four criteria.

26 Yasushi Washida, Questioning the Reason of the Existence of the Sports Arbitration Agency, NUMBER, No. 608, p.176 (2004).

27 See, II.2.

28 The Japanese Equestrian Association had adopted clear criteria for selection: all candidates had to take part in one single event and the top-ranking athletes in this event were to be selected. However, it subsequently abandoned this method in favour of more unclear means of selection.

29 See, supra note 19.

30 Nippon Keizai Shimbun Company, which publishes a well-known financial newspaper (*Nikkei*). During this symposium, one of the arbitrators listed on the website of the JSAA, a sports commentator and a number of athletes, among whom Olympic medallists, discussed the role of the JSAA in the sports world.

The Trials and Tribulations of the Court of Arbitration for Sport

Contribution to the Study of the Arbitration of Disputes concerning Disciplinary Sanctions

by **Andrea Pinna***

1. Introduction

The recourse to arbitration to settle sports disputes dates back to Antiquity. Evidence can already be found in Ancient Greece, in particular in Homer's works.[1] However, the arbitrators were invested with the power to determine whether a given athlete had respected the rules of the game during the competition. Therefore, this was not "arbitration" in the legal meaning. Indeed, the arbitrator was situated outside the law, because he was not called upon to apply a legal rule, but a rule of play.[2] However, because the panel called upon to settle these disputes was organised as a real court, ruling after the competitions, their decisions resemble the arbitral awards of our times. There is, however, an important difference between these two kinds of decisions and nowadays, as a principle, there are no courts that have jurisdiction to give a ruling on the application of the rules of play after the game. National courts and arbitration panels can only be competent only for the application of legal rules related to sport. The issue of whether arbitrators should be competent for the application of the rules of play is still topical.[3] If recent case law of the Court of Arbitration for Sport (CAS) has, at least implicitly, accepted the review of officials' decisions applying rules of play,[4] Swiss case law is of the opinion that it is not possible to bring a claim in order to assess whether a sports body has correctly applied a rule of play.[5]

On the other hand, the settlement of the disputes regarding the application of legal rules in sports matters is much more recent. The reason is that sports law is in itself a recent discipline, which found its *raison d'être* after the development of professional sport and the important profits which it engenders for the various operators of this economic market. One major consequence of the global phenomenon of commodification of sport-related activities is the development, next to the rules of the game, of legal rules which frame the practice of sport.

National sports law should compromise with the legal rules emanating from sports bodies and associations.[6] These rules are enacted by the National Federations, but also by international bodies, such as the international federations of every discipline, which elaborate the rules of the competitions which they organise, the International Olympic Committee (IOC), which drafted the Olympic Charter, or the World Anti-Doping Agency (WADA), which has recently enacted the World Anti-Doping Code. These rules, which find their origin in the decisions of organisations of an essentially private nature, are nevertheless of general application and determine, for example, the conditions of participation in the Olympic Games, the principles of sports nationality, the conditions of an anti-doping test and the sanctions in the event of a positive result. The importance and the number of these rules, as well as the difficulty of their application, have given raise to a great deal of litigation.

Since, such disputes are often of an international nature or can have international consequences, the idea soon arose to withdraw them from the jurisdiction of national courts and to subject them to arbitration. One of the advantages of arbitration is that it is the only way to guarantee uniform interpretation and application of the norms in the international sport.[7]

2. The Court of Arbitration for Sport

An arbitration centre specialised in the settlement of sports disputes was set up in the 1980s under the name of Court of Arbitration for Sport.[8] Today, this Court, having its seat in Lausanne, has today jurisdiction to settle numerous sports disputes and its importance is expected to grow since the bye-laws of the international sports federations increasingly include an arbitration clause. Such arbitration agreements endow the CAS with exclusive jurisdiction to settle disputes between the federations and their members, which are not only the athletes, but also the sporting clubs and the national federations. Recently, after long negotiations, the UEFA has also agreed to include such an arbitration agreement in its bye-laws.[9] The FIFA, after having opted in 2001 for the setting up of an *ad hoc* arbitration court dealing only with football-related matters, viz. the Court of Arbitration for Football, modelled on the CAS,[10] decided at the end of 2003 to include in its bye-laws an arbitration agreement conferring jurisdiction on the CAS.[11]

The arbitration of sports-related disputes is not uniform. Indeed, there are two types of sports conflicts. On the one hand, it is usual to speak of sports arbitration for disputes which are only related to sport matters. There are essentially disputes of an economic nature concerning contracts entered into by the different operators in the sports world viz., sponsoring contracts, contracts over broadcasting rights,

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1 For the details of the passages concerned, see D. Panagiotopoulos, Court of Arbitration for Sports, 6 Vill. Sports & Ent. L.J. 49 (1999).

2 On the question of the difference between rules of law and rules of play, see Ch. Jarrosson, La notion d'arbitrage, Diss. LGDJ 1990, no. 9; F. Vouilloz, Règles de droit et règles de jeu en droit du sport - l'exemple du dopage, PJA (Pratique juridique actuelle) 1999, pp. 161 ff.

3 See, e.g., R.J. Locklear, Arbitration in Olympic Disputes: Should Arbitrators Review the Field of Play Decisions of Officials?, 4 Tex. Rev. Ent. & Sports L. 199 (2003).

4 See CAS, Ad Hoc Division, Athens OG, 21 August 2004, English, French and US Olympic Committee v. FEI, L'Equipe 22 August 2004, concerning a disputed violation of a rule of preparation of the rider Bettina Hoy in the show-jumping round, the final component of the Olympic equestrian three-day long team event.

5 Swiss Federal Court, 21 January 1982, ATF 108 II 15, rendered in application of Article 75 of the Swiss Civil Code.

6 On the relations between State and private bodies' regulation of sport, see, e.g., J.-P. Karaquillo, Les normes des communautés sportives et le droit étatique, D. (Recueil Dalloz) 1990, Chr. 83; G. Simon, Puissance sportive et ordre juridique étatique, Diss. LGDJ 1990; G. Auneau, P. Jacq, Les particularismes des contentieux sportifs, J.C.P. (Juris-Classeur Périodique) 1996.I.3947.

7 See P. Jolidon, Arbitrage et sport, in Recht und Wirtschaft Heute, Festgabe zum 65. Gebrtstag von Max Kummer, Bern 1980, pp. 633-656; B. Simma, The Court of Arbitration for Sport, in Law of Nations, Law of International Organizations, World's Economic Law. Festschrift für Ignaz Seidl-Hohenveldern, Köln, Heymann, 1988, pp. 573-585; A. Samuel, R. Gearhart, Sporting Arbitration and the International Olympic Committee's Court of Arbitration for Sport, 6 J. Int'l Arb. 39-53 (1989); D. Oswald, Le règlement des litiges et la répression des comportements illicites dans le domaine sportif, Mélanges en l'honneur de Jacques-Michel Grossen, Bâle, Francfort-sur-le-Main 1992, pp. 67-82; A.T. Polvino, Arbitration as Preventive Medicine for Olympic Ailments: The International Olympic Committee's Court of Arbitration for Sport and the Future for the Settlement of International Sporting Disputes, 8 Emory Int'l L. Rev. 347 (1994); J.A.R. Nafziger, Arbitration of Rights and Obligations in the International Sports Arena, 35 Val. U. L. Rev. 357 (2001).

8 The current legal literature on this type of arbitration is abundant. For the contributions by the promoters of the CAS, see K. Mbaye, Une nouvelle institution d'arbitrage: Le Tribunal arbitral du sport (T.A.S.), AFDI 1985 pp. 409-424; M. Reeb, Le Tribunal arbitral du sport: son histoire et son fonctionnement, JDI 2001, 234; D. Hahn, Tribunal arbitral du sport, TAS Digest 1993, pp. 5-36.

9 Articles 61 et seq. of UEFA bye-laws.

10 See V. Vigoriti, FIFA, arbitrato, metodi di risoluzione delle controversie, Riv. dell'Arbitrato, 2002, 653.

11 Articles 59 et seq. of FIFA bye-laws.

contracts of sports agents, athletes' transfer contracts and, athletes' employment contracts. The arbitration of such disputes presents only little specificity vis-à-vis traditional arbitration.[12] The fact that the dispute concerns sports matters is insufficient to bring originality and to justify the existence of an *ad hoc* arbitration institution. The only original characteristic consists in the fact that the contracts underlying the dispute often have athletes and the exercise of their activity as direct or indirect objects. In certain cases, such a circumstance can influence the arbitrability of the dispute, lead to the application of mandatory laws and even block the enforcement of an arbitral award in application of the exception of international public policy.[13] For example, French law contains an international mandatory law in Article 15-2 of the 1984 Sports Act which provides in its paragraph 3 that a sports agent can act on behalf of only one of the parties to the same contract, which gives him mandate and is the only party that can only remunerate him. It also provides that the contract between the agent and his principal must determine the remuneration, which cannot exceed 10% of the amount of the contract concluded by the intermediation of the agent. Such a provision on the profession of sports agent is unknown in most of European jurisdictions. It is also in contradiction with the regulations of some international federations that do not have limitations to the amount of the commission of sports agents, such as the FIFA regulations. Although the French Supreme Court did not qualify this provision as mandatory law, there can be no doubts that the provision of article 15-2 constitutes a mandatory law.[14] The limitation of the remuneration of the agent will be applicable even though the law governing the contract is a foreign law, as soon as the situation falls within the scope of application of French mandatory law, i.e., when part of the activity of the agent is performed in France.[15]

The Code of Arbitration of the CAS contains a particular procedure for this kind of quasi-traditional arbitration. However, cases have been only rarely brought before the CAS within the framework of such a procedure, called the ordinary procedure.[16] This is explained by the fact that, being arbitration of a traditional nature, the parties do not feel the necessity of subjecting their disputes to a specific arbitration institution and prefer to turn - when they wish to keep their dispute out of a national court - to forms of arbitration to which they are more used or that give them more flexibility. As a result, it is not this type of disputes that justifies the CAS's existence.

It is in the settlement of another kind of sports disputes that the jurisdiction of the CAS showed itself indispensable. Indeed, in the past ten years, parties have turned to CAS arbitration mainly to settle disputes concerning the decisions of disciplinary courts or panels of sports federations, associations or other bodies. The arbitrators are here called upon to rule on the validity of these decisions, which object is mainly the sanction of doping offences and, more generally, the admission and the exclusion and disqualification of the athletes from competitions. The arbitrators are competent to hear appeals against the decisions of sports bodies. The Arbitration Code of the CAS refers to this procedure as the appeals arbitration procedure.[17] The naming of the procedure is badly chosen because the CAS rules directly in first instance, the various "courts" and "tribunals" of the sports bodies not being real jurisdictions. Their absence of jurisdictional power is explained by the lack of independence that is inherent in the "courts" of the sports bodies and results from the fact that these "courts" decide in the name and on behalf of the body of which they are a part. Their decision therefore has a purely disciplinary nature and cannot have a jurisdictional one.

3. The jurisdiction of national courts in settling sports disputes

For several decades, the pyramidal and monopolistic structures of the international sport, the top of which is represented by the international federations and the International Olympic Committee (IOC), have tried place themselves above the State. These organisations are established as associations of private law and confer upon themselves legislative, executive and especially jurisdictional powers.[18] Numerous the legal tricks were adopted to circumvent the jurisdiction of national courts. Some international federations even managed to punish those of their members who decided to challenge the decisions of the federation before a court of law. The clause of bye-laws according to which ordinary jurisdictional appeal is barred and any non-respect of this rule punished used to be very widespread. It was quasi-unanimously considered illegal because it was contrary to public policy or the natural and constitutional right to claim before a court.[19] For many years now, however, national courts have constantly argued their competence to decide on the validity of the decisions of federations towards sportspeople, both in domestic and international matters.[20] This solution is approved by a majority of legal doctrine, but was hardly acceptable to the sports federations.[21]

When the *Fédération Internationale de l'Automobile* (FIA) had been sued before the Court of Paris, its president indignantly asserted that it was the first time in seventy years that one of its members had taken the federation to court.[22] The reactions arguing total independence of the structures of international sport with regard to national statutory law were sometimes vicious. Late Primo Nebiolo, one of the most important managers of the Olympic movement and of international

12 On this kind of arbitration, see V. Vigoriti, L'arbitrato sportivo in materia economica, Riv. dell'Arbitrato, 2000, 13; J.A.R. Nafziger, Resolving Disputes over Financial Management of Athletes: English and American Experiences, 3 Vill. Sports & Ent. L.J. 413 (1996).

13 For a detailed study of the athlete's status, see M. Baddeley, Le sportif, sujet ou objet?, RDS (Revue de droit suisse), 1996, II, p. 141-252.

14 E. Loquin, G. Simon, JDI 2001, 97, case note of Cass. Civ. I, 18 July 2000, Bismuth, Bull. civ. I, no. 217, p. 140.

15 For example, in an international transfer of a football player, the French mandatory law is applicable as soon as the player crosses the French border, i.e. if the club of origin or the club of destination is French.

16 According to the statistics published on the CAS website (www.tas-cas.org), the CAS adjudicated only 40 ordinary procedures between 1995 and 2001.

17 This procedure is governed by Articles R47 et seq. of the CAS Arbitration Code.

18 On the organisation of international sport, see M.R. Will, Les structures du sport international, in Studi in Onore di Rodolfo Sacco, Giuffrè 1994, Vol. 2, pp. 1211 ff.; J.A.R. Nafziger, International Sports Law, Transnational Publishers, 1988, pp. 25-38. See also M.B. Nelson, Stuck between Interlocking Rings: Efforts to Resolve the Conflicting Demands Placed on Olympic Governing Bodies, 26 Vand. J. Transnat'l L. 895 (1993-1994).

19 On the invalidity of a contractual term forbidding the appeal to a national courts from a decision of a private sport association, see G. Simon, Puissance sportive et ordre juridique étatique, Diss. LGDJ 1990, p. 156 and pp. 168-170. For the explicit invalidity of such a clause, see Court Liège, 11 June 1971, J.T. (Journal des Tribunaux belges) 1971, 751.

20 In international matters, see TGI Paris, 26 January 1983, Alboreto et autres v. Fédération internationale de l'automobile (F.I.A.), D. 1986 somm. p. 366, with annotation G. Baron; Court of Berne, summary proceedings, 9 September 1993, SA Olympique de Marseille v. Union des Associations Européennes de Football (UEFA), J.C.P. 1993.II.22178, with annotation M. Gros, M. Lascombe, X. Vandendriessche (ruling of the Swiss Court suspending the effects of the disciplinary sanction of the UEFA depriving Olympique de Marseille of the right to participate in international competitions while the team was only suspected of active corruption of another team); J.-P. Karaquillo, Réflexions sur la décision du Tribunal de Berne dans l'affaire UEFA-FIFA c/ OM-FFF (9 sept. 1993), Rev. jur. éco. sport, Esport, no. 23, 1993, 21; B. Niki-Hege, Les normes de sanctions dans l'ordre juridique sportif, D. 1994, Chr. 86. In domestic matters, see French Conseil d'Etat CE, 19 December 1980, Hechter, Rec. Lebon p. 488, which states that the disciplinary sanctions of sports federations have no judicial nature.

21 On the general issue of the relation between State and Federal powers in sport, P. Jolidon, Ordre sportif et ordre juridique, à propos du pouvoir juridictionnel des tribunaux étatiques en matière sportive, RSJB (Revue de la Société des juristes bernois) 1991, pp. 213-235; P. Jacq, L'intervention du juge dans le règlement des conflits sportifs dans les Etats membres de la Communauté européenne, Petites Affiches 21 juill. 1993, p. 40; J.-P. Karaquillo, Un "pluralisme judiciaire complémentaire" original: La résolution par les institutions sportives et par les juridictions d'état de certains "litiges sportifs", D. 1996, chr. 87. Article also published in an Italian translation under the title: La complementarità tra la soluzione delle controversie ad opera delle istituzioni sportive e la soluzione ad opera delle giurisdizioni statali, Riv. dir. Sportivo, 1996, 671; A. Lacabarats, Le juge, arbitre du conflit sportif, Dalloz, Hors-Série Justices, May 2001, pp. 61 ff.; Coccia, Fenomenologia della controversia sportiva e dei suoi modi di risoluzione, Riv. dir. Sportivo, 1997, 605.

22 Le Monde, 10-11 June 1984, p. 11. This case led to the ruling of the TGI Paris, 18 March 1987, Peugeot v. F.I.A. et FISA, non reported, quoted by T. Summerer, Internationales Sportrecht vom dem staatlichen Richter in der Bundesrepublik Deutschland, Schweiz, USA und England, Munich, VVF, 1990, p. 35.

athletics asserted that the arbitration tribunal of the International Amateur Athletic Federation (IAAF), of which he was president, was the court of last instance in athletics disputes. He continued by stating that the IAAF did not accept any decision from any Court anywhere in the world because all athletes were bound to respect the IAAF rules and those who disagreed could go away.[23] This position was asserted during the famous Butch Reynolds case.[24]

This case marks a change in the settlement of disputes between sports federations and athletes. Butch Reynolds was an American athlete, holder of the 400 metres world record. In 1990, after the athletics meeting of Monte Carlo, he was tested positive for steroids. The IAAF immediately disqualified him for two years. In spite of doubts and errors, which had spoiled the procedure of the doping test, the IAAF refused to withdraw its decision. Faced with this refusal, Reynolds decided to appeal the decision before national courts. The U.S. District Court for the Southern District of Ohio, State where the athlete had his residence, suspended the disqualification to allow him to participate in the Trials and to take his chances to qualify for the Olympic Games in Barcelona.[25] The IAAF refused to give effect to the ruling of the Court and, to force the organisers of the competitions and the American federation to apply its decision, threatened with disqualification - synonymous with non-participation in the Olympic Games - of all the athletes who would have competed with Butch Reynolds. Such a rule is referred to as the rule of contamination, whereby disqualification also affects the athletes who compete with the sanctioned one. Given the refusal of other athletes to compete with him on the track, Reynolds had no other choice than to claim compensation for the damage suffered. In a decision in first instance, the IAAF was held liable and was ordered to pay Reynolds USD 27,356,008, including more than USD 20 million in punitive damages. The procedure ended in 1994 with the cancellation of the ruling because of the incompetence of the Ohio Court and the refusal of the Supreme Court to rule on the question.[26] In spite of this, the Reynolds case engendered a radical change in the management of sports disputes by international federations.

Today the different bodies of international sport no longer ban appeal to national courts by principle and no longer claim to be beyond the jurisdiction of national law. Several incidents bear evidence to this change of attitude. For example, the International Sporting Code of the FIA was modified to recognise the possibility of bringing an appeal against a decision of this association's National Court of Appeal and its International Court of Appeal before national or arbitration courts.[27] The strategy of the IOC and the different international federations has consisted in envisage appeal to arbitration panels that are independent from the internal bodies of the association and upon which jurisdiction is conferred, in arbitration clause, to settle disputes between the federations and their members. The independence of arbitration centres and arbitration courts is able to sensitively reduce the competence of national courts.

4. The appeals arbitration procedure of the CAS

The arbitration procedure of appeal before the CAS is meant to prevent appeals against the decisions of sports bodies from going before national courts. These appeals cases constitute the main type of litigation that the CAS is called upon to settle. Between 1995 and 2001, the Appeals Arbitration Division of the CAS had to settle 173 appeals. These are essentially appeals of disciplinary exclusions and disqualifications as a result of doping offences and of decisions concerning the sports nationality of athletes. Nowadays, the appeals procedure represents the main activity of the CAS. The experience of the CAS in dealing with such cases will be dealt with in this article.

Appeal to the CAS presents the usual advantages associated with arbitration as an alternative dispute resolution system.[28] These advantages include speed, simplicity and the low cost of the procedure, as well as the professional skill of the arbitrators. However, the same cannot be said for confidentiality; the arbitral award rendered in application of the appeals arbitration procedure is, in principle, public. The parties can agree that the award will remain confidential.[29] This means that one party cannot unilaterally impose confidentiality upon the other party. However, confidentiality is not felt as a requirement in a matter where the decisions which are subject to the appeal are public and, often, widely mediatised.[30] Besides the above-mentioned advantages of arbitration proceedings, it was argued that the jurisdiction of the CAS could allow the harmonisation of the various rules and regulations and so the solutions, by ending in a uniform regulation of international sports law: a so-called *lex sportiva*, paraphrasing the well-known *lex mercatoria*, to which development arbitration in international trade widely contributed.[31]

In spite of these advantages, arbitration in must matters must reach a compromise with the peculiarity of the disputes to be settled. Its efficiency widely depends on the way these specificities are taken into account. The arbitration procedure of appeal of the CAS presents very marked peculiarities. They are of mainly two sorts. On one hand, the disputes are not at all comparable to those that the arbitrators are usually called upon to settle within the framework of internal and international arbitration.[32] On the other hand, the parties are not the operators of the international trade who usually resort to this method of dispute resolution. These specificities require a new organisation of sports arbitration and present entirely new challenges.

5. The peculiarity of the disputes to be settled by the CAS

Article R47 of the CAS Arbitration Code defines the appeals proce-

23 Sports Illustrated, 22 June 1992, p. 9.

24 On this case, that turned international sport upside down, see V.A. Nelson, Jr., Comment, Butch Reynolds and the American Judicial System v. The International Amateur Athletic Federation. A Comment on the Need for Judicial Restraint, 3 Seton Hall J. Sports L. 173 (1992); H.J. Hatch, On Your Mark, Get Set, Stop! Drug-Testing Appeals in the International Amateur Athletic Federation, 16 Loy. L.A. Int'l & Comp. L.J. 537 (1994); D.B. Mack, Reynolds v. International Amateur Athletic Federation: The Need for an Independent Tribunal in International Athletic Disputes, 10 Conn. J. Int'l L. 653 (1995).

25 Reynolds v. IAAF, 841 F. Supp. 1444, 1448 (S.D. Ohio 1992): "[The IAAF is] restrained and enjoined from impeding or otherwise interfering with Plaintiff Harry L. Reynolds, Jr.'s participation in all international and national amateur track and field events as a result of or in any manner connected with tests of any sample of urine attributed to him from the August 12, 1990 Herculis '90 International track and field meet in Monte Carlo, Monaco."

26 Reynolds v. IAAF, 23 F.3d 1110, 1113 (6th Cir.); Reynolds v. IAAF, 115 S. Ct. 423 (1994).

27 Article 191bis of the FIA International Sporting Code: "For the avoidance of doubt, nothing in the Code shall prevent any party from pursuing any right of action which it may have before any Court or Tribunal, subject always to any obligations it may have accepted elsewhere first to pursue other remedies or alternative dispute resolution mechanisms." See G. Kaufmann-Kohler, H. Peter, Formula 1 Racing and Arbitration: The FIA Tailor-Made System for Fast Track Dispute Resolution, 17 Arb. Int'l 2, 173 (2001).

28 See, A. Samuel, R. Gearhart, Sporting Arbitration and the International Olympic Committee Court of Arbitration of Sport, 6 Journal of International Arbitration, 39 (1989); A.T. Polvino, Arbitration as Preventive Medicine for Olympic Ailments: The International Olympic Committee's Court of Arbitration for Sport and the Future for the Settlement of International Sporting Disputes, 8 Emory Int'l L. Rev. 347 (1994); N.K. Raber, Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport, 8 Seton Hall J. Sport L. 75 (1998); R.H. Mclaren, The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes, 35 Val. U. L. Rev. 379 (2001). For a national perspective, see also S. Haslip, International Sports Law Perspective: A Consideration of the Need for a National Dispute Resolution System for National Sport Organizations in Canada, 11 Marq. Sports L. Rev. 245 (2001).

29 Article R59 of the CAS Arbitration Code.

30 This has allowed the publication of a digest of CAS awards. A first volume contains a selection of awards rendered between 1986 and 1998 and has been published by Editions Stæmpfli. The second volume gathers a selection of awards rendered between 1998 and 2000 and has been published by Kluwer Law International. A digest had previously been published in 1993, which content has mainly been republished in the 1986-1998 digest.

31 Legal doctrine is in favour of the harmonisation of sports law, especially with regard to doping law, see F. Oschütz, Harmonisation of Anti-Doping Code through Arbitration: The Case Law of the Court of Arbitration for Sport, 12 Marq. Sports L. Rev. 675 (2001-2002). See also, B. Pfister, Die Doping-Rechtssprechung des TAS, SpuRt (Zeitschrift für Sport und Recht) 2000, 133. In general, J.A.R. Nafziger, Globalizing Sports Law, 9 Marq. Sports L. J. 225 (1998-1999); and more recently, J.A.R. Nafziger, Lex Sportiva, ISLJ 2004-1/2, pp. 3 ff.

32 See R.H. Mclaren, Sports Law Arbitration by CAS: Is it the Same as International Arbitration?, 29 Pepp. L. Rev. 101 (2001).

dure as appeal against a decision of a federation, an association or a different sports body. Appeal is simply a claim for invalidation of a decision unilaterally taken by a legal person under private law on the grounds of the contract of association. The main task of the arbitration panel consists in deciding on the validity of the decision taken by such a sports body. It is widely accepted that a legal person can endow itself, by a clause in its bye-laws, with disciplinary power over its members. The certainty of the solution is so widely accepted that it is not necessary to linger on this point, if not to stress that, in sports matters, such a possibility is generally recognised.[33] The disciplinary competence of sports associations was indirectly recognised when national courts agreed to examine the conformity of disciplinary decisions with the bye-laws, with the requirement of due process, or with the principle of the proportionality of the penalty with the gravity of the alleged offence.[34]

The decisions of sports bodies which are usually subject to appeals, are disciplinary decisions concerning athletes for violation of the bye-laws or other regulations of the association. These disciplinary sanctions principally concern doping offences, but the CAS had to decide on disciplinary measures motivated by other kinds of offences such as violent behaviour of athletes, violation of fair-play principles and ill-treatment of animals. Also decisions of a non-disciplinary nature are subject to claims for annulment. These decisions mainly concern the conditions of participation in competitions, such as the determination of sports nationality, as well as the selection of the athletes for the Olympic Games.[35]

It has so far been uncommon to refer this kind of litigation to arbitral justice. For example, the French Act on Sport of 16 July 1984 endows the French National Olympic Committee with mediation and conciliation competences in the event of litigation between athletes, clubs and federations, but not with the competence to definitively settle the dispute, which is the specific feature of arbitration.[36] However, the method of resolving disputes through arbitration can be found in the US Amateur Sports Act of 1978, according to which the parties can challenge the validity of a decision of the Olympic National Committee before the American Arbitration Association.[37] However, it is necessary to clarify that US courts are generally reluctant to appreciate the validity of decisions of a disciplinary nature in sports matters. The decision of the Federal Court of the District of Oregon in the Tonya Harding case is a good example of this principle of neutrality.[38] This is not the case, as was previously noted, in several European countries, where courts, conscious of the risk that the disciplinary measure can affect the interests and the honour of the athlete, traditionally accept jurisdiction to assess the validity of the decisions of disciplinary bodies of private associations towards their members.

6. The arbitrability of the case

Regarding arbitration of disciplinary decisions, the first issue is to discover whether such a dispute can validly be kept out of ordinary courts of law to be settled by justice of private nature. The question deserves to be addressed because it is essential to precisely know which disputes in sports matters can be subjected to arbitration and which cannot. As far as I know, there is very little case law on the question. The Court of Appeal of Paris, in a case concerning a decision of the Disciplinary Committee of a private association, decided that, according to French law, arbitration is only possible for the settlement of a dispute arising out of a contract that includes the arbitration agreement. This is not the case for the dispute between the association and one of its members, which is of a disciplinary nature.[39] The decision was criticised because, in principle, there is no incompatibility between disciplinary matters and arbitration.[40] In any case, France, being only rarely the country of reception of the arbitral award, the arbitration of the sports dispute will be, in practice, rarely governed by French law.

The country of reception of an arbitral award rendered by the CAS is Switzerland. Swiss Courts are, indeed, competent to deal with claims for nullity against such awards because the seat of this centre of arbitration is in Lausanne.[41] Only rarely courts in other countries could proceed to review a CAS award. Because of the particular matters on which the CAS rules, the necessity to require the enforcement of the arbitral award in a foreign country is generally absent. However, the ordinary procedure does not yet represent the main activity of the CAS, some of the awards that can be rendered could require enforcement. Such is the case for disputes concerning employment contracts between a member of the staff and a sports federation, *e.g.* a trainer being dismissed by the national federation. The CAS is competent to hear such a dispute if it arises during the Olympic Games. Indeed, Rule 74 of the Olympic Charter includes an arbitration clause endowing the CAS with the competence to settle all disputes arising on the occasion of the Olympic Games.[42] In settling such a dispute, the CAS should take into account the solution as regards arbitrability of the country where its award should be enforced. This country could very often be the country where a national federation has its seat. There are many legal systems that, in contrast to Swiss law, do not recognise the arbitrability of disputes involving the application of labour law.[43] More generally, all disputes of a disciplinary nature have a very narrow link with the exercise of a professional activity. Some sanctions, such as a suspension, prevent athletes from exercising their professional activity. When a sanctioned athlete is bound by an employment contract with a club or a team, the disciplinary measure taken by the sports federation has a direct effect on the possibility to perform such a contract. A clear example of this type of situations is the contract between a cyclist and the team to which he belongs. It cannot be excluded with certainty that, in such a situation, the arbitration dealing with the validity of the sanction would be declared inarbitrable, for it concerns the performance of a professional activity. A good example of this would be the deci-

33 See, e.g, J.-P. Karaquillo, Le pouvoir disciplinaire dans l'association sportive, D. 1980, chr. 115.

34 Under Swiss law, see the above-mentioned ruling of the Court of Berne in the Olympique de Marseille case, where the Tribunal applied association law. See also, in French law, Cass. Civ. I, 14 February 1979, Bull. civ. I, no. 60, p. 50, D. 1979, 542 (1st case), with annotation Alaphilippe and Karaquillo; Gaz. Pal. 1979, 546; Rev. soc. 1980, 140, with annotation R. Plaisant: "Les juges du fond saisis par un membre d'une association de la demande d'annulation d'une mesure d'exclusion sont tenus de contrôler la faute alléguée, et ce en dépit de la clause des statuts de l'association prévoyant que le conseil d'administration statuait en dernier ressort."

35 See G. Engelbrecht, The Individual Right to Participate in the Olympic Games, ISLJ 2004/1-2, pp. 8 ff.

36 For this reason, the commentators of this Act stressed the hostility of French law towards arbitration, see F. Alaphilippe, Requiem pour une mission d'arbitrage, ALD (Actualité Législative Dalloz), Special issue on Sports Law 1984, pp. 37 ff.

37 Article 205(c) Amateur Sports Act 1978. For a description of the various kinds of ADR in sports matters, see A. Epstein, Alternative Dispute Resolution in Sport Management and the Sport Management Curriculum, 12 J. Legal Aspects of Sport 153 (2002).

38 Tonya Harding v. United States Figure Skating Association, 851 F. Supp. 1476 (1994): "The courts should rightly hesitate before intervening in disciplinary hearings held by private associations, including the defendant United States Figure Skating Association. Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in serious and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then, injunctive relief is limited to correcting the breach of the rules. The court should not intervene in the merits of the underlying dispute."

39 CA Paris, 3 December 1986, Rev. arb. 1987, 352, with annotation Ch. Jarrosson.

40 Ch. Jarrosson, annotation quoted in previous footnote. See also E. Loquin, J.Cl. Proc. civ. Fasc. 1005, nos. 26 ff.

41 Article R28 of the CAS Arbitration Code sets the seat of the arbitration in Switzerland. Controversial issues arose with regard to the seat of the ad hoc Division of the CAS at the occasion of the Summer and Winter Olympic Games. On this issue, see infra.

42 The question is whether the arbitration agreement is also binding in horizontal disputes, arising between members of the association and not only to vertical disputes, arising between a member and the association.

43 Such is the case for Italian law, according to Article 806 of the Code of Civil Procedure. On this issue, see A. Rigozzi, L'arbitrabilité des litiges sportifs, ASA Bull. 2003, p. 501, at pp. 505-506. In legal doctrine, see C. Punzi, L'arbitrato nelle controversie di lavoro, Riv. dell'Arbitrato 2001, p. 389. Such is also the case for French law, where an ex ante arbitration agreement is invalid in application of Article L. 511-1 § 6 of the Labour Code. In legal doctrine, see J.-M. Olivier, Arbitrage en droit du travail, in Th. Clay (ed.) Nouvelles perspectives en matière d'arbitrage, Droit & Patrimoine, May 2002, p. 52.

sion of Jean-Marie Leblanc, the director of the *Tour de France*, to exclude two cyclists from the 2004 edition of this competition because they were only involved in doping investigation and trials, but not yet convicted.[44] In this case, it is possible that French courts, despite the existence of an arbitration clause in favour of the CAS, will accept to rule on the validity of such a decision by the organiser of the competition and, eventually, to compensate the cyclists and their employers for the damage suffered as a consequence of an illegal exclusion from the competition.

Moreover, disciplinary sanctions emanating from international federations should often be confirmed by the national federations in order to be enforced in the national sphere, i.e. on the occasion of competitions organised by the national federation. Particular review of the decision of the national federation by a court of law of the country of its seat can be made. Such was the solution followed by the French case law at the occasion of the doping sanction of the skier Christelle Guignard.[45] She was deprived of the bronze medal obtained in the Ski World Championships in the United States for a positive doping test and had been suspended by the international federation. Although French Courts had no jurisdiction to assess the validity of the disciplinary measure taken by the international federation, which has its seat in Switzerland, they could review and invalidate the decision of the President of the French federation, confirming the suspension on French territory. The reason for invalidity was, in this case, the incompetence of the President of the federation to take such a decision alone.

The solution would have been identical if the decision of the international federation had been previously reviewed by the CAS. The government endows French sports federations with a mission of public utility and, therefore, they have a sort of monopoly on the sanction for the competitions they organise.[46] Therefore, in order to be enforceable on the French territory, the decision of an international federation and the CAS award must be confirmed by the national competent federation. Although, technically this is not an enforcement procedure, national courts practically can, at the end of the chain, assess the validity of disciplinary measures taken towards an athlete.

Independently of these questions on the indirect review of a CAS award, the arbitrability of a dispute will be, most of the time, assessed on the basis of Swiss law.[47] The criterion of the arbitrability, set out in Article 177 of the Swiss Federal Act on International Private Law of 18 December 1987 (PILA), is the fact that the dispute presents a patrimonial nature. It is of course necessary that the dispute is international. According to Swiss law, arbitration is international when at least one of the parties was not, at the time of the conclusion of the arbitration agreement, domiciled in Switzerland, if the seat of the arbitration is in this country (Article 176 PILA). Many international federations have taken up residence in Switzerland, so the arbitrability of a dispute involving these federations will be assessed differently, depending on whether the person concerned is resident in Switzerland.[48] The hypothesis is not only academic, because Switzerland, with the neighbouring Principality of Monaco, is the privileged place of residence, probably for climatic reasons, of many professional sportspeople.

However, most of the time, the determination of the patrimonial character of the dispute will be at stake. After a first analysis of the question, it seems difficult to assert that a decision, the consequence of which is the suspension or the exclusion of an athlete for doping, presents a patrimonial character. The appeal against the decision of the IOC which stripped a skier of an Olympic medal because he made use of the famous Vicks Vapor Rub (r), in order to relieve nasal congestion, does not seems to present a patrimonial character.[49] Nevertheless, by virtue of a widely accepted *favor arbitrandum*,[50] the Federal Court held that such a dispute is arbitrable.[51]

Some can try to by-pass such case law and circumvent the CAS, hoping to take some advantages from it. One trick consists in bringing the claim before a national court of a third country instead of lodging an appeal before the CAS. A plea of lack of competence will be probably claimed before the court. To assess its jurisdiction, the court will have to ascertain the arbitrability of the dispute. It is not at all sure that this assessment will be made on the basis of Swiss law, especially since the court decision should receive no enforcement in Switzerland.[52]

The jurisdiction of national courts is even more an issue when the division of the CAS that is referred to by the arbitration agreement is the *ad hoc* Division that is set up on the occasion of the Olympic Games.[53] In 1996, the International Council of Arbitration for Sport (ICAS) created two permanent decentralized offices in Australia and in United States of America. The *ad hoc* Division of the CAS was created by the ICAS in the same year. This is a non-permanent arbitration centre created for major sports events such as the Olympic Games, the Commonwealth Games or the European Football Championship. For every *ad hoc* Division, the ICAS appoints a team of arbitrators that goes to the site of the sports event. The regulation prescribes a simplified procedure for the constitution of the panel and the settlement of disputes. A decision should be rendered, as a rule, within 24 hours as from the request for arbitration. Can the seat of the arbitration still be considered to be Switzerland in such a case?[54] It is clear that a choice has to be made between the real seat of the arbitration that is situated in the Olympic village and the virtual seat, determined by the regulation of arbitration, which is in Switzerland. An Australian court that had to answer this question on the occasion of the Olympic Games held in Sidney in 2000 opted for the virtual seat of arbitration and reasoned on the basis of Swiss law.[55] It is not certain that Greek courts would follow the same reasoning in the

44 The two cyclists are Stefano Casagranda and Martin Hvastija, see La Gazzetta dello Sport, 14 July 2004.

45 TA Grenoble, 2 July 1991, Guignard v. Fédération française de ski, D. 1991, somm. 395, with annotation J.-P. Karaquillo. Same solution in CE 26 November 1976, Fédération française de cyclisme, AJDA 1977, 139.

46 Articles 16 and 17 of the French Sports Act of 16 July 1984.

47 On the particularism of Swiss law, see M. Baddeley, La resolution des litiges dans le sport international: Importance et particularités du droit Suisse, Revue Juridique et Economique du Sport (Esport), 1997, pp. 5-29.

48 Noticing this incoherence for arbitration of sports disputes, see A. Rigozzi, L'arbitrabilité des litiges sportifs, ASA Bull. 2003, p. 501, at p. 504.

49 CAS, 15 October 2002, 2002/A/376, Alain Baxter v. IOC. The panel of arbitrators had been harsh towards the skier in the motivation of the award. After having confirmed the disciplinary sanction of the IOC, the arbitrators added: "The Panel is not without sympathy for Mr. Baxter, who appears to be a sincere and honest man..." This case is also an example of the difficult issue of the control of the proportionality of the sanction. On this issue, see infra.

50 The term was coined by B. Hanotiau, L'arbitrabilité et la favour arbitrandum: un réexamen, JDI 1994, 899.

51 Swiss Federal Court, 15 March 1993, Gundel v. FEI, ATF 119 II 271; ASA Bull. 1993, p. 398; RSDIE (Revue suisse de droit international et de droit européen) 1994, p. 149, with annotation F. Knoepfler; CAS Digest 1986-1998, p. 545; Riv. dir. Sportivo, 1994, p. 510. For criticism, Ph. Meier, C. Aguet, L'arbitrabilité du recours contre la suspension prononcée par une fédération sportive internationale, JdT (Journal des tribunaux suisses) 2002 pp. 56 ff. For the solution of Italian law, where arbitrability is much more limited, see A. Persichelli, Materie arbitrabili all'interno della competenza della giurisdizione sportiva, Riv. dir. Sportivo 1986, pp. 702 ff.

52 The New York Convention of 10 June 1958, if it requires national courts to address the issue of arbitrability, is silent on the law applicable to it (Article II.3).

53 Literature regarding the ad hoc Division of the CAS is now abundant, G. Kaufmann-Kohler, Arbitration at the Olympics. Issues of Fast-Track Dispute Resolution and Sports Law, Kluwer Law International, 2001; M.J. Beloff, The Court of Arbitration for Sport at the Olympics, 4 Sport and the Law Journal, 5 (1996); R.C. Reuben, And the Winner is... Arbitrators to Resolve Disputes as They Arise at Olympics, 82 A.B.A. J. 20 (1996); G. Kaufmann-Kohler, Atlanta et l'arbitrage ou les premières expériences de la Division olympique du Tribunal arbitral du sport, ASA Bull. 1996, p. 433; G. Kaufmann-Kohler, Arbitration and the Games or the First Experience of the Olympic Division of the Court of Arbitration for Sport, 12 Mealey's International Arbitration Report, (February 1997); Fumagalli, Arbitrato e Giochi Olimpici: Il Tribunale dello Sport ad Atlanta, Riv. dir. Sportivo, 1997, 23; J. Pilgrim, The Competition behind the Scenes at the Atlanta Centennial Olympic Games, 14 Ent. & Sports Law., 1 (1997); G. Kaufmann-Kohler, Nagano et l'arbitrage ou vers une justice de proximité, ASA Bull. 1998, p. 311; M.J. Beloff, The CAS Ad Hoc Division at the Sydney Olympic Games, 1 Int'l Sports L. Rev. (2000); R.H. Mclaren, Introducing the Court of Arbitration for Sport: The Ad hoc Division at the Olympic Games, 12 Marq. Sports L. Rev. 515 (2001-2002); U. Naidoo, N. Sarin, Dispute Resolution at Games Time, 12 Fordham Intell. Prop. Media & Ent. L.J. 489 (2002).

event of an appeal against an award of the *ad hoc* Division during the Athens Olympic Games of 2004.

7. The arbitration agreement

Like the peculiarity of the dispute, the peculiarity of the parties to the arbitration raises new issues in arbitration law. Unlike in traditional international arbitration, the CAS is competent to hear appeals against decisions taken by private bodies that govern international sport. Owing to their nature, these disputes do not involve companies that operate in international trade, but often natural (athletes) or legal persons (national and international sports federations). Some federations are professional organisations, but others are not, mainly because of the low broadcasting incomes generated by the sports they are involved in. Especially when the dispute concerns an athlete, the personal dimension makes this kind of dispute special. The peculiarity is not only interesting as it testifies to an imbalance between the parties to the dispute. Arbitration of sports disputes is also peculiar with regard to the origin of the competence of the arbitration centre.

Any arbitration presupposes the existence of a valid arbitration agreement.[56] In sports matters, such an agreement is always an *ex ante* arbitration clause, by which the parties, before the dispute arose, waive the possibility of bringing a claim before a national court. An *ex post* agreement to arbitrate is possible, but is rarely used in practice. Two conditions must be fulfilled. On the one hand, the agreement should not be contrary to public policy, which means that the dispute should be arbitrable, as has been shown above. On the other hand, and it is the condition which interests us now, the arbitration agreement must be known and accepted by the parties, notably by the athlete.

In practice, the arbitration clause can be stipulated in various ways. It is usually included in the bye-laws of the various sports bodies and organisations of which the parties to the arbitration procedure are members. The arbitration clause is therefore imposed upon the athletes as members of the organisation. This clause is similar to the very frequently used arbitration agreement that can be found in the bye-laws of companies and that imposes arbitration to settle all the disputes between the company and its shareholders. The conditions of enforcement of such a clause are not the criteria usually applied for the efficiency of arbitration clauses incorporated by reference.[57] Indeed, arbitration agreements in sports law are most of the time not stipulated by reference, because they are directly included in the contract which binds the federation and the athlete.[58] In other cases, the arbitration clause is explicitly included in the entry forms for a sport event. Today, this seems to be the most frequently used practice. The entry form for the Olympic Games includes an arbitration clause that summarises Rule 74 of the Olympic Charter. This form must be filled out and signed by all participants, not only the athletes, but more generally all those who participate in the realisation of this sport event: officials, juries, trainers, doctors, journalists. The trend in the case law is to accept the validity of such an arbitration clause and to recognise its enforceability towards the athlete, which obliges national courts to decline their jurisdiction if one of the parties brings a claim before them.[59]

Only rarely is the agreement incorporated by reference. Such is notably the case when there is a reference to the bye-laws of an international federation of which the athlete is not directly a member. Often, the athlete is only a member of the national federation, which is in turn a member of the international federation. Because there is not a contract between the extreme links of the chain, the arbitration clause is not enforceable without a clear reference in the bye-laws of the federation or without a direct agreement between the athlete and the federation.[60]

What characterises the arbitration in sports matters most is the fact that the arbitration clause is never freely accepted by the athlete. The agreement is always imposed by the sports federation, the International Olympic Committee (IOC) or the organiser of the competition. The athlete does not have the power to negotiate: he either accepts the terms imposed in order to practise his sport or he can only "practise his sport in marginality, in his garden, without competitors or partners, [...]."[61] Arbitration by the CAS is therefore compulsory and binding.[62] Today, in legal systems, which have traditionally widely favour arbitration and more generally alternative dispute resolution, doctrine begins to question the legitimacy of such a policy. This criticism is noticeable mainly in matters where arbitration is compulsory for the weaker party in contracts of adhesion. Such is especially the case for consumers, employees, franchisees and subcontractors. In these situations, the appeal to arbitration is often considered a tool of oppression of the weaker party, rather than as an instrument of justice.[63] In United States law, the validity of imposed arbitration clauses for the weaker party has become one of the most controversial issues both in case law and in literature.[64]

With regard to the CAS, the fact that arbitration is compulsory for the athletes and is imposed by the international federations and the IOC constitutes a very unusual situation, especially since the bodies and organisations of international sport have created this arbitration centre themselves.[65] It is also necessary to stress the fact that the CAS, in settling disputes between athletes and sport organisations and federation, is called upon to assess the correctness of the application of rules that these same bodies of the sport movement have made themselves. At the end of the day, the CAS applies the regulations and bye-laws of the sports body concerned in order to verify whether the disciplinary decision and the sanction were legal or illegal, i.e., whether they were validly taken.[66] The CAS is therefore permanently in a very uncomfortable situation; obliged to compromise between, on the one

54 On this issue, see G. Kaufmann-Kohler, Le lieu de l'arbitrage à l'aune de la mondialisation. Réflexions à propos de deux formes d'arbitrage, Rev. arb. 1998, 517.

55 Court of Appeal, New South Wales, 1st September 2000, Angela Raguz v. Rebecca Sullivan, The Judo Federation of Australia Inc. [2000] NSWCA (New South Wales Court of Appeal) 240; 11 World Arb. & Mediation Rep. 299 (2000); ASA Bull. 2001, p. 335.

56 Moreover, when athletes - e.g., in gymnastics - are minors according to their national law, there can be doubts as regards the validity of the arbitration agreement.

57 On these requirements, see X. Boucobza, La clause compromissoire par référence en matière d'arbitrage commercial international, Rev. arb. 1998, 495.

58 Contra, R. Wyler, La convention d'arbitrage en droit du sport, RDS 1997, I, 1, pp. 45-62.

59 See, e.g., Court of Appeal, New South Wales, 1st September 2000, Angela Raguz v. Rebecca Sullivan, The Judo Federation of Australia Inc. [2000] NSWCA 240. In this case, the arbitration agreement was stipulated directly in the form by which the athlete has accepted his selection for the Sidney Olympic Games.

60 See Swiss Federal Court, 7 February 2001, Stanley Roberts v. FIBA, ASA Bull. 2001, p. 523.

61 F. Knoepfler, RSDIE 1994, p. 153, annotation of Swiss Federal Court 15 March 1993 quoted note 52.

62 Noticing this peculiarity and analysing its consequences in United States law, see M.R. Bitting, Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Security"?, 25 Fla. St. U.L. Rev. 655 (1998). See also S.A. Kaufman, Issues in International Sports Arbitration, 13 B.U. Int'l L.J. 527 (1995), wondering whether, in application of the New York Convention, an imposed arbitration agreement is valid (Article V.b.2).

63 See J.R. Sternlight, Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L. Q. 637-712 (1996), where the author shows how the Supreme Court's interpretation of the Federal Arbitration Act 1925 favouring arbitration contradicted the initial intention of the legislator which consisted in limiting this form of dispute resolution to litigation arising out of contract between parties of equal bargaining power. The author also refutes the arguments put forward in favour of this evolution.

64 See, e.g., C.M. Hammond, A Real Estate Focus: The (Pre)(as)sumed "Consent" of Commercial Binding Arbitration Contracts. An Empirical Study of Attitudes and Expectations of Transactional Lawyers, 36 J. Marshall L. Rev. 589 (2003); C.R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. Ill. L. Rev. 695-790. For a law & economics study, see K.N. Hylton, Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis, 8 S. Ct. Econ. Rev. 209 (2000).

65 For the history of the CAS, see M. Reeb, Le Tribunal Arbitral du Sport (TAS), in CAS Digest 1986-1998, Editions Stæmpfli, Berne, pp. XIII ff. The issue of the independence of the CAS will be addressed later.

66 Between the numerous awards, see, e.g., CAS, ad hoc Division, Nagano OG, 1998/02, Ross Rebagliati v. IOC, CAS Digest 1986-1998, p. 419. The snowboarder was stripped of his medal because of marijuana consumption. Use of this drug is considered by the Medical Code of the IOC as doping only when there is an agreement between the IOC and the international federation concerned. Such an agreement did not exist with the International Ski Federation. The CAS was obliged to rule the invalidity of the decision of the disciplinary committee. See also CAS, 31 August 1999, 99/A/223, International Tennis Federation v. Korda, CAS Digest 1998-2000, p. 345.

hand, the need to establish its independence towards the IOC and international federations and, on the other hand, the fact that the existence of the CAS itself is dependent on the unilateral decision of the same international sports bodies to stipulate an arbitration agreement conferring jurisdiction upon the CAS. Since the international sports organisations are usually party to the disputes which the CAS is appointed to settle, it becomes clear that doubts as to the impartiality of the awards rendered is probably the most important weakness of this method of dispute resolution. The effectiveness of arbitration in sports matters today depends on a good balance between these contradictions.

8. The independence of the CAS

Since its institution, the effectiveness of the arbitration of the CAS has been disputed on grounds of the lack of independence of the centre of arbitration vis-à-vis the operators of the Olympic movement. However, the independence of CAS has recently been definitively settled by Swiss case law.

The issue of the organisation of the CAS arose soon after its establishment. Indeed, when the CAS was established at the beginning of the 1980s, the narrow links, both financial and administrative, between the CAS and the IOC suggested that, in spite of its statutory independence, *de facto* the CAS was an internal organ to the association and that it was not an independent arbitration court.[67] The Swiss Federal Court was asked to take position on this issue on the occasion of a claim for nullity of a CAS award confirming the disqualification for horse doping decided by the International Equestrian Federation.[68] In ruling on the appeal against this award, the Federal Court formulated reserves on the independence of the CAS in relation to the IOC, because of the organic and economic links existing between the two institutions.[69] According to the Court, it was desirable to secure a greater independence of the CAS from the IOC.[70] More precisely, the Federal Court considered that the CAS was an independent institution if the disputes it had to settle had no link with the IOC. However, the independence of the CAS could be questioned when the IOC was party to the arbitration, that is, when the decision being the object of the claim for nullity had been taken by the IOC itself. In such a case, it could have been impossible to attribute to the CAS the dignity of a private organ of justice and so to confer the value of arbitral award to its decisions. These decisions could not be enforced, neither in Switzerland nor abroad, because of the general legal principle according to which an institution cannot at the same time be the judge and the party. The ultimate consequence of this would be that the sanctioned athletes would have been able to take their claim to ordinary courts of law.[71] Such a solution is generally accepted; a disciplinary decision taken by the internal "arbitration" of an association does not constitute an arbitral award.[72] The principle according to which the arbitrator must be a third party vis-à-vis the litigants is so evident that for doctrine it is not a real issue.[73] So the appeal against such a decision is a claim against the decision of an association and not an appeal against an arbitral award. The practical consequence of this is that national courts can apply a much more in-depth review of the decision than the one that can be applied as regards an arbitral award.

Because of danger involved by the Gundel case for the existence of the CAS, an important reform was called for.[74] The most important measures consisted of the creation by the Convention of Paris on 22 June 1994, of the International Council of Arbitration for Sport (ICAS) and in the drafting of the Code of Sports-related Arbitration, which entered into force on 22 November 1994. Today, the ICAS is a private foundation governed by Swiss law. It consists of twenty lawyers appointed in the following way: four members appointed by the Olympic International Federations, three for summer and one for winter sports, chosen within these federations or outside them; four members by the Association of the National Olympic Committees (ANOC), chosen from within or outside; four members by the IOC, chosen from within or outside; four members appointed by the twelve members above-mentioned, after appropriate consultations, to protect the interests of the athletes; four members by these sixteen and chosen among independent persons from the bodies appointing the other members of ICAS.[75] The members of ICAS are appointed for a renewable period of four years. On the occasion of their appointment, they must sign a solemn declaration of independence. The members of ICAS cannot be on the list of the arbitrators of the CAS, nor act as council of one of the parties in a procedure before the CAS. According to Article 3 of the agreement of the constitution of ICAS, the financing of this foundation, which results from sums collected by the IOC from the exploitation of broadcasting rights of the Olympic Games, is assured by the IOC (4/12), by the Olympic International Federations, 3/12 for summer sports and 1/12 for winter sports and by the ANOC (4/12). It is the ICAS's task to protect the independence of the CAS and the rights of the parties. Its competences consist of adopting and modifying the Code of Sports-related Arbitration, administering and financing the CAS, establishing the list of the arbitrators of the CAS that can be chosen by the parties, ruling the claims for revocation of the arbitrators and appointing the General Secretary of the CAS.[76]

The effects of this reform on the independence of the CAS did not lead to unanimity within doctrine. Many scholars argued that the new organisation was in accordance with the requirements of the Swiss Federal Court expressed in the Gundel case.[77] Other scholars were more sceptic as regards the efficiency of the reform of 1994 on the independence of the CAS.[78] Independently of this doctrinal discussion and of advanced arguments and after much hesitation,[79] the Swiss Federal Court has recently closed the debate, by asserting clearly that the CAS is an arbitration institution independent from the

67 The title of many articles published in an early stage showed the dependence of the CAS on the IOC. See, e.g., A. Samuel, R. Gearhart, Sporting Arbitration and the International Olympic Commitee Court of Arbitration of Sport, 6 Journal of International Arbitration, 39 (1989).

68 CAS, 10 September 1992, 92/63, Gundel v. FEI, CAS Digest 1986-1998, p. 105.

69 Swiss Federal Court, 15 March 1993, Gundel v. FEI, quoted note 52. See also, J. Paulsson, The Swiss Federal Tribunal Recognises the Finality of Arbitral Awards Relating to Sports Disciplinary Sanctions Rendered by the IOC's Court of Arbitration for Sports, 8 International Arbitration Report 12 (October 1993).

70 Swiss Federal Court, 15 March 1993, Gundel v. FEI, quoted note 52, ATF 119 II 271, at p. 280.

71 For this analysis, see V. Vigoriti, Il "Tribunal Arbitral du Sport": Struttura, funzioni, esperienze, Riv. dell'Arbitrato 2000, 425.

72 J. Paulsson, Arbitration in International Sports Disputes, 8 Arb. Int'l 359 (1993); of the same author, Arbitration of International Sports Disputes, 11-WTR Ent. & Sports Law. 12 (1994).

73 See Ch. Jarrosson, La notion d'arbitrage, Diss. LGDJ 1990, no. 785 who gives this definition of arbitration: "L'arbitrage est l'institution par laquelle un tiers, règle le différend qui oppose deux ou plusieurs parties, en exerçant la mission juridictionnelle qui lui a été confiée par celles-ci." See also Ch. Jarrosson, Les frontières de l'arbitrage, Rev. arb. 2001, p. 5, at no. 27. On the independence of the arbitrator, see Th. Clay, L'arbitre, Diss. Dalloz, 2001, nos. 275 ff.

74 See M. Reeb, Le Tribunal Arbitral du Sport (TAS), CAS Digest 1986-1998, pp. XIII ff.

75 Article S4 of the Arbitration Code.

76 For the detail of the organisation of the CAS and the arbitration procedure, see J.M. Marxuach, The Court of Arbitration for Sport, 10 World Arb. & Mediation Rep. 71 (1991), also published in Memorias del congreso internacional de metodos alternos: Mediacion, evaluacion neutral y arbitraje, Revista del colegio de abogados de Puerto Rico, October/December 2001 p. 134.

77 J.-F. Poudret, S. Besson, Droit comparé de l'arbitrage international, Bruylant, LGDJ, Schulthless, Zürich, 2002, no. 106; Ph. Meier, C. Aguet, L'arbitrabilité du recours contre la suspension prononcée par une fédération sportive internationale, JdT 2002 p. 56 footnote 6; G. Simon, L'arbitrage des conflits sportifs, Rev. arb. 1995 pp. 185 ff., at p. 209; Zen-Ruffinen, Droit du Sport, Schulthess, Zürich, 2002, no. 1463; J. Anderson, Taking Sports out of the Courts: Alternative Dispute Resolution and the International Court of Arbitration for Sport, 10 J. Legal Aspects of Sport, 123 (2000).

78 M. Schillig, Schiedsgerichtsbarkeit von Sportverbänden in der Schweiz, Diss. Zurich 1999, pp. 157 ff.; M. Baddeley, L'association sportive face au droit, Diss. Geneva 1994, p. 272. footnote 79; D. Hantke, Brauchen wir eine Sport-Schiedsgerichtsbarkeit?, in SpuRt 1998 p. 187; R. Wyler, La convention d'arbitrage en droit du sport, RDS 1997, I pp. 45 ff., at p. 60.

79 Swiss Federal Court, 4 December 2000, Andrea Raducan v. IOC, ASA Bull., 2001, p. 508, where the Court explicitly asked the question of whether an award of a CAS ruling on a claim for invalidation of a decision by the IOC disqualifying an athlete for doping could be analysed as an arbitral award within the meaning of Article 189 PILA. However, the Court decided not to answer the question in this case.

IOC and that it renders real arbitral awards, even when the decision on which the CAS is asked to rule emanates from the IOC.[80] In the case in footnote, the IOC disqualified the Russian cross-country skiers Larissa Lazutina and Olga Danilova for doping during the Salt Lake City Winter Olympics. In June 2002, the International Ski Federation (FIS) suspended both athletes for a period of two years. The skiers then appealed to the CAS, claiming the nullity of the decisions of the IOC and of FIS, without success, because the CAS confirmed the decision of the sports organisations. The Swiss Federal Court finally rejected their claim in which the skiers put forward several of arguments, among which the one discussed in most detail by the Court: the issue of CAS' independence.

An important question is whether a foreign court will always take the view of the Swiss Federal Court as regards the independence of the CAS. To answer this question, it is first of all necessary to establish the court's competence. As a rule, claims for annulment of an arbitral award rendered by an arbitration panel having its seat in Switzerland are of the exclusive jurisdiction of the Swiss Federal Court of this country, according to the Private International Law Act. However, foreign courts could have jurisdiction to review the arbitral award, on different occasion than a claim for annulment of the award. This can be the case if, in contrast to the two Russian skiers, the athlete sanctioned by a sports federation contends, from the very beginning of the procedure, the competence of the CAS and goes directly to national court. This court could be either the one of the place of residence of the sports federation, bearing in mind the fact that many federations do not have their seat in Switzerland, or the Court of the place of residence of the athlete.[81] In such a case, it will be up to the Court to rule on the issue of its jurisdiction. This court will declare itself incompetent only if it considers the CAS to be a truly independent arbitration court. Should the opposite occur, this Court would have jurisdiction to examine the validity of the sanction imposed by the sports association. The question of the assessment of the independence of the CAS could also arise on the occasion of a claim for enforcement of an arbitral award, in particular if it includes a pecuniary measure. However, in that case, the New York Convention of 1958 provides that such a question must be answered in application of the law of the seat of the arbitration tribunal.[82] The statutory seat of the CAS is of course Switzerland, but in some cases the real seat of arbitration is abroad, especially as regards the *ad hoc* Divisions of the CAS. As a result of this, the debate on the independence of the CAS, after the reform of 1994, can still have practical interest.[83]

9. In-depth review applied by the CAS on disciplinary sanctions

Besides the legal effectiveness of the CAS awards, there is another type of effectiveness, which is subject to strict conditions. It is the practical and political efficiency of the arbitral awards. Their acceptance by the actors of international sport is subject to the existence of an in-depth review of the disciplinary decision.

The effectiveness of the arbitration of sports disputes, because of the peculiarities mentioned above, is subject to a certain number of conditions. The decision of a sports body can affect athletes in their deepest personal and professional interests, and could go so far as preventing them from exercising their profession.[84] Procedural guarantees, notably those of due process should apply. Besides these guarantees, the athlete should also benefit from fundamental guarantees as regards the merit of the claim, because disciplinary measures are, in practice, very similar to the sanctions of criminal offences. The qualification as a criminal offence was made by the CAS itself.[85] The question is discussed in legal literature,[86] but Swiss case law is clear on the absence of penal character of a disciplinary measure, even though it could lead to the disqualification, to the ban of an athlete or to a pecuniary fine.[87] Moreover, the Olympic Charter proclaims that the practice of sport is a human right.[88]

These guarantees are first of all to be found in the regulations of international federations and of the IOC.[89] The procedures are not the same from one federation to another, which means that the rights of athletes are not uniformly guaranteed. The system of international sport clearly contrasts with the American system, which is placed in its entirety under the aegis of the United States Anti-Doping Agency (USADA).[90] The general acceptance of the Anti-Doping Code of the WADA does not seem to introduce complete uniformity on this point.

The case law of the European Court of Human Rights soon argued that the guarantees of due process of Article 6 of the European Convention on Human Rights apply to disputes involving disciplinary measures, because they can be analysed as criminal charges.[91] It was also held that disciplinary procedures before tribunals of professional bodies concern civil rights, if the incurred sanction is the suspension or the ban to exercise a professional activity.[92] However, the European Convention on Human Rights and the guarantees of a fair trial it contains does not seem to be applicable in the case of a disciplinary sanction decided by a private association, notably in sports matters.[93] The disciplinary authorities of the sports bodies, if they are similar to courts,[94] are not established by law, while this is a requirement of Article 6 of the European Convention on Human Rights. However, in general, national courts, in the exercise of their duties of reviewing disciplinary measures, apply an in-depth screening, especially as regards standards and guarantees of due process.[95]

Article 6 of the European Convention on Human Rights does not

80 Swiss Federal Court, 27 May 2003, Larissa Lazutina and Olga Danilova v. IOC and FIS, cases 4P.267/2002, 4P.268/2002, 4P.269/2002, 4P.270/2002, publication ATF proposed; A. Plantey, Quelques observations sur l'arbitrage sportif international. À propos d'un arrêt récent du Tribunal fédéral suisse, JDI 2003, p. 1085. An English translation of the case can be found on the CAS website: www.tas-cas.org.

81 The courts of the country of residence of the athlete can recognise their jurisdiction. This has been the case, for example, for the claim of the Swiss Sandra Gasser. Swiss courts decided the claim she brought against the IAAF, the seat of which is in London: Court of Berne, 1987, quoted by M.R. Will, Les structures du sport international, in Studi in Onore di Rodolfo Sacco, Giuffrè 1994, Vol. 2, pp. 1211 ff. In this case, English Courts also had jurisdiction, Q.B. 15 June 1988, Gasser v. Stinson, unreported.

82 Article V.1.e. See S.A. Kaufman, Issues in International Sports Arbitration, 13 B.U. Int'l L.J. 527 (1995).

83 See also C. Ansley, International Athletic Dispute Resolution: Tarnishing the Olympic Dream, 12 Ariz. J. Int'l & Comp. Law 277 (1995), who stresses the existence of an influence of a non-legal nature of the IOC on the CAS.

84 See F. Rigaux, Le droit disciplinaire du sport, Rev. trim. dr. homme 1995, p. 295.

85 CAS, 25 June 1992, 91/56, S. v. Fédération équestre internationale (FEI), CAS Digest 1986-1998, pp. 99 ff. at p. 102: "compte tenu de la gravité des mesures [disciplinaires] qui peuvent être prononcées à son encontre et qui s'apparentent d'ailleurs à des sanctions pénales [...]" See also CAS, 12 January 2001, 2000/A/289, Union Cycliste Internationale (UCI) v. C. & Fédération Française de Cyclisme (FFC), CAS Digest 1998-2000, p. 424.

86 See Ph. Meier, C. Aguet, L'arbitrabilité du recours contre la suspension prononcée par une fédération sportive internationale, JdT 2002 pp. 56 ff.

87 Swiss Federal Court, 15 March 1993, Gundel v. FEI, quoted note 52; Swiss Federal Court, 31 March 1999, N., J., Y., W. c/ Fédération Internationale de Natation Amateur (FINA), CAS Digest 1998-2000, p. 767.

88 Olympic Charter, 4th Fundamental Principle of Olympism: "The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play. The organisation, administration and management of sport must be controlled by independent sports organisations."

89 For a list and an analysis of the different guarantees in doping cases, J.W. Soek, The Fundamental Rights of Athletes in Doping Trials, in J. O'Leary (ed.), Drugs and Doping in Sport, Socio-Legal Perspectives, Cavendish Publishing, London, 2001, pp. 57 ff.; M.K. Fitzgerald, The Court of Arbitration for Sport: Dealing With Doping and Due Process During the Olympics, 7 Sports Law. J., 213, (2000).

90 On the guarantees of due process of the USADA and its superiority on the organisation of international sport, see M.S. Straubel, Doping Due Process: A Critique of the Doping Control Process in International Sport, 106 Dick. L. Rev. 523 (2002).

91 ECHR 8 June 1976, Engel v. The Netherlands, AFDI 1977, 480 with annotation R. Pelloux; Cahiers de droit européen 1978, 368 with annotation G. Cohen-Jonathan. A military sanction was at stake here.

92 See, e.g., ECHR 26 September 1995, Diennet v. France, AJDA 1996, 378, with annotation J.-F. Flauss.

93 J.W. Soek, The Fundamental Rights of Athletes in Doping Trials, in J. O'Leary (ed.), Drugs and Doping in Sport, Socio-Legal Perspectives, Cavendish Publishing, London, 2001, pp. 57 ff.

94 As noted above, the qualification of court is generally refused. See, e.g., CE 14 mai 1990, Coudreau v. Fédération française d'aérostation.

seem to apply to the review of a CAS award either.[96] However, the question of the application of the European Convention on Human Rights to arbitration proceedings need to be addressed again, since the Pellegrini case recently rendered by the European Court of Human Rights.[97] In this case, the Court sanctioned Italy for violation of Article 6 of the Convention and in particular the non-application of its guarantees on the proceeding of enforcement of a decision of the Tribunal of the Roman Rota that had cancelled a religious wedding. This solution, transposed to arbitration law, would oblige a national court which has to decide on the validity of an arbitral award or its enforcement to verify whether the arbitrator has respected the guarantees of due process. Does this mean that, in this way, the procedure followed by sports organisations could be also reviewed on the basis of the European Convention on Human Rights? An affirmative answer is not evident. Contrary to ecclesiastical courts - the procedure in question in the Pellegrini case -, international sport organisations in the exercise of their disciplinary powers are not courts of law. Only the procedure before the CAS can be tested against the requirements of the European Convention on Human Rights. Therefore, the way athletes were able to organise their defence can be examined only indirectly during the arbitration procedure. Only once, to my knowledge, the application of the principles of the European Convention on Human Rights was argued before the CAS, but the arbitration panel did not answer this argument.[98] In any case, the national courts that will have to review a CAS award, if they would not apply the European Convention on Human Rights directly, could invalidate the award which violates such guarantees on the basis of the incompatibility with public policy (*ordre public*) of the forum.

Particular guarantees should be granted to athletes in doping trials. Article 7 of the Anti-Doping Convention of the Council of Europe of 16 November 1989, that has been widely ratified,[99] obliges Member States to encourage sports organisations to clarify and to harmonise their rights and obligations, in particular by harmonising disciplinary procedures. This provision clearly makes reference to the internationally recognised principles of natural justice and to the guarantee of athletes' fundamental rights. These principles are, first of all, the existence of a reporting body different from the disciplinary one, secondly, the right of due process and, finally, the possibility for the athlete of lodging an appeal against any judgment rendered towards him. The requirement of a the disciplinary decision could be reviewed by a tribunal of first instance and an appellate court[100] does not seem to be fulfilled when an appeal against disciplinary sanctions as a result of doping is lodged before the CAS, because the CAS Arbitration Code provides a waiver to lodge appeal against the arbitral award.[101] As was noted above, even if the procedure is called an appeal, the CAS rules as a court of first instance. However, the English Court of Appeal considered that the requirement of a double degree of jurisdiction imposed by this Convention does not only refer to courts independent from the sports organisation and that, in other words, within the meaning of the Convention, a "judgment" could also be the disciplinary decision of the sport body itself.[102] The requirements of this Convention could therefore be fulfilled, even if the procedure of appeal is organised inside the sports body. It is not certain, however, that all legal systems will interpret this provision in the same way. If courts will interpret the Convention differently, the waiver to appeal against a CAS award will not be valid in proceedings concerning doping offences.

The issue of the fundamental rights of the athlete also deserves to be addressed in the perspective of the merits of the disciplinary sanction. Besides the procedural guarantees, the content of the decision itself can violate an athlete's human rights. Review is necessary and is generally made. The question then arises how thorough the CAS's review must be. The extent of the CAS's review of the decisions by sports federations and of the IOC should technically be identical to the review applied by national courts. However, first of all, the question of private international law is sensitive here and can be formulated as follows: in application of what law must the decisions of sports organisations be reviewed? The answer seems to be evident. The applicable law is that of the legal person from which the decision emanates. Although this solution is widely accepted, legal systems diverge on the determination of the *lex societatis*. While, in some jurisdictions, the law applicable to an association is the law of the statutory seat of the legal entity, for others what counts is its real seat. The CAS Arbitration Code confirms this requirement by stipulating that the law to be applied by the arbitrators is, in the absence of a choice by the parties, the law of the country in which the federation, the association or the other sports body has its place of residence.[103] This means, for example, that it is English law that the panel should apply in examining the validity of the decision of a sports federation having its seat in England, such as the IAAF. If the parties have agreed that the law applicable to arbitration is the law of a particular country other than the one of the seat of the authority from which the decision emanates, the efficiency of such a choice is problematic.

Such is the problem of the limitation of the parties' autonomy in the choice of the law applicable to arbitration. If most of the legal systems accept that the application of the *lex societatis* cannot contractually derogated from, it is also accepted that the parties have great freedom in the choice of the law of arbitration.[104] Article 187 PILA, which contains the principle of the parties' autonomy, expressly provides for no limitation in its exercise and in the scope of the choice. However, it seems that the correspondence of bye-laws of an association to the legal requirements regarding the existence of disciplinary powers is a preliminary question, which should always be answered in application of the *lex societatis*.[105] I do not see how the CAS could free itself from the obligation to apply the law of the country where the body that has taken the disciplinary sanction has its seat. In any case, the arbitrator

95 This is the solution in French law, where the Supreme Administrative Court, the Conseil d'Etat, has often invalidated disciplinary sanctions in violation of these fundamental rights. See, e.g., CE, 23 May 1986, Lemaire, Rev. jur. éco. Sport (Esport) 1987, no. 2, p. 119, with annotation J. Carbajo; CE, 25 June 1990, Tison, with annotation D. 1991 somm. 393, with annotation J.-F. Lachaume; CE 16 March 1984, Moreteau, Rec. Lebon p. 110, concl. B. Genevois; D. 1984 somm. 483, with annotation J.-P. Théron; CE 10 April 1991, Bideault, D. 1993 somm. 345, with annotation J. Morange. In English law, see Calvin v. Carr [1980] A.C. 574, with particular regard to the obiter dictum at p. 597.

96 Explicitly ruled by Swiss Federal Court, 11 June 2001, Abel Xavier v. UEFA, ATF 127 III 429; ASA Bull. 2001, p. 566, this case concerned a disciplinary sanction of a Portuguese football player who had lightly assaulted an official during the semi-final of Euro 2000. On the general issue of application of the European Convention of Human Rights to arbitration procedures, see Ch. Jarrosson, L'arbitrage et la Convention européenne des droits de l'homme, Rev. arb. 1989, 573; A. Mourre, Le droit français de l'arbitrage international face à la Convention européenne des droits de l'homme, Gaz. Pal. 1st December 2000, p. 16, and legal literature quoted in footnote 4.

97 ECHR, 20 July 2001, Pellegrini v. Italy. On this case, see L. Sinopoli, Droit au procès équitable et exequatur: Strasbourg sonne les cloches à Rome (à propos de C.E.D.H. Pellegrini c/ Italie du 20 juill. 2001, Aff. n° 30.882/96), Gaz. Pal., 21-23 July 2002, nos. 202-204, pp. 2-12.

98 CAS, 12 January 2001, 2000/A/289, Union Cycliste Internationale (UCI) v. C. & Fédération Française de Cyclisme (FFC), CAS Digest 1998-2000, p. 424. The principle of proportionality between the offence and the sanction was at stake here. On this principle, see infra.

99 All members of the Council of Europe have ratified the Convention with the exception of Albania, Andorra, Armenia, Georgia, Ireland, Malta and Moldova.

100 This requirement is particular clear in the French translation of the Convention, which is also authentic: "Il doit exister des dispositions claires et applicables en pratique permettant d'interjeter appel contre tout jugement rendu."

101 Article R59 paragraph 4 of the CAS Arbitration Code: "The award, notified by the CAS Court Office, shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration."

102 Court of Appeal, 20 December 1996, Wilander v. Tobin, [1997] 2 Lloyd's Rep. 293. It is also noticeable that the Court of Appeal applied this provision, recognising implicitly that the Convention is self-executing and can be invoked by private persons in disputes between them.

103 Article R58 of the Arbitration Code.

104 Ph. Fouchard, E. Gaillard, B. Goldman, Traité de l'arbitrage commercial international, Litec 1996, nos. 1421 ff.

105 See, in comparison, on the question of legal capacity, Ph. Fouchard, E. Gaillard et B. Goldman, Traité de l'arbitrage commercial international, Litec 1996, no. 1532.

has the power to push aside the law chosen by the parties, by virtue of the exception of international public policy (*ordre public*).

The assessment of the validity of a disciplinary decision should be two-fold. On the one hand, the CAS must review the compatibility of the decision with the internal rules of the organisation and more widely with the rules emanating from the sports movement. On the other hand, even if these rules have been respected, the CAS must ascertain that the decision is in conformity with the national law of the country of the seat of the body that took the decision. The Swiss Civil Code provides explicitly that the decisions of an association must be in conformity not only with its bye-laws, but also with legal mandatory requirements.[106] The application of national law is a reality since the practice of sports has become a professional and economic activity. This application is even more imperative in countries where the sports education of young generations has become one of the responsibilities of the state.[107] Therefore, the arbitration panel should intervene at the same level as the national courts and should apply the same causes for annulment. It is then necessary to discover whether, besides illegality because of the contents of the decision, arbitrators should also assess the legality of the decision in accordance with its motives and purposes. In several legal systems, the review of unilateral decisions by associations, federations or other sports bodies is very thorough.[108] In some legal systems, the courts even control the proportionality of the sanction with the alleged fault.[109]

National courts traditionally apply the proportionality control. Such is the case of the French jurisdictions.[110] Such was also the case of German Courts on the occasion of the widely mediatised Katrin Krabbe case.[111] The Court of Appeal of Munich cancelled one of the two sanctions incurred by the athlete, the one rendered by the IAAF.[112] The same control is sometimes applied by the English Courts.[113] Such a thorough review is justified by the fact that the decision is taken by the internal organs of a sports federation or association on the basis of its own bye-laws. In other words, the body which pronounces the sanction is at the same time the one that enacted its legal ground. It is therefore justified that an external and independent authority reviews not only the conformity of the decision with the bye-laws, but also the conformity of the rule applied with the applicable national law and the proportionality of the sanction with the offence.

Nevertheless, it is interesting to notice that such a control is only rarely applied in the awards rendered under the aegis of the CAS. None of the awards I know of applied provisions of the national law chosen by the parties or of the law of the country where the sports body has its seat.[114] However, when the arbitration is purely domestic, i.e. concerning only the Swiss legal system, the awards clearly apply Swiss law.[115] However, statements concerning the principle of legality and the application of national law have been formulated by the CAS, not in the exercise of its arbitral office, but in giving non-binding legal opinions. It was notably asserted that the sanction of life disqualification is possible only if it is in conformity with the principles of national and international law, including human rights.[116]

Many awards of the CAS seemed to refuse to review the proportionality of the sanction in a detailed a way.[117] In the cases that led to the awards reported in footnote, a Spanish and a Slovenian swimmer, following a positive control to the nandrolone, were disqualified from the Marathon Swim world championships for which they had been classified in the first two places. They also incurred a disciplinary suspension for a period of four years. The arbitration panel did not assess the proportionality of the sanction. In other arbitral awards, the panel applied the principle of proportionality, although without referring to any legal provision.[118] Nevertheless, these awards restrict the control of proportionality of the penalties to the limits established by the regulations of the sports bodies and refuse to investigate whether these limits are reasonable. Moreover, arbitrators do not apply such a review for the automatic sanctions that are incurred after a positive doping test. In the Baxter case, they did not question the regulations, which deprived from an Olympic medal a skier who was recognised to be honest and who had made use of a harmless drug in order to relieve a nasal congestion, while it was established that its inhalation had had no effect on the athlete's performance.[119] While the arbitrators asserted that the athlete deserved the medal, they nevertheless refused to make use of their power to give the medal back to him!

10. Conclusion

The picture is clear: the arbitrators are endowed with wide powers to review and assess the validity of disciplinary sanctions rendered by private sports organisations. Less parsimonious use of their competence in the future would be desirable, especially since the CAS is the only jurisdictional authority that will really have to review such a decision. In claim for annulment of a CAS award, the Swiss Federal Court will, indeed, limit itself to reviewing the compatibility of the award with international public policy and will not verify that the national law - even if the law applicable to the arbitration is Swiss law - has been correctly applied.[120] In these circumstances, the CAS will show its real independence only if it makes an efficient use of its power.

106 Article 75 of the Swiss Civil Code: "Tout sociétaire est autorisé de par la loi à attaquer en justice, dans le mois à compter du jour où il en a eu connaissance, les décisions auxquelles il n'a pas adhéré et qui violent des dispositions légales ou statutaires."

107 See, F. Rigaux, Le droit disciplinaire du sport, Rev. trim. dr. homme 1995, pp. 295 ff., at no. 21.

108 For French law, see J.-M. Huon de Kermadec, Le contrôle de la légalité des décisions des fédérations sportives ayant le caractère d'acte administratif, RDP 1985, p. 407-441; J.-M. Duval, Le droit public du sport, Diss. PUAM 2002; B. Ozdirekcan, La répression du dopage dans le sport, Diss. PU du Septentrion, 2002.

109 This is the actual line of case law in France for all disciplinary sanctions, see M. de Saint Pulgent, RFDA 1991, 613, report under CE 1st March 1991, Le Cun, Rec. Lebon, p. 70; AJDA 1991, 358, with annotation C. Maugüé, R. Schwartz.

110 CE 13 March 1987, Le Sain, D. 1987 somm. 462, with annotation B. Faucher; CE 22 October 1993, Lorentz v. Fédération française de karaté, taekwondo et arts martiaux affinitaires, D. 1995 somm. p. 58, with annotation J.-P. Karaquillo; Cass. Civ. I, 16 May 1972, Bull. civ. I, no. 127, p. 113; J.C.P. 1972.II.17285 with annotation R. Lindon; Cass. Civ. I, 28 October 1981, Bull. civ. I, no. 316; D. 1982, 381 with annotation G. Sousi.

111 On this case, see J.A. Faylor, The Dismantling of a German Champion: Katrin Krabbe and Her Ordeal with the German Track and Field Association and the International Amateur Athletic Federation (IAAF), 17 Arb. Int'l 2, 163 (2001).

112 OLG Munich, 28 March 1996, NJW 1996, 2351; SpuRt, 1995 no. 4, 162. The Bundesgerichtshof rejected the appeal, BGH 16 June 1997, unreported.

113 Chancery Division, 23 June 1997, Edwards v. BAF and IAAF [1998] 2 CMLR 363.

114 In CAS, ad hoc Division OG Sidney, 18 September 2000, 2000/004, Comité Olympique Congolais & Jesus Kibunde v. Association Internationale de Boxe Amateur, CAS Digest 1998-2000, p. 617, the panel stated: "Il est exact qu'un règlement sportif doit respecter non seulement la loi mais également les principes généraux du droit." However, nothing more was said as regards the law applicable and the review of the decision has been only superficial.

115 CAS, 21 December 1995, 95/139, HC Y. v. Ligue Suisse de Hockey sur Glace (LSHG), CAS Digest 1986-1998, p. 323.

116 CAS, 10 November 1986, Advice 86/02, IOC, CAS Digest 1993, p. 462. See also CAS, 31 August 1994, Advice 93/109, Fédération française de triathlon, CAS Digest 1986-1998, p. 467.

117 CAS, 29 February 2000, 99/A/234, David Meca-Medina v. FINA and 99/A/235, Igor Majcen v. FINA, unreported.

118 CAS, 22 April 1996, 95/141 C. v. Fédération internationale de Natation Amateur (FINA), CAS Digest 1986-1998, p. 205, reduction of half of a two-year suspension. In other cases, the existence of the principle was only stated, CAS, 14 January 1999, 97/180, P. et alii v. FINA, CAS Digest 1998-2000, p. 171; CAS, 16 April 1995, 95/145, unreported.

119 CAS, 15 October 2002, 2002/A/376, Alain Baxter v. IOC. For criticism of this case, see also H. Opie, Drugs in Sports and the Law - Moral Authority, Diversity and the Pursuit of Excellence, 14 Marq. Sports L. Rev. 267 (2004).

120 See Swiss Federal Court, 31 March 1999, N., J., Y., W. v. Fédération Internationale de Natation Amateur (FINA), CAS Digest 1998-2000, p. 767. In this case, the Court could not verify whether the arbitrators had correctly applied Swiss law in following the principle of strict liability in cases of doping offences.

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Organization of Professional Sports in the Russian Federation

by **Mikhail V. Loukine***

1. Introduction

Nowadays professional sports as a whole can be examined as one of the most profitable business industries. The economical, sociological, cultural and political importance of professional sports can not be underestimated. Due to recent changes in the Russian economy and social order, this segment of the sports sphere has has developed in full accordance with international standards and histories of professional sports found in North American and European countries. In my report I would like to summarize the legal experience regarding the organization of professional sports in the Russian Federation, basing my examination on the legislative regulations, professional sports associations' bye-laws and other normative acts that regulate this area of public relations.

2. Professional sport as a specific sphere of public relations regulated by Sports Law

Sports Law is a specialized and complex branch of the law. According to the definition found in *West's Encyclopedia of American Law* (Sports law is an amalgam of laws that apply to athletes and the sport they play(. Professional sport plays a significant role in the physical culture and sport sphere. Multibillion businesses (mostly part of the entertainment industry) while trying to dominate public attention inevitably create legal problems that are intended to be resolved by numerous normative acts. That is the main reason why the industry professionals must understand a wide range of legal issues.[1]

It is obvious that such a significant sphere of public relations as professional sport is one of the main areas regulated by Sports Law. In order to examine the organization of professional sports in a particular country, it is necessary to define professional sports and professional athlete categories, and also provide a general list of subjects regarding the legal regulation in this sphere of public relations.

The above mentioned *West's Encyclopedia of American Law* defines (professional athlete(as a person who is paid for his/her services. It also provides a general list of subjects involved in professional sports such as team owners, athletes, agents, promoters, lawyers, accountants, advertisers, builders, carriers, journalists, media outlets, politicians, governing body of the particular sport and even courts.

In other sources we can find different opinions on the question of a professional athlete(s status. For example, several authors suggest that the term (professional(refers mostly to the skill of an athlete.[2] These lawyers and legal scientists insist that the one should distinguish between (commercial sport(and (professional sport(. However, legislative examples contradict this point of view.

After a basic analysis of the main definitions, categories, and economic matters pertaining to professional sports, it can be stated that professional sport itself constitutes a large and specific sphere of public relations regulated by Sports Law. The constant development process existing in this area requires permanent legislative attention in order to bring the existing laws and regulations in compliance with the modern conditions and international standards.

3. Legislative regulation of basic issues of professional sport in the Russian Federation

One of the most serious legislative issues facing the Russian Federation at present is the establishment of the "professional sportsman" appropriate status. According to Article 2 of the Federal Law on Physical Culture and Sports in the Russian Federation, a professional sportsman is a sportsman for whom going in for sports is the basic kind of activity, for which, according to the contract, he receives wages and other monetary compensation for preparation for sports competitions and participation in them.

4. Legal forms of organization of professional sport in the Russian Federation

In order to understand the organization of professional sport by associations of pro sports clubs, it is necessary to examine the history of the development of a particular sport and its internal regulations adopted by the corresponding structures.

4.1 Professional hockey in the Russian Federation (Russian Professional Hockey League)

Ice hockey is one of the most popular sports in the Russian Federation. It successfully survived the period known as the "transition economy" of the 1990's. Even foreign specialists have commented that "Russian ice hockey has been and remains the premier sport" in the territory of the former Soviet Union.[3] Today the Russian Professional Hockey League (PHL) is regarded as the "second best" ice hockey league in the world. Significant increases in players' salaries have made possible recent transfers of current NHL stars to Russian clubs (especially because of the current lock-out in the NBL this season).

In this Chapter I will provide you with a short historical background concerning the development of the organization of ice hockey as the national sport in the Russian Federation and also will focus on the structure and system of the PHL.

Despite its "amateur" status during the Soviet era, ice hockey was well organized in the USSR. Several leagues, consisting of strong teams, were competing for the Champion title. The international success of the national team proved the efficiency of this system. However, the domestic championship lacked real competition for the 1st place. The TsSKA Moscow hockey team, used as a basis for the national squad, would gather the best players under its command and make an undefeatable march for gold medals every year. State control, official amateur status of clubs, players that were in reality fulltime ice hockey athletes-workers, and the presence of the well developed championship system, combined to work for the interests of the USSR national team. These factors were important preconditions in the development of professional ice hockey in the Russian Federation.

After the collapse of the Soviet Union, the Inter-State Hockey League (MHL) was created. It became the first professional ice hockey association in the territory of tlie former USSR and consisted of the best clubs from the former Soviet republics. This League played an important role in the force that maintained the organization of ice hockey in the period known as the "transition economy". In the late 1990's it became obvious that the MHL was losing its credibility. Teams from former Soviet republics participated in the championship game in order to prepare their national teams for international competitions. Those clubs did not have any other sports objectives. After careful examination of this situation, Russian clubs with the legal and

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1 See Wong Glenn M. (2002), Essentials of ports law. Third edition, Greenwood Publishing Group Inc., p.3.

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3 See Aaron N. Wise, Bruce S. Meyer (1997) International Sports Law and business. Volume 2, Kluwer Law International, p. 1362.

economical support of the Russian Ice Hockey Federation (FHR) formed a new league in 1996. It was named the Russian Hockey League (RHL) and consisted of clubs located only within the territory of the Russian Federation. After several successful seasons the current Russian Professional Hockey League (PHL) was created. This association while complying with the Federal Law No. 80-FZ of April 29, 1999 on Physical Culture and Sports in the Russian Federation, fully recognized the professional status of ice hockey clubs (as the members of the League) and ice hockey players (as the athletes participating in the competitions organized by the PHL).

Several normative acts adopted by the PHL need to be examined in order to fully understand the current system and the legal status of its subjects:

- The Bye-Laws of the Noncommercial Partnership "Russian Professional Hockey League" of 1999,
- The lce Hockey Player's Status of 2002 adopted by the PHL,
- The Regulations on the Licensing of Agents' Activity in the System of the PHL of 2001,
- The Annual Ice Hockey Championship Regulations of the PHL.

The Bye-Laws of the Noncommercial Partnership, "Russian Professional Hockey League," is the primary normative act of the League consisting of provisions that define the legal status of the professional association. This legal document is simple and typical. It was adopted in one of the few forms of the standard bye-laws of noncommercial organizations that are normally used in Russia. According to this normative document, one of the main purposes of the PHL is to maintain the state's policy in the sphere of sports aimed at the development and co-ordination of professional ice hockey in the Russian Federation. The main governing body of the PHL is the General Assembly (Meeting), which is comprised of its members. The Council of the League (currently the Presidents Council composed of clubs' presidents) along with thr President, Vice-President and Director of the PHL maintain the League's operations.

There are a number of different committees within the PHL that govern various spheres of professional ice hockey ranging from the appointment of referees to legal disputes resolution. The Arbitral Committee of the PHL is one of the most influential bodies within the League. According to the Annual Ice Hockey Championship Regulations of the PHL (that also set rules and conditions for the annual championship including its schedule), all legal disputes in the area of professional hockey should be resolved by the PHL's Arbitral Committee on an exclusive basis. Such a provision also is included in

the Regulations on the Licensing of Agents' Activity in the System of the PHL of 2001, Ice Hockey Player's Status of the PHL of 2002, and the Standard Player Contract. However, the conflict between this sports rule and a ruie of national law regarding this matter is obvious. Article 46 of the Russian Constitution proclaims that everyone shall be guaranteed judicial protection of his rights and freedoms. Therefore, no association should attempt to limit the constitutionally guaranteed right to seek legal

protection before the courts. Moreover Article 25 of the Federal Law on Physical Culture and Sports in the Russian Federation defines a contract on sports activities as an agreement that is concluded on the basis of the labor legislation of Russian Federation, and represents an employment contract. An "exclusive obligatory arbitration system" is not possible to resolve labor disputes in accordance with Russian labor law. This means that the system created by the PHL is questionable in the Russian Federation because national law supercedes any associations' local normative acts. In reality, however, every party involved in Russian professional hockey obeys all the decisions of the League and its Arbitral Committee, and no one even tries to challenge its regulations in court.

The absence of a players' union in Russia leads to the situation where all significant legal relations in professional hockey are defined and regulated by the League. The Ice Hockey Player's Status of 2002 adopted by the PHL, and Regulations on the Licensing of Agents' Activity in the System of the PHL of 2001, are the key local normative acts that define the legal status of professional ice hockey players and their agents in the Russian Federation. The Ice Hockey Player's Status provides a definition of the "professional ice hockey player", a category that is similar to the state's legislative "professional sportsman" definition mentioned above.[4] The only difference is that this internal PHL document proclaims that in order to achieve "professional ice hockey player" status for the professional sportsman, hockey should be the basic kind of activity and the contract (contract on sports activities in accordance with Article 25 of the Federal Law on Physical Culture and Sports in the Russian Federation) should be concluded between the player and the club - a member of the PHL. A significant problem associated with the definition is that the League does not regard other players (except those who have a contract with a PHL's club) as professional. For this reason, the introduction of appropriate amendments to this definition is essential. For example, amendment language that would provide "PHL professional ice hockey player" status instead of just "professional ice hockey player" status, is thought to be necessary. Agents' activity in Russian professional hockey is based on the Regulations on the Licensing of Agents' Activity in the System of the PHL of 2001. All agents' contracts are supervised by special bodies of the PHL and the FHR. These bodies are the PHL Licensing Commission and the FHR Interregional Coordination Councils, which also have the authority and responsibility of initiating and then presenting disciplinary cases against players' representatives engaged in probibited conduct.[5]

After careful examination of the PHL's Bye-Laws and other regulations, it should be noted that the League intentionally decided to adopt its basic legal document in the general standard form in order to specify various relations in this particular sphere of public relations in other local normative acts. The League's strong financial position created the necessary framework for its future successful development, but the absence of a players' union and the PHL's intention to regulate all internal relations of professional ice hockey within the Russian Federation can lead to serious conflicts not only between the League and the players, but also between the League and the State.

4.2 Professional football in the Russian Federation (Russian Football Premier League)

These days football dominates Russian media. Despite unsuccessful participation in various international competitions, the Russian national team remains the main topic for sports discussions in television, radio and print sources. Although the level of participation in professional football in the Russian Federation is rather low comparison with ice hockey, financial investments made in the sport offer generally the best financial opportunities for sports professionals (athletes, coaches, managers and agents).

In this Chapter I will examine the history and current developments in Russian professional football. My analysis of the Russian championship will be based on the normative acts of the Russian Football Premier League (RFPL), which is the top League in Russia.

Football was a very popular sport in the USSR. Several international successes of the national team and the main clubs were a result of a well-developed championship system and strong governmental support. Football players like ice hockey players were considered "amateurs" during the Soviet era, but football authorities were the first in Russia to implement professional sports instruments such as transfers, contracts, and others documents to organize their sport. In 1992 the Russian Football Union (RFS) was created. Along with the newly formed Professional Football League (PFL), the RFS recognized the professional status of clubs and distinguished between amateur and non-amateur football. Successful cooperation between the RFS and the PFL continued until 2001 when the top clubs participating in the Russian Championship organized the Russian Football Premier League (RFPL), which gathered nonamateur Russian football clubs from high division.[6] As a result of these changes, the spheres of influ-

4 See Article 2 of the Federal Law on Physical Culture and Sports in the Russian Federation.

5 See Mikhail V. Loukine (2002), Legal regulation of sports agents' activity in the Russian Federation, Professiona League of Sports Lawyers, p.7.

6 See Article 1 paragraph 1.2. of the Bye-Laws of the Noncommercial Partnership "Russian Football Premier League".

ence were divided as follows: the RFS as the national football federation in accordance with FIFA regulations and the Federal Law No. 80-FZ of April 29, 1999 on Physical Culture and Sports in the Russian Federation delegated the rights for organizing the national championship (former high division) to the RFPL while the PFL remains responsible for organizing competitions between non-amateur clubs in the first and second divisions.

The RFPL as the PHL is also registered in the form of a noncommercial partnership. Basically, the Bye-Laws of the Noncommercial Partnership, "Russian Football Premier League", are similar to the corresponding normative act of tlie PHL and along with its general provisions consists of articles that mention the FIFA, UEFA and tlie RFS regulations (especially concerning football transfers). The main governing body of the RFPL is the General Assembly (Meeting), which is composed of its members. The President of the League is the highest position in the organization, but all the current operations are maintained by the Director of the RFPL. There also are several committees and commissions that are headed by their chairmen.

Based upon the Bye-Laws a number of local acts regulating relations in the field of professional football were adopted. The Annual Football Competition Regulations between PFPL Clubs is the local normative act that defines the structure and the system of the national championship in the top league.

The regulations also set the general disciplinary procedure that is conducted by the Controldisciplinary committee of the RFS with its bureau in the RFPL and the Dispute Resolution Chamber responsible for players' transfers matters and other legal disputes. All main legal questions concerning football transfers are regulated by the RFS Regulations for the Status and Transfer of Players. These national regulations do not contain any essential differences that distinguish it from the basic FIFA corporate act devoted to this question.

All the FIFA and RFS regulations are obligatory for the RFPL and the PFL. That is why the leagues' authorities concentrate mainly on organizing the championship and other internal matters (for example such legal question as players' agents' activity is also considered in accordance with the FIFA Players' Agents Regulations and local RFS Regulations). This arrangement means that several major areas of authority are removed from the leagues' interests. Moreover, often football associations' regulations contradict national law; for example, rules establishing the transfer system, violates the Russian Constitution's[7] provisional guarantees freedom of labor. This system reflects a balance of power between professional leagues and the national federation; however, this balance is very unstable and is dependant on the personal relationships between the heads of these organizations.

From the aforementioned analysis, it can be deduced that professional football in the Russian Federation is a developing industry. In recent years football has secured significant financial resources that have improved the game's organization and enhanced the level of the sport. It is of great concern, however, that the lack of a stable legal environment along with conformity between specific sports regulations (those by the FIFA, RFS and pro leagues) and national legislation may seriously harm any future progress in this area of public relations in sports.

4.3 Pro athletes' unions in the Federation and their relationships with professional sports leagues

The importance of players' unions in professional sports can not be underestimated. Pro athletes' associations in different leagues in various countries play a very important role in the industry. Representing sportsmen in relationship to particular pro sports clubs' associations, sportsmen's unions can play a significant role in influencing the business of sports. Sometimes serious differences of opinions between a players' union and a pro league can lead to a strike or lock-out that may even result in the in the cancellation of a sport championship.

Pro athletes' associations are a new phenomenon in Riissian sports. The Russian Sportsmen Union that was established in 1992 to operate on the national level became the first athletes' association in the country. According to its Bye-Laws, the Union's primary objective is to support both active and former athletes. However, in reality the Union does not have any serious influence on any sports, especially professional ones. It has become a formal organization that provides a little financial help to the sportsmen, mostly former Olympic champions, and uses its name for various presentations, conferences, and general meetings with the Russian Olympic Committee and national sports federations.

Currently in the Russian Federation there is only one real players' union that operates in football with the help of FIFPro - a worldwide representative organization for all professional football players. The Association of Professional Football Players of Russia actively participates in negotiations with the RFS, RFPL and PFL regarding various aspects of pro players' sporting life. However, the influence of this organization is not very high because there is no true unity between pro footballers in the country.

There also was an attempt to create a players' union for professional hockey in the Russian Federation using as a model the National Hockey League Players' Association (NHLPA). The attempted union was created in Russia by a group of active players who lacked a strategic plan and financial resources to maintain the activity of the union. This Union prepared samples of a Standard Player Contract and Collective Bargaining Agreement that were eventually presented to the PHL in the form of an official proposal. There was not any response from the League and subsequently the founders of the Union decided to dissolve the organization.

Having studied professional sports in the Russian Federation, it can be stated that despite significant financial investments in is sphere the absence of real pro athletes' associations has become a serious obstacle in the way of developing pro sports in the country. Because sportsmen's rights are an important concern in the sports business, these rights can only be fully protected by a system that tryly understands athletes' problems and demands.

5. Conclusion

After careful examination of the basic principles of organization regarding professional sports in the Russian Federation, it can be concluded that at the present time this area of public relations is one of the fastest growing industries in the Russian economy. In order to support this progress, however, an appropriate legal basis is necessary. The Federal Law on Professional Sports in the Russian Federation should be adopted and the autonomy of professional sports associations (leagues and, especially, players' unions) should be guaranteed at state level. Certainly, all new normative acts should meet not only other legislative demands, but also the international sports federations' requirements in order to avoid a contradiction between sports rules and a rule of national law.

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Romania

Civil Liability Arising from Breaches of Sports Regulations

by **Alexandru-Virgil Voicu***

1. Introduction

This article discusses the efforts which are undertaken in Romania against the background of similar efforts undertaken in other countries to provide a framework for sport which promotes civilised behaviour on the pitch. In addition, sport as a social phenomenon must also be subject to the rules of law in force. Where these rules are not voluntarily complied with, the state is entitled to enforce them and sports organisations or structures within sport may not limit the rights of the aggrieved party to compensation. This contribution will focus on liability, and more specifically, on the concept of civil liability arising from violations of the rules of sport.

2. Liability and consent

Sports activities or participating in sports-related activities are often a cause of damage as a result of, mainly, accidents. Due to a lack of special rules for such accidents, the legal consequences which they give rise to are dealt with on the basis of general principles of law. In proceedings for compensation or damages which may follow from sporting accidents, the consent of the victim is frequently invoked as a ground excluding liability, as consent is an accepted exemption under the legal principles concerning liability. The obligation to provide a remedy for breaches of legal obligations under Sections 998 and 999 of the Romanian Civil Code was established for the protection of certain public order interests and is therefore imperative law, which cannot be set aside by any agreement between the parties under penalty of nullity, in accordance with Section 5 of the Civil Code.[1] The prior consent of the victim which he/she gave to the other party to proceed in a certain manner while the victim was aware of the possible injurious consequences of the acts to be undertaken by the other party eliminates the illicit nature of the act which caused the injury and therefore also removes any liability. The victim in such a case gives his/her consent not to the resulting harm, but to the carrying out of an activity, which could potentially result in injury - for example, sports activities. Pierre Coubertin considered that sport is "*a volunteer cult of intensive muscular effort, supported by a desire of progress, and being able to go as far as risk permits*".[2] To successfully exclude liability, it is necessary that the act to which the victim consented was the result of *culpa levis*. The harmful act may thus only lose its illegal character through the effect of an elusive and limited exception to the normal rules of liability. In addition, some legal scholars maintain that liability can only be removed in case of damage to property, not in cases of personal injury. As regards personal injury,[3] it is argued that "*the non-applicability of liability may be recognised in exceptional cases where the injury sustained is temporary and not severe, or to the extent that its non-application would be justifiable in view of the aim that is to be served thereby*".[4] Liability is therefore recognised by certain scholars[5] not to apply in case of specific contact sports, such as rugby, hockey and boxing, on the condition that the rules of play are observed and that the players willingly assume the inherent risks. In short, therefore, the consent of the victim may limit liability, in which case the harmful act loses its illicit character, or, put differently, the illegality provided by the law is overridden by the contractual will [consent] of the victim.

Sports activities are susceptible to a series of risks, which are previously known to the participants and which they must all accept. This acceptance of, or consent to, the risks of sport is demonstrated by the players' presence in the stadium. Only when all mandatory rules have been respected by participants, sportsmen, coaches, referees, spectators and organisers alike, can liability be removed. This means that offenders who have failed to comply with the rules and have committed an act which resulted in the personal injury of another party, cannot successfully invoke consent.[6] The risks to which participants are exposed during sports activities may have many causes, among which violations of the rules of play, recklessness, negligence, organisational defects, and of course the more or less dangerous character of the sport itself.

Similar to legal rules, the rules of play in a particular sport serve the need of protecting the subjective rights of the participants and perhaps more importantly of ensuring that the activities in question will not go against social norms and principles. Fierce competition for better results, new records, or other non-performance-related rewards which sport may offer, may give rise to illegal behaviour entailing a higher or lesser risk of personal injury. Rules of play are generally established independent of state intervention. They are drafted "*not as a consequence of a unilateral decision of the members of a community but as an expression of their consent*".[7] The rules of play of a particular sport can thus be regarded as an official declaration of this consent. Rules that have been established in this way are at the same time a declaration of the authorities of a sporting community concerning the conditions to which the community's members have consented and a

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guarantee providing legal certainty that all the rights of the participants in the sports activities will be ensured. Conversely, through their consent, all parties involved are also obliged to comply with the rules of play. The sporting community provides all the necessary means in order to protect the interests and pursue the objectives for which purpose the rules were established. It accordingly provides sanctions for breaches, ranging from light (e.g. referee penalty call) to severe (disqualification, suspension). But the rules of play also provide rules of behaviour for referees, one of which is to enforce the rules in case of breach. Sports regulations include various rules concerning, among other things, their own breach, prohibited techniques, prohibited substances and methods, the duties of referees, organisers, doctors, etc., and penalties for violations of the regulations. International agreements concerning sports activities also require that the participants' rights are protected. With respect to disciplinary rules, the emphasis is on the informed consent of the sportsmen (client). In the classical formulation, this consent involves providing complete information concerning the activity in which the athlete will participate as well as its possible effects.

One reservation must be made to the conclusion drawn above that a player's acceptance of the risks of sport is shown by his/her presence in the stadium. This reservation does not apply to adults with full legal capacity, as these already have "*the necessary discernment to conclude any juridical act permitted by law and to [their] ability to act alone in juridical life*".[8] Rather, it applies to minors who lack or are restricted in this capacity. A valid expression of consent on the part of a minor to practice a certain sport can however be obtained through his/her legal guardians and representatives and after their prior agreement to protect the minor against the abuses to which he/she could be subjected while participating in sports activities.

Consent to practice a certain sport, subject to the conditions mentioned above, cannot be inferred from "sports practice", but has to be expressed more clearly, for example through the signing of registration forms for school sports clubs by a minor's legal guardians, which are however intended first of all as consent forms for the school and not as proof of consent in the meaning discussed here. Certain aspects of the consent to surgery when adapted to the specific requirements of sports could also be applied.[9] [10] In addition, the organiser could be held liable. The consent of the aggrieved party cannot legally remove the organiser's civil liability for breach of sporting rules in the event that harm is caused through the organiser's fault.

The organiser is the person who provides the sports facility and/or is responsible for making the proper arrangements with respect to the sports facility, checking the physical condition of participants and inspecting sporting equipment, seating spectators, organising security for the particular event, ensuring the safety of participants and spectators, etc. - in short, the organiser is responsible for making all efforts in good faith to prevent the occurrence of accidents.

Now that we have demonstrated the need for and practical use of consent (indeed, its obligatory nature in a sense), it remains to solve the issues of its proof, forms and objectives and the consequences of refusal or lack of consent.

3. Conclusions and recommendations

At present, there is no relevant case law in Romania. This article therefore mainly refers to doctrine, so as to raise awareness in the sporting community of the possibilities that exist to remedy harm caused on the pitch. Persons (either natural or juridical) involved in sports activities who have suffered damage to property or personal injury, may bring an action before a judicial body in civil, criminal or arbitration proceedings "*to concretise [their] right to reparation, including the manner and extent of the reparation, which obliges the defendant or defendants to assume responsibility for their harmful actions*."[11] Legal proceedings thus establish a compulsory legal relationship between the author of the act or the person responsible for the act and the victim, in this case, a person who suffered harm through his/her involvement in a sports activity. The victim is entitled to reparation, in other words, has become the creditor, while the perpetrator of the harmful act is obliged to make reparation, or has become the debtor. As we have seen, the harm caused to participants during sports activities may be damage to property or personal injury. To enforce his/her right to institute proceedings, which is an integrated part of the right to personality and a guarantee for its realisation, the victim who has suffered harm due to an illicit act has to commence an action arising out of civil liability for breach of obligation, in which the victim must prove the harm caused by the defendant.

It is recommended that the problem of civil liability for harm occurring during sports activities be further examined in order to clarify the obligations arising out of harmful acts suffered by athletes, but also to specify the professional liability of coaches and/or gym teachers in this field. Where necessary, the legal regulation of sport could subsequently be adapted in conformity with the outcome of the analysis. In any event, discussion of this subject is necessary in order to make lawyers aware of the legal implications of sport. But most of all, participants in sports activities must be made to realise that their actions are subject to a legal liability regime, so as to compel them to act in accordance with the rules.

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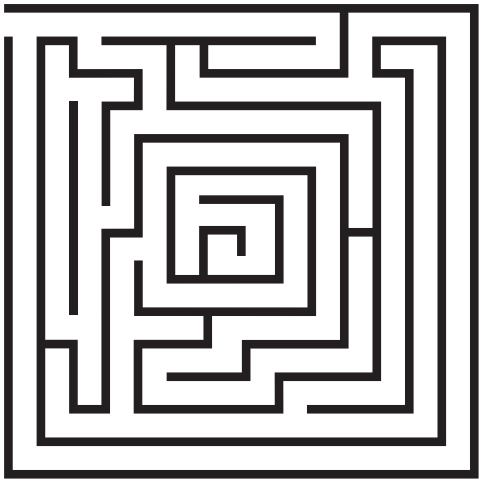

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Image is Everything: An Analysis of the Legal Protection of the Image of Sports Athletes

by **Paul Gelder***

1. Introduction

With large financial interests at stake it is not surprising that the legal status and protection afforded to Image Rights is acutely significant. Indeed such is the significance that exploration of this and the surrounding issues will form the central theme of this chapter.

An international perspective is adopted which compares and contrasts the various approaches to the protection of Image Rights in a variety of jurisdictions. A particular emphasis is placed on the UK where the debate is particularly contentious due to the approach adopted by the domestic courts, frequently criticised for their deemed failure to provide adequate legal protection for the Image Rights of famous individuals. The author will examine this perception and assess the adequacy of the possible causes of action that a sports athlete may bring when faced with the unauthorised use of these rights. Proposals for reform are submitted where appropriate. The role and effect of European Law is also given due consideration as an important development in the field.

The author examines the moral, social and ethical issues surrounding the use of an individuals image which are fundamentally important internationally as such considerations may contribute towards the formulation and direction of a jurisdictions legal rules and policy. Furthermore, no comprehensive discussion of Image Rights can take place without full consideration being given to the role and interpretation of image globally. Contrasting meanings may attach to image due to the cultural differences evident around the world.

However, in order to place this discussion in context one must firstly examine what Image Rights are, and the growing importance of such rights to sports athletes.

2. What are image rights?

Put simply, Image Rights are the 'ability to make money out of the fact that one was [is] very well known.'[1] This applies as much to individual sports as it does to team sports, witness Tiger Woods and David Beckham respectively.

2.1 Image rights and marketing

Commercial entities continue to view sports stars as compatible with their goods, services or products and pay handsomely for these individuals to be associated with them. One does not need to look far to view the proliferation of goods which bear the image or name of a sports star. This is attributable to the prominent position of sport in today's society and the largely unreplicated loyalty that sports fans display towards particular sports and teams. Consequently, investment in the industry is a particularly attractive proposition for commercial entities seeking to acquire a financial and marketing advantage over their competitors. This is particularly true of professional Football in the UK due to its growth in popularity since the early 1990's.

In the case of professional footballers, the marketing of Image Rights may centre on the role of the club player, the international or the individual and be harnessed in the form of sponsorship, merchandising and endorsement agreements. The main characteristics of these types of agreement are detailed below.

Merchandising is the exploitation of "images themes or articles which have become famous,"[2] commonly, the use of the name, logo, trade marks and other properties relating to the sports person, club or organisation unconnected to the core business.[3] Endorsement agreements are distinct in that endorsement is the communication to "the relevant public that he approves of the product or service or is happy to be associated with it. In effect, he adds his name as an encouragement to members of the relevant public to buy or use the service or product."[4] Finally, sponsorship details an investment in a particular activity. The nature of this type of agreement may offer the sponsor a competitor free environment.

To provide some indication of the commercial worth of these types of image rights agreements one need only look to the US $ 52.5m that Michael Schumacher earned in 1999 from the commercial use of his name and image. David Beckham also earns considerably more off the field than he does on it and enjoys commercial arrangements with market leaders such as Adidas, Bryl Cream and Vodafone, amongst others.

However, it is not only the 'clean cut' athletes whose images are sought after. A variety of types of image may represent attractive propositions to entities seeking to convey their "marketing message."[5] For example, Dennis Rodman, a basketball player in the National Basketball Association has made vast sums from Image Rights agreements despite being synonymous with controversial behaviour both on and off the court. Whilst commercial entities may tolerate such behaviour if the individual is successful and enjoying a high profile it is unlikely that, in the longer term, they will be willing to associate themselves, their products and their services with negative publicity.

It is apparent that:

> Personalities are increasingly becoming "marketing properties" in their own right, they are becoming like "brands" which, when associated with goods and services, can add tremendous value to the proposition.[6]

2.2 The UK position

Having provided context to this discussion and furnished the reader with a broad understanding of image rights and the nature and type of Image Rights agreements it is appropriate to consider the legal standing of such rights.

Professor Cornish states:

> English law has steadfastly refused to adopt any embracing principle that a person has a right to his or her name, or, for that matter, to identifying characteristics, such as voice or image. An entitlement simply to demand that such characteristics without more amount to property in personality is highly regarded as a commodification too far.[7]

Therefore, "plaintiffs lacking the real thing must rely on a confusing number of analogues and neighbouring doctrines."[8] The author examines the efficacy of these analogues and doctrines and assesses whether the sentiments expressed by Professor Cornish are an accurate reflection of the current legal position. However, before the chapter is so focused, it is important to consider the role of contract in Image Rights.

3. Contractual arrangements

A sample Image Rights definition may read:

> Image Rights mean access to the services of the personality for the purpose of filming and television (both live and recorded), audio

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1 Bergkamp and Platt v Special Commissioners of the Inland Revue-Taylor p. 636.

2 Per Laddie LJ, Irvine v Talksport Ltd [2002] EWHC 367; [2002] 2 ALL ER 414 (Ch D).

3 Lewis; A and Taylor; J, Sport: Law and Practice, Butterworths Press, 2003, p. 733.

4 Per Laddie LJ, Irvine v Talksport Ltd [2002] 2 ALL ER 414 at 426b -427e.

5 Lewis; A and Taylor; J, Sport: Law and Practice, Butterworths Press, 2003, p. 706

6 Couchman 'Protection for personalities' (1997) 12 Sports Business 26.

7 Cornish, Intellectual Property, (4th Edition), para. 16-34.

8 Goodenough, Re Theorising Privacy and Publicity, (1997) 1IPR 37 at p.65.

recording, video and electronic pictures (including but not limited to the production of computer generated images), still photographs, personal appearances, product endorsement and advertising in all media; as well as the right to use, for promotional and other commercial purposes, the Personality's name, likeness, autograph story and accomplishments, including but not limited to the Personality's actual or simulated likeness, voice, photograph, performances, personal characteristics and other personal identification.[9]

However, collective agreements relating to the team may represent a particular source of tension. On the one hand, the team may be said to display its own personality, but, on the other, it may be considered secondary to those comprising the team - its individual constituents. This situation needs to be managed contractually.

Sample provisions may include:

- The right of the club to use the player's name and image, in his capacity as a member of the club, to promote the brand, products and services of the club and its commercial partners.
- The obligation of the player to make personal appearances; attend photo shoots and provide other services to support that use; and
- The player's right to use his name and image for his own benefit, but not while on club service, nor using club colours, nor in relation to brands, products or services that compete with the brands, products or services of the clubs sponsors.[10]

However, whether an athlete is able to exert professional and contractual freedom or be prevented from using his name in relation to competing brands, products or services is ultimately determined by the relative bargaining power of the parties.[11] In 1996, a group of German swimmers protested against having to use 'Speedo' equipment during competitions. The swimmers were sponsored by a variety of other swimwear companies and wished to use alternative equipment.

In the case of football, clubs such as Real Madrid and Juventus, frequently enter into agreements to purchase their players' Image Rights. In the absence of an agreement such as this, sporting bodies should have a specific agreement executed in which it is confirmed and explained that the Football Club, in consideration for monetary payment, is entitled to use the "footballers image when the player is part of the total team image or part of the broadcast or data transmission by phone, internet or other means of communication."[12]

4. The role of intellectual property

Intellectual property rights are property rights granted by states to individuals and organisations by way of encouragement and reward for their efforts and creativity. Classical economics dictates that people require pecuniary incentives to encourage the production of creative works. These rights can be traded, licensed, rented or hired.

The importance of giving property in an image is due to the significance of image in cultural identity.[13] This culture develops in the way people act, interact and form relationships as a group.[14] The role of trade mark and copyright are now considered.

5. Trade Mark Law

Section 1 (1) of the Trade Marks Acts 1994 (The 1994 Act) defines a trade mark as 'any sign capable of being reproduced graphically and distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.'[15] Civil remedies for trademark infringement consist of damages, accounting for profits, injunctive relief and orders for delivery up of infringing articles.[16]

The author has chosen to examine case law primarily in order to illustrate the legal protection afforded to those seeking to protect their Image Rights by the use of registered trade marks. The two cases predominantly discussed are *EPEI v Elvisly Yours*[17] and *Arsenal v Reed,*[18] which, between them, provide a good juxtaposition and encapsulate many of the current issues and developments.

5.1 The Elvis case

In *EPEI v Elvisly Yours,*[19] Elvis Presley Enterprises Inc, sold Elvis Presley related merchandise with the approval of Elvis Presley during his lifetime and from 1982 it was properly regarded as the successor to the merchandising business.[20] EPEI sought UK trade mark registration of a manuscript version of the name "Elvis A Presley", the word "Elvis" and the words "Elvis Presley"[21] in respect of goods in class 3.[22] The applications were made subject to further enquiry because they were in respect of goods that the public would not automatically associate with Elvis Presley.[23]

However, the applications were made prior to 31 October 1994 bringing them within the ambit of the Trade Marks Act 1938 (The 1938 Act). However, it should be noted that it was also a requirement of The 1938 Act that a trade mark possessed the requisite distinctiveness.[24] Lord Parker in Registrar of Trade Marks v W and G Du Cros Ltd described the test for requisite distinctiveness as*:*

> Whether other traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark, or some mark nearly resembling it, upon or in connection with their own goods. [25]

It is now informative to view application of this test.

5.2 The 'Elvis' application

EPEI contended that the prospective marks were distinctive and that the fame of Elvis, in itself, indicated distinctiveness.[26] EPEI sought to rely on the case of *Teenage Mutant Ninja Turtles Mirage Studios v Counter Feat Clothing*[27] wherein an interlocutory injunction was granted to restrain the use of look-a-like products. However, this case was distinguished as being one of copyright infringement and passing off.

EPEI contended that the question posed by Lord Parker - whether legitimate traders without improper motive would be likely to require use of the mark- should be decided in favour of the applicant. Improper motive, it was said, was the commercial exploitation of the name or likeness which belonged to either the individual or his proper successors. However, the Court Of Appeal held that the word "Elvis" could not be registered as a trade mark because it was not distinctive serving merely to describe the nature of memorabilia. The fame of Elvis only exacerbated this:

> the more a proposed mark alludes to the character, quality or non-origin attributes of the goods on which it is used or proposed to be used, the lower its inherent distinctiveness.[28]

Therefore, if the Elvis applications had been made in the 1950's they

9 See Blackshaw, I, Intellectual Property Rights and Sport: Cashing in on sporting fame.

10 Lewis; A and Taylor; J, Sport: Law and Practice, Butterworths 2002, p. 659.

11 Luca Ferrari, Sports Image Rights under Italian Law, ISLJ 2004/1-2 pp. 13-19.

12 Ibid.

13 Yumbulul v Reserve Bank of Australia, (FCA), 21 I.P.R. 481.

14 Solomon; M, Consumer Behaviour, 4th ed., Prentice Hall, 1992.

15 There is a prima facie assumption of the validity of a trade mark and there is no need to establish goodwill before enforcing it.

16 Section 92 and 93 of The Trade Marks Act 1994 also criminalises types of unauthorised use of registered trade marks.

17 [1997] RPC 543.

18 [2001] All ER (D) 67 (Apr).

19 [1997] RPC 543.

20 Thus complying with rule 18 of the Trade Marks and Service Marks Rules 1986. S.I. 1986/1319.

21 Registration in Part A of the register was sought in respect of the first two prospective marks and Part B in respect of the words "Elvis Presley". This division of the register was abolished with the 1994 Act.

22 Including "toilet preparations, perfumes, eau de cologne, preparations for the hair and teeth; bath and shower preparations, deodorants, anti-perspirants and cosmetics."

23 Kerly's Law of Trade Marks and Trade Names (13th ed., Sweet & Maxwell, 2001) 22.51.

24 Under the 1938 Act the mark must be distinctive for the purposes of section 9, capable of distinguishing goods of one undertaking from those of another under section 10 and the mark must not cause confusion with the goods of another undertaking under section 11-12 of the 1938 Act.

25 [1913] A.C. 624.

26 Thus bringing the applications within the some "other circumstances" category under section 9 (3) (b).

would, presumably, have been successfully registered because, at that time, the name would have possessed the requisite distinctiveness. This apparent anomaly occurs because it is the date of registration that is examined.

5.3 The Elvis Presley application

The addition of the surname Presley, a relatively uncommon surname, made the mark no more distinctive and reconfirmed the descriptive nature of it.[29]

EPEI failed to establish inherent distinctiveness [in the absence of any acquired distinctiveness] in respect of the Elvis and Elvis Presley applications because of the wide spread use of the marks by Elvisly Yours.[30]

5.4 The Signature mark

In *Fanfold Limited*[31] it was established that a signature such as that of Elvis A. Presley is, prima facie, distinctive for trade mark purposes and registerable under section 9 (1) (b) of The 1938 Act. This, of course, is provided that the signature was an authentic representation and demonstrated the necessary connection between the goods and the proprietor of the trade mark.[32]

However, some signatures, which are spelt out in "precise capitals," or "precise script which is indistinguishable from, say, Times New Roman Font" would not be distinctive.[33] It is submitted that the Court of Appeal correctly held that the Elvis A Presley signature mark did not fall into such categorisation. It was held that Section 12 and particularly Section 12 (2) of The 1938 Act, which permits concurrent use, did not apply because the marks were likely to deceive or cause confusion under Section 11.[34]

Section 11 provides:

> It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would, by reason of its being likely to deceive or cause confusion.... in respect of (a) the same goods, (b) the same description of goods or (c) goods and services or a description of services which are associated with each other subject to such conditions as the court or registrar.... may think it right to impose. [35]

Further, Section 68 (2) (b) provides:

> References in this Act (The 1938 Act) to a near resemblance of marks are references to a resemblance so near as to be likely to deceive or cause confusion.

Such confusion arises from a "global appreciation of the visual, aural and conceptual similarities of the marks"[36] in the mind of the average consumer. However, the court commented upon the lack of any evidence of consumer confusion with regard to goods of the two undertakings despite the signature marks of Elvisly Yours and EPEI sharing a cursive script. The element of requisite confusion is an interesting caveat involving a subjective assessment. Consequently, a claimant may encounter problems in obtaining evidence of confusion and, subject to satisfying this requirement, in justifying the methodology in obtaining it.[37]

5.5 Case comment

Where there are suggestively similar marks so that an association with the sports star is formed in the minds of the buying public, the dicta of Laddie J in *Elvis* would suggest that what is in the contemplation of the buying public is determinative. Indeed, Laddie J therein cited the example of those who purchased cheap souvenirs of the royal wedding bearing pictures of Prince Charles and Princess Diana as purchasing a likeness, unconcerned with the source of the products. Therefore, there is no infringement of the trade mark owner's rights. Simon Brown J stated in *Elvis Presley Trade Marks*:

> A new "character right" to fill a perceived gap between the law of copyright (there being no copyright in a name) and the law of passing off was considered and rejected by the Whitford Committee in 1977. Thirty years earlier, indeed, when it was contended for as a corollary of passing off law, it had been rejected in *McCulloch v Lewis A May*.[38] I would assume to reject it. In addressing the critical issue of distinctiveness there should be no *a priori* assumption that only a celebrity or his successors may ever market (or licence the marketing of) his own character. Monopolies should not be so readily created. [39]

The case of *Halliwell v Panini*,[40] although an action under passing off, reconfirmed the reasoning in *Elvis* as did the *Tarzan* Case[41] which involved an application to register Tarzan in respect of tapes, games, toys and sporting equipment. The application was rejected because 'the word Tarzan has a very distinct reference to the character and quality of the goods.'[42]

In *Lyngstad v Anabas*, Oliver J explained:

> I do not think [that it] could be alleged on the evidence that there is any general custom for such licences to be granted by pop singers. Indeed, the available evidence is quite to the contrary.[43]

The view articulated by Oliver J is oft criticised as being out of touch with todays commercial reality in that the general custom is for music and sports stars to grant such licences. However, it is equally the case that the production and availability of unofficial goods has grown proportionately with those of official goods in order to cater for demand. The bigger the market for official goods the bigger the market for unofficial goods. This causes difficulty in assessing whether the public has been deceived and establishing the cause of action. The ability of undertakings to label products 'official' may be said to serve this distinction well.

Some commentators argue that Laddie J in *Elvis* purported that consumers are generally indifferent to source.[44] However, the judgment of Laddie J serves only to reject any predetermination of public perception when they encounter goods on which the name or image of a star is displayed. This has served as the prelude to much legal commentary which has focused upon 'the reluctance of the courts to give outright protection to the merchandising activities of bands and musicians [which] seems to be linked to an unwillingness to treat music and music groups as fully fledged commercial enterprises needing the same commercial protection that would be afforded to a manufacturer or retailer. To say that the Elvis Presley name applied to goods serves as an identifier of their subject matter, not of their origin, is to view Elvis Presley exclusively as an individual and not as a badge of trading...the value and goodwill invested in a name as famous as Elvis Presley deserves the same protection as that afforded to names...such as Coca Cola or Kodak.'[45] However, perhaps there is specificity in Elvis and sports stars that the general public do view as distinct. This is discussed further below.

27 [1991] F.S.R 145. This was an ex tempore judgment on an interlocutory application

28 Laddie J in Elvis.

29 This was despite the application being for the less rigorous Part B of the register.

30 There is a negative and positive burden to acquired distinctiveness. To satisfy the positive burden it must be shown that trading activity that has been carried out by or under license from the celebrity in the goods or services to which the application relates. The negative burden is to show that there has not been widespread use by traders generally of the name or image. Porter, H, Character Merchandising: Does English Law Recognise a Property Right in Name or Likeness. [1999] Ent. L.R 180, 181-182.

31 (1928) 45 R.P.C 199 at p.203.

32 EPEI relied on the presumption that things were done properly rather than vice, omnia praesumuntur rite esse acta. This was accepted by the court with Morritt LJ dissenting. Court of Appeal {1999} R.P.C 567.

33 Laddie LJ in Elvis and approved in Fanfold.

34 Laddie LJ stated that all three applications would fail under section 11-12 in addition to 9 and 10.

35 As per Robert Walker and Simon Brown LJ.

36 Case C251/95, Sabel v Puma, para. 23.

37 Lewis; A and Taylor; J, Sport Law and Practice, Butterworths 2002, p. 742.

38 [1947] 2 A.E.R 845

39 [1999] R.P.C 567, 597-598, CA.

40 6 June 1997, unreported.

41 Salmon LJ in Tarzan Trade Mark case [1970] R.P.C 450).

42 Salmon LJ in Tarzan Trade Mark case [1970] R.P.C 450). The word 'Tarzan' could no longer be regarded as an invented word under section 9 (1) (c) of the 1938 Act as it had passed into everyday language.

43 [1977] F.S.R. 62 at 68.

44 Porter; H, Character Merchandising: Does English Law Recognise A Property Right And Likeness, Ent. L.R. 1999, 10(6), 180-183.

45 Codrey; B, and Watts; J, E.L.R 1997 Character Merchandising - All Shook Up.

6. The Arsenal case and further developments

Arsenal Football Club PLC v Reed[46] is an important authority for sports stars seeking to protect their Image Rights through the use of registered trade marks. It considers the scope and type of protection that a trade mark affords to its proprietors including the interpretation of the European Court of Justice (ECJ) of The 1994 Act.

This case concerned the use of identical marks on goods identical to those for which the marks were registered. Mr Reed had been selling unofficial products outside Arsenal's Highbury stadium, London, on Arsenal match days. These products bore marks similar or identical to "Arsenal", "The Gunners" and the Arsenal Crest and Cannon device reproduced below. Arsenal brought proceedings for trade mark infringement and passing off.

Arsenal brought proceedings for trade mark infringement and passing off.

S 10 (1) and (2) of The1994 Act provides:

(1) A person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.

(2) A person infringes a registered trade mark if he uses in the course of trade a sign where -

(a) the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or

(b) the sign is similar to the trade mark and is used in relation to goods or services which are not similar to those for which the trade mark is registered,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.

In *Schieffelin & Co v The Jack Co of Boca Inc*[47] the court stated that 'the test for determining similarity was whether the respective marks convey the same general overall impression to the purchasing public when viewed separately. Ultimately, the crucial question is whether the similarity is likely to cause confusion.'[48]

The sign that Matthew Reed displayed at his stall which informed customers that all products were unofficial was held to preclude any claim based on passing off or trade mark infringement under S 10 (2) of The 1994 Act. Arsenal also sought to rely on S 10 (1) under which proof of confusion is not required. Counsel for Mr Reed contended that for an infringement to be made out under S 10 (1) it must be established that the use of the marks in question was of a particular type denoting a connection in the course of a trade between goods and proprietor. Reed submitted that supporters purchased his products as badges of support, loyalty or affiliation.

In the first judgment,[49] Laddie J found for Reed although the defence raised an issue of construction of the Trade Mark Directive 5 (1) (a) of the First Council Directive 89/104/EEC which was referred to the ECJ. This Directive states that The 1994 Act must be interpreted in accordance with the aims of the European Community and the ruling of the ECJ is therefore "binding on the national court as to the interpretation of the community provisions and acts in question."[50]

The referral was made in the following terms:

1. Where a trade mark is validly registered and

(a) a third party uses in the course of trade a sign identical with that trade mark in relation to goods which are identical with those for which that trade mark is registered; and

(b) the third party has no defence to infringement by virtue of Article 6 (1) of the Directive;

does the third party have a defence to infringement on the ground that the use complained of does not indicate trade origin (i.e. a connection in the course of trade between the goods and the trade mark proprietor)?

If so, is the fact that the use in question would be perceived as a badge of support, loyalty or affiliation to the trade mark proprietor a sufficient connection?

On 14TH May 2002 Advocate General Senor Ruiz-Jarabo Colomer opined:

> The debate must be moved on to a different ground... It is not the reason for which a person buys goods or services that I must examine but the reason which has led the person who is not the proprietor of the trade mark to place the goods on the market or to provide the service using the same distinctive sign. If, regardless of the reason which motivates him, he attempts to exploit it commercially then he can be said to be using it as a trade mark and the proprietor will be entitled to object within the limits and to the extent allowed under Article 5 of the directive. [51]

The Advocate General Senor Ruiz-Jarabo Colomer continued that it is "simplistic reductionism" to limit the function of a trade mark to an indication of trade origin:

> The trade mark acquires a life of its own, making a statement about quality reputation and even, in certain cases, a way of seeing life. [52]

In the second judgment,[53] Laddie J held that the ECJ had exceeded its authority in finding for Arsenal. However, the ECJ had merely reformulated the reference to it and found that the word 'uses' within the directive did not require that the use indicated trade origin.[54] The ECJ did not recognise the role of a trade mark as fulfilling advertising and guarantee functions and stated the correct test was whether the use complained of "was liable to jeopardise the essential function of the mark" which was:

> to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the Treaty seeks to establish and maintain, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality.[55]

The ECJ further stated:

> For that guarantee of origin...to be ensured, the proprietor must be protected against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it.[56]

Accordingly, the Court of Appeal[57] upheld the view of the ECJ and found for Arsenal if only because this guarantee of origin may be jeopardised by consumers who came across goods away from the point of sale, the 'end user'.[58] The decision in *Arsenal v Reed*[59] will be as unwelcome by consumers facing the prospect of no cheap alternatives to official goods as it is welcomed by sporting bodies whose commercial agreements will be enhanced by the eradication of unofficial merchandise.

6.1 The 'end user'

However, we must now consider this 'guarantee of origin'[60] as it relates to the 'end user.'

Match day ticket holders at Highbury, the home stadium of Arsenal Football Club, are not representative of a cross section of the general public. These fans have been subjected to countless instances, over many years, of street sellers such as Matthew Reed to the extent that it has become a traditional part of the match day experience. These consumers are therefore 'educated' as to the different products available and the different sources of such products, be they official or

46 [2001] All ER (D) 67.
47 850 F Supp 232 [SDNY 1994].
48 850 F Supp 232 [SDNY 1994] at p. 244
49 Handed down on 6th April 2001.
50 Benedetti v Munari case 52/76 [1977] ECR 163.
51 Arsenal Football Club plc v Reed Case C 206/1 ECJ.
52 This opinion is not binding on the ECJ but is regarded as influential.
53 Handed down on 12th December 2002.
54 The ECJ is quite entitled to reformulate a reference to it.
55 Paragraph 48 ECJ, 1st referral.
56 Paragraph 48.
57 Court of Appeal on appeal from Chancery Division [2003] EWCA Civ 96, Case Number A2/2003/0074.
58 Paragraph 48 ECJ,1st referral.
59 C-206/01 (13 June 2002), ECJ.
60 The Preamble to the Directive 5 states that the aim of the protection is in particular to guarantee the trade mark as an indication of origin.

unofficial. It is accepted that not all consumers of football memorabilia and goods are attendees at stadia. However, there may be some assumption that 'end users' whom acquire football related products have an interest in football and an awareness of the proliferation of unofficial goods that have been available to football fans over many years. Consequently, such an 'end user' may not make the assumption that Arsenal were responsible for their quality.

A similar outcome would occur if there was a notice, for example, on the label inside the product cautioning that Arsenal in no way assumed responsibility for the quality of it. This would suggest that there are simple methods available to circumvent the decision in *Arsenal v Reed*.[61] In any event, there remains a strong argument that consumers do generally recognise 'tat' for what it is.

Although the Court of Appeal did not consider it necessary to examine whether there was trade mark use, in light of the critique above such a determination becomes pertinent.

The Court stated:

> Mr Reed takes considerable care to inform his customers that his goods are not official in the sense that they do not come from Arsenal. If the use of the word "Arsenal" did not carry with it such an indication of origin, there would be no need for Mr Reed to do anything at all. Clearly Mr Reed is suspicious that persons purchasing from him would, absent an explanation, believe that the goods came from Arsenal. Why? The answer must be that they bear the name Arsenal and that it denotes origin.[62]

The author's view is that Arsenal can denote origin - to those seeking official Arsenal goods. However, because a mark is capable of performing a specific function it does not necessarily mean that it automatically does so. The facts of each case must be considered in reaching any determination in this regard. Given the context in which goods are bought, customers of Matthew Reed's stall will not, in all likelihood, believe the mark denotes origin but acts as a badge of allegiance. The position must be that some consumers desire the genuine licensed product and others unlicensed products. This case may therefore be an example of trade mark being used to protect a variety of meanings.

It has been argued that creativity in giving meaning to image including the manipulation of the consumers perception usually to encourage there purchase of goods or services and the subsequent communication of this through marketing should be rewarded.[63] Kelsen based the rationale for this on the function of law as a combination of a system of normative rules allied with sanction or coercion.[64]As these norms may be in constant flux, influenced by their role, effect and perception in society, the protection afforded by intellectual property rights varies in accordance with the meaning of that image. By ascribing specific meanings to works either as "authorship" (copyright) or as an "indication of origin" (trade mark) the judiciary therefore protects images, the meanings of which, are created by the trade mark proprietor.[65]

However, meaning in an image can never be definite because it remains subject to individual interpretations and is determined by a society which exhibits "cultural differences, social inequalities and conflicts within communities."[66] Sports and sports clubs exist in a wider social context which trade mark, may be said, not to fully recognise.

As Coombes notes:

> From a superficial perspective, the proliferation of Coca-Cola, Exxon, Barbie Dolls and the Big Mac around the globe appear as a universalisation and homogenisation of culture. It is not inevitably the case however that these phenomena assume the same meanings in other cultures that they do in our own. It is surely a form of imperialist hubris (and a marketing fantasy) to believe that they do.[67]

As it is estimated that 10 conglomerates have appropriated 100% of the world's output of culture[68] these large global undertakings approve meanings in images and control the dissemination of cultural images throughout society. This results in culture being a "governmentality of social life"[69] structured by legal regimes and the marginalisation of individuals whom are excluded from sharing in this culture.

Tottenham Hotspur Plc v Patricia and Michael O'Connell[70] is another football merchandise related case. Tottenham Hotspur succeeded in registering the words "TOTTENHAM" as a trade mark across various goods and services. The O' Connell family, traders similar to Matthew Reed, sold goods featuring the words "TOTTENHAM" and objected to the application under S 3 (1) (b) and 3 (1) (c) of The 1994 Act. The Hearing Officer dismissed the opposition because:

- If the word Arsenal was distinctive then by the same rationale the word Tottenham must also be distinctive under S 3 (1) (b).
- The objection, under S 3 (1) (c) that Tottenham, being a geographical place was incapable of being exclusively owned was overcome because there was nothing to suggest that Tottenham had a reputation for anything other than Tottenham Hotspur Football Club.

However, the case of *Tottenham Hotspur PLC v Patricia and Michael O' Connell*[71] did not address those anomalies discussed above which resulted from the courts decision in *Arsenal v Reed*.[72] Indeed, Tottenham Hotspur may still encounter the same problems as Arsenal.

Should Tottenham Hotspur Plc seek to prohibit the sale of scarfs by unofficial street sellers bearing the word Tottenham, S 11 (2) of The 1994 Act may, in addition to the above, offer a defence to infringement proceedings. It provides:

> A registered trade mark is not infringed by -
>
> (b) the use of indications concerning the kind, quality, intended purpose, value, geographical origin, the time of production of goods or of rendering of service, or other characteristic of goods or services, or
>
> (c) the use of the trade mark where it is necessary to indicate the intended purpose of a product or service (in particular, as accessories or spare parts).
>
> Provided the use is in accordance with honest practices in industrial or commercial matters.

The word Tottenham would therefore merely indicate the kind of scarf offered for sale and there is seemingly no other way in which this could be indicated.[73]

7. Trade mark expansion and Europe

Further expansion of the trade mark is evident in Europe. The European Directive 89/104, Article 2 states that a trade mark is "any sign that is capable of being represented graphically....that...is capable of distinguishing the goods or services of one undertaking from those of other undertakings." Descriptive or non-distinctive trade marks are then barred from registration.[74] Therefore, it may be assumed that there are some trade marks capable of distinguishing goods which are non-distinctive.

In *Belgacom v BMB*,[75] in allowing registration of the colour green, it was held that: "the issue ...is. ...whether the consumers perceive the colour just as a decorative element, deprived of any distinctive character, or as a badge of origin of services from one undertaking and not

61 C-206/01 (13 June 2002), ECJ.
62 [2001] RPC 922.
63 Cohen; J, Golden; E, Informational Social Influence and Product Evaluation, (1972), Journal of Psychology 56 Feb.
64 Kelsen; H, Pure Theory of Law, Knight trans, 1967.
65 Coombes; R, The Cultural Life of Intellectual Properties, Duke University Press, London, 1998, p. 61.
66 Coombes; R, The Cultural Life of Intellectual properties, Duke University Press, London, 1998, p.8.
67 Supra n. 73.
68 Sunday Times [2001].
69 Lury; C, Cultural Rights: Technology, Legality and Personality, Routledge, 1993.
70 Opposition proceedings pursuant to Section 3 (1) (b) and 3 (1) (c) of the 1994 Act.
71 Opposition proceedings pursuant to Section 3 (1) (b) and 3 (1) (c) of the 1994 Act.
72 2001] All ER (D) 67 (Apr), [2001] 2 CMLR 481, [2001] RPC 922, [2001] ETMA 860, C-206/01 (13 June 2002), ECJ.
73 http://www.jenkins-ip.com/mym/autumn2002/mym_2002_08.htm
74 Article 3, Directive 89/104.
75 Belgacom v BMB 1998/RG/3122. Judgment of September 28, 1999, Court of Appeal of Brussels.

those from another."[76] This modified approach recognises the protectable functions of the trade mark as an indication of origin not limited to the protection of goodwill but to maintenance of the way in which the public views the trade mark. Consequently, the law provides 'protection to the blank canvass on which meaning can be imprinted....'[77]

As early as 1927 Schechter suggested that a trade mark also fulfilled advertising and guarantee functions[78] which acted as a method of communication not only between the trade mark proprietor and the public but between competitors as an "an agency for the actual creation and perpetuation of goodwill."[79] We shall now consider this in relation to the reputation of the trade mark.

7.1 Reputation

In *General Motors Corporation v Yplon* the ECJ held that:

> a mark would have a reputation where it was known by a significant part of the public concerned by the products or services covered by the trade mark [80]

In the UK, S 10 (3) of The 1994 Act provides:

> A person infringes a registered trade mark if he uses in the course of trade a sign which-
>
> (a) is identical with or similar to the trade mark, and
>
> (b) is used in relation to goods or services which are not similar to those for which the trade mark is registered,
>
> where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

The English courts extended the requirement of confusion to S10 (3) in *Baywatch Productions Co. Inc v Home Video Channel*[81] thus removing the anomaly between S10 (2) requiring proof of confusion between identical or similar products and S10 (3) which did not require proof of confusion between goods which were not even similar.

'Unfair advantage' is where 'the plaintiffs have done nothing to deserve this detriment, nor the defendants this benefit,"[82] detriment being where the value of the mark is diminished or is likely to be diminished.

In Madgecourt Ltd's Trade Mark Application[83] the claimants sought to register 'MCL PARFUMS DE PARIS' in respect of perfumes, suntanning preparations, toiletries, soaps and dentifrices to be manufactured in the UK. The registry rejected the applications because Paris enjoyed a particular reputation for Perfumes of which the application for the words 'MCL PARFUMS DE PARIS' sought to take unfair advantage. However, registration was permitted in respect of dentifrices. This confines the scope of a trade mark to the product for which it holds an established reputation only.[84]

However, the case of *Canon Kabushiki Kaisha v Metro-Goldwyn Mayer* suggests that the protection a mark carries through its reputation, irrespective of similarity, is evolving. The ECJ held:

> registration of a trade mark may have to be refused despite the lesser degree of similarity where the marks were very similar and the earlier mark, in particular, its reputation is highly distinctive.[85]

The claimants had sought to register the mark 'Cannon' for film cassettes in Germany despite Canons established reputation for video recorders. Deveci takes the view that the decision in *Canon* raises the question of whether the courts adhere to the notion of 'confusion' as the basis for trademark protection or whether reputation is "surpassing confusion as a criterion for trade mark protection?"[86]

The development of EC case law is unsurprising given the demands of trade mark proprietors for harmonisation and expansion of the function of the trade mark. However, this development is based upon certain assumptions as to consumer behaviours which are largely unsupported by empirical evidence regarding, for example, the factors which formulate a consumers decision to purchase. The rationale underpinning this development may therefore be, at best, unsupported and speculative and, at worst, fundamentally flawed.

8. Domain names

The importance of domain names to famous sporting personalities is attributable to the exposure and gateway they provide to further commercial opportunity. Domain names identify an electronic address on the world wide web by user-friendly text representations which operate in much the same way as a postal address. The universal dot.com is the most commercially valuable domain, more so than the country coded generic Top Level Domains (gTLD) such as co.uk.

Trademarks are commonly used as domain names. It may be argued that advertising and/or familiarity elevated domain names distinguish one web site from another in the same way that trade marks distinguish the product of one undertaking from another. The crux of the debate is therefore the extent to which trade marks and domain names function in an identical manner and consequently to what degree, if any, principles governing the former should apply to the later.[87]

In *Robbie Williams v Howard Taylor*[88] an unauthorised third party who registered www.robbiewilliams.info as a domain name was ordered to relinquish the registration because, it was held, the customers perception is that the domain address will function as a trade mark in that it will bring them to the source of the goods. Similarly, a complaint by Eddie Jordan, owner of the Formula 1 racing team, further to the registration of the domain name jordanf1.com[89] was upheld by the World Intellectual Property Organisation (WIPO). The domain name was said to indicate an association with Formula 1 and the Jordan team.[90]

In a recent case, Seiko UK, the proprietor of the trade marks SEIKO and SPOONWATCH, appealed to Nominet, the body which regulates UK domain names, regarding the ownership of the domain name registrations seikoshop.co.uk and spoonwatchshop.co.uk.[91] In finding that the registrations be transferred to Seiko UK, the crucial factor was not whether confusion could be established but whether the registration took unfair advantage of the complainants' rights.

However, trademarks and domain names can be distinguished. Trademarks inform the consumer who produced the goods or supplied the services whereas domain names convey where the product can be found. Passing off and trade mark infringement may turn on the question of confusion yet this may be largely eradicated by the use of internet search engines. The function of these search engines is to gather information for the internet user to download if any hits interest him. There very use would, therefore, suggest that the domain name is not known to the user. Also, in *Efax.com Inc v Mark Oglesby*[92] an American Company with U.K customers using efax.com was refused an injunction against efax.co.uk because 'efax' was descriptive and any confusion between the two was attributable to this rather than any misrepresentation from the defendant.

Furthermore, trade marks are country and product specific whereas domain names are global namespaces unrestricted by territorial boundaries. The 1994 Act requires 'use' of the mark in the U.K 'in the

76 Belgacom v BMB 1998/RG/3122. Judgment of September 28, 1999, Court of Appeal of Brussels.

77 Mitchiner; J, Intellectual property in Image- A Mere Inconvenience, I.P.Q. 2003, 2, 163-208.

78 Schechter; F, The Rational Basis of Trade mark Protection, (1927) Harvard Law Review 813.

79 Schechter; F, The Rational Basis of Trade mark Protection, (1927) Harvard Law Review 813, p. 818.

80 Case C375/97 [1999] 3 CMLR 427, para. 22.

81 [1997] FSR 22.

82 Millet LJ in Harrods Ltd v Harrodian School Ltd [1996] RPC 697 at 77.

83 [1997] FSR 22.

84 Deveci; H, Domain Names: Has Trade Mark Law Strayed From Its Path? Intellectual Journal of Law and Information Technology, Vol. 11 No. 3, Oxford University Press

85 [1999] ETMR 1 at para. 19.

86 Deveci; H, Domain Names: Has Trade Mark Law Strayed From Its Path? Intellectual Journal of Law and Information Technology, Vol. 11 No. 3, Oxford University Press.

87 Howard; D; L, Trade mark and Service Marks and Internet Domain Names: Giving ICANN Deference, (2001) 33 Ariz St LJ 637.

88 (WIPO) Case No. D2002-0558.

89 F1 is a trademark and famous abbreviation of the mark Formula 1.

90 Evidence of bad faith was established due to an attempt to sell the domain name to the Jordan team.

91 Seiko v Designer Time, DRS 248, July 19, 2002.

92 Masons Computer Law Reports [August 2000].

93 [1999] RPC 1.

course of a trade'. This concept of 'use' is particularly relevant to the internet as web pages are accessible to all internet users irrespective of there location. Mere accessibility, in itself, does not, however, indicate a source of origin of goods or services and is therefore not equivalent to 'use'.

Prior to *British Telecommunications Plc v One In A Million Ltd and Others*[93] the question of whether domain names registered in bad faith were "used" was largely unanswered.[94] Bad faith may be prima facie evidenced by the domain name being offered for sale to the trade mark owner or their competitor. The High Court ruled that the registration of domain names such as 'Ladbroke' and 'Sainsbury' was 'use' in the trade mark sense. The mere existence of a domain name similar to a well-known name was said to raise the risk of deception.

However, intention to sell as constituting use in the trade mark sense is not convincing. Section 10 (4) of The 1994 Act, although not exhaustive, directs that a trade mark must be used in relation to a product whether affixed to a product or in the course of advertising. Furthermore, if a consumer accessed one of the domain names registered by the defendants in the *One In A Million and Others* case the risk of deception is unlikely given that the web page would be blank. The only conceivable effect is that the internet user presumes that the web page he is seeking does not exist and is deterred from continuing his search. Yet any confusion in this regard must relate to association as to origin which is again unlikely.

In the U.S, the Anticybersquatting Consumer Protection Act of 1999 (ACPA) was implemented to:

> protect consumers and American businesses, to promote the growth of online commerce, and to provide clarity in the law for trade mark owners by prohibiting the bad-faith and abusive registration of distinctive marks as Internet domain names with the intent to profit from the goodwill associated with such marks - a practice commonly referred to as 'cybersquatting.'[95]

The 'fair use' defence it profers also permits use of a mark as a parody when it appears as protected non-commercial speech, for example, 'walmartstinks.com'. Interestingly, a cybersquatting double standard termed 'reverse domain name hijacking' is emerging. George W. Bush's presidential campaign of 2000 involved 260 domain name registrations such as bushsucks and bushsux and numerous others in the dot.com, dot.net and dot.org versions. This is not only inconsistent with the stated purpose of the ACPA but morally objectionable and, in effect, technological censorship.

As an alternative to litigation, disputes over domain names are increasingly being referred to the WIPO's Adjudication and Mediation Centre. Jurisdiction is conferred from the terms and regulations to which the parties must submit in order to register the domain name. WIPO hears disputes over domain names and applies the Internet Corporation for Assigned Names and Number's (ICANN) dispute policy[96] under which transfer or cancellation of the domain name may be ordered or the claimant's argument dismissed. However, no monetary damages can be awarded, no injunctive relief is available and the dispute policy applies to gTLD's only.

Abusive domain name registration will be established where a domain name is:

- identical or confusingly similar to a trade mark of another proprietor.
- registered by a party who has no rights or legitimate interest in that domain name.
- already registered and used in bad faith.[97]

9. Copyright

The essential basis for copyright protection is the protection of an authors work from unjustified appropriation by providing him with exclusive rights to commercially exploit the work subject to protection.

The law of copyright in the UK is governed by the Copyright, Designs and Patents Act 1988 and confers a property right in original literary, dramatic and artistic works, sound recordings, films, broadcasts and cable programmes, and in typographical arrangements of published editions.[98] 'Artistic works' include photographs, sculptures and graphic words "irrespective of artistic merit."[99] Therefore, objects such as a club badge, an athlete's signature or a specially designed logo or graphic symbol, which is used to represent the player, may qualify for Copyright protection.

However, copyright in photography, is owned either by the photographer or his employers[100] and is unlikely to represent a particularly useful cause of action to those seeking to protect their Image Rights as there is no copyright attaching to the face,[101] name[102] or other identifying characteristics of the sports star.

10. The right of publicity and its rationale

We have discussed the role of meaning in trade mark and copy right. However, the issue of meaning extends to the rationale underpinning the right of publicity which exists in the U.S.

McCarthy states:

> It is possible to state with clarity that the right of publicity is simply this: it is the inherent right of every human being to control the commercial use of his or her identity. The right of publicity is a state-law created intellectual property right whose infringement is a commercial tort of unfair competition. It is a distinct legal category, not just a 'kind of' trade mark, copyright, false advertising or right of privacy. Whilst it bears some family resemblances to all these neighbouring areas of the law, the right of publicity has its own unique legal dimensions and reasons for being. The right of publicity is not merely a legal right of the 'celebrity', but is a right inherent to everyone to control the commercial use of identity and persona and recover in court damages and the commercial value of an unpermitted taking.[103]

A distinct 'right of publicity' is recognised under either statute or common law as the law of 27 U.S. States.[104] The courts enforcement of this right renders "a persons right to control the commercial use of his or her personality quite complete."[105] The right of publicity derives from the following, largely economic, principles:

- Those athletes whom invest much time, effort and, in all likelihood, financial expense in pursuing a chosen sport deserve to reap the benefit. Failing this, the population will be discouraged from becoming athletes and society will suffer the detriment.
- Each individual should have the power of autonomy over what they endorse.[106]

Casual observance does not necessarily support the contention that a shortage of new young sporting talent would follow if the image rights of athletes were not adequately protected. If one adopts this purely economic approach it is apparent that sports athletes can still earn vast wealth from sports irrespective of image rights. However, it is vital to consider not only the nature and composition of the right of publicity but also its rationale which is evident in other jurisdictions including Germany and France.

In both Germany and France Image Rights are regarded as rights "attached to the persona of the human being."[107] Article 42 (c) of the French Charter of Professional Football states that the commercial use of a players image shall be for the benefit of the player alone irrespective of whether the player is acting as an individual or as a club employee, unless an agreement has been made between the two to the

94 White; N, Resolution of Sports Domain Disputes, www.chass.co.uk

95 15 U.S.C. 1125(d). S.Rep. No. 106-140 at 4.

96 This is incorporated in all registration agreements with domain name registrars.

97 Gardiner; S, et al, Sports Law, 2nd ed, Cavendish Publishing, 2001.

98 Section 1(1) (a) of the Copyrights Designs and Patents Act 1988.

99 Section 4 (1) (a) of the Copyrights Designs and Patents Act 1988.

100 Section 11 (1) of the Copyrights Designs and Patents Act 1988.

101 Merchandising Corp. of America Inc. v Harpbond Inc. [1983] FSR 32

102 Exxon Insurance Consultants International Ltd [1982] Ch 119, [1981] 2 All ER 495

103 McCarthy, The Rights of Publicity and Privacy (2nd ed.) 1-2 to 1-3.

104 McCarthy, The Rights of Publicity and Privacy, 2nd Ed, 1-2.

105 Professor David Anderson, "The failure of American Privacy Law" (Basil S. Markesinis, ed.) at 146.

106 Frackman and Bloomfield 'The Right of Publicity: Going to the Dogs', UCLA Online Institute for Cyberspace Law and Policy, p. 2.

107 Logeais; E, The French Right to One's Image-a Legal Lure, [1994] Ent. L.R. 163 AT 164.

contrary.[108] Also, the unauthorised use of a person's image is prohibited under Article 9 of the French Civil Code.[109] The equivalent can be found in Articles 1 and 2 of the German Constitution which prohibit the unauthorised use of an individual's image and personality.[110]

Locke argues that every man has property in his own person and a right to appropriate from the commons is reward for the labour of the individual.[111] For Hegel,[112] the individual does not own himself but relies on personality to enable the individual to realise himself. Drahos[113] observes that Locke views property as serving personality whereas property is the embodiment of personality according to Hegel. Yet, the justification for the use of image in society must recognise how the public creates the object of property protection.

10.1 The First Law Doctrine

Other mechanisms established in the U.S include the "first law doctrine." In Alabama the case of *Orel Hershisher v Vintage Sports Plaques*[114] considered the applicability of the "first law doctrine." This doctrine applies to copyright, patent and trade mark and provides that once the holder of an intellectual property right "consents to the sale of particular copies... of his work, he may not thereafter exercise the distribution right with respect to such copies."[115]

Orel Hershisher, a well-known former famous Baseball player, sued Vintage Plaques for the infringement of licensing rights and violation of the right of publicity. Hershisher licensed his image to Maxx Race Cards for the manufacture and market trading of cards bearing his image in return for royalty payments. Vintage Sports Plaques purchased these trading cards from properly licensed distributors and manufacturers and mounted them in frames before marketing them. Vintage was not a party to any licensing agreement relating to its use of the image.

Under Alabama Law it is established that:

> The invasion of privacy tort consists of four distinct wrongs: 1) the intrusion upon the plaintiff's physical solitude or seclusion; 2) publicity which violates the ordinary decencies; 3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; and 4) the appropriation of some element of the plaintiff's personality for a commercial use.[116]

The state of Alabama therefore recognises the commercial appropriation of the right of privacy where image is used, without authorisation, for commercial purposes. However, the appellant's argument that the first sale doctrine was inapplicable was rejected primarily because any finding to the contrary would grant a monopoly to celebrities over their identities. The court held that a balance between the right of celebrities to protect and licence their identities in the first instance and the rights of the public to enjoy those identities must be maintained.[117]

11. Passing off

Turning back to the U.K, the tort of passing off prevents any party, without authorisation, passing their goods or services off as those of another and thus exploiting the goodwill that they may enjoy.

Lord MacNaghten in *IRC v Muller & Co's Margarine Ltd* expressed goodwill as being:

> The benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom.[118]

This cause of action may therefore, prima facie, represent a useful remedy for sports stars whose name or image has been used without authorisation.

11.1 Historical aspects of passing off

In the leading case of *McCulloch v Lewis A May Ltd*[119] a famous children's radio presenter brought an action for passing off against the defendant who produced and distributed 'Uncle Mac's Puffed Wheat'. It was held that the defendant did not pass off the goods because the plaintiff was not in the business of producing and distributing such a product and therefore possessed no goodwill in this area.

In *Henderson v Radio Corporation Pty Limited*[120] the High Court of New South Wales, Australia, considered the further requirement that there must be some common field of activity in which both the claimant and those seeking to pass off their goods as those of the claimant were engaged. The claimants, who were famous ballroom dancers, brought an action for passing off in response to the unauthorised use of their image on a record sleeve containing ballroom dancing music. Passing off was established as the use of the images was said to falsely represent that the claimants had endorsed the record despite their having no history of endorsing such products.

This was reconfirmed in a further Australian case, *Hogan v Koala Dundee Pty Ltd*:

> [A] personality who can be said to be in business - and the term is very broadly understood - is always free to grant or withhold his endorsement, and therefore any unauthorised claim to such endorsement damages him by depriving him of the fee he could otherwise have insisted on. It is irrelevant that the plaintiff may have no existing licensing business or may prefer not to grant licenses.[121]

In subsequent Australian case law, Burchett J added:

> To ask whether the consumer reasons that Mr Hogan authorised the advertisement is therefore to ask a question which is a mere side issue, and far from the full impact of the advertisement. The consumer is moved by a desire to wear something belonging in some sense to Crocodile Dundee (who is perceived as a persona, at most an avatar, of Mr Hogan). The arousal of that feeling by Mr Hogan himself could not be regarded as misleading; for then the value he promises the product will have is not its leather, but in its association with himself. When, however, an advertisement he did not authorise makes the same suggestion, it is misleading; for the product sold by that advertisement really lacks the one feature the advertisement attributed to it.[122]

Also, in Australia, Section 52 of the Trade Practices Act 1974 prohibits an engagement "in trade or commerce....that is misleading or deceptive, or is likely to mislead or deceive".

11.2 Practical developments in passing off

To the best of the author's knowledge *Irvinev v Talksport*[123] was the first case in the U.K. where an action for passing off was brought involving pure endorsement.

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108 Blackshaw; I, Intellectual Property Rights and Sport. See also Article 9 of the French Civil Code discussed above.

109 This also provides a right of privacy.

110 Oliver Khan, the German national team goalkeeper, successfully relied on Articles 1 and 2 in suing Electronic Arts, the computer games programmer, which produced a FIFA endorsed computer game featuring his image.

111 Locke; J, Two Treatises of Government, ED. P. Laslett, Cambridge University Press, London, 1967, II, 123. Locke does not define property merely stating "Lives, Liberties and Estates...I call by the general name, property".

112 Hegel; G, Philosophy of Right, Ed. T. Knox, Oxford University Press, Oxford, 1952

113 Drahos; P, A philosophy of Intellectual Property, Aldershot, Dartmouth, 1996, p. 75.

114 No. 96-6809. United States Court of Appeals For The Eleventh Circuit. 136 F.3d 1443; 1998 U.S App. Lexis 5026; 46 U.S.P.Q.2d (BNA) 1138; Copy. L.Rep. (CCH) p. 27, 755; 11 Fla.l. weekly Fed.. C 1141.

115 Nimmer; N, and Nimmer; D, Nimmer on Copyright 8.12 [B] [1] (1997).

116 No. 96-6809. United States Court of Appeals For The Eleventh Circuit. 136 F.3d 1443; 1998 U.S App. Lexis 5026; 46 U.S.P.Q.2d (BNA) 1138; Copy. L.Rep. (CCH)p27, 755; 11 Fla.l. weekly Fed.. C 1141. See also Phillips v Smalley Maintenance Services, Inc., 435 So. 2d 705, 708 (Ala. 1983).

117 White v Samsung Electronics Amer., Inc., 989 F.2d 1512, 1515 (9th Cir. 1993).

118 [1901] AC 217.

119 [1947] 2 ALL ER 845 ChD.

120 This case was considered and approved in Australia in Limitada v Nike International Ltd, [1969] R.P.C. 218.

121 (1988) 83 ALR 187 (Federal Court of Australia, Queensland District).

122 Hogan v Pacific Dunlop Limited [1989] 14 I.P.R. 398 at 429-430.

123 Irvine v Talksport Ltd [2002] 2 ALL ER 414.

124 The photograph was properly acquired and thus any copyright infringement was not in use.

125 Irvine v Talksport Ltd [2002] 2 ALL ER 414 at 426b - 427e. Laddie LJ had previously cited Eastman Photographic Materials Co Ltd v John Griffiths Cycle Corpn Ltd (1898) 15 RPC 105 and Harrods v Harrodian School Ltd [1996] RPC 697, CA in support.

In 1999, Mr Irvine was a famous racing driver whom drove for the prestigious Ferrari FIA Formula 1 team. An image of Mr Irvine holding a mobile telephone had been digitally manipulated and replaced by a portable radio with the words 'Talk Radio' in immediate proximity.[124] Mr Irvine contended this incorrectly suggested that he endorsed the Talksport radio station and brought an action for passing off.
Laddie J held:

> If someone acquires a valuable reputation or goodwill, the law of passing off will protect it from unlicensed use by other parties. Such use will frequently be damaging in the direct sense that it will involve selling inferior goods or services under the guise that they are from the claimant. But the action is not restricted to protecting against that sort of damage. The law will vindicate the claimant's exclusive right to the reputation or goodwill. It will not allow others to use goodwill as to reduce, blur or diminish its exclusivity...Manufacturers and retailers recognise the reality of the market place when they pay for well known personalities to endorse their goods. The law of passing off should do likewise. There appears to be no good reason why the law of passing off in this modern form and in modern trade circumstances should not apply to cases of false endorsement.[125]

A prima facie case for passing off, in cases of pure endorsement, will be established where, at the time of the alleged infringement, the claimant can show that:

- He possessed goodwill - this can be derived from merely being famous.
- The defendant's actions misrepresented, in the course of a trade, to a not insignificant amount of consumers that, the goods or services that it supplied derived from, or were connected to, the claimant.
- Confusion arose in the minds of the public between those products that derived from the claimant and those of the defendant. This is a question of fact in each case.
- Damage was suffered as a result of this misrepresentation be it through the reduction, blurring or diminishing of the sports star's goodwill.

Prior to *Irvine*, cases of pure endorsement had been expressly excluded from the ambit of passing off.[126] However, in *Harrods v Harrodian School*[127] it was stated that the misrepresentation must suppose that the plaintiff had made himself responsible for the quality of the defendant's goods or services. This ruling would be of greater assistance to sports stars in cases of pure endorsement as it validates the myth that the marketing industry seeks to profligate: that the product has been vetted for quality by the endorsing sports star whom has chosen to be associated with it.

The case of *Irvine v Talksport*[128] represents a modernisation of the law of passing off in the U.K and a shift towards the wider Australian approach.

11.3 Limitations of the *Irvine* Decision

It has been argued that the decision in *Irvine* represented somewhat of a hollow victory for sport stars.[129] Damages were awarded based on what a reasonable licence fee would have been had Mr Irvine so authorised the use of his image.[130] No additional pecuniary award attributable to Talksports unauthorised usage was made. This approach overlooks the exclusive nature of endorsement which dictates that an athlete can only endorse one area of a trade. Furthermore, this failure to provide sufficient compensation is exacerbated by the uncertainty a claimant may encounter under the Civil Procedure Rules.[131] Consequently, it may be said that the law does not provide a sufficient deterrent to those seeking to use the images of sports stars, without authorisation, to imply endorsement.[132]

11.4 Potential developments

Ian Botham, a famous retired Cricketer whom represented England, cited the *Irvine* case when a television advertisement to promote Guinness, featured images of one of his successful test innings as a back-drop. Botham received an undisclosed out of court settlement from Diageo, the company which owns Guinness.

Much debate has centred on whether Botham would have succeeded if the case had proceeded to trial as the use of the image solely as a back-drop may be said to distinguish *Irvine*.[133] It is submitted that Botham had a strong case as the public may have perceived that he endorsed the product. By the same token it is suggested that Rio Ferdinand, the most expensive defender in world football, could successfully utilise the *Irvine* precedent against BAE Systems which recently featured his Manchester United shirt in a advertisement with the question: 'Who Do You Think Spends This Much On Defence Every Season?'

The outcome where a sports star is featured alongside unfavourable comments has been similarly hypothesised.[134] It is submitted that the evolving scope of passing off may cover cases of this nature as any view of direct endorsement may in fact be reinforced, that is to say, the individual in question would never have allowed such use without authorisation. In any event, this would represent a particularly risky path for advertisers to tread given the popularity and influence that sports stars enjoy notwithstanding their financial capability to commence litigation.

12. Passing off and character merchandising

In *Irvine*, Laddie J distinguished between instances of merchandising and endorsement:

> In my view nothing said above touches on the quite separate issues which may arise in character merchandising cases... in those cases the defendant's activities do not imply any endorsement. For example, although it was a trade mark registration case, in Elvis Presley Trade Marks much of the argument turned on whether the appellant had merchandising rights in the name of Elvis Presley or in his image. It wanted to prevent third parties from selling products such as bars of soap and drinking mugs bearing the name of the performer and photographs of him. There could be no question of the performer endorsing anything since he had been dead for many years. So the argument being advanced was one which amounted to an attempt to create a quasi-copyright in the name and images. The Court of Appeal's rejection of that is, with respect, consistent with a long line of authority.[135]

In cases of character merchandising a sports star must show that he was 'engaged in the actual marketing and selling to the public of products or services endorsed with his name or image.'[136] The traditional view of the English courts is that the phenomenon of character merchandising is not so well established that consumers will automatically presume that the athlete has "assumed responsibility for an important aspect such as the quality of the goods or services"[137] carrying the athletes name or image. Failing this, the misrepresentation will not be "calculated to injure"[138] the claimants goodwill.

Consequently, 'there is no cause of action in passing off for false merchandising where there is no element of false endorsement by the celebrity.'[139] However, the expertise and suitability of the courts to identify these features may be called into question.[140]

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126 Reckitt & Colman Products Ltd v Borden [19990] 1W.L.R. 491; [1990] 1 ALL E.R. 927; [1980] R.P.C. 341.
127 Millet LJ [1996] R.P.C 697, 713.
128 [2002] EWHC 367; [2002] 2 ALL E.R. 414 (Ch D).
129 Sloper; K, Cordery; B, Personality Endorsement-New Brands Hatch, Ent. L.R. 2002, 13 (5), 106-109.
130 It was held that that no future endorsement opportunities were lost by Mr Irvine.
131 Where a defendant makes a Part 36 offer in settlement of damages and the claimant rejects the same, he will be liable for the costs of both sides from the latest date that the offer could have been accepted where the court does not award a sum higher than the defendants Part 36 offer.
132 Michaels; A, Passing off by false endorsement, E.I.P.R. 2002, 24 (9), 448-449.
133 Vesey; G, Are Celebrities' Image Rights Protectable as Image Rights, NLJ 152.7048 (1391).
134 Vesey; G, Are Celebrities' Image Rights Protectable as Image Rights, NLJ 152.7048(1391).
135 [2002] EWHC 367 (Ch), [2002] 2 ALL ER 414 at 427f-j.
136 Lewis; A and Taylor; J, Sport Law and Practice, Butterworths 2003.
137 Lewis; A and Taylor; J, Sport: Law and Practice, Butterwoths 2003, p 738.
138 As per Laddie LJ in Irvine v Talksport [2002] EWHC 367 (Ch), [2002] 2 ALL ER 414
139 Learmonth; A, Eddie, are you okay? Product endorsement and passing off, I.P.Q 2002, 3, 306-313.

Comment

The effect of the misrepresentation to the public thus makes passing off an unpredictable cause of action for sports athletes in cases of character merchandising. This rejects the proposition that 'if the representation is made, there is no requirement of law for further evidence as to how the misrepresentation was the cause of the public buying the goods in question. In general, the public expect to buy what they think they are getting, namely the genuine article...In the absence of evidence, the court must infer that if the ...consumer.... were aware that the object he is buying is not genuine, he would not buy it but would seek the real object.'[141]

There may be further remedies which avail themselves to cases of false endorsement and these are discussed later in the text.

13. Human Rights Act

Although Laddie J held that the Human Rights Act (HRA 1998) was not relevant to the *Irvine* case, the HRA 1998 nevertheless has the potential to impact significantly on the area of Image Rights.[142] The HRA 1998 incorporates into English law the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Section 3 of the HRA 1998 states:

> [so] far as it is possible to do so.... legislation ....must be read and given effect in a way which is compatible with Convention rights.

Those articles relevant to this chapter are discussed below.

13.1 The right to peaceful enjoyment of property

Article 1 of the First Protocol to the Convention states:

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In *Van Marle v Netherlands,*[143] the applicants, pre 1974, worked as accountants after which time domestic legislation required their registration, failing which, they would not be permitted to continue in practice. Significantly, it was held that Article 1 fell for consideration because the goodwill of the business qualified as a possession in the form of a proprietary right. The unauthorised use of an athlete's Image Rights would seemingly constitute an interference with the enjoyment of their goodwill which would be difficult to justify as being in the public interest. Furthermore, it is established that the peaceful enjoyment of possessions and the right of disposal over them is a 'traditional and fundamental aspect of the right of property.'[144] This is not limited to the protection of an individual's property against arbitrary state interference but also applies in cases between private individuals.[145]

Consequently, Article 1 of Protocol 1 may represent a viable legal remedy for sports stars seeking to protect their Image Rights from unauthorised use.

13.2 The right to private life

Article 8(1) of the Convention is also worthy of further consideration and provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others.

In *Botta V Italy*[146] it was established that the notion of private life includes ensuring the physical and psychological well being of the personality without outside interference. This includes relations between individuals:

On the basis that most people develop relationships worthy of protection in their working lives, the court has been unwilling to interpret Article 8 so as to exclude activities of a business or professional nature.[147]

In an information ravenous world the issues predominantly in opposition are those public interests in freedom of expression and freedom of the Press which exist in a democratic society balanced against competing private interests.[148] Article 10 (1) of the European Convention on Human Rights scheduled to the HRA 1998 protects the freedom of the Press where news reporting is justified and is enforceable "subject to such conditions... for the protection of the...rights of others [and] for preventing the disclosure of information received in confidence...".[149]

13.3 Case law

In *Douglas v Hello! Ltd,*[150] the claimants, who were famous celebrities, sold the exclusive rights to take and publish photographs of their wedding to the magazine, OK! However, Hello! Ltd, a rival publication, had taken and published photographs of the wedding, without authorisation. The Douglases brought 13 claims against Hello! Ltd including Breach of the Data Protection Act 1998, Breach of Confidence and Invasion of Privacy. The court held that Article 8 fell for consideration as aspects of the right to privacy remained by virtue of the claimants retaining control over publication of the photographs.

In finding that the claimants were adequately protected by the Breach of Confidence action the court effectively ignored the privacy claim. Similarly, in the case of *Campbell v MGN Ltd,*[151] Naomi Campbell, another famous celebrity, succeeded in an action against 'The Mirror' newspaper for Breach of Confidence although her privacy claim also failed.

In C*oco v A.N. Clarke (Engineers) Ltd* Judge Megarry stated:

> It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this would suffice to impose upon him the equitable obligation of confidence.[152]

Morland J has adapted this test to the case of those public figures subject to media attention as being whether a public figure "courts and expects media exposure, [s]he is left with a residual of privacy which the court should protect if its revelation would amount to a breach of confidentiality."[153] In *Campbell v MGN Ltd,*[154] the court held that it was "entirely legitimate" and in the public interest for 'The Mirror' to expose Ms Campbell as a drug addict although 'The Mirrors' surreptitious photography of her attendance at Narcotics Anonymous amounted to an unjustifiable breach of her confidentiality. The difficulties in determining what is and what is not in the public interest are immediately apparent.

The court in *Campbell v MGN Ltd* held that there is no "presumptive priority"[155] given to freedom of expression over the right to privacy. However, the traditional approach of the courts in the U.K has been diametrically opposed to a right of privacy:

> some men and women voluntarily enter professions which by their nature invite publicity, and public approval or disapproval. It is not

140 Lewis; A and Tylor; J, Sport: Law and Practice, Butterworths, 2002.

141 As per Wilkinson V.C. in Mirage Studios v Counter-feat Clothing Co Ltd [19991] FSR 145.

142 [2002] 2 ALL ER 414 at 428a.

143 91986) EHRR 483.

144 Marckxx v Belgium 1979-80 2 EHRR 330.

145 Gustafson v Sweden (1996) 22 EHRR 409 para. 60 as cited in Taylor; J and Lewis; A, Sport: Law and Practice, Blackstone Press 2002, p.655.

146 Botta v Italy (1998) 26 EHRR 241 para. 32. See also Aubry v Les Additions Vice- Versa (1998) 1 SER 591. Ibid and R V Broadcasting Standards Commission, ex p BBC 2001] QB 885

147 Starmer; K, European Human Rights Law, p.125. Niemitz v Germany cited [1993] 16 E.H.R.R. 97.

148 Hanson; N, Law Gazette, 22 July 2004.

149 Article 10 (2) European Convention on Human Rights.

150 [2001] 2 WLR 992 per Sedley LJ.

151 Campbell v MGN Ltd QBD 27 March 2002 [2002] EWHC 499.

152 [1969] RPC 41 at p.48.

153 Morland; J in Campbell v MGN Ltd QBD 27 March 2002 [2002] EWHC 499 as cited in Hall; S, and Dyer; C' Legal landmark as Naomi Campbell wins privacy case, Thursday March 28, 2002, The Guardian Newspaper.

unreasonable in their case that they should submit without complaint to their names and occupations and reputations being treated...almost as public property.[156]

The significance of these unsuccessful privacy claims should not be under estimated because:

the right of publicity evolved directly from the right to privacy in the US, any new privacy law [would be] an important development towards the protection of image and likeness in the UK.[157]

However, it is important to note that the court in *Douglas v Hello! Ltd*[158] stated that if Parliament failed to give full and proper consideration to the issue then the judiciary may be forced to do so.[159] This would lead to a law created "bit by bit at the expense of litigants, and with ... inevitable delays and uncertainty."[160] Furthermore, member states are required to justify interference with those rights conferred under the Convention. The case of *Peck v UK*[161] involved a man caught on CCTV unsuccessfully trying to commit suicide by cutting himself with a knife in Brentwood High Street. Images from the CCTV were published on television and in local and national press. The Press Complaints Commission (PCC) found that there had been no invasion of privacy because the incident took place in a public place. The ECHR awarded Mr Peck damages because his Article 8 rights had been breached. In *Hannover v Germany*[162] a breach of Article 8 was upheld where photographs of Princess Caroline of Monaco were taken by the Press whilst she was shopping with her family.

Interestingly, within those states in the U.S that recognise a distinct right of publicity, case law has differentiated between the "appropriation" of a public figure's persona and that of a private persons. Some commentators have argued that these two actions cannot be distinguished[163] but this author takes a contrary position. The cause of action in the former is essentially of an economic nature arising from the appropriation of the sports stars goodwill (publicity right) whereas the later is damages from injured feelings deriving from a breach of an individual's right to privacy (privacy right). Although the right to privacy is still in its infancy it may yet develop in the same manner as it has in the U.S.

There are a number of further avenues which an aggrieved party may consider. However, there are largely ineffective due to there limited scope and provision for sanctions or simply because they have become outdated. These are given a more fleeting analysis in recognition of this.

14. Defamation

The leading Defamation case is *Tolley v Fry.*[164] Mr Tolley's status as an amateur golfer was called into question in an era where there was a clear distinction between playing for money and participating as an amateur for the love of the game. Defamation was successfully established.

Street has observed:

The gist of the action is that the defendant either lowers the plaintiff in the estimation of reasonable, right thinking members of society, or causes such citizens to shun or avoid him.[165]

Therefore, the viability of the action in cases of the unauthorised use of an individual's image is limited to those cases wherein the usage has the effect of casting aspersions on the character of the individual in the eyes of the reasonable man. Furthermore, as the vast majority of today's sportsmen with valuable Image Rights are of professional status it seems unlikely that a Defamation case will arise again. Taylor[166] provides the hypothetical example of the unauthorised use of the image of a famous individual, who happens to be a vegetarian, to promote bacon. Here, Defamation could be argued as the individual may be portrayed as untrustworthy and mercenary.

In France, the famous model, Linda Evangelista, successfully relied on Defamation when a right wing political party used a photograph of her dressed as Joan d'Arc without her authorisation to promote their political cause.[167]

15. Trade Description Act 1968

Section 1 (1) of the Trade Descriptions Act 1968 (TDA 1968) provides:

any person who, in the course of a trade or business-
(a) applies a false trade description to any goods; or
(b) supplies or offers to supply any goods to which a false trade description is applied, shall, subject to the provisions of this Act, be guilty of an offence.[168]

Section 3 (4) of the TDA 1968 defines false trade description to include 'a false indication, or anything likely to be taken as an indication which would be false, that any goods comply with the standard specified or recognised by any person or implied by the approval of any person.' Furthermore, Section 2 of the TDA 1968 defines 'trade description' as 'an indication, direct or indirect, and by whatever means' with respect to goods. This includes:

(g) approval by any person or conformity with a type approved by any person.

The TDA 1968 may therefore prove useful in cases of false endorsement of goods or services although there are no recorded cases of it forming the basis of any action.

16. Malicious (injurious) falsehood

In *Ratcliffe v Evans* it was held that:

An action will lie for written or oral falsehoods.... where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce actual [economic] damage.[169]

Therefore, prima facie, this cause of action may prove useful to sports stars in instances of false endorsement. Indeed, in *Kaye v Robertson*[170] injurious falsehood was established where there was a false representation of an endorsement of products and services. However, the tort again remains un-used in relation to the unauthorised use of a celebrity's name or image for endorsement or merchandising.[171]

In light of the developments in the law of passing off the likelihood of both the TDA 1968 and the tort of malicious (injurious) falsehood forming the basis of any action may be further reduced.

17. The Control of misleading advertisements regulations

Regulation 2(2) of The Control of Misleading Advertisements Regulations 1998 (TCMAR 1998) provides:

For the purposes of these regulations an advertisement is misleading if in any way, including its presentation, it deceives or is likely to deceive the person to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for those reasons, injuries or is likely to injure a competitor of the person whose interest the advertisement seeks to promote. [172]

Under regulation 4(1) of TCMAR 1998 the Director General of Fair Trading is obliged to consider any complaint that an advertisement is misleading. The Director General may commence injunctive proceedings to restrain further publication.[173] However, in addition to

154 QBD 27 March 2002 [2002] EWHC 499.
155 Campbell v MGN Ltd QBD 27 March 2002 [2002] EWHC 499.
156 Judge Greer in Tolley v Fry [1930] 1 KB 467 at 477.
157 Smith, Image persona and the law- Special Report (2001), Sweet and Maxwell para. 5-70 as cited in Lewis, A and Taylor; J, Sport: Law and Practice, Butterworths 2003.
158 [2001] 2 WLR 992.
159 Mogford; M, Breach of confidence and privacy, http://www.spr-consilio.com/arttort8.htm
160 As per Lindsay J Douglas v Hello! Ltd [2001] 2 WLR 992.
161 ECHR 28/01/2003; application no. 44647/98.
162 ECHR 24/06/2004; application no. 59320/00.
163 Goodenough, Re-theorising Privacy and Publicity, (1997) I.P.Q.R. 37.
164 [1930] 1 KB 467 CA.
165 Street on Torts (10th edn) p.435.
166 Taylor; J, in Lewis; A and Taylor; J, Sport: Law and Practice, Butterworths 2003, p.675.
167 Linda Evangelista, also cited Article 9 of the French Civil Code.
168 Section 14 of the TDA provides similar protection in respect of services.
169 Ratcliffe v Evans [1892] 2 QB 524 at 527, CA.
170 [1991] FSR 62, CA.
171 Taylor; J, in Lewis; A and Taylor; J, Sport: Law and Practice, Butterworths 2003, p.646.
172 SI 1998/915.
173 Regulation 6 (5). of The Control of Misleading Advertisements Regulations 1998.

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the limited circumstances in which these regulations may apply there is no provision for a compensatory award to be made which is attributable to the unauthorised use of the individual's image in an advertisement. TCMAR 1998, therefore, may be regarded as largely toothless.

18. Regulatory Codes

The British Codes of Advertising and Sales Promotion[174] provides that all advertisements should be legal, decent, honest and truthful; prepared with a sense of responsibility to consumers and to society[175] and with respect for the principles of fair competition generally accepted in business.[176] No advertisement should bring advertising into disrepute.[177]

Paragraph 13.1 of the Advertising Code refers specifically to the 'protection of privacy' and provides:

> Advertisers should not unfairly portray or refer to people in an adverse or offensive way. Advertisers are urged to obtain written permission before....
> (b) referring to people with a public profile...
> (c) implying any personal approval of the advertising product....

However, in the event of a complaint being upheld by the Advertising Standards Authority (ASA) the sanctions are somewhat limited:

> The media, contractors and service providers may withhold their services or deny access to space; adverse publicity, which acts as a deterrent, may result from rulings published in the ASA's monthly report; pre-vetting or trading sanctions may be imposed or recognition revoked by the media's, advertisers, promoters or agency's professional association or service provider and financial incentives provided by trade, professional or media organisations may be withdrawn or temporarily withheld.[178]

The Independent Television Committee (ITC) is the statutory appointed body for the enforcement of a code of standards and practice relating to television advertising and programme sponsorship.[179] Paragraph 15 of the code is dedicated to the 'Protection of Privacy and Exploitation of the Individual' and provides that 'individual living persons must not be portrayed or referred to in advertisements without their permission except in circumstances approved by the Commission.' In the event of the ITC upholding a complaint formal warnings or fines may be issued to the licensee.

However, there is an absence of any provision under which a compensatory award may be made to the celebrity for the unauthorised use of their image.

19. Concluding comments

McCarthy states:

> English law often seems tied to the legal categories of the past and, up to the present, unable to accommodate itself to the modern commercial realities of licensing and merchandising.[180]

However, the author submits that the judiciary is correct to proceed with caution as the inventive use of current law will not create certainty but may ultimately serve to exacerbate a lack of clarity. The purpose of this work is to demonstrate that the rationale underpinning any movement towards modification must be well-founded and coherent policy decision. The English courts must not be wooed unduly by sentiments that 'if the image of a personality is worth exploiting without authorisation, it should be protected by the law.'[181]

Having said this, the author does concur that there has been a distinct reluctance to challenge the traditional view of the English courts. Sufficient consideration has not been given to a modification of the existing position in the U.K. and the mechanisms prevalent in other jurisdictions. However, in giving due consideration, the interests of the private individual, the role of the athlete in today's society and the position of the consumer must be carefully balanced.

174 10th edn. 1st October 1999
175 Para. 2.2 of The British Codes of Advertising and Sales Promotion.
176 Para. 2.3 of The British Codes of Advertising and Sales Promotion.
177 Para. 2.4 of The British Codes of Advertising and Sales Promotion.
178 10th edn. 1st October 1999 para. 68.39
179 The ITC was created under the Broadcasting Act 1990.
180 McCarthy, The rights of publicity and privacy (2nd edn) para. 2-286.
181 Abell; Protecting personalities: Time for a new form of copyright' (1998) 82 Copyright World 33.

Mind the Gap

National Collegiate Athletic Association Division I Handling of International Prospects and Student-Athletes - The Professionalization Threshold Regulatory Framework Analysis - Conveyance of Amateurism Policy

by **Anastasios Kaburakis and Jacob Solomon***

1. Introduction

An in-depth research project on International prospects and student-athletes for Division I National Collegiate Athletic Association member institutions has to cover a few elements that are necessary in developing a complete understanding of the problems faced by the prospects, as well as the challenges faced by the Association as a whole, and the member institutions independently. Such elements include the current regulatory framework applied by the NCAA on cases of international prospects and student-athletes (IPSAs-ISAs), which revolves around the amateurism bylaw of the NCAA DI Manual (Bylaw 12). Amateurism is the one single element that has created and still triggers most problems in ISAs cases and DI member institutions' recruiting attempts. Therefore, the ensuing analysis will shed light on the theory and the application portion of the amateurism bylaw in its present form.

Furthermore, there are important procedural elements that need to be posed and will follow the aforementioned analysis. These elements deal with the NCAA staff's internal mechanism, the Agents, Gambling, and Amateurism (AGA) staff and the review process by the Student-Athlete Reinstatement (SAR) Committee and staff, as it stands now the two main entities that are the crucial decision making bodies in the governance and evaluation of ISAs cases that come under scrutiny. Finally, the suggestions by the NCAA to member

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institutions will be juxtaposed with the valuable lessons this line of research has drawn from international governing bodies, international sports federations, club administrators and a plethora of cases involving international prospects and student-athletes. The differences in structure of these sport administrative entities and the legal implications they may cause will be applied and analyzed in the scope of international prospective student-athletes, who wish to overcome these challenges and pursue higher education combined with sport in the U.S.

2. NCAA Constitution - Amateurism definitions and regulations

The NCAA Constitution clearly states (NCAA DI Manual, 2004-2005, Bylaw 1.3.1, Constitution, Fundamental Policy) that: "The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports". Closely, (Bylaw 2.9, The Principle of Amateurism) "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises".

The main theoretical framework on amateurism and NCAA eligibility rules is to be found in Bylaw 12: "Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport" (Bylaw 12.01.1). The "clear line of demarcation" between college athletics and professional sports that was aforementioned is repeated in Bylaw 12.01.2. 12.01.3 covers an important definition for cases of international student-athletes, whose amateurism status may be affected by activities prior to enrollment in a DI member institution, costing them eligibility (such cases and particular activities are analyzed at a later portion of this paper with references to the different global sport legal systems and mainly the European Club-based system), and mentions: "NCAA amateur status may be lost as a result of activities prior to enrollment in college. If NCAA rules specify that an "individual" may or may not participate in certain activities, this term refers to a person prior to and subsequent to enrollment in a member institution. If NCAA rules specify a "student-athlete," the legislation applies only to that person's activities subsequent to enrollment." Hence, prospective student-athletes are differentiated by enrolled student-athletes. During the course of the evolution of amateurism regulations, NCAA guidelines to member institutions, and their application (elements that will follow this theory portion), there have been particular directives that have ultimately benefited already enrolled student-athletes that could have been adversely affected by legislative changes, however they have been treated in a fair manner after the reconsideration of their cases and the intervention of the Executive Committee.

In Bylaw 12.02 one finds crucial definitions and applications, such as:

- 12.02.2 **Pay**. Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.
- 12.02.3 **Professional Athlete**. A professional athlete is one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association.

  and the recently (8/1/02) amended and very important for this research definition of
- 12.02.4 **Professional Athletics Team**. A professional team is any organized team that:
  - **a** Provides any of its players more than actual and necessary expenses for the participation on the team, except as otherwise permitted by NCAA legislation. Actual and necessary expenses are limited to the following, provided the value of these items is commensurate with the fair market value in the locality of the player(s) and is not excessive in nature:
    - (1) Meals directly tied to competition and practice held in preparation for such competition;
    - (2) Lodging directly tied to competition and practice held in preparation for such competition;
    - (3) Apparel, equipment, and supplies;
    - (4) Coaching and instruction;
    - (5) Health/Medical Insurance;
    - (6) Transportation (i.e., expenses to and from practice and competition, cost of transportation from home to training/practice site at the beginning of the season and from training/practice site to home at the end of the season);
    - (7) Medical treatment and physical therapy;
    - (8) Facility usage; (Revised: 4/24/03)
    - (9) Entry fees; and (Revised: 4/24/03)
    - (10) Other reasonable expenses incidental to participation; or (Adopted 4/24/03)
  - **b** Declares itself to be professional

At this point there needs to be some legislative history presented, that will clarify a few elements in regard to the definition of a professional team. Moreover, one realizes that the wording and the specific rationale of each amendment play an integral role in shaping the handling of cases such as the ones we are researching and have led to the present reality of international student-athletes. Especially the ones that are governed by a federalized club-based system, as will be extrapolated in a later part, are directly affected by any modification in any portion of this definition. Specifically:

The broad inclusion of the wording *"...any of its players..."* means that if e.g. a junior in high school participated in a team that is not strictly defined as professional, however it does provide one of its players with some extra benefits, other then the ones mentioned in the definition and allowed by NCAA regulations, that team is deemed as professional in its entirety. Moreover, according to 12.02.4 (b) if a team merely declares itself as professional and does not fit any of the impermissible benefits definitions, it will still be characterized as professional. Actually, the internal mechanism of the NCAA and the S-A Reinstatement Committee have declared that they will provide remedy for cases such as these, and examples will be provided in the last portion of this research. Fact remains the wording of NCAA law creates some ground for interpretation and certain problems in particular cases.

Furthermore, there were three recently documented attempts to amend this definition that were successful. One of these amendments (proposal #2002-39) referred to participation in Olympic and National teams that may compete for prize money, in order to allow the benefits of international athletics participation without further ramifications for eligibility. The most important ones -addressing most cases that come under scrutiny- that have been added as of late are proposal #2002-49 and upcoming proposal #2004-150, which was recommended to the main legislative body of the NCAA, the Management Council, by the NCAA DI Academics/Eligibility/Compliance(AEC) Cabinet, and is going through the current (2004-2005) legislative cycle.

The former proposal (#2002-49) made the inclusion (10) under 12.02.4 (a) which referred to *"other reasonable expenses incidental to participation"*. This inclusion had the following rationale: *"Under NCAA rules, any team that provides an expense not listed as an actual and necessary expense under the definition of a professional team is considered a professional team. For example, any team that provides its members with telephone calls on a team trip would be considered a professional team, regardless of whether or not anything else is provided. It seems that the intent of the legislation was to clarify that only teams providing substantial funding to its team members, not merely expense money, should be classified as professional. This amendment clarifies that the provision of other reasonable expenses (such as telephone calls and local entertainment) does not cause the team to be considered professional under NCAA rules."*[NCAA Division I Board of Directors Management Council (Academics/Eligibility/Compliance Cabinet)(Agents and Amateurism Subcommittee) (Ivy Group), posted on NCAA

Legislative Database (LSDBI) on 6/23/03]. There are interesting elements to this rationale by NCAA legislature, one pertaining to the wording *"it seems that the intent of the legislation..."* that signifies some uncertainty, and that this amendment opened up -or at least attempted to do so- some breathing room for the narrow interpretations of past NCAA administrations, that would not go beyond the letter of the regulation and instantly declare a prospective S-A ineligible. At the same time, it may be criticized by true amateurism advocates, as creating some space for interpretation, thus allowing some institutions to bend the spirit of the regulation, recruiting athletes that would have had eligibility problems in the past. Leniency toward prospects and S-As has been the recent trend, as will be further explained in the following section, and this effort is further documented by the latest proposal, #2004-150.

This proposal has been initially accepted and supported by the Management Council for adoption, and at this time, it is widely recognized by NCAA legislative cycles that it will be included in the 2005-2006 NCAA DI Manual. The proposal deals with a further amendment of Bylaw 12.02.4 (a) (10) and the omission of the words *"incidental to participation"*. This will be according to the general trend for being more attentive to prospects and students and submitting specific facts for consideration under a reasonable standard. Once again, true amateurism advocates will assume the position that this "reasonable standard" will create opportunities for certain individual cases to exploit the present system and make the most of the leniency of the current spirit of legislation. A look at the rationale of the proposal may clarify these issues, and may lead to further examination of particular application for ISAs cases: *"The intent of the recent change to the definition of a professional team was to provide clarity to the membership and ensure that teams that provide players money in excess of actual and necessary expenses are considered professional under NCAA legislation. However, including the phrase "incidental to participation" resulted in an interpretation that causes certain amateur teams to be considered professional. For example, as worded, the new definition causes teams that merely provide laundry money to its players to be considered "professional," because such expenses are not directly tied to practice or competition. The intent of the new definition was not to have such teams (e.g., Espoir teams) trigger the definition of a professional team by simply providing laundry money. The proposed change in language will allow interpretive flexibility so teams that truly are not paying players do not trigger the NCAA definition of a professional team. This proposal is submitted as noncontroversial legislation as it is consistent with the intent of the legislation as initially proposed and merely broadens the legislation to provide greater flexibility in addressing potential student-athlete well-being concerns."*[NCAA LSDBI, NCAA Division I Academics/Eligibility/ Compliance Cabinet (Committee on Student-Athlete Reinstatement)]. Both of these proposals attempt to ratify the new trend in NCAA management of S-As and provide remedy for prior treatment that was challenged as unfair. This trend may assist in the management of ISAs, as it can incorporate more elements that go beyond American sport system governance. As a last observation, one may note that during similar legislative efforts, there usually is a set of directives or guidelines from the Executive Committee that will be implemented by the internal decision-making entities, such as the AGA or the S-A Reinstatement staff.

In NCAA Bylaw 12.1 one finds the general regulations and the noteworthy reference to the retention of amateur status:

12.1.1 **Amateur Status**. An individual loses amateur status and thus shall be ineligible for intercollegiate competition in a particular sport if the individual:

a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received;
d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based upon athletics skill or participation, except as permitted by NCAA rules and regulations;
e) Competes on any professional athletics team (per Bylaw 12.02.4), even if no pay or remuneration for expenses was received;
f) Subsequent to initial full-time collegiate enrollment, enters into a professional draft (with exceptions that other NCAA Bylaws cover on the cases of the National Football League and the National Basketball Association draft); or
g) Enters into an agreement with an agent

Major problematic areas in regard to the loss of amateur status for ISAs are juxtaposed in a following section with ISAs governance by federalized club-based systems of sport. Thus it may become clearer that frequently the nature of a national system and its amateurism policy bear problems for an international prospective student-athlete.

As an extension of the regulations on amateur status, we have specific descriptions of what constitutes prohibited forms of pay, under 12.1.1.1, with references to salary, gratuity or compensation, division or split of surplus, and an important inclusion of educational expenses, that a number of ISAs have had challenges with. Other prohibited forms of pay include expenses, awards, benefits, cash or equivalent awards with the exception of the prospect's educational institution, unspecified or unitemized expenses, and expenses from a sponsor other than the parents or legal guardians of the PSA. Further regulations refer to impermissible pay based on performance, preferential treatment, benefits, or services, and any prize for participating for an institution's promotional activity.

Bylaw 12.1.1.4 has a number of exceptions to the amateurism rule, and as contemporary situations become more demanding, this section becomes more extensive. What is of instrumental importance for the cases of IPSAs this research has dealt with, is contained under Bylaw 12.2.3, which covers competition against and with professionals. If the team is termed as an amateur team, the PSA can participate and compete against professionals. On the contrary, under 12.2.3.2: *"An individual shall not be eligible for intercollegiate athletics in a sport if the individual ever competed on a professional team (per Bylaw 12.02.4)* in that sport..." The crucial element of *"ever"* is oftentimes what has denied intercollegiate athletic participation to IPSAs. As will be demonstrated, there are cases where IPSAs have been "promoted" or joined their respective pro club that supports the junior age group amateur team, and by the mere relationship between the two and due to the fact that the IPSA may not have been able to avoid such participation at all levels of the team, including the pro rank, the situation led to permanent ineligibility, or -in the most favorable situations- a number of games withheld from intercollegiate athletic competition, according to a condition that will be covered in the next section.

3. Eligibility regulations - Initial Eligibility - "Amateurism Clearinghouse"

Under the general principle of institutional control and institutional responsibility, eligibility shall be determined by the member institutions. According to 14.01.1: *"An institution shall not permit a student-athlete to represent it in intercollegiate athletics competition unless the student-athlete meets all applicable eligibility requirements, and the institution has certified the student-athlete's eligibility". In addition, according to 14.01.3.1: "A student-athlete shall not be eligible for participation in an intercollegiate sport if the individual takes or has taken pay, or has accepted the promise of pay in any form, for participation in that sport, or if the individual has violated any of the other regulations related to amateurism set forth in Bylaw 12."*

Furthermore, Bylaw 14.1.2 mentions: *"As a condition and obligation of membership, it is the responsibility of a member institution to determine the validity of the information on which the eligibility of a student-athlete is based."* At this point, there have been significant efforts by member institutions, conferences, coaches' associations, and many stakeholders, to introduce an entity within the NCAA administration staff that will relieve the pressure from the institutions, which have had considerable challenges collecting information pertaining to ama-

teur status. Thus there is a consensus that declares a declining trend in recruiting international prospects (NBCA, WBCA communication) due to the hardship coaches and member institutions are confronted with. Therefore the following proposal recently sponsored by the West Coast Conference suggests the creation of an Initial Eligibility Clearinghouse for amateurism that will especially cater to the institutions and conferences' needs in terms of collecting the information that will render an IPSA eligible or not, and models it after the academic credentials Clearinghouse.

Proposal 2004-60 was initially supported in concept, but defeated in the process of the 2004-2005 legislative cycle. The proposed amendment by the WCC that intended to seek formal NCAA staff certification of amateur status for IPSAs read: *"*14.1.3 Validity of Amateur Status. As a condition and obligation of membership, it is the responsibility of an institution to determine the validity of the information on which the amateur status of a prospective student-athlete is based. The amateur status shall be certified by the NCAA national office. An institution shall use the certification decision with respect to amateur status for each international student-athlete in order to determine the eligibility of that international student-athlete. An institution is responsible for notifying the NCAA when it receives additional information, or otherwise has cause to believe, that a prospective student-athlete's amateur status that has been previously certified has been jeopardized".

The proposal's rationale is very useful toward an understanding of the specific situations that occur around recruitment of ISAs: *"Currently, each institution must certify the amateur status of incoming international prospects or selected students as defined in the NCAA General Amateurism and Eligibility Form for International and Selected Student-Athletes. This certification procedure causes the same prospect to receive different eligibility decisions at different institutions. This disparity has led to considerable hardship for and unfair treatment of our student-athletes and member institutions. It has also resulted in the participation of ineligible student-athletes, forfeiture of contests, last minute eligibility waivers and countless undue hours and resources spent on certifying an individual student-athlete. It has become common practice for institutions to obtain informal approval from the NCAA when certifying amateur status. This proposal seeks to formalize the process, take advantage of the NCAA's ability to collect data and equalize the playing field for those institutions unable to devote the same level of resources to certification of amateurism. This proposal is purposefully broad in language in order to allow the membership and NCAA, through subcommittee or otherwise, the flexibility to research the best method of implementation as was done when the initial eligibility clearinghouse was established. A proposal with such specificity would be impracticable at this point in the legislative process.*

Estimated Budget Impact: Not yet determined.

Impact on Student Athlete's Time: Considerable decrease on the time and effort expended by international student-athletes in collecting documentation from their home country". (NCAA LDSBI, proposal #2004-60).

The AEC Cabinet and the S-A Reinstatement Committee, in their recommendation to defeat the proposal at the Management Council, mention:

Academics/Eligibility/Compliance Cabinet: The cabinet opposes this proposal as presented. Although there is a need to have a system and process in place that would assist in ensuring competitive equity in the area of amateurism, this proposal lacks the details necessary to establish such a process. The cabinet asked the staff to review the concept presented within the proposal and provide recommendations to the NCAA Division I Academics/Eligibility/Compliance Cabinet Subcommittee on Agents and Amateurism.

Student-Athlete Reinstatement Committee: The committee did not support Proposal No. 2004-60 as written. Although the committee supports the concept of an international clearinghouse, the committee believes that this proposal lacked specificity to support. Specifically, no budget was addressed and the feasibility of information was not discussed. The committee believes that before it could take a position on the proposal, much greater specificity is needed. With regard to the concept of a clearinghouse, the committee did note that a clearinghouse would certify the amateur status of a prospect; however, the reinstatement committee could still review mitigation present in an individual situation. Further, the committee noted there would be a significant budgetary implication for this proposal.

The two main factors for the defeat of this proposal, other than the temporary nature and the specific wording problems, are -according to the NCAA staff- lack of specificity, and no budgetary implication. One may assume that the specific jurisdiction of this Clearinghouse would entail direct conflicts with the AGA and S-A Reinstatement staff's usual line of management. However, as a concept it is agreed by the NCAA staff that it would significantly reduce time and resources allotted by these two main entities. In the future, there may be an Executive Committee decision to adopt such a proposal and proceed with the realization of the task. According to the present strategy and the guidelines that will follow, both the centralization of decisions and the well-being of student-athletes are of major importance for the present administration. Thus, flexibility in decision-making will be served by such an entity that already has been pursued by many constituents. Regardless of the outcome of this endeavor, the S-A Reinstatement Committee will maintain the reigns for the ultimate decision, determining whether an IPSA will be eligible for intercollegiate competition or not, either on the first or second degree, after an institutional appeal.

In correspondence of the Collegiate Commissioners Association of Compliance Administrators (CCACA), an entity that is instrumental in the rules interpretations process on issues of national significance (*National Collegiate Athletic Association, Regional Seminars, Guide to Rules Compliance, NCAA DI Interpretations process*), there was further examination of the proposal and a discussion on the feasibility and realization of such a project. In the 11/3/2004 CCACA conference call transcript it was noted:

Overall the group was supportive of 2004-60 but recognize that there could be concern over cost. Suggestions were made regarding each institution paying for the service of the staff to certify an international prospect as well as having the prospect pay a fee themselves. The group was concerned that the cost issue may cause the proposal to not be approved. It was agreed to continue to have discussions with the NCAA staff regarding this matter and to request that it be placed on the agenda for the in-person February meeting. It was also requested that the AGA staff be present.

It is evident, therefore, that the major challenge in the realization of the project has been the budgetary implication for the Association and the membership. The CCACA members' suggestion of member institutions and prospects covering the cost may be one way of approaching realization. As was mentioned above, a precise description of the jurisdiction of such an entity would assist the AGA and SAR staff in their line of service provided to member institutions. Regardless of the outcome of a first degree Amateurism Clearinghouse decision, it should be noted that the SAR Committee reserved for itself the right to review the appeals process and consider mitigating circumstances for individual situations. The latter is a detail of significance and practical importance. During the next legislative cycle it may be established that such an entity can be realized, thus relieving the burden from the shoulders of member institutions' athletic administration staff members.

4. Internal mechanism - NCAA AGA and SAR standards of review application

As mentioned above, each NCAA DI member institution has the responsibility to research and confirm the eligibility of each recruited ISA. According to the aforementioned eligibility analysis, the institution needs to determine the validity of information pertaining to the amateur status of individuals-IPSAs. The process initially deals with the distribution of an ISA questionnaire.

The questionnaire covers such areas as educational background, athletics participation, expenses received from teams, contractual relationships, agentry relationships, prize money, benefits, age and level of previous athletic competition, recruiting information, scouting questions, all in an attempt to investigate any potential infractions or

areas that the NCAA staff would use to deny IPSA eligibility. The institution then has to conduct an extensive research effort -frequently conducted by independent legal counsel and firms each institution is contracted with- in order to verify this information and possibly find more areas of question. This initial stage is admittedly very difficult due to limitations of resources and information nodes from overseas, for most DI institutions. Hence the effort from a majority DI institutions and conferences consensus to promote the institution of the Initial Eligibility Amateurism Clearinghouse described above.

The entity that assists member institutions in amateurism compliance is the Agents, Gambling, and Amateurism staff (AGA), which has communicated a series of checklists and updated material each year in order for institutions to investigate the validity of the information submitted by the IPSA. Determinants that are included in the checklist for investigating SAs or PSAs by the AGA staff cover family history, social network, work history, expenses, sources of income, assets, educational history. Specifically for alleged amateurism violations, the checklist involves background information of individuals that were closely related to the prospect, and relationships such as runner, certified agent, financial advisor are determined. In addition, benefits provided to SA/family/friends are investigated. Other resource tools that are suggested by the AGA staff involve interviews with the PSAs family and friends, as well as questions to pose to the AGA or SAR staff, the latter as a secondary measure in the case when a violation has been documented. These checklists, though extensive and helpful for the institutions, practically are hard to realize the collection of material that would clarify the amateur status of an IPSA. Frequently, NCAA staff members as well as member institutions administrative personnel or recruiting staff members have been quoted saying that the institutions that are diligent enough in their research efforts find some type of violation having occurred. On the contrary, institutions that are not characterized as being as meticulous in their amateurism research efforts proceed accordingly, and either use ineligible ISAs, or are being investigated by the NCAA staff in the long run for infractions (*USA Today, Interview with Bill Saum, Director of AGA, 7/15/2003)*. Oftentimes, though, they are not, and that is where problems pertaining to competitive equity have been an area of controversy.

The next step after reviewing the amateurism information and deciding that the IPSA will be eligible for intercollegiate competition, is the institution and the recruited ISA completing the General Amateurism and Eligibility Form for International and Select Student-Athletes-Division I (*NCAA DI form* 04-10a). In this form one notices terminology and specific definitions applied for NCAA DI eligibility. According to the institutional guidelines, *"An international/select student-athlete is a student-athlete who either (a) is not a U.S. citizen, or (b) resides in an unincorporated or commonwealth territory of the U.S., or (c) has participated in foreign athletics activities or was associated as an athlete with a foreign athletics organization".* This is a useful inclusion, as it is not found in the NCAA DI Manual per se.

Once more, the institution has to analyze any applicable information that pertains to amateurism, and the ISA is advised that *"...information you provide on this form will be used to certify your eligibility and thus may impact your eligibility to compete... You are required to provide accurate information... If you knowingly provide false and misleading information on this form it may result in additional consequences to your NCAA eligibility".* After submitting the documentation to the NCAA office, the institution may proceed with declaring the ISA eligible or ineligible, which may lead the particular case to a further revision from the NCAA staff. The AGA staff will support the following action by the SAR staff, in the case an ISA has been declared ineligible and the institution appealed for reinstatement. It useful to note the procedure breakdown:

- Institution determines that a prospective or enrolled student-athlete was involved in a violation that affects eligibility.
- Institution declares student-athlete/prospective student-athlete ineligible under NCAA Bylaw 14.11.1 and withholds the student-athlete from all intercollegiate competition.
- Institution investigates situation and gathers facts (student-athlete reinstatement staff is not investigative in nature and it is the institution's responsibility to determine the facts of each case).
- Institution submits eligibility reinstatement request to student-athlete reinstatement staff.
- Staff reviews request, focusing on the student-athlete's/prospective student-athlete's responsibility.
- Staff reviews precedent with similar facts to determine what conditions for reinstatement should be imposed, if any. The student-athlete reinstatement staff attempts to put the individual back in the position they would have been in had the violation not occurred.
- Staff, on behalf of Student-Athlete Reinstatement Committees, can do one of three things:
  1. Reinstate eligibility without conditions.
  2. Reinstate eligibility with conditions such as repayment, return of benefit, withheld from one or more contests, lose one or more years of eligibility.
  3. Not reinstate eligibility at that institution or at any institution.

While the AGA staff is investigative and consulting toward member institutions in nature, the SAR staff is the one entity that is entrusted with a major decision-making responsibility. According to the NCAA webpage describing SAR:

"Student-athlete reinstatement is a department within the NCAA's membership services program. The student-athlete reinstatement staff processes violations and waivers that directly affect the eligibility of a prospective student-athlete or an enrolled student-athlete. When an NCAA member school self-reports a violation, all eligibility issues are addressed first and as quickly as possible. Then, if the violation has institutional responsibility, it is forwarded to the NCAA's enforcement staff to be processed as a secondary or major infraction case.

Student-Athlete Reinstatement Mission

The mission of the student-athlete reinstatement program is to protect the competitive equity of collegiate athletics by administrating the student-athlete reinstatement and administrative review processes in servicing the NCAA membership and student-athletes. The staff strives for equity, consistency, a service-oriented partnership, and efficient and effective decisions".

If the SAR staff denies reinstatement, then the institution may appeal the decision with the members of the SAR Committee for Division I. That will be the last resort the institution and the ISA have, before any legal action. On a number of cases, member institutions advise adversely affected ISAs to seek independent legal counsel, and pursue their case using any legal means available to them and necessary to achieve remedy. In the vast majority of cases such efforts will not see the light of the U.S. system of jurisprudence.

According to a recent interview conducted with Julie Roe, former Director of SAR, and currently holding one of the recently created positions of Director of Enforcement, the SAR staff was reported to conduct an average of 1,800 reinstatement requests' reviews per year, According to Julie Roe, one of the most important procedural developments in the management of SAs was the adoption of the new approach by the NCAA administration, the "less bureaucratic - more responsive" initiative by the NCAA Executive Committee in June 2003. According to the latter, SA welfare is weighed more than preserving competitive equity of member institutions. After the introduction of this new philosophy, it was reported that more than 50% of the cases handled were decided in favor of the SA, and 12% of the cases were treated with the withholding condition, which will be elaborated further; previously these cases would not have been reinstated.

Before extrapolating and discussing the withholding condition and the SAR process, it is instrumental to note certain developments in the policy formation of the present NCAA administration and certain guidelines the staff has to abide by when deciding on such cases. According to the September 2003 Report of the SAR Committee to the AEC Cabinet, certain legislative items and their rationale were evident of a change in philosophy and proposals for amendments in

the regulations that *"reflect what occurs in practice"* (*Supplement* #14, Report of the SAR Committee). Furthermore, the same report included nonlegislative items pertaining to the aforementioned shift in philosophy. After the NCAA Executive Committee communicated the new philosophical approach to committee chairs in a June 2nd 2003 memorandum, there were three major themes posed, by which the staff complies and delivers judgment:

- Flexible judgment
- Responsiveness
- Simplification

Flexible judgment: The committee determined that a shift in approach is appropriate. Previously, the committee provided directives to the staff prescribing specific outcomes for various categories of cases. The committee will continue to provide oversight to the staff, still serving as the appellate body for all decisions and working in collaboration in setting policy. The shift in philosophy will allow the staff to make flexible decisions aligned with guidelines set forth by the committee. Guidelines will assist both the staff and committee in considering what factors are important when deciding cases. The committee will regularly review all decisions made by the staff. The committee will have regular conference calls to review staff decisions that deviated from case precedent in light of the shift in approach. The committee will either approve the precedent or archive it. Until the committee's review, the staff's decisions are not binding on the committee.

In deciding cases, the staff and committee should consider many factors, including, but not limited to:

- *Student-athlete (SA) culpability (SA knew);*
- *Student-athlete responsibility (SA should have known); and*
- *The advantage gained from the violation and the appropriate way to address that advantage (in light of any mitigation; through a withholding condition imposed on the SA or through an institutional sanction).*

Responsiveness/Simplification: Regarding the two remaining themes, the committee discussed the student-athlete reinstatement process, including documentation requirements for various types of requests. The committee will continue to examine this area.

These guidelines are important in the conveyance of amateurism policy, as well as the future strategy by the NCAA staff and its decision-making process on ISAs cases. The major point that was reached after a July 7th 2004 meeting with the AGA and the SAR staff was that there is an imperative need of a concentrated effort by the NCAA staff and administration primarily, and by member institutions as the supporting mechanism, to educate the stakeholders in this process, mainly IPSAs and their families, on the particular regulations' details. Thus IPSAs will not be jeopardizing eligibility unknowingly, and if so, the work of the SAR staff will become more feasible. The elements of culpability and responsibility by the individual IPSA will play a major role in the decision, as the information and conscious decision to jeopardize amateurism status will have been in place and in close relation.

In the case of an IPSA being declared ineligible and after the submission of the reinstatement request it was decided that there are impermissible benefits that the IPSA has to repay, this purpose can be served by the institution enrolling in a repayment plan, or the IPSA may select a charity of his/her choice for repayment of impermissible benefits. What is important to note for the purposes of member institutions compliance, is that if the reinstatement condition requires repayment and the institution and ISA choose to enter into a repayment plan, failure to satisfy that repayment plan by the ISA after competing under the plan may result in the SAR staff not entering into repayment plans with that institution for a four-year period. For the purposes of IPSAs reinstatement, international charity plans for repayment will suffice, as was mentioned in the July 7th meeting with the AGA and SAR staff. What will be demonstrated through the last portion of this research project, however, is the rationale and purpose served in particular cases by the withholding condition.

The SAR policies mention: *"For decisions that involve withholding from competition as a condition, the student-athlete must fulfill the reinstatement condition when he or she is otherwise eligible and during one of his or her four seasons of competition. The competitions used to fulfill a reinstatement condition must be applied as follows:*

Team sports: The contests must be among those considered for team selection to the NCAA championship;

Individual sports with separate team championship: The dates of competition must be among those considered for team selection to the NCAA championship;

Individual sports without a separate team championship: The date of competition must be among those used to qualify for the NCAA championship.

Sports without an NCAA championship: The date must be regularly scheduled.

(Please note scrimmage or exhibition contests may not be used to fulfill a reinstatement condition. In addition, if the next contest in the institution's schedule is part of the NCAA championship or other postseason competition, then the student-athlete must be withheld from those contests.) Also, a student-athlete must fulfill a reinstatement condition when he or she is medically cleared to play by the institution".

According to the reinstatement policies for amateurism violations (*Bylaw* 12 guidelines, Reinstatement standard applied to amateurism violations for individuals initially enrolling at an NCAA institution for the 2003 academic year and thereafter) in the specific examples that will follow this analysis, reinstatement will be granted through the withholding condition. Even if the IPSA did not bear responsibility or culpability, and because of the nature and structure of the federalized club-based sports system in -mainly- European countries, such prospects will have to be withheld from competition, even if under no other circumstances did they jeopardize their amateur status (i.e. by signing a contract or with an agent). This seems to be the one element that may not serve the purpose of the rationale behind the new philosophy, or even the application of the "reasonable person" standard that substituted the "intent to professionalize" standard of review that existed in the past.

It is crucial, however, to make the distinction between professional competition for the IPSA before and after the first opportunity to enroll in an NCAA institution. In the former case, an individual who participates on a professional team (per Bylaw 12.02.4) after the first opportunity to enroll shall not be permitted to compete in intercollegiate athletics. In the latter case, an individual who participates on a professional team before the first opportunity to enroll will be withheld from competition on a one-for-one basis, not to exceed the equivalent of the number of contests in an NCAA season for that sport.

Case examples used by the NCAA staff as guidelines:

(1) *Facts*: While enrolled in high school, a basketball prospective student-athlete competes in 20 contests on a professional team, but did not sign a contract, nor accepted any impermissible benefits and expenses.

Decision: Eligibility reinstated upon the prospect being withheld from the first 20 regularly scheduled contests of the basketball season. The contests must be among those used for consideration for team selection for the NCAA Championship.

This is the case where a large number of IPSA from Europe and world regions with similar structure are being confronted with the withholding condition, while oftentimes they had no alternative but to play for the respective pro-club team, while enrolled in high school. Such cases and an overview of certain European countries sport structures will clarify these points in the ensuing discussion.

(2) *Facts*: While enrolled in high school, a basketball prospective student-athlete competes in 20 contests on a professional team, and signs a professional contract agreeing not to participate with any other team. There was no salary agreement.

Decision: Eligibility not reinstated due to the signing of a professional contract.

(3) *Facts*: A prospective student-athlete graduates from high school in May 2003 and decides to take a year off from school. The prospect competes in three contests on a professional team during the fall of 2003 and then decides to enroll in college in January 2004.

Decision: Eligibility not reinstated; the professional competition occurred after the prospect's first opportunity to enroll.

It is important to note that in the same context there are sport-specific guidelines posed. This is helpful for the SAR staff and the institutions, in order to take into consideration certain elements that are inherent in particular sports. Such exceptions are progressively introduced as amendments into the NCAA DI Manual. Being attentive to such needs may require further sport-specific amendments. Such an effort will coincide with the rationale and the philosophy the SAR staff is already implementing. An examination of facts on a case-by-case basis already leads to such legislative initiatives. Moreover, the application of the recently adopted standard of review came as a result of one such case.

Recapitulating, the standard of review that changed the summer of 2003 may have been initially strict in interpreting IPSAs cases and certain situations that may have led to amateurism violations; the intent to professionalize will not be the main deciding factor, but the IPSAs particular actions. These actions, however, as was mentioned above and will be explained further, may lack both the elements of culpability and responsibility. That is where the intervention of the new "student-athlete-first" philosophy has assisted in maintaining a balance in decision-making, and it remains to be seen how it will be implemented further in the near future.

According to The NCAA News: *"The student-athlete-first philosophy initially caused unease among segments of the membership who were concerned that the more flexible environment would be open to abuse. But student-athlete reinstatement committee members, many of whom had wanted to find a more friendly approach even before the new philosophy was adopted, are seeing positive results. The implementation of the new philosophy has led to two major changes within the processing of reinstatement requests.*

The first is the greater authority given to the student-athlete reinstatement staff to make decisions. That authority has resulted in fewer appeals; however, the committee still provides oversight and input to the staff. Although the committees may see fewer cases on appeal, members review all cases where the flexible review resulted in a different outcome. That review takes place on a quarterly basis and provides the staff with insight into the factors that should be considered in its analysis. In about 98 percent of the cases decided by the staff, the committees have agreed with the staff's decision.

In addition to the increased staff authority, the implementation of the new philosophy resulted in a shift away from dictated outcomes or directives to a focus on approach. With this change in focus, the staff and committees now spend time discussing what factors should be considered in the analysis of various cases" (The NCAA News, July 19th, 2004).

Julie Roe, in her aforementioned interview, mentioned that there has been a decrease in the numbers of appeals since the new philosophy. 5,4% of the cases dealt with were appealed to the SAR Committee in 2002, compared to 3,5% in 2003 *"due to the more flexible approach and staff discretion".* It should also be noted that the decision to shift to the new approach and adopt the recent standard of review were unanimous Management Council decisions. The latter provides specific guidance for the SAR staff. Specifically, the SAR Committee and staff have identified certain applicable guidelines that are appropriate for the developing management of ISAs. These deal with:

- Student-athlete's responsibility for the violation.
- Institution's responsibility for the violation.
- If the violation could have reasonably been avoided if the institution had knowledge of it beforehand.
- Any other relevant mitigation presented by the institution.

These new guidelines are the factors that can cause reconsideration of the withholding condition in cases of IPSAs. The fact remains that there needs to be attention drawn toward both the well-being and fair treatment of all PSAs and SAs, as well as maintenance of a level competitive field for DI member institutions. There have been concerns not yet eradicated in regard to the policies of certain institutions, which may approach the new philosophy with an attempt to bend and circumvent NCAA regulations, through a carefully staged series of successful appeals. Such conduct may perpetuate, thus the SAR Committee and staff assumed two policies that may relieve this pressure:

"The most direct would be for the committees to send a letter to the institution's CEO in cases in which institutional error caused the student-athlete to be in harm's way but relief was granted. Committee members believe that CEOs who receive many of these letters — or more than one that deals with the same violation — would be likely to ensure that the reason for the behavior was modified. The letter is not intended to serve as a penalty but rather to make the institution aware that relief from a penalty was provided because of an institutional error.

The groups also discussed educational efforts to modify behavior. Committee members believe the more that institutions know about the number and types of requests — and the patterns that emerge from the requests — the more likely that the behavior will change" (The NCAA News, July 19th, 2004).

Hopefully, this attempt by the SAR Committee and staff will bear fruit in the future. At the time being, however, one needs to observe particular situations that require attention in regard to IPSAs; these situations are directly related to the local region's sport structure, the norms of the particular national or international sport federation or national governing body, and impact the IPSAs amateur status and their eventual opportunities for pursuing higher education in the U.S.

5. The professionalization threshold - International sport entities structure - The case of men's and women's basketball

At this point we employed both the secondary data available to the NCAA staff and member institutions as of November 2004 (*National Collegiate Athletic Association, Evaluating the competitive experiences of International student-athletes, International student-athletes and International Sports Items links),* as well as original research spanning from December 2001 to December 2004. This line of research leads to useful information and the general conclusion that, because of the structure differences between the U.S. educational-based system of sport in NCAA DI athletics and the club-based model in most parts of the world, international prospects pursuing higher education and athletics in DI member institutions will be confronted with many challenges, mainly meeting the amateurism criteria as they were established above. An examination of international sport entities structure will provide evidence for these problems (both for IPSAs and member institutions wishing to recruit them) and for the purposes of this research paper, scope will be de-limited on the sport of basketball, with the specific differences between men's and women's basketball. The selection of the particular sport has a number of justifications, which include but are not limited to: growing popularity of sport internationally, revenue (men's) and borderline revenue (women's) producing sport in DI athletics, sport-specific regulations included in the NCAA DI Manual and the amount of basketball-specific rules that are incorporated for men's and women's basketball, being a team sport that signifies clearly the challenges examined in previous parts of this analysis. Moreover, the findings extricated may be useful for comparison and relevant analysis in similar federalized club-based systems of sport in team sports such as soccer, volleyball, handball, field hockey, ice hockey, rowing and water polo.

Interestingly and appropriately for reasons of serving the interests of member institutions and the IPSAs, the AGA staff embarked on a quest that would both inform member institutions of the situations existing in foreign countries and pose specific elements that may cause problems in recruiting eligible prospects, as well as educate foreign national and international sport federations on the NCAA amateurism regulations, with the hope the administrators overseas would disseminate the information to as many constituents as possible. In the previously mentioned meeting with the AGA and SAR staff, it was realized that there are challenges that have to be overcome and

that an all-encompassing educational effort on NCAA amateurism rules should target as many NGBs as possible and extend to younger age groups, before IPSAs engage in activities that would jeopardize their eligibility. In other words, before the prospects go beyond the crucial professionalization threshold. Once e.g., basketball prospects reach the 17-18 years-old age group it may be too late to ratify and remedy a situation that arose due to the sport system structure in the country of origin. This educational effort started with basketball and volleyball, and hopefully will extend beyond these sports, covering a wide range of intercollegiate athletics sponsored by DI member institutions that feature international prospects. As a suggestion, it was communicated to the NCAA staff that it may be feasible to start from the sports and countries that traditionally feature more ISAs in DI member institutions. The NCAA research staff is annually compiling this information and can be instrumental in assisting and identifying the next targets for this effort.

The European club-based model is representative of international sport entities structure and in similar forms may be encountered in other parts of the world as well. The organized participation in sports through clubs may begin as early as the 3-6 years-old bracket, with the first competitions taking place in the under-10 years-old age group. By the time the selected few reach the elite teams that are operated under the auspices of the sport federation overseeing the sport and/or a professional club, namely the Cadet age group (Under-16) and Junior age group (Under-18), they -most likely- will have been given the opportunity to join the ranks of the professional team supporting the infrastructure for the junior club, which would bear problems in the case these young athletes wish at a later point to pursue an athletic scholarship opportunity in the U.S. Hence, an extensive educational effort should focus on prospects and their families in as younger age groups as possible. Insofar as the member institutions may not engage in recruiting attempts during these early stages of competition, it will rely on the NCAA staff to organize this educational effort.

According to the info collected by the NCAA staff *(National Collegiate Athletic Association, International Sports Items, The European club-based athletics system):*

"The athletics structure in Europe is primarily a club-based system that is common throughout the continent. These clubs provide participation opportunities at many different levels, often for several sports. However, the formation of clubs just for basketball participation is not uncommon. In the case of basketball, top clubs will often participate in the highest competitive league in their respective country. The rosters of these senior teams may include individuals who have developed through the club structure by participating on the team's cadet or junior teams. The senior team roster may also include individuals with previous experience with other clubs or in other countries (including former U.S. collegiate and NBA or CBA players). The rights to a particular player may be traded, purchased or loaned to another club. Professional players in many leagues throughout Europe have the potential to earn large salaries but may be participating with a younger player who receives very little or no remuneration. Clubs may also sign younger players to agreements that provide small salaries, educational expenses, or actual and necessary expense reimbursement for their participation at any level for the club.

The popularity of basketball in Europe has increased significantly in recent years, and it appears that this popularity is having an effect on how many leagues throughout the world will market and promote themselves as professional. Further, many of these leagues wish to retain their younger players by providing them with financial incentives that will keep them from leaving their club teams and enrolling at NCAA member institutions. European basketball officials are cognizant of the increased popularity and financial revenue created by the NBA, and wish to create the same atmosphere in their countries. Therefore, eligibility issues regarding prospective or enrolled student-athletes' participation history in these leagues should be a concern.

The national federations are the governing body of the countries' club team system. The federation has all player contracts on file. The club team system is organized by four age levels. All players have a license that indicates for which club team they play.

Payment of money to players generally begins at the junior club team level for elite players. Club team contracts beginning at the junior level and up may include educational expenses, housing accommodations, per diem, stipends, allowances, equipment, facilities, coaching and transportation. Club teams with significant resources may provide housing, education and food. The NCAA's definition of "actual and necessary expenses" is more broadly interpreted by those involved in international basketball.

Club systems are financed through membership fees (shareholders and boosters), corporate sponsors, television contracts and local government funding.

The level of funding varies from club to club. The better-funded clubs have facilities where participants are lodged and fed. These clubs may also pay educational expenses as well as provide equipment, facilities, coaching, transportation, stipends and per diems at no cost to the player.

There are multiple divisions of club competitions. In some federations, there could be as many as seven divisions. Club teams in the first division in South America, the top 30 European countries and some Asian nations are considered professional teams where players are paid. First division club teams participating in leagues maintain or lose their status in the league each year based on their win/loss records. The two worst teams in first division are replaced by the top two teams from the second division. Second division teams may be professional.

Bearing in mind a recent (11/3/2004) agreement between the International Basketball Federation (FIBA) and the Union of European Basketball Leagues (ULEB), the entity that organizes the top competition in European Basketball - the Euroleague for the top European club teams, prospects may find themselves in a more balanced and at the same time more financially lucrative world of European basketball. According to the agreement, FIBA will continue to organize the youth development European National teams' championships, but with the joining of forces the strength of top basketball competition will lead to the best prospects signing with top notch professional teams. In combination with the fact NBA and WNBA teams have already led the way in international and especially European talent recruiting, it appears that only a handful of talented athletes will continue to pursue athletics combined with higher education in the U.S. If they wish to do so, however, they will be faced with challenges such as the ones created by the difference in structure between NCAA DI athletics and club-based sport.

Even before the aforementioned historic agreement between FIBA and ULEB, the NCAA staff reached a few points that member institutions wishing to recruit foreign student-athletes in basketball have to bear in mind:

- *First division club teams in South America, top 30 European countries and some Asian nations are considered professional teams where players are paid.*
- *First and second division club teams have players who are paid, under contract and are considered "professional."*
- *Only first division club teams compete in FIBA international competition.*
- *Elite junior European players (approximately 18 years old) are getting paid by club teams at the junior club team level.*
- *Club team contracts begin at the junior level (may include educational expenses, housing accommodations, per diem, stipends, allowances, equipment, facilities, coaching and transportation).*
- *Many first division club teams play in professional leagues.*
- *Most players on first division club teams have contracts with the teams.*
- *Many players on second division club teams have contracts with the teams.*
- *Agents are unregulated. Many agents have relationships with club teams and procure players for the teams.*
- *Agents sign elite players as young as 12 years old; many agents send students to the United States to play college basketball.*

An in-depth look at particular countries of origin and their sport structure as it pertains to basketball competition will lead to an identification of issues that need to be addressed by IPSAs, member institutions recruiting them, and ultimately the NCAA staff.

Australia:
Interestingly for NCAA DI member institutions, Australia along with a handful of other countries around the world with a very exquisite sport structure and an emphasis on the developmental side of youth athletics, has established the government funded Australian Institute of Sport (AIS). AIS athletes are selected as elite athletes and receive scholarships for attending AIS. These scholarships include a variety of benefits such as (*Australian Institute of Sport, Scholarship section*):

- access to world-class facilities
- high performance coaching
- performance reporting and supervision
- personal training and competition equipment
- sports science and sports medicine services
- travel, accommodation and living allowances for events chosen by the AIS
- full board at the AIS Residence or living-out allowances as appropriate
- reimbursement of education expenses to limits that depend on the type of study undertaken
- assistance provided by the Athlete Career and Education program
- incidental expenses.

Being an educational based amateur team, AIS maintains eligible IPSAs in their ranks, even though they participate in the Australian Basketball Association (ABA) -men's side - and the Women's National Basketball League (WNBL) -women's side. Both these leagues would be considered semi-professional for purposes of NCAA DI amateurism. However, the AIS players participating in e.g. WNBL competition may not be subjected to the withholding condition, as opposed to several European prospects hailing from similar conditions. The reason being AIS is considered maintaining the amateur status of IPSAs, as opposed to many European leagues and teams that fail to do so. As will be examined further, on a number of occasions, European prospects should be treated equally, as they do not jeopardize amateur status, but for the structure of their respective sport system that encourages or in certain situations obliges junior athletes to participate in the top division pro teams.

In Australia both the National Basketball League (NBL), the top club competition for men's basketball, and the WNBL, have teams that are or should be considered professional, and at the same time include in the rosters of these teams junior age players that would be considered IPSAs for NCAA DI member institutions. Even with limited participation or by the mere fact of their appearance on the roster of a pro team, these IPSAs jeopardize amateur status for NCAA DI. The AIS being the best solution for someone who wishes to participate in the highest level and at the same time maintain eligibility for NCAA DI athletics, IPSAs have challenges to face in their transition, but not in the degree European-based IPSAs have to. According to unpublished data from our research, most NCAA DI men's and women's basketball teams either entertained the notion of recruiting an IPSA and eventually did not follow through due to amateurism - basically- challenges, or were actively engaged in international recruiting attempts. In the case of basketball, the problematic area of amateurism application as well as the breeding ground for a majority of IPSAs for DI member institutions is the European club-based system. The following information is a juxtaposition of secondary data obtained from the NCAA staff's research communicated to member institutions with material from our original research conducted on the areas of focus of the previous NCAA staff research, as well as additional areas and countries of origin.

France:
The top league for men's basketball in France is the Ligue Nationale de Basketball (LNB). The LNB, which is made up to two divisions (Pro A and Pro B), is considered a professional league. Each LNB team will also have a junior or espoirs team in which young men from the age of 18 to 21 sign agreements with these teams, receive compensation or expense reimbursement, and commit to the club should they participate at the highest professional level in France. It is not unusual for an espoirs player to participate at the professional level in a limited number of contests. Lower leagues such as the National 1, 2, and 3 leagues appear to be considered amateur leagues even though some players may be compensated for their participation.

Similar to the AIS structure mentioned above, the French Basketball Federation (FFBB) has instituted youth development through the National Institute of Sport, (INSEP). Contrary to the AIS, French administrators self-proclaim the players on INSEP teams professionals as they participate in top division competition, traditionally in second division leagues; however it is established and the NCAA staff acknowledges that the mere declaration as professional does not render a prospect as such, depending on the particular situation. In the INSEP case, junior national team players may live, study, and train together for years, however they may not get paid and would be considered amateur according to NCAA DI amateurism standing.

The most interesting situations from an amateurism standpoint occur at the Espoir team level, with young athletes enjoying benefits from their respective pro teams. Oftentimes, the developmental side of these Espoir teams extends beyond what would be the professionalization threshold, and these young players may receive benefits that under NCAA regulations would be considered impermissible. This is the situation occurring in most European countries. The respective national systems function through state funding and appropriation of monies to national sport federations, which administer the competitions and support clubs in all levels. Most importantly, the better pro clubs have established a strong foundation for their Espoir teams, frequently paying the junior age players. These situations are more frequently encountered in men's basketball, though in select states and regional areas there may be similar relationships between junior women and the pro clubs operating top Espoir teams.

All Espoir players have to sign either an Aspirant contract or a Stagaire contract. Espoir players who are 16 to 18 years old sign Aspirant contracts, which are two-year contracts. Espoir players who are 19 to 21 years old sign Stagaire contracts, which are three-year contracts. These contracts reflect the cost of development of the Espoir players. The cost of development varies based on an Espoir player's age. Sixteen-year-old Espoir players are assessed 580 Francs per month. Seventeen-year-old Espoirt players are assessed 805 Francs per month. Eighteen year-old Espoir players are assessed 1,000 Francs per month. Nineteen-year-old Espoir players are assessed 1,600 Francs per month. Pro A and Pro B teams have Espoir contracts to reflect the cost of development assessed to Espoir players and to create a uniform monetary standard for the transfer of players based on the player's age. In rare instances, Espoir players who wish to leave their club team may be obligated to pay the team for the training they were provided. In essence, this is a release fee from their contract. The Espoir teams play each other during the regular season and prior to Pro A and Pro B games. There is also an Espoir championship. It is not unusual for an Espoir player to participate at the professional level in a limited number of contests.

In many countries there may be a practice of pro club administrators inflicting pressure on young talented athletes to sign early with their club teams for services that may extend to their late 20s. Certain countries' practices, especially former Eastern Block countries, would ban the talented young athletes from further participation in the junior ranks, if they did not sign for the respective pro club team. Thus, they would risk losing exposure for a potential career, or an athletic scholarship, that they would jeopardize by definition had they entered into an agreement with their clubs. This vicious cycle perpetuates and players only have their national teams' competitions as a last resort for exposure before U.S. recruiters. Sadly, in a number of cases the influence of club administrators on federation members, in charge of the selection of national team members, creates unfair practices, and players may be adversely affected if they do not conform to the urge of their club administrators. Former practices in some countries entailed the issue of an athletic identity card that would bind the player to their club for a minimum of 12 years; that was the situation in Greece.

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The European Union and Sport
Legal and Policy Documents

Editors:
Robert C.R. Siekmann and Janwillem Soek

With a Foreword by
Viviane Reding, EU Commissioner for Education and Culture

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

The contents of this book are divided into three parts totalling twenty chapters and covering all themes which the EC/EU has dealt with so far. The *General* part contains general policy documents such as, for example, the European Model of Sport and the so-called Helsinki Report on Sport. *Specific Subjects* concern Boycott, Broadcasting (in particular the Television without Frontiers Directive), Community Aid and Sport Funding (for example, the Eurathlon Programme), Competition (central selling of tv rights regarding the UEFA Champions League, the German Bundesliga, the English Premier League, etc., Formula One, World Cup ticketing arrangements, players' agents), Customs, Diplomas (Heylens), Discrimination (Walrave, Dona, Kolpak, and including Women in sport), Doping (Community Support Plan and Pilot Project for Campaigns to Combat Doping in Sport), Education / Youth (European Year of Education through Sport 2004, and documents concerning child protection in sport and trafficking in young footballers), the freedom of establishment to provide services (Deliege) and of movement of workers (Bosman, Lehtonen), the Olympic Games, State Aid, Tax, Tobacco Advertising, Trade Marks (Arsenal/Reed), Vandalism and Violence (football hooliganism) and Miscellanea (Fishing, Horses, Hunting, etc.).

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

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Greece:
After the European Union passed laws governing the protection and support of sport by national governments, nurturing youth sport and including it to the amended European Union Constitution, all member countries have to conform and comply by the modern, fairer regulations. In Greece, there are basically two professional leagues, A1 and A2, which attract some of the best players in Europe and former NBA players. A1 pro clubs have some of the better "Espoir" junior teams preparing talented athletes for the first team, and transfers of young players are often creating major controversies and intense situations among clubs. These young players often select to sign contracts as soon as they become of age (18), even though certain federation regulations may state that formal agreements should be posed to players over 21. Agreements have been documented between clubs and young athletes as early as 15 years old, in the case of a highly talented player sought after by every A1 team and recruited already by some NCAA DI institutions.

Certain inequities occur in the women's basketball league, where A1 is professional, contrary to the proclamations of the administrators. According to NCAA regulations, a female basketball prospect having played in A1 games prior to the first opportunity to enroll in a DI member institution, would be facing the withholding condition, in the best case scenario, where no contract or agreement with agents had been signed, and where no impermissible benefits were covered by the team. The practice shows that the most talented young athletes, members of the cadettes and junior women's national teams, would be practically forced to play in A1 games. Oftentimes, parents feel this is a great honor for their offspring, lacking the knowledge that she might be sacrificing an opportunity for an athletic scholarship in the process. The way A1 is structured in effect does not entail any compensation for these young players. But the mere fact that some of the players on the club team might be reimbursed for occurring expenses, or have contracts, would deem the younger athletes professionals as well.

For this reason and for others pertaining to both structure and national federation administration, there are not many chances of Greek players being considered as IPSAs in DI athletics. Hence, the educational effort by the NCAA staff that was mentioned above, would be serving a multi faceted purpose in such cases. The responsibility and culpability of the IPSA after such a communicated effort of the amateurism regulations and their application would make the SAR staff's work easier when reaching a decision. If a conscious decision has been made by the prospect and the family to pursue participation in pro sports and still consider an athletic scholarship opportunity from a DI member institution, then that decision would be prima facie evidence of culpability and the prospect's responsibility in the amateurism violation under question.

Israel:
In Israel the top divisions in both men's and women's basketball are considered professional. Young athletes under 18 are frequently invited to join and participate in these clubs' competitions. The latter would put them in the same situation as all the aforementioned prospects faced with the withholding condition. Moreover, in Israel (and in Cyprus for that matter) young men 18-19 years-old (in Israel and women) are required to serve mandatory military duty. Some of them receive expenses by their teams for transportation to practice and competition sites, as well as other expenses. Still, the exposure some players receive by means of their national teams' participation open up scholarship opportunities, even if they were not granted the chance to play in the top level of their respective leagues. However, it should be noted that the level of players the top-100 DI institutions expect from an international prospect would be that of a talented member of a respective nation's national team, if not a key contributor for certain specific cases. In turn, these players will be talented enough to have at least limited participation in top division athletic competition, and problems thus arise.

Italy:
Though the club and league structure in Italy is similar to the ones described above, on the women's side the nature of contracts for domestic players is markedly different. Players are not obliged by the Italian basketball federation to sign written contracts with their club teams. The oral contracts between player and club president act in the same manner as written contracts in other countries and these agreements can be entered at any age. It is not unusual for players as young as 14 to have such agreements. Italian basketball on the women's side has seen a decline in participation as volleyball has become more popular, which has led to the best young players being coveted by their club teams and used as bargaining chips between clubs. NCAA legislation treats verbal contracts in the same manner as written contracts. However, if the club or player's parents feel strongly that attending a U.S. institution would benefit a young player, it is very difficult to establish the existence of a verbal contract when all parties are willing to cooperate and deny the existence of such an agreement.

A1 and A2 leagues are professional both in men's and women's basketball. Because of the level of competition, only a selected few would be allowed to participate in pro club games; however these would be the players that top DI institutions would wish to recruit as well. For certain female basketball players, their participation in Italian pro club teams has been the reason for their ineligibility and denial of reinstatement by the NCAA staff, and in other cases certain players with remaining DI eligibility were allowed to compete in intercollegiate athletics, due to the individual case review and the specific facts presented by the ISA and the member institution. It appears that changes in national regulations as well as the re-classification of club teams play an important role in these cases, and may be instrumental for an IPSA pursuing reinstatement. At the time of participation, the team has to be considered amateur according to NCAA DI regulations. If the IPSA ever competed in a club team that at any point of the athlete's participation was falling under the definition of a professional athletics team, the result is ineligibility for the prospect.

For the NCAA staff to increase effectiveness in its pursuit of clarity a viable path is the continuous cooperation with the FIBA-Europe administration in an attempt to encourage a more cohesive mandate with regards to contracts between players and clubs. It is the nature of any federal system of governance to update archaic methods used by its members and it is the responsibility of the federal body to regulate within the defined boundaries of its power as defined by its members.

Spain:
The Spanish club structure is closer to a professional model. Professional leagues offer opportunities for competition to talented young players that are considered IPSAs, though the opportunities exist for only the very best athletes due to a very strong domestic base of players and a high level of funding for club teams both on the men's and women's side. This fact, combined with the establishment by the Spanish federation of basketball academies in Barcelona and Madrid that are educational institutions involved in the organization of a developmental team, provide young players with a luring alternative to signing contracts with senior teams. The players at the academies are recommended by their club team coaches at a young age, and attend the academies by their own volition. These players would be considered amateurs and would be eligible under NCAA regulations, according to what was aforementioned in regard to AIS. The fact that they competed against professionals bears no effect on their eligibility, considering the examination of amateurism regulations above. A recent case of one such player that was highly recruited by NCAA DI institutions signifies that these prospects may instead opt for the WNBA draft, a niche they have as opposed to U.S. players at the same age group.

It is worth noting here that this project by the Spanish federation has created a youth base that is becoming the dominant power in European basketball, with men's and women's teams in the finals or semifinals of U18 and U16 age groups at the European championships the past two years. Relevant areas of research that would be helpful in an all-encompassing education effort would be the nature of sponsor-

ship for the Spanish federation. Barclay Card, one of the major European credit card companies funds the Spanish federation to an unprecedented degree, rivaled only by the recent sponsorship of the Russian federation by Reebok. The Russian Federation's association with Reebok will be discussed below as it has serious implications for the future of elite level youth basketball around the world.

Turkey:
Turkey has many commonalities with the countries described above, but also features certain characteristics that will be purposefully omitted respecting the Buckley Amendment and the educational privacy of currently enrolled ISAs in DI member institutions. Top divisions in men's and women's basketball are of a professional nature and include participation of young prospects that may or may not be compensated. If they have signed a contract as the federation would urge them to after the completion of their senior year of high school, they would be considered ineligible per NCAA amateurism rules.

The Turkish federation has a clear policy of encouraging its premier players to attend U.S. institutions. The aim of this policy is to give Turkish basketball a higher global profile as is shown by the recent influx of Turkish players to the NBA and the emergence of Turkish youth national teams as contenders in FIBA youth competitions. In terms of contracts between young players and clubs the Turkish federation has very clear and accessible files that detail all contracts. Upon signing, the club must send a copy of any contract to the federation for its records and the federation must approve all contracts. Unlike many European countries it is not required by the Turkish federation that a player signs a contract within 90 days of their 18th birthday, though most players do so as the club system for both genders is well funded and clubs entice young players to sign contracts.

Yugoslavia/Serbia and Montenegro:
The common theme of former eastern block countries is best demonstrated in the case of Serbia and Montenegro. Before the dismantling of Yugoslavia funding for all sports came directly from the government and was supported in limited fashion by the small privately owned businesses that were allowed under the socialist governments. This led to a system that did not aim at making a profit. Free from the constraints of the bottom line, Yugoslav basketball developed a system that was based on coaching rather than players. National academies for coaching were developed in Belgrade and this in turn produced a generation of players that dominated leagues around Europe in both the men's and women's game. The generation of coaches that created these players is aging and although the coaching academy still exists, it is now a for-profit institution and the output has dropped dramatically. The latter's significance for the league system in terms of professionalism is that funding allowed for extended youth involvement has elapsed and clubs are forced to find private sponsors.

On the men's side this is not as great a problem due to the current trend of both European and NBA teams spending large sums to buy the best young players, and the Bosman ruling that has created a free market in the trade of European born players within Europe. However on the women's side funding has all but disappeared and exists for only two teams in a meaningful sense. While young players on these teams are not given contracts that are truly professional, these young athletes are regularly not paid the small amounts they are promised for their expenses and are generally treated with little respect due to the ease with which a replacement for them can be found. Under NCAA rules these prospects would be considered ineligible. However, due to the member institutions' self-report and investigation mechanisms there are currently many players representing NCAA member institutions who on closer examination would be deemed ineligible. As suggested above, an International Amateurism Clearinghouse would create a level playing field for all and promote one of the constitutional principles for NCAA DI purposes, competitive equity among member institutions, at the same time balancing this principle with the one promoting Student-Athlete welfare. In the long run this would lead to a massive database of information surrounding international amateurism issues and may necessitate an extended staff in its administration, not far from the model of the Initial Eligibility Clearinghouse for academic purposes, already enjoying the overall acceptance of the industry.

It is also noteworthy that students in all parts of the former Yugoslavia graduate from high school at age 19. By that time they will very likely be signed by clubs -should they be considered top-quality prospects, equally so by pro clubs and NCAA DI institutions- thus eventually being declared ineligible for intercollegiate competition. The choice for these players is limited. Certain prospects, currently eligible for DI athletics, have deliberately withheld from pro club negotiations, risking severe sanctions by their administrators, their federation coaches and administrators, even facing criminally chargeable threats, public criticism, and family turmoil. With their prior participation in the national team ranks, however, they managed to attract recruiters from DI institutions. These prospects would usually have some family tie or strong connection to the recruiting member institution, otherwise exposure would be difficult to attain. The national teams, however, play a very important role in this cause.

Russia:
The Russian system for youth development is a case in point of how difficult eligibility decisions are for NCAA member institutions. The elite players at the youth level are developed through privately funded basketball schools (Gloria and Trinta in Moscow are good examples). At these schools the coaches actively recruit the best young players to their institutions and act as feeder schools to the Russian "super league" teams. These teams compete in the junior leagues of their respective cities and dominate them as a rule. The federation does not officially sanction these basketball schools but significantly the head of each school has a place on the board of the Russian federation. Due to the strength of most "super league" teams, young players rarely get the chance to compete on the 1st team of their club sides, however it is not unusual for their names to appear in rosters simply as an insurance policy to prevent them from fleeing to U.S. institutions. The level of knowledge about NCAA rules is high among the junior level coaches in Russia.

The sponsorship of the federation by Reebok hints toward the future of the game at the pro level. Reebok looks to sign the best young players to endorsement deals early, and may sign as many players as possible on infinitesimal contracts. According to this developing fashion, the sponsors create a farm system of players headed to the NBA, at the same time receiving a solid following and eventual Return on Investment in each country they sponsor. One should monitor the evolution of this trend, as NBA rosters get deeper with foreign born players. Thus, it is instrumental for the NCAA staff and member institutions -should there be no International Amateurism Clearinghouse adopted in the near future- to develop nodes of information in timely fashion and become familiar with the key constituents of these sponsorships, namely investigating ties with the 3 big sneaker companies - Nike, Adidas, and Reebok.

The Former Soviet States - Ukraine, Belarus, Latvia, Lithuania:
Each of the former Soviet States has an ailing but fundamentally sound structure that begins with state-sponsored basketball schools that compete in either the first or second division of their countries' league. Although the trend in the early 90's was for players to make the effort and pursue college sports in the U.S., in general the opinion of the U.S. college game has dramatically plummeted, with the common conception being that players do not improve during their careers in the U.S. This means that most young players aspire to play in the Russian "Super League" and on both the men's and women's side there is the money to reward the best young athletes.

Graduation age in these countries and Russia itself is 16 which -for NCAA purposes- means that if a player is recruited beyond his/her high school graduation, even if he/she is only 17, he/she will have been playing professionally for at least part of a season. This is significant because of U.S. college coaches' lack of information. The latter are not educated in the finer points of the countries' high school systems and most of the time remain incognizant of them throughout

the recruiting process. It is therefore up to the member institution's compliance officer to establish high school graduation age and verify the authenticity of documents, which for the right price are all too easy to forge. The situation that recruits find themselves in if they are truly committed to pursuing higher education and NCAA DI sports in the U.S., is paying off whomever they need to in order to attain needed documentation. On the men's side such an effort is more difficult because players' names appear on websites, as having played on pro teams. For women the same situation arises but not with the same frequency. The issue faced by the players through this type of system is the lack of choice.

College basketball, as much as key stakeholders would like to promote it as an ideal system, does not cater for improving players skills so much as providing a show case for talented players and giving those who were overlooked the chance to prove themselves. Bearing in mind the aforementioned situation that is currently developing in European basketball, combined with the professional opportunities offered to young talented athletes by pro leagues both in the U.S. and Europe, the main reason for a foreign player to come to the U.S. and pursue an athletically related scholarship is education and it is precisely this spirit that the NCAA wishes to promote.

Compliance Officers at NCAA DI member institutions

The reliance on compliance officers creates a massive disparity between institutions due to the work ethic and knowledge base of the individual administrator, as many institutions have only one compliance officer and his/her limited staff must deal with the full load of compliance issues. Thus it is difficult for an individual to reach a complete understanding of the global scene. Hence, NCAA DI member institutions' athletic departments contract independent legal counsel to assist in knowledge attainment and information collection affecting amateur status and eligibility of recruited foreign prospects. At the same time, many institutions that took the time and put forth the effort in managing such issues examining every possible angle, often find that they were recruiting ineligible players. To their dismay, another institution might be less diligent and through a less meticulous investigative effort declared the same recruit eligible. The ultimate decision-making body remains the S-A reinstatement staff and Committee, and by means of the proposed Clearinghouse body, such issues and logistics problems would be avoided and assumed by the fiscally responsible and resources-apt NCAA administration.

Key points:

- The scope and capabilities of the suggested Amateurism Clearinghouse
- The role of individual compliance officers at member institutions
- The future sponsorship of national sports federations
- The disparities in graduating ages for different countries
- The purpose of foreign athletes choice of US colleges and universities
- National sport academies and private sport academies
- Federation policies in regard to the participation of their national team players attending US colleges and universities
- The coherence of NCAA policy in regard to foreign/domestic high school education and disparities among the two
- The definition of professionalism
- The lack of blanket policy

6. Conclusion

Recapitulating, one should note that in most European countries the club-based system creates challenging situations as they pertain to amateurism and NCAA DI eligibility. Prospects that originate from certain countries that do not have a very competitive league or that participate on a team that is not professional in nature would be relieved from the burden of proving they did not jeopardize eligibility and their amateur status. Recruiting institutions should look at those countries and their governing structure carefully, in order to identify potential problems that the NCAA staff will note eventually. Such countries as Albania, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Finland, FYROM, Germany, Great Britain, Hungary, Iceland, Ireland, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Sweden, Switzerland, and countries from Northern Europe and the former Soviet Union, including Russia, may have very strong leagues at a given time, especially in women's sports, and in the case of Russia, may be expanding their resources to cover salaries of the best players in Europe and the NBA/WNBA to play in their pro ranks. Croatia, Hungary, Poland, Czech and Slovak Republics, Slovenia, Lithuania, have had very strong club sides, which may be able to employ young talented athletes. The latter will thus go beyond that crucial professionalization threshold and will lose eligibility they would otherwise have, had they selected to maintain amateur status before the first opportunity to enroll at a DI member institution. In order for them to remain in good standing, an extensive educational effort is needed by the NCAA staff foremost, as well as by the recruiting member institutions at the first opportunity they are given with informational material targeting as many constituents as possible.

Suggestions that have already been communicated to the NCAA staff and have gone through initial legislative cycles include the Amateurism Clearinghouse that would confirm eligibility and amateurism status for IPSAs. If that effort is not realized, alternative proposals may include the opportunity of recruiting member institutions engaging in an informative and educational pursuit as part of their initial recruiting contacts that will be targeting younger age groups for that purpose. These initial educational efforts and ultimate recruiting attempts may be part of non-institutionalized camps established overseas, and may be sessions devoted to NCAA Amateurism compliance, where members of the NCAA staff could contribute as well. Hence, it will not be merely recruiting that will be the focus and emphasis of such sessions, but an all encompassing educational effort. Such sessions were customary in the past, conducted by many U.S. institutions, aiming at recruiting academic talent. Alternatively, the NCAA staff can uphold the principle of "no-recruiting" in banquets and informational presentations, but allow member institutions to engage in the educational effort, should the NCAA staff lack the budgetary ability to realize such an effort.

The well-intentioned efforts to educate IPSAs (specifically age groups 10-14), their families, and as many stakeholders in the process as possible, should extend beyond a superficial level, in order to fully reward the efforts of the educators. These efforts should cover the grassroot level of European sport infrastructure, creating an opportunity for choice, as opposed to the illusion currently afforded. As mentioned above, the window of opportunity is very narrow for athletes over the age of 15, due to the burden placed upon them by current NCAA legislation conveying amateurism policy from the analyzed international sport structures. Assuming a proactive stance, the NCAA membership may save valuable resources, and such an effort would deal with policy and legislative decisions.

For IPSAs the college route is mainly motivated by an educational pursuit, especially for male basketball players. This is in direct opposition to U.S. male basketball players for whom college is the stepping stone or the second chance to the professional ranks, considering emerging trends of high school athletic talent being directly drafted by NBA teams. If a foreign player is an elite level athlete, he will be drafted by an NBA team or sign for one of the top European club teams. For the women a similar situation is in place; they will either opt directly for the WNBA or for one of the top professional teams, as the standard of college basketball aside of the top-10 teams is not likely to improve their standing when they decide to go pro. It will take a more in depth discussion of the financial rewards that would be considered as actual and necessary expenses to create a framework for suggesting possible changes to NCAA regulations.

Finally, a reconsideration of the withholding condition for cases of IPSAs with amateurism issues prior to their first opportunity to enroll would provide more flexibility, especially for the cases that were analyzed and would render a prospect ineligible as an extension of this prospect's experience in the country of origin and its sport structure. The lessons learned in this line of research lead us to believe that a

"blanket waiver" of the withholding condition for such cases may even go as far as negating the purpose of the proposed Amateurism Clearinghouse. The cases the latter would be deciding upon would be treated preemptively by such a waiver. More constructive ideas are needed and more research and analysis should follow on these issues. Bridging the gap between the professionalization threshold existing in various parts of the world with the amateurism regulatory framework upheld by NCAA DI is one of the most challenging areas in contemporary sport law and management. Hopefully fairness and good-will prevail and competitive equity along with the emphasis on SAs well being may be balanced in order to create and uphold the values and principles the NCAA should traditionally stand for.

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Agassi Triumphs in UK Court of Appeal

by **Euan Lawson and Jonathan Mills***

1. Summary

On 19 November 2004 the Court of Appeal ruled in favour of the tennis star André Agassi in the latest round of his battle with the Inland Revenue over his liability to UK income tax on certain endorsement income paid in connection with his appearance at UK tennis tournaments.[1]

The relevant endorsement payments were made to Agassi's personal services company, Agassi Enterprises Inc. (*Enterprises*), by Nike Inc. (*Nike*) and Head Sports AG (*Head*). The payments were attributable, at least in part, to Agassi's activities as a competitor in UK tennis tournaments. None of Agassi, Enterprises, Nike and Head were resident in the UK at the relevant times.

The narrow question examined by the Court of Appeal was whether the relevant UK regulations imposed a technical obligation on Nike and Head to deduct UK tax from the payments made to Enterprises. If such a technical obligation existed, then the Inland Revenue would be entitled under the relevant regulations to assess Agassi personally to UK income tax on such proportion of the endorsement income that was derived from the performance of services in the UK.

The Court held that Nike and Head had no obligation to deduct UK tax on the endorsement payments. Consequently, under the relevant legislation, Agassi could have no primary obligation to pay UK tax on the endorsement payments.

The Inland Revenue has expressed its intention to appeal to the House of Lords, but if the decision stands it could have some significant impact for non-UK resident sportsmen and entertainers competing and performing in the UK.

2. Background

It is a long-established principle of UK tax law that income tax is charged on the annual profits or gains arising or accruing to any person not resident in the UK from any trade, profession or vocation exercised within the UK.[2] According to this principle, the income derived by a foreign sportsman from exercising his profession in the UK is subject to UK tax, even if the sportsman spends no more than a few days in the UK for this purpose.

Prior to 1987, the Inland Revenue had considerable difficulty enforcing this principle against foreign sportsmen and entertainers visiting the UK for short periods to compete or perform. The problem was particularly difficult at that time since tax on professional income was assessed on a preceding year basis. As prize money and performance fees paid to sportsmen and entertainers began to grow in the 1980s, the Inland Revenue became increasingly concerned that significant tax was being lost.

Consequently, in the Finance Act 1986, a set of new rules were introduced that were designed to clamp down on avoidance and aid enforcement.[3] The rules remain in force today.

One of the main features of the new rules was the imposition of a withholding obligation on those making payments to overseas sportsmen and entertainers. The obligation bites where such payments derive either directly or indirectly from the performance of an activity in the UK by a sportsman or entertainer in his character such on or in connection with a commercial occasion or event. The obligation is currently set out in the Taxes Act 1988 at Section 555(2).

Another feature of the new rules was a provision by which the ambit of the charge to tax on foreign entertainers and sportsmen performing in the UK was effectively extended so as to provide for attribution of income to a sportsman where payments made in connection with his performance in the UK are made, not to the sportsman himself, but to a third party under his control. This provision is currently set out in the Taxes Act 1988, Section 556(2),

The issue in this appeal concerned the interaction of these two provisions. The attribution rule at Section 556(2) is disapplied by Section 556(5):

[Section 556] shall not apply unless the payment or transfer is one to which section *555(2)* ... applies ... .

The question was therefore whether the withholding rule at Section 555(2) imposed an obligation to deduct on a non-resident payer.

3. Facts

General

Agassi is an international tennis player ordinarily resident and domiciled outside the UK. He set up and controlled Enterprises which entered into endorsement contracts in respect of tennis clothing and equipment with Nike and Head. Neither Nike nor Head are resident in the UK, nor do they have a tax presence in the UK.

In the relevant tax years, Agassi visited the UK for a number of days in order to participate in tennis tournaments such as Wimbledon. The endorsement payments made by Nike and Head to Enterprises derived at least in part from Agassi's activities in playing in such tournaments in the UK. The case involved a tax liability of £27,520 claimed by the Inland Revenue on such endorsement payments. This sum represented tax on a proportion of Enterprises' income under the contracts with Nike and Head.

The Inland Revenue sought to tax Agassi personally in respect of the endorsement payments under Section 556(2) of the Taxes Act.

Agassi's argument

Agassi argued that he was not liable to tax on the payments made to Enterprises since he could only be liable if Section 556(2) applied. He submitted that Section 556(5) disapplies Section 556(2) in cases where Section 555(2) does not apply i.e. where the withholding obligation on the payer does not arise. It is a rule of UK statutory construction that UK legislation is presumed to be territorial in application, that is, applicable only to British subjects or foreigners who by coming to the UK have made themselves subject to UK jurisdiction (the so-called territoriality principle). Neither Nike or Head had a UK tax presence and therefore, according to Agassi, Section 555(2) could impose no withholding obligation upon them.

Agassi relied upon the decision of the House of Lords in *Clark* v. *Oceanic Contractors, Inc.*[4] This case concerned an obligation to collect from employers income tax on employees' salaries. The House of Lords held that the statement of James LJ in *Ex Parte Blain*[5] applied to such provision, namely that there is a:

...broad, general universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English court to give effect to an English statute, is applicable only

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1 [2004] E.W.C.A. Civ. 1518.

2 Income and Corporation Taxes Act 1988 [hereinafter Taxes Act 1988 (in text) and T.A. 1988 (in footnotes), s. 18(1)(a)(iii).

3 Finance Act 1986, Schedule 11 (now at T.A. 1988, ss. 555-558) and The Income Tax (Entertainers and Sportsmen) Regulations 1987.

4 [1983] 2 A.C. 130.

to English subjects or to foreigners who by coming into this country, whether for a long or a short time have made themselves during that time subject to English legislation....But if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could ever have intended to make such a man subject to English legislation.

Previous decision in the High Court in favour of the Inland Revenue
In the High Court, Lightman J had held in favour of the Inland Revenue. He had considered the issue of territoriality and concluded that Section 555(2) had extra-territorial effect so that the provision should be read as imposing a withholding obligation on both those with a UK tax presence and those without a UK tax presence, albeit that the obligation might be unenforceable as against those without a UK tax presence.

The reasons for such a holding were two-fold. First, it was the judge's view that it was the purpose of the legislation set out at Sections 555 and 556 to extend the ambit of the general principle of UK taxation that a non-resident is liable to UK income from a profession carried on within the UK and therefore it was reasonable to suppose that Parliament had intended to give the withholding provision extra-territorial effect. Secondly, he believed that to construe the provision otherwise would encourage avoidance and evasion - the judge believed that it would be absurd to attribute the legislation with the intention that liability to tax could be avoided by the simple channelling of a payment through a foreign company with no UK tax presence.

4. Decision

The Court of Appeal reversed Lightman J's decision. Buxton LJ in the Court of Appeal referred to the principle of territoriality as stated in *Oceanic* as "a principle of some considerable strength". It is inherent in any Act of Parliament and "it is for those who seek to say that it does not apply to demonstrate good reason for its exclusion". Further, it is a particularly strong principle in relation to legislation imposing a duty to collect or account for tax. In this context, Buxton LJ disagreed with Lightman J's approach in the High Court as to the question of enforceability. Buxton LJ gave considerable weight to the guidance of Lord Scarman in *Oceanic* that, since the relevant liability to collect or account for tax against an entity outside the UK may be difficult to enforce, this was relevant to the prior question of whether the statutory obligation was intended to apply at all to those with no presence in the UK. Finally, it was also considered significant that the withholding obligation imposed upon the payer by Section 555(2) is subject to the penalties set out in Section 98 of the Taxes Management Act 1970 obliging the payer to provide returns.

The Court of Appeal thought Lightman J in the High Court had been particularly attracted to the Inland Revenue's argument that the purpose of the Sections 555 and 556 was to extend the ambit of the general principle of UK taxation that a non-resident is liable to UK income from a profession carried on within the UK. The Court of Appeal disagreed with this view, holding that the purpose of the legislation was not so clear, or at least not sufficiently clear so as to exclude the territoriality principle.

The Court of Appeal also believed Lightman J had been concerned that application of the territoriality principle would unduly favour entertainers and sportsmen. The Court of Appeal's response was that the rules applicable to non-resident entertainers and sportsmen performing in the UK were already less favourable than the rules applicable to other non-resident traders, and if Parliament had wanted to further extend the liability of entertainers and sportsmen, it should have done so more clearly.

5. Comment

In 1987, the OECD produced an oft-cited report on the taxation of income derived from entertainment, artistic and sporting activities.[6] The report noted the difficulties experienced by revenue authorities throughout the world in collecting tax from the entertainment and sports sectors: the activities performed by entertainers and sportsmen are short-term (often one-off performances); there is a certain degree of tax non-compliance, especially amongst the lower ranks of performers; and sophisticated tax avoidance schemes are frequently employed. The report characterised entertainers and sportsmen as "relatively unsophisticated people - in the business sense" who are advised by "adventurous but not very good accountants". As a result, the authors endorsed the widely-held international view that the activities of sportsmen and entertainers should be subject to tax in the country of performance and recommended that such liability should be enforced by the use of withholding tax systems "at fairly high levels".

The recommendations and tone of the OECD report found voice in the UK regime for the taxation of visiting sportsmen and entertainers. The legislation is notoriously broad in its scope and the Inland Revenue has always taken a firm line in interpretation and enforcement of its provisions. Few taxpayers have had the courage, money or inclination to challenge the Inland Revenue in the courts. It therefore came as something of a surprise when Agassi took his case to the Court of Appeal having lost the previous rounds in the battle before the Special Commissioners and in the High Court.

The decision marks a significant victory not only for Agassi, but for the many foreign sportsmen and entertainers who visit the UK to compete and perform each year.

First, the decision demonstrates that all legislation, including that relating to sportsmen and entertainers, is subject to interpretation and construction in line with higher, more general, principles of taxation and statutory interpretation. Secondly, if the decision stands, it could open the way for some significant tax refund applications from the many non-resident sportsmen and entertainers who have complied to date with the Inland Revenue's interpretation of the legislation. Some estimates have put the value of such claims at £500 million. Thirdly, it provides some significant scope for tax planning for foreign entertainers and sportsmen visiting the UK to compete and perform.

However, from a tax policy point of view, the decision does create some uncertainty and inconsistency in this field. The finding that a sportsman has no obligation to UK tax on endorsement payments only applies where the sportsman enters into endorsement contracts through a company with sponsors who have no tax presence in the UK. Agassi would have remained liable had the endorsement payments been made to him directly or had the sponsor been a UK resident company. Further, although there is no indication in the case itself as to how Agassi was remunerated by Enterprises, there is an issue as to the scope of Agassi's liability to UK tax in the event that he received salary payments or other fees from Enterprises in respect of his endorsement activities.

The Inland Revenue has given notice of intention to appeal the decision to the House of Lords.

5 (1879) 12 Ch. D. 522 at p.526.

6 OECD, The Taxation of Income Derived from Entertainment, Artistic and Sporting Activities (Paris: OECD, 1987).

The "Jock Tax": Taxation of Non Resident International Sportsmen & Athletes - Perspectives from India

by **K. Sriram***

1. Introduction

The traditional conception has been to deny the existence of any field of law by the appellation of "Sports law,"[1] as it would be but a mere misnomer for the application of the principles of torts, contracts, competition law and others to situations involving sports. However, increasingly the trend seems to have veered around to the moderate view, first, of accepting an area of "sports and the law" based on a fast maturing unique substantive corpus of law devoted to this interface.[2] The argument from this point has been carried forward to claim for this field, a separate substantive place amongst the laws. This is because a field becomes a field of law not because it is inherently so, but because in our public legal dealings and treatment we mould it as such, defining the concepts and legal norms that will prevail uniquely in that context.[3] Sports law might have lagged behind in terms of the quantum of litigation, academic scholarship and legislative action devoted to it, which possibly created serious doubt as to its distinct identity. However, with the growing body of case and statutory law and academic writing germane to the sports industry, one encounters strong evidence of the existence of a separately identifiable body of law which goes beyond a mere amalgamation of legal doctrines.[4]

What would a study of the discipline of Sports law entail? Without doubt one significant corner of the "Sports law" field would be occupied by issues of taxation. The first concern here would be with regard to whether sportsmen and athletes as a category, owing to their earning capacity, should be subject to a different rate of taxation, as compared to other taxpayers, popularly termed the "Jock Tax?"[5] Another issue would be concerning the imposition of Jock tax on athletes and sportsmen when they travel to foreign countries for rendering service on the sports-field. The legal dilemma here would be with regard to determining which country should be allowed to claim the right to tax, i.e., whether it would be the one whose resident the concerned athlete is, or whether it would be the country where performance is actually rendered by the sportsmen? The latter issue would be particularly relevant for students of international taxation, a discipline geared towards coordinating the tax authority of sovereign countries.[6]

The present paper manifests an interface between the discipline of international taxation and the fallow field of sports law, a fast-emerging area, yet to take flight fully. Research in relation to the field of international taxation was hailed by the recent report of the *Working Group on Non Resident Taxation* (2003) as being of "paramount importance."[7] Against such a backdrop, this paper draws substance by examining taxation-related concerns of sportsmen from an international perspective, i.e., a setting where more than one country is involved, from a vantage point fixed in the fabric of Indian law. Thus, the paper would scrutinize taxation of foreign athletes visiting India and vice-versa. For this purpose, the position *vis-à-vis* countries with whom India has entered into Double Taxation Avoidance Agreements[8] would be examined where Article 17 of the OECD and UN Model Tax Treaties would come into play, as also the circumstance when there is no such Agreement in place. However, before embarking upon such an exercise, an attempt will be made to elucidate upon the reasons justifying a Jock tax and the criticisms of such a scheme of taxation.

2. Why Have Special Provision for Athletes & Sportsmen?

a. Justifications

It is quite common for an athlete or sportsmen to live in one tax jurisdiction, namely, the residence jurisdiction, and to earn income in another jurisdiction, namely, the source jurisdiction. The legal question which such a scenario poses is with regard to the sharing of the potential revenue between the two jurisdictions.[9] The solution lies in finding a way out in one of two approaches. The first alternative is *residence-based* taxation, in which only the residence jurisdiction taxes the income. The second alternative is *source-based* taxation, in which both jurisdictions tax the income but the residence jurisdiction gives a tax credit for the taxes paid to the source jurisdiction. India, as will be studied in detail subsequently in the paper, in its domestic tax legislation and in its DTAAs follows the source-based taxation model for taxing international sports performers.

With advancing technologies, wide media coverage, convenience of travel and relatively open borders, peoples' thirst for entertainment can be quenched by the organization of sports events with an international flavour. This can happen either by way of league-play in one country affording contracts to foreign sportsmen,[10] or international clashes between sports teams from different countries.[11] However, in either case, success would come at a price in the international arena of sports. The next time the home team loses on a last second goal or on account of runs conceded in the dying moments of a cricket match; home-fans could take comfort in the fact that the opposing team's players will be taxed for their success and the spoils of defeat would be paid back to the fans in the form of Jock taxes.[12]

Most jurisdictions have firm constitutional authority for imposing taxes such as the Jock tax. In the particular case of India such taxes would be imposable in view of Article 265 of the Constitution of

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1 C. Woodhouse, The Lawyer in Sport: Some Reflections, 4 (3) SPORT AND THE LAW J. 14 (1996).

2 Kenneth L. Shropshire, Introduction: Sports Law?, 35 AM. BUS. L.J. 181, 182 (1998). One commentator has argued that this process parallels the enhanced focus by law schools on sports, and the increasing significance of sports regulation of participants, organizations and communities. This in turn, it is averred, will eventually transform the contours of sports law from "a course without a corpus" to a widely recognized independent substantive area of law. See Burlette Carter, Introduction: What Makes a "Field" a Field?, 1 VA. J. SPORTS & L. 234, 245 (1999). [Carter hereinafter].

3 Carter, Id. at 244-245.

4 Timothy Davis, What is Sports Law?, 11 MARQ. SPORTS L. REV. 211, 214 (2001).

5 In this paper the expression "Jock tax" would be used hereinafter to refer to taxation of visiting international athletes and sportsmen. This form of taxation has lead to fears of multiple income taxation in different jurisdictions, as is witnessed in case of the different States in the United States, the land where the expression was first coined. See generally Elizabeth C. Ekmekjian, The Jock Tax: State and Local Income Taxation of Professional Athletes, 4 SETON HALL J. SPORT L. 229, 230 (1994). [Ekmekjian hereinafter].

6 R.L. DORENBERG, INTERNATIONAL TAXATION 3 (1993); K.C. GOPALAKRISHNAN, TEXT BOOK ON INTERNATIONAL TAXATION 1 (2002)

7 Non Resident Taxation Report, infra note 26, at 12.

8 "DTAAs" hereinafter.

9 Alan Macnaughton, The Basic Analytics of the Taxation of Non-Resident Athletes, at http://chass.utoronto.ca/clea/confpapers/MacNaughton.pdf (last visited December 1, 2004). [Macnaughton hereinafter].

10 In the new global sporting environment, team loyalty and composition has taken on a trans-national character and identity, with teams such as the soccer club Manchester United and basketball teams such as the Chicago Bulls, no longer remaining the exclusive property of their cities, but operating as worldwide corporations.
See Peter Kell, Global Gladiators, at http://workers.labor.net.au/44/b_sportspage_good.html (last visited October 28, 2004).

11 A typical example would be the Indian cricket team playing the Pakistan cricket team in India.

12 Jeffrey Adams, Why Come to Training Camp Out of Shape When you can Work Out in the Off-Season and Lower your Taxes: The Taxation of Professional Athletes, 10 IND. INT'L & COMP. L. REV. 79 (1999). [Adams hereinafter].

India merely requiring the authority of law for the levy of any category of tax.[13] Further, the issue of Jock tax is also negotiated in the terms of DTAAs entered into by India, usually contained in Article 17 of any such treaty, so as to make sure that double taxation concerns are avoided *vis-à-vis* such a tax. In the particular case of India, tax treaties are made under the authority of Section 90 of Income Tax Act, 1961.[14]

What factors facilitate the imposition of Jock taxes? There can be no simple answer. However, with the increase in players' incomes over the past couple of decades,[15] and the ease of determination of their whereabouts and location in a tax jurisdiction on account of the publicity surrounding international players,[16] the Jock tax has proved to be a popular and convenient measure of taxation for the authorities to tap into a ready and conspicuous tax base. The best acknowledged reason for such form of taxation is the fact that professional athletes are a tempting target for State lawmakers by representing a highly concentrated pool of wealth that can be taxed with little enforcement.[17] Such a tax has however become a selective tax because States that tax non-resident athletes often do not tax other individuals, such as businessman who have greater contacts with the State.[18] The number of international games and events has also gone up significantly in recent years contributing to the income-generating potential of sportsmen and has made the Jock tax a regular revenue-earner for the authorities.[19] The incomes of some international performers are in fact so huge that they do not even grudge parting with some of it in the form of taxes and remain indifferent to their imposition.[20] International athletes fall in the category of non-residents for purposes of taxation, who cannot express their displeasure in the voting booth[21] and may enjoy little public sympathy for exemption from taxation.[22] Also, they are economic actors who cannot respond by avoiding the taxing jurisdiction, since the sites at which they play and the itinerary are pre-determined for them.[23] Further, the Jock tax can be justified much like other source-jurisdiction taxes by claiming the revenue to be a charge for the government services used by international athletes in earning their income abroad.[24] Also, in the particular context of the United States, the Jock tax has been made an instrument of retaliatory taxation by one tax jurisdiction against another.[25]

A combined reading of all the above-supplied reasons, coupled with the increased fiscal pressures faced by many governments has led to increased enforcement against athletes of non-resident tax laws. To this end, the Jock tax can be said to be readily amenable to the canon of administrative convenience in the theory of taxation by providing a ready solution to the issue of identification of a convenient tax base.[26]

b. The Nash Equilibrium Explanation

Governments at various levels could decide to tax income earned within their jurisdiction by athletes who are resident in other jurisdictions. Macnaughten provides a theoretical model for understanding Jock Taxation. According to him Jock taxation may occur in two ways. First, there may be a situation where a Provincial level government may impose tax on visiting sportsmen. This is seen in the United States where a number of States, for instance California, impose a Jock Tax. The second situation may be a case where Jock taxation happens at the level of the Federal government. For example, the Government of India imposes a Jock tax on foreign touring athletes under Section 115 BBA of the domestic tax legislation - the Income Tax Act, 1961.

In cases of Jock taxation, there might well be a situation where the net revenue to a tax jurisdiction is zero, because the revenue raised by a tax jurisdiction may be cancelled out by the credits given to residents of that jurisdiction for source-based taxes paid to other jurisdictions.[27] In this regard, the *Nash equilibrium* is that all government: provincial or sub-national - such as the different US States, as well as federal governments, will levy source-based taxes on visiting non-resident athletes.[28] In this regard Macnaughton provides two propositions:

Proposition 1: If both jurisdictions begin to tax income earned by non-residents, then the revenue of at least one jurisdiction must be higher than in a situation in which neither government has such a tax.[29] The intuition behind the result is that there are only two reasons for positive net revenue - either one jurisdiction has a higher tax

13 Owing to the complexities involved in the formulation of tax policy, wide latitude is given to the legislature in the matter of classification of objects, persons and things for purposes of taxation. The Supreme Court of India has observed that the power to make a law with respect to a tax comprehends within it the power to levy that tax and to determine the persons who are liable to pay such tax, the rates at which such tax is to be paid and the taxable event. The power to make a law with respect to a tax includes the power to make provisions in the relevant statute with respect to all matters ancillary and incidental to the levy, assessment, collection and recovery of tax. See Khazan Chand v. State of J & K, (1984) 2 S.C.C. 456.

14 Section 90 of the Income Tax Act, 1961, in substance enacts that any DTAA entered into by India is automatically enforceable, bereft of any requirement of passing an enabling domestic legislation. Under Section 90(1), the Central Government may enter into an agreement with the Govt. of any country outside India: (a) For the granting of relief in respect of income on which have been paid both Income Tax under this Act and Income Tax in that country, or (b) For the avoidance of double taxation of income under the corresponding law in force in that country, or (c) For exchange of information for the prevention of evasion or avoidance of income tax chargeable under this Act or under the corresponding law in force in that country or investigation of cases of evasion or avoidance, or (d) For recovery of Income Tax under this act and under the corresponding law in force in that country, and may by notification in the official gazettes make such provisions as may be necessary for implementing the agreement. Under Section 90 (2) where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief to tax, or as the case may be, avoidance of double taxation, then in relation to the assesses to whom such agreement applies, the provisions of the act shall apply to the extent they are more beneficiary to the assesses.

15 Adams, supra note 12. With a rise in the demand for athletic and sporting services both by viewers and organizers, comes the source for the enhanced incomes. See Carole C. Berry, Taxation of US Athletes Playing in Foreign Countries, 13 MARQ. SPORTS L. REV. 1 (2002).

16 Adams, supra note 12, at 79.

17 David K. Hoffman, State Income Taxation of Nonresident Professional Athletes, 115 TAX FOUNDATION: SPECIAL REPORT 1, 2 (2002), at http://www.heartland.org/pdf/80364z.pdf (last visited November 13, 2004). [Hoffman hereinafter].

18 Ekmekjian, supra note 5, at 244.

19 See generally Sandeep Velkar, Has Commercialization helped Sports?, at http://dignityfoundation.com/october2004sports.html (last visited November 13, 2004). In Australia, Ian Harvey, an international cricketer, who is yet to cement his place in the squad as a Test player and regularly pops in and out of the Australian one-day team, in 2003, went close to earning $1 million, before tax. This figure allows one to infer the possible earning potential of some of the more established international sports icons. On an average, the income of a contracted player with Cricket Australia amounts to $550,000 a year - before any endorsements or other payments they might receive. However, it is generally believed that the Indian superstar, Sachin Tendulkar, is the highest-paid cricketer in the world, with an income in excess of a mammoth $15 million a year, mainly from endorsements. See Stephen Dabkowski, Cricketers Scoring Quick Dollars, at http://www.theage.com.au/articles/2003/11/21/1069027329534.html?oneclick=true (last visited November 13, 2004). The following is a table which depicts the rise in incomes over time of the players in the National Hockey League, Major League Baseball and National Basketball Association in the US:

Average Salaries in Various Years (in US $)	NHL	MLB	NBA
2003	2,536,715	3,581,491	6,891,176
1998	1,993,152	2,325,344	4,318,496
1993	846,120	1,717,397	1,999,920
1988	328,601	781,810	1,092,424
1983	257,333	600,444	527,533
1978	296,794	249,932	446,753

See Macnaughton, supra note 9, at 16.

20 For instance, the tennis player Andre Agassi was reported not to have been perturbed as a consequence of a tax ruling in UK ordering him to pay $ 50, 000 as taxes on his endorsements earnings from Nike in the UK. His reaction to the ruling was: "You're paying taxes there or you're paying taxes here. I don't really begrudge them for it; no financial cost to me." See Agassi Undaunted by British Tax Ruling, at http://www.msnbc.msn.com/id/4546553/ (last visited November 13, 2004).

21 Adams, supra note 12, at 79.

rate than the other or one jurisdiction just has more income to tax than the other, causing the tax paid to the higher-income jurisdiction to exceed the credit granted for taxes paid to the lower-income jurisdiction.[30]

Proposition 2: If one jurisdiction taxes non-resident athletes, the other jurisdiction will respond by launching its own non-resident tax.[31] Revenue maximization is not the only assumption that would lead to this behaviour. An alternative or secondary motivation is that the introduction of the nonresident tax reduces the tax revenue of the first mover - because of the out-of-jurisdiction tax credit, the latter jurisdiction's revenue falls. Therefore, the new tax could serve as "revenge" on the first jurisdiction for the taxation of the second jurisdiction's athletes and the reduction of the second jurisdiction's revenue by the use of a non-resident tax.[32]

However, analysis of actual taxes levied by governments show that the prediction fits American States taxing out-of-state athletes, but it does not fit American states taxing foreign athletes.[33] This result is achieved because in the American context, where there is frequent sports-interaction with neighbouring Canada, the Canada-US DTAA, provides for *residence-based* taxation of league-based athletes who reside in one country and play for a team in that country in respect of the income earned in the other country. Thus, doing away with the source jurisdiction principle applicable to most DTAAs as regards the issue of taxation of sportsmen, Canada does not tax the income earned by US-resident athletes on US teams in respect of their games in Canada and vice versa.

c. The Flip Side - "Strangest Tax" & A Case of Bad Tax Policy?

Jock taxes might have found their way into the statute books of late. Yet, despite its philosophy of taxing those non-resident economic actors who are "here today gone tomorrow," this form of taxation has come in for its fair share of criticism. Jock taxes are featured in CNN's list of "Strangest Taxes," alongside such queer taxes as a 10% pack tax on a standard deck of playing cards in Alabama, a 9% surcharge on any "fountain soda drink" in Chicago, and even a tax on illegal drugs in 17 States in the US, based, of course, on the value of the drug.[34] Purely from an economic perspective the incidence of a Jock tax is not congruent with the location of economic activity that gives rise to it, a misalignment that leads to economic inefficiencies.[35] Professional sports teams derive their revenue from myriad sources. These include sale of broadcasting rights, ticket sales, and merchandising contracts. The vast majority of these economic activities are focused within the team's home state.[36] Thus, the argument raised against the structural anomaly in a scheme of source-based Jock taxation is that the revenues out of which a professional athlete receives his salary is earned through economic transactions in his team's home State, and not in the other states in which he performs.[37] In other words, the residents of jock tax states receive benefits for which they do not pay through their own taxes. At the same time, residents of the State in which the athlete resides face costs for which they do not receive proportional benefits.[38]

Arguments have been raised to the effect that such taxation is unfair and arbitrary on account of the singling out of the sports profession,[39] and an aggressive application of such taxes would eventually result in a negative rub-off effect on other economic actors as well, such as travelling salespersons and executives, who would also be brought within the tax dragnet, which trend is being witnessed in the United States where each State is treated as a separate legal system and consequently a distinct taxable territory.[40] Arguments are also currently being made by the players that the current system violates basic tenets of equity.[41] Professional athletes have minimal contacts with the cities and states in which away games are played, and sometimes they spend only a few hours within the taxing jurisdiction. Thus, a question of fairness is raised as individuals who spend only a few intermittent days in a State are asked to file tax returns and pay taxes.

Another facet to Jock taxation is its tendency to have unintended negative consequences in terms of its impact. Though it is meant to target high-salary professional athletes, it ends up hitting even players of a lesser earning stature. In the US, the particular model of Jock taxation which is followed ends up hitting the entire contingent surrounding the players, including the coaches, trainers and other members of the support staff.[42] The jock tax also involves the problem of

22 The 2002 episode involving the cricketer Sachin Tendulkar, wherein the player was granted a customs duty exemption to the tune of Rs. 1.13 crores upon brining into the country a Ferrari that was awarded to him by Formula One champion Michael Schumacher for having equaled Don Bradman's record of 29 centuries, amply demonstrates the degree of public anger and outrage that can be generated. Even a Public Interest Litigation was filed against the granting of the exemption, which was subsequently dismissed. The Amendment to Section 25 (2) of the Customs Act which empowered the government to grant ad hoc exemptions in exceptional cases saved the day for the government. See Swati Deshpande, Government Bends Rules for Sachin's Car, at http://timesofindia.indiatimes.com/articleshow/153399.cms (last visited November 23, 2004).

23 Professional athletes' labour supply is extremely 'inelastic'. Elasticity of labour refers to how easily a worker can decide where or when to work. If a game is on schedule, the players on that team go and play in that venue. On the other hand, professionals in other fields have a much more elastic labour supply. For example, business executive who are also frequently on the move like professional athletes, can, unlike athletes, shift their business engagements and meetings to conducive tax environments, if the situation so demands. See Hoffman, supra note 17, at 6.

24 Macnaughton, supra note 9.

25 Hoffman, supra note 17, at 6. However, the danger of retaliatory taxation is that the revenue yield could be zero or even negative when other jurisdictions choose to hit back by imposing their own taxes on nonresident athletes, as it is almost a common practice to give a tax credit to all taxpayers for taxes paid to other jurisdictions. See Macnaughton, supra note 9, at 3.

26 Adam Smith offered four "maxims" regarded as the Canons of Taxation. These were that taxes should: (1) Be proportionate to income; (2) Be certain and not arbitrary; (3) Be convenient as to manner and time of payment; and (4) Be cheap to collect and not calculated to encourage tax shenanigans. See John K. Steinkamp, Common Sense and the Gift Tax Annual Exclusion, 72 Neb. L. Rev. 106, 167 (1993). Thus, the canons of taxation include equality, certainty, economy, and administrative convenience. However, it is interesting to note that the recent Report of the Working Group on Non Resident Taxation chose to ignore the canon of administrative convenience in its list of essential pre-requisites for ensuring a responsive and vibrant tax system in the country. It noted that stability, certainty, equality/neutrality, efficiency were required, but the element of administrative convenience in tax collection seemed conspicuous by its absence. See REPORT OF THE WORKING GROUP ON NON RESIDENT TAXATION 7 (2003). [Non Resident Taxation Report hereinafter].

27 Macnaughton, supra note 9, at 1.

28 Id.

29 Id. at 7.

30 Id. at 6.

31 Id. at 7.

32 Id. at 8.

33 Id. at 1.

34 Annelena Lobb, Strangest State Tax Laws, at http://money.cnn.com/2003/01/06/pf/taxes/q_oddtaxes/ (last visited November 13, 2004).

35 Hoffman, supra note 17, at 3.

36 In the NFL in the USA, teams do share receipts from low cost ticket sales, with the home team getting 60 percent of ticket sales. In baseball, the American League teams get 80 percent of home ticket sales, while home teams in the National League get 90 percent of ticket sales in their own venue. In the NBA and NHL, 100 percent of ticket receipts are kept by the home team. Receipts collected from the most expensive seats in a venue are not shared between teams. See William H. Baker, Taxation and Professional Sports - A Look Inside the Huddle, 9(2) MARQ. SPORTS L. J. 297 (1999).

37 "The misalignment of the location in which an economic activity which gives rise to taxable income occurs and the location in which a tax is levied can lead to a distortion in the provision of publicly supplied goods and services." See Hoffman, supra note 17, at 7.

38 This imbalance will lead to the over-provision of government services in jock tax states and the under provision of public goods in non or low Jock tax States. See Id. at 8.

39 Kevin Osborne, Baseball: Jock Tax Unfair to Athletes, http://www.cincypost.com/2002/12/03/jock120302.html (last visited November 26, 2004). Visiting workers in other types of jobs only have to pay tax if they work in the taxable territory for a "threshold" minimum number of days. The Jock tax admits of no such exception generally. Thus, the "unfairness" argument is primarily based on the fact that athletes are discriminated against by the imposition of the Jock tax and get treatment different from other highly paid workers - say, investment bankers and corporate bankers, who are not subject to any "Exec tax" when it comes to the collection of non-resident taxes. See Mark Hyman, Commentary: Why the "Jock" Tax Doesn't Play Fair, http://www.businessweek.com/magazine/content/03_27/b3840062.htm (last visited November 26, 2004).

40 Kathy M. Kristof, High Salaried Visitors Feel Bite of the 'Jock Tax', http://the-idea-shop.com/papers/latimes.htm (last visited November 26, 2004).

41 Ekmekjian, supra note 5, at 244.

retrospective application of non-resident income taxes. Although cities and States have had regulations and the authority to tax visiting athletes for several decades, most have remained inactive in their enforcement efforts. Once the cities and states make the decision to enforce the jock tax, tax officials often require retroactive application and immediate payment of past due tax bills.[43] Since the statute of limitations for tax evasion does not begin to run until a tax return is filed, the cities and states can enforce their tax regulations retroactively. The effect of such legal action often causes financial difficulties for athletes who can not satisfy such burdens, especially retired athletes who once earned very comfortable salaries during their careers but now maintain a modest living in comparison. Letters from several State tax collectors requesting hundreds or even thousands of dollars could be quite devastating.

The major concerns for professional teams include income tax withholding and informational reporting. The Jock tax may force teams to allocate athletes' wages among various cities and States in case of international sports events, each with different requirements. In most instances, the teams will be forced to withhold taxes on the players for the few days that they visit each taxing jurisdiction, resulting in *de minimis* amounts being withheld. This type of system raises concerns about the economic burden and the compliance burden imposed on major league teams.[44] Finally, it has even been suggested that the administrative burden and transaction costs accompanying compliance with the scheme of Jock taxation is very high as it mandates the filling up of numerous forms, declarations and statements.[45]

Thus, it can be seen that despite the incorporation of the Jock tax as an instrument of taxation in the US and the world over and negotiated within the provisions of most DTAAs that are signed by countries and the domestic statute books,[46] this vehicle of taxation does have its fair share of detractors. However, the attractiveness of the tax base - rich and uncomplaining in a number of cases, has proved too much for the tax authorities to resist

3. Tax Treatment Accorded to International Athletes & Sportsmen: India & Abroad

The structure and inherent nature of international sport requires athletes and sportsmen to travel to other countries to compete. India is a frequent destination of these athletes to compete, train and endorse products. The taxation of an international athlete in India may be in one of two forms. This is because the taxation of non residents, the particular legal category for tax purposes into which international athletes would fall, is governed either by the domestic tax law, the Income Tax Act, 1961, in the absence of DTAAs, or by the provisions of the DTAAs that India has entered into with other countries. Internationally, treaties have been negotiated under the UN Model Convention,[47] OECD Model Convention[48] or the United States Model Convention of 1996. India being a developing country has largely followed the UN Model Convention.[49] There is a lot of similarity between the UN and OECD Model Conventions, as is amply demonstrated by Article 17 of both Model Conventions which concerns the taxation of sportsmen and has been worded in the same manner in both documents. However, as regards the rest of the provisions, it is clear that the UN Model Convention gives more importance to the "source" principle, as opposed to the OECD Model Convention, which gives more importance to the "residence" principle.[50]

(A) Taxation of Athletes from Non-DTAA Countries

In India the residential status plays an important role in the matter of assessment of taxpayers. It is the jurisdictional test for the Income Tax Act, 1961. This is explained in Section 6 of the Income Tax Act, as per the mandate of which Residential Status is divided into three categories:(i) Non-Resident; (ii) Resident;[51] (iii) Resident, but not ordinarily resident.[52]

The categories of persons referred to in (i) and (iii) above are liable to pay tax only on their "Indian income" while tax payers who are resident in India as per the Income Tax Act are taxed on their "world income". Support for this proposition can be gathered by perusing Section 5 of the Income Tax Act. Section 5 (1) applies to those who were resident in India in the previous financial year. It subjects to taxation all income from whatever source derived which: (a) is received or is deemed to be received in India in such year by or on behalf of such person; (b) accrues or arises or is deemed to accrue or arise to him in India during such year; or (c) accrues or arises to him outside India during such year.

From a reading of the statutory provisions it is clear that touring international athletes and sportsmen would not fall in the category of *Residents* for purposes of income taxation as usually they would be present on Indian soil fleetingly and for periods of time amounting to less than a few weeks at a time. Thus, Indian law taxes such international athletes under the category of *Non Residents*. In the following

42 Hoffman, supra note 17, at 6. Hoffman argues that the Jock tax sets a dangerous precedent because it violates several principles of good taxation. Most notably, it is poorly targeted. In the US it has spread from the athletes to all the traveling employees of their teams, including the announcers, trainers, and scouts. Many of these workers make salaries comparable to the national average and are not at all a part of the "super-earners" league that popular sportsmen are supposed to represent.

43 Ekmekjian, supra note 5, at 243.

44 Id. at 244.

45 Hoffman, supra note 17, at 7. This is particularly the case in the US where up to 20 forms are required to be filled up by the taxpayer. Prior to the implementation of the Jock tax in the US, two state authorities taxed the players. One authority was the state in which the player was a domiciliary and the other authority was the state in which the athlete played his home games. Due to the imposition of the jock tax by various cities and states, athletes are required to file a multiplicity of income tax returns. For example, the Major League Baseball Montreal Expos play in at least eleven different cities in eight states. Players on the team could file nineteen different city and state returns at the end of the tax year with each taxing jurisdiction having its own set of rules and regulations. In addition to the Canadian tax returns, this is both an administrative and a compliance burden for the athletes. Further, the athletes incur added expenses for tax preparation and tax planning fees. Even in India, the Report of the Working Group on Non Resident Taxation noted that requiring non residents, especially if they did not have any presence in India, to deduct tax from payments to residents of India, depositing tax in the Government Treasury within the prescribed time frame, filing TDS returns, etc. unnecessarily burdened them. The Report observed that it would become very difficult for them to comply with such obligations. The Report recommended that a provision be introduced to the effect that if the recipient undertakes to pay the withholding tax and completes all formalities including filing of TDS return on behalf of the non-resident payer, then the non-resident payer shall be relieved of his obligation of deduction of tax at source. The undertaking and the deposit of the tax in such cases shall be made in non-resident tax circles. This would also safeguard the Revenue's interest. See Non Resident Taxation Report, supra note 26, at 27.

46 In India Section 115 BBA of the Income Tax Act, 1961 is the relevant domestic law provision, which will be discussed subsequently in the paper.

47 In 1968 the UN Secretary General set up an ad hoc group of experts on tax treaties between developed and developing countries. These experts were initially from 19 countries, and later from 21 countries. India was part of this group which ultimately came up with the UN Model Convention which was published in 1980 with commentaries. The latest UN Model Convention was brought out in 2001. See K. SRINIVASAN, GUIDE TO DOUBLE TAXATION AGREEMENTS 1.12 (1998).

48 Historically from 1948 onwards, the Organization for European Economic Cooperation worked to prepare a draft convention for double taxation avoidance with regard to taxes on income and capital. This task was later taken over by the Organization for Economic Cooperation and Development (OECD). OECD was set up in 1961 and all developed countries were its members. The first final Model Convention was prepared in 1977 by the OECD and it was revised in 1992. See Pallavi Gopinath, Importance of Permanent Establishments and Business Connection to Double Taxaxtion Avoidance Agreements, 129 TAXMAN-MAGAZINE 133, 136 (2003). [Gopinath hereinafter].

49 Non Resident Taxation Report, supra note 26, at 8.

50 Gopinath, supra note 48, at 137.

51 An individual is Resident and ordinarily Resident if one of the following conditions is fulfilled: (i) Stays in India for 182 days or more during the previous year [Section 6 (1) (a) of the Income Tax Act]; or (ii) Stays in India for 365 days or more during the four preceding years and stays in India for at least 60 days during the previous year [Section 6 (1) (c) of the Income Tax Act].

52 The status given at (iii) comes into operation only in respect of Individuals and Hindu Undivided Families (HUFs). An individual or HUF whose manager has not been resident in India in nine out of ten previous years preceding the relevant previous year or has not been in India for an aggregate period of 730 days or more during the seven previous years preceding that year is regarded as a person not ordinarily resident. [Section 6 (6) of the Income Tax Act].

sub-sections of the paper, both the general scheme of non-resident taxation, as well as the scheme of taxation aimed specifically at foreign, non-resident athletes would be discussed.

Scheme of Non-Resident Taxation under Income Tax Act, 1961

An individual is considered as a Non Resident in India if he is not resident in India.[53] This would be so if he is in India during any financial year, i.e, a period of twelve months from 1st April to 31st of March following, for an aggregate period of less than 182 days.[54] However there is an exception to this rule. In case his stay in India in a year is 60 days or more, and additionally he was in India in the four years preceding the said year for a total period of 365 days or more, then even though he may have stayed in India for less than 182 days in that year, but more than 60 days, he would not be a *Non Resident* but a *Resident*.

Section 5 (2) of the Income Tax Act, 1961 provides what income of the Non Resident is to be taxed in India. Its mandate stipulates that the total income of any previous year of a person being Non Resident includes *all income* from what ever source derived which: (a) is received or is deemed to be received in India in such year by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to him in India during such year.[55]

Scheme of Taxation for Athletes/Sportsmen under Income Tax Act, 1961

Policy Initiatives

Non resident sportsmen are substantial contributors to the government coffers. Canada has in fact formulated *The Policy for Hosting International Sport Events, 1996* so as to ensure a more streamlined organization of international sports events. This policy addresses two significant issues.[56] *First*, the number of events on the hosting calendar continues to increase each year. At the same time, the costs associated with hosting and the period of bidding, planning and preparation leading up to staging an event are increasing. When coupled with reduced federal resources, a hosting policy is needed to ensure that the federal government invests in only those events which reap significant sport, economic, social and cultural benefits. *Second*, the federal government in Canada has historically provided a significant portion of the funding for the staging of events and has often been the primary funder of the associated legacy, particularly for major games. The financial funding model of the Hosting Policy will ensure closer partnerships between governments, private sector and franchise holders for both the staging and legacies associated with an event.

As regards the issue of taxation, the Hosting Policy explicitly recognizes that increased economic activity stimulated by the games generates net increases in tourism spending that would not otherwise have occurred and, thus, a net increase in taxes. This net increase in taxes may be claimed as a benefit to the federal government, if the distinction is made between the spending (and resultant taxes) made by local residents in the normal course of events and new spending by visitors who would have spent their money outside Canada, if not for the event.[57] The Hosting Policy suggests that a cost benefit analysis should be conducted keeping in mind the revenue proceeds from the organization of an event and the costs which would have to be incurred for setting up an event.[58]

In the Indian scenario the government policy initiative in the realm of sports is the *National Sports Policy, 2001*.[59] Under the head "Resource Mobilization for Sports" the policy recognizes that insufficiency of financial resources has been a major constraint in promoting sports in India. The Policy points out that a *National Sports Development Fund* has been created in India with initial contribution of the Union Government. The Policy states that all contributions - from within and outside the country, to this Fund would be extended 100% exemption from Income Tax. More importantly, it would be of interest to note that the Policy makes a commitment that mobilization of resources for the Fund would be strenuously pursued by the Government and the *feasibility of exempting the incomes of Sports Federations and Sports persons (from sources other than employers) from payment of Income Tax explored*.[60] However, the Policy does not clarify as to whether such "sports persons" would include international non resident sportsmen also. But, given the general tenor of the Policy which emphasis the much needed increase in sporting standards in India and the achievement of "excellence" in sports, it seems likely that the reference is only to Indian resident sportsmen.

Relevant Statutory Provision

The nub of the Indian taxing scheme as regards non resident sportsmen and athletes is contained in Section 115 BBA of the Income Tax Act. This is unlike the approach of countries such as Norway which have a separate statute dealing with the taxation of foreign athletes - they are taxable pursuant to the Foreign Artists Taxation Act for the first six months of their stay in Norway. However, if the athlete's stay exceeds 6 continuous months, he is considered tax liable pursuant to the standard Norwegian tax legislation.[61]

Section 115 BBA in India instead of determining the income of such persons at a flat rate and computing tax thereon at normal rate, the provision lays down a flat rate of tax of 10% to be applied on the gross receipts of a non-resident sportsman who is not a citizen of India in respect of his participation in India in any game or sports (other than horse races) or from advertisement or from contribution of articles relating to game or sport in any newspapers, magazines or journals. Similarly, a non-resident sports association or institution is liable to tax at the rate of 10% on the guaranteed amount paid or payable to it in relation to any game (other than horse races) or sport played in India.

The essential conditions of Section 115 BBA are that the assessee should be:

(a) a sportsman (including an athlete)
(b) who is not a citizen of India
(c) and is a non resident
(d) whose income includes any income received or receivable by way of -
  (i) Participation in India in any game (other than a game the winnings wherefrom are taxable under section 115BB) or sport; or
  (ii) Advertisement; or
  (iii) Contribution of articles relating to any game or sport in India in newspapers, magazines or journals.

Section 115 BBA may the Indian domestic law position. However, each tax jurisdiction adopts its own formula for purposes of Jock tax-

53 Section 2 (30) of the Income Tax Act.
54 See Section 6 (1) of the Income Tax Act.
55 However, Explanation 2 to Section 5 (2) clarifies that income which has been included in the total of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.
56 See http://www.canadianheritage.gc.ca/progs/sc/pubs/host_e.cfm (last visited November 23, 2004).
57 Id.
58 The Hosting Policy states that the costs to be considered can include: (1) Development, presentation and promotion of the proposal. (2) Planning the event. (3) Operation of the event. (4) Investment in direct infrastructure (Ex: facilities for the games) and indirect infrastructure (Ex: roadways, increased sewage facilities). Costs for related private investments (Ex: hotels) should not be included, since those costs are not being written off against projected event revenues, but rather will be written off against revenues of their own. (5) Post-event costs (Ex: re-adaptation of facilities, dismantling of facilities).
59 The National Sports Policy was initially formulated in 1984. Taking into account the emerging needs and in order to further introduce necessary changes, a draft New Sports Policy was formulated in 1996. Since then, the draft Policy has been discussed in a number of meetings held with sportspersons of eminence, officials of National Sports Federations, State Governments and other concerned agencies. It was also circulated to Members of Parliament and to different Ministries concerned with promotion of Sports in the country. The outcome of various meetings and suggestions and recommendations offered by various persons and organisations, have been considered and suitably incorporated in the draft National Sports Policy. The Sports Policy is now in its final shape. See http://yas.nic.in/yasroot/anual_reports/ar_01/ar_01-02_1.htm (last visited December 17, 2004).
60 See Paragraph 23 of the National Sports Policy, 2001.
61 See Taxation of Foreign Artists and Athletes in Norway, http://www.skatteetaten.no/Templates/Artikkel.aspx?id=8683 (last visited December 17, 2004).

ation to suit its own purposes.[62] For instance, the player's taxable salary for a game played in the State of Alberta in Canada is determined in accordance with the following formula, which is then taxed at the rate of 12.5%[63]:

A ÷ B, where A is the base salary in effect on the day of the game played in Alberta and

B is the number of calendar days in the regular season in which the game is played.

The base salary of a player is the salary as defined in the Collective Bargaining Agreement between the League and the League Players' Association. However, signing bonuses, deferred compensation or performance bonuses are not to be included. For example, a player provides hockey duties or services to his team in a hockey facility in Alberta during the 2002-03 regular season. The season begins on October 9, 2002 and ends on April 6, 2003. Therefore, there are 180 calendar days in the 2002-03 season. The player plays a game in Venue 1 on December 31, 2002 and a game in Venue 2 on January 2, 2003. The player's base salary is $1,000,000. The player's taxable salary for each game in Alberta would be 1,000,000/180 or $5,555.56.

Assessable Income

In the Indian scenario, the non resident sportsmen assessable income may come from three sources: (i) Participation in India in any game or sport - the match fees; or (ii) Advertisement - endorsements; or (iii) Contribution of articles relating to any game or sport in India in newspapers, magazines or journals. Thus, there are specified head-sources from which the sportsmen's income must arise so as to be taxable.

In the Australian context a Tax Ruling has been brought out which gives a much broader definition as regards the issue of the taxable income for a sportsmen. A payment or other benefit received by a sportsperson is assessable income if it is[64]:

1) income in the ordinary sense of the word (ordinary income); or
2) an amount or benefit that through the operation of the provisions of the tax law is included in assessable income (statutory income). Statutory income includes non-cash benefits that may not be ordinary income.

Assessable income would also include[65]:

1) payments received from, in respect of, or in connection with employment;
2) payments or other benefits received for, in respect of, or in connection with services provided; and
3) amounts of a revenue nature or other benefits received, including prizes and awards, from carrying on a business of participating in sport. This includes the exploitation of personal skills in a commercial way for the purpose of gaining reward.

However, the Australian Tax Ruling clarifies that money and other benefits received from the pursuit of a pastime or hobby are not assessable income. In India, clarifications on issues entertainers' and sportsmen's income tax liability are not provided beyond the articulation of Section 115 BBA of the Income Tax Act which applies to non resident athletes and sportsmen. However, the Central Board of Direct Taxes' (CBDT) Circular No. 787 dated 10.2.2000 (Taxation of income of artists/entertainers/sportsman etc) clarifies the issue on the collections of revenue made from the organization of a sports event.[66] As regards the issue of domestic taxation, the Circular states that receipts from the organization of an event may be of the following nature: (1) Sponsorship money, (2) Gate money, (3) Advertisement revenue, (4) Sale of broadcasting or telecasting rights, (5) Rent from hiring out of space, (6) Rents from caterers, which may be subject to taxation.

Principle of Withholding & Deductions

In India under the provisions of section 195 of the Income Tax Act, any sum payable to a nonresident and chargeable to tax under the Act requires tax withholding by the payer. However, the deductor or recipient can apply for a No Objection Certificate under section 195/197 of the Act. Circular No. 787 of the CBDT recognizes that to offset the revenue earned an event manager/organizer may *inter alia* incur expenditure on guarantee money, prize money, rental for premises or equipment, payments to labour contractor, for decoration, salaries, royalties, fees for technical services, insurance premium for the event etc. The Circular provides that such receipts and payments may be liable to deduction of tax at source under various provisions of the Income-tax Act, 1961. In this regard, the Circular states that in the case of residents the applicability of the provisions of Sections 194-C,[67] 194-J[68] and 194-I[69] should be examined on the subject of tax deductions at source (TDS).

This principle of withholding is followed in the US as well. The I.R.C requires that taxes to the tune of 30% of the payment be withheld on payments made to non-employee status nonresident aliens for the performance of personal services.[70] The rate of tax withheld depends on whether the athlete performed the personal services as an employee or as an independent contractor.[71]

In the US an athlete can enter into a *Central Withholding Agreement* (CWA) with the IRS to have one withholding agent withhold an amount based on the estimated tax liability of what the athlete would report when ultimately filing their returns on net income.[72] The CWA procedure requires the attorney to send several documents to the IRS ninety days before the Athlete enters the US. These documents include a power of attorney, a proposed budget with estimated expenses, an itinerary, and all relevant contracts with venues, employers, promoters, band members, trainers and agents, which includes the contract with the proposed withholding agent.[73] Further, the attorney for an athlete may, but does not have to, submit a proposed CWA. Submitting a proposed CWA has the benefit of avoiding the delays inherent with the IRS drafting the document.

Along the lines of the CWA, Section 194 E in India makes the withholding principle statutorily applicable specifically with regard to non resident athletes and sportsmen. The section provides that where any income referred to in section 115BBA is payable to a non-resident

62 In the State of California the formula for arriving at the assessable income is as follows: total number of duty days spent in California/total number of duty days. The California Code of Regulations reads: "If non resident employees are employed in this State at intervals throughout the year ... the gross income from sources within this State includes that portion of the total compensation for personal services which the total number of working days employed within the State bears to the total number of working days both within and without the State."

63 See Alberta Personal Income Tax Information Circular (September 10, 2002), at www.revenue.gov.ab.ca (last visited December 17, 2004).

64 See Australian Taxation Office, Taxation Ruling - Income tax: sportspeople - receipts and other benefits obtained from involvement in sport (TR 1999/17) at 2. This Tax Ruling is available online.

65 Id. at 2-3.

66 In K.P. Varghese v. I.T.O., [1981] 131 I.T.R. 597, the Supreme Court held that circulars of the CBDT are legally binding on the Revenue and this binding character attaches to the circulars even if they be found not in accordance with the correct interpretation of a provision and they depart or deviate from such construction. See also UCO Bank v. C.I.T., [1999] 237 I.T.R. 889.

67 Tax deductions at source to be made for payments to resident contractors.

68 Tax deductions at source to be made for payments made to performers of professional or technical services.

69 Tax deductions at source to be made for payment of rent to residents.

70 Robert J. Misey, Providing Tax Relief for Foreign Athletes and Entertainers With a Central Withholding Agreement, at http://www.irs.gov/businesses/small/international/article/0,,id=129240,00.html (last visited December 1, 2004). [hereinafter Misey].

71 If an employment relationship exists, payments made to a non-resident athlete for personal services rendered in the United States are subject to graduated rates of withholding. The employer must withhold the tax even if the employer is not a U.S. person or entity. If the non-resident athlete is not an employee but an independent contractor, payments made are subject to a thirty-percent withholding rate. See Stephanie C. Evans, U.S. Taxation of International Athletes: A Re-examination of the Artiste and Athlete Article in Tax Treaties, 29 GEO. WASH. J. INT'L L. & ECON. 297, 302-303 (1995). [hereinafter Evans].

72 Misey, supra note 70.

73 Id.

74 30 % has been used in the calculations as the assessment in the example commences from April 1, 2003. See Section 80 RR (iii), Income Tax Act.

75 See I.R.C. § 7701 (b) (1) (A) (i)-(ii), (b) (3) (1994). In addition to the "green card" and "substantial presence" tests, a foreign athlete will be considered a resident of the United States if the athlete makes a first-year election to be treated as such. [I.R.C. §7701 (b) (1) (A) (iii), (b) (4) (1994)]. See Id. at 299-301.

sportsman (including an athlete) who is not a citizen of India or a non-resident sports association or institution, the person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of ten per cent.

Section 80 RR of the Income Tax Act deals with deductions in respect of professional income of Indian resident sportsmen from foreign sources in certain cases. With regard to sportsmen including athletes it provides that where the gross total income of such individuals, resident in India includes any income derived by him in exercise of his profession from the Government of a foreign State or any person not resident in India, then there is allowed in computing the total income of the sportsmen, a deduction from such income of an amount calculated by reference to a phased percentage table:

i 60 % of such income for an assessment year beginning on the April 1, 2001;
ii 45 % of such income for an assessment year beginning on the April 1, 2002;
iii 30 % of such income for an assessment year beginning on the April 1, 2003;
iv 15 % of such income for an assessment year beginning on the April 1, 2004;

as is brought into the country, or on behalf of, the assessee in convertible foreign exchange within a period of six months from the end of the previous year or within such further period as the competent authority may allow in this behalf and *no deduction is to be allowed in respect of the assessment year beginning on the April 1, 2005*, and any subsequent assessment year. Thus, from a reading of the statutory provision it is clear that 2005 onwards international sportsmen and athletes would try their very best to avoid gaining *resident* status in India, as then they would not even be able to avail of the benefit of a deduction in the taxable income, as was previously provided by Section 80 RR prior to the amendment of the year 2000.

The simple dynamics of Section 80 RR can be understood better by way of an example. Let us take Mr. X, a billiards player of international status, resident in India for the assessment year commencing April 1, 2003, goes to the UK to compete in a tournament. His gross receipts of participation in the event amount to Rs. 1, 00, 000. This includes Rs. 10, 000 received from a person resident in India. His professional expenses for the tour amount to Rs. 40, 000. Mr. X thereafter brings Rs. 42, 000 into India in accordance with the FEMA. Would this income be exempt from taxation?

Mr. X's claim would not be tenable. Being a resident of India his professional foreign income would be liable to tax in India. The deduction under Section 80 RR would be provided in the following manner:

Gross Receipts		100,000
Less: *Expenses*		40,000
Income		60,000
Less: *Deductions u/s 80* RR		
Amount brought into India	42,000	
Less: *10* % from resident in India	4,200	
	Rs.37,800	
Less: 30 %[74] of 37, 800 =		11,340
Taxable Income:		Rs. 48,660

Position in the United States & Australia

In India it would be nearly impossible for the tax authorities to tax international athletes as *Residents*, given the threshold requirement of a stay of 182 days. However, in the United States even after a foreign athlete establishes that he or she is not a U.S. citizen, the athlete may nevertheless be considered a resident for U.S. income tax purposes if either the "green card" test or the "substantial presence" test is satisfied.[75]

For U.S. tax purposes, an individual who is a lawful permanent resident of the United States at any time during the calendar year is a U.S. resident.[76] An individual who holds or applies for an alien registration card - a "Green Card" during the calendar year attains U.S. resident status. Instead of acquiring a "Green Card," however, a foreign athlete typically obtains a temporary work permit that allows the athlete to work in the United States for up to one year.[77] The alternative "substantial presence" test, therefore, is more appropriate for determining whether a foreign athlete is a U.S. resident for income tax purposes.

An individual has substantial presence in the United States if the individual was present in the United States on at least 31 days during the calendar year, and the sum of the number of days on which such individual was present in the United States during the current year and the 2 preceding calendar years equals or exceeds 183 days.[78] However, the I.R.C. provides that a professional athlete's time spent competing in a "charitable sports event" does not count as time in the United States for the purpose of determining residency.[79] Several tour events contribute their profits to local charities, thereby enabling a foreign athlete to spend most of the year in the United States without satisfying the substantial presence test.[80] In addition, the U.S. Golf Association and the U.S. Tennis Association have charitable status therefore, the time spent participating in the "open" championships in either sport would not count as U.S. days.[81] Many U.S. income tax treaties contain "tie-breaker" provisions that determine residency in the case of an individual who meets the definition of a U.S. resident under section 7701(b) of the Code and qualifies as a resident of another country.[82] If an applicable tie-breaker provision classifies the foreign athlete as a resident of a foreign country, the athlete is treated as a nonresident of the United States but only for those items covered by the applicable income tax treaty.[83] The foreign athlete is still regarded as a U.S. resident for all other purposes of the Code.[84]

In case of the I.R.C. no special tax concessions to professional athletes are provided. An athlete's federal taxable income is calculated in the same manner as for any taxpayer: gross income - allowable deductions = taxable income.[85] Determining each component in this equation - gross income, allowable deductions, and taxable income - involves careful tax analysis and tax planning.

Aside from the elaborate scheme of *resident* taxation which a much lesser threshold for becoming a US resident for tax purposes as compared to the scene in India, the United States was also the first country in the world where a scheme of Jock taxation for non resident athletes was employed at the provincial level, i.e., *inter se* amongst the different States, each one a distinct legal system on its own. Jock taxation began in the US in 1991 with the State of California trying to get revenge on Michael Jordan and the Chicago Bulls by imposing a specially created tax on him, for beating the L.A. Lakers in 1991.[86] Also, California state lawmakers were bound and determined to benefit from Michael Jordan's popularity. Today, of the 24 States in the US with professional teams, 20 have enacted Jock taxes, as have half

76 See I.R.C. § 7701 (b) (1) (A) (i) (1994).
77 Evans, supra note 71, at 300.
78 See I.R.C. § 7701 (b) (3) (A) (i)-(ii) (1994). The 183-day requirement is calculated utilizing the following weighted average: (1) each day of the current year counts as one day; (2) each day in the first preceding year counts as one-third of a day; and (3) each day in the second preceding year counts as one-sixth of a day.
79 See I.R.C. § 7701 (b) (5) (A) (iv) (1994).
80 Evans, supra note 71, at 301.
81 Id.
82 Sheri Jeffrey, Pre-Residency Tax Planning for the Foreign Entertainer, Athlete, or Other Talent, 12 LOY. L.A. ENT. L.J. 311, 317 (1992).
83 Id.
84 Id. Thus, if a foreign athlete, for example, is deemed a U.S. resident, the athlete's entire worldwide income will be subject to United States income tax (both federal and state) at the regular graduated rates.
85 Ekmekjian, supra note 5, at 231.
86 David K. Hoffman, Non Resident State and Local Income Taxes in the United States: The Continuing Spread of "Jock Taxes", 130 TAX FOUNDATION: SPECIAL REPORT 1, 3 (2004), at http://www.taxfoundation.org/sr130.pdf (last visited November 13, 2004).
87 Id. at 12. The problem with Jock taxation is aggravated in US States such as Texas which is one of the few States with a professional sports team that does not have a jock tax, as it has no income tax. This increases the tax bite for Texas players, since they pay sales and use taxes at home as well as other states' income taxes on the road, with no offsetting deduction.

a dozen cities. Thus, it can be seen that the Jock tax evolved first as an instrument of taxation aimed at just Michael Jordan and the Chicago Bulls, then proceeded to all professional athletes and sportsmen, and *now even includes accompanying trainers, scouts, lawyers, and even amateur skateboarders are being taxed in the US when they leave their home State*.[87] Thus, according to many in the domestic US setting this form of targeted taxation of a selective tax base has set a dangerous precedent.

In Australia the model of income taxation is very similar to India. Australia has the right to tax residents on domestic and foreign source income and also the right to tax non-residents on Australian source income.[88] Where payment is received for services or employment, one approach is to source the income where the work or service is performed. This is the principle of source-based taxation which is employed with respect to the taxation of sportsmen and athletes in all DTAAs as will be studied subsequently in this paper. This principle was applied in Australia by Jordan C.J. in *C of T (NSW) v Cam & Sons Ltd*,[89] in order to streamline the meaning of the term "source." In this case the taxpayer employed two men to work on trawlers. Trawling was carried out in the open sea, both within and outside the territorial waters of New South Wales. The men were engaged in New South Wales on the morning of each cruise that lasted from nine to twenty five days. They were paid in New South Wales on their return. The place where the work was performed was held to be the source of the income. Wages for work performed within New South Wales territorial waters were subject to New South Wales tax. Wages for work performed outside those waters was not.

In *FCT v Spotless Services Ltd*,[90] the High Court of Australia held that source of income is a question of practical reality. According to the High Court, practical reality is not so much a test as an attitude of mind in which the Court should approach the task of judgment, and this reality is subject to variation, for reality, like beauty, is in the eye of the beholder. It may be noted that athletes and sportsmen are commonly independent contractors and if suitable contractual structures are developed they may source income outside of Australia for services performed within Australia. Such structures were examined by the High Court of Australia in *FCT v Mitchum.*[91] The case though not set in a sports related environment is nevertheless important for athletes' tax liability in Australia. In this case, Mr. Mitchum had entered into a contract with Mandeville Films SA, a company incorporated in Switzerland. Under this contract the company agreed to employ him to render his services as a consultant to the producer and to: advise in the connection of the selection and suitability of principal members of the cast and to assist the producer in the selection, training and coaching of the other members of the cast among other things. Under this agreement Mandeville Films agreed to pay Mr Mitchum a sum of $50,000 US dollars for each two month photoplay. On 8th July 1959 the Swiss company agreed to lend the services of the respondent to Warner Bros Pictures Inc. of California to portray the role of Paddy Carmody in a photoplay entitled "The Sundowners." This photoplay was to be filmed in England and Australia. It was understood and agreed between the Swiss company and Warner California that Warner California should have the right to lend the services of Mr Mitchum to Warner Bros Production Limited. However, notwithstanding the loan of Mr Mitchum's services he should be deemed to be rendering services under the agreement between the Swiss company and Warner California. Mr Mitchum came to Australia for eleven weeks in 1959 to film "The Sundowners." During this period the Swiss Company assigned their right to Mr Mitchum to a company named DRM Productions Inc incorporated in California. At the conclusion of filming Warner California paid the sum of $50,000 US dollars to DRM Productions in discharge of the Swiss Company's obligations to Mr. Mitchum.

The Australian Commissioner of Taxation assessed Mr Mitchum to tax on the amount attributed to his eleven weeks work in Australia. This amount was 16,675 pounds. Counsel for the Commissioner sought to apply the rule of law from the afore-mentioned *C of T (NSW) v Cam & Sons Ltd.*, that where the consideration for payment of the money which constitutes income from personal exertion is the performance of work or rendering services, the source of that income is the place at which the work is done or the services performed, unless there are special circumstances necessitating or at any rate warranting a contrary conclusion.

This argument was rejected as "unacceptable" by the court,[92] as it was held that a conclusion as to the source of income for the purposes of the Act is a conclusion of fact. There was no statutory definition of "source" to be applied, with the matter being judged as one of practical reality. The result was that Mr Mitchum was not liable to pay Australian tax on the earnings received by him, as this income was not sourced in Australia.

The overall effect of the decisions, especially in light of *Mitchum's* case, is that the place of contract and the place of payment may be sufficiently important to make them the source of the income. Therefore in the absence of a DTAA, reliance on this principle will be important to an international athlete.[93] Notwithstanding that performing the services or competing in a tax jurisdiction will represent a large element in any evaluation of "source", careful drafting may enable taxpayers to keep the source of income outside Australia. However, this position may be altered where an athlete or a sportsmen enters the DTAA environment under the aegis of Article 17 of most tax treaties.

(b) DTAA Countries & Article 17 of OECD/UN Model Tax Treaties

Developing a fair and reasonable method of taxing international sportsmen and athletes has presented itself as a knotty problem for both the revenue authorities' world-side, as well as for the professional athletes' community. Tax authorities are concerned with receiving their fair share of income from sportsmen who enjoy the benefits of performing within the geographical contours of their tax jurisdiction.[94] International athletes on the other hand are anxious to avoid double taxation, i.e., the imposition by more than one country of comparable taxes on the same taxpayer, for the same subject-matter, and for identical periods.[95] The trade-off which has been agreed upon by way of negotiations between States is the approach that has evolved for addressing the concerns of both sides by the conclusion of bilateral treaties that contain an "Artiste and Athlete" Article. The "Artiste and Athlete" Article, as shall be studied in greater detail in this section of the paper, in its essence, provides that an athlete's income is taxable by the country in which an athlete's personal services are performed or exercised, i.e., the *source country*.

History the DTAA Jock Tax Scheme

Tax treaties arose out of a need to address double taxation. The ideal resolution of the double taxation problem was said to lie in a uniform, world-wide approach, agreed to by all countries in a multilateral treaty.[96] Also, Double tax treaties are viewed as beneficial by most States because they allow business to transact with a degree of certain-

88 Section 25 (1) (a) & (b), Income Tax Assessment Act. The word "source" like in the Indian context is not defined in the Australian statute - the Income Tax Assessment Act (ITAA), but its meaning has been considered frequently by Australian courts in various contexts. In the early case of Nathan v FCT, (1918) 25 C.L.R. 183, 188, the court stated: "The legislature in using the word 'source' meant, not a legal concept, but something which a practical man would regard as a real source of income. Legal concepts must, of course, enter into the question when we have to consider to whom a source belongs. But the ascertainment of the actual source of a given income is a practical, hard matter of fact."

89 (1936) S.R. (NSW) 544. The case was followed in FCT v. French, (1957) 98 C.L.R. 198.

90 (1996) 186 C.L.R. 404.

91 (1965) 113 C.L.R. 401.

92 Id. at 407.

93 Braedon Clark, Robert Mitchum 17 - Australian Taxation Office 0: The Taxation of International Athletes, Bond L. Rev. 118, 122 (1998). [Clark hereinafter].

94 Bennet Susser, Note, Achieving Parity in the Taxation of Nonresident Alien Entertainers, 5 CARDOZO ARTS & ENT. L.J. 613, 629, 647 (1986). [Susser hereinafter].

95 Evans, supra note 71, at 298.

96 David M. Hudson & Daniel C. Turner, International and Interstate Approaches to Taxing Business Income, 6 NW. J. INT'L L. & BUS. 562, 563 (1984). As early as 1928 the League of Nations explored the possibility of achieving a uniform multilateral treaty for the avoidance of double taxation. However, differences inherent in the different Model tax treaties have in a way defeated the objective of achieving uniformity the world over.

ty both on the part of the individuals, partnerships or corporate entities and the government of that State in which that business entity operates.[97] The position of law in India is that the DTAAs entered into by India override the domestic law.[98] Developed and developing countries in their treaty negotiations with the United States insisted on a provision that implemented the OECD Model Convention's rule that grants the source country an unlimited right to tax compensation paid to athletes with relief from double taxation provided by the residence country.[99] The OECD Model Convention's rule of source taxation reflects the fact that some athletes receive considerable compensation for brief appearances, and the existence of administrative difficulties in endeavouring to follow rules other than those allowing full taxation in the source country.[100] In 1945, the United States adopted such a provision in the first tax treaty between the United States and the United Kingdom.[101] The provision was however thereafter removed from the treaty because of criticisms raised before the Senate Foreign Relations Committee that it unfairly discriminated against one class of service providers, athletes and entertainers, in comparison with other high-income earners, such as executives and salespersons.[102] This form of argument it may be recalled is in congruence with the stand taken by Hoffman against Jock taxation in the United States. In 1970, however, the United States reversed its once favourable stance towards athletes and began to conclude bilateral tax treaties containing provisions unfavourable to athletes.[103]

The United States-Trinidad and Tobago Tax Treaty, signed on January 9, 1970, reflects the watershed moment in the United States' position *vis-à-vis* Jock taxation provisions in its negotiated DTAAs.[104] That treaty included for the first time a specific provision that addressed the treatment of income earned by an athlete.[105] This provision excluded foreign athletes from benefiting from the exemptions available under the independent and dependent personal services provisions traditionally granted to them. The reason for this is that exemptions contained in the personal services provisions generally allowed the *country of residence*, as opposed to the *source country*, to tax the income earned in the source country.[106]

Before 1970 a non resident athlete, who performed services in the United States and met the requirements of either the independent or dependent personal services provision, could avoid U.S. income tax liability on income from services rendered in the United States because the country of residence had authority to tax the income earned in the source country.[107] After 1970, however, a non resident athlete or sportsmen who performed services in the United States was not entitled to the independent or dependent personal services exemption and was required to pay income tax where services were rendered, i.e., the United States, rather than where the athlete resided.[108]

Aside from the United States-Trinidad and Tobago Treaty, which brought in Jock taxation within the framework of DTAAs, two other developments according to Evans proved significant in signalling the changing U.S. position with respect to the taxation of non resident athletes.[109] *First*, the U.S. Treasury Department published its own model treaty (U.S. Model Treaty), which also contained a similar provision, to serve as the starting point for U.S. treaty negotiations.[110] This in a way cemented a birth for US-entered tax treaties for the future.[111] This in turn led to the *second* development with the U.S.-U.K. Tax Treaty eventually including a provision similar to the one in the U.S.-Trinidad and Tobago Treaty despite the strong objections directed at the provision at the Senate Foreign Relations Committee Hearings. Considering the frequent sporting interaction between the U.S. and the U.K. the model of *source* based taxation became a fixture for sports events in the U.S. Jock taxation has not looked back since these developments.

At this juncture the analysis can turn to the substance of the scheme of Jock taxation embodied in the typical Article 17 of most tax treaties. The number 17 in case of certain DTAAs varies,[112] however the "Artiste and Athlete" clause is most closely associated with that number as the OECD Model treaties of 1963 and 1977, as well as the UN Model treaty[113] follow such a scheme of correlation between the number 17 and the "Artiste and Athlete" clause. In 1992, the word "Sportsmen" replaced the term "Athlete" in the OECD Model treaty;[114] however, some of the old unrevised DTAAs entered into by India have continued to make use of the term "Athlete."

The following articles of the OECD Model Convention are significant to sportsmen and athletes:

(a) Article 7: Permanent Establishment - Article 7 provides that the business profits of a treaty partner resident are taxable in the source country if the non resident has a "permanent establishment" in the source country, but only to the extent that the business profits are attributable to the permanent establishment.[115] Article 5 defines a permanent establishment as a fixed place of business, such as an office, branch, or place of management; however, the definition also includes a person - other than an independent agent - who acts on behalf of the non resident and has habitually exercised an authority to conclude contracts in the name of the non resident.

The concept of a "permanent establishment" is encompassed in DTAAs negotiated by India. However, the term "*business connection*" has been used in the Section 9 of the domestic tax statute, the Income Tax Act. The term "business connection" has been made the subject of interpretation by various courts in India leading to a dilution of the original intent of taxing the non residents on the basis of their business connection in India.[116] The recent *Report of the Working Group on Non Resident Taxation* (2003) therefore recommended that the term "business connection" should be amended to also mean an agency "permanent establishment".[117] In other words the import of the recommendation was that the meaning of the term 'business connection' should be such that it includes a person acting on behalf of a non resident who: (a) has and habitually exercises in India an authority to conclude contracts on behalf of the non resident, unless his activities are limited to the purchase of goods or merchandise for the nonresident; or (b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non resident; or (c) habitually secures orders in India, wholly or almost wholly for the non-resident or for that non-resident and other non residents controlling, controlled by, or subject to the same common control, as that non resident. However, the Report clarified that the agency "permanent estab-

97 Roy Saunders, Understanding Double Tax Treaties, at http://www.itpa.org/open/archive/saundersunder.rtf (last visited December 23, 2004). [Saunders hereinafter].

98 Gopinath, supra note 48, at 135. This has been clarified by Circular No. 333, dated April 2, 1982, whereby the Central Board of Direct Taxes (CBDT) clarified that it has been brought to its notice that sometimes Assessing Officers do not give effect to the provisions of DTAAs because the treaty provisions are in conflict with the Income Tax Act. The CBDT made it clear that a specific provision of a DTAA will prevail over the general provisions of the Income Tax Act.

99 Robert J. Patrick, Jr., A Comparison of the United States and OECD Model Income Tax Conventions, 10 LAW & POL'Y INT'L BUS. 613, 683 (1978).

100 Id. at 682.

101 Evans, supra note 71, at 311.

102 Dennis Ardi, Tax Planning for Foreign Entertainers Who Perform Within the United States, 32 TAX LAW. 349, 373 (1979).

103 Evans, supra note 71, at 311.

104 Id.

105 See Article 17 of the U.S.-Trinidad & Tobago DTAA.

106 Evans, supra note 71, at 312.

107 Debra Dobray & Tim Kreatschman, Taxation Issues Facing the Foreign Athlete or Entertainer, 9 N.Y.L. SCH. J. INT'L & COMP. L. 265, 279 (1988). [Dobray & Kreatschman hereinafter].

108 Id. at 280.

109 Evans, supra note 71, at 312.

110 Id.

111 Both the U.S.-U.K. Treaty and the U.S. Model Treaty departed somewhat from the rule of the OECD Model Convention, which granted the source country an unlimited right to tax an athlete's compensation. The treaties provided for a tax exemption in the source country if the independent or dependent personal service articles were applicable and the gross receipts derived by the athlete, including reimbursed expenses, did not exceed $15,000 or its equivalent in foreign currency. See Id. at 313.

112 For instance the India-Poland DTAA.

113 The OECD Model Convention was used as a guide for the United Nations Model Double Taxation Convention between Developed and Developing Countries (United Nations Model Convention).

114 Evans, supra note 71, at 308.

115 KLAUS VOGEL, KLAUS VOGEL ON DOUBLE TAXATION CONVENTION 320 (2nd ed., 1990). [VOGEL, hereinafter].

116 Non Resident Taxation Report, supra note 26, at 18.

117 Id.

lishment," however, should not be held to be established in cases where the non resident carries on business through a broker, general commission agent or any other agent of an independent status, provided that such a person is acting in the ordinary course of his business.[118]

The Report also made a specific recommendation with regard to non resident taxation of sportsmen. It reminded itself that a non resident sportsman is currently taxable under Section 115 BBA of the Income Tax Act in respect of his participation in India in any game. However, sportspersons may remain in India for a very short period of time. Consequently, they cannot be treated as residents and taxed in respect of the activities performed here, which in turn serves as justification Section 115 BBA. The DTAAs largely provide for the taxation of artists and sportspersons in the country where their activities are exercised. To align the domestic law with the DTAAs, the Report recommended that Section 9 of the Income Tax Act be amended to deem that the income in respect of artistes and sportspersons should accrue in India, if the income earned is in respect of personal activities performed in India. Where, however, the income accrues to another person in respect of the personal activities of the artists or the sportspersons, such income may notwithstanding anything contained in Sections 28 to 44C of the Act, should be taxed in India under Section 115 BBA in the hands of the other person only.[119]

(b) **Article 14: Independent Personal Services** - Article 14 provides that income from professional services or other activities of an independent character are taxable in the source country if the individual has a fixed base regularly available to the individual but only to the extent the income is attributable to the fixed base. For example, income that touring athletes earn as independent contractors from tournament competition would be excluded by this provision, whereas income for a continuing engagement in one place may be taxable.[120]

Article 14 excludes industrial and commercial activities and professional services performed through employment. The definition of professional services is provided in paragraph two of the article. The OECD commentary suggests that this definition has only an explanatory character and is not exhaustive. Moreover, as stated above, this article operates in a similar manner to Article 7.

(c) **Article 15: Dependent Personal Services** - The source country may tax a non resident's income from employment if the employment occurs in the source country. The source country may not, however, tax employment income if: (1) the employee is in the country no more than 183 days in any twelve-month period commencing or ending in the fiscal year concerned; (2) the salary is paid by or on behalf of a non resident employer; and (3) the salary is not borne by a permanent establishment or a fixed base of the employer in the source country.[121] For example, Article 15 would exclude the salaries of foreign sports team members if the 183-day limit and other conditions are met.

Article 15 is one particular exception to the general rule of host country taxation. Transferring tax liability to the service provider's country of residence, Article 15 protects the directors, producers, and crew members who are working outside the United States from source country taxation whenever there is a limited physical connection in the foreign locale.[122] In addition, Article 15 protects attorneys, accountants, and business managers who are working outside the United States. The tests of physical connection to justify host country taxation are a "permanent establishment" or "fixed base," or a physical presence that continues for a period in excess of 183 days.[123]

The effect of Article 15 obviously favours the State where an athlete or sportsmen is resident. This article was examined in the case of *Johannson* v. *U.S.*.[124] In the matter the taxpayer was a professional boxer who was employed by a Swiss company of which he was the sole director and shareholder. This company negotiated with an American sporting agent for Ingemar Johansson to compete against a local champion in the United States. In this case the United States Supreme Court held that this employment situation was a mere sham and rejected the taxpayer's source argument. It is suggested that this decision influenced the IRS to pass United States Revenue Ruling 74-330.This ruling penetrates a corporate veil to uncover the operations of a business that employs a sole sportsperson. The ruling states that where the circumstances indicate that the athlete is more an employee of a United States company, the athlete will be taxed in the United States. The circumstances that are taken into account are[125]:

i Did the employer have control over the employee?
ii Is there a long-term personal contract?
iii Who is responsible for providing accommodation, costumes, etc.?
iv Does the employer bear the customary business losses?

In *Johansson*'s case the athlete signed the contracts as guarantor for the Swiss company and performed his services on the United States company's premises and subject to their control. According to Clark, the sole purpose of Ruling 74-330 and this case was to extend the taxing rights of the United States.[126] However, it is submitted that a similar decision would not be arrived at today due to the redundancy of Revenue Ruling 74-330, and the introduction of Article 17 (2) in DTAAs entered into by the United States. A full discussion of Article 17 (2) would be provided in the next sub-section.

(d) **Article 17: Artistes and Athletes/Sportsmen** - Article 17 eliminates most of the benefits for athletes provided by Articles 14 and 15. Article 17 in its essence states that:

i Notwithstanding the provisions of Articles 14 and 15, income derived by a resident of a country as a sportsman, from his personal activities as such exercised in the source country, may be taxed in the source country.
ii Where income in respect of personal activities exercised by a sportsman in his capacity as such accrues not to the sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15 be taxed in the country in which the activities of the sportsman are exercised.

Put another way, the mandate of Article 17 (1) is that where: (a) a resident of a contracting State, (b) being an athlete/sportsmen or an entertainer, (c) derives income from his personal activity as such exercised in the other contracting State; then the State of performance would have the right to tax such income.[127] Generally income from services is taxable where ever they are rendered, including foreign countries. The basis for this rule is that compensation is drawn from the wealth of the host country, and, consequently, it is the appropriate tax locus.[128] Article 17 of the OECD Model as well as the UN Model embodies this rule.

Thus, in case of athletes the State of source imposes tax in conformity with its domestic law and is in no way restricted by a DTAA in so doing.[129] According to its domestic law, each State in particular provides whether and, if so, to what extent the income of athletes is subjected to a withholding tax. However, Article 17 leaves open the question of taxation of such income in the State of residence, on account of the use of the word "may." Whether that State must exempt such income from tax, or must allow as a credit any tax imposed by the State of source depends on Article 23 A [Exemption Method of Double Taxation Elimination] or B [Credit Method of Double Taxation Elimination] of the OECD Model Treaty.

118 Id. at 19.
119 Id. It was also recommended that the provisions of Section 115 BBA should be amended to include the term "artistes/entertainers" in addition to sportspersons. Consequential amendments were also recommended to Section 194 E and Part II of the First Schedule of the Income Tax Act.
120 Victor Abrams et al., International Taxation of Entertainers and Athletes: Report by Organization for Economic Cooperation and Development Spotlights the Area, 10 ENT. L. REP. 3, 4 (1988). A golf or tennis player, for example, typically performs activities of an independent character.
121 Evans, supra note 71, at 308.
122 Barbara Rosenfeld, A Tax Anomaly that Penalizes Actors Working Abroad, 27 MAY L.A. LAW. 20 (2004). [Rosenfeld hereinafter].
123 Id.
124 (1964) 336 F2d 809 (USCA 5 Ct).
125 Clark, supra note 93, at 124.
126 Id. at 125.
127 VOGEL, supra note 115, at 841.
128 Rosenfeld, supra note 124.
129 VOGEL, supra note 115, at 840.

Article 17 specifically addresses the tax treatment of payments to athletes in paragraph 1 and to those furnishing the services of athletes in paragraph 2. Article 17 (1), i.e., the first limb of the provision mandates that income derived by a resident of one state as an entertainer or as a sportsman (which will include for example footballers, golfers, jockeys, cricketers, tennis players, racing car drivers) as well as any participant in public entertainment (such as snooker, chess or bridge players), from his personal activities *as such* exercised in the other state may be taxed in the other state. The words "as such" are important to understand in relation to income from non-performing activities contracted by the entertainers and sportsmen, such as endorsement and merchandising contracts.[130] Thus, according to Vogel if an athlete *additionally* exercises some other activities as well, such as advertising, taxation of the income derived there from would be governed by the provisions applicable to such other activity, for instance as business profits under Article 7.[131] This principle applies even when the DTAA stipulates that the rules on entertainers and athletes take precedence over all other treaty rules, because both under the treaty and otherwise, this priority applies only to cases where an entertainer or athlete exercises activities as such.[132]

Clarifying the position further, Evans points out that advertising or sponsorship income paid in connection with a performance or a series of performances, and not in addition to his services - either before or after the event, would fall within the ambit of Article 17.[133] However, compensation paid to an athlete when a performance is cancelled by the organizer comes under Article 21 of the OECD Model Tax Treaty dealing with "other income" and is therefore taxable only in the athlete's country of residence.[134] Additionally, Article 17 does not apply to an athlete who is employed by and derives income from a government. Such income is to be treated under the provisions of Article 19.[135]

Certain DTAAs contain provisions excluding entertainers and athletes employed in organizations which are subsidised out of public funds and those visiting supported wholly or substantially by public funds, from the application of Article 17.[136] Such provisions are designed to facilitate cultural and sporting exchanges between two countries.[137] Clark has argued that this is an insubstantial justification as an exchange requires representation by both parties.[138] The evident problem with this exception is that teams from some Developed countries such as Australia are seldom government funded. In contrast, the majority of Asian sporting teams are supported by the Government and therefore exempt from taxation. The following practical effect of this provision could be considered: In the 1993/1994 cricket season the Sri Lankan cricket team won the limited overs Benson and Hedges World Series in Australia and New Zealand. The result is that the substantial prize-money won in this event is exempt from taxation in Australia. Conversely, if the Australian cricket team had won the World Series in 1995/1996 in Sri Lanka they would have incurred Sri Lankan taxation on the prize-money.

Thus, it has been argued that the reason of "cultural exchange" is contradictory and indicative of a case of reverse-discrimination as it significantly favours developing nations and nations that support their sporting teams. However, it is submitted that such an argument is flawed as all Developing countries' government do not support all their sports teams as most of them would find it financially unviable. Besides, Vogel has pointed out that the real reason behind the attempt of DTAAs to foster cultural exchanges within the ambit of Article 17 by ensuring that - under varying conditions - taxation in the State of residence is retained, is to avoid the necessity of increasing public subsidies of sponsored events as a result of taxation imposed by a foreign country.[139]

Article 17 (2), i.e., the second limb of the provision extends the right of the local tax administration not only to tax income paid direct to the above individuals, but also to tax such income even if it is received by companies or indeed any other entity. Very few treaties still exist which afford protection to such "loan out" companies from local taxation

Paragraph 2 to Article 17 was added when the OECD Model Convention was revised in 1977 and targeted a tax avoidance vehicle referred to as a "loan-out" corporation arrangement.[140] In a typical "loan-out" arrangement a foreign athlete forms a personal service corporation (PSC), also referred to as a "loan-out" corporation.[141] The athlete then contractually agrees to provide personal services to the PSC in exchange for a salary.[142] A second contract is entered into between the PSC and a third-party service recipient, such as a team.[143] This second contract ordinarily provides that the PSC agrees to supply the services of the athlete at a prearranged fee.[144] Under Article 7 the profits received by the PSC - the consideration for supplying the athlete's services - would be taxable in the country of residence, rather than in the source country, provided that the PSC had no permanent establishment in the source country.[145] Paragraph 2 counters this result and overrides Article 7 by providing that income from personal activities - performed by an athlete and received by the athlete's PSC - may be taxed in the source country.

Who is An International Athlete/Sportsmen?

The first line of inquiry under Article 17 taxation is with regard to the question of determination of the identity of a sportsperson. A "sportsman" is ordinarily considered to be an individual who engages in some physical activity which is exercised as an end in itself, usually in line with certain rules.[146] The term "sportsmen," however, is not limited to participants in traditional athletic events but also includes jockeys, billiard players, and participants in chess or bridge tournaments.[147] It is suggested that this extensive definition is required to cover the dynamic forum of entertainment.[148] However, the term "sportsmen" does not extend to administrative or support staff, such as coaches, trainers, or managers of teams.[149] Thus, the Article 17 scheme of Jock taxation may be said to differ in this regard from the scheme of non resident Jock taxation practised domestically in the different US States which was discussed earlier where the entire entourage accompanying a sports team is taxed. According to Vogel, the fact that athletes are grouped together with entertainers under Article 17 appears to indicate that the Article is meant to apply only to such athletes as perform in *public* - either directly or via the media.[150] These are typically athletes who engage in competitive games or sports. Thus, mountaineers, scuba divers and like are not covered. Also, a mental contest before an audience is included, if the type of contest is comparable with a physical contest. Consequently, chess is within the ambit of Article 17, but participation in a quiz contest and the like is not.[151]

Further, athletes and sportsmen may be either classified as employees or as self employed. However, with regard to the scheme of taxa-

130 Saunders, supra note 99.
131 VOGEL, supra note 115, at 844.
132 Id.
133 Evans, supra note 71, at 310.
134 Id. at 311.
135 VOGEL, supra note 115, at 840.
136 See for instance Article 17 (3) of India-Malaysia DTAA of 2004. Similarly, the Australia-Sri Lanka DTAA provides: "Notwithstanding the provisions of paragraph (1), income derived by an entertainer from his or her personal activities as such in one of the Contracting States shall be taxable only in other Contracting State if those activities in the first mentioned State are supported substantially from the public funds of that other State or of one of its political subdivisions or local authorities."
137 Clark, supra note 93, at 129.
138 Id.
139 VOGEL, supra note 115, at 848.
140 Dobray & Kreatschman, supra note 109, at 286-88. The use of loan-out corporations arose in a period when there were significant advantages to performing personal services through a corporation, rather than having the entertainer provide his services directly as an employee or independent contractor. Those advantages have been reduced. The Internal Revenue Service (IRS) and other tax authorities have made significant challenges to the use of loan-out corporations (with some success). Still, the use of the loan-out company continues, both for entertainers and other service providers.
141 Id.
142 Id. at 286.
143 Evans, supra note 71, at 310.
144 Id.
145 Id.
146 VOGEL, supra note 115, at 842.
147 Evans, supra note 71, at 308.
148 Clark, supra note 93, at 125.
149 Evans, supra note 71, at 308.
150 Rather than being restricted to the actual games, the count made in this connection must extend to cover proportionately the preparatory phase - rehearsals, practice sessions, time spent in training camps etc. See Stemkowski v. Comm., 690 F. 2d 46 (1982).
151 VOGEL, supra note 115, at 842.

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tion of Article 17, this classification is irrelevant, for the exclusively relevant point there is with regard to the *quality* of the activity being engaged in, i.e., whether or not the same would qualify as a public performance.[152] Also, Article 17 does not require the activities of athletes and sportsmen to be exercise *professionally*. Accordingly, Article 17 covers both professional activities as well as those exercised occasionally or in the capacity of an amateur.[153] However, Article 17 does require an athlete to exercise his activities *personally* in the other Contracting State. To do so, he must be present, and engage in his entertaining or athletic or sporting activities, in that State.[154] Further, if a sportsman receives a standardized remuneration for activities exercised in two or more States, for instance, a fixed salary, such remuneration must be split up *pro rata* to the volume of the activities exercised in each State.[155]

Governing CBDT Circular in India

The Central Board of Direct Taxes (CBDT) Circular No. 787 dated 10.2.2000 dealing with the taxation of the income of artists/entertainers/sportsman etc. examines the issue of non resident Jock taxation. The lead up to the circular was the Central Board of Direct Taxes' study of the taxation issues concerning national or international events or shows for entertainment, sports etc. The Circular recognizes that such shows are often characterized by substantial incomes being earned by organizers, sponsors, players, athletes and artists during very short periods of time, where many of the performers may leave the country within a few hours of the show or event.

The Circular confirms the principle that in the case of non residents, in addition to the provisions of the Income Tax Act, 1961, the applicability of DTAAs should be examined.

This is followed by a reiteration of the fact that under the DTAAs, usually there is a separate Article on "Artistes and Sportsmen," which provides for taxation in India of the income from the personal activities of the sportsman or artist in India. Even where the income from personal activities accrues to another person and not directly to the artist or sportsman, it is still taxable in India in accordance with this Article in the DTAAs. However, in agreement with the views of Vogel which have been discussed earlier in this paper, the Circular states that advertising or sponsorship income etc., of the sportsman or artist, which is *related directly or indirectly* to performance or appearance in India would also be covered under the DTAA Article on "Artists and Sportsmen." In cases where money is taxable in India under the DTAA, income would be determined in accordance with Section 115 BBA of the Income Tax Act and the tax deducted at source under Section 194 E of the Income Tax Act.

Where, under the same contract or under a separate one, the performance is recorded and royalties are stipulated to be paid, the same would be covered under the Article on "Royalties" in the DTAA. Further, the Circular questions the application of the provisions of Section 115 BBA of the Income Tax Act to the guarantee money receivable by a non resident sports associations in terms of the existence of the Article on "Other Income" or on "Income not expressly mentioned" of the relevant DTAA.[156]

Finally, by way of illustrations though not exhaustive, the Circular provides certain principles for Jock taxation:

a Gratuitous public performances by sportsmen lacking consideration would not attract taxation as there would be no income to tax.

b Any consideration received by sportsmen for live performances or simultaneous live telecast or broadcast on the radio, television, internet etc. in India would qualify as income and consequently would be taxable. Even if separate consideration is received for simultaneous live telecast etc. of performance, the same would be taxable in India and would be treated under the Article on "Artistes and Sportsmen" in the DTAA.

c The portion of the endorsement fees for a sportsman for the launch or promotion of products etc., which relates to his performance in India, would be taxable in India in accordance with the provisions of Section 5 of the Income-tax Act. Under the DTAA, this would fall under the Article on "Artists and Sportsmen." Against the backdrop, the contracts of the performers with event managers, sponsors etc., would be of vital importance in deciding the taxability of their income in India. It would therefore be necessary to obtain and examine the contracts of the performers relating to the event. The apportionment of income attributable to India would have to be done by the Assessing Officer.

The Circular clarifies that wherever the participants in public shows or events are not domiciled in India and spend less than 120 days in India they may be required to obtain a tax clearance certificate (TCC) under Section 230 of the Income Tax Act from the competent authority.[157] The Circular by way of abundant caution for securing the interests of the Revenue also provides that the competent authority should insist on the obtaining of TCC by performers and athletes in such shows or events wherever such persons *are believed* to be having taxable income in India, and no tax has been paid or no arrangement for the payment of tax has been made.

(e) Article 23 A & B: Tax Exemptions & Credits for Addressing Double Taxation Concerns

Since professional athletes earn income in several states, they are faced with the possibility of paying taxes to their residence state, or domicile, and various non resident jurisdictions.[158] Regardless of the application of the residence rule of taxation in a tax jurisdiction,[159] if a person pays income tax to a foreign country, he is entitled to receive a foreign tax credit[160] or a deduction[161] with respect to such foreign tax paid. The country of residence is obligated to eliminate double taxation under its entered DTAAs. The elimination of double taxation may be accomplished by one of two methods: (1) the exemption method contained in Article 23 A of the OECD Model Tax Treaty - income that is taxable in the source country is exempted in the country of residence, but may be taken into account in determining the rate of tax applicable to the taxpayer's remaining income; or (2) the credit method contained in Article 23 A of the OECD Model Tax Treaty - income that is taxable in the source country is subject to tax in the country of residence, but the tax levied by the source country is credited against the tax levied by the country of residence on such income.

In case of the latter method, which is usually followed, on account of the issuance of a credit, the sportsmen's overall tax liability would remain unchanged. To illustrate this concept, suppose that X is a Tax Jurisdiction A resident playing football for a team in the National Football League with a taxable income of Rs. 1,000,000. Since X is a domiciliary of Tax Jurisdiction B, he is subject to the State's income tax. Let us suppose his return equalled Rs. 66,400. If Rs. 100,000 of his taxable income is allocated to Tax Jurisdiction A, since he played two games in that State, X would have to pay non resident income taxes to the tune of approximately Rs. 7,200 to Tax Jurisdiction A. On his Tax Jurisdiction B tax return, X would be able to deduct Rs. 7,200

152 Id.

153 Id. at 843.

154 Id. Even a non-recurring appearance would be sufficient.

155 Ken Linsemann v. Comm., 82 T.C. 514 (1984).

156 The position of taxation of such guarantee money under this Article in some of the DTAAs is as under: U.K. Taxable in India, as per Article 23.3; USA Taxable in India, as per Article 23.3; Japan Taxable in India, as per Article 22.3; Australia Taxable in India, as per Article XXII(2); New Zealand Taxable in India, as per Article 22; Sri Lanka Taxable where the sports association/institution is resident, as per Article 22; France Taxable in India, as per Article 23.3.

157 The Central Government vide its Notification No. SRO 961 dated 25.5.1953 has listed the persons who are exempted from obtaining TCC. However, the said Notification also provides that the competent authority, at its discretion, may still require such persons to obtain TCC from the competent authority.

158 Ekmekjian, supra note 5, at 241.

159 It is possible, under certain circumstances, for an American to elect to exclude from gross income up to $70,000 of earned income while living abroad. However, in order to do that, he would have to be either a resident of a foreign country for an uninterrupted period of time that includes a whole calendar year, or be physically present in a foreign country or countries for at least 330 days in any period of twelve consecutive months. See I.R.C. § 911 (d) (1) (A)-(B).

160 See I.R.C. § 901 in the US domestic context.

161 See I.R.C. § 164 (a) in the US domestic context.

from his total tax liability of Rs. 66,400, resulting in net taxes payable to Tax Jurisdiction B of Rs. 59,200.[162] While this deduction represents a credit against the Tax Jurisdiction B's taxes, the athlete's total tax bill is still Rs. 66,400 but is paid to two separate tax collectors. From a tax standpoint, Tax Jurisdiction A benefits to the detriment of Tax Jurisdiction B. Since Tax Jurisdiction B offers a tax credit for taxes paid to Tax Jurisdiction A, the Tax Jurisdiction A Jock tax costs Tax Jurisdiction B tax revenues of Rs. 7,200.

4. Criticisms of the Existing "Artists & Sportsmen" Clause

As was explained earlier in the paper, the escalation of salaries, bonuses, tournament and prize winnings, and endorsements paid to athletes has triggered a strong financial interest in taxing sportsmen and athletes. The purpose of the "Artiste and Sportsmen" Article is to enable countries to collect potentially substantial amounts of tax revenue from foreign athletes who perform in their respective countries.

The primary defects of the article are its imprecision and inconsistency.[163] These flaws lead to a lack of uniformity in taxing foreign athletes and sportsmen which in turn frustrates the principal function of an income tax treaty; namely, to prevent taxes from impeding the free flow of international trade, investment, and the movement of persons.

(i) Imprecision

An example of the Article's imprecision is its failure to identify a specific method of computing the amount of the athlete's income that was actually earned in each source country, other than by the domestic laws of each source country.[164] The general definition of an athlete's income that is subject to tax under the article further accentuates the Article's imprecision. Only the income that is derived by an athlete from personal services as an athlete is subject to tax by the source country under the article. Tax officials, therefore, encounter a problem in applying this definition to indirect spin-off income - such as endorsement and sponsorship income - earned by an athlete for lending his or her name to a line of sporting goods or for appearing in a commercial. For example, the athlete may not necessarily be rendering personal services in the country where the goods are sold or where the commercial is shown, and the athlete's sporting activities may not be connected with the product that is advertised.

(ii) Inconsistency

Another major problem with the "Artiste and Sportsmen" clause is the variation of its terms in the different DTAAs after its actual incorporation which takes away from the ideal of uniformity in tax legislations which was intended at the time of framing of the OECD and UN Model Conventions. The mere fact that countries find it necessary to deviate from the terms of the Model Conventions is indicative of the insufficiency of the existing "Artiste and Sportsmen" clause. The following variation-models can be identified:

(a) Income Threshold Residence-Based Taxation Model:

Most US tax treaties with other countries include a minimum earning-threshold for Article 17 to operate. The US Treasury Department included the threshold to reflect the view that cultural exchanges should be encouraged, and that athletes should not be singled out for special adverse tax treatment.[165] For instance the US-Canada, US-UK tax treaties tax athletes in the source jurisdiction when earning more than $15,000 per taxable year. In case of the US-India treaty this figure is $1500. If the earnings are less than the threshold figure, the State of residence retains its right of taxation. However, the United States's tax treaty with China does not contain an Artiste and Athlete Article with an earning-threshold requirement. Thus, not only does the threshold exemption amount vary among countries, but the threshold exemption amount does not even really account for inflation. The US-UK Treaty, for example, has a threshold exemption amount of $15,000 which amount was set way back in 1973.[166]

(b) League-Play Residence-Based Taxation Model:

Following Article 17 of the Model income tax treaty of the OECD, the general rule around the world for the taxation of athletes and sportsmen as has been discussed in this paper is taxation by the source jurisdiction with a foreign tax credit in the residence jurisdiction. However, the U.S. and Canada do not always apply source based taxation to an athlete in respect of his or her employment with a team that participates in a league with regularly scheduled games in both countries.[167] Such athletes are subject only to taxation in the country of residence where (i) the athlete is present in the source country for 183 days or less, and (ii) the remuneration is not borne by an employer who is a resident of the source country or by a permanent establishment or fixed base of the employer in the source country.[168] Hence, the income of a league-based athlete from games played outside the country where his or her team is located is generally taxed on a residence basis. For example, when the New York Yankees play the Toronto Blue Jays in Toronto, the income of US-resident Yankees players is generally taxable only in the US. Macnaughton has argued that this provision appears to be anomalous relative to other treaties and may be something of a relic of the circumstances prevailing 25 years ago at the time of its creation.[169]

(c) Subsidiary-Clause Residence-Based Taxation Model:

Some DTAAs contain clauses which give the right to taxation to the State of residence in case the source jurisdiction waives its right to tax. For instance, the German-Denmark DTAA in 1990 had such a *subsidiary clause* according to which the State of residence could tax the remuneration in question if the State in which the sportsmen exercised his activities did not make use of its right to tax.[170]

(d) No Express Rule Model:

Overlooking the provisions of the Artiste and Sportsmen Clause, some DTAAs have no express rule for income derived by entertainers and athletes. For instance, an early version of the India-German tax treaty included no such provision.[171] Thus, in such a situation the rules with regard to business profits (Article 7) or independent personal services (Article 14) or dependent personal services (Article 15) would be applicable.

Thus, it is evident that the "Artiste and Sportsmen" Article's current form leaves room for improvement, which has forced many countries to consider changes in its typical form as prescribed in the OECD and UN Model Conventions. A solution could perhaps be found in a special multilateral treaty dealing with the issue of Jock taxation, instead of depending on bilateral negotiations premised upon Model tax treaties to secure the issue.

5. Conclusion

A tax that started as a petty attack on Michael Jordan is becoming a major concern for thousands of taxpayers, namely those involved in the field of sports. It has been argued that the only "harm" that would result from eliminating the Jock tax would be a slight loss of revenue in some high tax States - slight because credits to residents currently cancel out most of the collections from visitors. The benefits would clearly outweigh this small revenue loss. Athletes and their moderate income colleagues - scouts, assistant coaches, support staff, etc in the specific case of the United States - would not be singled out for unfair treatment, a great deal of unproductive tax paperwork would be eliminated, and the States' income tax systems would be operating on a more principled basis. It is certain that a reasonable approach to non

162 Ekmekjian, supra note 5, at 242.
163 Evans, supra note 71, at 320.
164 Id. at 321.
165 Susser, supra note 94, at 632.
166 Evans, supra note 71, at 322.
167 US-Canada DTAA, Article XVI, paragraph 3.
168 Such athletes are grouped with non-athlete employees and are subject to Article XV (Dependent Personal Services). Paragraph 2 of this article prohibits source-based taxation except in the described circumstances and where the amount of income is $10,000 or less.
169 See Alan Macnaughton and Kim Wood, Should Provinces Tax Non-Resident Athletes?, 52 (2) CANADIAN TAX JOURNAL 428-85 (2004), at http://www.ctf.ca/ctjindex/04ctj2.asp (last visited November 23, 2004); Alan Macnaughton and Kim Wood, The Anomalous Taxation of Athletes in U.S.-Canada Leagues 1 (2004).
170 VOGEL, supra note 115, at 848.
171 Id.

resident taxation would not include Jock taxes as practiced *inter se* amongst the US States.

The Jock tax is frequently criticized as it introduces a tax system that is poorly targeted and arbitrary as comparably rich professionals are not burdened with this form of taxation. A most interesting result of Jock taxation is that a jurisdiction that taxes non-resident athletes may be losing money *relative to* the situation where neither jurisdiction taxes such athletes. This can occur because the latter situation is not within the State's power; it cannot change the action of the other jurisdiction, but instead can only react by changing its own tax system.[172]

In India the principle of source based taxation *vis-à-vis* sportsmen is contained in Section 115 BBA of the Income Tax Act, 1961. As regards resident sportsmen, the National Sports Policy of 2001 promises tax reliefs. With respect to the taxation of athletes engaged in income producing activities in more than one country, the approach taken has been to conclude bilateral treaties that contain provisions that specifically address athletes and other entertainers in an "Artiste and Athlete/Sportsmen" Article. This Article, included in most modern bilateral tax treaties in the form of Article 17 usually, was introduced in response to the mobility of international entertainers and sportsmen and their ability to engage in tax avoidance activities. Also, taxing foreign athletes proved to be a steady and substantial source for the tax coffers' of States. In India CBDT Circular No. 787 of 2000 clarifies the operation of Article 17 in DTAAs entered into with other countries.

172 Macnaughton, supra note 9, at 11.

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The European Union and Football Hooliganism

by **Hans Mojet***

1. Introduction

On 29 May 1985, a disaster took place at the Heysel stadium in Brussels. Before the start of the UEFA Cup Final, British hooligans charged the section of the stand where there were mostly Italian supporters. A total of 39 people died and 670 people were injured. Liverpool and Juventus went on to play the Cup Final regardless. Afterwards, UEFA decided to ban British football clubs from European Cup tournaments for a period of five years and the Secretary-General of the Belgian football league was given a suspended prison sentence. Some 14 British hooligans were sentenced to three years' effective imprisonment.[1]

The Heysel tragedy led to the European Community's first involvement in the fight against hooliganism. Before, hooliganism had been a relatively unknown phenomenon on the European continent. This chapter gives an overview of the involvement of the EU in the fight against vandalism and violence in sport, which has led to numerous European Parliament resolutions and some European Parliament reports and to several Council resolutions and decisions. The hard and soft law resulting from the decisions of the EU institutions will be briefly described, although the amount of hard EU law in this field is rather limited. The non-binding 2001 Police Handbook will be discussed in more detail, as it gives a good impression of how international police cooperation in the fight against football hooliganism could be organised within the EU in future.

2. After the Heysel tragedy

Two weeks after the Heysel stadium disaster, the European Parliament adopted two resolutions condemning the violence preceding the European Cup Final.[2] It condemned "these violent crimes of a minority and their exploitation by fascist and extremist groups which promote chauvinist, racist, intolerant and aggressive feelings".[3] In later reports, resolutions and decisions, a similar connection was made between fascism, chauvinism and football hooliganism.

In the first of the resolutions, the Parliament furthermore called on the Commission to urgently propose a directive in this field for adoption by the Council. Such a directive had to guarantee that sporting events could take place in conditions which ensured the personal safety of both players and spectators. The resolution further proposed a ban on the sale of alcohol inside and near stadiums and called on the governments of Member States and sporting associations to launch a major information campaign to raise public awareness concerning the importance of fair play in sport and to support sporting associations in their struggle against violence at sporting events.

Finally, the resolution contained an instruction to the Youth, Culture, Education, Information and Sports Committee of the European Parliament. This Committee as soon as possible had to present an intermediate report on violence in sport, which in particular had to deal with the measures to be taken in the short term to avoid any repetition of violence in sport. In addition, the resolution proposed a public hearing, following which a final report would be prepared containing an inventory of the policy and legislation in the different Member States to combat violence in sport and including an investigation into the causes of the increase of violence in sport. Measures taken to combat this violence, however, should not prevent the organisation of European sporting events, especially among youth organisations.

The second resolution adopted after the Heysel tragedy among other things requested the Commission and the Council to submit practical proposals for a genuine European sports policy within the Community.[4]

3. The Larive Report on vandalism and violence in sport

The intermediate report requested in the aforementioned resolutions was drafted by the Dutch liberal MEP Mrs Larive-Groenendaal. It referred to earlier proposals by several MEPs for resolutions on violence in sport.[5] In it, the urgent call for practical measures to combat

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1 "Herinneringen aan het Heizeldrama", Robert Misset, NRC Handelsblad, 15 May 2001; "Vak Z of de schande van de Heizel", Gazet van Antwerpen, 27 December 1999; "Tientallen doden in Heizel-stadion, De Standaard, 30 May 1985.

2 Resolution of the European Parliament on the violence at the football-match in Brussels on 29 May 1985, 13 June 1985; Resolution of the European Parliament on the tragedy at the Heysel stadium in Brussels, 13 June 1985.

3 Resolution of the European Parliament on the violence at the football-match in Brussels on 29 May 1985, 13 June 1985, para. 1.

4 Resolution of the European Parliament on the tragedy at the Heysel stadium in Brussels, 13 June 1985.

vandalism and violence at football matches was repeated. These measures were to be taken at Community level, in close cooperation with governments and sports authorities. Furthermore, a balance had to be struck between strict measures to repress violence in sport and the maintenance of the fundamental values of our society (as the final part of the preamble stressed). The causes of this violence should also be dealt with.

The report suggested preventive measures in seven fields: international coordination, the sale of alcohol, body searches, the construction of football grounds, ticket controls, arrangements for supporters and the provision of entertainment. First of all, international coordination before, during and after matches between government, local authorities, police forces, sports organisations and other bodies concerned had to be strengthened. It was considered particularly important that a prudent timetable should be drafted for sporting events for the transport and accompaniment of supporters. In addition, exchange of information had to take place in order to initiate an effective campaign to prevent violence. Secondly, a ban was proposed on the sale and consumption of alcoholic drinks and of drinks in cans or bottles inside and around stadiums. Thirdly, the report made clear that body searches of all supporters should be performed, and any weapons or objects which might be used as such should be confiscated, as should banners and flags bearing slogans inciting to violence.

Fourthly, the design and construction of football grounds had to be adapted in order to meet European standards. Holding international matches at grounds which do not meet these standards had to be prohibited. The standards in question would concern: 1) the removal of all inflammable material; 2) barriers between groups of supporters which are strong enough to withstand crowd surges; 3) more and segregated entrances/exits both to the stadium and between blocks of seating, enabling their opening and closing to be controlled in accordance with requirements; 4) improvements in audiovisual control systems using closed-circuit television, loudspeakers and corridors for movement between blocks.

A fifth field in which action was considered necessary concerned ticket sales. These sales had to be brought under strict legal control, with sanctions applying against "ticket touts" selling tickets on the black market and against their customers. Another field of action was to include arrangements for supporters. These had to consist of the organisation and monitoring of travel arrangements for visiting supporters, the combined sale of tickets (travel and match), accompaniment of the supporters from the train or coach to the stadium and back and the imposition of a ban on alcohol during the journey. A final field of action concerned the provision of entertainment before, between and after sporting events, to prevent misbehaviour arising from boredom.

After listing these preventive measures against violence during football matches, the report called on the police to take further specific action. First of all, it suggested that a sufficient number of police forces have to be mobilised to combat violence around matches. Laws to combat drunkenness on the public highway and the carrying of weapons would need to be applied very strictly. Troublemakers (including foreigners) would have to be arrested at an early stage and be tried immediately. Stiffer penalties, alternative sentences and the payment or repair by the delinquents of the damage they caused were also considered necessary. In addition, the report urged for a legal stadium ban based on a European blacklist for persons convicted of criminal acts at previous matches. Finally, the clubs whose supporters committed the acts of violence would have to be punished as well. The report proposed that all these measures should be laid down in a Community Directive, as the Parliamentary Committee which drafted the report considered this the only way in which the uniform application of the measures could be ensured. In addition, the report called for another Directive to take account of the work of the Council of Europe, which adopted a convention against spectator violence after the Heysel stadium disaster.[6]

The report also stated that a broader approach to the problem of football hooliganism was needed. Such an approach could be instigated if the European Ministers responsible for sport were to "study longer-term measures which [would] ensure the harmonious development of sport in the Community by drawing up a genuine action programme".[7] This programme had to comprise education programmes at schools and public information campaigns against extremism and campaigns to promote fair play in sport. Sporting facilities at schools and for the general public also needed to be improved. Another suggestion in the report was to promote contact between supporters of opposing teams preceding matches, in order to improve mutual understanding. Finally, the programme had to aim to establish appropriate training for police forces and the appointment of police liaison officers.

Another proposal was to draw up a code of conduct for the media in order to avoid any stirring up of aggression and chauvinist sentiments by them.[8] Freedom of movement for sportsmen and women was also expected to lead to a less nationalistic attitude during European sporting events. Finally, it was suggested that the Committee on Youth of the European Parliament draft a final report on the basis of a public hearing. This report would have to include a study into the causes of the increase of violence in sport, research into the exploitation of sport for commercial, political and criminal purposes and a comparative overview of relevant legislation in the Member States. However, it had to be prevented that measures to combat football hooliganism would impede the organisation of European amateur sporting events.

4. An amended resolution

On 11 July, the European Parliament adopted the resolution proposed by the Education and Sports Committee after amendments.[9] One amendment was that the resolution now proposed disciplinary measures against players who in the course of matches gave way to excesses of enthusiasm and behaviour, which could unduly arouse and provoke emotional reactions from the spectators. The amended resolution also urged UEFA and FIFA to be responsible in determining the stadiums where major matches would take place and to ensure adequate standards and safety measures. Apart from these amendments, the essential elements of the proposed resolution of the Education and Sports Committee were left intact.

Despite the fact that two Community Directives concerning the fight against vandalism and violence in sport had been called for, the Commission did not submit any proposals to this end. In a new Resolution in January 1988, the European Parliament expressed its regret and repeated its call for measures against football hooliganism. It added that a possible Framework Directive would have to include rules concerning the international coordination of measures (among which exchange of information) and the harmonisation of national measures, and would need to provide standards for stadiums. Some new measures were also proposed, such as the establishment of central national information points in all Member States. These information points would consult prior to all international sporting events so as to be able to adopt common measures. Exchange of information should facilitate the extradition and bringing to trial of hooligans. Finally, it was suggested that Member States should introduce a licensing system for sports stadiums (based on health and safety grounds). The Parliament further called on the Commission to collect information on the role of racist and extreme right-wing political organisations in the provocation of violent incidents during sporting events.

5 Motion for a resolution tabled by Mr McMahon on hooliganism and violence by football supporters at European football matches (Doc. 2-734/84), motion for a resolution tabled by Mrs De Backer-van Ocken and others on violence in sport (Doc. 2-1661/84); motion for a resolution tabled by Mr De la Malene on the increase in acts of violence (Doc. 2-1692/84).

6 The European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches; the Convention was adopted on 19 August 1985 and entered into force 1 November 1985.

7 Interim Report drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport on Vandalism and Violence in Sport, 2 July 1985, Motion for a resolution on vandalism and violence in sport, para. 6.

8 Ibidem, para. 8.

9 Resolution of the European Parliament on the measures needed to combat vandalism and violence in sport, 11 July 1985.

Preventive action, especially in the social sphere, also had to pursued. Its objective would have to be to educate young people towards a new way of thinking, which rejects violence and regards sport as a means of meeting other people. Member States had to make greater use of information campaigns. Sport education at school and sporting facilities in general needed to be improved. Attention also had to be paid to the link between drug use in sport and violence. The resolution concluded with a call for a European action programme for the harmonious development of sport. Six years later, the European Parliament would repeat its call for European standards concerning security in football stadiums. In addition, it called for comparative research into the Member States' policies for preventing and combating football hooliganism.[10]

5. The 1996 Council Recommendation

During the 1990s, the Council of Ministers finally began to pay attention to the phenomenon of football hooliganism, which would ultimately even result in a (limited) number of binding decisions in this field. However, the first action by the Council was to adopt a number of non-binding recommendations.[11] In April 1996 the Council of Ministers adopted a recommendation in which it advised the EU Member States to draw on the recommendations of the Standing Committee of the Convention concerning spectator violence of the Council of Europe.[12] Member States were further urged to use a common format for police intelligence reports on known or suspected groups of troublemakers. This format would facilitate the exchange of information between Member States. The annex to the Council recommendation contained a specimen of the suggested format. Reports would have to be exchanged quickly and effectively between the Member States, possibly by means of the network of correspondents concerning football hooliganism. In addition, Member States were advised to cooperate in the training of police: where appropriate, police officers should be encouraged to attend relevant training courses in other Member States. Police cooperation also had to be made possible before, during and after football matches. Requests for such cooperation would have to be submitted as soon as possible and no later than four weeks prior to the match. Finally, the Council of Ministers recognised the importance of stewards in this field, and recommended that the police should contribute to training programmes promoting close cooperation between stewards and police officers.

6. The Roth Report and the resulting Resolution

In April 1996, German MEP Claudia Roth (Green Party) submitted her report on hooliganism and the free movement of football supporters.[13] The report concerned a thorough examination of the problems caused by football hooligans and possible measures to counter these problems. The report resulted in a resolution, which was adopted by the European Parliament on 21 May 1996.[14] The resolution started with some general points, among which a call on the EU Member States to respect the Convention of the Council of Europe concerning spectator violence. Concerning stadiums, the European Parliament "[took] the view that the absolute requirement to provide all-seater stadiums is excessive and that the installation of "cages" is dangerous and degrading and may give rise to violence; [took] the view, on the other hand, that women and children should be encouraged to attend sports events, with family enclosures."[15] Furthermore, the Parliament noted "that the current file system and the exchange of data has resulted in the detention or expulsion of innocent persons."[16]

After these general points, the Resolution formulated several recommendations concerning social and preventive policy, free movement of persons and police and legal measures. Concerning the first policy field, fan projects were regarded by the Parliament as an excellent means to prevent violence at sports events. Clubs, national associations, UEFA and FIFA should therefore provide financial support for these projects. Clubs should also try to involve supporters in the life of the club, in particular in important decisions. The European Parliament further called on the Commission to take action against football clubs which linked ticket sales to travel packages. It furthermore proposed that all supporters' clubs should appoint stewards to look after and accompany groups of supporters of their club to away matches.

It was further noted that measures to restrict the free movement of persons could only be directed at individuals whose past conduct indicated that they posed a genuine and serious threat to public safety. The nationality of any given supporter can never be a criterion based on which access to sports events is denied. However, under certain conditions, the organisation of a match may justify internal border controls, "provided they would not exceed what is strictly necessary to respond to a serious threat to public safety and to protect the rights and freedoms of others."[17] In this, the European Parliament aimed to strike a balance between different sets of rights: "the rights of all people, including football supporters, to free movement within the European Union; the rights of those who want to attend football matches in a safe and secure environment; and the rights of those who live near to stadiums."[18] Restricting access to stadiums can only take place in accordance with fundamental standards. Unfortunately, legal differences between Member States made it difficult to apply restrictions on attendance at matches in other Member States for persons convicted of football-related offences. Only supporters who had been convicted for such offences could legitimately be prevented from attending football matches.

Concerning police and legal measures, the European Parliament called on the Member States to adopt legislation providing appropriate penalties for individuals found guilty of football-related offences. These penalties had to include stadium bans for a specific period of time Spectators committing offences must be tried in accordance with the law of the country where the offence was committed. In case of international matches, police assistance also had to be provided by police officers from the country of the team playing away. In general, it was considered that international police information had to be improved, as well as the exchange of information. Football clubs themselves also had to take appropriate measures to prevent fans from intimidating players and supporters. Clubs which openly tolerated violence and race hatred had to be penalised. A final recommendation concerned rigorous security checks, which must be carried out at the entrance to and in the streets near stadiums.

The resolution concluded by calling for the inclusion of a provision on countering racism, anti-semitism and xenophobia in the Treaty on the European Union. The European Parliament also called for extensive research to be undertaken into the causes of hooliganism, the role played by extremist organisations among groups of supporters and the ways in which the media could help prevent hooliganism. It also called on the Council to consider a Convention on measures to combat football violence. This Convention could define the concept of "high-risk fan" and lay down clear rules for the exchange of information between Member States (with the necessary legal protection).

7. Binding measures

The first binding Council decision to impact the fight against football hooliganism was made in May 1997,[19] when the Council adopt-

10 Resolution of the European Parliament on the Community and Sport, 6 May 1994.

11 Earlier recommendations of the Council (indirectly) relating to football hooliganism were the following: Council recommendation of 30 November 1993 concerning the responsibility of organisers of sporting events; Council recommendation of 1 December 1994 concerning direct, informal exchanges of information with the CCEEs in the area of international sporting events (network of contact persons); Council recommendation of 1 December 1994 concerning exchange of information on the occasion of major events and meetings (network of contact persons).

12 Council Recommendation on Guidelines for Preventing and Restraining Disorder connected with Football Matches, 22 April 1996.

13 Ausschuß für Grundfreiheiten und innere Angelegenheiten, Bericht über das Problem des Hooliganismus und die Freizügigkeit der Fußballfans, Berichterstatterin: Frau Claudia Roth, 25 April 1996.

14 Resolution of the European Parliament on Hooliganism and the Free Movement of Football Supporters, 21 May 1996.

15 Ibidem, para. 9.

16 Ibidem, para. 10.

17 Ibidem, para. 28.

18 Ibidem, para. 29.

19 Joint Action adopted by the Council on the basis of Article K.3 of the Treaty on European Union with regard to Cooperation on Law and Order and Security, 26 May 1997.

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ed a Joint Action with regard to cooperation in law and order and security. The decision was taken within the framework of the third Community pillar, which (at that time) comprised cooperation in the field of justice and home affairs. The Joint Action was one of the (binding) instruments available within this framework. It was intended to supplement existing bilateral and multilateral arrangements and was without prejudice to closer cooperation between Member States.

The first obligation following from the Joint Action concerned the mutual provision (by Member States) of information. This information was to be requested via central bodies, whether upon request or not. Information would be provided if "sizable groups which may pose a threat to law and order and security are travelling to another Member State in order to participate in events. This information shall be supplied at as early a stage as possible to all Member States concerned, regardless of whether they are neighbours, including Member States of transit."[20] This information was to include the fullest possible details concerning the group in question (overall composition and nature of the group: is it aggressive and is there any chance of disturbances?), routes to be taken and stopping-off points, means of transport and any other relevant information. For each of these categories of information it had to be indicated how reliable the provided information was. Finally, the provision of information was to be in compliance with national law.

Article 2 had a less binding character than the first Article of the Joint Action. It created the possibility to post liaison officers to other Member States upon their request. These officers would have an advisory and supportive function, without any special powers, and they would be unarmed. They were to provide information and carry out their duties in accordance with instructions from their home Member State and guidelines from the Member State to which they were seconded. The host Member State would ensure the protection of the liaison officers (para. 1). The competent authorities of the host Member State had to determine the activities in which the liaison officers would be involved. Liaison officers must follow the guidelines of the aforementioned competent authorities (para. 2). Article 3 concerned a basis for further cooperation in the field of law and order and security. Each spring, the EU Presidency had to organise a meeting of heads of central bodies for law and order and security in the Member States. During these meetings matters of common interest would be discussed. Furthermore the heads of the aforementioned central bodies were to encourage the holding of exercises and exchanges and training secondments for their staff.

8. The possibility of stadium bans

In its recommendation of 9 June 1997, the Council considered the possibility of stadium exclusions/bans for football hooligans.[21] In March 1997, an EU seminar on football hooliganism took place in Amsterdam. This seminar led to the conclusion that greater cooperation between police forces on specific issues to combat disorder connected with football matches was needed. In certain Member States, stadium exclusions were found to be an effective means. In some of those Member States the exclusion followed from civil law (i.e. bans imposed by football clubs), while in other Member States the ban was regulated under public law. Stadium exclusions in one Member State must also be effective in another Member State during European football matches. For this reason, the recommendation suggested that the responsible Ministers in the Member States should invite their national sports associations to examine how stadium exclusions imposed under national civil law could be applied to football matches in a European context. An annual report on the situation in the Member States concerning football hooliganism and an annual meeting of experts would also be useful. Special attention had to be paid to international networks of supporters' groups. A checklist of media policy for use by police authorities in the Member States was also considered desirable. This checklist would contain recommendations for a media strategy relating to international football matches and championships. Comparative research into the situation in the Member States could lead to a future Joint Action to be adopted by the Council.

9. The first Police Handbook

In June 1999, the Council adopted a resolution concerning a Handbook for international police cooperation and measures to prevent and control violence and disturbances in connection with international football matches (the Handbook was included in the annex to the resolution).[22] A revised version of the Handbook was adopted in 2001 and therefore the description of the 1999 Handbook given here will be brief. The full title of the Handbook was as follows: Handbook for international police cooperation and measures to prevent and control violence and disturbances in connection with international football matches, in which *at least one Member State is involved* either by participation in the match and/or by hosting the match. The *non-binding* Handbook concerned a large number of recommendations in this field. The Handbook concerned the following topics:

- *Preparations by police forces*: organising authorities and police forces had to involve police forces from participating countries in preparations, at an early stage;
- *Organising cooperation between police forces*: organising authorities and police forces had to take into account requirements for the organisation of international police cooperation;
- *Information management by police forces*: organising authorities and police forces had to take into account the requirements of police information management;
- *Cooperation between police forces and stewards*: organising authorities and police forces had to call on the persons responsible for supervising fans from participating football associations for assistance in maximum cooperation;
- *Checklist for media policy and communication strategy (police/authorities) relating to major (international) championships and matches*: police forces must make use of the media policy checklist provided by the Handbook;
- *Requirements for admission policy and ticketing policy*: organising authorities must take into account the requirements for organisers in the area of admission policy, in particular by establishing a ticketing policy and ticket control and by separating rival groups of fans.

The Handbook further contained a list of documents previously adopted by the Council of the European Union.

10. The 2001 Handbook

The new Handbook from 2001 was adopted in a Council resolution to which it was annexed and replaced the 1999 Handbook.[23] The Handbook remained a non-binding document containing a large number of recommendation concerning information management by police forces, preparations by police forces, organising cooperation between police forces, cooperation between police forces and stewards, the role of the organiser and a list of documents previously adopted by the Council. Below, we will focus more closely on the recommendations provided.

10.1 Information management by police forces

The exchange of information is "of the utmost importance" to combat and prevent football-related violence. In order to achieve this, Member States were strongly recommended to establish a permanent national (police) football information point. This information point ideally had to be the "central and sole" contact point for the exchange

20 Ibidem, Art. 1(1).

21 Resolution of the Council on preventing and restraining football hooliganism through the exchange of experience, exclusion from stadiums and media policy, 9 June 1997.

22 Resolution of the Council concerning a Handbook for international police cooperation and measures to prevent and control violence and disturbances in connection with international football matches, 21 June 1999.

23 Resolution of the Council concerning a Handbook with recommendations for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension, in which at least one Member State is involved, 6 December 2001.

of information relating to football matches with an international dimension. Member State were free to decide to organise certain contacts in this field through the competent authorities, but the national football information point should at least be provided with a minimum of information. Moreover, it had to be avoided that the quality and efficiency of the activities of the national information point would be jeopardised by any separate exchange of information. Member States had to equip the information points with the necessary technical facilities to fulfil their tasks effectively.[24]

The football information point also needed to aim to facilitate international police cooperation. The information point could support the competent national authorities by addressing the necessary proposals or recommendations to these authorities regarding the policy to be followed by them on football-related issues. With a view to football matches with an international dimension, it was considered desirable if the information point had at its disposal an updated risk-analysis related to its own clubs and its national team. In addition, the information point was to be responsible for administering personal data regarding high-risk supporters in accordance with the applicable legislation. Finally, the information point would be responsible for the coordination of police information in connection with football matches, whereby it could extend this exchange of information to other law enforcement services responsible for safety or public order.[25]

The Handbook devoted much attention to the actual exchange of information between the national football information points. A distinction was made between general information and personal information. What was termed general information was made up of information defining the event in all its dimensions with particular attention to the security risks at the event (strategic *information*), information that could help make a correct analysis of the issues surrounding the event (*operational information*) and information allowing the persons in charge at the operational level to respond appropriately in connection with order and security surrounding the event (*tactical information*). Personal information referred to information concerning individuals who represented or might represent a danger to public order or to security in connection with the event or who might have been involved in incidents, with a view to preparing or taking the appropriate measures (mentioned as examples of these measures are stadium bans and photos of the persons in question). Personal information could only be exchanged if it served a well-defined goal, i.e. it had to contribute to the success of a specific mission. Use of such information was furthermore limited in time and scope.[26]

Concerning the chronological sequence of the exchange of information the Handbook distinguished between three stages: *before* the event (i.e. the football match or tournament in all its aspects), *during* the event and *after* the event. The national football information points of both the organising country and the supporting country would each have different tasks during these stages. The three stages did not always need to be strictly separated.[27]

The tasks assigned to the national football information point of the *organising* country before, during and after the event were the following (with the aforementioned distinction concerning general information (strategic, operational and tactical information) also applying here). *Before* the event the information point of the organising country could formulate the information requirements and send a request for information to national football information points in one or more other countries (*strategic level*). This had to concern matters such as the risk analysis concerning the fans of the team concerned, information on the team itself and its accompanying party (when there was a threat) and information concerning spotters. Information if possible also had to concern the applicable legislation and policy of the authorities of the organising country, information on the organisation of the event and identification of officials and police chiefs in charge. This information could also be made available to the other national football information points concerned by the event. At *operational level*, the national football information point of the supporting country could be asked to supply information regarding the movements of normal and risk supporters, the participating team and its accompanying party, ticket sales and possible requests for the participation of police officers and of fan coaches, and information regarding general crime, including terrorism. Information concerning the organisation of security during the event (e.g. the integration of the spotters within the local security system, guidelines for fans) could also be provided to the information point of the supporting country.[28]

During the event the national football information point of the organising country could request confirmation of the information supplied by the information point of the supporting country, including an update of the risk analysis (*operational level*). According to the Handbook, this request had to be forwarded and answered via a system of liaison officers if such a system had been set up. At *tactical level*, the information point of the organising country could provide confirmation of the information supplied by having all the parties involved carry out checks on the spot. Proposals might then be made for adjusting the measures. General information regarding the possible return of fans that were expelled and/or refused entry must also be supplied to the national football information points of the country of origin and of the transit countries. If necessary, information regarding this return could also be provided by the information point of the organising country.[29]

After the event, the information point of the organising country could assess fan behaviour so that a risk analysis of visitors could be updated by the information point of the supporting country. The process of information exchange could also be evaluated (*strategic level*). At *operational level* the information point of the organising country could assess the operational usefulness of the information provided by the supporting countries and of the support supplied by the visiting country. In addition, it could supply factual information concerning the reported visitors and a description of the incidents. Information regarding possible arrests could also be exchanged, with the legal possibilities being taken into account.[30]

For the national football information point of the *supporting* country, the Handbook recommended the following tasks. *Before* the event it could on its own initiative supply all relevant information to the other national football information points concerned. In addition, it could supply the information point of the organising country with answers to the questions formulated and make use of the list of stadium bans, in conformity with the law (*strategic level*). At *operational level*, it could answer the questions asked, especially the questions concerning the movements of fans, the participation of police officers such as spotters and the sending of fan coaches. At *tactical level*, preparations to integrate the police delegation could be initiated. *During* the event and at operational level, the information supplied could be updated and the movements and stays of the fans could be monitored by the information point of the supporting country.[31]

After the event the information point of the supporting country could adapt the risk analysis (*strategic level*). At *operational level* it could carry out an assessment with regard to the following issues: the exchange of information based on the factual information supplied by the national football information point of the organising country; the operational usefulness of the exchange of information; the strategic and operational information given in advance by the national football information point of the organising country and the spotters' work.[32]

Concerning the communication procedure between the national football information points of the differing countries, the Handbook

24 Ibidem, Chapter 1, Section 1, 1. Introduction.
25 Ibidem, Chapter 1, Section 1, III. Tasks with an international dimension.
26 Chapter 1, Section 1, IV. Exchange of police information, 1. (Kinds of information).
27 Chapter 1, Section 1, IV Exchange of police information, 2. (Chronological sequence of information exchange).
28 Chapter 1, Section 1, IV Exchange of police information, 2.a. (Task of the national football information point of the organising country), para. 1.
29 Chapter 1, Section 1, IV Exchange of police information, 2.a. (Task of the national football information point of the organising country), para. 2.
30 Chapter 1, Section 1, IV Exchange of police information, 2.a. (Task of the national football information point of the organising country), para. 3.
31 Chapter 1, Section 1, IV Exchange of police information, 2.a. (Mission of the national football information point of the supporting country), paras. 1 and 2.
32 Chapter 1, Section 1, IV Exchange of police information, 2.a. (Mission of the national football information point of the supporting country), para. 3.

contained the following recommendations. First of all, the contacts between the police services of the countries involved in an event had to be coordinated and, if necessary, organised by the national information points. In addition, the lines of communication and information facilities had to be clear to the supporting foreign police forces. If a system of liaisons officers was set up, the different police forces deployed throughout the championships or match had to communicate via the liaison officer appointed and seconded by the country in question. This officer could have responsibility for tasks relating to public order, violent football hooliganism and general crime, including terrorism, where this was connected with a particular football match or tournament. If in place, local football information points had to cooperate with the national football information point. The use of the native language was recommended. The communication between the national information points had to guarantee the confidential character of the exchanged information. The exchanged information could also be stored and consulted at a later date by other national football information points.[33]

Finally, four general rules concerning the exchange of information were recommended. First of all, the police force of the organising country had to shield the liaison officer of the supporting foreign police force from any contact with the media, if the liaison officer so desired. Secondly, the officer had to be stationed at the national football information point for championships spread over a number of days and in case of one-off matches in the host country concerned. Thirdly, the national information point of the organising country had to make arrangements to promptly channel information received from the foreign police team to the proper authorities within its own police organisation. It also had to appoint an information officer who would be attached to the support team responsible for reconnaissance or spotting. The officer would be a contact for the team leader and would be responsible for the proper channelling of information. Finally, the police forces of the organising country had to ensure that there were no differences in the quality of information available at local and national level.[34]

The national football information point could also support the competent national authorities and local police services with regard to national or international football matches. Concerning national football matches the information point could coordinate the exchange of information and organise the spotters' work. In addition, it could ensure the exchange of information with third countries. The first appendix to the Handbook contained a format for this exchange of information.

10.2 Preparations by police forces

In case of football championships or matches with an international dimension, police forces of the countries involved in the event could support each other. The Minister responsible in the organising country had to send a formal request for support. Before sending this request the Minister would receive advice from the national police services. The request had to indicate the degree of support and its constituent elements and had to be made well in advance of an event. For international tournaments, the supporting foreign police team required at least 16 weeks' preparation time. A request for police assistance could only be sent to countries whose assistance contributed added value. This added value had to be considered in the light of a number of factors (such as professional experience of football-related violence, knowledge about risk fans and being able to provide information so as to avert disturbances of public order and security). International police cooperation had to ensure the safety of the event with the following aims: intelligence gathering, reconnaissance, spotting and bringing the crowd under police supervision. The police forces from the supporting countries would be responsible for providing an advance risk analysis, which had to be handed over to the organising country at least two weeks before the beginning of the game (or, in case of a tournament, at least eight weeks before the tournament would start). This analysis had to determine in which of the four fields mentioned police cooperation had to be requested. Furthermore, spotters who were acquainted with them had to accompany risk fans where possible. After receiving a request the foreign police force would have to indicate as soon as possible the extent to which it could meet the request. Supporting police forces have to be given the opportunity to acquaint themselves with the organisation of police operations in the host country and to get to know the operation commanders who are responsible for the match days. [35]

10.3 Organising cooperation between police forces

The Handbook recommended making maximum use of the support that foreign police forces could provide. This support had to be part of the host police organisation's tactical plan. Therefore, foreign police forces had to be informed thoroughly (in a language they understood) about this tactical plan and had to be given the opportunity to attend briefing and debriefing procedures. The foreign police forces also had to be given the opportunity to become an explicit partner in the information structure (so that they could supply information as well as be informed). Finally, they had to be actively involved in the police deployment in the field.

The host police organisation had to guarantee the safety of the supporting foreign police officers. In addition, the police forces of the country from which the fans would come had to supervise risk fans from the start of their journey until they reached the country where the match was to be played. The supporting country had to forward the necessary information on these risk fans to the organising country, so that these risk fans could be prevented from entering the country (insofar as the local law allowed this). Countries, which have the legal possibility to prevent risk fans from travelling abroad had to take all the necessary measures to achieve this objective effectively and had to inform the organising country accordingly. Each country had to take all possible measures to prevent its own citizens from participating in and/or organising public order disturbances in another country. Furthermore, the host police organisation had to assign the police team from the supporting country at least one accompanying police officer (preferably familiar with football hooliganism and with the spotters' task and with sufficient language knowledge) to maintain operational contact with the team and make reports.[36]

10.4 Cooperation between police forces and stewards

Police forces and stewards' organisations had to work together on a complementary basis. Placing a senior official from the stewards' organisation in the command centre of the police forces had to be considered by the latter. Mutual provision of information by both organisations had to be organised effectively.[37]

10.5 Checklist for media police and communication strategy

The Handbook concluded by providing a detailed checklist for media policy and communication strategy (of the police forces and responsible authorities) relating to major (international) championships and matches. The central strategic aim of the media policy had to be "ensuring police authorities" cooperation with the media in informing the public at national and international level of forthcoming championships and preparations and providing those attending matches with appropriate police advice concerning their security."[38] This media policy would be part of a communication strategy and had to demonstrate the supportive role of the police and the authorities in ensuring the festive nature of sporting events. An active media policy had to have the following aims, according to the Handbook:

- Creating a positive public image for the policy pursued by police and authorities;
- Promoting amenities for those attending matches and encouraging a sporting attitude on their part;
- Discouraging misbehaviour by those attending: misbehaviour does not pay;

33 Chapter 1, Section 1, IV Exchange of police information, 3. (Communication procedure).
34 Chapter 1, Section 1, IV Exchange of police information, 4. (General Rules).
35 Chapter 2, Preparations by police forces.
36 Chapter 3, Organising cooperation between police forces.
37 Chapter 4.
38 Chapter 5, Checklist for media policy and communication strategy, 1. Media Policy, para. 1.

- Informing the public of police measures and the steps, which would be taken in the case of disturbances.

Finally, the media policy had to convey the idea of overall control, suggest security and trust, make it clear that football hooliganism would be severely dealt with and had to ensure openness and transparency.[39]

Concerning the communication strategy, the Handbook recommended establishing relations with the media focusing on championships and matches. These relations had to be established well in advance of the events. The press services of police, local and national authorities and national and international football organisations had to cooperate in order to communicate an unambiguous policy to the media. Finally, arrangements had to be made for providing police information to all those concerned. This could be done though information folders and daily press offices and by setting up a special press office for the duration of championships. The recommendations on the communication strategy were followed by a long list of "important topics for consideration", among which timely preparation and planning. [40]

10.6. Role of the organiser

The Handbook contained a number of requirements which the organisers of football events had to fulfil. Organisers had to take "all the sufficient and necessary measures" to avoid disturbances of the peace. An overall approach between all the parties concerned was expected to lead to an efficient policy and for this reason cooperation between the organiser, the private parties involved, the authorities and police services was strongly recommended. Member States had to identify who was responsible as the organiser of the match and of a possible division of responsibilities if two or more bodies were. In order to maintain public order and safety, the authorities and police services concerned had to impose on the organiser prior minimal requirements, which they had to meet in order to organise national or international games. These requirements had to lead to a situation in which the organiser and other services concerned fully assumed their own responsibilities so that the police forces could concentrate on their principal task of maintaining law and order.[41]

The second appendix to the Handbook contained a checklist for the authorities and police services. The checklist consisted of a number of requirements, which could be imposed upon the organiser of the match. The requirements had to be in conformity with national law. Requirements concerned the appointment by the organiser of a safety officer (for the coordination of safety policy), safety standards with regard to infrastructure, the use of stewards and ticketing policy and control. Other requirements concerned stadium regulations (among which the civil law exclusions/bans), agreements to be concluded (with the authorities, police services and emergency services concerned) and a local charter to be concluded in order to guarantee the safety of all the supporters, local residents and other parties concerned.[42]

11. The Council Decision of 25 April 2002

In April 2002 the Council adopted a decision concerning security in connection with football matches with an international dimension.[43] It based this decision on Article 30(1)(a) and (b) and Article 34(2)(c) of the Treaty on European Union. Both these provisions are part of Title VI of the Treaty concerning police and judicial cooperation in criminal matters and aim to achieve the Union's objective of providing EU citizens with a high level of safety within an area of freedom, security and justice. Article 30 concerns common actions in the field of police cooperation among which operational cooperation (para. 1(a)) and the exchange of information (para. 1(b)). Article 34 concerns the process of decision-making in the third-pillar (which entails police and judicial cooperation in criminal matters). According to Article 34(2)(c), the Council can adopt binding decisions in this field. These decisions shall, however, not entail direct effect. The Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union. This means that the decision of 25 April 2002 is binding upon the Member States, but lacks direct effect.

The decision gave binding effect to a number of recommendations from the 2001 Handbook on police cooperation, especially concerning the exchange of information. First of all, it made binding the recommendation that each Member State set up or designate a national football information point. The information point has to act as the direct, central point for exchanging relevant information and for facilitating international police cooperation in connection with football matches with an international dimension. Each Member State can also decide to carry out certain contacts on football-related aspects through the services competent for those specific aspects, but it should always supply the national football information point with a minimum of information. Member States have to ensure that their national information points are capable of fulfilling their tasks efficiently and promptly. The Council decision applies without prejudice to existing national provisions, in particular the allocation of powers among the different services and authorities in the Member States concerned.

Article 2 of the Council decision concerns the tasks of the national football information point. The information point is responsible for coordinating and facilitating the police information exchange in connection with football matches with an international dimension. This exchange may also involve other law enforcement authorities contributing to security or law and order in accordance with the distribution of powers in the Member States. Therefore, the information point is to have access to information involving personal data on high-risk supporters. This access should be in accordance with the domestic and international rules applicable. In addition, the information points must facilitate, coordinate or organise the implementation of international police cooperation in connection with football matches with an international dimension. Furthermore, for these matches national football information points will provide, at least at the request of another football information point in a Member State concerned, a risk assessment of their own country's clubs and national team. Finally, they can be responsible for providing assistance to the competent national authorities.

Before, during and after a football event with an international dimension, national football information points, at the request of a national football information point concerned or on its own initiative, will engage in mutual exchange of general information and personal data.[44] The general information exchanged shall comprise strategic, operational and tactical information. These concepts are defined as follows:

- *strategic* information: information specifying all aspects of the event, with particular reference to the security risks involved;
- *operational* information: information providing an accurate picture of proceedings in the course of the event;
- *tactical* information: information enabling those in charge of operations to take appropriate action for the purposes of maintaining order and security in connection with the event.

The exchange of personal data has to take place in accordance with the domestic and international rules applicable. In this context, reference is made to the principles of Convention no. 108 of the Council of Europe and to a Recommendation of the Committee of the Council of Europe.[45] The exchange of personal data has to take place with a view to preparing and taking the appropriate measures to

39 Chapter 5, Checklist for media policy and communication strategy, I. Media Policy, paras. 2 and 3.

40 Chapter 5, Checklist for media policy and communication strategy, II. Communication strategy.

41 Chapter 6, Role of the organiser, Section 1, Criteria with which the organiser should comply.

42 Handbook, Appendix 2, Checklist concerning possible requirements to be met by the organiser.

43 Decision of the Council concerning security in connection with football matches with an international dimension, 25 April 2002.

44 Ibidem, Art. 3.

45 Convention no. 108 of the Council of Europe of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data and Recommendation no. R (87) 15 of the Committee of Ministers of the Council of Europe of 17 September 1981 regulating the use of personal data in the police sector.

maintain law and order when a football event takes place. Such exchange may in particular involve details of individuals actually or potentially posing a threat to law and order and security.

National football information points must coordinate the handling of information on football matches with an international dimension.[46] They are to ensure that all the police services concerned receive the necessary information in time. After processing, information can either be used by a national football information point itself or be passed to the relevant authorities and police forces. The information point in the Member State hosting a football event must communicate, before, during and after the competition or match, with the national police force(s) of the Member States concerned. Where appropriate, this communication shall take place via the liaison officer(s) appointed and supplied by the Member States concerned. Liaison officers may be contacted in the subject areas of law and order and security, football-related violence and ordinary crime, where this is connected with a particular football match or tournament. Communication will take place in such a way as to preserve the confidentiality of data. National football information points are to communicate with each other in their own language with a translation in a working language common to both sides (unless they make other arrangements).[47]

12. The Council and stadium bans

In November 2003, the Council adopted a resolution containing a number of recommendations concerning stadium bans.[48] The Council invited Member States to examine the possibility of introducing provisions establishing a means of banning individuals previously guilty of violent conduct at football matches from stadiums at which football matches are to be held. In order to ensure compliance with orders imposing stadium bans, Member States must provide penalties in the event of non-compliance. Member States in which stadium bans are in force are also invited to consider the possibility of extending these bans to other Member States, so that banned supporters in one Member State are prevented from attending matches held in other Member States, taking into account any orders issued by these Member States. The resolution contains a similar request for sports organisations in case they are the parties to impose stadium bans. Exchange of information is to take place via the national football information points. Exchange of personal data must be in accordance with the relevant national and international legislation.

There are limits to the possibility to extend stadium bans, however. Member States in which football matches with an international dimension are held can only use the personal details of persons who have been banned in other countries in order to deny them access to stadiums (if national law permits this) or in order to take other appropriate measures to maintain law and order. The use and storage of personal data must be restricted to the football matches in relation to which the details were transmitted. Finally, Member States staging international matches are invited to ensure that their police forces establish the necessary contacts with the event's organisers and with the competent authorities or sports bodies having an interest in it, for the purposes of coordinated cooperation under the resolution, within their respective spheres of responsibility.

13. Some concluding remarks

The above overview of EU involvement in the fight against football hooliganism shows that only a limited amount of binding measures have been taken at EU level in this field. Only two Council decisions have been consequential for Member States' policy in the field of football hooliganism. The first decision, a Joint Action in the framework of the third pillar, aimed to establish and reinforce the exchange of information between Member States in order to counter violence and vandalism committed by football supporters. The second decision led to the establishment of national football information points responsible for the exchange of information in this field. This decision gave binding effect to a number of recommendations from the two Handbooks adopted in earlier Council resolutions.

In other fields of action concerning football hooliganism only soft law exists in the form of resolutions and recommendations of the European Parliament and the Council. Several times already, it has been proposed to introduce stadium bans with international effect (for the first time just after the Heysel tragedy), but no binding provisions have resulted from this yet. The EU did not get involved in establishing safety standards for stadiums or ticketing arrangements either. The directives which were called for during the eighties have failed to come into existence. Policy concerning the fight against football hooliganism is, however, in full development. The 2001 Police Handbook has proved to be an important document (from which important recommendations now have binding effect). All in all, it can be concluded that the European Union has been quite active in this area over the past few years and it is expected that this will result in more hard law and cooperation against violence and vandalism in sport.

46 Decision of the Council concerning security in connection with football matches with an international dimension, 25 April 2002. Art. 4.

47 Ibidem, Art. 5.

48 Resolution of the Council on the use by Member States of bans on access to venues of football matches with an international dimension.

Sport, Gender and Law

by **Matthew Bradford***

Should sports that require strength, stamina and physique be allowed to exclude women from participating on the basis of their sex?

1. Introduction

All anti-discrimination legislation in Australia provides an exception that allows sporting organisations to exclude participants on the basis of their sex where the strength, stamina and physique of the athletes are relevant.[1] This paper will examine why such a discriminatory provision has been enacted and the beliefs justifying its existence. It will also look at the effect that such a law has on maintaining gendered attitudes in society at large.

It is important to gain an understanding of the theoretical framework in which this argument will be presented. To do so, this paper will begin by exploring feminist legal theory and applying these arguments to sport. It will also examine a post-structuralist approach, drawing on the work of Foucault, which will consider the implications arising from sport itself being a cultural institution. This theoretical framework is important in gaining a true understanding of the gendered hierarchy inherent in sport. The discrimination that results from this gendered hierarchy will then be analysed, along with the aforementioned exclusionary provision in light of the recent decision in *Taylor v Moorabbin Saints Football League*[2] ("*Taylor*") which considered the exclusion of 13, 14 and 15 year old girls from playing junior Australian Rules football.

This paper will then critically discuss the inherently gendered notions that contribute to the justification of this legislation, including the belief that girls will get hurt, boys will modify their behaviour, it is unnatural for women to compete, women are weaker, women are inferior and the feministic notion of female body image. It will also put forward an argument as to how change at an amateur level in sport will not only filter through to the elite level, but have an effect on society at large. The possible interpretation of this exclusionary provision as a one-way exception that only excludes males from female sport will be considered and the applicability of *Taylor* to other sports will be examined.

It is concluded that, to achieve true equality, it is necessary to amend this provision to only provide for a one-way exception that prevents males from competing against females in sports where the relative strength, stamina and physique of the participants is relevant.

2. Theoretical framework - gender, law and sport

2.1 Feminist tradition

Many feminists have argued that the law oppresses and marginalises the experiences of women.[3] McArdle[4] argues that, in conjunction with the law, organised sport remains fundamental to the maintenance of a patriarchal society that subordinates women. Bourdieu[5] also draws this comparison, suggesting that although sport is one of the most patriarchal fields in popular culture, the juridical field is not far behind. In fact, MacKinnon has stated that issues which adversely affect women, in particular women's sexuality, connect directly with issues of athletics and sport.[6] This resemblance and likeness is borne out in the application of feminist legal discourse to the principles of sporting culture.

Liberalistic feminism would argue that an equal sporting society would consist of one where a person's competitive achievements determine their status, power and opportunity. It would contend that women have an equal right to compete in the same sports as men and the rules of the game must be the same for everybody. This approach seeks formal equality, but it has become evident that pure formal equality does not address the systemic biases present in society, in the legal system and presumably in sport as well.

The Marxist feminist on the other hand, would advocate that women are a class of persons who are oppressed by those in power and in control of sporting organisations. In order for there to be equality, a distinction should not be made between the classes of men and women. As Costa and Guthrie[7] argue, Marxist feminists believe that the right of women to participate in sport is a natural extension of the right of all persons to participate in the workforce. However, gender distinctions are imposed on women through the masculine hierarchies that are maintained by the dominant class, those in positions of power in sporting organisations, which thereby limit women's opportunities in sport.

The theory of radical feminism states that the patriarchy which has existed in most societies and economies is the primary force of domination of women.[8] This approach focuses on the central aspect of the woman, rather than advocating for a reform of the traditional model or emphasising class distinctions. Radical feminists would believe that the organisation of sport has allowed men to retain a systemic power over women and that these systems have constructed ideologies which legitimise the subordination of women. Rather than subscribing to the Marxist belief that there is a false female consciousness, MacKinnon[9] advocates that female consciousness is buried beneath the gender hierarchy that inherently dominates society. As such, it is only by deconstructing the existing systems that true change can be effected to provide women with the same opportunities as men to compete in sport.

2.2 Foucauldian perspective

It is also useful to examine power relations in sport in a post-structural sense, so that the cultural nature of gender relations in sport can be conceptualised.[10] Foucault argues that power is seen to exist through discourse and as such it takes effect through the regulation of sexuality, which is normalised through cultural institutions.[11] It is argued that sport is a key cultural institution in Australia and therefore the gender bias present in sport does not merely reflect that which occurs in society at large, sport itself is an instrument that creates and legitimises inherently gendered norms and ideologies.

For example, Foucault stated that '*the legitimate and procreative couple laid down the law. The couple imposed itself as model [which] enforced the norm*'.[12] This model views women as having a reproductive role and does not accommodate the concept of a woman partici-

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1 Section 42 Sex Discrimination Act 1984 (Cth); s.66(1) Equal Opportunity Act 1995 (Vic); s.111 Anti-Discrimination Act 1991 (Qld); s.38 Anti-Discrimination Act 1977 (NSW); s.29 Anti-Discrimination Act 1998 (Tas); s.56 Anti-Discrimination Act 1992 (NT); s.41(1) Anti-Discrimination Act 1991 (ACT); s.48 Equal Opportunity Act 1984 (SA); s.35(1) Equal Opportunity Act 1984 (WA).

2 Taylor & Ors v Moorabbin Saints Football League & Football Victoria [2004] VCAT 158.

3 See generally Barnett, H. (1998). Introduction to feminist jurisprudence, London: Cavendish; Chamallas, M. (2003). Introduction to feminist legal theory (2nd ed.), New York: Aspen Publishers; and Naffine, N. (ed.). (2002). Gender and justice, Aldershot: Ashgate/Dartsmouth.

4 McArdle, D. (1996). 'Brothers in Arms: Sport, the Law and the Construction of Gender Identity'. International Journal of the Sociology of Law, 24, 145-162.

5 Bourdieu, P. (1987). 'The force of law: toward a sociology of the juridical field'. Hastings Law Journal, 38, 805-853.

6 MacKinnon, C. (1987). Feminism unmodified: Discourses on life and law, Cambridge: Harvard University Press.

7 Costa, M. & Guthrie, S. (1994). 'Feminist perspectives: Intersections with women and sport' in Costa, M. & Guthrie, S. (eds.) Women and sport: Interdisciplinary perspectives, pp 235-252, Illinois: Human Kinetics.

8 MacKinnon, C. (1989). Toward a feminist theory of the state, Cambridge: Harvard University Press.

9 MacKinnon, C. (1989). As above, see n. 8.

10 Theberge, N. & Birrell, S. (1994). 'The sociological study of women in sport' in Costa, M. & Guthrie, S. (eds.). Women and sport: Interdisciplinary perspectives, pp 323-330, Illinois: Human Kinetics.

11 Foucault, M. (1980). Power/knowledge, London: Harvester Press.

pating in a highly competitive contact sport. As such, the law has legislated to restrict such an event from occurring. Radical feminists condemn gender constructs as they assume that certain characteristics 'naturally' belong to women. Foucault agrees with this post-modern thought, arguing that perceptions of the body are not 'natural'; rather they are produced through power and thus are a cultural product.[13]

3. Sex discrimination in sport

Although anti-discrimination legislation focuses upon differences in sex, amongst other attributes, it is the construct of gender that perpetuates division in sport. Gender encompasses the stereotypes and attitudes about the characteristics, attributes and behaviours that are appropriate for members of each sex. Research has shown that not only are these gender beliefs consistent, but that children develop and form attitudes about gender from a very early age.[14]

The effect of gender constructs is particularly relevant in sport. Whilst advances in gender equality have been made in areas such as employment and education, women still face considerable barriers to attaining true equality in sports. Although resources have been increased in sport, women are still subordinate to men at both the amateur and elite level in the provision of sporting facilities, financial remuneration, media coverage and corporate sponsorship.[15]

There is a profoundly gendered inflection in Australian sport through which ascendant forms of masculinity are asserted, promoted and defended against competing notions of femininity.[16] However, not only do women experience oppression in sport, but the sporting culture actually contributes to and maintains the differentiation between genders in other aspects of life.

4. The law

One particular way in which the State has intervened in sport is through anti-discrimination legislation. This paper is concerned with the fact that although sex discrimination in sport is prohibited,[17] there is an exception that legitimises discrimination on the basis of sex in sports that require physical strength.

The Victorian Civil and Administrative Tribunal recently gave a landmark decision in *Taylor* when it ruled that a 13 year old girl could not be excluded from competing in a junior Australian Rules football league, but that 14 and 15 year old girls could be excluded. The football league relied on the provision in the *Equal Opportunity Act 1995* (Vic) which allows the exclusion of people of one sex from a '*competitive sporting activity in which the strength, stamina or physique of competitors is relevant*'.[18] Whilst Morris J held that that this discriminatory law was valid, he did not consider there to be a relative difference between the strength, stamina or physique of boys and girls playing Australian Rules football until the age of 14, therefore this section could not be used to exclude a girl aged 13 years old. Similar provisions are reflected in the relevant anti-discrimination laws for all States, Territories and the Commonwealth.[19]

It appears from this case and several other recent decisions[20] that the previously discriminatory view of the judiciary towards issues of gender in sport is slowly changing from earlier notions, such as that of Lord Denning MR who responded to the suggestion that sex discrimination laws applied to football by stating '*football is not within the Sex Discrimination Act, and I think most people would agree with that .... If the law supposes that, the law is an ass*'.[21] However, the influence of the judiciary is limited as they do not have the power to alter legislation that it is validly enacted.[22]

5. Why are women discriminated against in sport?

It is necessary therefore to examine why governments have legislated to allow the exclusion of women from sports on the basis of gender. There are a number of arguments premised on socially constructed norms of femininity and masculinity that have been put forward to justify such discriminatory provisions.

5.1 Girls will get hurt

One argument that has been advanced and was relied upon by the respondents in *Taylor* is that females would be physically hurt if they were to compete with males, who are inherently stronger. Morris J dismissed this argument, relying on empirical evidence that showed that girls were not more prone to injury than boys when participating in mixed contact sports.[23] However, even if there was such evidence, it should be disregarded as being irrelevant. Smaller, weaker males are not prevented from playing sports with stronger males, so there is no logic for preventing females.

The High Court has noted that although there are many risks inherent in competitive sports, people have a right to voluntarily assume these risks and participate in the sport.[24] Consequently, females should be allowed to decide whether they risk being injured as a result of participating in competitive sport. Furthermore, the notion of liberty would dictate that everyone should have the right to choose what he/she does in his/her leisure time, provided that it does not harm another person or constrain another's liberty. There may be a paternalistic argument that minors do not have the requisite capacity to voluntarily consent to the possible risks. However, this could be addressed by obtaining permission from the child's parents or legal guardians.

Accordingly, females should not be prevented from exercising their autonomy and participating in sport with males on the basis that they may get hurt and the patriarchal notion that such discrimination is actually for the benefit of women needs to be reformed.

5.2 Boys will modify their behaviour

The second argument advanced by the respondents in *Taylor* was that the participation of girls would cause the boys to modify their behaviour, which would be detrimental to the competitive nature that is the essence of sport. Although Morris J did not find any evidence to support this,[25] he stated that if such a change in behaviour did occur, it is foreseeable that the same effect would be found in relation to smaller, weaker male competitors.[26]

However, if there is empirical evidence which shows that males do modify their behaviour in contact sports that involve females, and that this modification is detrimental to the sport, then there may be

12 Foucault, M. (1990). The history of sexuality, Volume 3: The care of the self, London: Penguin, p 3.

13 Gilroy, S. (1997). 'Working on the body: Links between physical activity and social power' in Clarke, G. & Humberstone, B. (eds.). Researching women and sport, pp 96-112, London: MacMillan Press

14 Shaffer, D. (2000). Personality and Social Development (4th ed.), Belmont: Wadsworth/Thompson Learning.

15 McKay, J., Lawrence, G., Miller, T. & Rowe, D. (2001). 'Gender equity, hegemonic masculinity and the governmentalisation of Australian amateur sport' in Bennett, T. & Carter, D. (eds.). Culture in Australia: Policies, publics and programs, pp 233-251, Cambridge: Cambridge University Press.

16 McKay, J. et al. (2001). As above, see n15.

17 Only Victoria specifically prohibits discrimination in sport: s.65 Equal Opportunity Act 1995 (Vic). In all other jurisdictions, it is implied through prohibitions on discrimination in the provision of goods and services, clubs, education, etc.

18 Section 66(1) Equal Opportunity Act 1995 (Vic). Note that s.66(3) states that this exception does not apply to sporting activities for children who are less than 12 years of age.

19 Section 42 Sex Discrimination Act 1984 (Cth); s.111 Anti-Discrimination Act 1991 (Qld); s.38 Anti-Discrimination Act 1977 (NSW); s.29 Anti-Discrimination Act 1998 (Tas); s.56 Anti-Discrimination Act 1992 (NT); s.41(1) Anti-Discrimination Act 1991 (ACT); s.48 Equal Opportunity Act 1984 (SA); s.35(1) Equal Opportunity Act 1984 (WA).

20 The decision makers stressed that they did not agree with the discriminatory and patriarchal nature of the particular law. See also South v Royal Victorian Bowls Association Inc [2001] VCRT 207; Ferneley v Boxing Authority of New South Wales [2001] FCA 1740; Robertson v Australian Ice Hockey Federation [1998] VADT 112.

21 Bennett v The Football Association (1978) Unreported Court of Appeal transcript: No 591 of 1978, cited in McArdle, D. (1996). As above, see n. 4.

22 'If the result is thought to be un atisfactory, it can be rectified by either the New South Wales Parliament or the Commonwealth Parliament . As a matter of policy is involved, it is appropriate for any change in the law to be made by a body directly answerable to the electorate': Wilcox J in Ferneley v Boxing Authority of New South Wales [2001] FCA 1740, p 1767.

23 [2004] VCAT 158, para. 51.

24 Agar v Hyde (2000) 201 CLR 552; Woods v Multi-Sport Pty Ltd (2002) 208 CLR 460; Rootes v Shelton (1967) 116 CLR 383.

25 Morris J actually concluded that, if anything, the evidence was to the contrary: [2004] VCAT 158, para. 49.

26 [2004] VCAT 158, para. 55.

a justification for such discrimination. In such an instance, the competing interests of women who want to participate would have to be balanced against the libertarian right of the males to determine who they want to compete with and against. Nevertheless, if a woman genuinely has the ability to compete with men, then it is more than likely that she will be treated the same as other competitors. Also, by increasing the number of women who compete in men's sports, this problem will be less likely to occur as it will become the norm.

5.3 Unnatural for women to compete

There appears to be a further reason as to why such an exemption has been legislated. The assumptions about either sex that arise from conceptions of gender have deemed that it is inconsistent with notions of femininity that females can participate in highly competitive sports, particularly where physical aggression is involved. In *Ferneley v Boxing Authority of New South Wales*[27] the law that stated only males were eligible for boxing licenses[28] was challenged. Although the application was eventually dismissed on the ground that it was brought in the incorrect jurisdiction, the Court examined the policy behind such a discriminatory provision. In his decision, Wilcox J referred to the parliamentary speech given by the relevant Minister when introducing the Bill. The rationale behind the exclusion of females from obtaining a licence was, *inter alia*, that '*the spectacle of women attacking each other is simply not acceptable to a majority of people in our community ... [there is a] risk of [women] becoming freaks in some sort of Roman circus disguised as a sporting contest*'.[29] These comments clearly show the extent to which gendered assumptions of appropriate behaviours have worked to discriminate against females.[30]

Accordingly, there should be no justification for a law that prevents women from competing in sports on the basis that it is 'unnatural' and that it does not fit into the type of feminine behaviour that society expects of females.

5.4 Women are weaker

The marginalisation of women in sport on the basis that they are weaker than men generally relies on medical evidence that reflects the popular cultural beliefs about the nature of women, their biological purpose and their social role.[31] This medicalisation of the female body '*stirs up people's fears*'[32] and causes them to lose sight of real issues; namely that women should have the right to choose how they behave and the fact that women are simply different to men, rather than weaker. Women are resultantly viewed as the deviation from the male body, which is considered the norm. Although there is a significant difference between the average muscle mass of men and women, the within group differences amongst men are actually higher than the between group differences.[33] This means that the weakest males are actually weaker than the average female; therefore any difference based on physiology should be applied to weaker males as well as females.

However, it would be difficult to implement such a system without using extreme methods such as measuring each individual's strength, speed, etc. One option may be to follow the practice used in New South Wales rugby union competitions where teams are determined by age, but competitors whose weight is one standard deviation below the mean for their age may participate in a younger age group.[34] Furthermore, as highlighted by Morris J[35] there is likely to be a significant element of self-selection in that females who desire to compete against men would undoubtedly be those who are stronger than the average female.

McArdle[36] observes how female athletes are often warned that by competing in physical sports they may damage their potential to have children and how it is automatically assumed that pregnancy is a more important goal for female athletes. However, there is very little conclusive evidence that competing in sport actually harms a woman's chances of getting pregnant,[37] or that competing when pregnant harms the foetus,[38] which is another issue that women face in sport.

Furthermore, there is medical evidence that women are stronger today than they were in the past and that they are evolving at a faster rate than men.[39] This has occurred over the last 30 years when barriers faced by women in society have been broken down and women have been given more equal opportunities. This may mean that the exception on the grounds of strength, stamina and physique is no longer as relevant as it was when the legislation was drafted. In the event that women are given more opportunities to participate in contact sport and cultural notions of femininity are deconstructed, then it is likely that women will continue to evolve into naturally stronger beings with each generation. But as long as this exclusion exists, the pressure on women to conform to stereotypical feminine activities will persist and hinder this evolution.

Therefore, it would appear that the reasoning behind this legislation may be invalid as not only are women closing the gap to men in terms of strength, but provisions like this are in fact contributing to the difference in physical strength between women and men.

5.5 Women are inferior

The view that women are inferior must also be considered in context. Like most systemic norms in society, including the legal system, the rules of most sports were originally designed by men to test male skills. This is where the liberalistic model of feminism falls short in its attempt to gain true equality and radical feminist theory, which accepts that women are different to men, comes to the fore. Women would be more successful if sports were played within a regulatory framework that was adapted to the natural skills and strengths of females. However, if women did play sport within a completely different framework, they would once again be viewed as deviating from the norm on the basis of their inferiority, which would further reinforce the gender hierarchy.

An example of a change, albeit a minor change, that has occurred in a sport is in cricket. Traditionally, cricket was played with the participants' bowling underarm. It has been reported that when women tried to play, they found that their full length dresses prohibited them from bowling underarm, so they bowled overarm.[40] Not only did the men adopt this change, but it is now against the rules to bowl underarm in a game of cricket. However, this change is not fundamental enough, as it merely adopts a different means to achieve the same end. Perhaps if the rules of cricket were changed so that the skill of bowling only relied upon accuracy, rather than the speed of the delivery or the amount of spin on the ball, this would redress the inherent disadvantage that women face when bowling in cricket.

However not all sports consist of rules that disadvantage women. In *South v Royal Victorian Bowls Association Inc*[41] the respondent's constitution prohibited females from participating in lawn bowls competitions. The respondent argued that lawn bowls requires strength and therefore they were permitted to exclude women under the same provision as argued in *Taylor*. It was held that there was no material difference between men and women when it came to the strength required to compete in lawn bowls. Even though men could propel the bowls faster, this was irrelevant as women had the requisite strength to achieve the same effect.

It is imperative that it be acknowledged that women are different

27 [2001] FCA 1740.
28 Section 8(1) of the Boxing and Wrestling Control Act 1986 (NSW).
29 Ferneley v Boxing Authority of New South Wales [2001] FCA 1740, p 1745.
30 It should be pointed out that this clause does not only prevent women from competing against men, it actually prohibits women from competing against other women.
31 Vertinsky, P. (1990). The Eternally Wounded Woman, Manchester: Manchester University Press.
32 Foucault, M. (1980). As above, see n11, p 54.
33 Taylor [2004] VCAT 158, para. 62.
34 Taylor [2004] VCAT 158, para. 85.
35 Taylor [2004] VCAT 158, para. 84.
36 McArdle, D. (1996). As above, see n. 4.
37 O'Toole, M. (2000). 'Physiological aspects of training' in Drinkwater, B. (ed.). Women in sport, pp 77-92, Oxford: Blackwell Science.
38 Australian Sports Commission. (2002). Pregnancy in Sport: Guidelines for the Australian Sporting Industry, Canberra: Australian Sports Commission; Mottola, M. & Wolfe, L. (2000). 'The pregnant athlete' in Drinkwater, B. (ed.). Women in sport, pp 194-207, Oxford: Blackwell Science.
39 See Swedan, N. (ed.). (2001). Women's sport and rehabilitation, Gaithersburg: Aspen Publishers.
40 Wynne-Thomas, P. (1997). The history of cricket: From the weald to the world, Norwich: Stationery Office; Goleswothy, M. (1974). The encyclopaedia of cricket, Bristol: Robert Hale & Company.
41 [2001] VCRT 207.

to men, but that this difference does not mean that they are inferior. Garcia[42] has found gender differences in how children participate in physical education settings. Girls tend to interact in a cooperative, caring and sharing manner, whilst boys interact in a competitive, individualised and egocentric manner. Gill[43] has also shown that women score lower than men on tasks based on competitiveness. This demonstrates how women may be disadvantaged in sport, where the emphasis is on competitiveness.

If this difference is accepted by society without viewing it as a liability, it may be possible to see the emergence of what Townson[44] describes as a distinctive women's sporting world; equal to that of men but with its own characteristic elements. Perhaps the values of sports can be changed so that they are not purely the values of men. Until this occurs however, women should not be prevented from competing with and against men in sports such as figure skating and equestrian, which do not place a large emphasis on the relative strength of competitors.

5.6 Body image

Another in which the gender hierarchy is reinforced in sport is through body image. Strong, fit and muscular bodies, which are necessary to compete in sport, embody the concept of power. But this powerful body type has been defined as masculine and culture has discouraged women from developing such bodies. In contrast, the feministic traits that women are supposed to adopt limit their physical ability, which prevents them from effectively competing against men and from achieving their potential in sport.

Cultural notions of femininity create conflict for women who participate in contact sports that require masculine traits and body shapes. Markula describes the ideal feminine body type as a series of contradictions '*firm but shapely, fit but sexy, strong but thin*'.[45] Mutrie and Choi[46] found that female athletes had feelings of ambivalence towards their bodies and that this was directly related to the discrepancy between perceptions of their body as an athlete compared to perceptions of their body as culturally female. Women who have a slender body may believe that this suggests good self-discipline and that they are empowered. However, according to Krane and colleagues[47] this in fact demonstrates a lack of power and it merely reinforces the norms of the cultural ideal body image, consequently oppressing women.

Therefore, the culturally dictated body image which requires women to adhere to notions of femininity actually prevents them from excelling in sports which require strength, stamina and physique. This in turn perpetuates the distinction between men and women, providing support for the discriminatory concept that women should be excluded from competing against men in such sports.

6. Amateur level will eventually influence elite

At the moment, very few women would be able to compete against men at the elite level in sports such as cricket, Australian Rules football and rugby league. However, this is no reason to prevent mixed participation from occurring at amateur levels of these sports. As mentioned earlier, the within group sex differences are at least equal to the differences between the sexes, if not greater. Therefore, at lower levels of competitive sport where the factors separating competitors are more fluid,[48] differentiating purely on the basis of sex should not occur. If a woman can match the ability of men in her chosen sport, then she should be able to compete.

Once participation is occurring at an amateur level, more women will participate and eventually they will become stronger and closer to the level of men. In his largely influential and empirically supported social cognitive theory, Bandura[49] argued that social modelling is one of the most powerful means of transmitting values, attitudes and patterns of thought and behaviour. Therefore, if a number of women are participating against men in contact sports, other women may be inclined to follow them. Some people may argue that it would require a woman to be competitive at an elite level before there would be a social modelling effect. However, Lockwood and Kunda[50] found that sporting role models who were peers had just as great an effect as elite athletes on influencing young girls' behaviour.

Not only would women's participation in contact sports deconstruct gendered stereotypes in sport generally, but there would be a much wider influence. As discussed above, sport is a key cultural institution which develops norms that are accepted and maintained in society at large. By redressing notions of femininity, female participation in contact sports, even at an amateur level, would result in the deconstruction of systemic cultural norms that disadvantage women in society and it would go some way to redressing the power imbalance based on perceptions of gender.

7. Should there be a one-way exception?

An important issue that arises when considering the gender exception for sports based on the strength of the competitors is whether this should be interpreted as a one-way exception that only prevents males from competing in female sports. So far it has not been interpreted as such and although Morris J considered this a desirable understanding of the law, he concluded that this was not the case.[51]

However, a one-way interpretation is still consistent with the objectives of the various Acts, in that it promotes equal opportunity for women to compete with men and provides an opportunity for women to compete amongst themselves so that they are not disadvantaged because of the domination by stronger men. It is true that this approach does not create formal equality; nevertheless it is a necessary step to redress the inherent imbalance of power in sport. All anti-discrimination legislation provides for special measures and affirmative action provisions, which have been deemed as essential to achieving true equality.[52]

There is an argument that special measures may serve to entrench discriminatory attitudes and that society will not redress the disadvantages women experience if the underlying attitudes remain discriminatory.[53] It is also true that a provision which specifically protects women's sports may further the belief that women are weaker and inferior. However, it is a better alternative than women not being allowed to compete with men at all, or even worse, women's competitions being dominated by men and allowing no success for female athletes in any competitions.

It must be remembered though, that males also face pressure to conform to the appropriate behaviours that are prescribed to masculinity. This prescribed behaviour would largely be considered inconsistent with participating in female competitions. The irony is however, that if society is successful in deconstructing the gendered hierarchy, then the concept of a man competing in a sport organised for women would not be inappropriate.

It is submitted that to achieve true equality it is necessary to amend

42 Garcia, C. (1994). 'Gender differences in young children's interactions when learning fundamental motor skills'. Research Quarterly for Exercise and Sport, 65(3), 213-225.

43 Gill, D. (1994). 'Psychological perspectives on women in sport and exercise' In Costa, M. & Guthrie, S. (eds.). Women and sport: Interdisciplinary perspectives, pp 253-284, Illinois: Human Kinetics.

44 Townson, N. (1997). The British at Play - a social history of British sport from 1600 to the present, Bucharest: Cavallioti Publishers.

45 Markula, P. (1995). 'Firm but shapely, fit but sexy, strong but thin: The post-modern aerobicizing female bodies' Sociology of Sport Journal, 12, 424-453.

46 Mutrie, N. & Choi, P. (2000). 'Is 'fit' a feminist issue? Dilemmas for exercise psychology'. Feminism and Psychology, 10, 544-551.

47 Krane, V., Waldron, J., Michalenok, J. & Stiles-Shipley, J. (2001). 'Body image concerns in female exercisers and athletes: A feminist cultural perspective'. Women in Sport and Physical Activity Journal, 19(1), 10-54.

48 Opie, H. (2001). 'Medico-Legal issues in sport: The view from the grandstand'. Sydney Law Review, 23, 375-404.

49 Banudra, A. (1986). Social foundations of thought and action: A social cognitive theory, New Jersey: Prentice-Hall.

50 Lockwood, P. & Kunda, Z. (1999). 'Increasing the salience of one's best selves can undermine the inspiration by outstanding role models'. Journal of Personality and Social Psychology, 75(2), 214-228.

51 [2004] VCAT 158, para 43. See also Victorian Ladies' Bowling Association Inc [2001] VCAT 1992.

52 Australian Law Reform Commission. (1994). Equality before the law: Justice for women, Canberra: Australian Government Publishing Service.

53 See discussion in Australian Law Reform Commission. (1994). As above, see n53.

this provision to provide for a one-way exception that prevents males from competing against females in sports where the relative strength, stamina and physique of the participants is relevant. The justification is that allowing women who have the requisite ability to compete against men does not disadvantage men, whereas allowing men to compete against the average woman, who has less strength, does place women at a disadvantage. It may be that the current legislation in Queensland and the Northern Territory, if challenged, would be interpreted in such a manner, as they both provide a requirement that the restriction must be reasonable.[54]

8. Applicability of *Taylor* decision

Duthie[55] believes that the applicability of the decision in *Taylor* will be somewhat limited. It does appear that Morris J deliberately intended to limit his decision to Australian Rules football, citing the judgment in *Jernakoff v Western Australia Softball Association*[56] where the Tribunal concluded that the application of the provision will vary from sport to sport and that the present case was not to be regarded as a precedent for the future.

Morris J limited his decision to children aged 13, because he found that at the age of 14 there is a significant difference in strength between boys and girls. As such, the immediate application of this decision will be limited to those instances involving children below the age of 14 years old playing Australian Rules football. The problem with further extending Morris J's decision to other sports is that he did not explain why a difference of one standard deviation in lean body mass was significant enough to constitute a relevant difference between the sexes in the sport of Australian Rules football. Undoubtedly, Australian Rules football would be considered at the upper end of the scale of sports in which the relative strength, stamina and physique of the competitors are significant. Therefore, in sports such as volleyball, tennis and soccer, which are non-contact sports, organisations would theoretically be unable to discriminate on the basis of sex, at least until children reach the age of 14 years old.

It is interesting to note that Morris J agreed with the Tribunal in *Re Hall and Victorian Amateur Football Association*[57] in finding that the sporting body had the onus of proving that there was a relevant difference between the sexes.[58] Therefore, it may be prudent for the national governing organisation of each sport to commission a report into the differences between sexes, before deciding to exclude females from participating in their competition. This would provide a guide to the limit of the exclusionary provision and perhaps allow them to avoid the costs of defending similar cases to *Taylor* in the future.

9. Conclusion

Opportunities for women to enjoy sport provide a means through which the scripts provided by the powerful male can be re-written to define what it is to be a woman, thus challenging notions of women being inferior to men.[59] However, provisions that legitimise the exclusion of women from sport on the basis of their sex, without considering their ability, remove this opportunity and in fact contribute to the subordination of women in society at large. As can be seen, there are parallels between gendered hierarchies present in the law, society and sport. As sport is a key cultural institution, it also perpetuates the systemic bias inherent in society, rather than merely reflecting it. The patriarchal basis for such an exclusionary provision is unjustified and runs contrary to notions of liberty and equality.

Females should have the right to assume the risk that they might get hurt, should not be viewed as unnatural if competing in physical sports and should not be forced to conform to notions of a feminine body image that physically prevents them from competing on equal terms. Assumptions that women are weaker and inferior need to discarded and women should be judged solely on their individual abilities. The fear that males will have to modify their behaviour to accommodate women will not be a problem once gendered norms are deconstructed and developed to include the concept of women competing on equal terms. If change can at least occur at an amateur level, where the differences between sexes are not as pronounced, then this will contribute to long term change at the elite level and in other institutions in society.

Both the Australian Law Reform Commission[60] and the Sex Discrimination Commissioner[61] have recommended that the Commonwealth's equivalent of this provision be repealed. However, the best solution may be that the law is amended to act as a special measures provision that provides a one-way exception. This will allow some women to compete on equal terms against men if they wish, whilst at the same time, allowing other women to compete without being disadvantaged by the presence of stronger males, who may otherwise dominate their competitions.

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Sport in the European Constitution

by **Alexandre Mestre***

The signature on 29 October 2004 in Rome of the Treaty establishing a Constitution for Europe was an important step, not only for the European Union (EU), but also for European sport. For the first time in European Union history, sport was integrated in the primary law of the EU. Finally, we have a specific legal basis for sport.

Article I-17 in conjunction with Article III-282 of the European Constitution makes sport part of the 'coordinating, complementary and supporting action' competences of the EU, which therefore allows for EU support for sport.

Euro-sceptics, who worry about loss of national sovereignty, may find a certain degree of satisfaction in the allocation of this type of competence, as competences in the field of coordinating, complementary and supporting action imply that such action on the part of the EU necessarily follows prior national action. It also means that the EU must accept such national action and the choice of the type of action which the Member States may make.

In fact, those who are sceptical by nature may argue that the legal basis for EU action in the policy area of sport leaves quite a bit of room: room for improvement!

Sport is not recognised in an autonomous, specific or single Article within the Constitution; it has been included in the category of education, training, and youth.

Even though the Commission has stressed that there are five functions of sport which give it its specific nature, namely the social function, the educational function, the recreational function, the cultural function and the public health function, the Constitution fails to do them all justice. It only timidly refers to the first two: the social and the educational function.

Critics might add that Article III- 282 does not contain a horizontal integration clause, which would have been a significant step forward in safeguarding the *specificity of sport*. Such a clause could have been similar to the one provided in Article III-120 concerning consumer protection according to which "*Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities*".

There is no doubt that it would be enormously helpful if the special characteristics of sport were taken into account in the application of other EU policies. In our opinion, recognising the horizontal nature of sport policy could be the basis not for a 'sport exception' or 'blanket immunity', but for a 'sporting justification', namely safeguarding the uniqueness of sport. This would oblige European actors to take sport into account when framing other EU policies.

Finally, to take the criticism one step further, the legislative and regulatory acts that the EU can adopt in the field of sport are only *soft law*.

However, despite the above, there are considerable advantages to be gained for sport through the European Constitution.

First and foremost, it must be emphasised that the European Constitution forms the basis for an end to the previous EU approach to sport, which was irregular, erratic, reactive and *ad hoc*. Article III-282 refers to the 'European sports dimension' which in itself demonstrates that the EU is concerned about building a European sports policy. Even though this is not the same as a European common sports policy, it could be the start of one.

If we consider the new 'Rolling Agenda' of the European Commission, it appears to envisage an integrated, continuous and permanent intervention of the EU in sport, leaving behind the piecemeal approach of the past which to a large extent depended on the priorities or conveniences of each Council Presidency subject to rotation every six months.

The following advantages of the new legal framework can be discerned:

- Sport has finally received a European identity, now that it has been included in the Treaty. We can look forward to a new EU approach to sport, now that sport has become a tool in EU social, educational, training and youth policies.
- It is finally possible to include a heading for sports in the EU budget.
- Advocate-Generals and Judges of both the European Court of Justice and the Court of First Instance can finally derive some guidance from the Treaty on which to base their interpretation or application of EU law in the field of sport.
- The Council of Europe has been recognised as the specific privileged institutional partner of the EU when it comes to the much-needed enhancement of international cooperation for sport.
- Article III-282 may serve to preserve the European sports model, as opposed to the American model with its closed leagues, by providing that the *openness* and *equity* of sport competitions is extremely important. In fact, it can be said that the EU gave a red card to Americanisation, since the new Constitution provides a clear rejection of a free-market model and contends that in the future development of sport, the special features of the European model need

* Adjunct to the Secretary of State for Sport of Portugal and the author of "O Desporto Na Constituiçao Europeia - O Fim Do 'Dilema de Hamlet'", Livraria Almedina - Coimbra, October 2004.

to be carefully taken into consideration. This mainly refers to the pyramid structure, with clubs at the foundation, regional and national federations (one of each discipline) in the middle, and the European federations at the top.

The EU Constitution is an important step towards defending the EU system of promotion and relegation, vertical solidarity, the interdependence between the different levels, the emphasis on the socio-cultural significance of sport and the continuous changes in the rankings. This European model is the opposite of the closed and hermetic league system, which is based on salary caps, minimised risk of financial loss arising from sporting failure, self-government and over-commercialisation; which is, in sum, an economic, capitalist, free-market model adapted to sport.

In short, what the European Constitution intends to stress is that the advent of new forms of competition which do not comply with the principles of internal equilibrium and solidarity could endanger sport in the EU.

In addition, considering the history of European integration, *soft law* has often proved the starting point for binding legal documents. At present, sport may benefit from support actions, resolutions, recommendations, declarations, action programmes, Presidency conclusions, codes of conduct, joint communications, gentleman's agreements, declarations of principles, pilot projects and guidelines; an impressive list of instruments, which might well form the prelude to eventual mandatory rules.

The new mission of the EU concerning sport, the Open Method of Coordination which was created in Lisbon, could be an important tool for *policy linkage* and allow the EU, although respecting the principle of subsidiarity, not only to stimulate or facilitate policies, behaviours and responsibilities of all the Member States, but also to promote a valuable exchange of good or best practices.

With the new legal context, the EU and the Member States face plenty of challenges, as many strategic guidelines still need to be addressed. Regarding institutional aspects, new bodies could be created in the Council, the European Commission and the European Parliament. Due consideration must be given to the creation of an European Observatory for Sports and of a liaison committee with the task of institutionalising the relationship between the EU and the different international sport organisations, i.e. the IOC, FIFA, UEFA and ENGSO.

Let us recall the words of Robert Schuman: European construction based only on economic aspects is condemned to failure... It therefore seems right to claim that the socio-cultural and integrational qualities of sport should be given a higher priority, now that it is beyond doubt that sport can promote integration within and beyond the borders of Europe!

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What Now for Former Jockey Graham Bradley?

by **Ian Blackshaw and Mark Edmondson***

Introduction

The Jockey Club is no stranger to controversy or indeed the Law Courts. Since its formation in 1752, the Jockey Club has ruled the Sport of Kings with an iron rod with relatively little outside interference. However, times have changed. We now live in the age where human rights have become an integral part of an increasingly litigious society.

Over the years, there have been some legal challenges to the Club's authority, the most recent of which was brought by the brilliant and somewhat colourful character of former jump jockey, Graham Bradley, with Judgment being handed down by the High Court at the beginning of October 2004. In this article, we will look at this important ruling and its legal and practical implications.

The Bradley Case

The Orders and Rules of Racing, which are reprinted annually in May, now runs to some 471 pages, consisting of 22 parts and 22 appendices. This governing code was described by Mr Justice Richards in the Bradley case as a "fascinating document". Bradley had been charged by the Jockey Club with six breaches of the Rules, the most serious of which related to (i) providing false information to the Club's Licensing Committee contrary to Rule 220(vii)(b), (ii) receiving presents in connection with races other than from an owner in contravention of Rule 62(ii)(c), and (iii) offering to give information on certain horses for monetary consideration contrary to Rule 204(iv). The last two of which are not allowed by jockeys, all of whom are licensed annually and, therefore, engaged in a contractual relationship with the governing body. The charges were based on testimony that Bradley himself had given when he appeared as a Defence witness in the case of another former jump jockey, the lesser-known Barrie Wright, at Southampton Crown Court in September 2001.

Wright was charged with certain drug-related offences in connection with being part of the wider circle of the so-called "drugs baron" Brendan Brian Wright (no relation), who is now a fugitive in Northern Cyprus. Barrie Wright and Bradley were old friends and Wright called upon his old friend to give evidence, explaining how funds can be received in return for valuable information concerning horses and their prospects of success, and so on. Bradley had held a licence since 1982 but had retired from the saddle in December 1999 to concentrate on his new and successful bloodstock agency where, amongst others, he had advised footballers Steve McManaman and Robbie Fowler on their racehorses. Importantly, however, since retirement he was no longer a licensed person under the Rules of Racing and potentially, therefore, no longer bound by them. However, his evidence in Southampton appeared to contain admissions of certain breaches of the Jockey Club Rules, covering the period when he was riding. The jockey had been stung by an earlier BBC Panorama programme criticising the Club for its inactivity. Charges, therefore, followed and, at an early stage,

Bradley had consented to be voluntarily bound by the Rules of Racing as this concession would enable the Jockey Club to consider a wider range of penalties under their Rules. The only effective sanction available to the Jockey Club for those not wishing to bow to their authority is to exclude those found in breach from all premises, owned or controlled by them, which would include all of Britain's 59 racecourses and all training yards. This would have made life difficult for Bradley, but now the Club had the option of imposing a financial

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penalty. The normal sanctions available to the Stewards of the Jockey Club are to either caution an individual, impose a fine up to £40,000, withdraw or suspend a licence, refuse to grant or renew a licence or to disqualify a person. Disqualification means that the disqualified person shall not be able to enter a racecourse; be employed in a racing stable; or, more importantly for Bradley, deal in any capacity with a racehorse in terms of trading. Any further breach would lead to the horse itself being disqualified until sold again to an unconnected person.

Bradley duly appeared before the Disciplinary Committee of the Jockey Club in November 2002. He was legally represented and, after three days of evidence, the case was found proved and he was duly fined, but more disastrously for his new career, he was declared a disqualified person for a period of eight years. Not surprisingly, Bradley then exercised his right of appeal to the Club's final level of appellate jurisdiction - the Appeal Board.

The Board sits rarely, with only three appeals in 2001 and two each in 2002 and 2003. Chaired by an independent lawyer (in this case the former High Court Judge Sir Edward Cazalet) and sitting with two other members of the Jockey Club, the Board heard detailed submissions for another three days. Bradley's grounds of appeal were essentially that the Disciplinary Panel had misconstrued or failed or wrongly applied the Rules of Racing and that the severity of sanction was disproportionate. Bradley also argued that the Board lacked the appearance of being impartial and independent, and was therefore in breach of Article 6(1) of the European Convention on Human Rights. Sir Edward Cazalet delivered a very careful and lengthy decision of the Board, in which Bradley was fined a total of £3,275 for the various offences, but reduced his disqualification to five years. In reality, it may well have been 50 years as Bradley's ability to work in his chosen field was thereby virtually extinguished. It was no accident that the published decision of the Board was produced in such a meticulous and detailed manner - reminiscent more of a High Court Judgment than a sports governing body. The reasoning behind the Board's decision was clear for the whole world to see, appearing as it did on the Jockey Club's website and totalled over 40 pages long. Trying to overturn such a decision in Court would now be very difficult for Bradley. However, Bradley was not done yet and issued High Court proceedings pleading a breach of contract, but essentially seeking a review of the decision of the Board.

High Court Challenge

There has been long debate in sports law circles as to whether this type of case should be challenged by way of private or public law. Bradley presumably, following the leading authority of *R -v- Disciplinary Committee of the Jockey Club ex part The Aga Khan (1993)* in which the Court of Appeal rejected the Aga Khan's attempt to subject the Jockey Club to Judicial Review, decided to limit his case to a private law remedy in contract. The Jockey Club has always maintained that it is a private body and therefore that challenges must be by way of private law, notwithstanding the governing bodies' monopolistic position. One of the key differences is that Judicial Review is a discretionary remedy and not a remedy as of right, which would follow an established breach of contract.

In the Bradley case, Counsel for both sides agreed that the Court had jurisdiction and Mr Justice Richards indicated that his approach would be largely similar in that, in the process of exercising the Court's accepted supervisory jurisdiction, he would essentially examine the fairness and lawfulness of the Appeal Board's decision. Was the procedure fair? Was there an error of law? Did the Board in the exercise of its discretion exercise its judgment fairly and within the range of reasonable responses open to it? Although Bradley had earlier, on the threat of an injunction, had the penalty suspended, the disqualification order meant that if upheld, Bradley was effectively prevented from working and, therefore, the Court had to consider the fairness of the restraint of trade aspects in addition to procedural fairness in terms of the rules of natural justice. However, Bradley's enormous and - as it transpired - his insurmountable difficulty was the Court's reluctance to place itself in the shoes of the "primary decision maker". But is it perhaps too often left to the primary decision maker to strike the balance in determining what is proportionate and what is outside the range of reasonable responses in terms of its decisions? In *De Freitas -v- Permanent Secretary (1991) 1* AC *69* the Court set the framework test. Is the legislative objective (of the Rules) sufficiently important to justify limiting a fundamental right (in this case the right to work)? Are the measures designed to meet that objective rationally committed to it and are the means used no more than are necessary?

Clearly, in the Bradley case, the Jockey Club considered that the integrity of racing had been challenged over a long period of time - 10 years. A balance had to be struck which considered punishment, deterrence and prevention and the Appeal Board had concluded that the offences were so serious that five years would be the appropriate penalty. And the Hig Court agreed, finding that the disqualification of five years was reasonable in all the circumstances of the Bradley case.

As the Jockey Club's Appeal Board's decision was upheld, its long and detailed published decision was, therefore, highly effective and, we may add, pre-emptive. Incidentally, the High Court judgement itself was lengthy too!

Issues Raised by the Bradley Case

The Bradley case raises a number of legal issues. Is it not time that the Courts choose to scrutinise more closely any perception of unfairness at internal level? The Board had earlier dismissed any arguments as to the appearance of lack of impartiality or independence and the Jockey Club has never yet faced a European challenge. We know, and often for good reason, that the Courts have long held the view that sporting decisions are best decided by those with an integral knowledge of the sport rather than the Courts, and clearly a balance needs to be struck. Indeed, Mr Justice Richards recognised the need in his Judgment that the Appeal Board includes members who are knowledgeable about racing and better placed than the Court to decide upon the importance of the Rules and the precise weight to be attached to any breaches. But there are other equally qualified but unconnected persons who could sit on a Tribunal. Bradley has never been very good at running away from adversity. Could this be the case, which forms the basis of a subsequent challenge under Article 6(1) of the European Convention on Human Rights? In cases involving breaches of such fundamental rights as that of the right to work then should not the Court consider intervention? It could have been successfully argued in the *Bosman* litigation in 1996 that the matter was best left to the various Football Associations to regulate such matters as to employment rights and transfers of football players, but the European Court of Justice was prepared to dramatically intervene to revolutionise the football transfer system.

Conclusion

Bradley is a sportsman and cannot work. He is not an accountant, lawyer or footballer. The turf is his only profession. He is, therefore, an unemployed and unemployable horseman. Has he had a fair deal? Was the punishment proportionate to the offence? Should the disqualification have been reduced by the High Court? What now for Bradley? The International Sports Law Journal

The New Entry of Mediaset and La 7 into the Pay-TV Market in Italy

by **Luca Ferrari***

Ever since the season of 2002/2003, Sky Italia - formed through a merger authorized by the European Commission between Stream and Canal+ controlled Tele+ - has been enjoying a virtual monopoly in the pay-TV market.

In fact, as may be recalled, during the first season following the merger there was an attempt to establish a rival platform, named "Gioco Calcio", owned by Plus Media Trading, a consortium constituted by a good number of small and medium sized Serie A and Serie B clubs. Gioco Calcio, other than upsetting the early strategic plans of Sky Italia, struggled to operate under enormous difficulties through its first season, only to collapse in the end, failing to find investors willing to provide the necessary medium-term financial resources. Once Sky became the only pay-Tv provider, the Authority for Competition and the Marketplace, after consulting with the Authority for Telecommunications, authorized Sky to exceed the limit which otherwise prohibits any single operator from acquiring more than 60% of the pay television rights of games of the Serie A Championship. However, the Authority set specific pro-competitive restrictions on Sky. In particular, Sky was prevented from entering license agreements exceeding three years duration. A further limitation was imposed by the European Commission, prohibiting Sky from combining satellite and digital terrestrial pay-TV rights.

At the time of the creation of Sky Italia, digital terrestrial technology seemed far from the kind of development that would make it a platform able to support the offer of competitive pay-TV service and consequently created the illusion that Murdoch's TV was to be the only offeror on the market of pay-TV contents.

However, Sky's privileged monopoly was doomed to come to an untimely end.

On 3 May 2004 the Italian Parliament passed a law[1] (commonly referred to as "Legge Gasparri" after Maurizio Gasparri, the Minister for Communications) introducing and regulating digital terrestrial technology.

Among the conditions imposed for the development of the latter[2], the law in question and the subsequent decrees promulgated for its application required that decoders should be necessarily sold to the public at "accessible" prices[3].

In order to facilitate the fulfilment of such condition and provide an incentive for the growth of the new technology , the Government soon made available a state contribution for each decoder purchased.

Availing itself of such a favourable opportunity, in July 2004 Mediaset, the Italian television operator owned by Premier Silvio Berlusconi, unexpectedly announced its 86 million Euro purchase of the rights to the transmission through digital terrestrial technology of domestic games of the three main Serie A clubs Internazionale, Juventus and Milan for the seasons 2004/2005, 2005/2006 and 2006/2007. Furthermore, Mediaset obtained a right of first negotiation and a right of first refusal for the transmission of the games of the same clubs through satellite television technology starting from the season 2007-2008. Mediaset was soon followed by the entry in the pay-TV market of another private broadcasting channel, La 7, controlled by Telecom Italia, which equally decided to invest in digital technology and acquire the rights of other Serie A clubs. As of today's date, the two digital terrestrial operators have acquired separately the control of all Serie A games and have agreed to exchange between themselves the highlights of the games broadcasted, so as to enable each of them to offer to the viewers the highlights of the day's fixtures in addition to the single game purchased. On 23 January 2005, Bologna-Cagliari and Inter-Chievo were the first games offered by La 7 and Mediaset.

Bolstered by the low prices of the viewing offered by Mediaset[4] selling pre-paid cards for only 3 Euro per game and by the State contribution to the purchase of the decoders, the market for digital terrestrial pay-TV is rapidly growing.

Sky has been undermined by the appealing offers proposed to the audience by Mediaset, which recently also has purchased the rights to digital terrestrial transmission to the home matches of Roma, Atalanta, Livorno, Messina and Sampdoria, and by La 7. Customers are keen to pay and view each single game for merely 3 Euro, rather than having to purchase the entire season package.

Unquestionably, the two new competitors have taken advantage of the fact that, whereas the Commission had prevented Sky from cumulatively utilizing digital and satellite pay-TV technology, no such limitation has yet been imposed on Mediaset and La 7. As a consequence, Mediaset currently is freely entitled to broadcast games via digital terrestrial pay-TV but it also acquired a right of first negotiation and a right of first refusal for the transmission of the games of the same clubs through satellite television technology starting from the season 2007/2008. Mediaset has thus acquired an unfair advantage which will concretise when the current contracts between Sky and the Serie A clubs expire.

It would be interesting to learn whether Mediaset has clandestine plans to launch a new satellite channel or if, rather, it simply intends to define and keep distinct Sky's and its own "territories".

Due to the condition of blatantly unequal treatment between the competing channels which the above mentioned circumstances have produced, Sky Italia is now considering a claim addressed to the European Antitrust Authority, requesting it to revise the restrictions imposed on it, with special reference to the prohibition to cumulate satellite and digital technologies. According to Murdoch's pay-TV management, the disparity at case - consisting in obliging *exclusively* its own pay-TV to undergo a series of limitations - is alone sufficient to distort free competition on the market.

Leaving aside the ongoing competitive issues between Sky, Mediaset[5] and La 7, the principal concern of the moment is the fact that no limits to the utilization of digital terrestrial technology have yet been delineated by the Italian Antitrust Authority.

More precisely, notwithstanding the fact that the Authority had passed a decision in November 2001[6] containing a detailed Regulation disciplining radio and television digital terrestrial broadcasting, it has not yet adopted a further measure - which was bound to be issued before 31 March 2004 - fixing the percentages of the entirety of the

* Partner, Studio Associato LCA, Avvocati e Commercialisti d'Impresa, Padova, Italy. See also, by the same author: *Ownership, Exploitation and Competition Issues - Legal Aspects of Media Rights on Football Events under Italian Law*, The International Sports Law Journal (ISLJ) 2003/3 pp. 4-11.

1 Legge 3 maggio 2004, n. 112.

2 Conditions which must be verified, from time to time, by the Authority for Communications.

3 Two other conditions were introduced by the law: a) the percentage of population covered by digital terrestrial channels should not be less than 50%; b) the programmes broadcasted by digital terrestrial channels must provide a variety of programmes which differ from those broadcasted on ordinary non pay-TV channels.

4 According to Minister Maurizio Gasparri, digital technology is expected to reach all Italian homes by the end of 2006.

5 Murdoch's Italian management firmly reacted to the practice undertaken by Mediaset and La 7 of pricing the games transmitted via digital terrestrial at below cost and has recently threatened the Serie A clubs to reduce their revenues by 60%. Should this reaction of the American managers be carried to its extremes, undoubtedly it would result in an irreparable and retaliatory damage to the clubs' finances.

6 Autorità Garante per le Comunicazioni, Delibera n. 435/01 "Approvazione del regolamento relativo alla radiodiffusione terrestre tecnica digitale".

television programmes broadcasted through digital terrestrial technology which may be covered by *pay-TV* and *pay-per-view.* This means that while many aspects of the new technology are properly regulated (authorizations and licenses for suppliers of information, relationship with TV operators, etc.), the Italian Authority has failed to establish any limitation to the so-called "broadcasting capacity" for codified format pay-TV programmes. Consequently, as the facts currently stand, Mediaset and La 7 have the right to freely and discretionally determine how many programmes are going to be transmitted exclusively to pay-TV viewers.

Considering that it has been estimated that by the end of 2006 digital terrestrial technology will reach all Italian homes, it can easily be comprehended how the absence of regulations in this respect creates a highly undesirable situation.

The rivalry between operators of digital terrestrial and satellite technology directly influences the position of the owners of the pay-TV rights, namely, the football clubs, which are, as we may recall entitled to sell and economically exploit pay-TV rights individually, rather than through the national federation collectively.

Individual selling is of course exploited by all the major and leading Serie A clubs, which can avail themselves of an exceptionally strong negotiation power with pay-TV operators.

In contrast, the smaller clubs, whose games do not capture such a broad audience, are often left with little or no offers to purchase their pay-TV rights.

As a result, the law establishing individual ownership has been criticized for being, paradoxically, anticompetitive in the peculiar sense that the smaller clubs have been unfairly stripped of all bargaining strength.

Obviously the proposal employed in the summer 2004 to reintroduce collective selling by the League of pay-TV rights, was opposed by the big clubs, which did not agree with the idea of "diluting" or otherwise further sharing their revenues[7].

As a result, current attempts are afoot in order to return some of the economic power to the minor clubs and reinforce their position, by creating an association of ten Serie A clubs (which, not surprisingly, excludes Milan, Juventus and Internazionale) authorized to collectively sell their pay-TV rights. Such collective action will restore balance to the lopsided economic picture that emerges from the current football scenario.

7 It should be kept in mind that re-distribution of the revenues is based on a mutuality principle according to which the total income - deriving from the sale of pay-TV rights of domestic games - is split between the hosting and the hosted club, in the percentages respectively of 82% and 18%. Moreover, revenues deriving from the collective selling of free-to-air highlights of Serie A and Serie B games are divided equally between Serie A and Serie B clubs (in a percentage of 50% to Serie A and 50% to Serie B). With regard to the selling of TV rights of Coppa Italia games, 50% of the revenues is divided among the clubs whose games are broadcasted, 25% is equally divided between all Serie A clubs and the remaining 25% is split between all Serie B clubs.

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The Role of Sport in Development and Peace Promotion

by **Adolf Ogi***

It is a great pleasure and an honour for me to be invited to the 4th Asser-Clingendael Sports Lecture and to be allowed to address you here at the prestigious Clingendael Institute. I am particularly thankful to Dr. Robert Siekmann, Director of the Asser International Sports Law Centre for his invitation. Had I come last year, as initially planned, I wouldn't have had the latest and most timely and exciting information to share with you. I am therefore especially pleased to be allowed to inform you about the latest developments in our field, in particular in relation with the International Year of Sport and Physical Education 2005.

Excellencies, Ladies and Gentlemen,

As the United Nations Secretary-General, Mr. Kofi Annan, launched the *International Year of Sport and Physical Education 2005* at United Nations headquarters in New York on 5 November 2004, we realised how timely and essential it is to adequately comprehend the full dimension of sport in today's society.

The real value of sport is its power to promote human dignity, a feeling of belonging and unity through the universal acceptance of rules and values such as respect for the opponent, without whom there would be no game, for the rules of the game and the decisions of the referee. With this fundamental conception, the impact of sport can be felt on whole nations at global events such as the Olympic Games as well as on each individual on any sports ground on a sunny weekend.

Sport is the best school of life!
As the Special Adviser to United Nations Secretary-General on Sport for Development and Peace, I repeat this message around the world since February 2001. I am convinced by this message as for me it is more than a slogan. Sport has helped me in my life and I have witnessed the power of sport for development and peace many times all around the world.

Sport teaches life skills.
When I practice sport, I learn to overcome defeat; I learn to deal with victory.

I learn to respect my opponent, the referee and I learn to accept his decisions.

These are essential lessons for life in our societies.

Sport helps create good citizens.
Sport is a universal language.
The positive lessons and values of sport are useful in everyday life.

Sport teaches respect for cultural diversity and integration into teams.

Sport brings people together for common goals in a playful and relaxed way.

Sport is a constructive outlet for excessive energy and emotions.

Sport teaches self-control and builds self-esteem.

Sport is good for health.
It's obvious that the regular practice of physical activity has a positive effect on health conditions. Evidence shows that regular participation in physical activity programmes provides all people with physical, social and mental health benefits.

Physical activity acts positively on diet improvement and discourages the use of tobacco, alcohol and drugs.

• Special Adviser to the Secretary-General of the United Nations on Sport for Development and Peace, Under-Secretary-General, Former President of Switzerland.

Address at the 4th Asser-Clingendael International Sports Lecture at the Clingendael Institute in The Hague, The Netherlands, November 19th 2004.

COBY GERHARZ, INSTITUUT "CLINGENDAEL"

Dr Adolf Ogi, UN Special Adviser on Sport for Development and Peace (right), with Dr Robert Siekmann, Director of the ASSER International Sports Law Center (left).

Physical activity is an effective method of disease prevention for the individual and, for nations, a cost-effective way to improve public health.

Sport is good for economic development.
A physically active population is a healthier population, improving the productivity of the workforce and increasing economic output.

Sport and the sports equipment manufacturing industry is also an economic force that is constantly growing, providing jobs and development opportunities.

Sport, thanks to its global and cross-cutting capacity can add tremendous positive value to international development and cooperation work.

In October 2003, the United Nations published a report by an inter-agency task force on Sport for Development and Peace. The task force convened by the Secretary-General was co-chaired by Ms Carol Bellamy, Executive Director of UNICEF and by myself. The report analyses in detail the potential contribution that sport can make towards achieving the United Nations Millennium Development Goals. It provides an overview of the growing role that sport activities are playing in many United Nations' programmes and crystallizes the lessons learned. It also includes recommendations aimed at maximizing and mainstreaming the use of sport.

We are convinced that Governments hold a key position. By being fully engaged domestically as well as in cooperation with each other in their international development and cooperation efforts, Governments can develop greater awareness for the issues of *development through sport* and support the setting up of innovative partnerships.

In November 2003, when I was invited the first time to the Asser-Clingendael Sports Lecture, I had to attend in New York the adoption by the United Nations General Assembly of Resolution 58/5 "Sport as a means to promote Education, Health, Development and Peace". The main goal of the resolution is to elaborate and implement partnership initiatives in which sport plays a central role and to develop sport-based projects to help achieve the Millennium Development Goals. The resolution also proclaims the year 2005 as the *"International Year of Sport and Physical Education"* (IYSPE 2005).

In April 2004, the Secretary-General, Mr. Kofi Annan, urged Governments to consider how sport can be included more systematically in plans to improve people's lives, especially children who live in poverty, disease or conflict. Sport can be used as a relatively simple and inexpensive means to alleviate the trauma and suffering of refugees and others affected by armed conflict; to contribute to peace-building, reconciliation and healing in post-conflict societies; and to assist populations in moving closer to reaching the Millennium Development Goals.

The IYSPE 2005 will provide a unique opportunity to make the case for the value of sport for human development and lasting peace. From football matches in the First World War trenches to the successful 'peace' tests bringing the Pakistani cricket team to India for the first time since 1989; sport has played an important role in the promotion of lasting peace, including during war time, when international diplomatic relations break down. International competitions have always been seen as a peaceful way for countries to measure themselves against one another and to boost nationalism.

Sport has helped re-initiate dialogue when other channels were struggling: North and South Korea have merged their athletes into a common team for the Sydney 2000 Olympic Games; table tennis set the stage for the resumption of diplomatic ties between China and the USA in 1971; and today, Israeli and Palestinian children regularly come together to play football. In December 2004, the Pakistani cricket team will play a return series in India and it is expected that these competitions will further ease a normalization of relations between the two countries in the Sub-Continent.

Within the United Nations system there is a growing experience of using sport as a tool for development and peace. However, much more should be done. Sport is yet to be mainstreamed into the development agenda or the United Nations system. So far, sports initiatives are generally ad hoc, informal, and isolated. The IYSPE 2005 is an ideal platform to develop a coherent and systematic strategy for increasing a more systematic use of sport by all concerned.

Various activities are already being planned by the United Nations system to support national committees in their efforts to observe the IYSPE 2005.

In 2005 I expect to see many partnership efforts between Governments, the private sector, NGOs and the United Nations. The United Nations Fund for international Partnerships (UNFIP) as well as the United Nations Development Programme (UNDP) will support us in the effort of building partnerships for development through sport.

Governments together with sports federations and prestigious athletes are able to make such high profile initiatives take place. What I believe we need to witness next is a clear commitment to making sport available to all. The main goal of the International Year in 2005 must be "*Sport for All*". Our objective must be that every girl and every boy in the world have access to sport. And through sport to a better life, a more healthy life, a better integration and a more balanced education.

I expect all Member States to set up national committees and to use this unique opportunity of the IYSPE 2005. Sport and physical education are necessary to all but they are still loosing ground. In 2005, the United Nations will build partnerships to make sport more available and help those who cannot benefit from sport to enjoy its benefits.

We must work together closely to ensure that the benefits of sport are better known around the world. All stakeholders of Sport must come together and *work beyond sport development to reach development through sport*. By making development through sport possible, by

making "sport for all" possible, we will also promote sport development. If more boys and girls, adults and older people have access to sport, they will also contribute to the development of sport.

As you can see, we have a strong interest in working together next year and shall strengthen our existing partnerships. I also count on the strong support of the Olympic Movement and am proud to announce that the International Olympic Committee President has asked the National Olympic Committees to become involved in the national committees for the IYSPE 2005 as well.

There will be a number of conferences around the world to discuss the value of sport for education, health, development and peace. United Nations personnel from the field and the National Olympic Committee counterparts will also work together to achieve their common development goals through sport.

Sport, with its joys and triumphs, its pains and defeats, its emotions and challenges, is an unrivalled medium for the promotion of education, health, development and peace. I am convinced that sport helps us demonstrate, in our pursuit of the betterment of humanity, that there is more that unites than divides us.

I thank you for your attention.

Van Praag Knows How to Handle Hooligans

by **Erik Oudshoorn***

Would it make sense to introduce a Football Act in the Netherlands in the fight against football hooliganism? This was the central question at a symposium in The Hague yesterday. Michael van Praag had no trouble finding the answer.

In February, the sports spokespersons of the political parties may expect to receive an invitation from Michael van Praag. The chairman of the board of supervisory directors of the Eredivisie CV [Champions League, limited partnership] will treat them to a lecture by the English professor and solicitor Ian Blackshaw, who will explain to them the positive consequences which the special Football Act has had in his country in the fight against hooliganism. In Great Britain, the number of incidents at the highest level has been pushed back since a Football Act indicates precisely which penalties can be imposed for which offences. A special investigative unit keeps hooligans under surveillance and infiltrates the hard-core groups. Compliance with banning orders is monitored by the police. Blackshaw, who is a member of the international sports tribunal (CAS), gave the authorities some well-meaning advice yesterday at a symposium in The Hague. "As far as I am concerned, they can just take over our Act in The Hague and rename it. The Irish have been copying us for years."

This was music to the ears of Michael van Praag. The day before, the former Ajax chairman had been confronted with the government's position in this matter as put across by Prime Minister Balkenende. A Football Act? It would be better to take preventive measures, said the Prime Minister.

Van Praag, however, again pointed out yesterday that despite what politicians and lawyers are claiming the legislation currently in force is simply inadequate. He believes that this is evidenced by practice. As a former chairman of Ajax and a former professional football board member with security as part of his portfolio, Van Praag has some 14 years' experience in this area. Apart from being the chairman of the board of supervisory directors of the Champions League's interest group, he chairs the Stadiums and Security Committee of the European football association UEFA. "If you want to control supporter violence, you have to establish clear rules beforehand and enforce them", Van Praag says. "This could be done in a Football Act or a Special Events Act containing a specific section on football. The current legislation leaves too many loopholes. Throwing a stone at a police officer around a game should be punishable by a clearly described penalty. In England, they can get onto the field straight from the stands. And why don't they? Because this is punishable by a 1,500 pound fine and being banned from the stadium for life."

In his final year as chairman, Van Praag still experienced some troubled times. At twelve out of the seventeen away games problems occurred with the Ajax supporters accompanying the team. At eleven of the seventeen home matches riots broke out, once nearly culminating in a rush on the boardroom. "For us, that was the limit", said Van Praag. "We said, if such and such happens, there will no longer be supporters accompanying the team to away games or we will close down the F-side stand at home matches. Ajax has had no problems since."

Van Praag feels that football hooligans who have committed punishable offences are let off too easily. He read out some figures from the *Centraal Informatiepunt Voetbalvandalisme (CIV)* [Central Information Point for Football Hooliganism] from which it emerged that the judicial authorities had had to drop charges in 36% of the 1,837 cases during the previous season. This was an increase of 14% compared to the year before. The reason was that too often the police detained large groups, which afterwards made it difficult to prove who did what. Van Praag: "Cases have been dismissed which the court considered too childish. Some fifty detentions were performed when Ajax played Roda JC and nothing was done about them. The police are supposed to maintain public order. On a yearly basis, this costs 27 million euro, but 525 million euro is provided each year in taxes for the Treasury. Dozens of cases do not even come before the courts. If you clearly lay down the offences and the penalties connected with them in an Act, the courts will no longer be able to dismiss them so easily."

However, it is not just the politicians who remain unconvinced of the need for a Football Act. The lawyers are not so eager either, including even the legal adviser to the *KNVB*. Professor Heiko van Staveren fears that football and sport in general would become too isolated in case such an Act was introduced. "The violence will shift to other areas. That would be a good thing for football, but not for the legislation. It would leave a bad smell if the government would isolate sport with special legislation. One of the main bottlenecks is the description. What exactly is sport? Sport-related legislation leads to inequality among citizens. It would be like placing a red light where nobody would bother to stop. The government would do better to fight violence across the board."

Just how tolerant the situation meanwhile is in this country was revealed by the *CIV* figures. Supporters who had had a banning order imposed upon them were tolerated in the stands "as long as they stayed out of trouble", according to the *CIV*. Van Praag also had an interesting anecdote to share. "In the interdisciplinary steering group on football hooliganism we had agreed that supporters without a ticket would no longer be admitted to the stadiums. This steering group also included the mayor of Den Bosch. Shortly thereafter, Ajax was to play in the De Vliert stadium. A contingent of special duty police was bussed in from Amsterdam to perform the controls. And still supporters without tickets were admitted. After the game, the mayor stood in the boardroom smoking a fat cigar and boasting what a great job he had done."

The International Sports Law Journal

* Report on ASSER International Sports Law Seminar - in co-operation with CMS Derks Star Busmann, Utrecht - on "Sports Legislation and Football Act: The Netherlands, England and Europe: Using Special Legislation to Combat Football Hooliganism", T.M.C. Asser Instituut, The Hague, 30 November 2004; translated from *NRC Handelsblad*, 1 December 2004.

The 'English Disease' - Tackling Football Hooliganism in England

by **Ian Blackshaw***

1. Introductory

The legendary Liverpool Football Club Manager, Bill Shankley, who was passionate about football, when asked whether football was a matter of life and death, is reputed to have said: "Oh no! - It's much more important than that!"

Unfortunately, football has turned out, in a number of cases, to be a matter of life and death, insofar as football-related violence and misbehaviour at and around matches -particularly internationals - is concerned. For example, the stabbing to death of two English football fans in Turkey and the civil disorder which broke out amongst English football fans in Liege in Belgium during the staging of the Euro 2000 football championships. Because of these and other high profile incidents over the years at home and abroad, football hooliganism has been dubbed 'the English Disease'.

Football hooliganism is often regarded as a modern phenomenon, but one can trace its origins back to the turn of the Twentieth Century, and is not just limited to England either. In 1909, for example, goalposts were torn down and over 100 people were injured in a pitched battle between fans and the police following the Scottish Cup Final in Glasgow. According to many commentators, the modern era of football hooliganism began in 1961, when, in that year, a major riot broke out following an equalising goal during a match between Sunderland and Tottenham. In 1985, incidents involving spectators gaining access to the playing area and mass fights breaking out between opposing groups at matches at Chelsea and Luton Town grounds were caught on television for all to see. Football hooliganism had become a serious social problem in England. And naturally, the question facing the football and civil authorities was how best to combat it? In particular, what legal measures should be taken?

2. Legal Measures Generally

Also in 1985, a Government Inquiry, following the fire at the Bradford City ground, which led to the deaths of 54 people, culminated in the Popplewell Report. Its recommendations - also based on a review of the tragedy at the Hazel Stadium in Brussels at the UEFA Cup Final - led to a number of measures on safety and the consideration of a membership scheme for all football spectators. Although enabling legislation was introduced in the form of the Football Spectators Act 1989, it was never introduced.

Another turning point was the death in 1989 of 95 Liverpool fans at the FA Cup semi-final at the Hillsborough Stadium in Sheffield. Although it is now recognised that this was caused primarily by safety defects and failures of policing, it was initially regarded as the latest manifestation of football hooliganism. Another Government Inquiry followed and this resulted in the Taylor Report. Like the earlier Popplewell Report, the recommendations dealt with safety at football grounds - most notably the introduction of all-seater stadiums at the top professional clubs - and also specific football-related legal measures leading to amendments of the Football Spectators Act 1989, which, at the time, was going through Parliament, and also the passing of the Football Offences Act 1991. This latter Act made it a criminal offence to enter the playing area; to throw missiles; and to chant racist remarks. The measures in the1989 and 1991 Acts were subsequently strengthened by the passing of the Football (Offences and Disorder) Act 1999 and the Football (Disorder) Act 2000.

Although all these legal measures have been generally welcomed, it must be observed that they do not treat the causes but only the symptoms of football hooliganism.

3. Specific Football Hooligan Offences

Section 14A of the Football Spectators Act 1989, as amended by the Football (Disorder) Act 2000, requires the Court to impose a football banning order on any person convicted of a relevant football-related offence, if it is satisfied that there are reasonable grounds for believing that the making of the banning order would help to prevent violence or disorder at or in connection with any regulated football matches. Schedule 1 of the Football Spectators Act 1989 contains a full list of the relevant offences. If the Court does not impose a banning order, it must give reasons.

Section 14B of the Football Spectators Act 1989 empowers the police to apply to a Magistrates' Court to impose a banning order on any person that the police can prove, to the civil standard of proof - 'on the balance of probabilities' - "has at any time caused or contributed to any violence or disorder in the United kingdom or elsewhere." It should be noted, however, that the violence or disorder need not be football-related. If the police can make that showing, provided the Court is "satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches", the Court is *obliged* to impose a banning order on the person concerned. Thus, section 14B authorises the banning of a person who has not been convicted of any offence - football related or otherwise. In support of applications for a banning order under section 14B, the police usually rely on previous convictions, often coupled with a so-called 'hooligan profile' compiled by the Football Intelligence Unit (part of 'NCIS' - the National Criminal Intelligence Service), as happened in the Gough case (see later). However, previous convictions are not a legal prerequisite - the police may rely on a 'hooligan profile' alone! This raises Human Rights considerations under the UK Human Rights Act 1998, which incorporates directly into UK Law the provisions of the European Convention on Human Rights 1950 (again, see later).

4. Length of Banning Orders

For section 14A offences, the banning order must be for a minimum period of 3 years, where a non-custodial sentence has been imposed on the person concerned; and a minimum of 6 years and a maximum of 10 years, where a custodial sentence has been imposed.

For section 14B offences, the banning order must be for a minimum of 2 and a maximum of 3 years.

In all cases, the Courts may impose domestic and international banning orders. Furthermore, a police officer may refuse individual fans from travelling abroad where the officer has "reasonable suspicion" that the persons concerned *may* be involved in football hooliganism. Again, this measure raises Human Rights Act issues (see below). Thus, passports may be confiscated.

5. Human Rights Act 1998 Issues

As mentioned above, Banning orders imposed on football hooligans may raise issues under the UK Human Rights Act and, in particular under article 6 of the European Convention on human rights 1950, which guarantees the right of a person to a fair trial, and under article 8, which concerns respect for a person's private. International Banning Orders may also raise issues under the freedom of movement

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* Honorary Fellow of the ASSER International Sports Law Centre. Paper delivered at the ASSER International Sports Law Seminar - in co-operation with CMS Derks Star Busmann, Utrecht - on "Sports Legislation and Football Act: The Netherlands, England and Europe: Using Special Legislation to Combat Football Hooliganism", The Hague, The Netherlands, T.M.C. Asser Instituut, 30 November 2004.

of persons provisions of the European Union Treaty.

The Gough case, already referred to, well illustrates the attitude - so far - of the English Judges to these issues. A brief report of the facts, arguments and decision in this case now follows:

Gough V Chief Constable of Derbyshire (2002) 2 All ER 985
Appeal by Gough and Smith ('the appellants') from a decision of the Divisional Court dismissing their appeals by way of case stated against banning orders for two years made against them under s.14B Football Spectators Act 1989 as amended by the Football (Disorder) Act 2000. The appellants had been convicted of violent offences in 1998 and 1990 respectively. In addition, each was the subject of a "profile" prepared by the police that indicated repeated involvement in or near incidents of violence at or around football matches. By this appeal the appellants contended that: (i) the banning orders derogated from the positive rights on freedom of movement and freedom to leave their home country conferred on them by Art.1 and Art.2 Council Directive 73/148/EEC because it was not permissible to justify a banning order on public grounds, alternatively that no such grounds were made out on the evidence; (ii) the 2000 Act was contrary to Community law and therefore inapplicable insofar as it imposed mandatory restrictions on free movement within the Community on criteria that were not provided for or permitted by Community legislation; and (iii) it was contrary to the Community law principle of proportionality to ban an individual from travelling anywhere within the Community even if the relevant match or tournament was not taking place within the Community. The appellants further contended that the procedures for the imposition of banning orders infringed Art.6 and/or Art.8 European Convention on Human Rights because: (a) only the civil standard of proof was required to be satisfied; (b) there were insufficient procedural safeguards appropriate to the "criminal charge" that a notice of application for a banning order constituted; and (c) the geographical scope of the orders was unacceptably broad.

HELD: (1) The court was satisfied that there was a public policy exception to Art.2 of the Directive. There was no absolute right to leave one's country. (2) Although it might initially appear disproportionate to ban all foreign travel, the court was satisfied that such a reaction was unsound. Banning orders were only to be imposed where there were strong grounds for concluding that the individual had a propensity for taking part in football hooliganism. It was proportionate that those who had shown such a propensity should be subject to a scheme that restricted their ability to indulge in it. (3) Although the civil standard of proof applied, that standard was flexible and had to reflect the consequences that would follow if the case for a banning order were made out. This should lead magistrates to apply an exacting standard of proof which, in practice, would be hard to distinguish from the criminal one (see *B v Chief Constable of Avon and Somerset Constabulary (2001)* 1 WLR 340 and *R v Manchester Crown Court, ex parte McCann (2001)* 1 WLR 1084). (4) Banning orders were not "criminal charges", yet the standard of proof to be applied was akin to the criminal standard. In such circumstances, the Art.6 challenge failed. (5) If a banning order were properly made, any interference with an individual's Art.8 rights would be justified under Art.8 (2) because it was necessary for the prevention of disorder. (6) On the facts, and even though the correct standard of proof had not been applied, the case for a banning order on each of the appellants was amply made out.

The Appeals were dismissed.

Thus, the Gough case decided that International Banning Orders on football hooligans did not infringe EU Law on freedom of movement of persons, or the provisions of the European Convention on Human Rights. However, there is unease in some legal quarters, with which the author of this article, who has written in 'The Times' on this subject, would sympathise and wish to be associated, that the civil liberties of football hooligans - particularly those who have not been convicted of any public order or football-related offence, but merely suspected of being a potential football hooligan - are being eroded by the legal measures that have been enacted in England to curb football hooliganism.

6. Latest UK Home Office Statistics on Football Hooliganism

The UK Home Office (Interior Ministry) has recently published some statistics on football-related offences for the football season 2003-2004. The main ones, which make interesting reading, are as follows:

- Arrests for football related offences down by 10%, to 3,982 from 4,413
- Level of arrests reflects the lingering domestic football disorder problems

Substantial increase in the number of football banning orders, up to 2,596 on 18 October 2004, from 1,794 on 14 August 2003

- Targeted police operations resulted in hundreds of high quality football banning orders. 1,263 new bans were made between 15 August 2003 and 18 October 2004

Arrest levels remain low - the highest league attendances for 34 years, 29,197,510 produced 3,010 arrests - an arrest rate of 0.01%

- Vast majority of matches remain trouble-free - 50% of Premiership, 72% of 1st Division, 82% of 2nd Division and 89% of 3rd Division matches had one arrest or less. Overall, during the 2003-2004 season there was an average of 1.62 arrests per game
- 69% increase in the number of arrests for domestic breach of football banning order (from 37 to 63) reflecting an increased crackdown on individuals acting in breach of the terms of their order. No arrests, or evidence of anyone subject to a banning order attempting to travel overseas
- 57% of the total arrests were made outside of grounds, 85% of arrests for violent disorder outside of grounds

More information can be obtained by logging on to the UK Home Office official website at 'www.homeoffice.gov.uk'.

The Home Office figures show that arrests per football fan/per game were very low, bearing in mind that some 36 million fans attended professional football matches in England during the 2003-2004 season. It may be deuced from them that the legal measures to curb football hooliganism in England seem to be working.

7. Conclusion

In my view, to kick hooliganism out of football not only requires initiatives and actions on the part of national, regional and world football governing bodies, but also a legal framework in which law and order may be maintained and civilised behaviour encouraged for the good of the game and in the interests of the wider community.

However, in framing the actual legal measures to achieve these ends, there is a need to treat the causes of football hooliganism rather than the symptoms and, in this regard, to pay particular attention to the Human Rights implications of imposing restrictions on the freedom of actual and, more particularly, potential football hooligans. Getting this balance right is crucial and clearly the name of the game!

The European Union and Sport: Legal and Policy Documents

Robert Siekmann and Janwillem Soek (Eds), T.M.C. Asser Press, The Hague 2005, pp. 921 + XI, hardcover, ISBN 90-6704-194-7, price GBP 90.00/US$ 150.00

This is the latest and, indeed, the very first volume in the series of collections of important documentation on International Sports Law published by the International Sports Law Centre of the T M C Asser Instituut, based in The Hague, which deals with the Intergovernmental (inter-state) side of International Sports Law. Previous volumes have dealt with NGO materials - the Statutes and Constitutions, Doping, Arbitral and Disciplinary Rules of the International Olympic Committee and the International Sports Federations belonging to the Olympic Movement.

Writing the Foreword, the former EU Sports Commissioner, Viviane Reding, remarks that "The Book provides a detailed insight in what could be called the *acquis communautaire sportive*."

This body of law and policy was developed over the years through numerous decisions and policy documents of the European Council of Ministers, the Commission, the European Parliament and - not least - by the European Court of justice itself. The collection - not surprisingly - begins with the ECJ landmark decision in the case of *Walrave and Koch v Association Union Cycliste Internationale* in 1974, which held that sport is subject to Community insofar as it constitutes an economic activity. Since then, various cases, for example, *Dona*, *Deliège*, *Lehtonen* and - not least - *Bosman* (a case that has aroused more media attention and general public interest than any other!) have confirmed this legal approach. All of them figure in the Book. As do various other leading ECJ cases and Commission decisions on, for example, competition law; discrimination; doping; state aid; and trade marks (including the famous Matthew Reed and Arsenal Football Club long-running dispute), to mention but a few.

The Book also covers EU Directives, including the important so-called 'Television Without Frontiers' Directive of 30 June 1997, and Policy Statements and Questions and Answers on Sport of the European Parliament and Council Declarations on Sport, including those of Amsterdam (1997) and Nice (2000). The Book went to press before the new Sport Article 282 in Part III of the new EU Constitution Treaty was signed in Rome on 29 October 2004. However, the learned Editors mention and anticipate it in their Introduction!

There is also a miscellaneous section dealing with such diverse and, in some cases, controversial matters such as child labour; dangerous sports; fishing; hunting; and noise pollution.

Not all of the documents on EU Sports Law and Policy, of course, are included in the Book - otherwise the Book would have become too unwieldy and impracticable - but the main ones are included. However, those, whose texts are not included in full, but only mentioned, are marked with an asterisk and, as such, are freely accessible on the Asser International Sports Law Centre website at *www.sportslaw.nl/documentation*.

There is an excellent, detailed and comprehensive Index, spanning 58 pages, which makes the work user friendly and a very valuable and practical reference tool.

The Book is a veritable mine of useful information and materials, and one that any self-respecting sports lawyer, administrator, promoter, researcher or, indeed, anyone else with a professional, commercial and other interest in sport, can hardly do without.

Ian Blackshaw

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