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On 10 November 2005, in the Olympic Museum in Lausanne (Switzerland), a scientific conference was held by the International Center for Sports Studies (CIES) of the University of Neuchâtel on the topical issue of *Nationality in Sports: Issues and Problems*. Prof. Gerard-René de Groot, University of Maastricht (The Netherlands), an international expert on nationality law, was one of the speakers. He has elaborated his presentation for that occasion into the leading article of this issue of ISLJ. In his contribution, he recommends that new general sporting rules be adopted by the IFs to counter ad hoc naturalization procedures under public law for sporting purposes. On 4 April last at the Asser Institute in The Hague a seminar took place on this issue following the hotly debated question of the occasional naturalization of Ivory Coast's Salomon Kalou, a player of Feyenoord Rotterdam, in order that he might play for Holland in the Football World Cup in Germany this summer. Besides Kalou's lawyer, Prof. De Groot was again a speaker as was Dr Stefaan van den Bogaert, who is also with the University of Maastricht and author of *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (The Hague 2005). The event was chaired by Nicole Edelenbos, partner of Boer & Croon Management Executives and a former director of Feyenoord Rotterdam.

In December 2005, the anniversary publication *The Court of Arbitration for Sport 1984-2004* appeared in print (T.M.C. Asser Press; pp. 577). It was produced by the ASSER International Sports Law Centre in cooperation with the University of Johannesburg, South Africa and Griffith University, Brisbane, Australia. On 9 May the second joint international sports law seminar organized by the ASSER International Sports Law Centre in cooperation with the Hugo Sinzheimer Institute for Labour Law took place at the University of Amsterdam. The theme was *CAS and Lex Sportiva*. Speakers were Ian

Blackshaw, Domenico Di Pietro, Ousmane Kane, Roberto Branco Martins, Janwillem Soek, Emile Vrijman and Andrea Pinna.

In the meantime, two new projects have been started that are to culminate in the publication of two books. The first is *Player Agents Worldwide: Legal Aspects*, which will mainly consist of country studies and also have a section on European Law and Players' Agents, and the second is *The Selling of TV Rights in European Professional Football*, to which Professor Stephen Weatherill, Oxford University, United Kingdom will contribute a study on the European law aspects of the issue and which for the purpose of comparison will also comprise country studies on the European "Big Five" professional football countries and others.

On 6 June next, the 6th Annual Asser/Clingendael International Sports Lecture will take place at, as has become the tradition, the Netherlands Institute for International Relations "Clingendael" in The Hague. The theme of this lecture will be *The European Union and Sport: Law and Policy* and the speakers will be Prof. Stephen Weatherill and Mr Jean-Louis Dupont, who was counsel in *Bosman* and who now counsels the G-14 in the FC Sporting Charleroi and FC Lyonais cases versus FIFA on the mandatory player release system for international matches.

Finally it should be mentioned that on 3 March 2006 Janwillem Soek, co-editor of ISLJ and senior researcher at the ASSER International Sports Law Centre, successfully defended his PhD on *The Strict Liability Principle and the Human Rights of the Athlete in Doping Cases* at the Erasmus University, Rotterdam.

The Editors

Remarks on the Relationship Between the General Legal Nationality of a Person and his 'Sporting Nationality'*

by Gerard-René de Groot**

1. Function and definition of nationality

Nationality is both in international and in national law an important connecting factor for the attribution of rights and duties to individual persons and States. Under international law States have e.g. the right to grant diplomatic protection to persons who possess their nationality (Donner 1983). Under national law the obligation to fulfil military service and the rights to become a member of parliament or to have high political functions are frequently linked to the possession of the nationality of the country involved. However, there is no standard list of duties and rights which normally are linked to the nationality of a State under national and international law (de Groot 1989, 13-15; Makarov 1962, 30, 31; Wiessner 1989). National States are in principle autonomous in their decision which rights and duties will be connected to the possession of nationality, whereas under international law the consequences of the possession of a nationality are also subject of discussion (van Panhuys 1959). In sports the possession of the nationality of a certain State is - inter alia - of paramount importance in order to be qualified to represent this State in international competitions between athletes (Van den Bogaert 2005, 321-389.).

Nationality can be defined as 'the legal bond between a person and a State'. This definition is, inter alia, given in Art. 2 (a) of the European Convention on Nationality (Strasbourg 1997). Art. 2 (a) immediately adds the words "and does not indicate the person's ethnic origin". In other words, nationality is a legal concept and not a sociological or ethnical concept. The nationality of a country in this legal sense (hereinafter: general legal nationality) is acquired or lost on the basis of a nationality statute (de Groot 1989, 10-12; Makarov 1962, 12-19). For example, a person possesses Netherlands nationality if he or she possesses this nationality by virtue of the general Netherlands nationality statute, i.e. the 1984 *Rijkswet op het Nederlanderschap* or other relevant legislation, rules of implementation, case law and legal practice.

2. The term 'nationality'

The word 'nationality' is etymologically derived from the Latin word '*natio*' (nation). A difficulty is that 'nation' can nowadays be used as a synonym for 'State', but also in order to refer to a 'people' in a sociological or ethnical sense. In the context of international and national law the word 'nationality' refers to the legal bond with the 'nation' as State, but in many languages words etymologically related to nationality are (or can be) used for the indication of the ethnicity of persons (e.g. '*Nationalität*' in the German language) (de Groot 2003b, 6-10).

A second difficulty is the relationship between the concepts 'nationality' and 'citizenship'. 'Nationality' expresses a person's legal bond with a particular State; 'citizenship' implies, *inter alia*, enabling an individual to actively participate in the constitutional life of that State. Often, the entitlement to citizenship rights and nationality coincide in practice. However, not everyone who possesses the nationality of a particular State also enjoys full citizenship rights of that State; small children may possess the nationality of a State, but they are not yet entitled to exercise citizenship rights. The opposite occurs as well: persons who are not nationals of a particular State may nevertheless be granted specific rights to participate in the constitutional life of that State. In some countries, for example, subject to certain conditions non-'nationals' are entitled to vote and be elected in local (municipalities) elections.

In the English language, the relationship between the two terms 'nationality' and 'citizenship' is even complicated in the context of

nationality law itself. In the United Kingdom, the term 'nationality' is used to indicate the formal link between a person and the State. The statute that regulates this status is the British *Nationality Act* 1981. The most privileged status to be acquired under this Act, however, is the status of "British *citizen*". Other statuses are: British Overseas Territories Citizen, British Overseas Citizen, British Subject without Citizenship and British Protected Person. In Ireland, it is the Irish *Nationality and Citizenship Act* 1956 that regulates who precisely possess Irish *citizenship*. In the United States, the Immigration and *Nationality Act* 1952 regulates who is an American *citizen*, but the Act also provides that the inhabitants of American Samoa and Swains Island have the status of American *national* without *citizenship* (Section 308; 8 U.S.C. 1408).

Also within several other languages a complicated relationship between terms for nationality (in the sense of a bond with the State) and citizenship can be observed. Compare e.g. Dutch: *nationaliteit-burgerschap*; French: *nationalité-citoyenneté* (see on these terms Guiguet 1997), German: *Staatsangehörigkeit-Bürgerschaft* (see Grawert 1973, 164-174), Portuguese: *nacionalidade-cidadania*; Spanish: *nacionalidad-ciudadania*. But in again several other languages only one term is used for both 'nationality' and 'citizenship' (e.g. Polish: *obywatelstwo*; Italian: *cittadinanza*; Swedish: *medborgarskap*), but frequently in those languages another word exists which indicates the nationality in ethnical sense (Italian: *nazionalità*; Polish: *narodowość*; Swedish: *nationalitet*).

3. General versus functional nationality

When international law refers to nationality, this reference has to be read as a reference to the general legal nationality of a State, acquired on the basis of a ground for acquisition provided by the statute on nationality of the State involved. This is e.g. the case, where art. 15 of the Universal Declaration of Human Rights states, that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Next to this general legal nationality which indicates the formal legal bond between a person and a State, States or International Organisations may - for special purposes - develop a so-called 'functional nationality' or "autonomous nationality" (Makarov 1962, 13-17; van Panhuys 1959, 140, 141). If for certain purposes a functional nationality is introduced, the grounds for acquisition and loss of this specific functional nationality have to be defined in detail.

In this contribution, the question has to be answered whether the development of a functional autonomous sporting nationality is desirable? In principle, a negative answer of this question is advisable. The regulation of these grounds for acquisition and loss of such a functional nationality is a very complicated task, if one does not want to use simply the place of birth as the only ground for acquisition of the functional nationality without any ground for loss of the functional nationality involved. Even the fiction that one is deemed to have the nationality of the country where one has ordinary residence needs considerable further elaboration, because of the fact that the definition of residence differs from country to country.

* This contribution is an elaborated version of a paper that was presented at the Scientific Congress on Nationality in Sports: Issues and Problems, organized by The International Center for Sports Studies (CIES) of the University of

Neuchâtel, in Lausanne, Switzerland, 10 November 2005.

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From left to right: Professor De Groot (University of Maastricht), Salomon Kalou (Ivory Coast / Feyenoord Rotterdam) and Marco van Basten (head coach of the Dutch national football team)

However, there is an attractive alternative for the development of a functional nationality, which comes quite close to an own sporting nationality, but is in fact not an independent notion and which does not require to regulate the grounds for acquisition and loss in detail. One could for the determination, whether a person qualifies to represent a certain State in international sporting competitions use as a basic requirement the possession of the general legal nationality of the country involved, but add - insofar as it is desirable - additional requirements which guarantee that the nationality is the manifestation of a genuine link between the person and the State involved. The essential questions are then of course, which additional requirement(s) should be added and in which cases these additional requirement(s) should be fulfilled?

If one uses the general legal nationality as a basic requirement for the eligibility of persons to represent a country in international sporting competitions, it is appropriate to pay special attention to the position of stateless persons and refugees. These persons should be eligible as representatives of their country of residence as a consequence of the Geneva Convention relating to the status of refugees (1951), respectively of the New York Convention relating to the status of stateless persons (1954) (compare art. 12 (1) of these conventions).

4. Genuine link

The reason to add - in certain cases - (an) additional requirement(s) next to the condition of the possession of the nationality of the country involved, before a person qualifies to represent a country in international sporting competitions, is in order to ensure that a real, genuine link exists between the athlete involved and the country which he wants to represent. However, one has to realise that the general legal nationality normally is already a manifestation of such a genuine link. With other words: normally the general, legal nationality is only attributed, if a genuine link exists between the person involved and the State in question.

The expressions 'genuine link' or 'genuine connection' refer implicitly to the *Nottebohm* decision of the International Court of Justice (ICJ Reports 1955, 4 (23)). The Court concluded in that case in respect to the naturalisation of Mr Nottebohm by the State of Liechtenstein:

"... a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."

However, this decision does not deal with the validity of the conferment of nationality in general, nor with the validity of the acquisition of nationality by naturalisation, but exclusively with the right of a State to grant diplomatic protection to a national against another State (Randelshofer 1985, 421). Therefore, a conferral of nationality

without genuine link as such is valid. As a consequence, it may happen that a person possesses a nationality, which is not a manifestation of a genuine link between this person and the State involved.

5. Intermezzo: national autonomy

Thus far no general agreement on the rules relating to the acquisition and loss of nationality exist. The fixing of such rules is within the competence of each State.

Art. 1 of the Hague Convention on certain questions relating to the conflict of nationality laws (1930) underpins: 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.'

This principal autonomy in nationality matters was already earlier recognised by the Permanent Court of International Justice in 1923 in the decision on the Nationality decrees in Tunis and Morocco. The Court concluded that nationality questions 'belong according to the current status of international law' to the '*domaine réservé*' of national States.

The principle of autonomy in nationality matters is repeated in Art. 3 of the European Convention on Nationality (1997) and is also recognised by the European Court of Justice in the decision in *re Micheletti* (7-7-1992; ECR 1992, I-4258) (cf., de Groot 2003b, 18-20).

A consequence of the autonomy of States in matters of nationality is the possibility of statelessness or dual/multiple nationality. It may happen that no State attributes a nationality to a certain person, whereas another person may possess simultaneously the nationality of two or more States (Makarov 1962, 291-322).

The national autonomy in nationality matters is nowadays restricted by several bilateral and multilateral treaties. Bilateral nationality treaties are frequently concluded after the transfer of territory from one State to another and in cases of State succession (Makarov 1962, 128-140). An example is the Agreement concerning the assignment of citizens between the Kingdom of the Netherlands and the Republic of Surinam (1975) (*Overeenkomst betreffende de toescheiding van staatsburgers tussen het Koninkrijk der Nederlanden en de Republiek Suriname*).

In the past 75 years several multilateral treaties were concluded with relevance for nationality law (see on those treaties de Groot/Doeswijk 2004, 58-84).

The autonomy of States in nationality matters is also limited by general principles of international law. However, it is not easy to identify the content of those principles. In the 1997 European Convention on Nationality an attempt is made to codify the state of the art in respect of these general principles of international law which limit the autonomy of States in nationality matters. Art. 4 states:

'The rules on nationality of each State Party shall be based on the following principles:

- a. everyone has the right to a nationality;
- b. statelessness shall be avoided;
- c. no one shall be arbitrarily deprived of his or her nationality;
- d. neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.'

However, these general principles are rather vague. Art. 4 (a) does not indicate to which nationality a person should have a right; Art. 4 (b) lacks to mention in which ways statelessness should be avoided; and Art. 4 (c) does not provide criteria in order to establish that a deprivation of nationality was arbitrary. Exclusively Art. 4 (d) is concrete enough to apply directly (de Groot 2000, 123-128).

Art. 5 of the European Convention on Nationality 1997 gives two additional rules which could develop into general principles of international law regarding nationality. Art. 5 (1) prescribes that the rules of a State on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin. However, in practice it is extremely difficult to establish when, e.g., a preferential access to the nationality of a State based on ethnic origin constitutes a discrimination in the sense of this provision (see, e.g., Par. 7 German nationality act and Art. 116 (1) German constitution; Art. 5 Greek nationality Act; Art. 22 (1) Spanish civil code (sefardic jews)) (de Groot/ Doeswijk 2004, 89, 90).

Art. 5 (2) obliges States to 'be guided by the principle of non-discrimination between its nationals, whether they are nationals at birth or have acquired its nationality subsequently.' This obligation is also extremely vague. Furthermore, in a comparative perspective, one can observe that many States do not observe this rule.

As was mentioned already above, no concrete limitation of the autonomy can be concluded from the ruling of the International Court of Justice in *re Nottebohm*.

In view of these facts, one has to answer the question whether many restrictions of the autonomy of States in nationality matters are caused by international conventions, customary international law and the principles of law generally recognised with regard to nationality, in the negative. The most important general restriction is that the grounds for acquisition and loss should not violate human rights (e.g. no discrimination on racial grounds)

The consequence is, that an enormous variety of grounds for acquisition and grounds for loss of nationality exists.

An indirect consequence of this fact for sports is an unequal competition for States with respect to excellent sporting (wo)men and shocking inequalities between athletes.

6. Grounds for acquisition of nationality: main categories

6.1 General grounds for acquisition

Although some international treaties aim to harmonise certain grounds for acquisition of nationality, one can still observe a huge variety of grounds for acquisition *ex lege*. The most current ways of acquisition of nationality by birth are acquisition *iure sanguinis* (by birth as a child of a national) and acquisition *iure soli* (by birth on the territory of a State).

Originally, all States which provided for an acquisition of nationality *iure sanguinis* nearly exclusively applied *ius sanguinis a patre* (in the paternal line); only in exceptional circumstances *ius sanguinis a matre* (the maternal line) was relevant (e.g. in case of a child born out of wedlock and not recognised by a man) (Gonset 1977). In practice, however, most children had the same nationality as father and mother, because women lost their own nationality at the moment of their marriage and at that moment acquired the nationality of their husband. This system was labelled by Dutoit (1973) as *système unitaire*. During the 20th century this system was gradually replaced by the so-called *système dualiste* which allowed married women to possess an

own independent nationality (Dutoit 1973-1980; Dutoit/Masmejan 1991; Dutoit/ Blackie 1993; Dutoit/ Affolter 1998; de Groot 1977).

Most countries now apply a *ius sanguinis a matre et a patre*: a child acquires the nationality if father or mother possesses this nationality (de Groot 2002a, 124). However, some countries provide for exceptions. In the first place, some countries exclude children born out of wedlock as a child of a foreign mother and a father who is a national (de Groot 2002a, 131-135) (see Art. 6 (1) (a) (2) European convention on nationality 1997). Secondly, several countries restrict acquisition of nationality if not both parents possess the nationality of the country involved (de Groot 2002a, 128). In the third place, many countries restrict the transmission of the nationality of a parent to a child born abroad to the first or second generation born outside the country involved (de Groot 2002a, 125-129) (see Art. 6 (1) (a) (1) European Convention on Nationality 1997).

The United Kingdom and Ireland traditionally applied *ius soli*; so did traditional immigration countries like the United States, most countries of Latin America (see Moosmayer 1963), Australia, New Zealand and South Africa. Increasingly, these countries do not apply a strict *ius soli* (birth on territory entitles to nationality), but prescribe additionally that at least one parent meets certain residence requirements (UK since 1983; Ireland since 2005).

Nowadays, most countries do not apply either *ius sanguinis* or *ius soli*, but a combination of both principles. Classical *ius soli* countries provide in case of birth abroad of a child of a national for an acquisition *iure sanguinis*, but often limit the transmission of nationality in this way to the first or second generation. At the other side, classical *ius sanguinis* countries have in the recent past introduced some elements of *ius soli* in order to reduce cases of statelessness or to stimulate the integration of the descendants of foreign families residing permanently on their territory (de Groot 2002a, 137-139).

Children born in wedlock have in principle at the moment of birth a family relationship with both father and mother: this family relationship is frequently the legal basis for the acquisition of nationality *iure sanguinis*. If a child is born out of wedlock, the family relationship with the father can be established later on by, e.g., recognition, legitimation or judicial establishment of paternity. Many legal systems provide that in this case the child acquires the nationality of the father, although several countries provide for additional requirements (de Groot 2002a, 131-133)

Many countries mention adoption as a ground for acquisition of nationality *ex lege*. Most of these countries require that the adoption involved was realized during the minority of the child. However, in some countries the age limit is lower (de Groot 2002a, 135, 136); Hecker 1985). Some countries only provide for nationality consequences of adoption when the adoption order was made by a court or by authorities of the country involved. However, an increasing number of nationality codes provide for the possibility that a foreign adoption order has nationality consequences if this foreign adoption order is recognized because of rules of private international law. In some countries, a special reference is made to the Hague Adoption Convention of 29 May 1993. In respect of adoption, one has to realize that many countries only know full adoption, which replaces completely the pre-existing legal family ties of the child with the original parents by a family relationship with the adoptive parents. Some countries provide (in most cases as an alternative: so e.g. France and Portugal) for a weak adoption (also called 'simple adoption'), which creates a family relationship with the adoptive parents, but does not disrupt all legal ties with the original parents. This so-called 'weak' adoption often lacks nationality consequences, whereas the full adoption has these consequences.

Most countries provide that, under certain conditions, children of a person who acquires the nationality of the country also acquire this nationality if they are still minors. A large variety of conditions for an extension of acquisition can be observed (de Groot/ Vrinds 2004). Next to these frequently occurring grounds for acquisition of nationality *ex lege* some States provide for other grounds for automatic acquisition of nationality. Some examples: Children born in France to foreign parents born abroad acquire French nationality *ex lege* when they reach

the age of majority. According to Austrian nationality law, an alien may acquire *ex lege* Austrian nationality by accepting an appointment as an ordinary professor at an Austrian university. Compare also in this context the legislation of the Vatican. French nationality can, if certain conditions are fulfilled, be acquired by a person born in France who enters the French army. In Spain the possession and continuous use of Spanish nationality for 10 years in good faith and based on a title registered in the civil register is cause for consolidation of the nationality if the title for the acquisition involved is annulled. In other words, continuous treatment as a national is, in case of good faith of the person involved, a ground for acquisition of nationality.

6.2 Option rights

In several countries certain persons can acquire, under certain conditions, the nationality of the country involved by lodging a declaration of option (de Groot 2002a, 144-154; Meessen 1966). The details of the conditions can not be elaborated here nor will the precise option procedure be described. However, it is important to stress that there are at least two distinct types of options. According to the law of some countries, a declaration of option can be made orally without any formality. Of course the declaration has to reach the competent authorities. Normally these authorities will make an official document, which will be signed in order to prove the declaration, but if such a document does not exist, the declaration can be proved by any other means. If a declaration was made, but not all the conditions giving a right to opt were fulfilled, the nationality is not acquired. If all conditions were fulfilled and the declaration can be proved, although no document exists, the nationality is nevertheless acquired. The authorities do not have the possibility to avoid the acquisition of nationality because of, for example, reasons of public policy or state security.

In some other countries, a person who uses his right of option must make a written declaration. The authorities control whether all the conditions are fulfilled, but they are also able to reject the option for reasons of public security or lack of integration. It is obvious that this kind of option is much weaker than the first category mentioned. It is therefore not surprising that, generally speaking, countries which have this second type of option rights often grant this right to considerably more persons than countries where the first type of option rights exists. One could also describe the second type of option rights as a quick naturalization procedure where the discretion of the authorities to refuse the acquisition of nationality is limited.

Some countries do not use the term 'option rights', but provide for the possibility to register as a citizen if certain requirements are met. If the authorities do not have any discretion in respect of the registration, such a right to register as a citizen is in fact an option right of the first mentioned category. If there is a discretion of the authorities, it can be classified as an option right of the second category.

In this context it also has to be mentioned that a couple of countries use the construction of a legal entitlement to naturalization: if certain conditions are fulfilled naturalization has to be granted on the application of the person involved. The authorities' discretion is reduced to zero. Such an entitlement comes close to the option rights of the first mentioned category. If the naturalization can still be refused for reasons of public policy or similar general reasons, the entitlement can be compared with the option rights of the second category.

6.3 Naturalisation

All countries provide for the possibility of acquisition of nationality by naturalisation, i.e. by a discretionary decision of competent authorities. In some countries a naturalisation has to be granted by act of parliament (e.g. Belgium, Denmark). In most other countries the power to grant naturalisation is given to the head of State, to the government or to a particular Minister. Treaty provisions which aim to harmonise the conditions of naturalisation are rare. Some treaties prescribe the facilitation of some categories of persons (like stateless persons or refugees), but only the European Convention on Nationality (1997) tries to take influence on one certain requirement for naturalisation: the length of residence, which should according to this Convention not exceed 10 years (although, at the occasion of the rat-

ification of this Convention Macedonia stipulated for the right to require nationality a residence of 15 years).

Comparative studies (de Groot 1989, 237-270; Walmsley 2001; Weil 2001, 17-35) learn that the variety of requirements for naturalisation is huge. Walmsley (2001) concluded correctly, that 'few countries have the same requirements for naturalisation or refer to them in the same terms as other States.'

The following requirements are frequent:

- * Full age: in most countries, this implies having reached the age of 18 years. Nearly all countries provide for the possibility of a waiver of this condition.
- * Residence (continuous residence creates a genuine link) but
 - the required length varies considerably. The period of residence required for naturalisation is for example
 - 3 years in Belgium
 - 4 years in Ireland
 - 5 years in the Czech Republic, Estonia, France, The Netherlands, Slovakia, Sweden, UK
 - 6 years in Finland
 - 7 years in Norway
 - 8 years in Cyprus, Germany, Hungary
 - 9 years in Denmark
 - 10 years in Austria, Greece, Italy, Luxembourg, Portugal, Spain
 - 12 years in Switzerland
 - 15 years in the Former Yugoslav Republic Macedonia.

Moreover, many countries do not require simple residence, but legal residence or even entitlement to reside permanently. In several countries the required period of residence must be uninterrupted. Therefore, also the way of calculation of this condition for naturalisation varies considerably from country to country.

- * Immigration status: nearly all countries require that the applicant resides legally in the country at the moment of application for naturalisation. However, - as already mentioned - several countries prescribe that the whole required period of residence must be legal. Moreover, some countries require that the applicant must possess an entitlement to reside permanently in the country.
- * Integration or even assimilation: in several countries the applicant has to successfully do an integration examination.
- * Command of (one of) the national language(s): the degree of knowledge of a State's language which is required varies again. In some States a basic oral command is enough, some other States also require command to write the language.
- * No danger for the security of the State. The concrete application of this requirement varies again from country to country. Several States influenced by the United Kingdom refer to this requirement by the condition that the applicant must be of 'good character'.
- * Ability to support oneself: although this condition is frequently 'hidden' behind the condition with respect to the immigration status.
- * Renunciation of a previous nationality: whether this condition is required depends on the general attitude of a State regarding cases of dual or multiple nationality.
- * Oath of fidelity.
- * Payment of a naturalisation fee. In some countries naturalisation is free of charge (Belgium, Luxembourg); other countries provide for a fee in order to cover the costs of the naturalisation authorities; again other countries require really high fees (some cantons in Switzerland).

Less frequent are, e.g., the following requirements:

- * Health certificate (France).
- * No intensive relation to another State (Austria).
- * Benefit to the country.

6.4 Waiver or reduction of conditions for naturalisation

All States allow for a waiver of (most/all) requirements for regular naturalisation (de Groot 1989, 270, 271). Whether this exception is used for sports(women) differs considerably.

Moreover, all countries reduce the requirements for naturalisation for some specific groups of applicants, e.g. spouses of nationals, for-

mer nationals, refugees, stateless persons and sometimes also for nationals of specific other States.

Spain for example requires only a residence of 2 years for nationals of Latin American countries, Philippines, Andorra, Portugal, Equatorial Guinea and Sephardic Jews. Denmark and Sweden allow the naturalisation of nationals of other Nordic countries after a residence of 2 years (see de Groot, 2002b). Italy facilitates the naturalisation of nationals of other Member States of the European Union after a residence of 4 years.

The conditions for a facilitated acquisition of nationality for foreign spouses of nationals differs again enormously (de Groot 2005). In the past most States provided for an automatic acquisition of nationality by a foreign wife of a national (de Groot, 1989, 311, 312). Incidentally, this ground for acquisition still exists. Now, most States give married women an independent nationality status. However, in some countries the foreign wife of a national can acquire nationality without any residence requirement by lodging a declaration of option. The far majority of States facilitate the naturalisation of foreign spouses independent of their sex, but the precise requirements differ again enormously. For example: Italy allows the acquisition of Italian nationality by the foreign spouse after 6 month residence or 3 years marriage. The Netherlands allows an application for naturalisation after 3 years marriage (no residence required). Spain allows the naturalisation of the foreign spouse after 1 year residence.

7. Comparison of grounds for acquisition and the relevancy of compensation mechanisms

If one wants to compare the grounds of acquisition of nationality of several countries in order to get an impression of the unequal competition of the States involved regarding excellent athletes, one should not compare isolated grounds for acquisition, but should take into account all grounds for acquisition and all grounds for loss. For example, differences regarding naturalisation have to be evaluated and assessed in the perspective of the differences regarding other ways of acquisition of nationality. The same applies for differences regarding possibilities of acquisition by registration as a national or by declaration of option.

It is important to realise, that already the choice for a certain application of *ius soli*/ *ius sanguinis* implies an unequal competition of States in respect of sports(wo)men and unequal opportunities for athletes. The largest number of nationals (and therefore the biggest chance to find excellent athletes which could represent the country in international competitions) has a country which applies cumulative *ius soli* and an unlimited *ius sanguinis a matre et patre*. The smallest number of nationals (and thus the smallest chance to find excellent athletes which could represent the country) has a country which applies exclusively *ius sanguinis a patre* with limitation in case of birth abroad.

But in fact, if States do not apply *ius soli* or make exceptions regarding *ius sanguinis* this is often to some extent compensated by facilitated access to the nationality. A country which does not apply *ius soli*, may provide for the automatic acquisition of the nationality at the 18th anniversary by persons born on the territory of the State (e.g. France) (de Groot 2002a, 141) or by acquisition of nationality by lodging a declaration of option by a person born on the territory of the State (e.g. Netherlands, Portugal) (de Groot 2002a, 145, 146)

A country which provides for a limitation of the acquisition of nationality *iure sanguinis* in case of birth, may compensate this by creating the possibility of registration as a national for children of nationals born abroad (sometimes: if certain conditions are met) (Belgium, Germany, Portugal, United Kingdom) (de Groot, 2002a, 148, 149). And a non-acquisition of nationality *iure sanguinis a patre* by children born out of wedlock may also be compensated by a possibility of registration as a national for the children involved (sometimes: if certain conditions are met) (de Groot, 2002a, 148, 149).

These compensation mechanisms have as a result that the competition between States regarding excellent sports(wo)men gets again more equal. The introduction of an additional residence requirement for sports(wo)men after the acquisition of a nationality by one of

these compensation mechanisms would therefore not be acceptable, because it would cause new inequalities.

Some specific rules of international sport federations are problematic in this comparative perspective. Art. 3.3.3 of the FIBA 2002 Regulations states, that a team:

‘may only have one player who has acquired the legal nationality of that country by naturalisation or by any other means after the age of 16’ (van den Bogaert, 350, 351).

This rule causes inequalities. A person born on the territory of a *ius soli* country will always possess the nationality of the country of birth, often next to a nationality acquired *iure sanguinis*. A person born on the territory of the Netherlands as a child of foreign parents will only be able to get Netherlands nationality by a declaration of option after the 18th anniversary. It is essential to take into account this fact, if a federation wants to formulate nationality restrictions.

8. Naturalisation and an additional residence requirement

The most obvious unequal competition in respect to athletes can be observed in the different attitude and practices of States regarding the quick naturalisation of athletes. The question has to be raised and answered, whereas these differences regarding naturalisation should be compensated by the introduction of an additional requirement, which has to be fulfilled before the naturalised athletes may represent their new country in international sporting competitions. The content of the additional requirement should guarantee that the new nationality is a manifestation of an appropriate, genuine link with the State involved. In that perspective an additional residence requirement could prove to be useful: a naturalised athlete should - in principle - only be entitled to represent his new country in international sporting competitions, if he had his habitual residence for a certain uninterrupted period - *before or after the naturalisation* - in the new country.

However, such an additional residence requirement is not reasonable if already for other reasons a genuine link exists between the naturalised person and the State involved, but the person involved did until his naturalisation not acquire the nationality due to the choices which the State involved made in the field of nationality law. Sports(wo)men should not suffer disadvantages because of technical choices of States in respect of nationality law. I would like to submit, that a relevant genuine link between a person and a State always exists:

- in case of birth on the territory of the State
- for children of a national, both natural and adopted children¹
- in case of the naturalisation of former nationals

If persons born on the territory of a State or children of a national of the State are naturalised by the State involved or acquire the nationality involved by registration, declaration of option or even by operation of law when they reach a certain age, this acquisition of nationality has to be considered as a compensation of the non (or partial) application of *ius soli* or *ius sanguinis*. An additional residence requirement would then not be fair.

The reintegration (re-naturalisation) of former nationals has to be considered as a compensation for differences between the States regarding the provisions on the loss of nationality. Some States follow the principle of perpetual allegiance and do not provide for any possibility to loose the nationality, whereas other States provide for a wide range of grounds for loss.

There is an enormous variety of grounds for loss of nationality. The 1961 Convention on the Reduction of Statelessness takes, *inter alia*, influence on the grounds for loss of nationality by rules which forbid loss of nationality if this would cause statelessness for the person involved, but the Convention also provides for many exceptions to this main rule. A very important development is manifested by Arts. 7 and 8 of the European Convention on Nationality 1997 which give

¹ Insofar I have difficulties with the decision taken by the FIFA-Emergency Committee in 2004 in reaction to the plans of Qatar to naturalise Brazilian football players, which i.a. uses as a cri-

terium that the biological father or mother was born in the territory of the relevant association. See on that decision Van den Bogaert, 359.

an exhaustive list of acceptable grounds for loss of nationality. The grounds mentioned in these articles are:

- voluntary acquisition of another nationality ;
- acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant;
- voluntary service in a foreign military force;
- conduct seriously prejudicial to the vital interests of the State Party;
- lack of a genuine link between the State Party and a national habitually residing abroad;
- where it is established during the minority of a child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled;
- adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adoptive parents ;
- the renunciation of his/her nationality by the person concerned, under the condition that this person does not thereby become stateless.

Furthermore Art. 7 (2) allows, that a State provides for the loss of its nationality by children whose parents lose that nationality except in case of loss because of foreign military service or because of conduct seriously prejudicial to the vital interests of the State. However, children shall not lose their nationality if one of their parents retains it.

According to Art. 7 (3) loss of nationality may not cause statelessness with the exception of deprivation of nationality because of fraud.

Many countries provide for the loss of their nationality on several of these grounds (de Groot 2003a). Some countries only provide for the loss of nationality by renunciation on the initiative of the person involved (e.g. Poland, Portugal). On the other hand, not all countries recognise the right that a person may renounce his nationality provided that no statelessness is caused (e.g. Morocco).

In a comparative perspective, numerous other grounds for loss can be observed, which are not covered by the list of Arts. 7 and 8 of the European Convention on Nationality: Some examples:

- Foreign public service (e.g. France, Italy);
- General criminal behaviour (e.g. Spain, United Kingdom);
- Refusal to fulfil military service (e.g. Turkey);
- Using a foreign passport (e.g. Indonesia, Mexico).

It is necessary to take into account all these differences regarding the loss of nationality. The consequence has to be, that in case of reintegration of a former national, never an additional requirement should be imposed.

A difficult question is, whether an additional residence requirement should also apply in cases, where the nationality is *acquired after marriage* (automatically/ by declaration of option/ after a very short period of marriage)? On the one hand, comparative law shows that many States facilitate the access to nationality for the foreign spouse of a national immediately after the marriage or after only a short period. These States obviously consider the marriage as a manifestation of a genuine link with the State involved. On the other hand, not to require an additional residence requirement may cause sham marriages by athletes. A possible compromise could be to require - in principle - not only an additional residence of two years, but to provide

also that the time of marriage and residence are added. Such an addition of the time of marriage and the period of residence happens in e.g. Austria and Denmark in order to determine whether the foreign spouse qualifies for facilitated naturalisation (de Groot 2005)

In all cases where a genuine link is lacking, an additional residence requirement is reasonable. The next question is of course, how long the additional residence requirement should be. I submit that the required period of habitual residence should be shorter than the lowest residence requirement for regular naturalisation, which is in Belgium 3 years. It is therefore - in my opinion - attractive to require a habitual residence of two years of continuous residence immediately before naturalisation.² If at the moment of naturalisation this condition is not fulfilled, the naturalised athlete only qualifies to represent his new country, after he has resided two years in the new country (the period of residence directly before the naturalisation and after the naturalisation should be added up). If this condition is not fulfilled at the moment of naturalisation, the naturalised athlete only should be eligible to represent his new country after he fulfilled the two years requirement. A residence period of two years immediately before naturalisation should not be required, if the naturalised person had in the past a continuous and uninterrupted residence of five years in the country involved. Such an uninterrupted period of residence in the past guarantees already the existence of a genuine link of the athlete involved and the country of the new acquired nationality. In such a case there is no need anymore to require an uninterrupted habitual residence of two years immediately preceding the acquisition of nationality. Furthermore, this additional rule is realistic in view of the fact that young athletes frequently get part of their sporting education and make part of their sporting career in another country than the one where they grew up.

The remarks made above concentrated very much on inequalities caused by the different attitudes of States in respect of quick naturalisation. The introduction of an additional residence requirement would prevent that an athlete qualifies to represent a country in international competition without having a genuine link with the country involved.

In the perspective of the comparative analysis given above, we also can imagine cases where an athlete moved from his country of origin to another country and wants to represent that other country in international competition, but is not able to do that, because that other country has very severe conditions for naturalisation (e.g. a residence requirement of 10 years or more). It would be wise to study also that type of unequal opportunities for athletes. The question has to be raised, whether it should be made possible for athletes to apply for being eligible to represent their country of residence, after they had their habitual residence in that country for e.g. five years. The creation of such a possibility would also compensate disadvantages which are caused by the differences between the rules and practice of States in the field of naturalisation.

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Baseball's Doping Crisis and New Anti-Doping Program

by James A.R. Nafziger*

The first World Baseball Classic confirmed that baseball is no longer simply the national pastime of a single country, the United States.¹ It is thoroughly international. The sport has become a national pastime in several other countries, including Japan, Taiwan, Korea, the Dominican Republic, Mexico, Nicaragua, Panama, Cuba, and Venezuela. (It is clear from this list that international politics is irrelevant.) Major League Baseball (MLB) rosters in North America are replete with foreign nationals. Foreign teams regularly win the Little League World Series for young people and other international competitions. Latin Americans make up 37% of all players under contracts with MLB clubs. In 2006 Venezuela won a Caribbean World Series and Japan won the first World Baseball Classic.

To be sure, the globalization of baseball has been uneven. Sometimes the process has been two steps forward and one step backward. For example, the demise of the Montreal Expos in 2004² left MLB with only one Canadian franchise, the Toronto Blue Jays, and in 2005 the International Olympic Committee (IOC) dropped baseball as an Olympic sport beginning after the 2008 Games.³ The process of globalization nevertheless continues apace, as the MLB's new anti-doping program demonstrates.

I. Baseball's Doping Crisis

The most significant issue confronting professional baseball has been the use by players of performance-enhancing drugs.⁴ The widespread use of steroids, in particular, led to a doping crisis in the sport and irresistible pressures for reform emanating from congressional hearings in the United States on the crisis. As a result, MLB first accepted minimum testing procedures and sanctions against doping in 2002 and then, under continuing public and congressional pressures, rapidly instituted a respectable program of testing and sanctions in 2005. Frontier issues involving difficult-to-detect and undetectable drugs remain to be resolved in the future.⁵ What may be particularly significant about baseball's new program is not simply its rapid development under pressure but its growing conformity with the standards and procedures of international sports law—a significant development, given the independent role of player contracts and collective bargaining in professional baseball. This study first summarizes baseball's doping crisis, then discusses MLB's response to it and the significance of the response in the context of international sports law and the globalizing process.

It is not entirely clear why the IOC decided to drop baseball as an Olympic sport so soon after it had been added in 1992. The sport's lack

of a popular following in many countries may have been a factor.⁶ Many other Olympic sports, however, also would fail that test—for example, curling, skeleton, the pentathlon, synchronized swimming, the biathlon, and Greco-Roman wrestling. Moreover, in reducing the breadth and complexity of international competition, the International Olympic Committee (IOC) and international federations (IFs)⁷ are divided over the issue of whether to eliminate entire sports or, rather, excessive or redundant events within a particular sport.

Instead, it is likely that baseball's demise as an Olympic sport was attributable to two other factors: the unwillingness of the players, especially the superstars, to participate in the Olympics and other sanctioned competition; and baseball's reputation in the past for turning a blind eye to its doping problem, which involves a widespread use of performance-enhancing steroids. It is true, of course, that other sports such as cycling, swimming, and track and field have been seriously tainted by doping, but their respective sports federations have taken substantial measures to respond to the problem—generally in conformity with international sports law. Unfortunately, the International Baseball Federation, headquartered in Switzerland, has been ineffective in establishing MLB anti-doping measures. In any event it is reasonable to infer from the IOC decision a direct link between MLB noncompliance in the past with international anti-doping standards and baseball's demise in Olympic and related competitions.

Professional baseball's doping crisis came to a head only in the late 1990s. Although the first claims of steroid use date back to the late 1980s,⁸ MLB's concerns about substance abuse in that decade centered on criminally prohibited (so-called recreational) drugs, especially cocaine.⁹

In 1983, after four Kansas City Royals players had received jail sentences on cocaine convictions, MLB first proposed comprehensive drug testing. The following year players and franchise owners reached agreement on for-cause testing whereby a player could be tested if a club claimed to have reasonable cause to believe the player was using drugs. Unfortunately the agreement died in 1985 because the Major League Baseball Players Association, the players union, refused to cooperate in implementing it. During the same year, however, MLB Commissioner Peter Ueberroth announced his intention to establish a mandatory testing program for all minor league players and major league officials.

In 1986 a second scandal resulted from the conviction of a Pittsburgh cocaine dealer who had found a market among players on

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1 The first World Baseball Classic, which was intended to be a sort of World Cup in the sport, took place in March 2006. See Tom Verducci, *Global Warming*, SPORTS ILLUS., Mar. 6, 2006, at 56. It is debatable whether baseball is the national pastime of the United States, but there is no doubt that it is a national pastime. For example, when John Roberts appeared before the Judiciary Committee of the United States Senate

for a hearing on his (eventually successful) nomination to become Chief Justice, his opening statement was couched in a baseball metaphor ("Judges are like umpires. Umpires don't make the rules; they apply them."). N.Y. TIMES, Sept. 13, 2005, at A16.

2 See George Vecsey, *Take the Renewal, Leave the Memories*, N.Y. TIMES, Jan. 13, 2005, at D2.

3 See Lynne Zinser, *I.O.C. Drops Baseball and Softball*, N.Y. TIMES, July 9, 2005, at D1. Softball also was dropped from the Olympic roster, quite likely because of its association with baseball despite their gender-related and other differences. The modern pentathlon was also subject to removal but was retained because of

European support for it. The last previous sport to be removed from the IOC list was polo in 1936.

4 See generally JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 147-64 (2d ed. 2004).

5 See James A.R. Nafziger, *Circumstantial Evidence of Doping: BALCO and Beyond*, 16 MARQ. SPORTS L. REV. 45 (2005).

6 See Zinser, *supra* note 3.

7 The Olympic Charter provides for recognition of IFs. OLYMPIC CHARTER, Rule 29 (2004).

8 José Canseco claimed that steroids made their appearance in MLB on September 2, 1985, the day he debuted for the Oakland Athletics. See JOSÉ CANSECO, JUICED: WILD TIMES,

RAMPANT 'ROIDS, SMASH HITS, AND HOW BASEBALL GOT BIG 53 (2005). In any case, Canseco was the first prominent baseball player to be publicly accused of using steroids—an accusation leveled in 1988 by Thomas Boswell, the distinguished *Washington Post* sports-writer. E.g., *Baseball Insider*, ST. PETERSBURG TIMES, Sept. 30, 1998, at 4C.

9 Lee Jenkins et al., *Another Chance for Baseball to Settle Its Score With Drugs*, N.Y. TIMES, Dec. 12, 2004, § 8, at 1 (from which the history of doping in baseball, as follows in this text, is primarily drawn).

the Pittsburgh Pirates, the local MLB franchise team. The bad publicity generated by this scandal led Commissioner Ueberroth to suspend eleven team members conditionally for cocaine use. The incident also prompted the Commissioner to propose a program under which major league players would be tested up to four times a year for cocaine, heroin, marijuana, and morphine, without a penalty for a first-time positive test. Implementation was stalled, however, when an arbitrator struck down clauses in players' contracts that provided for random drug testing because they had not been negotiated in the process of collective bargaining between MLB and the players union. It had again delayed efforts to respond to baseball's growing drug problem. The scourge of drug abuse continued unabated.

During the next decade the use of anabolic steroids, which had barely been apparent in baseball, began to grow. Some of these synthetic agents, which mimic testosterone and other hormones, have the metabolic effect of boosting the production of muscle mass and thereby the strength of batters.¹⁰ As the problem emerged full-blown in the mid-1990s, MLB took no action to test players for the use of steroids or to impose sanctions against their use. By contrast, the IOC and several professional sports organizations not directly governed by IOC rules have prohibited their use, based on five principles.¹¹ These principles are the "unnaturalness" of steroids, their unfairness to competing athletes who do not choose to use them, the consequential unevenness of the playing field or competitive balance on it, the uncertain long-term effects of steroids on the health of athletes, and their questionable effect on the role of athletes as models for youth.

In the mid-1990s the Federal Bureau of Investigation (FBI) of the United States Department of Justice notified MLB of the growing use of steroids among players.¹² In 1998 home-run king Mark McGuire admitting using a testosterone-boosting supplement, androstenedione (andro).¹³ Although the IOC, IFs, and several professional sports organizations such as the National Football League (NFL) had banned the agent, MLB did not. MLB Commissioner Bud Selig responded to the controversy, however, by initiating a study of andro that was later published, undertaking to educate players with a pamphlet on the known dangers of performance-enhancing agents and hiring medical expertise to advise MLB on doping.¹⁴ In 2004 Congress amended the Anabolic Steroid Control Act of 1990 so as to ban the sale of andro.¹⁵ As of the new millennium, however, MLB still had no testing program or mandatory sanctions against doping.

Further reports of rampant doping among players contributed to a crisis in baseball, but there was still no effective response to the problem. In 2002 the players union and owners finally agreed to a steroid-testing program after Ken Caminiti, MLB's Most Valuable Player in 1996, admitted that he had used steroids, claiming that the majority of players did so, too.¹⁶

In summary, "[f]rom 1986 until 2002, about the only way a team could take recourse [against doping] was if a player was arrested on drug charges."¹⁷ In retrospect, what explains MLB sluggishness in responding to a serious and growing problem of which it was clearly aware? Several likely explanations include the concerns of the players union about breaches of personal privacy, the confidentiality of physician-player relationships, and MLB's confidence in the ability of the owners to control doping without outside intervention.¹⁸ Perhaps the most likely explanation, at least until recently, was public tolerance, if not encouragement, of steroids whenever their use might help the

superstars set new records on the baseball diamond. The public loves big hitters. By 2002, however, public tolerance had waned, putting new pressure on Congress to conduct investigations, on the MLB to take effective action, and on the players union to cooperate in efforts to address the doping problem.

II. Major League Baseball's Response to the Crisis and Its Significance

A. MLB's Response

1. The 2002 Program

MLB's first step in 2002 toward an effective anti-doping program initiated a year of anonymous, random testing. According to the program, if more than five percent of the tests proved to be positive, mandatory testing and sanctions would follow. The sanctions included suspension of players and disclosure of their names, along a scale calibrated according to the number of offenses. First-time offenders would remain anonymous and be subjected only to mandatory treatment. In late 2003 the stricter program went into effect after a determination that the five-percent threshold of use had been reached.¹⁹

Despite growing skepticism about the efficacy of MLB's minimal 2002 program, it was at least a first step. On the other hand, it might not have led very soon to more effective measures had it not been for the BALCO controversy.²⁰ In 2003 a police raid on the Bay Area Laboratory Cooperative (BALCO) in Burlingame, California, brought to light documents that indicated BALCO's widespread distribution of performance-enhancing drugs to leading athletes. As the ensuing cause célèbre developed in the Olympic year of 2004, much of the public attention was focused on track-and-field superstars. Several baseball stars, notably Barry Bonds, Jason Giambi, and Gary Sheffield,²¹ however, were also linked to BALCO and testified before grand juries. Barry Bonds' stature as a home-run king brought him sharply into the public limelight following media reports of his admission before a grand jury that he had used two kinds of steroids: "the clear" (taken orally) and "the cream" (rubbed on the skin).²² He attracted further attention when his trainer was indicted on BALCO-derived evidence in early 2004.²³ Bonds, however, publicly denied using steroids.

Suffice it to say here that the BALCO controversy led to an expression of concern by President Bush in his 2004 State of the Union address,²⁴ to an investigation by Congress the same year,²⁵ and eventually, in 2005, to another congressional inquiry into the reportedly widespread use of performance-enhancing agents in baseball.²⁶

2. Public Opinion

The 2005 congressional inquiry took place against a background of public disenchantment concerning baseball's sorry record in combating doping. Opinion polls showed that 86% of the public agreed that steroid use was at least a serious problem, if not a threat to the future of the sport. Some 69% doubted that MLB had done enough to prevent steroid use, and 59% agreed that the records of players who had used performance-enhancing agents should not remain in the record books.²⁷

In interpreting these statistics, however, a few notes of caution are in order. First, at bottom, the public has become used to performance-enhancement and the use of dietary supplements, some of which

10 See generally Steven Shapin, *Hitters*, NEW YORKER, Apr. 18, 2005, at 191. Stasinos Stavrianeas, who kindly read a draft of this article, pointed out to me that other types of steroids accelerate recovery between activities, increase aggressiveness, and perform various other functions.

11 *Id.* at 191-92, 194.

12 See Andrew Zimbalist, *Stamping Out Steroids Takes Time*, N.Y. TIMES, Mar. 6, 2005, at SP 7.

13 See, e.g., William C. Rhoden, *Baseball's Pandora's Box Cracks Open*, N.Y. TIMES, Aug. 25, 1998, at C1.

14 See Zimbalist, *supra* note 12.

15 See Jenkins et al., *supra* note 9, at 6.

16 See Tom Verducci, *Caminiti Comes Clean*, SPORTS ILLUS., May 28, 2002.

17 Jenkins et al., *supra* note 9.

18 See Zimbalist, *supra* note 12.

19 Jenkins et al., *supra* note 9, at 6.

Subsequently, within a year, the incidence of doping dropped dramatically to about 1.7%. See Curry, *infra* note 37.

20 See generally Jere Longman & Liz

Robbins, *Top U.S. Sprinter Barred as Drug Scandal Grows*, N.Y. TIMES, May 20, 2004, at 1.

21 See Jenkins et al., *supra* note 9, at 6.

22 See Mark Sappenfield, *Yield on Bonds and Baseball: Dropping?*, CHRIST. SCI. MONITOR, Dec. 6, 2004, at 2. See generally MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS* (2006).

23 *Id.*

24 See *State of the Union: The President's Address*, N.Y. TIMES, Jan. 21, 2004, at A14, A15.

25 The congressional inquiry centered on a hearing before the United States Senate Commerce, Science and Transportation

committee featuring baseball Commissioner Bud Selig and Donald Behr, Executive Director of the MLB Players Association. See STATESMAN-JOURNAL (Salem, Or.), Mar. 28, 2004, at 6B.

26 See Anne E. Kornblut, *Now Batting: Hearings in Congress on Steroids*, N.Y. TIMES, Mar. 13, 2005, § 8, at 8.

27 See Harry Bruinius, *Will steroids alter baseball records, too?*, CHRIST. SCI. MONITOR, Mar. 24, 2005, at 11.

are at the margins of prohibited performance-enhancing drugs. The growing use of prescription drugs and the general acceptance of chemically enhanced activity have desensitized people to the use of steroids and other so-called enhancers. Moreover, the public perceives that the social impact of such products pales by comparison to that of street drugs such as cocaine and heroin. Second, it must be noted that younger people—some 41% of all people under the age of 30—expressed no concern at all about the problem of doping.²⁸ One can reasonably conclude from this finding that the younger generation, which is more inured to the use of street drugs and doping of athletes, may be less inclined to adopt strict programs of control in the future.

Third, despite the statistics, sports that rely on the use of steroids for effect, such as televised professional wrestling in the United States, are more popular than ever. It may be, of course, that such sports attract only a distinct minority of the population, whereas baseball is still more of a national pastime, thereby generating higher public expectations about the ethical behavior of the players. In other words, the sport may still symbolize the best in American sports to a substantial majority of the population, even persons who do not participate in it or watch it. On the other hand, to sound a fourth cautionary note about the public's intolerance of doping, one poll revealed that, whatever the sport, 48.7% of the Americans acknowledged that they themselves would take steroids if doing so would boost their income into the millions of dollars.²⁹ One should be cautious, therefore in reaching conclusions derived from anything as volatile as the aggregate opinion of a spectator public easily excited by brute strength and record-setting.

Despite this evidence of cynicism, public opinion strongly favored some kind of response in Washington to the doping crisis. The congressional inquiry in 2005 was also conducted against the background of a published exposé by superstar José Canseco, naming many names, about the rampant steroid juicing of players in the MLB.³⁰ Although Congress was criticized for yet another self-indulgence in its own pastime of investigating baseball,³¹ the inquiry appears to have prompted MLB's replacement of its initial 2002 program with a tougher regime of drug testing and sanctions. The Canseco book, for its part, appears to have prompted additional testing, leading quickly to the revelation that yet another superstar, first baseman Rafael Palmeiro, had tested positive.³²

3. The 2005 Program

Whatever may have been the pressures on MLB, the industry took a second step, effective during spring training 2005. For the first time, the players union agreed to reopen an agreement with MLB in order to strengthen its anti-doping clause. Under the new program,³³ each player had to undergo at least one random test between the beginning of spring training and the end of the regular season. Players also had to submit to additional testing based on reasonable cause to believe prohibited activity may have occurred, as well as random testing initiated by the Commissioner. The program was extended to the off-season and could be conducted outside the United States. It also established elaborate provisions for protecting the confidentiality of tests and the identity of tested players, as well as a procedure for appealing administrative decisions. Only when a player is actually suspended, however, may his identity be disclosed.

"Positive" test results, with clinical and administrative consequences, included not only meeting biological levels set forth in annexed testing protocols but also refusals by players to cooperate in the program and attempts by players to alter tests. All players on entry into the program were to be put on a clinical track, which might involve treatment for some of them. Players might be moved from the clinical to the administrative track, involving the possibility of sanctions, after testing positive for other violations of the law (for example, the use or sale of a prohibited substance) or for failure to cooperate in initial evaluations or in the course of required treatment.

This second step in the development of an effective anti-doping program defined "prohibited substances" as both drugs of abuse (cocaine, LSD, marijuana, opiates, and so on) and performance-enhancing agents. The program broadened the list of banned sub-

stances to include not only steroids but also steroid precursors, designer steroids, ephedra, human growth hormone, masking agents, and diuretics (but not stimulants), but imposed specific penalties only against the use of steroids. The penalties fell short of stiffer ones proposed by MLB but nevertheless moved professional baseball another step closer to compliance with the established standards of international sports law and practice.³⁴

Then, in November 2005, continuing pressure from Congress and MLB Commissioner Selig's invigorated leadership led MLB to take a third step. It reopened the existing collective-bargaining agreements for the second time in ten months, resulting in tougher penalties, increased frequency of testing, and a first-ever prohibition of the use of amphetamines.³⁵

The revised sanctions substantially lengthened penalties for steroid offenses, as follows: a 50-day suspension for a first offense, a 100-day suspension for a second offense, and a lifetime suspension for a third offense with a right to seek reinstatement after two years. This third set of reforms also eliminated alternative fines as well as tolerance of a positive test after a third one. The new program increased the frequency of testing from once during the training and regular season, with additional random testing, to once each during spring training physicals and the regular season, with additional random testing. Players continue to be subject to off-season testing as well. The new penalties for presence of amphetamines are as follows: mandatory follow-up testing for a first positive test, a 25-game suspension for a second positive test, an 80-game suspension for a third positive test, and, for a fourth positive test, a penalty at the Baseball Commissioner's discretion, including the possibility of a lifetime ban from MLB.

Besides MLB's stricter program, the congressional inquiries generated several bills that called for more frequent, random drug testing, made reference to international standards, and largely adopted World Anti-Doping Code sanctions against violations, as implemented by the World Anti-Doping Agency (WADA). Although the players union raised broad objections to the bills, baseball Commissioner Selig raised little objection to their substance and embraced the idea of stricter penalties.³⁶ The globalization of the MLB was apparent from the influence, if only indirect, of the World Anti-Doping Code.

B. The Significance of MLB's Response in the Process of Globalization

It is too early to judge the effectiveness of MLB's initiatives in the revised 2005 program to control doping. A reported 8% drop in home runs during the 2005 season may indicate that the more modest ini-

27 See Harry Bruinius, *Will steroids alter baseball records, too?*, CHRIST. SCI. MONITOR, Mar. 24, 2005, at 11.

28 See Jere Longman, *Revelations Only Confirm Suspicions About Drugs*, N.Y. TIMES, Dec. 5, 2004, § 8, at 1.

29 See Sappenfield, *supra* note 22.

30 CANSECO, *supra* note 8.

31 Historically, hearings about baseball's conduct have been a popular congressional pastime. Since the early 1990s there have been as many as two dozen inquiries into various baseball topics in at least six committees and subcommittees. Kornblut, *supra* note 26.

32 See Hal Bodley, *Palmeiro, baseball won't fight Congress*, USA TODAY, Aug. 4, 2005, at 1C; Mike Todd, *Experts: Stanazolol Tough to Mask*, USA TODAY, Aug. 4, 2005, at 6C; Mike Todd & Dick Patrick, *Critics: Palmeiro case exposes flawed policy*, Aug. 3, 2005, at 6C. Palmeiro had denied using steroids in his testimony at a March 2005 congressional hearing, but after being confronted with evidence to the contrary, he admitted using them, but denied using them knowingly. Instead, he speculated

that the presence of stanozolol in his body resulted from his taking a contaminated nutritive supplement. See also a later sensational exposé about super-slugger Barry Bonds. FAINARU-WADA & WILLIAMS, *supra* note 22.

33 For commentary on the summary of this 2005 agreement (the first of two) that follows in the text, see MAJOR LEAGUE BASEBALL, MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM 11-12 (2005). For a comparison of suspensions, as between the 2002 and the first 2005 MLB testing programs, see Bruinius, *supra* note 27, at 12.

34 See George Vecsey, *Baseball Union Comes a Long Way*, N.Y. TIMES, Sept. 28, 2005, at C22.

35 See Jack Curry, *Baseball Backs Stiffer Penalties for Steroid Use*, N.Y. TIMES, Nov. 16, 2005, at A1.

36 See letter from Bud Selig to Donald Fehr, Apr. 25, 2005, available at www.businessofbaseball.com/seligletter_2005JDA.htm (last visited Nov. 2, 2005).

tial program in 2005 deterred would-be violators because of either the lost protection of their anonymity or longer suspensions,³⁷ but it would be foolish to jump to conclusions based on that statistic alone.

What is clear is that before 2002 MLB moved extraordinarily slowly in response to the huge problem of doping among players until several important developments put it in high gear. MLB's first step in 2002, when the players union finally agreed to a threshold program, was a milestone. Between 2002 and 2005, Congress put continued pressure on the MLB to take further steps.³⁸ The MLB's program still fell short of longer-established programs in professional sports such as that of professional football, as well as the standards set by the World Anti-Doping Code within the framework of international sports law.³⁹ The current program, established in November 2005, was influenced by the Code and approximates it, even though it still falls short of full compliance with the Code's requirements.

It is ironic that the IOC decided to drop baseball after the 2008 Games just as the MLB, under public and congressional pressure, was substantially strengthening the sport's anti-doping program. Very likely, MLB's failure until November 2005 to impose strong penalties for doping helped explain why baseball's appeal as an Olympic sport faded, and why baseball became the first castoff by the IOC in nearly seventy years. Another plausible explanation for the IOC decision was that the IOC concluded that many of the best players were not competing in the Olympic Games. Baseball has never fielded anything resembling professional basketball's Dream Team in the Games. To the contrary, many of the best MLB players have largely avoided the kind of international competition that would enhance the visibility and global stature of the sport. That may be due to the scheduling of the Olympic Games during the peak season of baseball. In any event, MLB has provided little encouragement to players who may wish to take time off from prescribed league schedules to join national teams in open international competition at the Games or elsewhere.

In other sports, however, the effect of open competition in the

Olympics and other sanctioned international events has been profound. The tough requirements of international sports law and the *lex sportiva*,⁴⁰ including the globalizing World Anti-Doping Code, have governed many professional athletes preparing for and participating in open competition, if only sporadically and temporarily. One effect of those requirements has been to discourage professional players from doping even long after such competition. Another effect has been to encourage professional sports bodies—for example, the European football (soccer) leagues—to move toward the tougher international standards and procedures of international sports law.⁴¹

Professional sports bodies therefore have been gradually adopting standards, procedures, and sanctions consonant with international sports law. Baseball, too, finally seems to be moving in that direction. The international framework has great merit to players and sports bodies alike. It is both effective and uniform, thereby overcoming the unfairness to players of radically different standards, procedures, and sanctions from one sort to another. Baseball and other professional sports may continue to be governed by player contracts and collective bargaining, but that need not affect the adoption by players and owners of adequate, uniform procedures and sanctions, as major league baseball in North America has finally been pressured to do. The International Sports Law Journal

37 Jack Curry, *Fall in Home Runs Raises Some Doubts*, INT'L HERALD TRIB., Aug. 18, 2005, at 18.

38 See, e.g., Richard Pound, *The New Testing Policy Does Not Begin to Solve the Drug Problem*, N.Y. TIMES, Mar. 20, 2005, at 10. Mr. Pound, a former Vice President of the IOC, is Chairman of the World Anti-Doping Agency (WADA), headquartered in Montreal, Canada.

39 See Nafziger, *supra* note 4, at 161-64. See also Klaus Vieweg, *The Definition of*

Doping and The Proof of a Doping Offense (an Anti-Doping Rule Violation) Under Special Consideration of the German Legal Position, 15 MARQ. SPORTS L. REV. 37 (2004).

40 "Lex sportiva" refers to a growing jurisprudence of the Court of Arbitration for Sport. See James Nafziger, *Lex Sportiva*, INT'L SPORTS L.J., 2004-1/2, at 3.

41 See generally Nafziger, *supra* note 4, at 132-35, 163.

Public Viewing in Germany

Infront Guidelines and the German Copyright Act

by Wiebke Baars*

I. Introduction

The World Cup 2006 will be, next to the Winter Olympic Games, the world's greatest sporting event in 2006. Nearly 10 million football fans are expected to join the World Cup in Germany, but only 3.2 million of them have tickets to visit the games.¹ Fans without tickets will be able to enjoy the games in a communal live atmosphere by watching them on one of the big screens that will be found in nearly every city. Not only fans but also marketing divisions are looking forward to these so called public viewing events. They offer the chance to enjoy the economic fruits of the Football World Cup without being an official sponsor.

These public viewing events are linked to the World Cup broadcasting rights. These have been acquired by Infront Sports & Media

AG. Infront not only markets the transmission rights - assigned in Germany to broadcasting organisations ARD, ZDF, RTL and Premiere - but also licenses the public viewing rights.

Infront and FIFA have agreed on guidelines concerning commercial as well as non-commercial public viewing events.

II. The Infront / FIFA Guidelines

The Public Viewing Guidelines, as announced in a press release by Infront on January 2005², apply to both commercial and non-commercial public viewing events in Germany. They state that the organiser of each public viewing event is responsible for the technical organisation of the event as well as obtaining any necessary permissions from third parties, which Infront cannot grant (e.g. from Collecting Societies or for the use of public ground). The television signals must not be altered and there are additional rules with respect to the sale of food, drinks and other goods during the show, stating that it must be avoided to give the impression that the seller is in any way officially linked to FIFA. It is especially stressed that no logos or trademarks of FIFA must be used in connection with the events.

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2 See press release dated 20 January 2005, www.infrontsports.com/webautor-data/6/200501202006FIFAWorldCupPublicViewing-DE.pdf

1 Deutsche Bahn Press release dated 26 January 2006.



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Consequently, Infront requires all organisers of a public viewing event to contact them in order to arrange the formalities and to assure adherence to the guidelines. The public viewing enquiry form can be downloaded from the Infront homepage.³

The most controversial aspect of these guidelines is the circumstances under which the organiser of a public viewing event needs to acquire a Licence from Infront with costs. According to the guidelines only *commercial* public events need to be licensed. Commercial events are considered to be events where an entrance fee is charged and/or which is sponsored by third parties. The assessment of a fee for commercial public events will be determined on a case by case basis dependent on the size of the event.

III. Legal Context

The question in dispute is whether the definition of a commercial public viewing event, for which a licence needs to be obtained according to the Infront / FIFA guidelines, is compatible with German Copyright Law.

According to Sec. 87 Para. 1 No. 3 Copyright Act (*Urheberrechtsgesetz*) a so called ancillary copyright (neighbouring right) is granted to the broadcasting organization. Thereby the broadcasting organisation has the **exclusive right** to make its broadcast perceivable to the public in places only accessible to the public **on payment of an entrance fee**. It is generally acknowledged that the term "entrance fee" has to be extensively interpreted.⁴ The precise scope of this provision however has not yet been established and the question is whether Infront's approach, to equate public viewing events for which an entrance fee is charged with events which are sponsored, complies with Sec. 87 Para. 1 No. 3 Copyright Act.

The scope of this regulation can only be defined by taking into account its historical development. Protection for the broadcasting organisations was granted by German Unfair Competition Law before the entry into force of the Copyright Act. Against this background the German Federal Court ruled in its AKI judgement that making a broadcast perceivable to the public without the permission of the broadcasting organization within a professional scope is prohibited by competition law.⁵ The German Federal Court pointed out that the use of broadcasting rights without permission is a case of the exploitation of other's accomplishments (passing off), because the use assures a position in competition that the organiser would not otherwise obtain without using the broadcast signals.⁶

Sec. 87 Para. 1 No. 3 Copyright Act is based on this judgement of the Federal Court.⁷ Therefore it can be argued that it is not only the entrance fee that is covered by the prohibitive terms of this regulation, but also all activities that constitute an exploitation of other's accomplishments. Due to the high organisational and technical effort it is necessary to protect the broadcasting organisation against every economic utilisation.⁸ Thus it is already acknowledged that every kind of contribution towards expenses as a condition of entrance is caught by the prohibition. Therefore obligations of minimum consumption or increased prices for beverages and food are covered.⁹

It has been argued that an event where no such contribution

towards expenses is made but which is sponsored by external firms is not covered by Sec. 87 Para. 1 No. 3 Copyright Act.¹⁰ Although the organiser benefits from the sponsoring amount it is concluded that this is unlikely to be the situation envisaged by the regulation, especially as not everybody interested in obtaining tickets for the World Cup was successful, so that the organisers do not face a financial loss despite the investment they made.¹¹ However it should be taken into account that the sponsor is only able to participate in the event because of his sponsoring and therefore the sponsoring amount can be viewed as his entrance fee.¹² Furthermore the organiser of the public viewing event gains the sponsoring amounts as an additional fee only based on the opportunity of public viewing. Bearing in mind that the protection of Sec. 87 Para. 1 No. 3 covers every economic utilisation no difference can be seen between an entrance fee and sponsoring. In both cases the use of broadcast signals assures a position in competition which the organiser would not obtain without making the broadcast perceivable to the public.

IV. Conclusion

Due to the considerations above, it must be held that every economic utilisation without the permission of the broadcast organisation is prohibited by Sec. 87 Para. 1 No. 3 Copyright Act.

Thus the Infront guidelines only specify the regulation when pointing out that commercial events are constituted as those where an entrance fee is charged and/or sponsorship and the like are included.

Therefore the question mentioned above can be answered: Commercial public viewing events cannot be held without a licence from Infront. In this respect, the Infront/FIFA guidelines only reflect legal requirements established by Sec. 87 Para. 1 No. 3 Copyright Act.

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3 www.infrontsports.com/publicviewing/public_viewing_enquiry_form.pdf

4 Möhring/Nicolini-Hillig, Urheberrechtsgesetz, 2ed Edition 2000, § 87 Para. 40; Schricker-Melichar, Urheberrecht, 2ed Edition 1999, § 52 Para. 17; Götting, Die Regelung der öffentlichen Wiedergabe nach § 87 Abs. 1 Nr. 3 UrhG, ZUM 2005, 185, 187; Hamacher/Efing, Das WM-Erlebnis auf Großbildleinwand, SpuRt 2006, 15, 17; Reinholz, Marketing mit der FIFA WM 2006 - Werbung, Marken Tickets, Public Viewing, WRP 2005, 1485, 1487.

5 Federal Court [1962] GRUR 470 - AKI.

6 Federal Court [1962] GRUR 470, 475 - AKI.

7 GÖTTING, Die Regelung der öffentlichen Wiedergabe nach § 87 Abs. 1 Nr. 3 UrhG, ZUM 2005, 185, 187.

8 Wandtke/Bullinger, Praxiskommentar zum Urheberrecht, 2ed Edition 2006, § 87 Para. 6.

9 Möhring/Nicolini-Hillig, Urheberrechtsgesetz, 2ed Edition 2000, § 87 Para 40; Schricker-Melichar, Urheberrecht, 2ed Edition 1999, § 52 Para. 17; Götting, Die Regelung der öffentlichen Wiedergabe nach § 87 Abs. 1 Nr. 3 UrhG, ZUM 2005, 185, 187; Hamacher/Efing, Das WM-Erlebnis auf Großbildleinwand, SpuRt 2006, 15, 17; Reinholz, Marketing mit der FIFA WM 2006 - Werbung, Marken Tickets, Public Viewing, WRP 2005, 1485, 1487; Reinholz, Marketing mit der FIFA WM 2006 - Werbung, Marken Tickets, Public Viewing, WRP 2005, 1485, 1487.

11 Reinholz, Marketing mit der FIFA WM 2006 - Werbung, Marken Tickets, Public Viewing, WRP 2005, 1485, 1487.

12 Hamacher/Efing, Das WM-Erlebnis auf Großbildleinwand, SpuRt 2006, 15, 17.



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One Size Fits All? Challenging the Notion of a Uniform EC Sports Law

by Simon Boyes*

"*Bosman* should not be seen as a bible."¹

The name of one journeyman Belgian footballer, Jean-Marc Bosman, has become considered synonymous with the revolution that has taken place in association football. During each summer, between the end of one football season and the start of the next, the media is full of Bosman's name. This is not because of great sporting achievements or of field heroism, but because of the implications of the case that Bosman brought against football's regulations and governing bodies. What might otherwise have been referred to as a 'free' or 'out of contract' transfer has indelibly become the '*Bosman*'. This case - and the modifications imposed upon the football transfer system subsequently² - have had implications not confined to that particular sport. In fact any professional sport operating in the European Union will almost certainly have had to review its practices in the light of the judgment.

The details of the case are well known, and will not be considered in great depth. Nevertheless, it is worthwhile briefly outlining the two main issues in the case.

Bosman and its impact

In *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*³ (*Bosman*) the European Court of Justice (ECJ) outlawed the imposition of transfer fees upon the expiry of a footballer's playing contract. The second element of the *Bosman* judgment was the prohibition of player quotas based on nationality, having the effect of preventing EU nationals from obtaining employment with professional teams abroad.

One immediate consequence of the judgment in *Bosman* was that the significance of holding the passport of an EU Member State grew immensely for professional sportsmen as this represents the key to freedom of movement within the European Union. This came about because of the relatively simplistic response of many sports governing bodies to the judgment; where sports had previously placed quantitative limitations on non-domestic nationals there were now limits placed on non-EU or EEA nationals participating in professional sport. Acquisition of this status effectively allows a third state national to sidestep the nationality requirements imposed by sporting federations, as well as any onerous immigration or work permit requirements which states may impose on incoming workers. Indeed some players and agents were driven to deception and forgery in order to secure access to the freedoms afforded under the Treaty of Rome.⁴ A recent example of the importance of obtaining EU 'citizenship' is provided by Brazilian striker Julio Baptista, a transfer target for Arsenal, who declined the opportunity to move to the English club in favour of staying in Spain with Real Madrid. His choice was partly premised on the basis that he would then satisfy the qualifying period for Spanish citizenship and the corresponding capacity to freely obtain employment within the Community.

Extending *Bosman*

Access to Community law rights of free movement has been extended by the decision of the ECJ in the case of *Deutscher Handballbund v Maros Kolpak*.⁵ Kolpak, a Slovakian handball player, was employed as a professional by a German team. As a Slovak, a national of a State not then a member of the EU, Kolpak was not considered subject to the non-discrimination provisions emanating from *Bosman*. The *Handballbund* limited the number of non-EEA nationals teams could field in professional fixtures. Kolpak considered that an association agreement between Slovakia and the European Union

entitled him to be treated in the same way as an EEA national in relation to treatment once in employment. The European Court of Justice agreed that the relevant part of the association agreement was capable of direct effect, that is being applied by a EEA Member State court, and thus sporting bodies could not discriminate against Kolpak once in legal employment within an EEA Member State.⁶ The EU has a small number of association agreements with other European nations, many of which have since joined the EU. However, the 'Cotonou Agreement' has given the ruling the potential for a significantly greater impact. The Cotonou Agreement is an international agreement signed between the EU and nations from the ACP (Africa, Caribbean, Pacific) Group, which now includes more than 70 nations. Article 13(3) of the Cotonou Agreement includes similar provisions to those applied in *Kolpak*, potentially expanding the reach of the *Kolpak* decision to 100 states.⁷ Although concerning handball, the decision has been of particular significance to other sports, not least cricket and the rugby codes in the UK context. In respect of cricket, the Cotonou Agreement extends the non-discrimination obligation to Test playing nations: South Africa and the states making up the West Indies. The inclusion of South Africa and the South Sea Islands have provoked most concern amongst the rugby codes.⁸

It is significant that the *Kolpak* ruling applies only to the treatment of players once in lawful employment in an EU member State, it does not extend to a right of entry or access to employment or free movement between EU Member States.⁹ However, the judgment has effected a shift in regulatory responsibility away from sporting federations to State authorities, which have control of work permit provision. This represents the key to the *Kolpak* approach, as the capacity to enter into lawful employment is a prerequisite to engaging the rights coming from the judgment.

The UK government has recently taken action to limit access to work permits by sports professionals. Sports federations in the UK face particular problems because of the overlap between *Kolpak* coun-

* Senior Lecturer, Nottingham Law School, Nottingham Trent University. This paper is a development of work first presented at 'The State of Play' conference, University of Central Lancashire, 27-28 April 2005. I am grateful to the participants at the conference for their constructive criticism of the original paper and to Ian Blackshaw for encouraging me to expand it into the present article. Specific application of the principles outlined in this paper to cricket can be found in Boyes, S 'Caught Behind or Following-On? Cricket, the European Union and the *Bosman* Effect' [2005] 3(1) ESJL (Online) <http://www2.warwick.ac.uk/fac/soc/law/elj/esjl/issues/volume3/number1/boyes/>

1 Jean-Louis Dupont, quoted in Caiger, A. and Gardiner, S. *Professional Sport in the European Union: Regulation and Re-regulation* (2001) TMC Asser Press: The Hague, p. 14.

2 FIFA, *Regulations for the Status and Transfer of Players* (2005) http://fifa.com/documents/static/regulations/Status_Transfer_EN.pdf

3 Case C-415/93 [1996] 1 CMLR 645.

4 Boyes, S. 'The Boy Can Pick a

Pass(port): Football and Nationality in the EU' (2001) 4(2) SLB 4.

5 C-438/00 [2003] ECR I-4135.

6 Boyes, S. 'In the Shadow of Bosman: The Regulatory Penumbra of Sport in the EU' (2003) 12(2) Nott LJ 72; van den Bogaert, S. 'And Another Uppercut from the European Court of Justice to Nationality Requirements in Sports Regulations' (2004) 29(2) EuLR 267.

7 Branco Martins, R. 'The Kolpak case: Bosman times 10?' (2004) 1-2 ISLJ 26; 'EU says foreign quotas are illegal' (2003) *The Guardian*, 5 August. This position has been confirmed by the ECJ in Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura*, [2005] 2 CMLR 11, relating to the treatment of a Russian national in respect of his status as a 'foreign' player in Spanish professional football.

8 See e.g. 'Red tape forces Guttenbeil home' (2005) *BBCi*, 2 February, http://212.58.226.30/sport1/hil/rugby_league/super_league/widnes/4228931.stm

9 Simutenkov at para. 58; Branco Martins, *supra* n.18 at 27; cf Gardiner, S. 'Support for quotas in EU professional sport' (2000) 3(2) SLB 1.

tries and those making up the Commonwealth. Citizens of Commonwealth nations are given preferential treatment by the UK government, allowing them to undertake employment as part of a 'working holiday' for up to two years. It was feared that such easy access to work permits, combined with the *Kolpak* freedoms, would effectively open up the market for professional sports persons in the UK, leading to an influx of 'foreign' players. The government has responded to this by amending the conditions of the Commonwealth citizens working-holiday work permit scheme to expressly disqualify such workers from engaging in employment as sports professionals.¹⁰ More specifically, the Home Office works with sports governing bodies to construct specific arrangements for professionals within individual sports. As the *Kolpak* position only applies to workers once they are in employment,¹¹ these filtration systems are of great importance to sports governing bodies.¹²

The *Kolpak* judgment is of such significance primarily because of the response of sports federations to the ECJ's rulings in *Bosman*. The typical reaction was the relatively simple amendment of qualification rules such that where previously there had been restrictive measures imposed in respect of 'foreign' players these were simply amended to refer to non-EEA players. After *Kolpak* the approach seems to have been much the same; a simple change, dumbly accepting that players qualified in this way should be treated in the same way as *Bosman* players.

The significant numbers of *Kolpak* and *Bosman* qualified 'foreign' players participating in English County Cricket suggest that such an approach has not been entirely successful, at least from the perspective of those who see such developments as undesirable. Surveys suggest that County teams are fielding as many as two *Bosman-Kolpak* qualified players, in addition to their two 'official' foreign players.¹³ Similarly, it seems that the rugby codes have encountered similar problems.¹⁴

A Retreat from *Bosman*?

English cricket's regulatory body, the England and Wales Cricket Board (ECB), has sought to counter this trend by rewarding County sides financially for each England qualified player fielded in competitive fixtures.¹⁵ This measure is aimed at bypassing the equal treatment requirements imposed by the *Bosman* and *Kolpak* cases. The ECJ might well take the view that these measures constitute discrimination based on nationality, placing UK nationals in an advantageous position, and thus amount to a potential breach of Article 39 EC and related *Kolpak* type agreements. It is arguable that this measure could be considered not to be directly discriminatory, but this would still mean that the ECB have failed to take account of the approach to indirect discrimination adopted by the European Court of Justice, that a migrant worker must not be treated:

"differently from national workers in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or reemployment."¹⁶

Similarly, any measure which is "likely to constitute an obstacle to the free movement of workers"¹⁷ would be a *prima facie* breach of the free movement principle. It seems likely that increasing numbers of sporting bodies will seek to protect 'domestic' players. Indeed, the governing body of European football (UEFA) has introduced proposals recently which are aimed at ensuring that professional clubs include a significant proportion of 'home grown' players in their squads.¹⁸ It seemed initially that the adoption of this measure would be the subject of legal challenge emanating from the English and Italian leagues, though this has not, as yet, been forthcoming. Such litigation, whatever its source, appears inevitable at some stage however. Nevertheless, such an approach appears popular with both rugby codes contemplating regulatory action to counter the influx of 'foreign' players under these cases.

In Support of Discrimination

The homogeneic approach adopted by many team sports in the wake of the judgments in *Bosman* and *Kolpak* makes the assumption that

any discrimination based on nationality put in place by sports regulators will be considered illegal under Community law. However, this fails to appreciate that sports differ in their essential characteristics, whether that be in respect of market structure or geographical coverage, and that such contextual factors have the potential to result in different outcomes when Community law is applied.

Sporting rules

To make the assumption that restrictions and regulations that disadvantage 'foreigners' are per se unlawful is a mistake. As with many aspects of legal regulation it is rare that rules are absolute - and where a compelling competing value can be evidenced then exceptions can be made. In particular, it is valuable to consider the approach of the ECJ in the *Bosman* case. Breaches of Art 39 EC can usually only be justified by reference to the requirements of public policy, public health and public security. Account should also be taken of the restrictive jurisprudence in these respects. Nevertheless the Court was prepared to consider the view that arrangements of a purely sporting nature might fall without the compass of the Treaty of Rome. In the early case of *Dona v Mantero*¹⁹ the ECJ accepted the proposition that proportionate rules aimed at genuinely sporting objectives could exempt sport from consideration under the Treaty. Such an approach has been followed more recently, culminating in the judgment in *Meca-Medina and Majcen v Commission*.²⁰ The approach of the Community Courts in such cases has been that such rules are not economic though, as discussed by Weatherill, this approach has little merit.²¹

Maintaining National Links

It was argued in *Bosman* that the restriction on 'foreign' players was put in place to maintain the link between teams and the country in which they play.

The ECJ responded unsympathetically, perceiving the link between State and team as being no more necessary than an allegiance with the team's locality or region. Given a lack of similar protection in this regard restrictions on nationality could certainly not be justified in this manner.²² Nevertheless, such an approach does suggest a way forward for sports federations. Were competition to be centered around a geographically oriented approach, rather than a 'club' system then the potential arises for free movement provisions to be circumvented to some degree. Sports well disposed to a regionally structured 'state of origin' type competition may well find that they are better able to achieve this. Rugby Union provides a good example, particularly in Scotland, Wales and Ireland, where top-level competition is already structured on a regional basis.

Examples exist in cricket also, most notably Yorkshire CCC which only relatively recently abandoned its "Yorkshiremen only" policy. This approach is not, however, without its drawbacks; such a scheme

¹⁰ See <http://www.workingintheuk.gov.uk>

¹¹ *Per* A-G Stix-Hackl, *Simutenkov* at para. 58.

¹² Though *cf* Advocate General Stix-Hackl's consideration of Article 48 of the *Partnership and Cooperation Agreement between the EC and the Russian Federation*, which states: "For the purpose of this Title, nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services, provided that, in so doing, they do not apply them in a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement", noted in *Simutenkov* at para. 49.

¹³ 'Regulations on Overseas Players must be Tightened' (2004) *The Times*, 25 August.

¹⁴ 'Kolpak case threatens RFU bid to stop influx of imports' (2004) *The Times*, 4 January; 'Kear calls for help in Noble cause' (2005) *The Daily Telegraph*, 3 May.

¹⁵ 'ECB aims to slow foreign invasion' (2004) *BBCi*, 21 October, <http://news.bbc.co.uk/go/pr/-/sport/hi/cricket/counties/3763140.stm>

¹⁶ Article 7(1) of Regulation 1612/68

¹⁷ Case C-224/01 *Köbler v Austria*, judgment [2004] QB at para 77.

¹⁸ 'Homegrown player plan revealed' (2005) *uefa.com*, 3 February, <http://213.130.44.134/uefa/Keytopics/kinid=65536/newsId=276829.html>

¹⁹ Case 13/76 [1976] 2 CMLR 578.

²⁰ Case T-313/02 [2004] 3 CMLR 60

²¹ Weatherill, S 'Anti-doping rules and EC law' [2005] 26(7) ECLR 416-421.

²² At para 131.

must be total if it is to sustain a claim of geographic allegiance. Thus, this excludes the possibility of employing foreign 'stars' as a means of making the sport attractive to spectators and commercial partners.

Domestic Competition and National Teams

It was also argued in *Bosman* that restrictions were required in order to ensure that a sufficient throughput of players eligible to represent the national team was secured. The Court gave little credence to this approach; players did not necessarily have to play for a club in a particular nation in order to represent it at international level and while acknowledging that the abolition of quotas would diminish opportunities to develop as a player in domestic competition, there would be an increase in opportunities available in other Member States.²³ It is arguable that such an approach need not be considered universal because of the differing structure of other sports. Cricket provides a prime example with the English county game offering the only significant prospect of participation in a professional capacity. Reciprocal opportunities are not necessarily available, as in many cases 'incoming' players rely on a second EU nationality to provide access to free movement rights; inevitably this is of an EU nation where no opportunity to play professional cricket exists. Similarly *Kolpak* countries may owe a general obligation to open their own markets up to EU nationals; however they are not subject to the jurisdiction of the ECJ in this respect, so a consistency of access cannot be guaranteed. This approach is equally applicable in respect of the rugby codes: Rugby League is limited geographically even within the United Kingdom, outside of which limited professional opportunities exist only in France. The market in respect of rugby Union is less restricted, but still narrow, with the professional game confined to the UK, Ireland, France and, to a lesser extent, Italy.

On this basis, it is possible to argue that restrictions might be acceptable where they seek to ensure an appropriate quality and quantity of players for the national team and limited reciprocal opportunities for development exist.

However, this approach can only be sustained where the provision of players for national teams is acknowledged as a genuine and legitimate objective. That it is genuine can be inferred from a variety of other measures put in place by sports regulators. In English cricket, the professional game at a domestic level is almost wholly dependent upon income generated by international cricket, as is the grass roots of the sport.

This is emphasised by the controversy over the ECB's award of Test cricket broadcasting rights between 2006 and 2008 to BSkyB; effectively removing home Test matches from free to air terrestrial television. The ECB decision was motivated by the premium which BSkyB was able to offer for the rights.²⁴ The significance of this income for cricket has been recognised by the English High Court, which also noted that restrictive rules could be legitimately imposed in order to protect the game.²⁵ The judicially perceived importance of television revenues to sport more generally is also demonstrated by the relatively liberal approach to the application of competition law to the acquisition and sale of rights to sporting events and the relatively few events which are protected as being of particular national importance.²⁶ The importance of international competition is further evidenced by the extent to which governing bodies exercise control over players with a view to this. In cricket the ECB operates a system of 'central contracts' where the governing body takes over the employment and control of key players, ensuring that they are prepared to the best advantage of the national side. Rugby Union has a less rigid structure, but agreements between the Rugby Football Union (RFU) and the professional clubs in England limits the amount of rugby that can be played by international players. Indeed, the degree of control exercised over players by the RFU has been a matter of concern for the clubs.²⁷ Even a club-oriented sport such as association football puts in place protections for national teams - putting in place regulations, albeit relatively weak, requiring the release of national team players from their club sides for international fixtures. Even so, this protection is under attack from the clubs.²⁸ By way of contrast, a sport such as Rugby League, is very much focused on the professional game at a domestic level, in

particular "SuperLeague", with the international game rather marginalized. As such it may be more difficult to make out a strong case that the international game needs protection. Indeed, Rugby League has welcomed 'foreign' imports with significantly fewer reservations than other sports. Nevertheless, Community law does recognise the inherent value of international competition and that it can justify the proportionate imposition of free movement restrictions:

"The pursuit of a national team's interests constitutes an overriding need in the public interest which, by its very nature, is capable of justifying restrictions on the freedom to provide services. In order to meet that overriding need, it is possible to grant certain powers to the sports teams or to the national sports federations, which are also exclusively responsible for selecting national teams."²⁹

The Importance of Competitive Balance

Such judicial emphasis placed upon international competition can further justify potentially discriminatory practice that is aimed at ensuring adequate development of players for international competition. Sport is premised on, amongst other things, the principle of uncertainty of outcome. Sporting competition which is overly predictable ceases to be exciting and does not attract spectators to events or encourage participation.³⁰ Much domestic sport is organised with a view to developing players' skills. In cricket domestic competition in England has been restructured with a view to creating enhanced levels of competition and thus support the development of international players, whilst in Rugby League moves are being considered towards a franchise-style restructuring of *SuperLeague* in order to provide a secure and stable basis upon which clubs can develop their playing talent. In *Bosman* the ECJ took the view that the number of opportunities available to players would not be diminished by the outlawing of nationality rules and thus, that opportunities for development would not be lost. However it is in any case arguable that the Court's analysis was incorrect and that what has, in fact, occurred has been an influx of 'foreign' players from 'strong' markets, such as Italy and Spain, into weaker markets, with a negative impact on development and consequentially, the capacity of the national team.³¹ Scottish football is a prime example of this. The aftermath of the judgment in *Bosman* and amendments to the transfer system resulted in large numbers of *Bosman* qualified players being recruited by top Scottish clubs, often at the expense of young Scottish players. The on-field performance of the Scottish national team has declined markedly over this period.

In *Bosman* the ECJ recognised both youth development and competitive balance as legitimate objectives to be pursued by sporting bodies:

"In view of the considerable social importance of sporting activities ... in the Community, the aims of maintaining a balance ... by preserving a certain degree of equality and uncertainty as to results and

²³ At paras 132-134.

²⁴ 'Sport England's £11m Threat to ECB' (2005) *The Daily Telegraph*, 20th February.

²⁵ *Greig v Insole* [1978] 1 WLR 302.

²⁶ See generally, Fraser, D. and McMahon, K. 'When too much sport is barely enough; broadcasting regulation and national identity' (2002) 1(3) *Ent L* 1; Boyes, S. 'Protecting sports events for free-to-air broadcast' (2001) 10(2) *Nott LJ* 41.

²⁷ 'RFU set for further club showdown' (2005) *BBCi*, 6 December, http://news.bbc.co.uk/sport1/hi/rugby_union/english/4502248.stm

²⁸ 'A case that could transform international football' (2005) *The Financial Times*, 12 September.

²⁹ Case C-51/96-191/97 *Christelle Delière v Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] ECR I-2549, opinion of A-G Cosmas at para. 84. NB

the reservations expressed as to the legitimacy of such an objective in, McCutcheon, J-P. 'National Eligibility Rules After *Bosman*' in Caiger, A. and Gardiner, S. *Professional Sport in the EU: Regulation and Re-regulation* (2001) The Hague: Asser Institute Press, p. 127.

³⁰ See generally, Weatherill, S. "Fair play please!": Recent developments in the application of EC law to sport' (2003) 40 *CMLRev* 51, 55; Michie, J and Oughton, C. *Competitive Balance in Football: Trends and Effects* (2004) Sportsnexus: London.

³¹ See generally, Welch, R. and Gardiner, S. "Show Me the Money": Regulation of the Migration of Professional Sportsmen in Post-*Bosman* Europe' in Caiger, A and Gardiner, S (eds) *Professional Sport in the EU: Regulation and Re-regulation* (2001) TMC Asser Press: The Hague, p. 107.

³² *Bosman* at para. 106.

of encouraging the recruitment and training of young players must be accepted as legitimate.”³²

Competitive balance has also been acknowledged as a legitimate objective by the Court, albeit in the context of ‘transfer windows’ and expressly outlawing the variable application of the provisions contingent upon nationality.³³ Nevertheless, the Court has consistently recognised the need for sport to be able to put in place constitutive, structural rules, as long as they satisfy the requirements of proportionality.³⁴

Nationality or Affiliation?

One potential approach that might be adopted by sports governing bodies in order to circumvent Community law would be a shift in approach requiring ‘affiliation’ to a particular national team, rather than strict rules based on ‘nationality proper’. In many sports it is possible to acquire ‘nationality’ for the purposes of representative sport, indeed, to represent more than one international team during a career. Such an approach is hinted at by the England and Wales Cricket Board’s (ECB) recently introduced incentive scheme, which rewards county sides financially for playing English *qualified* players – their nationality is not necessarily in issue. Though, as noted, UK nationals are more likely, because of the construction of the eligibility rules, to be able to satisfy this requirement.³⁵

However, this situation was considered to be a potentially acceptable solution by the ECJ in *Deliège*. However, such an approach risks conflicting with another legitimate sporting objective. Community law has long recognised the importance of taking into account the social significance of sporting activity. Advocate-General Cosmas noted in *Deliège* that the Member States had expressly identified this in the declaration attached to the Treaty of Amsterdam:

“It should again be noted that highlighting that dimension of sport appears to have been one of the concerns of the Community’s constitutional legislature during the discussions leading to the conclusion of the Treaty of Amsterdam. In Declaration No 29 on sport, the Conference ‘emphasises the social significance of sport, in particular its role in forging identity and bringing people together.’ Nor is it a coincidence that the same declaration recognises the need to listen to sports associations when important questions affecting sport are at issue”.³⁶

A similar expression of the social significance of sport was made by the intergovernmental conference at the signing of the Nice Treaty. Any weakening of the required link between international players and the national team they represent could undermine Community law’s conception of sport’s important role in the promotion of social solidarity.

Playing for Europe?

However, certain sports may be able to transcend this position if it is possible to demonstrate that regulations which appear *prima facie* restrictive or discriminatory might be justifiable in that they are perceived as promoting the development of sport at an intra-Community level. Indeed, Community institutions have long seen sport as a vehicle for the development of social solidarity and cohesion at a European, rather than national, level.³⁷

Cricket and the rugby codes could legitimately argue that by ensuring that players were genuinely ‘European’ – that is eligible and willing to represent an EU Member State at international level – then restrictions on *Kolpak* players might be justified on the grounds that the restrictions promote the development of European sport. A parallel approach to *Bosman* and *Kolpak* players could act as an inhibition to the growth of European sport, with the influx of dual-citizenship players effectively blocking the path of genuine European talent domestically, without providing mutual opportunities to develop in *Kolpak* nations. An approach of this kind could be acceptable under Community law as being the genuine protection of a legitimate interest, rather than bald discrimination.

Cricket has made moves in this direction with the inclusion of a Scottish team in the one-day league and Ireland and the Netherlands in the main one-day cup competition. Rugby Union has taken significant strides down this road with the development of the European Cup club competition and the expansion of the main international tournament from five to six nations to include the fledgling Italian national side. Similarly, Rugby League opens up its cup competitions to French sides and *Les Catalans* will feature in *SuperLeague* during the 2006 season.

The legitimacy of such approach has already been supported by Advocate-General Cosmas in *Deliège*:

“In other words, the idea of representativeness also includes the need for balanced development of the sport at pan-European level; that need is directly linked to the ideal of noble competition which is, or at least should be, espoused in sport. Accordingly, the restrictions on access ... which are imposed ... in the interest of the balanced development of the sport at pan-European level, are justified, even if they may be equivalent to restrictions on the freedom to provide services.”³⁸

Conclusions: A need for an imaginative response?

So it is conceivable that Community law could accommodate restrictions of the nature discussed on the basis of the existence of limited opportunities to play a particular sport professionally, alongside the social significance of a particular sport at a Member State level. Indeed, the ECB should be lauded for developing a less restrictive, incentive oriented approach, which stops short of an openly discriminatory imposition of a ban or quota on ‘foreign’ players. In doing this it may have achieved a happy balance between the need to limit economic restrictions and a genuine interest in the protection of legitimate sporting concerns. Cricket may well wish to consider other ways of negating the externalities of the judgments in *Bosman* and *Kolpak*. Other sports with a similar market structure to cricket, such as the rugby codes, would do well to consider this innovative scheme and reflect on the possibilities open to them to deal with Community law’s attendant problems. UEFA’s new approach to the development of youth players also suggests that a more ubiquitous sport may be able to provide a legitimate rationale for the relaxation of the free movement provisions.

None of the solutions offered in this article necessarily offer sport a ‘watertight’ way around the restrictions of EC law, nor are they exhaustive. Nevertheless, they clearly illustrate that sporting interests can legitimately be shielded against the adverse impact of decisions such as *Bosman* and *Kolpak*, provided that such measures are proportionate and genuine. The Post-*Bosman* era has undoubtedly seen a less aggressive approach towards sport on the part of the Community and offered regulators the possibility of wholly or partially escaping the influence of Community law. Such an escape will undoubtedly require a degree of ingenuity and a willingness to transcend established sporting structures. Nonetheless, such opportunities clearly exist and the notion of a ‘one size fits all’, rigidly applied EC ‘sports law’ is undoubtedly a myth. As Professor Weatherill points out: “The lesson of *Bosman* is that the game can cope – but only if it responds imaginatively.”³⁹

33 Case C-176/96 *Jyri Lehtonen & Castors Canada Dry Namur-Braine ASBL v Fédération Royale des Sociétés de Basketball* [2000] ECR I-2681.

34 As in *Deliège*.

35 At para. 44.

36 *Deliège*, opinion of A-G Cosmas at para. 75.

37 European Parliament Committee on Culture, Youth and the Media, *Report on the Role of the European Union in the*

Field of Sport (1997) 28 May, A4-0197/97; European Parliament Committee on Culture Youth and the Media, *Report on the European Community and Sport* (1994) 27 and 29 April, A3-0326/94.

38 At para. 85.

39 ‘A case that could transform international football’ (2005) *Financial Times*, 12 September.

The International Supply of Sports Agent Services

by Andrea Pinna*

1. Introduction

For a long time, the profession of sports agent has not specifically been regulated. Only recently were particular rules concerning the access to the profession and the exercise of this activity enacted, both at the State level and at the level of sports' federations. Such rules were enacted in reaction to a certain drift of the profession, which resulted, these last years, in the perpetration of embezzlements and frauds in France and abroad. Among the numerous scandals, the one that affected the basketball player Kareem Abdul-Jabbar, the player who scored the biggest number of points in the history of the NBA, is the most famous.¹ In this case, not only had the agent violated his obligation of loyalty towards the player, but he had also commingled his personal funds with those of his client, made investments contrary to his client's instructions and even secured his personal debts with his client's funds.²

The suspicion towards this profession largely resulted in discrediting it. In the United States, the suspicion is such that lawyers, who are subject to stricter rules of professional conduct, are substituting to sports agents in exercising the activity of intermediation between sportsmen, clubs and sponsors.³ In most European countries such an evolution may not possibly occur, since lawyers' rules of conduct prevent them from exercising intermediation activities of that kind. Such prohibition may be either direct, as in French law,⁴ or indirect as a result of the prohibition of contingency fees.

The distrust towards the profession of sports agent also contributed to the development of specific rules governing sports agents. Such rules have a unique typology and are often much more demanding than those imposed on their counterparts in the artistic and literary fields. While some of the new rules emanate from state authorities, sport however remains an activity widely controlled and organized by sports federations. It is therefore not surprising to note that a large number of requirements applying to sports agents derives from the *lex sportiva* of national and international federations. Besides, regulatory efforts were initiated by associations of professional sportsmen having more or less of authority. The four main sportsmen's associations in the United States - which benefit from the status of trade unions - oblige their members to appoint only licensed agents.⁵ Finally, efforts

of self-regulation also appeared within the profession. Notably, the Association of Representative of Professional Athletes, adopted a Code of professional conduct, although the latter has no binding value since the membership to the association is voluntary and since the Association does not have the powers to enforce the principles it adopted.⁶

A specific frame of the activity of sports agent was first established in the United States, with the adoption in 1981 of the *Athlete Agents Act* by the State of California.⁷ In my knowledge, the first European legislation in that field is the French law no. 92-652 of July 13, 1992, which modified the law no. 84-610 of July 16, 1984 governing the organization and the promotion of physical and sports activities. Until 1992, the activity of sports agent was forbidden in France. Although such activity was employed in practice, notably in the field of professional football, courts that were referred disputes between agents and their principals ruled for the nullity of sports agent contract on the ground that the rules of the French Labour Code on labour procurement prohibit the exercise of any intermediary's activity between two persons called to be bound by an employment contract.⁸ The activity of sports agent was authorized and regulated in France by the law no. 92-652 of July 13, 1992.⁹ With this law, French law, contrary to most foreign legal systems and international federations regulations, introduced a restrictive regulation of the activity.¹⁰ Article 15-2 of the law no. 84-610 of July 16, 1984 was recently modified and, in its last version, deriving from the law no. 2000-627 of July 6, 2000, it introduces two main rules.¹¹ On the first hand, the law requires that sports agents obtain a license in order to exercise their profession while under the regime of 1992, a mere preliminary declaration was sufficient.¹² On the other hand, the new provision of Article 15-2 provides that the payment of sports agent cannot exceed 10% of the amount of the contract which was concluded following to his intermediation and prohibits sports agents to act on behalf of both parties to a single contract. Only the party who is "represented" by the agent can therefore remunerate him. Article 15-3 adds to this regime a total ban for an agent to be remunerated when the contract relating to the exercise of the sports activity concerns a sportsman under the age of majority.

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1 *Collins v. NBPA*, 850 F. Supp. 1468 (D. Colo. 1991).

2 For other examples in the UK: S. Gardiner et alii, *Sports Law*, 2nd ed., Cavendish Publishing, 2001, pp. 353ff.; in the US: Philip N. Fluhr, Jr., *The Regulation of Sports Agents and the Quest for Uniformity*, 6 Sports Law J. 1 (1999).

3 See, Charles B. Lipscomb & Peter Titlebaum, *Selecting a Sports Agent: The Inside for Athletes & Parents*, 3 Vand. J. Ent. L. & Prac. 95, at p. 99 (2001); David S. Caudill, *Revisiting the Ethics of Representing Professional Athletes: Agents, "Attorney-Agents", Full-Service Agencies, and the Dream Team Model*, 3 Va. Sports & Ent. L.J. 31 (2003): "Due to the widespread and much publicized incidents of incompetence, criminal abuses, and unreasonable fees in the sports representation industry, many athletes are increas-

ingly turning towards lawyers for representation. Currently, over fifty percent of those actively involved as representatives in the three major professional leagues are lawyers."

4 Article 115 of the 27 November 1991 of the French Decree organising the profession of attorney.

5 NFLPA Code of Conduct for NFLPA Member Contract Advisors (1990); NBPA Regulations Governing Player Agents (1991); NHL Collective Bargaining Agreement art. 2 (Jan. 13, 1995); MLB Collective Bargaining Agreement Art. 2 (Mar. 19, 1990). On this issue, see already Lionel S. Sobel, *The Regulation of Sports Agents: An Analytical Primer*, 39 Baylor L. Rev. 701, (1987), at. 731ff.

6 On such inconveniences, David L. Dunn, *Regulation of Sports Agents: Since at First It Hasn't Succeeded, Try Federal Legislation*, 39 Hastings L.J. 1031, at p. 1074 (1988).

7 More recently, the *Miller-Ayala Athlete*

Agents Act, Cal. Bus. & Prof. Code 18895-97 (West 1997 & Supp. 1998) has replaced the 1981 Act. For a commentary of the new regulation, James Malone & Daren Lipinsky, *The Game Behind the Games: Unscrupulous Agents in College Athletics & California's Miller-Ayala Act*, 17 Loy. L.A. Ent. L.J. 413 (1997).

8 See, for ex. CA Montpellier, 28 February 1996, *Sablier v. Laurey*, unreported, Juris-Data no. 034119, declaring a sports agent contract concluded by the entry into force of the 1992 Act null and void. The connection between the activity of sports agent and the activity of labour procurement is often made, see F. Hendrickx, *Player's Agents in Professional Football and Employment-Finding Laws in Belgium and the Netherlands*, International Sports Law Journal 2002/3, p. 23.

9 In other countries the regulation is also recent or even only a proposal like the Portuguese Act on sports law, A.D. De Carvalho, *A profissão de empresário*

desportivo - Uma lei simplista para uma actividade complexa?, Desporto & Derecho, 2004/2, p. 251.

10 For commentaries of the 1992 French sports Act, see J.-P. Karaquillo, *La réglementation de l'activité d'intermédiaire du sport : une réglementation de transition?*, in E. Bournazel (ed.) *Droit du sport, Loi n° 92-652 du 13 juillet 1992*, Dalloz, 1994, pp. 106ff.; *Dictionnaire permanent droit du sport*, V° *Intermédiaire du sport*.

11 For a commentary of the new regulation, see F. Rizzo, *À propos de l'activité d'intermédiaire du sport*, Droit & Patrimoine, mars 2001, pp. 40ff.; Lamy Droit du Sport, Etude 272, *Agents de sportifs et de groupements sportifs*.

12 The decree no. 2002-649 of 29 April 2002, organises the examination for the delivery of the license that is organized by sports federations. On this issue, see J.-P. Karaquillo, *Observations relatives au décret n° 2002-649 du 29 avril 2002*, RJES 2002, no. 64, p. 77.

At the federal level, the first rules of the International Federation of Football Associations (FIFA) were adopted in 1994. They have been deeply criticised notably because they required the deposit in the hands of the federation of an important sum of money as a guarantee. The Executive committee of the FIFA modified its regulation of the activity of sports agents on December 10, 2000. Nevertheless, at the level of international federations, FIFA is isolated. In sports other than football, international federations generally let national federations free to adopt rules or to allow whoever wishes so to exercise the profession of sports agent. This gave place to the development of a body of ill-assorted rules with different scopes of application, which conflict with each other.

The recent intervention of sports movements and of national authorities in the regulation of the profession have not yet resulted in the expected improvement of the moral standards of the profession of sports agent. As a consequence, this profession, especially in the world of football, is still today under scrutiny. The introduction in France in 2000 of an authorisation procedure instead of a declaration for the access to the profession gave rise to serious difficulties, as evidenced in recent inquiries on the players' "false agents".¹³ Regardless of the success of the undertaken efforts, it is indisputable that the activity of sports agent begins to be very much regulated. The superimposition of regulations having different origins leads to a great complication. The purpose of this article is, if not to establish the various solutions to the existing problems, to analyse the complex issues concerning the international exercise of the activity of sports agent.

The activity of sports agent consists in putting in touch parties that are interested in the conclusion of a contract relating to the exercise of a remunerated sports activity. Such is the definition given by French law, which often corresponds to the common conception of the profession according to which an agent aims at helping an applicant for an employment to find an employer or conversely at helping an employer to find an employee presenting particular characteristics. The activity of sports agent is thus an activity of intermediation on the employment market, in the specific context of physical and sports activities. The qualification of mandate is often used by practitioners and by the law. However, if the activity of the agent sometimes consists in representing his client, in most cases, the agent merely acts as a broker, following the example of many artistic agents.¹⁴

The sports agent is nevertheless called upon intervening in a very large variety of situations, which requires the establishment of a typology. In general, when evoking the activity of a sports agent, one assimilates such activity with that of the agent of the sportsman. The intermediary would thus be the person who represents the sportsman in his relations with employers, organizers of competitions, sponsors, etc. The activity of advising the sportsman is also important. It includes any kind of advice concerning the management of his career, as well as any kind of legal, financial or even tax advice. As a consequence of the variety of this activity, the program of the exam for accessing to the profession of sports agent often includes legal and tax tests. This is notably the case of the exam organized by the French sports federations. In this article, it will be mainly discussed about the intermediation activity of the agent.¹⁵

However, if the contract of sports agency is generally the contract by which a sportsman requires an agent to represent and to advise him in the management of his career, the law also envisages other possibilities. In several hypotheses, intermediaries are appointed, not by the sportsmen, but by clubs and more generally by sports organizations endowed with legal personality. Such mandate can have different objects. The mandate to "scout" for a sportsman is very frequent, notably in case of transfer of players between clubs. In that case, the agent is appointed by a club to find a player having certain characteristics and to negotiate the conditions of his transfer. In this case, the agents appointed by the club can act in two different manners. Very often, they intervene for the negotiation of the contract of transfer concluded between the club of origin and the club of destination, their payment being fixed on the basis of the amount of the transfer. This is the most frequent situation. In less frequent cases, the agent appointed by the club is involved in the negotiation of the new

employment contract to be concluded between the club and the player, but in the name and on behalf of the club and not of the player. In that case, the commission of the agent is often calculated on the basis of all wages to be paid to the player for the period of the concluded employment contract. Nevertheless, in practice, such a mandate to scout for a sportsman is often concluded with "the agent of the player", that is with the agent who is contractually tied up with the sportsman. It appears that the agent then acts for two interested parties in the transfer: the club of destination and the player. The validity of such a practice of double representation is often uncertain because of the risk of conflict of interest and sometimes it is expressly prohibited, as in French law or according to FIFA regulations.

In other cases, the sport agent is appointed by the club where the player performs to find another club inclined "to acquire" the player and possibly to negotiate the conditions of his potential departure. The club of origin of the player then remunerates the agent by paying him a commission calculated on the basis of the amount of the transfer concluded.

Resorting to intermediation in sports matters is today frequent in most of the professional sports, which increases the variety of manifestation of such intermediation. If in the field of team sports, the agent intervenes mainly in the relations between clubs or between a club and a sportsman, in the field of individual sports, the agent's main task is to intervene in the relations between sportsman and the organizers of competitions.¹⁶ It is however essentially in the world of football that the activity and also the setbacks of the sports agents are given the largest media coverage.

The activity of sports agent is often exercised at the international level. The international sports agent is the one in charge of representing the interests of sportsmen who exercise or may exercise their professional activity in different countries. The international dimension of the activity is noticeable especially when the sports agent negotiates and allows the "transfer" of his client in a foreign country, or more precisely when he drafts an employment contract with a new employer established in a state different from the one where the sportsman or his employer currently reside. Whether the agent acts for a club or for a player, the criterion for establishing the internationality of the activity is the same: namely the cross-border movement of a professional sportsman. Therefore, the contract is often international by its object. Naturally, the contract of sports agent can present an international character in the absence of such a movement. In that case, it is by application of a legal criterion and not of an economic one that the relation is subject to the regime of the international contracts. Such situation occurs notably when the agent and the sportsman are established in different countries. However, similar questions arise whether the contract is economically or legally international.

The international transfer of sportsmen is more and more frequent due to the globalisation of sports activities and of their media coverage. In "minor" sports, this phenomenon is even strengthened by the fact that the level of the various national championships is less homogeneous. Accordingly, some European countries exercise a very important attraction on young talents. For instance, high level male handball can be practised almost only in three countries in Europe: Germany, Spain and France. The same goes for basketball and volleyball for which the championships organised by the Italian federation are the most demanded. The opposite phenomenon may also be noticed. Indeed, certain countries cannot integrate all the athletes who come out of their training centres. Such is the case of the United

¹³ M. Chevrier, *La chasse aux faux agents*, L'Equipe, 18 March 2004.

¹⁴ For the qualification of the contract of artistic agent, P.-Y. Gautier, *Propriété littéraire et artistique*, PUF 4th ed. 2001, no. 352.

¹⁵ For the list of the different activities of the sports agent, Ph. Ciocca, *Les relations contractuelles entre un sportif professionnel et son représentant*, Diss. Lausanne, 1995, pp. 83-95.

¹⁶ In the field of professional boxing, see G. Borriore, *Osservazioni sul contratto di procura sportiva nel pugilato professionistico*, Rivista di Diritto Sportivo, 1999, p. 646.

¹⁷ ECJ, 15 December 1995, C-415/93, Rec. 1995, p. I-4921; J.C.P. 1996.II.22660 with annotation Auneau; See also ECJ 13 March 2000, *Lehtonen and Castors Braine*, C-176/96, Rec. 2000, p. I-2681.

States, where a very big number of basketball players who do not manage to evolve from university amateur championships towards the NBA have been used to emigrate in almost all European countries, and sometimes even perform in lower divisions.

International sports agent activity greatly developed after the *Bosman* case which created a breach in the restrictions to the movement of professional sportsmen within the European Union.¹⁷ The freedom of movement that resulted from it had extended to all the countries having a cooperation agreement with the European Union and the European Economic Space: more than eighty non-EU countries are nowadays concerned.¹⁸ This phenomenon requires the implementation of specific regulations that take into consideration the international character of the activity of the sportsman and consequently of the activity of his agent. The world authorities of football have been quickly aware of this situation. The General Secretary of the FIFA, Michel Zen-Ruffien, was able to assert that: "The repercussions of the *Bosman* ruling, the sweeping changes in international football and the transfer market demand a far reaching re-assessment of the situation. FIFA intends to make allowance for such changed circumstances in its current revision of the regulations."¹⁹

The substantial current regulation of the profession of sports agent as well as its strong international dimension raise very complex questions of private international law. We shall attempt to analyse the various problems experienced in practice, by the agents, the clubs and the players who interact with them and by the sports federations, which are in charge of organising and of controlling the profession.

The regulation of sports agency has a double nature which requires that the analyse be carried both within state legal order and sports legal order.²⁰ The scope of application of the rights and obligations of private nature and of the sports obligations do not always coincide: this can entail additional problems of application leading sometimes to the superimposing of contradictory provisions that the agent cannot simultaneously fulfil. Even within state's legislations one may notice the division of the international regulatory context (I). A first attempt of simplification is nevertheless being set up today at the instigation of the European Union and of international sports federations (II).

2. A divided international regulatory context

Legal systems differ as to the conditions of access to the profession of sports agent. In several countries, it remains a free activity that everyone can exercise. However, today limitations to the freedom of enterprise are developing, essentially in the form of a duty to obtain a preliminary license by state authorities or by depositaries of the mission of public utility to control sports activity. The most developed system consists in delivering a license subject to the agent obtaining the professional skills required for the exercise of the profession. To the contrary, the system of preliminary declaration, that was once used, is in the process of disappearing today. There is therefore a first conflict, which must be resolved between the legal systems that restrict the access to the profession and those for which such access to the profession remains free. Then, it is the combination of the restrictive regulations that gives rise to important practical problems.

The first reaction of international private law scholars consists in looking for a conflict-of-laws rule or, more generally, for a rule which allows to determine the scope of application of the national provisions in the space. Although the activity of the agent is an activity of intermediation, one would vainly look for a rule of conflict regarding the access to the profession in The Hague Convention of March 14, 1978 on the Law Applicable to Agency. Not only this Convention was not widely ratified, but above all it contains no conflict-of-law rule concerning the access to the activity of the profession of intermediary. The technique of traditional private international law experiences serious difficulties to apply, although the issue of prohibitions and professional incompatibilities is known for a long time. A first trend suggests to solve this question by applying the national law of the intermediary, that is his law of origin.²¹ The majority of legal doctrine seems to be rather in favour of the application of the law, often qualified as mandatory law, in force in the place where the profession is

exercised.²² Such is also the tendency of the provisions, which, such as French law, unilaterally determine, in a more or less explicit way, the scope of application of the regulation of the activity at stake.

The determination of the territorial scope of application of Article 15-2 of the law of July 16, 1984 however raises a certain number of difficulties. The first consists in determining if it can be qualified as a mandatory law or if its applicability is subject to the conflicts of laws technique. In the *Bismuth* case, the French Supreme Court reasoned in terms of conflict of laws, contrarily to the Aix-en-Provence Court of Appeal which ruled in the same case.²³ In this case, the commission was due to a French agent residing in France and appointed by a Tunisian club to negotiate the transfer of a player from this latter club to a French one. The agent's claim for payment was dismissed because the contract had been entered into in violation of Article 15-2 of the 1984 law in its version of 1992. The Supreme Court justified the application of French law by referring to the Rome Convention of June 19, 1980 on the law applicable to the contractual obligations, according to which absent a choice of law by the parties, the law of the place of residence of the debtor of the characteristic performance is applicable. The characteristic performance of a sports agent contract being supplied by the agent and this one having his place of residence in France, French law had to be applied.

The motivation of the case was criticised by the commentators, on the ground that the Rome Convention was not applicable,²⁴ and more specifically on the ground that Article 15-2 is a mandatory rule which applies before French jurisdictions whichever is the law designated by the conflict-of-law rule.²⁵ In other words, the parties to a sport agent contract could not, by choosing a foreign law, avoid the application of French mandatory law, when the activity at stake is within the scope of its application. Such a criticism is justified, since Article 15-2 seems to have all the elements of a mandatory law. It is true that the qualification of a national law as a mandatory law is a difficult task when the provisions in question does not qualify itself as such or does not determine its scope of application in the space by attributing itself a wider scope than the one deriving from the application of the relevant choice-of-law rules. However, it seems, as it will be observed later, that Article 15-2 partially proceeds to such a determination of its scope of application. Besides, the 1984 law on sports, and more specifically its provisions relating to sports agency seem to correspond perfectly to the functional criterion of the mandatory law adopted by the European Court of Justice in the *Arblade* case.²⁶ In this case it was held that the term "public-order" legislation "must be understood as applying to national provisions compliance with which

18 ECJ, 8 May 2003, *Deutscher Handballbund e.V. v. Maros Kolpak*, C-438/00, Rec. 2003, p. I-4135 : "The first indent of Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part [...] must be construed as precluding the application to a professional sportsman of Slovak nationality, who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation in that State under which clubs are authorised to field, during league or cup matches, only a limited number of players from non-member countries that are not parties to the Agreement on the European Economic Area."

19 Quoted by S. Gardiner, *Regulation of sports agents in Europe*, 3(6) Sports Law Bulletin, 8 [2000].

20 On the distinction between the two kind of provisions, J.-P. Karaquillo, *Les normes des communautés sportives et le droit étatique*, D. 1990, Chr. 83; G. Simon, *Puissance sportive et ordre juridique étatique*, Diss. LGDJ 1990.

21 See, J.-P. Niboyet, *Traité de droit international privé français*, t. V, 1949, p. 642 according to which professional incompatibilities are governed by the *lex societatis*.

22 F. Rigaux, *Le statut de la représentation. Étude de droit international privé comparé*, Diss. 1963, E.J. Brill, Leyden, p. 70.

23 Cass. Civ. I, 18 July 2000, Bull. civ. I, no. 217; JDI 2001, 97 with annotation E. Loquin, G. Simon; D. 2002 somm. 1391 obs. B. Audit. On this case, see also D. Mainguy, P. Mousseron, *Match autour d'un transfert de joueur de football*, Droit & patrimoine 2001, no. 99, p. 114.

24 The Hague Convention of the 14 March 1978 on the Law Applicable to Agency should have been applied.

25 E. Loquin, G. Simon op. cit.; B. Audit, op. cit. See also, E. Loquin, *L'internationalisation des contrats sportifs*, in G. Simon (ed.) *Les contrats des sportifs, L'exemple du football professionnel*, PUF, 2003, pp. 33ff. at pp. 43-45.

26 ECJ, 23 November 1999, *Arblade*, C-369/96, C-376/96, Rec. 1999, p. I-8453; Rev. crit. DIP 2000, 710 with annotation M. Fallon.

has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.”²⁷

Such a solution derives from the analysis of the provisions. It is useful to examine this issue in detail by distinguishing Article 15-2's version of 1992 and its version of 2000. Paragraph 2 of the Article, in its version of 1992, provided that a foreigner who was not established in France could exercise the activity of sports agent in France only through the intermediary of a person established in France who herself complied with the necessary administrative requirements to be able to exercise the activity of sports agent. Such a provision clearly demonstrated that it was a mandatory law. Its violation was also criminally punished. Article 15-2 II 4° in its version actually in force provides that: “II. - Nobody can obtain or hold a license of sports agent: [...] 4° The occasional exercise of the activity of sports agent by a national of a member state of the European Union or a State party to the agreement on the European Economic Space not established on the national territory is subordinated to the respect of the conditions of morality defined in the present paragraph.” By disregarding the grammatical incoherence of this article and the irreconcilability between the beginning of the paragraph II and the terms of the subparagraph 4°, one can infer what follows. The national of a member state of the European Union or a State party to the European Economic Space which exercises agent's activity *occasionally* without being established on the French territory is not subject to the requirement of a license, but should only respect the “conditions of morality defined in the present paragraph.” The conditions of morality are only those of paragraph 2 that is those of the sub-paragraphs 1°, 2° and 3° 15-2-II.

The consequences of an *a contrario* interpretation of this provision should be mentioned. Firstly, the agent who is the national of a Member State of the European Union or of the European Economic Space and who would exercise the activity *on a usual basis* is not exempted from obtaining a license and is subject to the upper limit of 10%. Secondly, an agent who is not a national of one of these States and who is not established in France cannot exercise in France the activity of sports agent, on a usual basis, without having obtained a license or the recognition of a foreign license. He should certainly respect the other requirements of Article 15-2 and is, notably, subject to the upper limit of 10%. The question is all about knowing when the activity of sports agent is exercised on a usual basis and when it is exercised occasionally. It seems that the occasional character of the activity must not be assessed only with regard to the French territory. Thus, an agent who exercises on a usual basis the agent activity abroad will inevitably be an agent practicing on a usual basis in the meaning of Article 15-2 even though he concluded a single operation on the French territory.²⁸

Since it is accepted that Article 15-2 is a mandatory law, the difficulty arises as to the determination of its territorial scope of application. This latter is not expressly determined by the mandatory law itself. Indeed, if Article 15-2 II 4° deals with the possibility for an agent non-established on the French territory to exercise the activity of sports agent, it does not determine clearly to which typology of intermediation the requirements of this text apply. The same solution derives from the version of 1992 of Article 15-2, which in its paragraph 2, clearly subordinated the application of the provision to the fact that the activity was exercised in France. It is therefore the solution proposed by Mister François Rigaux, which has been upheld. As a result French mandatory law applies to all sports agents who exercise their activity in France.

The issue therefore consists in determining when the activity of international sports agency is exercised in France. The scholars that dealt with the question were of the opinion that it was necessary to retain a wide interpretation of this condition of applicability and that the exercise of the activity is made in France when the agent allows the player to cross the French border in a direction or in the other one. More particularly, Article 15-2 is applicable when the hiring of the player by a French club or the departure of the player from a

French club to evolve abroad is at stake. Such an alternative connecting criterion conveys to the provision a wider scope of application than the one that would result from the mere application of the conflict-of-law rule, and notably from the application of the *lex societatis*. Neither the nationality of the sportsman, nor the agent's place of residence or main establishment seem to have an influence on the determination of the scope of application of the mandatory law in the space. This is confirmed by the terms of the provision when they refer to the conditions of exercise of the activity in France of an agent established in another country. A distinction is therefore made between the place of where the agent exercises his activity and his place of main establishment: it must therefore inevitably be distinguished between the law of exercise and the law of origin of the service provider. This results in both acknowledging the inherent internationality of the activity of the sports agent and subordinating such an activity to extreme restrictions.

It is then obvious that French mandatory law applies so long as the activity of the agent is, at least partially, exercised on the French territory, i.e. so long as such territory is interested in the transfer of the sportsman. Nevertheless, the question remains to know how the French territory should be interested in the activity of sports agent: certainly as the country of destination of the player, but probably also as the country of departure of the player. A similar situation is noticeable when the agent is not in charge of the sportsman's interests, but of those of a sports club willing to employ professional sportsmen. The agent's activity is certainly considered as exercised in France when the principal is established there. However, it will be possible to consider that the agent of the club also exercises his activity in France when the club with which he is about to negotiate a transfer is established on the territory of this country.

The activity of the sports agent is in a sense multi-localised for the needs of the application of the French mandatory law. Such a conception of the activity of an intermediary is rather unusual. In the close field of commercial agency and more generally of distribution exercised on the territory of several States, case law traditionally refused to localise the activity in several countries and generally considers today that the place of execution of the service coincides with the place of establishment of the agent or of the distributor. It is in this place that the contract is mainly performed. Case law was called to hold such a solution in conflicts of jurisdiction cases.²⁹

It is therefore possible that several mandatory laws apply - or at least aim at applying - simultaneously. It may result that the sports agent be obliged to have the necessary licenses in more than one country in order to exercise his activity. These provisions should not therefore be considered as mandatory laws as it was suggested by scholars, but rather as public law provisions.³⁰ This solution is all the more true since the remedy to their violation is not only civil (such as the annulment of the contract of representation and the impossibility for the agent to receive payment), but often also of criminal nature. As a consequence, the various laws are not really in conflict and can eventually be applied cumulatively. French courts will apply their own law so long as the international situation falls within the scope of application of the French law. Conversely, a foreign rule can be applied by a foreign jurisdiction. Thus, we are no more in presence of a conflict of laws of private nature, but rather in a domain where the cumulative application of laws is conceivable. As a consequence, the sports agent must, should the need arise, be authorised to exercise his activity on the territory of several States at the same moment.³¹

²⁷ ECJ, 23 November 1999, cit. at no. 30.

²⁸ The issue is discussed by scholars; see E.

Loquin, G. Simon op. cit., at p. 107.

²⁹ In domestic matters, Cass. Com. 19 July 1988, Bull. civ. IV, no. 257. In international litigations, CA Lyon, 10 June 1976, JDI 1977, 665; comp. ECJ 9 January 1997, P. W. Rutten v. Cross Medical Ltd, C-383/95; JDI 1997, p. 635. J.M. Bischoff; Rev. crit. DIP 1997, p. 337, H. Gaudemet-Tallon.

³⁰ On this issue, K. Zweigert, *Droit international privé et droit public*, Rev. crit. DIP 1965, 645; P. Mayer, *Le rôle du droit public en droit international privé*, RIDC 1986, 484.

³¹ Y. Loussouarn, P. Bourel, P. de Vareilles-Sommières, *Droit international privé*, 8th ed. 2004, Dalloz, nos. 120ff.; P. Mayer, V. Heuzé, *Droit international privé*, 8th ed. 2004, Montchrestien, nos. 99ff.

Such an approach was adopted in the past by French courts applying Article 4 of the decree no. 58-1345 of December 23, 1958, which requires that the commercial agents be registered before beginning the exercise of their activities.³² The case quoted in footnote dealt with the requirement of registration of an Italian agent acting for a French company. The Supreme Court held that the defect of registration of the agent in France prevented him from benefiting from a compensation for the termination of the contract even though the contract was governed by French law in accordance with a choice of law clause. This solution has later on been abandoned by cases, which decided that the agent established abroad could benefit from the protection granted by French law, even if he did not proceed to his registration in France.³³ The requirement of registration of commercial agents is not subject to the law of the place of exercise of the activity, but to the *lex societatis* as law of origin. It is moreover frequent that an agent established abroad receives mandate to represent a product not only in the country where he is established but also on the territory of several States. Such an agent would yet be subject only to the requirements of access to the profession of his country of establishment.

The difference between the scope of application in the space of the conditions of access to the profession of commercial agent and of sports agent therefore clearly appears. While the first regulation takes only into account the place of residence of the agent, the second one is instead mainly concerned with the place of exercise of the profession. The access to the profession is all the more restricted for sports agents since the place of provision of the service is defined in very broad terms and since contrarily to commercial agent's activity, it is not generally defined in the sports agent contract. Indeed, the athlete rarely requests the sport agent to look for a club in a precise country. Therefore the agent often ignores the place of residence of the potential employers of his client, which means that he does not know in which countries it will be called to exercise its activity. Establishing such a barrier in the exercise of the profession can be very prejudicial. Indeed, often the sports agent will not be entitled to enter into negotiation with a foreign club to represent the interests of his client absent a license to practice in the potential country of destination of his client. Despite all his efforts, he will not be able to obtain the license and the authorisation to practice in the country at stake, because the exams are generally organised every six months, if not annually.

The main problem consists in submitting to the same conditions the establishment of a sports agent in a country, and the exercise on the territory of that country of the activity of a sports agent established abroad. However, both situations are far from being comparable. While usually the international dimension of the situation is used by the operators in their advantage as it often allows them to obtain the application of the law which is the most favourable to them notably by choosing the place of their establishment, in sports agency the international dimension of the activity constitutes a barrier to its exercise, not only due to the impossibility to proceed to such a "law shopping", but also due to the cumulative application of several laws that make the access to the profession difficult if not impossible. It is probably for the same reason that the illegal exercise of the profession of sports agent still proliferates.

A first attempt of simplification is nevertheless emerging, not at the instigation of the States, which continue to implement provisions to protect their own interests, but under the harmonisation drive of the European Union law and also of international sports federations. Some of them are currently setting up a coherent and uniform system of regulation of sports agency.

3. A first attempt of simplification of the system

The simplification of the regulation of the international activity of sports agent appears mainly through the convergence of the different legal systems concerned. As it was mentioned in the introduction, the activity of sports agent is not only governed by national regulations. The international and national federations, in charge of organising competitions and championships, also adopt rules in this field. All these rules start to converge, which results in the creation of a com-

mon set of principles making the practice of sports agency easier. This convergence is far from being complete, but it is appearing at the level of both the access to the profession and the conditions of the exercise of the activity.

As previously mentioned, French law on sports requires that the sports agent who acts in France obtains a license delivered by the competent sports federation, unless the exception based on the occasional character of the activity applies. The scope of application of the French regulation is broad since the condition of exercise of the activity in France is interpreted very extensively. When the foreign agent has to intervene on the French territory in the interests of his client, he has several alternatives to avoid incurring the various sanctions related to the illegal exercise of the profession of sports agent. Initially, the option was opened between waiving the mandate, which was not very likely to occur, and having recourse to a local licensed agent. Such a procedure constitutes a sub-mandate rather than a substitution of agent.³⁴ The sports sub-agent is thus in charge of a particular mission restricted in the time, but he is the only one who can negotiate. The agent of the player cannot participate in the negotiations because, even in the presence of a sub-agent, he is still not authorised to exercise on the territory of the country, which did not deliver a license to him. The risks are clear: the mandate being traditionally based on trust, it is likely that the player will wish to have his own agent taking care of the defence of his interests at the exclusion of anyone else.

Similarly, to mitigate the material impossibility for the agent to obtain a license in all the countries where he negotiates contracts, the national federations of destination of the player suggest that the agent confer a sub-mandate to local agents who are in possession of the license delivered by the federation of the country of destination. In that sense, the rules of the Italian federation of basketball forbid any agent, even those who are licensed in another European country, to conclude a contract with an Italian club for a player in the absence of a license delivered by this federation, even though the said player is a foreigner. Moreover the Italian federation, following the example of most of the national federations, does not recognise licenses delivered by foreign federations.

To justify the recourse to a local agent, one generally puts forward the fact that the obtaining of the license in a country is subordinated to the knowledge of a certain number of regulations relative to the exercise of the sports activity, such as the relevant rules of the domestic law system (labour law, tax law, contracts law) or the rules of the national federation. These rules indeed change from one country to another and it is obviously useful to know them to exercise the activity in the best interest of the sportsman. Such an assertion is probably true, but there are other means for a foreign agent to reach such an objective. He could for example be attended by a specialised lawyer who would not hold the negotiations in his place, but who would limit himself in informing the agent about the legal aspects which he should know to carry out his negotiations fairly. National federations however most often require that the foreign agent have recourse to the services of an agent authorised by the federation of the country in which the player is transferred. This was for long time the only mean to mitigate the absence of recognition of the foreign license and to avoid that the international agent's obligation to pass exams in all the countries where he exercised his activity and where a license was required. Such a legal construction is necessary not only to avoid the criminal and civil law sanctions implemented by domestic law, but also to avoid the disciplinary measures at a federal level. Several federal regulations have sanctions for clubs and players who negotiate or are represented by unauthorised agents.³⁵

Within the European Union, the requirement of having recourse to

32 Cass. Com. 19 January 1976, Bull. civ. IV, no. 20; JCP N 1977, 18630, with annotation J.J. Hanine; Rev. Crit. DIP 1977, 503 with annotation H. Batiroll.

33 New line of the case law started by, Cass. Com. 9 October 1990, Bull. civ. IV, no. 232; JCP E 1991, no. 211, with annotation J.J. Hanine; Rev. Crit. DIP 1991,

545 with annotation P. Lagarde; Cass. Com. 19 November 1996, Bull. civ. IV, no. 273; Cass. Com. 12 November 1997, D. aff. 1997, 1463.

34 On the difference between these two situations, B. Mallet-Bricout, *La substitution du mandataire*, Diss. Editions Panthéon-Assas, 2000, nos. 581ff.

a local agent does not seem to be in conformity with the provisions of the Rome Treaty concerning the freedom to provide services.³⁶ In the close field of artistic agency, France was recently convicted because of the implementation a similar rule. Indeed, the former article L.762-9 of the Labour Code provided that: "Unless agreement of reciprocity between France and their countries, foreign artistic agents cannot negotiate the employment of artists in France without having recourse to a French artistic agent." The *Van Wesemael* case had already declared that such a system was contrary to European Community Law.³⁷ Following a formal demand sent by the commission to the French State, the latter had to modify its law and the new article L. 762-9 revised provides that: "Artistic agents who are the nationals of a Member State of the European Community or a State party to the agreement on the European Economic Space can exercise their activity in France, provided they obtain a license in accordance with the conditions set forth in Article L.762-3 or they can justify of a license delivered in one of these States in comparable conditions. Unless an agreement of reciprocity applies between the states involved, artistic agents who are the nationals of other States cannot negotiate the employment of artists in France without having recourse to a French artistic agent." A similar modification of French law occurred with respect sports agency with the law of 2000 which substituted the requirement to have recourse to an intermediary licensed in France by a system of recognition of licenses delivered in the other Member States of the European Union.

However the requirement for foreign agents to appeal to the services of local agents is still a common practice of federal authorities, which have not implemented a system of recognition of licenses. Disciplinary measures for clubs and players having had relations with non-licensed agents *de facto* restrict the freedom to provide services. Yet, the EU regulations on freedom to provide services also apply to federal rules since Article 49 of the Treaty of Rome does not only impose obligations to Member States but more generally prohibit any limitation to the freedom to provide services.³⁸ Following the *Bosman* case, EU case law has been constantly controlling the conformity of the rules emanating from sports federations with the requirements of the Rome treaty relative to the freedom of movement of workers and to the freedom to provide services. The federal and non national nature of the rule has never entailed the application of a particular set of rules.³⁹

The principles attached to the freedom to provide services favour the development of a coordination of the legal systems based on the recognition of the license of sports agent obtained in a foreign country. Such system was adopted by French law in its 2000 reform. The decree of April 29, 2002 assigns the power to recognise foreign licenses to the competent sports federations. This means that everything will actually depend on the policy adopted by sports federation. Such a recognition is however limited to licenses delivered in Member States of the European Union or the European Economic Space. This introduces two limitations to the coordination of legal systems. On one hand, agents who are the nationals of States that are not members of the European Union or the European Economic Space cannot claim for the recognition of their license. On the other hand and most importantly, all Member States do not subject the exercise of the activity of sports agency to the condition of obtaining a license. In that case, the possibility of practicing in France and more generally in any Member State regulating the profession always requires the obtaining of a license and the passing of a professional exam organized in the country of exercise.

Consequently, it is necessary to determine whether the system of control of foreign licenses - and therefore the requirement that the profession be regulated abroad - is in conformity with EU law. Today, such a control is allowed and recognition of a license may be denied when the foreign license and the local control of the profession are not adequate. However, the systems of conditional recognition of the agent's activity exercised abroad will probably evolve on this point if the proposal for directive concerning the services in the internal market is adopted.⁴⁰ One of the main functions of this proposal consists in establishing a real freedom of movement of services. This freedom of movement will be guaranteed by the exclusive competence of the

law of the country of origin of the service provider.⁴¹ Article 16 of the proposal provides that: "1. Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field. Paragraph 1 shall cover national provisions relating to access to and the exercise of a service activity, in particular those requirements governing the behaviour of the provider, the quality or content of the service, advertising, contracts and the provider's liability. 2. The Member State of origin shall be responsible for supervising the provider and the services provided by him, including services provided by him in another Member State. [...]" ("Since the activity of sports agent is fully part of the "coordinated field", the consequence of adopting the directive as such would be that a sports agent would be bound only by the law of the country in which he has his professional establishment. The procedure of recognition of foreign licenses currently in force in France could not be imposed any more and there would be an *ipso facto* recognition. Moreover, in situations involving countries which do not regulate the profession of sports agents,⁴² the countries which restrict the access to the profession should allow agents established in the more liberal country to exercise their activities without requiring any professional justification.

The coming into force of the directive would therefore abolish several limitations to the access to the profession of sports agent and to its exercise within the EC. However, outside of the EC, the problem would not be solved. On this subject, only the FIFA federal regulations were able to make some improvements. This international federation set up an international system of licenses' delivery and recognises licenses delivered at the state level. Thus, a license delivered by the French football federation by virtue of the delegation of competence of French law, will be at the same time recognized as a FIFA license. By recognising State licenses, football international authorities provide those licenses with an international relevance that they do not normally have. Yet, the opposite is not true. A State will not necessarily recognise a global license delivered by the FIFA to an agent established in a foreign country. The harmonization system established at the level of sport's international law still applies in a unilateral way today.

While FIFA adapts itself to the idiosyncrasies of national legislations, States continue to deny any value to regulations of private origin. Moreover, these regulations are controlled by both States and EEC authorities. Besides the controls of the freedom of establishment and of the freedom to provide services mentioned above, the control of the validity of federal regulations is also implemented with regard to the requirements of competition law. Recently, the European Commission screened the FIFA regulations that requires from the persons who want to exercise the activity of sports agent the obtaining of a licence delivered by this federation.⁴³ It finally considered that the regulation, in its current version, entails no distortion of competition.⁴⁴ An appeal was filed against this decision of the Commission, which recently gave rise to a ruling of the Tribunal of First Instance of the European Community.⁴⁵ This appeal has been dismissed on the

35 Cf. Article 19 of the FIFA regulation on players' agents.

36 Article 49 of the Rome Treaty.

37 ECJ, 18 January 1979, C-110/78, *Ministère public and Chambre syndicale des agents artistiques et impresarii de Belgique ABSL v. Willy van Wesemael*, Rec. 1979, p. 35.

38 Article 49 of the Rome Treaty.

39 See, recently, CFI, 30 September 2004, *David Meca-Medina and Igor Majcen v. Commission*, T-313/02.

40 Proposal for a directive of the European Parliament and of the Council on Services in the Internal Market, 13 January 2004, COM (2004) 2 final: the famous "Bolkestein directive".

41 On the issue of the principle of origin, M. Fallon, *Variations sur le principe d'origine, entre droit communautaire et*

droit international privé, Hommage à François Rigaux, Bruylant, Bruxelles, 1993, pp. 187ff.

42 The definition is provided by Article 4 of the proposal: "regulated profession" means a professional activity or a group of professional activities, access to which or pursuit of which, or one of the modes of pursuing which, is conditional, directly or indirectly, upon possession of specific professional qualifications, pursuant to laws, regulations or administrative provisions."

43 IP/99/782, 21 October 1999.

44 IP/02/585, 18 April 2002. See also S. Weatherill, "Fair Play Please!": Recent Developments in the Application of EC Law to Sport, Common Market Law Review, 2003, pp. 51ff, at p. 60.

ground that the regulation is not contrary to the rules on concerted practices, because it can benefit from an exemption pursuant to Article 81 paragraph 3 of the Treaty. The Tribunal has also considered that FIFA does not abuse of its dominant position on the market of the supply of sports agents services.

The proposal for directive on services goes even further since the provisions of Article 16 would concern not only the conditions of access to the profession, but also the modalities of its exercise, which is not the case today as they are generally governed by the *lex contractus*. Obviously, this law can correspond to the law of the country of origin of the service since absent of choice of law by the parties, the applicable law is, pursuant to the Rome Convention, the law of the country of residence of the debtor of the characteristic performance. But such is not inevitably the case because of the freedom of choice of the applicable law by the parties, because of the existence of conflict-of-law rules with substantial purposes, such as the protection of employees and, finally, because of the possibility to enact mandatory laws, the scope of application of which is determined according to the place of exercise of the activity. The proposal for directive goes definitely further by endorsing the opinion of some scholars who consider that the prohibition of restrictions to free movement implies the submission of contractual obligations to the law of the country of origin of the good or the service at stake.⁴⁵ In presence of an intra-EC relation, the conflict-of-law rule contained in the proposal for directive would prevail over that of the Rome Convention, by virtue of Article 20 of this last instrument, which confers priority to EC law and which is one of the causes of ineffectiveness of this convention today.⁴⁷

Although current systems of law did not yet reach that stage, it is possible to assert that many distortions in the conditions of exercise of the activity of sports agent have recently disappeared. Today, the law of the contract mainly governs the modalities of exercise of the activity of sports agent. This is particularly true with regard to the regulation of the relations between the agent and his principal, i.e. with regard to the issue that is at the centre of the present research. The conflict-of-law rule is determined by The Hague Convention of 1978 on the Law Applicable to Agency in the countries where it was ratified and by the Rome Convention of June 19, 1980 on the law applicable to the contractual obligations. In both cases, the solution is similar: the parties are free to choose the law applicable to the contract and, absent a choice, it is the law of the place of establishment of the service provider that is applicable.

However, the *lex contractus* is not the only one to determine the modalities of exercise of agent's activity. Mandatory laws can interfere and substitute themselves to it. This often happens in this field because some legislators introduced very strict obligations from which the agent cannot contractually deviate. The purpose is to prevent the parties to by-pass the application of these rules by choosing a more liberal foreign law for the sports agent.

Until recently, legal systems substantially differed in the contents of their mandatory rules. There are two main mandatory rules. The first rule consists in the limitation of the maximal amount of commission that the agent may negotiate as it has been mentioned above. The second provision and the most frequent one consists in the determining who is the debtor of the commission, i.e., which of the parties to the contract concluded with the intervention of the agent should pay him for the service provided. As a general rule, the agent can receive his commission only from the person who gave him a mandate. Thus, the agent of the player can receive payment only from the player himself and not from the club which concluded a contract with the player. This is the solution retained by French law, as well as by the FIFA regulations. Such solution aims at forbidding a practice that was quite common for a long time according to which the club of destination had to pay the agent of the player. The economy of social security tax of such a practice is obvious. The practical advantage for the agent is also obvious since the club is a debtor who is more reliable, more serious and often inclined to pay the amount of the commission at once. Drawbacks also exist since an agent who has the guarantee of its commission by the club can tend to neglect the interests of the player. But

the main risk lies in that the agent and the club of destination could come to an understanding by stipulating very high commissions without reporting it to the player whose salary would be indirectly affected.

Other legal systems follow another direction by assimilating the activity of the player's agent to the activity of intermediation on the employment market and to the supply of job-seeking services. Thus, Dutch law on labour procurement services of May 18, 1998 and its decree of application of June 24, 1998⁴⁸ which concern job-seeking agencies are applicable to professional sport, that is to one of the main activities of the sports agent.⁴⁹ As for all job-seeking agencies, the principle is that they cannot claim for payment from the employee - here the player - who is yet their client: only the employer can pay sports agents. Dutch law was modified in 2003 to finally exclude the activity of sports agents from its scope of application. Before the reform of 2003, the situation of a sports agent established in Netherlands who was in charge of negotiating the transfer of a sportsman in France appeared to be impossible. Indeed, if he accepted payment from the sportsman, he committed a criminal offence in the Netherlands. On the other hand, if he was paid by the club of destination of the player, he committed a criminal offence in France in violation of Article 15-2 of the French law of 1984 and he was required to return the commission to the club. Naturally from the point of view of private international law, the solution could not have been different. French and Dutch laws, being mandatory laws with a scope of application based on the place of execution of the supply of a service, which extends over the territory of several countries, both laws claim to apply to the same situation. According to the Court having jurisdiction to settle the dispute, one of the two laws would have been applied as the mandatory law of the forum. The solution would have been the same even by retaining the qualification of public law rule: the cumulative application of two incompatible laws.

A similar conflict could occur between state and federal regulations. This is not the case any more today since an important convergence is being introduced. In this field, the FIFA regulations can be mentioned as model of international norms that take into consideration national idiosyncrasies in a federative purpose. Article 14.g of the FIFA agents regulations foresees the eventuality of a conflict and asserts the priority of the state provision: "Licensed players' agents are required: [...] G) to comply with the relevant public law provisions governing job placement in the country concerned." Other FIFA provisions also go in this direction. According to paragraphs 2 and 3 of the introductory note of the FIFA regulation, the national federations - among which the French Football Federation - should implement regulations concerning players' agents. The national regulation should be approved by the FIFA Players' Statutes Committee, which will verify its conformity with the FIFA Statutes and Regulations. FIFA regulations furthermore provide that the regulation of national associations should comply with national legislation.

In accordance with this requirement, the French Football Federation's regulation of players' agents of December 6, 2002, introduced provisions in all respects conform to Article 15-2 of the 1984 Law on sports and to its decrees of application. The text of Article 15-

45 CFI, 26 January 2005, *Laurent Piau v. Commission and FIFA*, T-193/02.

46 This solution has been put forward by, L.G. Radicati di Brozolo, *L'influence sur les conflits de lois des principes de droit communautaire en matière de libre circulation*, Rev. crit. DIP 1993, 401; J. Basedow, *Das Kollisionsrechtliche Gehalt der Produktfreibeiheiten im europäischen Binnenmarkt: favor offerentis*, *RabelsZ* 1995, p. 1. For criticism, V. Heuzé, *De la compétence de la loi du pays d'origine en matière contractuelle ou l'anti-droit européen*, *Mélanges en l'honneur de Paul Lagarde*, Dalloz 2005, p. 394.

47 Article 20: "This Convention shall not affect the application of provisions

which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts."

48 *Wet Allocatie Arbeidskrachten door Intermediairs* (WAADI).

49 Article 1.4 WAADI. On this issue, F. Hendrickx, *Player's Agents in Professional Football and Employment-Finding Laws in Belgium and the Netherlands*, *International Sports Law Journal* 2002/3, p. 23.

2 is reproduced in the introductory part of this regulation and the requirement of an upper limit of 10% to the amount of the contract concluded is set forth in Article 18 of this regulation. This article states: "The player's agent should be exclusively paid by his principal for the services provided and not by a third party. According to Article 15.2 § 3 of the modified law of July 16, 1984, the mandate determines the amount of this remuneration, which cannot exceed 10% of the amount of the contract concluded. Any agreement against the provision of the present paragraph is null and void."

Such a coordination of the sports and state legal orders certainly puts an end to the awkward attempts of combinations of both types of standards that the French courts tried to set up. Court of appeals ruled that the validity of sports agents' mandates cannot be subordinated to the requirements of a sports regulation, whether national or international, unless the parties integrated the requirements of such sports regulation in their contract with the consequence that the validity of the mandate is exclusively dependent on the compliance with national public policy rules.⁵⁰ The reasoning of the judges of the merit was based on the consideration that both regulations play on a different level, therefore, denying the main practical difficulty. Indeed, the purpose for the parties is to exercise the activity in accor-

dance with all the standards applicable to them, whether they emanate from the state or from sports authorities. Asserting that both rules are not in conflict from a technical point of view, because they may not be applied exclusively from each other, and that they apply on different levels, does not solve the practical problems.

The question of the reception of the sports regulations in the state legal order traditionally raises difficulties and was widely discussed in legal doctrine.⁵¹ These difficulties are enhanced when the operators of the sports movement and, in particular, international federations implement a regulation in contradiction with the national provisions in force. The FIFA Regulations - as the ones of the other sports authorities - contains provisions different from those imposed as mandatory law by the national legislator. Nevertheless, sports federations envisage the possibility of a conflict and bring a solution to it by giving precedence to imperative national rules. Obviously, the phenomenon has just begun, but the traditional tendency of international sports authorities, which consisted in rejecting any state intervention seems in the process of being abandoned.⁵² Therefore, one may nowadays notice a new trend, which consists in an important reception of the national rules in the sports legal order and not the opposite.⁵³

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⁵⁰ CA Metz, 20 March 2002, RJES 2003, no. 66, p. 50; CA Aix-en-Provence, 17 April 2002, *Association Proform conseil v. E. Souloy*, unreported quoted in Lamy Droit du Sport, Etude 272, *Agents de sportifs et de groupement sportifs*. These cases concerned sports agents acting in conformity with the French 1992 Act but without having a FIFA license.

⁵¹ On this issue, see G. Simon, *Ordre juridique sportif et puissance étatique*,

Diss. LGDJ, 1990; G. Simon, *Existe-t-il un ordre juridique du sport?*, *Droits: Revue française de théorie juridique*, 2001, p. 97; T. Sárközy, *Regulation in sport as a borderline case between state and law regulation and self-regulation*, *Acta Juridica Academia Scientiarum Hungaricae*, 2001, no. 3/4, p. 159. For examples of conflicts between national and sports originated provisions, see A. Borrás, *Existe-t-il un droit international*

du sport?, *Hommage à François Rigaux*, Bruylant, Bruxelles, 1993, p. 187ff.; M. Raquel Rei, *Contrato de transferência internacional de jogadores profissionais de futebol*, in M. Raquel Rei, F. Xarepe Silveiro, S. Castela Graça, *Estudos de direito desportivo*, Coimbra, Livraria Almedina, 2002, pp. 11ff. at pp. 54ff.

⁵² For examples of independence statements towards national law see my article, *The Trials and Tribulations of the Court of*

Arbitration for Sport. Contribution to the Study of the Arbitration of Disputes concerning Disciplinary Sanctions, *International Sports Law Journal* 2005 1-2 pp. 8ff.

⁵³ Scholars traditionally stress the opposite phenomenon. See J.-P. Karaquillo, *Droit du sport*, 2nd ed. 1997, Dalloz, pp. 63ff.

Sailing Away from Judicial Interference: Arbitrating the America's Cup

by Thomas Schultz*

The America's Cup is one of the most prestigious and oldest sports events in the world. The stakes involved are huge, be it only in financial terms. Moreover, it is organized in an almost entirely autonomous fashion, in the sense that the respective defender of the Cup (the sailing club that last won the Cup), along with its first challenger are almost completely free to organize the competition as they see fit, the only real constraint being a 150-years old two-pages document. The combination of this liberty and the stakes just mentioned lead, over the years, to a series of interesting adjustment as regards the way dispute arising in the context of the Cup are resolved. From long and bitter litigation in connection with Dennis Conner's famous catamaran, the sailing community has learned the importance of providing for extra-judicial methods and bodies. These methods and bodies have, over the last editions of the America's Cup, gradually evolved, thereby revealing likely strong points and pitfalls in the setting up of ad hoc dispute resolution.

This article first introduces the various documents and rules that govern the Cup. It then goes back over the court proceedings that sparked the intention to equip this sporting event with private dispute resolution mechanisms. Thereafter, it presents the three different dispute resolution bodies that accompanied the five last editions of the Cup. Finally, this article reviews the jurisprudence (13 arbitral awards so far) of the current edition of the Cup.

Introduction

The fact of calling to mind the America's Cup unavoidably conjures up scenes of awe-inspiring boats and regattas, images of a grandiose event and a noble sport, and the notion of a particularly high-stakes competition from which radiates an ideal of sportsmanship. But below these flamboyant aspects of the event, the Cup has a more shadowy history of disputes and dispute resolution. Dispute resolution, in reality, is entrenched in the very history of the America's Cup. The very race that led to the creation of this 154-years-old competition gave rise to a protest because a vague rule had been taken advan-

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edition of the Cup in 2003 but never published. Thanks also to him for reviewing an earlier draft of the present article, which was posted at JusLetter www.Jusletter.ch, a Swiss legal newsletter.

¹ See for instance J. Faire, M. Foster, D. Manasse, H. Peter (ed.), and D. Tompkins, *Arbitration in the America's Cup: the XXXI America's Cup arbitration panel and its decisions*, The Hague 2003, p. 2.

tage of.¹ Since that time, the competition has been punctuated with protests, court actions and arbitral proceedings.

It is the effort to reconcile these two sides of the America's Cup that is interesting to the lawyer. It is interesting because the need emerged to provide the Cup with a dispute resolution process able to handle the inevitable disputes in an honorable fashion. A system was needed that prevents the competition from becoming a battle on the complex rules of sailing rather than a contest at sea, while ensuring that the inevitable disputes do not cripple the spirit of the race because of unsatisfactory resolutions. In this regard, the America's Cup shows an interesting history of experiments and gradual innovations and improvements, as a core feature of the Cup is that its respective organizers, which have a large liberty to do as they think fit, have in recent decades come to change at a frequency quite unlike other sports. These successive changes and the factors of these changes reveal many valuable insights into the field of dispute resolution in sports, but also into *ad hoc* dispute resolution mechanisms in general.

This article seeks to go back quickly over this evolution and to present in further detail its outcome so far: the America's Cup Jury, which has a broad and radically exclusive jurisdiction over the current 32nd edition of the Cup.

This article moves in three parts. Part I presents the history of the Cup that led to the constitution of specific dispute resolution bodies for this competition (I. Historical and legal background). Part II focuses on these dispute resolution bodies and provides an analysis of the global setup and procedures of the three different *ad hoc* bodies that the Cup has known in its history, with special emphasis on the current system, the America's Cup Jury (II. Dispute resolution bodies). Part III reviews the 13 decisions that the Jury has rendered so far (III. The Jury jurisprudence related to the 32nd America's Cup).

I. Historical and legal background

Although the most famous heritage of the Great Exhibitions certainly is the Eiffel tower, the America's Cup may increasingly deserve a good second place. During the 1851 Exhibition, the schooner "America", built and owned by a syndicate of members of the New York Yacht Club (NYYC), entered a race around the Isle of Wight against 16 British yachts. On August 22nd, before the eyes of a disappointed British Queen at Cowes,² in England, the lone American vessel won the race hands down and earned a £100 ornate silver cup prize, sometimes called the "Auld Mug". The syndicate, back in New York, entrusted their yacht club with the trophy, which was to be "preserved as a perpetual Challenge Cup for friendly competition between foreign countries", becoming in turn the "property of the [winning] Club". The competition, not exactly "friendly" at all times, became rapidly known as the "America's Cup".³

Thus was born a sporting event associated with many superlatives: many today consider it the third most important sporting event in the world (after the Olympic Games and the football world championships);⁴ it is said to be the world's oldest sports trophy (it is even 45 years older than the modern Olympic Games); it is probably, with Formula One racing, the sports competition that requires the most significant financial investments⁵ (which may exceed USD 100 million per team).

From 1851 to the 1960's, the Cup was in essence a series of desperate attempts of the British to recover the Cup. Sir Thomas Lipton, for instance, challenged the NYYC five times in 31 years with his yachts Shamrock I - Shamrock V, but never returned home a winner. (His persistence in the face of failure made him being referred to as "the best of all losers", but it also made his tea brand famous throughout the world.) The Australians then joined in and, in 1970, the concept of multiple challengers was introduced. A decade later, in 1983, the Royal Perth Yacht Club, with their famous winged keel yacht, wrested the Cup from the NYYC, where it had stayed for 132 years, in an event watched by 500 million TV viewers. The Cup went back to the US in 1987 (San Diego Yacht Club), where it was successfully defended in 1988 and 1992. It was lost in 1995 to the Royal New Zealand Yacht Squadron, and it was successfully defended down-under once, in 2000. In 2003, it was then lost to the Société Nautique de Genève

and Alinghi, the team from the only country ever to participate in the Cup with no access to the sea (but which had employed Russel Coutts, the illustrious New Zealand helmsman who had led his country to victory in the previous editions). Even this victory was marked by the intervention of a dispute resolution body, as Alinghi, because of Switzerland's absence of access to the sea, had to obtain a decision from the Arbitration Panel for the America's Cup, 31st edition, to be allowed to participate.⁶ Alinghi's victory brought the Cup back to Europe for the first time since its creation.

All the Yacht Clubs that have held the Cup, as we will see, have contributed to the progressive amendment of the documents and rules that govern the Cup and the setup of the dispute resolution bodies for the event.

1. The Deed of Gift and its sources of interpretation

When the America syndicate entrusted the NYYC with the silver Cup, it did so under the terms of a trust deed called the "Deed of Gift",⁷ which established the fundamental rules of the America's Cup. As it gave rise to a series of interpretation disputes in the years following its first draft in 1857, it was amended several times until 24 October 1887, at which time the last surviving member of the America syndicate-wishing to leave a mark on the grand competition he had contributed to found-put pen to paper and bequeathed its final version to the sailing community.⁸ A document of only two pages, it still governs the basic characteristics of the Cup today.

The spirit of the fundamental rules laid out in 1887 is basically twofold. First, the challengers of the Cup are to be slightly disadvantaged-this led to rules providing for instance that the defender of the Cup chooses the place of the competition and that all vessels must be built in their home country and be sailed "on their own bottom" from their place of origin to the race venue. Second, additional rules setting out the details of how the race is organized-in recent times they came to be called the Protocol-are to be drafted for each Cup challenge by mutual consent between the holder of the Cup and the first challenging syndicate, called the Challenger of Record.

Some important amendments and interpretations to the Deed have been made judicially-by the Supreme Court of New York-since the middle of the past century.⁹

Significant amendments are for instance that, in 1956, the NYYC obtained an order from the Supreme Court of New York that reduced the minimum load water-line length set out in the Deed of Gift to its present 44 feet (thus opening the race to the at the time internationally prevailing 12-meter class) and to eliminate the requirement to sail the vessels to the race venue on "their own bottom". This amendment revived interest in the race to the point that elimination series (the "Challenger Selection Series") had to be introduced, the winner of the series being entitled to sail a match against the holder and defender of the Cup.

In 1985, the Royal Perth Yacht Club of Western Australia, who had won the Cup in 1983, obtained an order from the same New York court that amended the Deed of Gift so as to allow the competition to take place in the southern hemisphere.

2 The Queen asked: "Who is first?" "America has won", she was told. "Who is second?" asked the Queen. The famous reply still echoes: "Your Majesty, there is no second."

3 Further on the history of the Cup, see V. Hines, *About the America's Cup*, Grand Junction, CO, 1986.

4 A. Rigozzi, *L'arbitrage international en matière de sport*, Basle 2005, p. 52.

5 *Ibid.*, p. 222.

6 ACAP 00/6, 5 December 2000, reported and commented in H. Peter, "The America's Cup Arbitration Panel", in: ASA Bulletin, 2003, vol. 21, p. 249, 268, and reproduced in Faire, Foster, Manasse, Peter, Tompkins, n. 1 above, p. 82 et seq.

7 See e.g. www.americacup.com/

multimedia/docs/2004/08/1092062211_deed_of_gift.pdf.

8 J.A.R. Nafziger, "International Sports law: A Replay of Characteristics and Trends", in: *American Journal of International Law*, 1992, p. 489, 512.

9 On the legal mechanics behind these amendments and interpretations (i.e. the *cy pres* doctrine), see Nafziger, n. 8 above, p. 512, note 120; A.M. Johnson and R.D. Taylor, "Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation", in: *Iowa Law Review*, 1989, vol. 74, p. 545; and R. Atkinson, "Reforming Cy Pres Reform", in: *Hastings Law Journal*, 1993, vol. 44, p. 1112.

The most important interpretation of the Deed by the New York Supreme Court was to declare, in the 1989 case known as *Mercury Bay*,¹⁰ multihulls eligible to the competition—the Cup having famously been won, on the water, by Dennis Conner’s *Stars & Stripes* catamaran in 1988.¹¹

The Deed has also been clarified by *in abstracto* interpretations by Trustees of the America’s Cup (“Trustee Interpretative Resolutions”)—the holder of the Cup is its sole Trustee and is succeeded by the competitor who successfully challenges him in a race for the Cup, the current Trustee being the Société Nautique de Genève (SNG). Trustee Interpretative Resolutions have for instance covered topics such as the definition of “constructed” and nationality requirements for both boats and crew members.¹² As regards the 31st America’s Cup, the validity of Trustee Interpretative Resolutions had been expressly retained by a provision of the Protocol¹³ and an advisory opinion of the America’s Cup Arbitration Panel.¹⁴ In the 32nd America’s Cup, these Interpretative Resolutions have been put together, amended and updated, and codified into another source document, namely the Protocol, which is presented below. In general, one may say that the 32nd Cup has cancelled several provisions contained in Interpretative Resolutions that had made, since 1980, the Cup more formalistic. The rules setting nationality requirements for both team members and yachts, for instance, have been simplified and loosened up. The 32nd Cup ends the tradition of referring to Interpretative Resolutions, at least in the form of separate documents; they now have “no further effect for any purpose whatsoever.”¹⁵

2. Protocol

The Deed of Gift includes a “mutual consent clause”, which states that “the Club challenging for the Cup and the Club holding the same may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match [and the races] shall be sailed subject to [these] rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift.”

It became custom that prospective competitors mutually agree on such terms not prescribed by the Deed but consistent with it and record them in a protocol. Such protocol is negotiated for each challenge of the Cup between the Cup holder and the Challenger of Record.

Immediately after the victory of Alinghi in the 31st America’s Cup, Alinghi’s yacht club, the Société Nautique de Genève, received and accepted a notice of challenge from the Golden Gate Yacht Club represented by the syndicate Oracle BMW Racing. The two teams agreed on a series of terms governing the 32nd Cup and recorded those in the 32nd Protocol.¹⁶

The provisions of America’s Cup protocols usually cover: the con-

ditions of acceptance of challenges; financial arrangements and general aspects of management; the eligibility of yachts and team members; the venue and timing of the race; the organization of the challenger selection series and the final match race; the race conditions; and the applicable rules that govern the race and dispute resolution procedures.

The Protocol for the 32nd edition shows several amendments in comparison with the 31st. The main goal of the amendments is to level the playing field, as the Defender used to be too much favored by the race conditions. Some of the more important changes provided by the present Protocol are the following:

- * ‘Neutral Regatta Management’:¹⁷ The 32nd Protocol provides that it is no longer the Defender who appoints the regatta officials that are responsible for on-the-water activities. The race committee is now appointed by the Regatta Director, who is himself appointed jointly by the Challenger Commission, which represents all Challengers, and the Defender.
- * Technology transfer: Technical information produced prior to the last race of the 31st edition could be purchased until October 2004, either included or not with the purchase of a boat built prior to the end of the 31st edition.¹⁸ This provision is meant to help new syndicates compete more easily and to avoid having teams, which bought old boats without technical information, lose their keel for instance (as happened to Oracle BMW Racing in the 31st edition). In addition, designers and any other individuals having worked for another syndicate in another edition of the Cup are free to work for any team in the 32nd edition. Working in “another edition” covers in principle only the period ending with the last race of the edition in question, but the Protocol slightly extends this period. It expressly makes a provision that allows designers of the 32nd edition to have worked for another syndicate in the 31st edition up to 90 days after the last race of the 31st edition.¹⁹ Designers, however, are required to have no involvement with any other competitor’s program for the 32nd edition.²⁰
- * Nationality and residency requirements regarding team members: The new Protocol reintroduced the rules and practice followed before 1980, i.e. completely dropping all requirements.²¹ One purpose of this rule is to avoid useless costs, as some syndicates during the 31st edition have bought apartments in their home locations to allegedly accommodate their personnel, who in fact never occupied them.²²
- * Event Authority: It is SNG’s responsibility, according to the Protocol,²³ to organize the 32nd Cup. In order to fulfill these obligations with “professional management expertise” and (hence) to minimize the risk of financial losses,²⁴ it has been decided to create, for the first time in the history of the America’s Cup, an independ-

10 See *Mercury Bay Boating Club v. San Diego Yacht Club and New York Yacht Club*, 150 A.D.2d 82; 545 N.Y.S.2d 693; 1989 N.Y. App. Div. LEXIS 11706. This case is discussed below, under 1.3 *The Mercury Bay Saga and the Need to Avoid Court Litigation*, o et seq.

11 Multihulls have meanwhile been expressly prohibited, see n. 43 below.

12 See e.g. the amended Resolutions *ad Art. 11* Protocol for the 31st America’s Cup.

13 Art. 11 Protocol for the 31st America’s Cup: “11.1 In an effort to maintain the stipulation in the Deed of Gift that the America’s Cup is for “Friendly competition between foreign countries” the Interpretive Resolutions of the Deed of Gift issued by prior Trustees of the America’s Cup and by RNZYS as the present Trustee are retained subject to the alterations contained in this Article 11.”

14 ACAP 00/7, 28 February 2001, §§ 19-21, reproduced in *Faire, Foster, Manasse, Peter, Tompkins*, n. 1 above, p. 93 et seq.

15 See Art. 9 Protocol for the 32nd America’s Cup.

16 See e.g. www.americascup.com/multimedia/docs/2004/11/1099409701_040723_protocol.pdf.

17 See Section 5 of the Protocol for the 32nd America’s Cup.

18 Art. 13.8(a) Protocol for the 32nd America’s Cup states that “At any time a Competitor may acquire an Old ACC Yacht, or any of its components, that was constructed prior to the last race of the 31st America’s Cup match (2 March 2003), and may also acquire its plans, specifications, and/or design and performance information that were in existence prior to the last race of the 31st America’s Cup match (2 March 2003).” Art. 13.9 states that “A Competitor may acquire, until 1 October 2004, any design or performance information regarding any ACC Yacht from a lawful owner of such design or performance information provided that design or performance

information existed prior to the end of the last race of the 31st America’s Cup match (2 March 2003) whether or not the ACC Yacht to which it relates has been acquired.”

19 Art. 13.5 Protocol for the 32nd America’s Cup *in fine*: “Working for the same Competitor as in the 31st America’s Cup for a period of up to 90 days after the last race of the 31st America’s Cup match (2 March 2003) shall not constitute working for a Competitor.”

20 Art. 13.5 Protocol for the 32nd America’s Cup states that “each Competitor shall engage separate and independent Designers, who have had no involvement with any other Competitor’s program for this Regatta”. Art. 13.7 of the 32 Protocol states that “Nothing in this Protocol shall prevent any person [...] from using the benefit of their experience, knowledge and skills gained in the design and construction of ACC yachts built prior to the last race of the 31st Match in 2003.

21 See Art. 7(g) Protocol for the 32nd America’s Cup: “In accordance with past practice in America’s Cup competition prior to 1980, there shall be no requirement regarding the nationality or residency of any crew member, nor of a Designer, of a Competitor’s ACC Yacht.” It may be noted that the Protocol for the 31st America’s Cup had already made this provision less strict by providing that the place where a vessel is “built” no longer referred to the sails, but only to the place where the hull has been fabricated and assembled: see Art. 11.8 Protocol for the 31st America’s Cup, which modified the 1980 Trustee Interpretative Resolutions and its 1982 Amendments.

22 Press Conference of Team Alinghi, Geneva, 2 March 2003.

23 Art. 4(1) Protocol for the 32nd America’s Cup provides that “SNG shall have sole responsibility to organize and manage the Event”.

ent professional organization entrusted with the management and funding of the Cup. AC Management Limited (ACM), a private company incorporated in Geneva, plays the role of this Event Authority. ACM's tasks, which covers all stages of the Cup, are for instance to announce the terms and conditions on which all further challenges will be accepted (i.e. the Terms of Challenge);²⁵ to manage the funding of the event;²⁶ to specify the times and format of the races;²⁷ to approve the terms of engagement of regatta officials;²⁸ to manage public relations (e.g. accreditation of media representatives,²⁹ protection of each competitor's performance data from other competitors,³⁰ media releases,³¹ advertising of the Cup³²); and to participate in the establishment of the Jury's procedural rules.³³

- * Place of construction of the yachts: The "nationality" requirement of the yachts has been reduced to the fact that any "form of construction of the entire hull" must be undertaken in the relevant country.³⁴ Previous rules on this requirement were much stricter, and provided for instance that all methods of surfacing of the hull, the deck and all appendages of the hull were to be fabricated and assembled in the country of the "nationality" of the yacht.³⁵
- * Changes in the shapes of vessels and rigging: The new version of the America's Cup Class Rules (ACC Rules),³⁶ which provide the measurement constraints and tolerances for the yachts, allows larger sails, deeper keels, and lighter boats.³⁷ These changes amount to permitting faster boats.
- * Additional races: A much higher number of races will be run before the final Match between the Defender and the best Challenger. Traditionally, the Defender used to sail only one regatta, i.e. the final Match, while the Challengers sailed the Challenger Selection Series, whose winner was subsequently allowed to enter the Match against the Defender. The 32nd edition has added a number of Pre-regattas to the Match and the Challenger Selection Series.³⁸ These Pre-regattas, in which the Defender will participate, seek to increase the level of competition through training, to allow further presence of the Defender on the water, and to intensify media presence. Commonly called the Louis Vuitton Championship Acts (as opposed to the Louis Vuitton Cup, which is the Challenger Selection Series only sailed by the Challengers), the 14 pre-regattas take place at regular intervals between September 2004 and April 2007, in Valencia, Marseille, Malmö, and Trapani and take the form of alternatively a fleet race and a match race. The points gathered during these prior racing events will determine the seeded competitors in the Challenger Selection Series. Hence, the current regatta format is as follows:³⁹
 - First, the Pre-regattas or Louis Vuitton Championship Acts (with the Defender; both fleet and match racing).⁴⁰

- Second, the Challenger Selection Series or Louis Vuitton Cup (without the Defender; match racing), composed of (1) a round robin series where the seeds depend on the results achieved during the Pre-regattas and (2) a knock-out race amongst at least the four best teams of the round robin.⁴¹
- Third, the America's Cup Match Race, i.e. the final between the Challenger who has won the Challenger Selection Series and the Defender, Team Alinghi. The winner will be the first competitor to have won five races (best-of-nine regatta).⁴²

3. The Mercury Bay Saga and the Need to Avoid Court Litigation

About every sailor has heard about the saga of the Big Boat against the catamaran *Stars and Stripes*. The story is about the last-minute announcement by a New Zealand yacht club that they would be sailing a particular long boat compared to those used in the preceding editions of the Cup. It was rather unfair because the Defender was prevented, by the short notice, to build a similar boat—one should know that one thumb rule in sailing is that a longer boat is faster than a smaller one. This announcement was met by the famous aggressive response of Dennis Conner and the San Diego Yacht Club that they would be sailing a catamaran—another thumb rule is that multihull boats are remarkably faster than monohulls. Dennis Conner and the catamaran, sailors will remember, won the Cup without trouble.⁴³

In the legal community, this event is rather known as the Mercury Bay saga, referring to the name of the New Zealand club: the Mercury Bay Boating Club. It is known in the legal community because it was accompanied by a legal battle in court that was just as fierce as the regatta itself, and much more uncertain. As the Protocol of the time did not provide for an extra-judicial dispute resolution body or procedure, both the Mercury Bay Boating Club (MMBC) and the San Diego Yacht Club (SDYC) commenced legal actions in court, turning the actual events on the water to a masquerade.⁴⁴

First, before the race, the MMBC filed an action with the New York Supreme Court seeking declaratory judgment that its challenge was valid and a preliminary injunction ordering San Diego to accept the challenge. In its response, the SDYC sought an interpretation of the Deed of Gift that would restrict the admissible yachts to the traditional 12-meter series, thus excluding the MMBC yacht, which was 27.43 meters in length. The court rejected SDYC's action, found MMBC's challenge valid, granted its motion for a preliminary injunction and ordered SDYC to comply with the Deed of Gift and to sail against the Big Boat;⁴⁵ the race was on.

At that time, forced to participate, the SDYC announced that it would be sailing a catamaran. The MMBC, realizing that they no longer stood a chance of winning the Cup at sea, decided to file a second action with the same court. This time, they sought an interpreta-

24 Art. 4.2(a) Protocol for the 32nd America's Cup provides that "To meet its obligations set out in Art. 4.1 [...] SNG will enter into a contract with AC Management Limited to provide professional commercial management expertise and financial resources to minimize the risk of losses. Such entity shall be the Event Authority."

25 Art. 3.4. Protocol for the 32nd America's Cup.

26 Art. 4.1(c) and 4.2(b) Protocol for the 32nd America's Cup.

27 Art. 5.1 Protocol for the 32nd America's Cup.

28 Art. 5.5 Protocol for the 32nd America's Cup.

29 Art. 11.4 Protocol for the 32nd America's Cup.

30 Art. 17.3 Protocol for the 32nd America's Cup.

31 Art. 17.5(a) Protocol for the 32nd America's Cup.

32 Art. 17.5(b) Protocol for the 32nd America's Cup. It may be noted that the

admissibility of advertising on the boats and crew lies within the jurisdiction of the Jury (see Art. 10.13 Protocol).

33 Art. 21.7 Protocol for the 32nd America's Cup.

34 See Art. 7(f)(i) Protocol for the 32nd America's Cup: "the requirement that the yacht of a challenging yacht club be constructed in the country of the challenging yacht club, and the yacht of the yacht club holding the America's Cup be constructed in the country of such yacht club, shall be deemed to be satisfied by the lamination or another form of construction of the entire Hull in such country; materials, moulds and other components and hardware used in or during the lamination or other form of construction of the Hull may be obtained from any source."

35 See Art. 11.8(b) Protocol for the 31st America's Cup: "A yacht shall be deemed to be 'built' in a country if the hull of the yacht, including all training and all planking, plating or other form of surfac-

ing of the hull, the deck and all appendages (including keel fins, bulbs, canards, rudders, skegs, trim tabs, wings etc) have been fabricated and assembled in that country."

36 See e.g. www.americascup.com/multimedia/docs/2004/08/1092062211_accv5.pdf.

37 Art. 13.1 Protocol for the 32nd America's Cup refers, for all races held after 31 December 2004, to version 5.0 of the America's Cup Class Rules (ACC Rules), of 15 December 2003.

38 See Art. 3.3 Protocol for the 32nd America's Cup.

39 For a graphical presentation of this format, see www.americascup.com/multimedia/docs/2005/06/1118076113_32nd_ac_regatta_format.pdf.

40 Art. 3.3(b)(i) and (ii) Protocol for the 32nd America's Cup.

41 Art. 3.3(c)(i) and (ii) Protocol for the 32nd America's Cup.

42 Art. 7(d) Protocol for the 32nd America's Cup.

43 Multihull vessels are now expressly pro-

hibited: see ACC Rules, preamble "vision" § 2(a): "The America's Cup Class is intended: [...] to produce wholesome, fast and manoeuvrable day sailing monohulls of similar performance". The International America's Cup Class (IACC) of yachts, still the relevant class today, was introduced in the subsequent edition of the Cup, in 1992, replacing 12-meter class that had been used since 1958. Moreover, announcements for "special" boats must now be made with a two-years notice: see Rigozzi, n. 4 above, p. 53, note 327.

44 For a description of this saga, see Nafziger, n. 8 above, pp. 511-518; Peter, n. 6 above, pp. 251-253; Note, "The Litigation of the America's Cup Runneth Over with Inconsistencies: A New Approach to Interpreting Charitable Trusts", in: *Loyola Law and Entertainment Law Journal*, 1992, vol. 12, p. 221.

45 *Mercury Bay Boating Club v. San Diego Yacht Club*, no. 21, 229/87 (N.Y. Sup. Ct. Nov. 25, 1987).

tion of the Deed of Gift that would prohibit the use of multihull vessels, as sailing a catamaran against a monohull vessel, the MMBC cried, would no longer be a “match”, as the Deed of Gift provided for. MMBC further argued that the SDYC was in contempt of court, having refused to submit to the terms of the Deed of Gift, as the court had directed. The court denied the actuality of a contempt of court, refused to give an advisory opinion on the admissibility of multihull yachts, and deferred the action until after the end of the Cup.⁴⁶

After the end of the Cup, the MMBC, having as expected lost the final match race, revived its deferred action. It contended that the use of a catamaran was unsportmanlike, in contradiction with the concept of a “friendly competition between foreign countries” as provided in the Deed of Gift, and going against the “spirit and intent” of the Deed of Gift. The court unexpectedly found the action valid and awarded the Cup to the MMBC.⁴⁷

The SDYC then lodged an appeal in the Appellate Division of the New York Supreme Court. The court reversed the judgment of the New York Supreme Court, finding that there was no indication in the Deed of Gift that multihull yachts should be prohibited and that the Deed of Gift did not require evenly matched, “like or similar” vessels. The court thus reattributed the Cup to San Diego.⁴⁸

Finally, MMBC filed an appeal with the Court of Appeals of the State of New York. The Court of Appeals, finding that nothing in the Deed of Gift prohibited multihull yachts, upheld the decision of the Appellate Division of the Supreme Court. The Cup stayed in San Diego.⁴⁹

The Court of Appeals described this as “the most distasteful innovation of all-resolution of the competition in court.” “If the traditions and ideals of the sport are dependent on judicial coercion”, the court continued, then the “battle is already lost.”⁵⁰ In the sailing community, this fierce battle in the courts rather than at sea was also met with bitterness: “Is the game worth the playing when players must be prepared to split hairs like barristers?”, some commentators ask, before expressing the general feeling that “to voluntarily seek it as sport is, we think, asking a bit too much.”⁵¹ For some, the Mercury Bay litigation was particularly contemptible, since it rocked the image of the America’s Cup as “the ideal example of sportsmanship.”⁵² It is consequently “no doubt because of it”,⁵³ as one commentator writes, that alternative dispute resolution methods and bodies were provided for in every subsequent Protocol.

II. Dispute resolution bodies

Three main dispute resolution bodies (excluding bodies such as measurement committees whose jurisdiction covers only technical sailing issues) have successively been provided for during the five last editions of the Cup. The setup and procedure that characterize these dispute resolution bodies have gradually evolved and their respective caseloads have been globally rising. These three bodies were the Trustees Committee for the editions of the Cup held in 1992 and 1995 in San Diego; the America’s Cup Arbitration Panel for the editions of the Cup held in 2000 and 2003 in New Zealand; and the America’s Cup Jury for the current edition, which will end in 2007 in Valencia. These three bodies are reviewed in turn in this section.

1. The 28th and 29th editions’ Trustees Committee

The San Diego Protocol, which governed the two editions of the Cup following the Mercury Bay affair, in 1992 and (the 1992 Cup having been won again by Dennis Conner) in 1995, provided for the first *ad hoc* dispute resolution body of the America’s Cup: the Trustee Committee.

The Trustee Committee was composed of representatives of the only three yacht clubs to have held the Cup in its history thus far, i.e. the three trustees of the Cup: the New York Yacht Club, the Royal Perth Yacht Club, and the San Diego Yacht Club. It had jurisdiction over all disputes between the participants, except those relating to “technical or whistle-blowing rules of conducting a race.”⁵⁴

The Trustee Committee raised concerns with regard to its independence.⁵⁵ Indeed, as pointed out by James Nafziger,⁵⁶ in the situation of a dispute opposing an Australian or American team and a team

of any other country, the latter would inevitably be facing a dispute resolution panel comprising at least one national of its opponent, possibly two, and maybe even a member of its opponent’s own yacht club. The non-Australian and non-US team, however, had no chance of having a national of its country on the panel, and much less of its own yacht club. More generally, as Antonio Rigozzi notes, the three yacht clubs that previously won the Cup had a direct influence on the selection of the members of the panel’s members, while the other teams had no influence whatsoever.⁵⁷

A further, more theoretical, source of criticism of the Trustees Committee was that, according to Henry Peter, its “jurisdiction was not exclusive”,⁵⁸ which suggests that it might have failed to qualify as arbitration.

These issues led to the constitution, for the two next editions of the Cup in 2000 and 2003, of more mature dispute resolution body: the America’s Cup Arbitration Panel.

2. The 30th and 31st editions’ America’s Cup Arbitration Panel

The 1995 America’s Cup was brought home by the Royal New Zealand Yacht Squadron (RNZYS). Challenged soon after by the New York Yacht Club, both syndicates, respectively as Defender and Challenger of Record, drafted the Protocol for the 30th edition of the Cup, held in 2000. Keeping in mind the lurking shadow of the Mercury Bay saga and aware of the criticism that the Trustees Committee had met, they included in the Protocol⁵⁹ a series of provisions that established a more sophisticated dispute resolution body: the America’s Cup Arbitration Panel (ACAP). The goal of this specialist Panel was to give the syndicates the opportunity to resolve doubtful areas of the applicable rules, as well as resolving concrete disputes arising under these rules while avoiding court intervention. The Protocol further expressly provided that recourse to the courts was excluded (or, rather, prohibited).⁶⁰ These provisions relating to the ACAP were taken over with no substantial change in the Protocol for the 31st edition of the Cup, held in 2003, in which the RNZYS acted again as Defender, after the memorable victory in 2000 of Sir Peter Blake’s team with Russel Coutts at the helm. The 2003 Protocol for the 31st edition was co-drafted with the Yacht Club Punta Ala, as Challenger of Record.⁶¹

The composition of the ACAP was as follows: Five members, of which two were selected by the Defender and two by the Challenger of Record, the fifth, who was the chairman of the Panel, being select-

46 *Ibid.*

47 *Ibid.*

48 *Mercury Bay Boating Club v. San Diego Yacht Club*, 150 A.D.2d 82, 545 N.Y.S.2d 693 (1989).

49 *Mercury Bay Boating Club v. San Diego Yacht Club*, 76 N.Y.2d 256, 557 N.E.2d 87 (1990), reproduced in Faire, Foster, Manasse, Peter, Tompkins, n. 1 above, p. 19 et seq.

50 *Ibid.*

51 W.M. Lawson and T. Thompson, *The Lawson History of the America’s Cup*, 2nd edn, Boston 1986, p. 279.

52 S.C. Berges, “America’s Cup, The Ideal Example of Sportsmanship”, in: *Sports Lawyers Journal*, 2001, vol. 8, p. 249.

53 D. Tompkins, “Sports Arbitration in New Zealand and Australia: The America’s Cup Arbitration Panel”, in: *Arbitration International*, 2000, p. 461, 463; H. Peter and M. Züblin, “L’arbitrato nella Coppa America”, in: *Rivista dell’arbitrato*, 2003, p. 435, 440.

54 Nafziger, n. 8 above, p. 518; See also Peter, n. 6 above, p. 254; Rigozzi, n. 4 above, p. 329.

55 See Peter and Züblin, n. 53 above, p. 441; Peter, n. 6 above, p. 254.

56 Nafziger, n. 8 above, p. 518

57 Rigozzi, n. 4 above, p. 329.

58 Peter, n. 6 above, p. 254.

59 Available at www.a3.org/ac2000_protocol.html.

60 Art. 12.3 Protocol for the 30th America’s Cup: “Any Challenger who resorts to any court or tribunal not provided by the Racing Rules is in breach of this Protocol and [...] shall not be eligible to be Challenger for the Match.” Art. 12.4 Protocol for the 30th America’s Cup: “Each Challenger [...] covenants that [it] will not, at any time, in relation to any matter governed by this Protocol or in respect of America’s Cup XXX issue proceedings or suit in any court or other tribunal.” The same provision applies to the Defender, see Art. 12.5. See also Art. 12.1: “America’s Cup Arbitration Panel are binding and not subject to appeal and may not be referred to any court or other tribunal for review in any manner.” The same rules were provided at Art. 10 Protocol for the 31st America’s Cup. This system is presented in Faire, Foster, Manasse, Peter, Tompkins, n. 1 above, p. 12-13.

61 The Protocol governing the 31st America’s Cup is reproduced in Faire, Foster, Manasse, Peter, Tompkins, n. 1 above, p. 47 et seq. and available for instance at www.nautica.it/americascup/rules.htm.

ed by the four other arbitrators. The requirements for eligibility to be a member of the panel were: being “a resident or citizen of any country participating in the America’s Cup”; possessing “extensive knowledge of America’s Cup history, the Deed of Gift, and the Interpretive Resolutions”; possessing “good general knowledge of yacht racing and yacht clubs”; and being “known to be fair minded and possess[ing] good judgment”.⁶²

The ACAP’s jurisdiction covered all disputes between the Defender and a Challenger or between Challengers⁶³ “other than those concerning the racing rules or any applicable class or rating rule”,⁶⁴ which were within the jurisdiction of the International Jury (disputes relating to the race itself)⁶⁵ or the Measurement Committee (disputes relating to the technical characteristics of the yachts).⁶⁶ Moreover, in order to clarify obscure areas of the applicable rules or to resolve concrete disputes, the ACAP had the power to interpret the Protocol in the 30th edition.⁶⁷ In the 31st edition, it had the power to interpret the Deed of Gift, the Interpretive Resolutions, the decisions of the Arbitration Panel, and the Protocol.⁶⁸ Moreover, the ACAP was authorized to determine “matters of nationality”.⁶⁹ Under the Protocol for the 30th edition, the ACAP was also expressly empowered to determine “the appropriate penalty” for breaches of the provisions governing nationality matters⁷⁰ and breaches of reconnaissance limitations.⁷¹ Under the Protocol for the 31st edition, the ACAP was empowered to sanction breaches of all applicable rules and documents.⁷² The Protocols also allowed the ACAP to rule on any other dispute, if the parties agreed to submit it to the tribunal.⁷³ In addition to adjudicating concrete disputes relevant to these categories, the ACAP also had the capacity to render advisory opinions at the request of any party wishing to ensure that its planned actions were admissible with regard to the Protocol.⁷⁴ The opinion of the ACAP in such cases was binding upon the parties, insofar as the task that was undertaken did indeed correspond to the hypothesis submitted to the Panel.

The rules of procedure adopted for the 31st edition of the Cup⁷⁵ provided that all submissions (application, response, reply) would be communicated to each participating syndicate, independently of its effective implication in the procedure. The transmission of the submissions was made by electronic means of communication.⁷⁶ If a hearing was necessary, for instance to hear a witness, which occurred only once in the history of the ACAP, it could be held by videoconferencing.⁷⁷ The deliberations of the Panel could be done in telephone conferences or by means of videoconferencing. All decisions were

taken by a majority vote and all five members had to be present (i.e. in general participating from afar in the conference or the written deliberations) for the Panel to reach a valid decision.⁷⁸

Not unlike the Trustees Committee, the ACAP met some criticism with regard to its independence. Indeed, as was mentioned above, the Defender and the Challenger of Record both selected two members of the Panel (the fifth being selected by the other arbitrators), an opportunity that was not granted to any other syndicate. These other syndicates had to either accept to submit to this tribunal or forego participation in the Cup. In the situation of a dispute opposing the Defender or the Challenger of Record and any other Challenger, the latter would inevitably have faced an arbitral tribunal comprising two arbitrators selected by its opponent and one arbitrator which had at least been approved by the two arbitrators just mentioned. The Challenger other than the Challenger of Record, however, would have had no saying at all in the formation of the arbitral tribunal. As Antonio Rigozzi suggests, this situation could cast doubt on the independence of the tribunal, and even on the “legal validity, from the point of view of the public legal order, of this system”.⁷⁹ Had a legal action been submitted to a state court, and had it not been withdrawn under the threat of being excluded from the Cup,⁸⁰ as had indeed happened,⁸¹ it is not guaranteed that the court would not have disqualified the ACAP as arbitration on the ground of “institutionalized” lack of independence.⁸² At the least, this system of formation of the arbitral tribunal, combined with the presence of a clause prohibiting recourse to courts, sets an unlevel playing field and it constitutes a practice that is frowned upon in other fields of sports law, in the sense that one is left with the general impression that a better solution must exist.⁸³ Nevertheless, the system seems to have been working to the global satisfaction of the competitors and the absence of actions to vacate an award by the ACAP suggests that the decisions were well accepted.

3. The 32nd edition’ America’s Cup Jury

The 2003 edition of the Cup having been won in New Zealand by Team Alinghi and SNG, the Cup came to Switzerland and a new Defender became in charge of organizing the 32nd edition. Hence, a new principal drafter set pen to paper and revised several aspects of the main dispute resolution body that was the ACAP.

a. Jurisdiction

The main substantial change with regard to arbitration in the context of the 32nd edition of the Cup relates to the jurisdiction of the new

62 Art. 25 Protocol for the 30th America’s Cup and Art. 22.2 Protocol for the 31st America’s Cup.

63 A dispute between the Defender and a Challenger other than the Challenger of Record required a certification in writing of the Challenger or Record that a majority of the Challengers desire the issue to be resolved by the Arbitration Panel”: Art. 25(iii) Protocol for the 30th America’s Cup and Art. 22.3(c) Protocol for the 31st America’s Cup.

64 See Art. 25(ii), (iii) and (iv) Protocol for the 30th America’s Cup and Art. 22.3(b), (c) and (d) Protocol for the 31st America’s Cup.

65 Art. 23 Protocol for the 30th America’s Cup: “The Jury shall have jurisdiction to determine all disputes concerning Racing Rules.” As regards the 31st America’s Cup, for which the term “International” was dropped, and the Jury was only called “Jury”, see Art. 14.1(d)(i): “The conduct of the Challenger Selection Series, the Defender Selection Series, if there is one, and the Match shall be governed by: [...] the racing rules as agreed and adopted by COR/D and administered by a Jury appointed by COR/D”; Art. 18.5(a) and (c) of the Louis Vuitton Cup Conditions

and of the Match state that the Jury’s functions include “(a) to decide such other matters in these Conditions not within the jurisdiction of the Measurement Committee or the Arbitration Panel and (c) such ‘other matters as COR or CORM may put before the Jury’”; finally, the Clarification No. 1 to the 2 March 2000 Protocol Governing the 31st America’s Cup provides that “The Jury is responsible for interpreting and resolving the disputes on the LVC and Match Conditions, Sailing Instructions and Racing Rules of Sailing [...]”.

66 Art. 24 Protocol for the 30th America’s Cup and Art. 21.1 Protocol for the 31st America’s Cup provide that “All matters relating to the measurement of the IACC yachts, the interpretation of Class Rules and the determination as to whether a yacht meets IACC class rules are to be determined by the Measurement Committee.”

67 Art. 25 Protocol: “The America’s Cup Arbitration Panel shall be empowered as follows: (i) to resolve all matters of interpretation of this Protocol.”

68 Clarification No. 1 of the Protocol and Art. 22.3(a) and 14 of the Protocol.

69 Art. 25(vii) Protocol for the 30th America’s Cup and 22.3(f) Protocol for the 31st America’s Cup.

70 Art. 25(viii) Protocol for the 30th America’s Cup.

71 Art. 25(viii) and 15 Protocol for the 30th America’s Cup.

72 Art. 22.8, 22.3(g), and 13 Protocol for the 31st America’s Cup.

73 The ACAP was indeed empowered to “to resolve any other matters which it is given jurisdiction to determine”: Art. 25(x) Protocol for the 30th America’s Cup and 22.3(i) Protocol for the 31st America’s Cup.

74 Rigozzi, n. 4 above, p. 152.

75 The procedural rules (ACAP Rules) were prepared by the ACAP and submitted for approval to the Defender and the Challenger of Record (Art. 22.6 *in fine* Protocol for the 31st America’s Cup). For an overview of the ACAP Rules, see Tompkins, n. 53 above, pp. 464-465.

76 Art. 7 ACAP Rules, reproduced in Faire, Foster, Manasse, Peter, Tompkins, n. 1 above, p. 75 et seq.

77 Art. 10.3 ACAP Rules.

78 Art. 22.6 Protocol for the 31st America’s Cup.

79 Rigozzi, n. 4 above, p. 330.

80 This threat was based on the grounds of a violation of the provision of the Protocol prohibiting recourse to the courts, i.e. Art. 10.2 Protocol for the 31st America’s Cup.

81 The Challenger of Record had commenced a legal action in the High Court of New Zealand against another Challenger. The latter Challenger filed an action with the ACAP, seeking a decision that the Challenger of Record had breached Art. 10.1 Protocol for the 31st America’s Cup, which prohibits resorting to the courts. The Challenger of Record, doubtlessly afraid of being excluded from the Cup by the ACAP, withdrew its application in court.

82 On this topic, see Rigozzi, n. 4 above, p. 329 et seq.

83 *Ibid.*, pp. 102 et seq., 120-123, 312 et seq., 422-424; see also J.-C. Michel, “Réflexions quant à la résolution des conflits en matière sportive: aspects de droit civil”, in: *Revue suisse de jurisprudence*, 1994, vol. 90, p. 261 and S. Gardiner, A. Felix, J. O’Leary, M. James, and R. Welch, *Sports Law*, 2nd ed., London 2001, p. 246.

America's Cup Jury (ACJ). The ACJ's jurisdiction covers the competences of both the former ACAP and the International Jury of the 30th and 31st editions. According to the Protocol, the ACJ "shall act both as a jury under the applicable rules of sailing and also as an arbitration panel".⁸⁴ The goal of this modification was to simplify and consolidate the dispute resolution mechanisms directly related to the Cup. The only main areas directly related to the Cup that remain outside of the competence of the ACJ are the issues on the technical admissibility of yachts, over which the Measurement Committee has exclusive jurisdiction.⁸⁵ Consequently, in the present edition of the Cup, the ACJ is competent to interpret,⁸⁶ to resolve disputes related to,⁸⁷ and to sanction breaches⁸⁸ of any of the applicable documents and rules that govern the event—except if it is a question of technical admissibility of a yacht. These applicable documents and rules are: the Deed of Gift;⁸⁹ the Protocol;⁹⁰ the America's Cup Class Rules⁹¹ (if they are not applied to determine the admissibility of a yacht); the Terms of Challenge;⁹² the applicable Notice of Race⁹³ (a separate Notice of race is published for each pre-regatta, the Challenger Selection series, and the final Match); the applicable Sailing Instructions⁹⁴ (which are specific to each regatta); and the Racing Rules of Sailing⁹⁵ of the International Sailing Federation.⁹⁶

On the other hand, the jurisdiction of the ACJ compared to the ACAP has also been the subject of a restriction: Commercial arrangements and other management matters are now excluded from the competence of the ACJ; they are to be resolved exclusively by *ad hoc* arbitration with seat in Geneva.⁹⁷

The jurisdiction of the ACJ is meant to be totally exclusive of the jurisdiction of the courts, in the sense that, first, resorting to the courts is prohibited, as it was in the previous editions, for all but specifically identified types of disputes, under penalty of ineligibility to compete in further races of the 32nd Cup.⁹⁸ Combined with the imperfect independence of the arbitral tribunal, as suggested in the following paragraphs, and the obligation of the parties to accept the jurisdiction of the ACJ if they wish to participate in the competition, this scheme of prohibiting and sanctioning recourse to courts does not fail to entertain the impression that one may have done better. Still, again as for the ACAP, this system seems so far to be working to the general satisfaction of the competitors and the awards rendered by the Jury appear to be well accepted.

Second, the Protocol further states that an award of the Jury "may not be challenged by way of an action for setting aside for any reason".⁹⁹ This provision amounts to a total exclusion of judicial review, i.e. a waiver of all grounds for vacatur. It is doubtful that this provision is valid under US arbitration law—which is the applicable law because of the legal seat of the ACJ and pursuant to its procedural rules.¹⁰⁰ This means not that the exclusion of the courts of first instance is not valid; such exclusion certainly is valid. It means that the waiver of all grounds for setting aside an award is probably not valid, that the parties may still, despite the arbitration clause, file an action in court to vacate an award, on the usually admissible grounds for such an action. Indeed, the possibility to waive all grounds for vacatur is not statutorily provided for in the US Federal Arbitration Act (FAA) (as opposed to Switzerland for instance¹⁰¹) and even commentators generally very much in favor of the parties' autonomy to contract out of the FAA are cautious on this matter.¹⁰² Hence, it is likely that the drafters of the Protocol sought primarily the psychological effect that such a clause is likely to have on the competitors, and maybe to stress the fact that the ACJ is meant to be arbitration and not some purely contractual dispute resolution method.

b. Composition

With regard to the composition of the ACJ, the solution where the Defender and the Challenger of Record choose each two members of the panel, the four of whom then together select the chairman of the panel, has been replaced by a scheme in which the Defender and the Challenger Commission are deemed to make their best efforts to select the five members of the Jury by a collective agreement. Had it failed, it would have been the chairman of the International Jury (and not of the ACAP) of the Cup's previous edition who would have selected the five members of the ACJ.¹⁰³ The Challenger Commission is in this regard a welcome innovation, as it has somewhat reduced the independence concerns that the ACAP and the Trustees Committees had triggered. The situation, however, is not perfect yet.

The Challenger Commission is composed of one representative of each Challenger, which have equal power and an equal vote on all matters that the Commission is competent for.¹⁰⁴ It reduces the independence concerns because all Challengers have, in principle, a saying in the selection of the members of the Jury—even if the Defender's

84 Art. 21.4 Protocol for the 32nd America's Cup. Art. 21(4)(f) further provides that the ACJ is empowered to "act as a Jury under the racing rules applicable for the Event".

85 Art. 20.1 Protocol for the 32nd America's Cup: "the measurement of the ACC Yachts, the interpretation of the ACC Rules, [and] the determination as to whether a yacht meets the ACC Rules or the racing rules [...] insofar as they relate to a yacht's equipment."

86 See Art. 21.4(a) and 12 Protocol for the 32nd America's Cup.

87 Art. 21.4(d) Protocol for the 32nd America's Cup provides that the ACJ has jurisdiction, notably, "to resolve any dispute, deadlock or impasse between any Competitor, SNG, Event Authority, Race Committee, Challenger Commission or any Official (other than the Jury) that cannot be resolved by the terms of the Protocol, provided that unless the parties otherwise agree, the Jury shall not have jurisdiction to resolve disputes between: (i) SNG and the Event Authority; (ii) SNG and the entity it has selected to defend the America's Cup on its behalf; (iii) the Event Authority and any party which is not referred to in paragraph (d); or (iv) the Event Authority and any Official concerning their contractual or employment relationship."

88 Art. 21.4(c) Protocol for the 32nd America's Cup states that the ACJ is empowered to "impose any penalty on a Competitor the Jury believes to be just and equitable". The same provision further lists examples of such penalties, which may thus for instance be: "(i) censure; (ii) fine; (iii) partial or full forfeiture of a Challenger's [financial advance payment for participation in the Cup] (or a fine in the case of the Defender; (iv) loss of existing or future points or races; (v) award of points or races to another Competitor; (vi) disqualification from any race, series or the Event; (vii) the reduction in the number of sails permitted by Art. 15 to be used by a competitor; and/or (viii) the suspension or expulsion of any individual at fault as being a member of a crew of a competing yacht, or as part of a competing team."

89 See n. 7 above.

90 See n. 16 above.

91 See n. 36 above.

92 Available at www.americascup.com/multimedia/docs/2004/08/1092299550_term_s_of_challenge.pdf.

93 See for instance, regarding the Louis Vuitton Act 6 in Malmö (a new notice of race is issued for each regatta or Act): www.challengercommission.com/dox/act6noramended.pdf.

94 Available at www.challengercommission.com/dox/act6si.pdf.

95 Available at www.sailing.org.

96 See Art. 12 Protocol for the 32nd America's Cup.

97 See Art. 22.3(g) Protocol for the 32nd America's Cup.

98 Art. 22.1 Protocol for the 32nd America's Cup.

99 *Ibid.*

100 The legal seat is in New York and the law applicable to the procedure is the FAA pursuant to Art. 3.1 and 3.2 Procedural Rules; see also *o* below.

101 See Art. 192 Swiss PIL Act.

102 A.S. Rau, "Contracting Out of the Arbitration Act", in: *American Review of International Arbitration*, 1997, vol. 8, p. 225, 231: "I see the provisions of Section 10, not as an imperative command of public policy, but as no more than a set of 'default rules' intended to reflect the traditional historical understanding concerning the binding effect of arbitral awards. [...] And so whatever we can characterize as a 'default rule' may naturally be varied by an express agreement of the parties, who may stray in the direction of expanding the statutory grounds of review—or even, perhaps, in the direction of restricting them still further." In the footnote to this assertion, the authors go on by emphasizing "I

must say that I can at least understand the inevitable doubts and hesitations about such agreements—doubts, that is, as to whether parties should be permitted to restrict review by eliminating grounds for vacatur found in the FAA." See also I. Macneil, R.E. Speidel, and T.J. Stipanowich, *Federal Arbitration Law: Agreements, Awards, and Remedies Under the Federal Arbitration Act*, Waltham, MA, 1994, § 28:36. Moreover, it may be noted that some US courts have even suggested that, because of *public policy* reasons, they have non-statutory powers to invalidate an award on non-statutory grounds. That seems to go in the sense of confirming that, under US law, the grounds for challenging an award may indeed constitute minimal guarantees provided by the public legal system that lie outside of the autonomy of the parties. See J.J. Coe, *International Commercial Arbitration: American Principles and Examples in a Global Context*, New York 1997, p. 303 et seq. For an overview, see also W.W. Park, *International Forum Selection*, Boston 1995, p. 89 et seq.

103 Art. 21.1(a) Protocol for the 32nd America's Cup.

104 Art. 6.3(b) Protocol for the 32nd America's Cup.

influence is likely to remain much more important than the influence of each Challenger taking separately, the latter being diluted in a commission while the former speaks with one voice. However, the Commission is always composed of the current Challengers (possibly only the Challenger of Record, if no other Challenger is registered at that time),¹⁰⁵ which means that not all Challengers that will eventually participate in the Cup have had an influence at the time when the members of the ACJ were selected. It seems that what has actually happened in practice is that the members of the Jury were selected at a time where no other Challenger than the Challenger of Record were registered, i.e. the members of the Jury have been selected exclusively by the Defender and the Challenger of Record.¹⁰⁶ If the procedure for selecting the members of the ACJ has thus been improved in theory, it seems that the actual implementation of this provision led to a very similar situation than the one provided for by the Protocols of the two previous editions. Nevertheless, one specificity of the current Protocol slightly lessens this issue, as the Defender and the Challenger Commission may agree to remove and replace any member of the ACJ.¹⁰⁷ Admittedly, it would certainly take much more than a lone Challenger, not satisfied with a member of the Jury, to be able to have this person removed. On the other hand, it should be reminded that all challengers but the Challenger of Record have no other choice than to accept the conditions of the event as they have been defined by the Defender and the Challenger of Record. In this regard, the composition of the Jury only follows the general practice that governs the event, and should therefore be regarded as acceptable, even though it is not perfect in itself.

As regards the eligibility of the members of the ACJ, the Protocol sets the following conditions: they must “possess knowledge of the America’s Cup history and the Deed of Gift”, as well as “good general knowledge of yacht racing and yacht clubs”; they must also be “known to be fair minded and possess good judgment”.¹⁰⁸ *In casu*, the Defender and the Challenger Commission have selected four persons from the sailing community, and one of the highest ranked arbitrators in the world, surely in order to combine expertise in the fields of sailing and arbitration.¹⁰⁹

Other innovations of the ACJ include express provisions on the role of “precedents” from the two previous editions of the America’s Cup and on the time limit to file a case with the ACJ. The Protocol provides that the Jury is not bound by decisions of either the ACAP or the International Jury rendered during the 30th or 31st edition. The Jury may, however, take them into account if it wishes to do so.¹¹⁰ Conversely, the Protocol is silent on the role of preceding decisions made by the ACJ during the same edition of the Cup.¹¹¹ As to the time limit to lodge a protest on the grounds of non-compliance with one

of the applicable documents or rules, the Protocol states that it is, in the absence of a “good and substantial reason”, of seven days from “when the protestor was or could reasonably have been aware of the circumstances justifying the protest”.¹¹²

c. Procedural aspects

The Rules of Procedure¹¹³ for the ACJ provide several noteworthy specifications, relating to the quorum of the Jury; the dissemination of communications to all competitors; the legal seat and applicable law; the means of communication admissible for submissions; its power to render advisory opinions; its power to order interim measures; and the publication of its decisions. These procedural aspects are presented in turn in the following.

While the Protocols for the previous editions of the Cup required the presence of the five members of the Arbitration Panel for any decision of the Panel to be valid,¹¹⁴ the *quorum* for meetings of the ACJ, which is principle composed of five persons, has been reduced to three, provided there is an “urgent need to resolve the dispute” and that the absence of resolution of the matter would amount to a disruption of the event.¹¹⁵

The Procedural Rules provide for a “Service Address List”, which consists of a list of the email and postal addresses of all the competitors, the Race Committee, the Measurement Committee, ACM, SNG, and all Officials.¹¹⁶ This list is used to forward to each competitor the applications made to the Jury,¹¹⁷ as well as all replies and responses, including the evidence attached to such submissions.¹¹⁸ The goal of this list is to guarantee the right of all the competitors and the official entities of the Cup, if they are directly concerned by the application, to file a response.¹¹⁹ The evidence may not be communicated to all parties if the Jury decides that it includes information that deserve confidentiality or that would lead to an embarrassing situation.¹²⁰ The identity of the party making the submission may also be kept confidential, but only under “exceptional circumstances” and if the party has a “substantial risk of serious damage if their identity is disclosed”.¹²¹ Moreover, the parties are forbidden to publish the applications, responses and replies, including the respective pieces of evidence, before the Jury has rendered its decision.¹²²

The Procedural Rules state that the legal seat of the ACJ is in New York; that, consequently, the *lex arbitri* is the US Federal Arbitration Act; and that the New York Convention is also applicable.¹²³ This serves to evidence the fact that the intention of the parties was to provide for arbitration (and not another dispute resolution method) and, by virtue of Article II of the Convention, that a court in any country party to the Convention would have to decline jurisdiction and to refer the parties to the ACJ.¹²⁴ Drawing upon the experience of the Ad

105 Art. 1.1(f) Protocol for the 32nd America’s Cup.

106 Rigozzi, n. 4 above, pp. 330-331: “Tout comme ses précurseurs, le Jury pour la 32ème édition de la Coupe de l’America peut en effet susciter des perplexités quant à son indépendance du fait de son mode de désignation. En effet, en application de l’art. 21.1 du Protocole, les membres du Jury ont tous été désignés par le *Defender* (Société Nautique de Genève) et par le *Challenger of Record* (Golden Gate Yacht Club) sans que les autres défis [...] aient eu leur mot à dire.”

107 Art. 21.5 Protocol for the 32nd America’s Cup.

108 Art. 21.2(c), (d), and (d) Protocol for the 32nd America’s Cup. Art. 21.1(a) and (b) further provide that the members of the Jury may (or may not) be a resident or citizen of a country of one of the syndicates and a member of a club participating in the Cup.

109 The members are: Gabrielle Kaufmann-Kohler, Graham McKenzie, Henry

Menin, David Tillett, and Bryan Willis (Chairman). See www.acjury.org/ACJuryMembers.htm.

110 Art. 21.9 Protocol for the 32nd America’s Cup.

111 In the Protocol for the 31st America’s Cup, it was provided that the ACAP had to apply “the decisions of the Arbitration Panel” (Art. 14.1, see also Art. 22.3(a)). The decisions of the ACJ are not mentioned in the sources of the rules governing the 32nd Cup (see Art. 12.1 of the corresponding Protocol). See also Art. 15.1 Rules of Procedure for ACJ: “The Jury shall rule on each matter placed before it in accordance with the Deed of Gift, the Protocol, the Terms of Challenge, the RRS, and such other rules and regulations as are applicable, using general principles of law and the rules of law the application of which it deems appropriate.”

112 Art. 21.10 Protocol for the 32nd America’s Cup.

113 Available at www.acjury.org/Rules of Procedure May 2004.pdf.

114 Art. 22.6 Protocol for the 31st America’s Cup and Art. 25.5 Protocol for the 30th America’s Cup: “A quorum for meetings of the America’s Cup Arbitration Panel shall at all times be five”.

115 Art. 2.2 Procedural Rules and Art. 21.1(c) Protocol for the 32nd America’s Cup: “The quorum for meetings of the Jury shall be all five members. However, if some members are unavailable for any reason, the quorum may be reduced provided that: (i) the remaining members of the Jury believe there is an urgent need to resolve an issue before all five members of the Jury will be available, and resolution reasonably cannot be delayed without disrupting the Event; (ii) the jurisdiction of the remaining Jury is limited to only those urgent matters requiring resolution to avoid disrupting the Event; and (iii) the quorum shall never be less than three. Decisions of a reduced Jury shall be final, and there shall be no appeal or other redress to the full Jury.”

116 Art. 1.7 and 1.13 Procedural Rules.

117 Art. 5.2 Procedural Rules.

118 Art. 8.1. and 10 Procedural Rules.

119 Art. 5.4 Procedural Rules states that “Any party directly affected by an application may file a written response with attachments if appropriate with the Jury secretary. The Race Committee, Measurement Committee, Event Authority (ACM), SNG or any other official to whom the Jury has granted leave to respond may also file a Response in their area of responsibility.”

120 More precisely, Art. 8.1. Procedural Rules states that such communications of the submissions and the related evidence are made to all the addresses included in the list, “unless the Jury decides otherwise in order to protect a person or entity from a breach of confidence, annoyance, embarrassment, oppression, undue burden or expense or for other reasons of fairness and equity.”

121 Art. 7 Procedural Rules.

122 Art. 8.2 Procedural Rules.

123 Art. 3.1 and 3.2 Procedural Rules.

Hoc Division for the Olympic Games of the Court of Arbitration for Sports,¹²⁵ the Procedural Rules further specify that, although the legal seat is in New York, the activities of the ACJ may be physically carried out elsewhere.¹²⁶ This is necessary as the activities of the ACJ will physically take place at the locations where the races are sailed (Valencia, Marseille, Malmö and Trapani), at any other location deemed convenient for a gathering of all the parties for an in-person hearing (the case review of the next section shows that this happened in London), and possibly even at several locations at the same time, as the Rules of Procedure make a provision for videoconferencing.

Indeed, electronic means of communication, just as in the previous editions of the Cup, are admitted. Submissions, including the related evidence, can be communicated by email.¹²⁷ The Procedural Rules further provide that witnesses may be heard, submitted to the permission of the Jury, via videoconferencing.¹²⁸ The use of a video linkup is however not limited to the hearing of witnesses; it may also be used for allegations of facts, submission of legal arguments, and the production of evidence, i.e. a videoconferencing hearing may validly replace an oral hearing. Indeed, the parties have no rights to an oral hearing; they may request one, but the Jury may refuse it.¹²⁹ *A fortiori*, provided both parties are treated equally as the result of the conduct of the proceedings, if the Jury is not obliged to grant an opportunity to be heard orally, it may also allow only a hearing over videoconferencing.¹³⁰

With regard to advisory opinions, i.e. decisions rendered by the Jury in response to an application made by a competitor outside of the context of a dispute, the Procedural Rules state that the ACJ may “answer hypothetical questions only in exceptional circumstances and only when it decides that a decision on the question is essential to the furtherance of the purposes of the [...] Cup and for those participating in the event.”¹³¹ As the review of the cases of the ACJ below shows, such exceptional circumstances are actually quite frequent.

The Procedural Rules further empower the Jury to make orders for provisional or interim relief, on the classical conditions that it is necessary to protect the applicant from irreparable harm, that the applicant is likely to succeed on the merits, and that the interests of the applicant outweigh those of any other party. Requests for interim relief, just as any other legal action, except a restricted list of situations, may not be addressed to any other authority.¹³²

The decisions of the ACJ are in principle published with indication of the name of the parties, unless the Jury finds that such publication should be refused because it would include information that deserve confidentiality or because it may lead to an embarrassing situation.¹³³ So far, all decisions have been published. Dissenting opinions may be published with the decision, if the dissenting member of the Jury so wishes.¹³⁴ So far, no dissenting opinion has been published.

III. The Jury jurisprudence related to the 32nd America's Cup

In the context of the 30th edition of the Cup, the Arbitration Panel handled 20 cases, which mainly concerned issues of technical characteristics of yachts, protection of technical knowledge rules, and sailing related rules.¹³⁵ The matters adjudicated during the 31st edition, which represent 22 cases, showed an extension in the types of disputes,

among which one should mention in particular eligibility disputes and jurisdictional disputes.¹³⁶

In this 32nd America's Cup, 13 disputes have yet been resolved by the Jury. The Cup has so far only been through the first 17 months of the event and nine pre-regattas, out of the 34 months total and the 13 pre-regattas, the Challenger Selection Series and the final match which will be run in 2007. Consequently, it may be expected that the total number of disputes submitted to the Jury will exceed that of the last two editions.

The cases considered so far by the Jury may be classified in the following categories:

- 1 Designers and team members: one case was about the definition of a designer, two concerned the question if a specific person had previously worked as a designer for another team, and the third case involved two members that had been hired away from one team by another.
- 2 Sailing rules and situations: one case involved a collision between two boats that should allegedly have been avoided by one of them, the second a spinnaker sheet that became entangled in the propeller of an umpire boat, and the third the question whether a spinnaker had crossed in first place the finish line or merely its extension.
- 3 Yachts: one case was about a model yacht made for an exhibition and the question was whether it could count as a new yacht or not, the second raised the question if “K-Challenge” is a name that constitutes advertising, the third involved a water ingress that filled up compartments in such a way that it constituted a breach of the sailing rules, and the fourth related to a yacht who had sailed two flights with one too many battens.
- 4 Management of the event: the sole case in this category was related to the meteorological measurement and forecasting system that was imposed on the competitors.

All the cases reported and reviewed below have been published on the official website of the ACJ.¹³⁷

Before turning to the review of the cases, the competitors for the present edition of the Cup may shortly be presented, in order to set the stage and to introduce the actors.¹³⁸ The competitors in this 32nd edition of the Cup are:

- * Société Nautique de Genève represented by Team *Alinghi* (Defender), Switzerland;
- * Golden Gate Yacht Club represented by Team *Oracle BMW Racing* (Challenger of Record), USA;
- * Circolo Vela Gargnano represented by Team *+39*, Italy;
- * Royal Cape Yacht Club represented by Team *Shosholozza*, South Africa;
- * Royal New Zealand Yacht Squadron represented by *Emirates Team New Zealand*, New Zealand;
- * Yacht Club Italiano represented by Team *Luna Rossa*, Italy;
- * Cercle de la Voile de Paris represented by *K-Challenge*, France;
- * Gamla Stans Yacht Sällskap represented by Team *Victory Challenge*, Sweden;
- * Real Federación Española de Vela represented by Team *Desafío Espanol El Reto*, Spain;

¹²⁴ Rigozzi, n. 4 above, p. 331.

¹²⁵ See generally G. Kaufmann-Kohler, *Arbitration at the Olympics. Issues of Fast-Track Dispute Resolution and Sports Law*, The Hague 2001. The Ad Hoc Division has its seat always in Lausanne, irrespective of the place where the Games are organized and the arbitration proceedings actually take place.

¹²⁶ Art. 3.1 Procedural Rules. On the distinction between the legal seat of an arbitration and the place where its actions are actually carried out, see G. Kaufmann-Kohler, “Arbitration Procedure: Identifying and Applying the Law Governing the Arbitration Procedure-The Role of the Law of the

Place of Arbitration”, in: A.J. Van Den Berg, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention: ICCA International Arbitration Conference, Paris, 1998*, The Hague and Cambridge, MA, 1999, p. 336.

¹²⁷ Art. 4 and 10 Procedural Rules.

¹²⁸ Art. 11.3 Procedural Rules.

¹²⁹ Art. 6.2 Procedural Rules states that “Any party to a proceeding may, in its application or int its response, request an oral hearing and such request will be granted if the Jury deems it appropriate.”

¹³⁰ On the legal questions raised by video-

conferencing, see e.g. G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges For Contemporary Justice*, The Hague 2004, p. 197 et seq.; D. Girsberger and D. Schramm, “Cyber Arbitration und prozessuale Fairness”, in: R.H. Weber, M. Berger, and R. auf der Maur, *Geschäftsplattform Internet IV. Open Source - Multimedia - Online Arbitration*, Basle and Geneva 2003, p. 189.

¹³¹ Art. 5.7 Procedural Rules.

¹³² Art. 13 Procedural Rules.

¹³³ “In order to protect a person or entity from a breach of confidence, annoyance, embarrassment, oppression, undue burden or expense or for other reasons of

fairness and equity.” (Art. 15.2 and 8.1 Procedural Rules).

¹³⁴ Art. 15.3 Procedural Rules.

¹³⁵ For an overview of the disputes that the ACAP handled during the 30th Cup, see Tompkins, n. 53 above, pp. 464-465.

¹³⁶ These cases are briefly presented and commented in Peter, n. 6 above, p. 268 et seq. and reproduced in Faire, Foster, Manasse, Peter, Tompkins, n. 1 above, pp. 75-232.

¹³⁷ www.acjury.org/.

¹³⁸ Registration for new challengers is closed since 29 April 2005.

- * Reale Yacht Club Canottieri Savoia represented by Team *Mascalzone Latino*, Italy;
- * Deutscher Challenger Yacht Club represented by *United Internet Team Germany*, Germany;
- * and Qingdao International Yacht Club represented by *China Team*, China.

1. Designers and other team members

The decision in case ACJ001,¹³⁹ of 4 June 2004, dealt with two consolidated applications (a third one having been withdrawn shortly after filing) regarding the definition of a “designer” under Article 13.1 of the Protocol. The applications were made by K-Challenge and Mascalzone Latino, which were not, at the time, Challengers; the applications were filed outside the context of any dispute. The Jury decided it had jurisdiction *ratione materiae* because it was a matter of interpretation of the rules governing the event¹⁴⁰ and, *ratione personae*, because the applicants had “demonstrated direct interest in or likelihood of becoming a Challenger”, thus being a “bona fide registrant” to whom leave to file a case may be granted,¹⁴¹ which was done because the applications raised “issues that need to be resolved in order to facilitate their becoming a Challenger”. The ACJ then stated that hypothetical questions should only be answered with restraint, as in doing so it might amend the Protocol, which it is not empowered to do. In the case at hand, however, the Jury found that the question was not in fact hypothetical, as it was based on a “clear concise genuine interpretative requirement”, and that answering it would be in the interest of the Cup. In order to ascertain that its decision could not be considered to amount to an amendment of the Protocol, the Jury further specified that its determination “must be read in conjunction with the particular questions and must not be construed to have a wider application”. Consequently, the Jury merely quoted the terms of the Protocol, which states that a designer is a person who “applies substantial intellectual creativity and judgment to the determination of the shape or structure of [main elements of a yacht]”, and, briefly summarizing the parties’ position, concluded that “the title or designation or remuneration of a person does not determine whether that person is a designer”.

The decision in case ACJ003,¹⁴² of 20 May 2005 dealt with an application regarding the definition of a “designer” under Articles 13.5 and 13.6 of the Protocol, which provide that designers are restricted to work for one competitor only and that they are prohibited from sharing design information and equipment. The application was made by El Reto and addressed, initially, the issue of restrictions on the work a designer has done for a potential Challenger with regard to the possibility of subsequent employment of this person by an actual Challenger. The issue was divided into two questions, a theoretical question regarding the very existence of such restrictions and a concrete question on the possibility to employ a designer by the name of Phil Kaiko, who had previously worked for Mascalzone Latino, a potential Challenger. Case ACJ003 is the first case to have implied an oral hearing, which was held in person in London on 2 and 3 May 2005. This hearing, according to ACJ003, generated costs in excess of EUR 100’000, due for a large part to the fact that the hearing took place outside of a competition period and all participants were therefore not in the same location; they all had to travel to London. This hearing was held to speed up the proceedings, after the Jury had repeatedly expressed its concern at the amount of time the resolution of this application was taking, as the Jury was apparently faced with a particularly significant load of submissions and witness statements filed notably by El Reto and Mascalzone Latino. Mascalzone Latino, which did not want designer Phil Kaiko to work for another team, submitted that this person had “designed certain tank drawings, a section of the mast and provided input on the mast spreadsheets and participated in computational fluid dynamics tests by the University of Florence”, which made him “apply substantial intellectual creativity” in terms of the Protocol. Consequently, Mascalzone Latino maintained, Phil Kaiko had worked as a designer and if Mascalzone Latino became a Challenger, Phil Kaiko would no longer be allowed to work for any other team competing in the Cup. El Reto replied, first, that

the Jury had no jurisdiction over potential Challengers as the Protocol is not applicable to potential Challengers and, second, that the work carried out by Phil Kaiko was not design work as defined in the Protocol. Shortly thereafter, the application of Mascalzone Latino to become a Challenger was accepted, which solved the issue of jurisdiction and changed the question on the merits to mean, in the terms of the Jury: “is El Reto able to continue its engagement with Phil Kaiko as designer?” and, hence, “is El Reto in breach of Protocol 13.5 by employing Phil Kaiko, having regard to whether Phil Kaiko was a Designer for Mascalzone Latino [...]?” The issue that was to be resolved in order to answer these questions, the Jury correctly noted, was “did Phil Kaiko apply substantial intellectual creativity and judgment to the determination of the shape or structure of Mascalzone Latino’s hull, cockpit, mast tube, geometry of the mast rigging, appendages or sails?” The Jury found that Mr. Kaiko did apply such “substantial intellectual creativity” and thus worked as a designer for Mascalzone Latino; El Reto was consequently not permitted to employ Mr. Kaiko. The Jury based its decision on the facts that Mr. Kaiko had received payments described in an invoice as payments for “design services” and that evidence was adduced that he exercised a continuing work with the University of Florence with regard to improving the shape and structure of a mast tube for Mascalzone Latino. It may be noted that he was found to have “applied substantial creativity and judgment” despite the lack of evidence that a physical or material product came out of his work; the Jury reckoned that “such words describe an abstract mental process” and that it is irrelevant whether an actual product comes out of such a mental process or not.

The decisions of 14 June 2005 in cases ACJ005 and ACJ006,¹⁴³ which were consolidated because they involved the same parties and substantially similar issues, dealt with two applications filed by Team +39. Two athletes, Karol Jablonski, a helmsman, and Miguel Jáuregi, a crew, had left Team +39 to join El Reto. Team +39 argued that this course of conduct of the athletes was in breach of their contract with this team and that El Reto’s decision to employ these individuals was a breach of the fair play and sportsmanship spirit of the Deed of Gift, the Protocol and the Racing Rules. Team +39 sought a number of orders, including an order for interim relief to restrain the athletes in question to work for El Reto. The Jury found that it had no jurisdiction to rule on the contractual arrangements between a competitor and its employees and that it consequently had no power to order the requested interim measures.¹⁴⁴ The Jury, conversely, found that it had jurisdiction to hear the allegation of a breach of fair play and sportsmanship by a competitor. A hearing was scheduled to take place in Valencia with a reduced Jury (only four of the five members would be present), as one of them could not be present and there was “an urgent need to resolve the issue”.¹⁴⁵ Two days before the hearing, Team +39 and El Reto reached a settlement agreement and Team +39 withdrew the applications.

ACJ013¹⁴⁶ involved two different questions relating to the interpretation of the Protocol, both of them posed in an application made by United Internet Team Germany (UITG), and two decisions, one rendered on 4 October 2003, the other handed down on 8th November 2005. The question addressed in the first decision of the ACJ was whether UITG was allowed to acquire used sails from other competitors for purposes of training, so as to save their new sails for the races. The ACJ based its decision on an obvious application of two provisions of the Protocol. Article 13.6 of the Protocol states that “Competitors [...] shall not share or exchange ACC [...] equipment except hardware (not being [...] sails)”. Article 13.8(a) provides an exception to this rule, stating that “a Competitor may acquire an old

¹³⁹ Available at www.acjyury.org/Jury Decision ACJ001.pdf.

¹⁴⁰ Art. 21.4(a), (f), and (i) Protocol.

¹⁴¹ Art. 3.4 Protocol and 5.6 Rules of Procedure.

¹⁴² Available at www.acjyury.org/Jury Notice 16 Decision ACJ003 amended.pdf.

¹⁴³ Available at www.acjyury.org/Jury Notice 22.pdf.

¹⁴⁴ Art. 21 Protocol.

¹⁴⁵ Admissible on the basis of Art. 21.1(c)(i) Protocol.

¹⁴⁶ Available at www.acjyury.org/Jury Notice 29 ACJ013 Decision part 1.pdf and www.acjyury.org/Jury Notice 32 ACJ013 Decision.pdf.

ACC Yacht or any of its components, that was constructed prior to the last race of the 31st America's Cup match". On this basis, UITG was allowed only to acquire sails used by other competitors that were constructed before the end of the 31st Cup and warned that buying any more recent sails, used by other teams, would constitute a breach of the Protocol. The second question asked by UITG was about the possibility to employ a mast maker who had, according to his own declarations, previously worked for K-Challenge as a "composite fabricator" and for BMW Oracle as a "draughtsman". The matter to be decided by the Jury was whether this person's prior work characterized him as a "designer" under Article 13.5 of the Protocol, which, it may be reminded, provides that each team may not engage designers who have had involvement with other teams. Upon a request from the Jury for responses from other teams, and after several deadline extensions, the Jury was only provided the following statement by K-Challenge: "I checked with our design team, and no one here seems to have heard of him. Perhaps he worked with some subcontractor, but surely not an important role and not directly for K-Challenge." K-Challenge further stated to have no objections on the employment of the person in question by UITG. BMW Oracle submitted no reply. The Jury found that there was no evidence that the person in question had been involved as a designer with any competitor.

2. Sailing rules and situations

The decision in case ACJ002,¹⁴⁷ of 2 October 2004, dealt with a technical sailing-rule dispute, which would have been, in the two previous editions of the Cup, of the jurisdiction of the International Jury. The application was filed by the syndicate K-Challenge, whose boat had its hull slightly damaged during a collision with Le Défi, a team that later abandoned the America's Cup for funding reasons. K-Challenge claimed, first, that the umpires made an error by refusing to penalize Le Défi during the race despite K-Challenge's protest and, second, that Le Défi broke the sailing rule that obliges every boat to avoid contact if reasonably possible.¹⁴⁸ K-Challenge asked for the costs of repair to be paid by Le Défi. The decision of the Jury was the first to be rendered with only four of the five members present, a situation to which both parties had agreed and that is permitted by the Rules of Procedure as there was "an urgent need to resolve the issue".¹⁴⁹ The Jury found, first, that the decision of the umpires (which was, by the way, correct) was not open to redress or appeal, according to the Racing Rules.¹⁵⁰ On the collision itself, the Jury found that the failure of Le Défi, which did not have right-of-way, to keep clear and thus to avoid contact was due to the failure of K-Challenger to give room, which it was required to do as it had just acquired right-of-way.¹⁵¹ In other words, K-Challenge's violation of a sailing rule exonerated Le Défi's subsequent violation of a sailing rule, as the first violation directly caused the second.¹⁵² K-Challenge's claim was thus rejected.

The decision in case ACJ009,¹⁵³ of 23 June 2005, also dealt with a situation that would in the two previous editions of the Cup been of the competence of the International Jury. It was decided by a reduced Jury of four. The facts are the following. Coming out of a downwind course and rounding the leeward gate mark, Luna Rossa doused her spinnaker. As the spinnaker was stowed away, its leeward sheet, over a length of 20 meters, was left trailing in the water, which is not unusual. At that moment, a following umpire boat crossed the wake of Luna Rossa within less than 20 meters to the yacht, and the spinnaker sheet (such sheets do not float and therefore could not have been spotted by the umpire) became entangled in the propeller of the umpire boat. Luna Rossa fell to leeward and lost speed as the spinnaker was being pulled from the yacht. The crew cut the spinnaker in half in order to free the yacht, thereby losing the sail for the rest of the race. The question was whether the umpire boat had come too close to the yacht. Were this the case, the umpire boat would have made an "improper action" that made Luna Rossa's position in the race "significantly worse", which would have been a ground for redress.¹⁵⁴ The ACJ, after having heard Luna Rossa's helmsman and the umpire steering the umpire boat in an oral hearing in Valencia, found that the umpire boat was in its normal position for a leeward mark rounding and that its conduct did thus not amount to an "improper action".

Case ACJ010,¹⁵⁵ of 26 June 2005, decided by a reduced Jury of four, was a request for redress filed by Victory Challenge, which claimed that the first place had been misattributed to Luna Rossa, whose spinnaker, Victory Challenge maintained, had crossed the *extension* of the finish line in first place, but not the line itself. In the very close finish of this race, the Race Committee had judged that Luna Rossa's spinnaker had crossed the finish line ahead of Victory Challenge with a one second gap. Victory Challenge's helmsman Magnus Holmberg, however, stated that, from the position Luna Rossa had, it could not have finished ahead of Victory Challenge; that the Race Committee did not have a clear view anyway of the finish line; and that what the video footage, showing Luna Rossa's spinnaker crossing the line first, was actually showing was Luna Rossa's spinnaker merely crossing the extension of the finish line and not the line itself. The ACJ found that the video evidence was inconclusive as to whether the finish line or rather its extension was crossed by the spinnaker, but that it follows from the angle of approach and the setting of the spinnaker that the sail crossed the real finish line, and not its extension. Consequently, the ACJ turned the case down.

3. Yachts

Case ACJ004,¹⁵⁶ of 1 March 2005, dealt with the question whether an interactive model of an ACC Yacht designed for an exhibition would amount to a model developed for tests and thereby count as a new yacht of the syndicate. It may be reminded that the Protocol sets a limitation for the number of new yachts each team is allowed to possess or have possessed; the maximum is two such yachts.¹⁵⁷ Team Alinghi submitted an application to the Jury regarding the definition of Article 13.10 of the Protocol, which provides that "Any scale model or scaled down version of an ACC Yacht [...] is deemed to be a New ACC Yacht [...] and shall be deemed to have been allocated a sail number under the ACC Rules." What happened is that Alinghi was planning to build "an interactive exhibit, which has a hull similar to, and approximately the size of an ACC Yacht to provide a replica sailing experience", for the purpose of an "interactive activity" to take place at the America's Cup Base in Valencia. The Jury, interpreting Article 13.10 of the Protocol according to its spirit and in light of Article 2 of the Protocol, which states that the purpose of this text includes promoting the "commercial potential of the America's Cup", found that an exhibition model does not constitute a model of the type of those covered by Article 13.10. In order to ensure that the exhibition model would not be misused as a testing model, the Jury ordered that the undertaking would be admissible only if the following conditions were met: the hull and deck must be constructed of fiberglass and/or wood, but not of carbon fiber (which has another stiffness entirely); the final working drawings must be approved by the Measurement Committee; any significant or material change must be communicated to and approved by the Jury and

¹⁴⁷ Available at www.acjury.org/JuryDecision/ACJ002.pdf.

¹⁴⁸ § 14 of the Racing Rules of Sailing (RRS) for 2005-2008, drafted by the International Sailing Federation, June 2004, accessible at www.sailing.org/, applicable by virtue of Art. 12.1(g) Protocol and the respective Notice of Race for each regatta (available at www.americascup.com/en/acclopaedia/texts/event_documents.php).

¹⁴⁹ Art. 21.1(c) Protocol and 2.2 Procedural Rules.

¹⁵⁰ RRS C9.1.

¹⁵¹ RRS 15 states that "when a boat acquires right of way, she shall initially give the other boat room to keep clear".

¹⁵² RRS 64.1(b) states that "when as a consequence of breaking a rule a boat has compelled another boat to break a rule, [...] she shall be exonerated."

¹⁵³ Available at www.acjury.org/JuryNotice/23.pdf.

¹⁵⁴ RRS C9.2 states that "A competitor may not base a request for redress on a claim that an action by an official boat was improper. The protest committee may decide to consider giving redress in such circumstances but only if it believes that an official boat, including an umpire boat, may have seriously interfered with a competing boat." And RRS 62.1 provides that "A request for redress or a protest committee's decision to consider redress shall be based on a claim or possibility that a boat's score in a race or series has, through no fault of her own, been made significantly worse by [...] an improper action [...] of the race committee".

¹⁵⁵ Available at www.acjury.org/JuryNotice/24.pdf.

¹⁵⁶ Available at www.acjury.org/JuryNotice/JN006Decision/ACJ004.pdf.

¹⁵⁷ Art. 13.3 Protocol.

Measurement Committee; representatives of the Measurement Committee must be granted permanent access to inspect the model; and the model must not be used in the context of towing, tank towing, wind tunnel testing, or any other form of testing.

Case ACJ007,¹⁵⁸ of 12 May 2005, was an advisory opinion dealing with the question whether the name “K-Challenge” complied with the provision of the Protocol¹⁵⁹ which prohibits yacht names that constitute advertising. The name “K-Challenge” is based on the initial of the last name of the two businessmen who had started the syndicate: Ortwin and Stéphane Kandler. The Jury granted approval of the name, but no reasons were provided for the decision.

Case ACJ011,¹⁶⁰ of 26 June 2005, is an unfortunate (although, according to the rules, unavoidable) case in which Victory Challenge has been disqualified from a race because of an inadvertent breach of a rule, with no proven intention to break a rule and, apparently, no advantage gained from the breach. The facts were the following. During a post-race measurement upon arrival at the dock of the yachts, the Chairman of the Measurement Committee found two compartments of salt water, for a total volume of 160-180 liters, in the mast/keel area of Victory Challenge. Compartments containing water are, according to the Racing Rules, prohibited.¹⁶¹ Victory Challenge asserted that the presence of water was due to ingress from the area of the keel bolts (very frequent in racing sailboats), which was a problem that occurred during the regatta. The water ingress, Victory Challenge asserted, took place “primarily during the period after the finish of the race while being towed to the dock”. Moreover, Victory Challenge stressed, the weight and position of the water could not have increased the performance of the boat. Complying with the Racing Rules, which provide for a strict liability and thus allow no exculpatory explanation of the circumstances, the Measurement Committee protested the boat.¹⁶² The Race Committee then filed the application with the ACJ. The Jury first of all reminded that its jurisdiction excluded all matters concerning the measurement of a yacht or the interpretation of the ACC Rules, which are within the exclusive jurisdiction of the Measurement Committee. The Jury further explained that it had jurisdiction to find the facts, but that such findings of facts would then be submitted to the Measurement Committee for it to interpret the ACC Rules and to determine the actuality of an infringement of the ACC Rules. The Jury finally stated that it would be bound by that determination and that it would make its decision based on it. After having heard the parties in an oral hearing in Valencia, during which the finding of the facts described above was made, the Jury referred the issue to the Measurement Committee, requesting a report¹⁶³ in respect of the rule prohibiting the presence of water compartments. The Measurement Committee found that Victory Challenge was in breach of this rule. It must be noted that this rule provides that “Compartments or containers that hold liquid in a manner that may increase performance are prohibited.”¹⁶⁴ The Measurement Committee, however, focused its report on the issue whether the spaces in which the water was found did actually constitute compartments (the answer was yes), but did not at all address the question whether such compartments “may increase performance”, as the rule requires and despite the allegations of Victory Challenge. The Jury concluded correctly that it had “no discretion but to disqualify Victory Challenge” under the Racing Rules.¹⁶⁵ The Jury nevertheless stressed that it “was satisfied that the breach was inadvertent and that there was no intention by Victory Challenge to break a rule.”

Case ACJ012,¹⁶⁶ of 28th August 2005, concerns a competitor who had sailed two flights of the Malmö regatta with one too many battens in the mainsail. A reduced Jury of four handled the case. It all started with an individual suggesting anonymously to the Measurement Committee that K-Challenge may have sailed, on the previous day, two match races with a mainsail including more than the permitted number of battens. K-Challenge had won the first match against Team +39, and lost the second to Victory Challenge. The Measurement Committee inspected the boat and made the observation that her mainsail did indeed contain eleven battens instead of the ten maximally allowed by the ACC Rules.¹⁶⁷ The Measurement Committee further noticed, and remarked, that the

battens were very difficult to count as they could be seen only when the sun was directly behind the sail. Consequently, the Measurement Committee protested K-Challenge and filed an application with the Jury. K-Challenge admitted the breach of the relevant ACC Rule, but raised two arguments in its defense. First, it maintained that the breach, or rather the extra batten, had no significant effect on the outcome of the match it won against Team +39. Second, it claimed that the batten had been added only to increase the life of the sail, not to increase its performances, and that the breach was consequently due to a mere oversight. The Measurement Committee confirmed that the extra batten could not have had a measurable effect on the performance of the boat and that it could not have affected the result of the match against Team +39. The helmsman of Team +39 stated that K-Challenge had sailed a good race and deserved her victory; he further stated that he did not wish to make a submission on penalty. The Jury concluded that K-Challenge was in breach of the ACC Rules, but admitted that the breach was inadvertent and that it had no effect on the outcome of the match against Team +39. On sanctions, the Jury found that, in the case of a breach of a sailing rule that had no effect on the outcome of a *match* (it would have been different with regards to a fleet race¹⁶⁸), it had the possibility to “make another arrangement it decides is equitable, which may be to impose no penalty”.¹⁶⁹ Making use of this possibility, the Jury decided that the only sanction would be a fine of EUR 5'000 on K-Challenge. It however stressed that “such a penalty may not be considered appropriate for the America's Cup Regattas during 2006 and 2007”, i.e. that the sanctions would be harsher then.

4. Management aspects of the event

Case ACJ008,¹⁷⁰ of 27 June 2005, dealt with the meteorological service of the America's Cup. The application for this case was filed by the Challenger Commission, representing all the Challengers, against ACM, the Regatta Director, and the Race Committee. This case first of all raised the question whether the Challenger Commission had the standing to seek relief from the Jury; a question that the Jury answered in the affirmative. On the merits, the Challenger Commission claimed that the respondents' establishment and management of the Meteorological Data Service (MDS), which collects and supplies meteorological and oceanographic data to competitors, failed to comply with their obligations under the Protocol.¹⁷¹ The Challenger Commission submitted in substance that the MDS was too expensive, that it gave Alinghi “an ability to obtain detailed data of the Challenger yachts' performance”, and, as only Alinghi seemed to have the financial means to subscribe to the service, that “the Challengers were being prejudiced as Alinghi was the only subscriber to the MDS system”. In addition to the submissions of the Challenger Commission, which all Challengers agreed to be represented by, some Challengers sought to file additional, parallel submissions, which the

158 Available at www.acjyry.org/Jury Notice 15.pdf.

159 Art. 10.5 Protocol.

160 Available at www.acjyry.org/Jury Notice 25.pdf.

161 ACC Rule 36.12 provides that “Compartments or containers that hold liquid in a manner that may increase performance are prohibited. Any compartment or space which could hold water shall be drained with limber holes of size consistent with the rapid draining of that compartment.”

162 RRS 78.3: “When a measurer for an event decides that a boat or personal equipment does not comply with the class rules, he shall report the matter in writing to the race committee, which shall protest the boat.”

163 Available at www.acjyry.org/Jury Notice 25 measurers report.pdf.

164 ACC Rule 36.12.

165 RRS 64.1(a) provides that “When the

protest committee decides that a boat that is a party to a protest hearing has broken a rule, it shall disqualify her unless some other penalty applies.”

166 Available at www.acjyry.org/Jury Notice 27.pdf.

167 See ACC Rules 34.1.

168 Under RRS 64.1(a), applicable to fleet races, the Jury would have had no discretion other than to disqualify the competitor.

169 See RRS C6.6: “Protest Committee Decisions ... (b) If the protest committee decides that a breach of a rule has had no significant effect on the outcome of the match, it may (1) impose a penalty of one point or part of one point; (2) order a resale; or (3) make another arrangement it decides is equitable, which may be to impose no penalty”.

170 Available at www.acjyry.org/Jury Notice 26 ACJ008 decision.pdf.

Jury permitted, considering that “by supporting the Challenger Commission’s Application, the Protocol does not provide that a Challenger will lose its standing as a Party”. Team Shosholozza filed a submission claiming that “the MDS program [was] unfair to the smaller America’s Cup teams [because] the price was unnecessary excessive, the number and density of weather buoys was excessive and the cost recovery as proposed would result in a double payment”.¹⁷² Team Shosholozza sought the establishment of a substantially reduced MDS system. The Regatta Director replied that, as no agreement could be found between the Defender and the Challenger of Record, he was “not happy [but] was forced to make choices for an MDS program”. ACM submitted that the application should be rejected as it was filed outside of the limit of seven days from the “time when the protester could reasonably have been aware of the circumstances justifying the protest.”¹⁷³ Alinghi held the same position as ACM and, on the merits, opposed any alteration to the MDS system. BMW Oracle, after reminding that they had at all times been pushing for a scaled-down version of the weather program, submitted that ACM had adopted the weather system proposed by Alinghi, and not a middle ground between Alinghi’s proposal and the proposal of the Challenger of Record. In addition, BMW Oracle maintained, ACM had acted “without reference to external experts and meaningful compromise to the Challenger requirements.” The Challenger Commission responded that it had complied with the seven-days requirement for filing since it had been recurrently suggesting compromise proposals to ACM until three days before the filing. The Challenger Commission then submitted that the “respective parties ought to be allowed the opportunity to achieve an amicable settlement without the requirement of a Jury proceeding”, to which Alinghi reacted by formally suggesting a mediation. A mediation meeting thus took place a few days later, with two members of the Jury as mediators, and one representative from the Challenger Commission, the Race Committee, ACM, Alinghi, and BMW Oracle. The case reached a mediated settlement agreement, which amended the Protocol so as to provide that the costs of the MDS would be met by ACM, as proposed by the Race Committee, and to specifically ban teams from combining the information provided by the MDS with GPS, radar, or lidar systems to assess the performance of competing yachts.

Conclusion

The America’s Cup is one of the most significant sporting events whose organization is completely outside of the Olympic movement. Consequently, it is to some extent more free to experiment with innovative solutions and it thus provides interesting reflections on *ad hoc* dispute resolution. The present analysis has exposed issues such as the importance and difficulty of fine-tuning jurisdiction and the relationship between technical organs and more formal dispute resolution bodies; the inadequacy of recourse to (traditional) court procedures vis-à-vis the somewhat unsatisfactory prohibition to litigate in court; pitfalls in the composition and independence of the tribunal; the usefulness of using electronic means of communication; and the usefulness of rendering advisory opinions. Most of these issues are present throughout the entire field of sports law. It will thus be interesting to follow the next stages of the competition, in which, as the stakes increase, it is likely that the competitors will become gradually more vindictive and that the disputes will be on the rise.

Sure enough the teachings of the America’s Cup, and notably the apparent acceptability of a provision excluding all forms of review of the decision, may only be transposed to other sports contexts with great care: the parties to proceedings in the context of the Cup are generally extremely well-off when compared to normal athletes. Moreover, no ACJ decision has yet really been gravely detrimental to anyone (except, in a sense to Mr. Kaiko, but his hands seem to have

been not entirely clean either), at least not in the way in which life-ban doping sanctions may be.

Finally, as the number of cases submitted to such formal and adjudicative dispute resolution bodies is on the increase and the jurisdiction of these bodies is being extended, it should not be forgotten that the fundamental goal of such dispute resolution is to avoid a remake of the Mercury Bay affair. From this point of view, one may mention the following advantages of the Jury vis-à-vis court proceedings.

First, one may remind that most of the members are experienced sailors, and the Jury is consequently more specialized in the field of the disputes it is solving than any court might be.

Second, the Jury answers most applications and resolves the issues at stake within a day or two, thereby providing for no interruption of the competition, or for the most minimal of interruptions. This a court could barely do.

Third, the increasingly omnipresent legal proceedings of the ACJ are a very low price to pay and in this respect they are absolutely acceptable in order to avoid the risk of a remake of the Mercury Bay affair, which had certainly involved several million dollars in legal fees and had tarnished the image and the credibility of the Cup for a number of years. Besides, legal anthropology has clearly shown that each community with its own dispute resolution mechanisms tends to push these mechanisms towards increasing formalization and legalization, until they become similar to courts.¹⁷⁴ Put differently, a need for a sophisticated dispute resolution mechanism seems to exist in every community, and in the present context the ACJ is simply developing towards something that is more fully able to replace courts, and thus to avoid recourse to them. Consequently, a dispute resolution body such as the ACJ seems to be an essential element to guarantee the fulfillment of the very purpose of the organization of the America’s Cup, which, in the words of the Protocol, is to “promote a competitive sporting regatta for all Competitors, to realize the sporting and commercial potential of the America’s Cup and to encourage world-wide growth and interest in the America’s Cup as the premier event in the sport of sailing, consistent with the provisions of the Deed of Gift.”¹⁷⁵ Sailing away from court interference appears, in this case, entirely legitimate.

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¹⁷¹ Art. 5.8 Protocol provides that “The Race Committee shall, at the request of the Event Authority, establish and manage a meteorological and oceanographic data collection service at the Venue and make the data available to Competitors electronically on a cost recovery basis” and Art. 5.9. states that “SNG, the Defender, the Event Authority, the Regatta Director, the Challenger Commission, the Challenger of Record and all Officials shall (a) each in the best interests of all of the Competitors [...] in organizing and managing the Event [...] and (b) not favor the interests of the Defender over those of the Challengers nor the interests of the Challengers over the Defender.”

¹⁷² The system includes 21 purpose-built buoys and six land stations, which provide information on wind direction and speed, barometric pressure, and humidity, as well as two further buoys that provide wave and current information and a vertical wind profiler providing wind information for every section of 50 meters in altitude, up to an altitude

of 2’000 meters. The interpretation and modeling of the data provided by the system remain a task of each team.

¹⁷³ Art. 21.10 Protocol.

¹⁷⁴ J.S. Auerbach, *Justice without law? Resolving Disputes without Lawyers*, New York 1983, p. 15; L.M. Friedmann, “Courts Over Time: A Survey of Theories and Research” in K.O. Boyum and L. Mather, *Empirical Theories About Courts*, New York 1983, p. 9, 15-16; E. Durkheim, *De la division du travail social*, Paris 1893, pp. 115-116; H. Wimberly, “Legal Evolution: One Further Step” in *American Journal of Sociology*, 1973, vol. 79, p. 78; and also A. Kojève, *Esquisse d’une phénoménologie du droit*, Paris 1981. See also T. Schultz, “Human Rights: A Speed Bump for Arbitral Procedures? An exploration of safeguards in the acceleration of justice” in *International Arbitration Law Review*, 2006, vol. 9, issue 1, p. 8.

¹⁷⁵ Art. 2 Protocol for the 32nd America’s Cup.





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THE HAGUE – THE NETHERLANDS

The European Union and Sport Legal and Policy Documents

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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 subordinated 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 totaling 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 re-

garding 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.

www.asserpress.nl/cata/EUsport/fra.htm

2005, ISBN 90-6704-194-7

921 pages, hardcover

GBP 90.00 / USD 150.00

Distributed for T.M.C. ASSER PRESS by CAMBRIDGE UNIVERSITY PRESS:

Cambridge University Press
Customer Service Department
Shaftesbury Road
Cambridge, CB2 1BB, United Kingdom
Tel. +44(1223)326050 / Fax +44(1223)326111
Email: directcustserve@cambridge.org
www.cambridge.org/uk

Cambridge University Press
100 Brook Hill Drive
West Nyack, NY 10994
USA
Tel. +1(845)3537500
Fax +1(845)3534141
www.cambridge.org/us

Recent Developments in Tort Liability for Foul Play

by Jack Anderson*

Introduction

On 12 May 2000, Jarrod McCracken of the Australian rugby league team, West Tigers, was tackled by two members of the opposing Melbourne Storm team. The strength of the tackle led to McCracken being swivelled off balance and dumped on his head in what is referred to in that sport as a 'spear-tackle'. The tackle resulted in significant neck and spinal injuries ending McCracken's playing career. In February 2005, McCracken successfully sued the offending players and their club for negligence in a case heard by the New South Wales Supreme Court.

On 8 March 2004, Steven Moore of the National Hockey League's Colorado Avalanche was punched and jumped upon by Todd Bertuzzi, a member of the opposing Vancouver Canucks. The ferocity of the attack left Moore hospitalised with three fractured vertebrae, facial cuts, concussion and amnesia. It is unlikely that Moore will ever play hockey again at the professional level. On 15 February this year, Moore filed a lawsuit in Denver District Court accusing Bertuzzi of assault, battery, negligence and civil conspiracy.

The McCracken and Bertuzzi incidents, both of which raise a number of interesting points, will be discussed in the following manner. Firstly, they demand a brief review of the general principles of tort liability arising from violent play between participants. In this, it must be noted that, although this article will be informed by a comparative approach incorporating all the major common law jurisdictions, the primary emphasis will be on English law and what sports lawyers within that jurisdiction might learn from the stated incidents.

Secondly, while the McCracken case is of specific interest from the point of view of the tort of negligence and possible defences such as the assumption of risk; it also reminds professional sports clubs of their vicarious responsibility for acts of their employees. Furthermore, the quantum of damages in the McCracken case is noteworthy in that McCracken is seeking a significant sum in compensation based on the fact that his lucrative professional career was prematurely ended as a result of the negligent tackle.

Thirdly, the lawsuit filed by Moore contains an accusation of civil conspiracy against his immediate opponent, Todd Bertuzzi, Bertuzzi's employing club as well as Bertuzzi's coach and certain named teammates. The implication seems to be that the Vancouver Canucks had a concerted plan to target and injure Moore during the course of the game in question. The potential scope of such a finding will be discussed, as will its implications for all contact sports.

Finally, this article will conclude by indulging in some speculation as to the possible future developments in this area of the law focusing on the duty of care and standard of care expected of participants, coaches, professional sports clubs and sports regulatory bodies.

1. General Principles

The law of torts determines who bears the loss that results from the defendant's unlawful act or omission and seeks to award compensation for that loss. According to Jahn, tort law should be seen as 'the best way to deter violent conduct among athletes and provide them with an adequate remedy for their injuries. Tort law imposes financial liability on the athlete...and this will hit him where it hurts the most - in his pocket.'¹ In February 2004, for example, former Charlton FC player, Matthew Holmes, received £250,000 in agreed damages without admission of liability at the English High Court as a result of a tackle by Kevin Muscat. Holmes suffered a broken tibia in the tackle

by then Wolves defender Muscat in an FA Cup game in February 1998. Holmes had launched a £2m lawsuit against Wolves and Muscat, who now plays for Millwall.

In attacking the athlete 'where it hurts the most', the law of torts is armed with two weapons, namely, assault and battery (trespass to the person) and negligence.² At common law, the distinction between trespass to the person and negligence was summarised by Lord Denning in *Letang v Cooper* (1965):

"If he [the defendant] does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care. If the plaintiff cannot prove want of reasonable care, he may have no cause of action at all."³

As a matter of practice therefore, trespass to the person can be characterised by its concern for direct intentional acts; negligence by its concern for careless or indirect acts.⁴ Lord Denning's maxim prompts two important points of interest. Firstly, seldom will a plaintiff injured during the course of a contact sport sue in assault and battery. This is because the plaintiff would have to demonstrate that, on the balance of probabilities, the injury was inflicted deliberately and intentionally. This is a difficult onus of proof to discharge particularly as the courts will inevitably be asked to take into account factors such as the spontaneous and necessarily robust environment that is contact sport, that players act and react 'in the heat of the moment' and that players in a sporting contest must be assumed to have been acting consensually. In sum, the difficulties confronting plaintiffs in such instances are similar to those facing the prosecution in criminal assaults resulting from violence on the field of play.⁵

Secondly, Lord Denning's remarks reveal that fundamental to the tort of negligence is the applicable standard of care - reasonable care, as construed by Lord Atkin in *Donoghue v Stevenson* (1932).⁶ In *Wooldridge v Sumner* (1962)⁷ - a case concerning a claim in negligence by a spectator injured by a participant in a horse riding event but taken to have applicability to the inter-participant standard of care - Sellers LJ elaborated upon that standard's application to violence in sport:

"...provided the competition or game is being performed within the rules and the requirement of the sport and by a person of ade-

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1 Jahn, G. "Civil Liability: An Alternative to Violence in Sporting Events" (1988) 15 *Ohio Northern University Law Review* 243 at p.253.

2 A thorough and comparative review of this topic in the UK and Ireland can be found in Cox, N. "Civil Liability for Foul Play in Sport" (2003) 54 *Northern Ireland Legal Quarterly* 351. See also James, M. "Sports Torts and the Development of Negligence in England" (2003) 2(2) *International Sports Law Journal* 17. For a North American perspective see Richardson, D. "Player Violence: An Essay on Torts and Sports" (2004) 15 *Stanford Law & Policy Review*

133. For an Australian/New Zealand view see Yeo, S. "Accepted Inherent Risks Among Sporting Participants" (2001) 9 *Tort Law Review* 114.

3 [1965] 1 QB 232 at pp.239-240.

4 See also Wilson v Pringle [1987] Q.B. 237 per Croom-Johnson LJ.

5 On criminal assaults in sport see R v Barnes [2004] All ER (D) 338 (Dec); *The Times*, 10 January 2005 as discussed in Anderson, J. "Policing the Sports Field: The Role of the Criminal Law" [2005] *International Sports Law Review* 25. See also James, M. "Prosecuting Sports Field Violence: A British Perspective" (1997) 7(2) *Journal of the Legal Aspects of Sport* 81 and McCutcheon, P. "Sports Violence, Consent and the Criminal Law" (1994) 45 *Northern Ireland Legal Quarterly* 267. 6 [1932] AC 562.

quate skill and competence, the spectator does not expect his safety to be regarded by the participant. If the conduct is deliberately intended to injure someone whose presence is known or is reckless and in disregard to all safety of others so that it is a departure from the standard which might reasonably be expected in anyone pursuing the competition or game, then the performer might well be liable for any injury his act caused.”⁸

The stated principle was subsequently labelled as ‘The Sportsman’s Charter’. In sum, in the honourable opinion of the judges of the English Court of Appeal, momentary lapses of skill and judgment by the participant on the sportsfield would not amount to negligence provided that (a) the participant could be said to have a reasonable level of skill, judgment and experience and (b) the participant did not act in a manner that could be adjudged to have been recklessly in disregard of the safety of others immediately involved in that activity.

‘The Sportsman’s Charter’ did not, initially at least, receive welcome. One distinguished academic, Professor A.L. Goodhart, argued vehemently against the apparent deviation by the Court of Appeal from the principles of *Donoghue v Stevenson*; nor did he see any consequent justification for the creation of a special ‘sporting’ category of negligence.⁹ Professor Goodhart concluded that with necessary respect for the ordinary principles of negligence mapped by Lord Atkin, the proper test to be applied should be whether the injury had been caused ‘by an error of judgment that a reasonable competitor being a reasonable competitor being a reasonable man of the sporting world, would not have made.’¹⁰

It is submitted that the learned professor was somewhat hurried in his reflection on *Wooldridge*. In the stated case, the English Court of Appeal did not create anything like a special ‘sporting’ category of negligence; they merely tailored *Atkinian* reasonability to the circumstances at hand, taking into account the recognised social utility of sport to justify a lower behavioural standard of ‘reckless disregard’ – the legal standard of care remaining at all times that which is reasonable in the circumstances. Furthermore, it is the social utility of sport that should be taken to underpin the lower (behavioural) standard of care, outweighing factors such as the probability of an accident in sport, the gravity of the threatened injury and the cost of eliminating the risk – factors which, if taken in isolation, might justify a stricter standard.

The subtle distinction between the general legal standard of reasonable care and the behavioural standard of reckless disregard has been broadly acknowledged and applied by the English Courts.¹¹ For example, in *Wilks v Cheltenham Home Guard Motor Cycle and Light Car Club* (1971),¹² the English Court of Appeal, anxious nonetheless to reiterate the fundamental applicability of the principle of reasonable care, stated that some factual account must be taken of the robust and risky ‘sporting’ nature of the circumstances at hand. Although *Wilks* concerned an injury sustained by a spectator as a result of the alleged negligence of a competitor in a motorbike scramble, Lord Denning’s judgment is most revealing as regards the standard of care in sport generally:

“Let me first try to state the duty which lies on a competitor in a race. He must, of course, use reasonable care. But that means reasonable care having regard to the fact that he is a competitor in a race in which he is expected to go ‘all out’ to win. Take a batsman at the wicket. He is expected to hit a six, if he can, even if it lands among spectators. So also in a race, a competitor is expected to go as fast as he can, so long as he is not foolhardy. In seeing if a man is negligent, you ask what a reasonable man in his place would or would not do. In a race a reasonable man would do everything he could do to win, but he would not be foolhardy. That, I think, is the standard of care expected of him...In a race a rider is, I think, liable if his conduct is such as to evince a reckless disregard...in other words if his conduct is foolhardy.”¹³

The Court of Appeal in *Wilks* demonstrated a clear understanding of the distinction between the legal and behavioural standard of care in sport, as it would later in *Condon v Basi* (1985).¹⁴ In that case, the claimant suffered a serious leg injury as a result of a tackle made by the defendant during a local football league game. At trial, the defen-

dant was held liable and the plaintiff was awarded nearly £5,000 in compensation. Sir John Donaldson MR dismissed a subsequent appeal by the defendant concisely:

“He [the defendant] was clearly guilty, as I find the facts, of serious and dangerous foul play which showed reckless disregard of the plaintiff’s safety and which fell far below the standard which might reasonably be expected in anyone pursuing the game.”¹⁵

The judgment has been criticised on the grounds that it is somewhat inaccurate on the distinction between the duty of care and the standard of care in negligence and that the Court made no use, and was seemingly unaware, of the principles and precedent inherent in *Wooldridge* and *Wilks*.¹⁶ Moreover, the Master of the Rolls remarked that in reaching his decision he expressly affirmed *Rootes v Sheldon* (1967),¹⁷ a decision of the Australian High Court. In that case, arising out of injuries sustained by a water skier which, the skier claimed, were attributable to the powerboat driver’s negligence, the Australian High Court seemed to reject the approach that evidence of factual recklessness must be provided in order to demonstrate ‘sporting’ negligence.¹⁸

The Australian High Court had two perspectives on dealing with such cases. Barwick CJ preferred to take a more generalised duty of care and to modify it on the basis that the participants in the sport or pastime impliedly consent to taking risks which otherwise would be a breach of a duty of care. Kitto J seemed to prefer the *Atkinian* approach that an individual is under a duty to take all reasonable care taking into account of the circumstances in which they are placed. Donaldson MR favoured Kitto J’s approach but acknowledged that it made not the slightest difference in the end if it is found by a tribunal of fact that the defendant failed to exercise that degree of care which was appropriate in all the circumstances, or that he acted in a way to which the plaintiff cannot be expected to have consented, as in either event, there is liability.¹⁹

In this light, it is difficult at first instance to see how the then Master of the Rolls’ reliance on *Rootes* can be reconciled with his use of the term ‘reckless disregard’ in *Condon v Basi*. However, this again misunderstands the approach of the Court of Appeal. The standard of care in negligence is at all times an objective one – that of reasonability – but that objectivity depends on the circumstances of each case and the Court of Appeal seems to suggest that as a general guide the term ‘reckless disregard’ is a useful evidentiary barometer of unacceptable behaviour in the circumstances of contact sports (which cannot equally be consented to), though it is no more than that.

The above approach is broadly identifiable in Drake J’s judgment in *Elliot v Saunders and Liverpool FC* (1994).²⁰ In that case, Paul Elliot, a defender with Chelsea F.C., and Dean Saunders, a ‘striker’ with Liverpool F.C., went at speed for what is known as a ‘fifty-fifty’ ball, during an English Premier League match. The evidence demonstrated that Elliot lunged at the ball with his right foot in an attempt to divert it away from his opponent. Despite the high nature of this

7 [1962] 2 All ER 978.

8 *Ibid.*, at p.983 and at pp.989-990 per Lord Diplock. See also Harrison v Vincent [1982] RTR 8. Note Felix, A. “The Standard of Care in Sport” (1996) 4 (1) *Sport and the Law Journal* 32 at p.34: ‘...if the standard of care owed to spectators is one of reckless disregard then this must also be applicable to participants. If not, participants in games would owe each other a higher duty of care than that owed to spectators. This cannot be correct given that the foreseeability of harm to participants is greater than in respect of spectators.’

9 Goodhart, A.L. “The Sportsman’s Charter” (1962) 78 *Law Quarterly Review* 490.

10 *Ibid.*, at p.496.

11 Duff, A. “Reasonable Care v Reckless Disregard” (1999) 7(1) *Sport and the Law Journal* 44; “Reasonable Care v

Reckless Disregard Revisited” (2002) 10(2) *Sport and the Law Journal* 156.

12 [1971] 2 All ER 369.

13 *Ibid.*, at pp.370-371.

14 [1985] 2 All ER 453.

15 *Ibid.*, at p.455.

16 *Ibid.*, ‘no authority’ at pp.453-454. The judgment attracts considerable criticism from Felix, *supra* note 8 at p.33.

17 (1967) 116 CLR 383; (1968) ALR 33.

18 *Ibid.*, at p.387 per Kitto J. See also Johnston v Frazer (1990) 21 NSWLR 89 at p.94 per Priestly J.

19 [1985] 2 All ER 453 at p.454.

20 Unreported, Queen’s Bench Division, 10 June 1994 per Drake J. See generally Gardiner, S. and Felix, A. “Elliot v Saunders: Drama in Court 14” (1994) 2(2) *Sport and the Law Journal* 1 and Grayson, E. “Drake’s Drum-Beat for Sporting Remedies/Injuries” (1994) 144 *New Law Journal* 1094.

tackle, Saunders had continued his run and collided with the inner side of Elliot's right knee. Elliot claimed that Saunders could have avoided the impact but instead had made a two-footed stamp on his prone leg, severing his cruciate ligament to such a grievous extent that it terminated Elliot's professional career. Saunders countered that Elliot's tackle had been intimidatory in nature and had led him to jump up instinctively to avoid serious injury.

Elliot's claim in negligence was effectively based on three grounds. Firstly, he argued that participants in competitive, contact sports owed each other a duty of care 'appropriate to the circumstances'. Second, that this reasonability in the 'sporting' circumstances would have to be further qualified by the professional nature of the game and its participants. In this, Elliot claimed that Saunders, a fellow professional, owed him a higher standard of care on par with that expected of an elite, highly trained and skilled participant. Finally, Elliot stated that applying these principles to the facts at hand, it was clear that Saunders' tackle had been negligent in that it was clearly reckless and dangerous - there being no suggestion that Saunders had any intent to injure.

In considering what was 'appropriate' in the circumstances of the game in question, Drake J remarked:

"...the Court should not forget that football is a game necessarily involving strong physical contact between opposing players, that it is a game sometimes played at a very fast speed...It is easy enough for the armchair video watcher to replay the incident frame by frame and then decide how the player should ideally have reacted to the situation. But in the real world that is to say in the agony of the moment, in the heat of the game, the player has no more than literally a fraction of one second in which to make a decision...Therefore, an error of judgment or mistake will certainly not always mean that the player has failed to exercise the duty of care appropriate in the circumstances."²¹

Before applying that principle in the light of the presented evidence, Drake J dismissed the argument (first mooted by Donaldson MR in *Condon v Basi*) that the elite, professional level at which the game was played should have a material effect on the applicable standard of care because 'liability on the part of a defendant depends on the facts and circumstances of each individual case.' Clearly this is the better view because if the Donaldson reasoning was followed to its logical conclusion its practical effect could be that when an elite team in English football (for example a Premier League side) plays a side of a manifestly lesser standard (for example a non-league side) in an 'open' tournament (for example an FA Cup match), the Premiership players would presumably be taken to owe a higher standard of care to their opponents than the corresponding obligation.²²

On the facts and circumstances of this individual case, Drake J was of the opinion that the standard of care owed by the defendant to the plaintiff had not been breached. Moreover, Drake J was satisfied that the defendant's reaction could not be considered 'dangerous or reckless play'. The evidence fell into five easily identifiable categories, highly typical of the evidence deemed crucial in all such cases. Firstly, the video evidence, which was rejected as being insufficiently 'two dimensional'; thus open to unlimited interpretation. Second, the dubious nature of the video angles meant that it was not surprising that there was, in the words of Drake J, 'complete disagreement' in the opinion of expert witnesses as to where culpability lay. Third, the plaintiff called a number of teammates as witnesses, namely Vinnie Jones and Dennis Wise - the irony in having Jones and Wise as witnesses cannot be lost on football fans, as both had notoriously poor disciplinary records. On cross-examination, the players in question were deemed not to have a sufficiently clear view of the incident. Fourth, the evidence of the plaintiff and defendant was taken into account with Mr. Justice Drake finding that Saunders was 'an honest and reliable' witnesses who strongly impressed that he was telling the truth in stating that he (Saunders) had at all times intended to play the ball and had jumped by instinct in order only to avoid injury.

Finally, Drake J relied heavily on the evidence given by the match officials, including the referee, linesmen and the Football League's assessor, who was watching and adjudicating upon the referee's per-

formance in the stands. It is interesting to note that the referee had in fact given a free kick against Elliot as a result of the incident because he had considered Elliot's tackle as constituting dangerous play. The linesman nearest to the incident and the assessor in the stands had agreed with that decision, both noting that Saunders had, at worst, acted in a (self) defensive manner and, at best, had at all times gone to play the ball. The plaintiff's case in negligence failed.

In contrast, in *McCord v Swansea Football Club and Another* (1996),²³ the plaintiff would succeed in obtaining damages for personal injuries sustained as a result of an opponent's negligence on the field of play during a professional match. Kennedy J cited directly from Drake J's judgment as to what the 'appropriate' behaviour was in the circumstances of a football game. In other words, Kennedy J made allowance for the fact that football is a fast and skilful game and that players acting in the heat of the moment do not always react as ideally as a video replay suggests they should have acted. Therefore, Kennedy J relied upon Drake J's presumption that 'an error of judgment or mistake will...not always mean that the player has failed to exercise the duty of care appropriate in the circumstances.'

That presumption could not be rebutted on the evidence presented in *Elliot v Saunders*. However, the evidence presented in the stated case suggested otherwise. The testimony of the match officials - notably the match assessor in the stands, who deemed the tackle in question 'dangerous and disgraceful' - particularly influenced Kennedy J, who again had to dismiss video and expert analysis as inconclusive. Even though the tackle was only fractionally late - the video measured the delay as one-fiftieth of a second - Kennedy J felt that in the circumstances it was sufficiently misjudged as to be deemed negligent. Put simply, according to Kennedy J, the second defendant had made 'an error which was inconsistent with his taking reasonable care towards his opponent.'²⁴ Mr. McCord, whose career ended when he broke his leg in the tackle, eventually received an award estimated to be in the region of £250,000.

The facts of *Watson and Bradford City FC v Gray and Huddersfield Town FC* (1998)²⁵ are analogous to *McCord* with the plaintiff suffering serious injuries (although not career ending) as a result of a (fractionally) late tackle by the defendant. At trial, Hooper J held the defendants liable and adopted an approach similar to the *Elliot* and *McCord* cases in that he was convinced by the evidence of the officials, witnesses and video recordings that the presumption that an error of judgment would not necessarily breach the appropriate duty of care was rebutted in the circumstances of this individual case. An appeal was subsequently dismissed and the case resulted in a damages award of over £900,000 - so-called 'the most expensive tackle in football history'.²⁶

An interesting aside to the *Watson* case was a claim by Bradford for the loss of Watson's services as an employee. In this, Bradford argued that Gray should be held liable under the (intentional) tort of unlawful interference with contract. Bradford's claim failed when the court argued that, although the defendant-player was negligent, that finding was not sufficient to establish the necessary degree of recklessness for the purposes of the tort in question. It remains open, therefore, whether a club can recover for losses that it incurs consequent to the loss of one of its employee-players arising from the negligent infliction of injury caused by an opposing player.²⁷ As a corollary, it can be argued that as vicarious liability arises only where the employee is acting in furtherance of his employment, it does not extend to incidents where an injury is inflicted in a manner that bears no relation to the

²¹ *Ibid*, at p.9 of the transcript.

²² Moore, C. *Sports Law and Litigation*, Sutton Coldfield, CLT Professional, 1997 at p.49.

²³ *The Times*, 11 February 1997; Unreported, Queen's Bench Division, 19 December 1996 *per* Kennedy J.

²⁴ *Ibid*, at p.10 of the transcript.

²⁵ *The Times*, 26 November 1998; Unreported, Queen's Bench Division, 26 October 1998 *per* Hooper J.

²⁶ [1999] EWHC Admin 341 (22 April 1999).

²⁷ See Duff, A. "Civil Actions and Sporting Injuries" (1994) *New Law Journal* 639 at p.640 and Kevan, T "Sports Injury Cases: Footballers, Referees and Schools" (2001) *Journal of Personal Injury Litigation* 138 at pp.142-143.

playing of the sport in question, such as where one player punches another 'off-the-ball'.²⁸

In contrast to *Watson*, the presumption [that an error of judgment or skill does not necessarily breach the appropriate duty of care] was sustained in *Caldwell v Maguire & Another* (2001)²⁹ - a case involving careless riding by jockeys in a horse race which the defendant claimed was compensable in negligence; and in *Pitcher v Huddersfield Town F.C.* (2001)³⁰ - another late/high tackle during a professional football match. The manner in which the above stated presumption operated is well illustrated in Hallett J's judgment in *Pitcher*:

"The rules [of football] are designed to discourage late tackles.

They are, however, a common feature of the game and they do not lead automatically to a sending off. There must be something more [so as to attach legal liability]...I am satisfied this was not something more; this was a misjudged attempt to get to the ball...I am not prepared to say on the balance of probabilities that this tackle was anything more than an error of judgment nor am I prepared to find that [the defendant] was guilty of negligence."³¹

In sum, there may be an argument that the inconsistency of the above judgments reflects a certain ambiguity and uncertainty as to the applicable principles in cases of sporting negligence. Further, it could be argued that this ambiguity may affect the nature and scope of the accepted inherent risk that sporting participants might be taken to assume.³² Moreover, while the presumption that misjudgements and errors in skill do not necessarily give rise to liability is an attractive and useful interpretative guideline, it might be argued that it has been applied only to incidents involving late tackles occurring during professional football games. Consequently, it is suggested that the better view (and one that can be reconciled with English law's classically incremental approach to the tort of negligence) is to return to the principles implicit in *Wooldridge* and *Wilkes* i.e., the standard of care in negligence is at all times an objective one - that of reasonability - but given that that objectivity depends on the circumstances of each case, it is contended that as a general guide the term 'reckless disregard' is a useful evidentiary barometer of liability in the circumstances of contact sports.³³

2. McCracken

In February 2005 in Australia, a former New Zealand rugby league captain, Jarrod McCracken, successfully sued the Melbourne Storm rugby league club and two of its players, saying they destroyed his career with a 'spear-tackle'.³⁴ A spear-tackle is where an unbalanced player is swivelled around the midriff and dumped on their head. McCracken had injured his spine and neck when he was tackled in such a manner during a National Rugby League ('NRL') game between his team, West Tigers, and Melbourne Storm on 12 May 2002.³⁵ By reason of the injuries sustained in the tackle, McCracken was prevented from returning to playing professional rugby league and his employer terminated his playing contract.³⁶

Mr Justice Hulme of the New South Wales Supreme Court ruled that the players (the second and third defendants) and vicariously their employer (the first-named defendant) were liable towards the defendant in executing the tackle in question. Moreover, Hulme J was of the opinion that the players in question intended to cause McCracken injury and the fact that they had pleaded guilty at the NRL Judiciary to an illegal tackle further proved that they had intended to injure. Mr Justice Hulme rejected the defence's argument that what had occurred was but a normal incident of the game of rugby league.³⁷

In assessing the judgment in greater depth, it must be noted that in New South Wales the Civil Liability Act 2002 imposes limits on civil liability and awards of damages in those proceedings. However, section 3B of the Act provides that the provisions of the Act do not apply to civil liability in respect of an intentional act that is done with the intention to cause injury or death. In this light, McCracken's statement of claim asserted that the actions of the opposing Melbourne Storm players were:

"...intentional and done with the intent to cause injury, in that...[they]...intended during the performance of the tackle, to lift

the Plaintiff, and having completed doing so, to then drive the Plaintiff forcefully into contact with the ground causing the Plaintiff's body to suffer some physical trauma and temporary non-serious soft tissue injury."³⁸

In assessing liability, Hulme J adopted an approach similar to that of the English Courts. In other words, Hulme J acknowledged that in the circumstances of contact sport there must be a presumption that an error of judgment or mistake will not always mean that the player has failed to exercise the duty of care appropriate in the circumstances. The manner in which Hulme J (albeit implicitly) adopted this approach is illustrated as follows:

"...I do not ignore the fact that the tackle took but seconds, there were likely to have been a number of matters in the minds of the Second and Third Defendants immediately before and during the tackle, and during a game of football is not the time for calm and reflective thought ... [and]...there is undoubtedly scope for a truly accidental error..."³⁹

Again, similar to the approach taken by the English Courts, Hulme J recognised that the above presumption could be rebutted by the presented evidence i.e., was, on the evidence presented, a truly accidental error' a satisfactory explanation for the actions of the defendants? In answer to the question, Hulme J was convinced in the negative by three factors. Firstly, Hulme J pointed to the inherent dangerousness of the tackle in question. Second, Hulme J was persuaded by the fact that the player-defendants had pleaded guilty at an internal NRL disciplinary hearing to a charge of effecting a dangerous throw contrary to section 15 of the Laws of the Game of the Australian Rugby League. Section 15 defines a 'dangerous throw' as follows:

"If in any tackle or contact with an opponent, that player is so lifted that he is placed in a position where it is likely that the first part of his body to make contact with the ground will be his head or neck then that tackle or contact will be deemed to be a dangerous throw unless with the exercise of reasonable care the dangerous position could not have been avoided."⁴⁰

Thirdly, Hulme J rejected the defendant's submission that the movements of the three persons involved were 'but normal, and to an appreciable degree unavoidable, incidents of an event involving three heavy players.'⁴¹ Hulme J remarked that the video evidence clearly demonstrated (whether run at normal or slow speed) that the tackle in question was not necessary in preventing McCracken's momentum. In this, Hulme J rejected outrightly that what occurred was but a normal incident in the game of rugby league. Accordingly, Hulme J concluded that the player-defendant's liability was satisfactorily established to the point that 'the actions of the Second and Third Defendant, not only in tackling the Plaintiff but in lifting and upending the Plaintiff...were intentional and done with the intent that he should fall heavily onto

²⁸ Cox, *supra* note 2 at pp.366-367.

²⁹ [2001] EWCA Civ 1054 (27 June 2001).

³⁰ Unreported, Queen's Bench Division, 17 July 2001 *per* Hallett J.

³¹ *Ibid*, at p.22 of the transcript.

³² See generally Yeo, *supra* note 2.

³³ A perspective supported by the English Court of Appeal in *Caldwell v Maguire & Another* [2001] EWCA Civ 1054 (27 June 2001) at para.11 *per* Tuckey LJ and in *Blake v Galloway* [2004] EWCA Civ 814 (24 June 2004) at paras.10-12 *per* Dyson LJ. See also Smolden v Whitworth [1997] ELR 249; [1997] PIQR 133 *per* Lord Bingham CJ.

³⁴ *McCracken v Melbourne Storm Rugby League Football Club and Others* [2005] NSWSC 107 (22 February 2005) *per* Hulme J.

³⁵ Lamont, L. "No one says sorry in spear tackle code" *The Sydney Morning Herald*, 16 February 2005.

³⁶ Walter, B. "McCracken pursues Storm over career-ending tackle" *The Sydney Morning Herald*, 15 February 2005.

³⁷ Magnay, J. and Lamont, L. "McCracken

wins fight for spear tackle damages" *The Sydney Morning Herald*, 23 February 2005.

³⁸ *McCracken v Melbourne Storm Rugby League Football Club and Others* [2005] NSWSC 107 (22 February 2005) at para.3.

³⁹ *Ibid*, at para.29.

⁴⁰ See Holmes, M. "Case Note: McCracken v Melbourne Storm Rugby League Football Club Ltd." [2005] *International Sports Law Review* 58 at p.60: 'A dilemma now faces both players and administrators in that players are encouraged to enter a plea of guilty when charged before the internal disciplinary tribunal by the offering on a reduction in the applicable penalty yet the plea of guilty may lead to subsequent civil liability attaching to the consequences of their conduct as occurred in the present case.'

⁴¹ *McCracken v Melbourne Storm Rugby League Football Club and Others* [2005] NSWSC 107 (22 February 2005) at para.34.

the ground.⁴² It must be noted however, that, although the player-defendants breached the duty of care owed to the plaintiff and had intended some injury to the plaintiff, the Court did not suggest that injury of the severity that occurred had been intended.⁴³

Finally, Hulme J noted that the first-named defendant (Melbourne Storm, the employer-club) was vicariously liable for the actions of its employees, a liability the club did not deny.⁴⁴

Difficulties in obtaining access to a number of bank and other financial documents meant that damages in the McCracken case are to be assessed at a separate hearing scheduled for 22 August 2005. Mr. McCracken is seeking unspecified damages for his permanent neck disability (he also claims to have suffered a depressive illness for a short period). He will also seek damages for loss of football earnings from West Tigers for the remainder of the 2000 season, as well as a potential three-year, Aus\$1.35m contract in the British Super League for the seasons 2002 to 2004. In addition, McCracken is to make an Aus\$2million claim relating to the forced sale of a property, which came about after his career and earnings were cut short.⁴⁵

The manner in which the NSW Supreme Court calculates and assesses the level of compensation will be of interest, particularly as regards the claim for damages for economic loss of chance. In England, four points are noteworthy as regards the quantum of damages in such cases. Firstly, the general rule is that the aim of the courts must be to place a claimant so far as possible in financial terms in the position in which they would have been but for the injury; necessarily, however, the process is somewhat rough and ready and 'the Court must do its best with the available evidence, proceeding with caution so as to steer a course between, on the one hand, any undue expectations on the part of claimants and, on the other, any unwillingness on the part of defendants to recognise the true financial consequences of the injury for which they are responsible.'⁴⁶

Secondly, it must be noted that where it is proved that a person's employment prospects (or his prospects of promotion) have been adversely affected by a physical injury, the claimant is not required to prove on a balance of probabilities what his employment record would have been (or that he would in fact have been promoted) but for his injury. It is enough for the claimant to prove that there was a prospect immediately before he was injured which he has lost due to the wrongdoer's negligence. The claim is for the loss of prospects assessed as at that date, not for the loss of a certainty. Clearly, some evidence is required to enable the court to assess and evaluate those prospects as without such evidence the claim would be entirely speculative; but, it seems, English law does not insist on proof that events would in fact have taken the course that the chances or prospects relied upon have indicated.⁴⁷

Thirdly, in evaluating a fair figure for future earnings loss, the English courts utilise the so-called 'career model' approach, which is forming a view as to the appropriate or 'baseline' level of compensation based on the most likely future working career of the claimant had he not been injured. Accordingly, where, at the time of the accident, a claimant is in an established job or field of work in which he was likely to have remained but for the accident, the working assumption is that he would have done so, the court taking into account any reasonable prospects of promotion and/or movement to a higher salary scale or into a better remunerated field of work. However, if a move of job or change of career at some stage is probable, it need only be allowed for so far as it is likely to increase or decrease the level of the claimant's earnings at the stage of his career at which it is regarded as likely to happen. If such a move or change is unlikely significantly to affect the future level of earnings, it may even be ignored.⁴⁸

Fourthly, in special circumstances, particularly where the chance to be assessed has been the chance that the career of the claimant will take a course leading to significantly higher overall earnings than those which it is otherwise reasonable to take as the baseline for calculation, the English courts have preferred what is called the 'percentage loss of a chance' approach to the assessment of damages. This may be particularly useful to sportspersons where the loss of chance to pursue a highly lucrative, albeit abridged, career as a professional is aggravated by the fact that opportunities to sustain such a career in sport are lim-

ited. The percentage loss of chance technique was applied in *Langford v Hebran and another* (2001)⁴⁹ where damages had to be assessed in light of the fact that the appellant might have become a highly successful full-time kick-boxing champion, rather than a bricklayer with five fights a year at what might be called 'journeyman level'.⁵⁰

In *Langford*, the claimant was awarded damages of £423,133 for personal injuries sustained in a road traffic accident in December 1994 for which liability was admitted. The award consisted of £57,379 plus interest for past and £326,368 for future loss of earnings. The defendant appealed the damages award on the grounds that the trial judge, Klevan J, had made a number of assumptions not supported by the evidence. In particular, the defendant argued that Klevan J had overvalued the claimant's loss attributable to his prospective career as a kick-boxer.

At the date of the accident, the claimant was aged 27 and had been working as a trainee bricklayer for four to five months. The claimant supported his apprenticeship by giving training classes in kick-boxing (approximately thirty per year). Langford had had a very successful amateur kick-boxing career culminating in a world light-middleweight championship in 1994. On winning that title, the claimant had turned professional and had won his only professional fight before the accident. The injuries sustained in the accident, although permitting the claimant to participate in kick-boxing at an amateur level were, nevertheless, such that the agreed medical evidence at trial was that Langford should not pursue a professional career in the sport.

The trial judge awarded £19,000 for pain, suffering and loss of amenity. In assessing the claim for loss of earnings, the trial judge focussed on the extent of Langford's skills as a kick-boxer and how his career might have developed but for the accident. In an approach similar to that in *Doyle v Wallace* (1998)⁵¹, the trial judge awarded a basic claim plus a percentage of a number of alternative scenarios based upon prospective escalating success in the claimant's fighting career. The basic claim assumed that Langford's fighting career would last until he was 36 and that during that time he would work part-time for twenty-six weeks as a bricklayer and have five professional fights each year. It further assumed that when Langford's fighting career was over he would work full time as a bricklayer until he was 60 and would continue to hold thirty training classes a year until he was 60.

The percentage loss of chance technique was, in Langford's circumstances, applied to four alternative (and escalating) scenarios: (i) a significant chance or assumption that Langford would win at least one national or European title, thus enhancing his income from instruction after his fighting career; (ii) a significant chance or assumption that after gaining such a title Langford would move to the United States (a much more lucrative kick-boxing market) where he would win state or other titles but not a world title; (iii) a significant chance or assumption that Langford would, within a year of his move to the US, win a world title, and (iv) a significant chance or assumption that Langford after becoming world champion would remain in the United States for two years working as a professional instructor earning US\$350,000 per annum.⁵²

On taking account of the claimant's earnings or earning capacity,

42 *Ibid*, at para.26.

43 *Ibid*, at para.37.

44 *Ibid* at para.43: 'The First Defendant was, as I have said, someone who employed the Second and Third Defendants and it was not suggested that in that situation if they were liable the First Defendant was not.'

45 Magnay, J. "McCracken set to chase \$3.5m payout" *The Sydney Morning Herald*, 23 February 2005.

46 *Dixon v Were* [2004] EWHC 2273 (QB) (26 October 2004) per Gross J at para.22

47 See generally *Davies v Taylor* [1974] AC 207 at p.213 per Lord Reid. In example, see the approach taken by *Vaughan Williams LJ in Chaplin v Hicks* [1911] 2 KB 786 to a claimant's lost chance of

winning a prize and by *Griffiths LJ in Croke v Wiseman* [1981] 3 All ER 852 to a claim for loss of earnings in the case of a very young child.

48 *Herring v Ministry of Defence* [2004] 1 All ER 44; [2003] EWCA Civ 528 (10 April 2003) at para.23 per Potter LJ.

49 [2001] PIQR Q160; [2001] EWCA Civ 361 (15 March 2001).

50 See also *Doyle v Wallace* [1998] PIQR Q146 where it was deemed appropriate to assess on a percentage basis the chance that the claimant might have had a lucrative career as a drama teacher rather than the more prosaic baseline activity of clerical or administrative work.

51 *Ibid*.

Klevan J assessed the basic claim as: £28,974 (pre-trial loss); £101,651 (future loss). The trial judge then evaluated, in terms of percentage, the chances of the alternative scenarios arising as follows: (i) 20%; (ii) 40%; (iii) 30%; (iv) 10%; which equated in total to £28,405 (pre-trial loss); £224,719 (future loss).

The English Court of Appeal dismissed the defendant's subsequent appeal and broadly upheld the approach taken by the trial judge, noting that the percentage loss of chance model 'does not involve the same amount of guesstimating on the part of the judge as a broad-brush approach.'⁵³ The Court did however have two technical criticisms of the trial judge's assessment of damages. Firstly, the Court of Appeal noted that the calculation on loss of income as a professional instructor in the United States (in scenario four) was much too high and did not, for example, take into account the cost of running such a business; thus that figure was reduced by one third.⁵⁴ Second and more importantly, the Court of Appeal was concerned with the 'illogicality' of the manner in which the trial judge evaluated the percentage chance relative to each scenario. For example, scenario (i) = 20% and scenario (ii) = 40%, but, according to Ward LJ, surely the 'chance of climbing the first rung on the progressive ladder of success had to be greater than his [Langford] reaching stage 2? Surely the percentages should decrease?'⁵⁵

The English Court of Appeal preferred to assess the percentage loss of chance as follows: scenario (i), a national or European title = 80%; scenario (ii), entering the US market = 66%; scenario (iii), a world title = 40%; scenario (iv), two years as a world champion/instructor in the US = 20%, factoring in the uncertainty associated with Langford having to move his wife and family from the UK to the US for the period.⁵⁶ Although the Court of Appeal accepted that Langford was a sufficiently proven kick-boxer so highly regarded by the experts that his chances of success were real and not 'fanciful', the Court of Appeal still felt obliged to reduce the damages for future loss of earnings by a further 20% in recognition that, given the vicissitudes of life, none of Langford's ambitions might ever be realised.⁵⁷

In sum, the Court of Appeal's calculations produced figures £11,677 less than the trial judge ordered. Bearing in mind that (a) in England the Court of Appeal should not ordinarily interfere with an assessment of damages unless the figure awarded at trial is 'entirely erroneous' and (b) the trial judge's approach, no matter how illogical in a technical sense, must be viewed against the advantage of being exposed to the entire factual and legal circumstances of a trial hearing, the Court of Appeal concluded that it would not amend the award and accordingly dismissed the appeal.⁵⁸

In sum, as Tim Kevan, the leading practitioner on sports injuries claims in England, suggests, the process by which damages are evaluated in a sporting context is not readily identifiable.⁵⁹ It is often reflective of nothing more than the 'indefinable yet vital feel for the case' that trial judge experiences.⁶⁰ Nevertheless, the merits of the percentage loss of chance approach to an injured sportsperson's future loss of earnings are evident in that it allows for a comprehensive review of a professional sportsperson's precarious but potentially lucrative career path.⁶¹ In any event, irrespective of whether the board brush /career path model or the percentage loss of chance model is definitively adopted by the English courts, clubs must be aware that the vicarious liability that attaches for the negligent actions of their employees in the course of their employment might have significant and adverse financial consequences.

3. Todd Bertuzzi

In December 2004 a Canadian provincial court in British Columbia overheard the prosecution of Todd Bertuzzi of the NHL's Vancouver Canucks, for an alleged assault on an opponent, Steve Moore of the Colorado Avalanche.⁶² The incident which had its origins in a series of games between the sides in February/March 2004 culminated in Bertuzzi attacking Moore in retaliation for some aggressive play by Moore in a previous game. Moore was hospitalised with three fractured vertebrae, facial cuts, post-concussion symptoms and amnesia after the incident.⁶³

It seems that what occurred was that in the first game in Denver

Moore hit the visiting Vancouver captain, Markus Nausland, causing Nausland to miss three games with concussion. Although Moore was not penalised during the game, some Vancouver players spoke afterwards to the media about seeking retribution. A few weeks later the teams met in Denver without incident. On 8 March 2004, the teams met in Vancouver. Moore was roughed up early on by a number of Vancouver players, and it appears that the Canucks were interested more in vengeance than victory. Into the third period, and now losing 8-2, Vancouver's Todd Bertuzzi, a close friend of Nausland, punched Moore on the side of the head from behind, jumped on Moore's back and drove him face first into the ice. Bertuzzi, a physically imposing player weighing over 100kgs, inflicted grievous injuries on Moore, who had to be hospitalised with three fractured vertebrae, stretch nerves in the spinal area and facial cuts. Moore also suffered post-concussion symptoms and amnesia after the incident.

At trial, Bertuzzi pleaded guilty to criminal assault and was given a conditional discharge. He was also been suspended indefinitely from the NHL. Moore, who always held that if he could recover medically and play again he would not pursue a civil action, has recently filed a lawsuit, for unspecified damages, against Bertuzzi and the Vancouver club in Denver District Court. Interestingly, Moore, who was not resigned by his club, is accusing Bertuzzi of assault and battery, negligence and civil conspiracy with the lawsuit listing a number of other Vancouver players and the coach, presumably on the grounds that the Vancouver team and management had designed a concerted plan to target Moore and 'take him out'.⁶⁴

The supplementary civil conspiracy element of the claim is interesting in its potential use and impact in cases concerning sports violence. To establish a civil conspiracy in Colorado, Moore will have to demonstrate: (i) the involvement of two or more persons; (ii) an object to be accomplished; (iii) a meeting of minds on the object or course of action; (iv) an unlawful overt act; and (v) damages as to the proximate result.⁶⁵ The definition prompts three points of note. Firstly, the court should not infer the agreement necessary to form a conspiracy; evidence of such an agreement must be presented by the plaintiff.⁶⁶ Second, the purpose of the conspiracy must involve an unlawful act or unlawful means; a party may not be held liable for doing in a proper manner that which it had a lawful right to do.⁶⁷ Thirdly, as is elsewhere in the United States, the essence of a civil conspiracy claim is not the conspiracy itself but the actual damages resulting from the acts done in furtherance of the conspiracy.⁶⁸

52 The other three scenarios assumed the same career after his fighting career as the basic claim, see *Langford v Hebran* and another [2001] EWCA Civ 361 (15 March 2001) at para.7 *per* Ward LJ accepting a report from a forensic accountant.

53 *Ibid.*, at para.15 *per* Ward LJ.

54 *Ibid.*, at para.16.

55 *Ibid.*, at para.17.

56 *Ibid.*, at para.29.

57 *Ibid.*, at para.33.

58 *Ibid.*, at para.35.

59 See generally Kevan, T. *et al Sports Personal Injuries: Law and Practice*, London: Sweet & Maxwell, 2002.

60 *Langford v Hebran* and another [2001] EWCA Civ 361 (15 March 2001) at para.35 *per* Ward LJ.

61 *Cf* Raitt v Lunn [2003] EWCA Civ 1449 (22 October 2003) at para.23 *per* Potter LJ on the 'speculative' nature of the percentage chance calculation. The case concerned damages arising from a dog bite suffered by a professional golfer, which had resulting in the loss of a finger. The accident occurred at a critical point in the claimant's career, he having turned professional only a few months earlier and being about to enter the full golf season in an effort to qualify for the PGA European Tour.

62 R v Bertuzzi [2004] BCJ No. 2692; 2004 BPC 472; 2004 BCC Lexis 2849 (22 December 2004).

63 On the background see Ruskin, B. and Goldsmith, L. "The Role of the Criminal Courts in Sport" (2004) 11 (5) *Sports Law Administration & Practice* 8.

64 Associated Press "Ex Avalanche Moore sues Bertuzzi for hit" *CNNSportsillustrated.com* (posted and last accessed 17 February 2005).

65 *Jet Courier Serv., Inc. v Mulei* (1989) 771 P.2d 486 (Colo.) at p.502 and *Nelson v Elway* (1995) 908 P.2d 102 (Colo.) at p.106.

66 *More v Johnson* (1977) 568 P.2d 437 (Colo.) at p.440.

67 *Contract Maintenance Co. v Local No. 105* (1966) 415 P.2d 855 (Colo.) at p.857.

68 W. Page Keeton *et al. Prosser and Keeton on the Law of Torts*, 5th ed., St Paul, Minn.: West Publishing Co., 1984 at p.324 (footnotes omitted): '...it is clear that the mere agreement to do a wrongful act can never alone amount to a tort, whether or not it may be a crime; and that some act must be committed by one of the parties in pursuance of the agreement, which is itself a tort. The gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff.'

Accordingly, where the denominated wrongful conduct is negligence (as is likely in this instance) the proper question is not whether one can conspire to be negligent but whether when two or more persons consciously conspire and deliberately pursue a common plan and design, the execution of such common plan or design results in wrongful conduct causing injury or damages.⁶⁹ Overall, is it likely that Moore be able to sustain such a claim? Will the 'omerta' of the (Vancouver) dressing room - a factor that deters many an injured sports participant from initiating legal proceedings - be such that Moore will be unable to demonstrate to the satisfaction of the court that on the stated occasion the named playing and coaching staff of the Vancouver Canucks consciously and deliberately concocted a plan to target him, the execution of which resulted in negligence causing injury of damages? The proceedings in this claim are awaited with curiosity.

In England, civil conspiracy is discussed mainly in relation to interference with the victim's economic interests. It is well established that there are two categories of civil conspiracy. One is conspiracy to injure or the tort in *Quinn v Leathem* (1901).⁷⁰ The other is conspiracy using unlawful means. To satisfy both categories, there must be a combination of two or more persons and the victim must show that he has suffered damage as a result of the conspiracy. The fundamental difference is that as regards conspiracy to injure, the conspirators' 'predominant purpose' must be to injure the victim and it does not matter whether the means used for putting the conspiracy into effect are lawful or not since it is not the character of the means deployed but the predominant purpose which underpins the cause of action.⁷¹ Although, the House of Lords has more recently confirmed the existence of the tort, it does not favour its expansion.⁷² An allegation of conspiracy to injure is 'a strong' one and it should only be pleaded where there is some credible material to support it.⁷³

In contrast, and more relevantly for instances such as that claimed by Steve Moore, for conspiracy using unlawful means it is not necessary to demonstrate the existence of a predominant intention to injure because it is the character of the means deployed that underpins the cause of action. In short, liability will attach if it is demonstrated that the means used by the conspirators in order to harm the victim were independently unlawful.⁷⁴ Theoretically at least, it would seem that a supplementary claim of civil conspiracy based on a primary claim actionable in its own right against at least one of the conspirators, such as negligence or trespass to the person, would merit consideration in any circumstance where that injury arose as *per* Moore-Abruzzi.⁷⁵

Moreover, it must be noted that a person can commit this conspiracy tort even if he does not himself use unlawful means. For example, suppose before a game that the intended victim's immediate opponent, O, agrees with his team mates and coach to inflict some kind of physical damage on the victim over an above that which is ordinarily incidental to the game is question and O carries out the plan successfully by demonstrating reckless disregard for the safety of the victim;

then all of those involved in the initial 'dressing-room agreement' will be deemed to have used unlawful means to harm the victim, even though O is the only one to have actually used unlawful means to harm the victim.⁷⁶

While the fiery and inspiration rhetoric of the dressing room is a fundamental aspect of many sports, that which leads deliberately to an unacceptably abrasive outcome, such as specifically targeting and injuring a skilled opponent, should be discouraged and may now, if sufficiently grievous, attract legal sanction for all concerned.⁷⁷

4. Conclusion

In conclusion, five points are noteworthy. Firstly, in England, the vast majority of cases in civil liability for inter-participant foul play are pursued on the grounds of negligence. The intentional element of the tort of trespass to the person is difficult to sustain when subjected to the spontaneous and robust circumstances presented by sport. In sports negligence cases, the English courts presume that an error of judgment or mistake in skill will not always mean that the player has failed to exercise the duty of care *inter alia* owed to his opponent and appropriate to the standard of care in the sporting circumstances. That presumption may however be rebutted where the evidence demonstrates that the injuring party acted in reckless disregard of the safety and dignity of the injured party in a manner that is not ordinarily incidental to the rules, nature and spirit of the game in question.

Second, where a professional player successfully demonstrates the liability of another pursuant to a career-ending (or interrupting) tackle, the subsequent award of damages may be quite substantial, a factor that should be kept in mind by the defendant-employing (and indemnifying) club. The manner in which damages for future loss of earnings as a professional sportsperson is evaluated is open to debate in England, although the 'percentage loss of chance' model that applied in *Langford* appears an attractive and flexible method of assessment.

Third, *McCracken* reminds sports governing bodies, particularly those that administer contact sports, of the need to monitor and regulate inherently dangerous practices. In Australia, the NRL is of the opinion that through its safety rules, as strictly applied and interpreted by its internal disciplinary mechanism, it has done enough to repulse any suggestion that it as an organisation could be vulnerable to liability on the issue of 'spear-tackling'.⁷⁸ That may be so, thus the repercussions of *McCracken* may be limited for Australian rugby league as a whole. However, sports organisations in England should be aware that the English Court of Appeal has held that sports bodies owe a strict duty of care to adopt rules and policies that protect the health and safety of participants.⁷⁹

Fourth, *McCracken*, in which the Melbourne Storm club was the first-named defendant, illustrates that clubs, given their greater depth of resources and probable insurance policies, will be perceived as the most appropriate defendants in actions of this nature, to the extent

69 Resolution Trust Corporation v Heiserman (1995) 898 P.2d 1049 (Colo.) at p.1055.

70 [1901] AC 495.

71 See Lonrho v Fayed [1992] 1 AC 448 at p.455 *per* Lord Bridge and Michaels v Taylor Woodrow Developments Ltd. [2000] 4 All ER 645 *per* Laddie J.

72 Lonrho Ltd. v Shell Petroleum Co. Ltd. (No.2) [1982] AC 173 at p.189 *per* Lord Diplock.

73 Douglas and others v Hello! [2002] EWHC 2560 (Ch) (3 December 2002) at para.32 *per* Laddie J. Furthermore, there is a strong justification defence in that the defendants will avoid liability if they can show that their purpose in combining together was legitimately to advance their own self-interest.

74 See generally Kuwait Oil Tanker Co. SAK v Al Bader [2000] 2 All ER (Comm) 271.

75 There is some argument as to whether the unlawful means used must have been independently actionable against at least one of the conspirators, compare Laddie J in Michaels v Taylor Woodrow Developments Ltd. [2000] 4 All ER 645 at p.666 to Waller LJ in Surzur Overseas Ltd. v Koros [1999] 2 Lloyd's Rep.611 at p.617.

76 See McBride, N. and Bagshaw, R. *Tort Law*, Harlow: Pearson, 2001 at p.356.

77 In Canterbury Bankstown Rugby League Football Club Ltd v Rogers; Bugden v Rogers (1993) Australian Torts Reps. 81-246, a rugby league footballer who was employed by the defendant football club was found to have assaulted the plaintiff during the course of a match. The New South Wales Court of Appeal held the employer club vicariously liable for the assault and made some interesting comments about the role that the defendant's coach played in inciting his players. See the comment in James, M. and McCordle, D. "Player Violence, or violent players? Vicarious liability for sports participants" (2004) 12(3) *Tort Law Review* 131 at pp.140-142.

78 See the comments of the NRL chief operating officer, Graham Annesley, in "Ruling won't impact on game: NRL" *The Sydney Morning Herald*, 22 February 2005. Note recent moves by the NRL to combat the 'grapple-tackle', see Walter, B. and Prichard, G. "NRL won't stick neck out over tackle on Stevens" *The Sydney Morning Herald*, 3 May 2005 and "NRL moves to stamp out grapple tackle" *The Sydney Morning Herald*, 9 May 2005.

79 Watson v the British Boxing Board of Control [2001] 2 WLR 1256: the BBBC, a private organisation formed for the regulation of boxing, owed a duty of care to ensure an adequate standard of ringside medical treatment for an injured boxer, including the adoption of rules and policies that would protect the health and safety of boxers. See also Wattleworth v Goodwood Road Racing Company Ltd and others [2004] EWHC 140 (QBD) (4 February 2004); [2004] PIQR P25 (QBD) where it was held that an experienced racing driver was owed a duty of care both by the motor racing venue where he crashed and died, and by the sport's national licensing body, although neither had in the circumstances been in breach of that duty. The international licensing body did not owe the deceased a duty of care, despite having provided experts to advise on track safety.

that in *McCracken*, Hulme J noted the assumed, almost automatic, nature of Melbourne's vicarious liability.

Finally, *Bertuzzi* demonstrates that the vicarious liability of professional sports clubs for the actions of their employees (coaches and players) might in certain circumstances extend to a claim of conspiracy. The actual application of civil conspiracy to sports violence remains at

a nascent and speculative stage; nevertheless it serves as a reminder to those all those involved in professional sport - managerial, coaching and playing staff - that an egregious lack of respect for the bodily integrity of an opponent and/or the dignity of the game that provides them with a living, might now attract significant legal liability.

The International Sports Law Journal

Evaluating Recent Developments in the Governance and Regulation of South African Sport

Some Thoughts and Concerns for the Future

by Andre M. Louw*

1. Introduction

Recent times have seen important and interesting developments in the state regulation of sport in South Africa, which, at least in part, have been a response to the experience of a generally poor standard of sports governance among some of the major federations and governing bodies. In fact, the South African situation provides an interesting case study of a government's regulatory response to the apparent inability of private sports administrators to adapt to the changing face of world sport, especially in respect of high level, professional and elite competition. In contrast to other jurisdictions, such as the European Union and the UK, where the law has increasingly been called to intervene in sport because of its successful growth and increased economic significance (and impact on the rights of individuals), in South Africa it seems that the significant measure of intervention experienced in recent times has been a response to the general malaise among those governing sport in adapting to the globalised economy of modern sport.

This note will briefly consider developments in South African sport, with the focus on private governance and the regulatory response by government. The limited discussion does not allow for any in-depth analysis of the issues touched upon, although it is hoped that major developments are sufficiently highlighted in order to provide those who are unfamiliar with South African sport with a useful overview. The discussion will also, due to the limited scope, focus specifically on the three major (professional) sports in South Africa, namely rugby union¹, football² and cricket³.

I will argue that the main characteristics of South African sport in recent times have been the generally poor standard of private governance, as well as a trend in government regulation towards active and rather drastic intervention in the traditionally accepted autonomy of sports governing bodies, where such intervention has mainly occurred in the context of the SA government's agenda of racial transformation in society, generally, and sport, more specifically. In the concluding section, I will attempt to extrapolate a number of problems and potential problems regarding the status quo, especially as it relates to new structures of regulation, in order to pose some questions regarding expectations for the future of South African sport.⁴

While I will argue that poor standards of private governance might necessitate a measure of pro-active regulatory intervention, certain problems relating to poor planning and conceptualization, and largely incoherent policies and measures (especially in respect of the central issue of sports transformation), are serving to shape a sports regulatory system that is unique to South Africa. I will argue that this system is out of step with developments and trends elsewhere. It might be time for stakeholders in international sport, especially international governing bodies, to take heed of these developments and to consider steps to assist in addressing the problems experienced by a system faced with monumental challenges.

2. The South African sporting landscape post 1994: Re-admission, unification and regulation

South African sport during the last few decades of the 20th century was characterized by exclusion and isolation on the world stage due to domestic state policies.⁵ The governance of sport, as so many facets of South African life, was essentially racially aligned in a proliferation of 'official' federations and governing bodies representing the interests of specific groups. Sports bodies representing the interests of 'non-White' athletes had been forced, by the all-pervasive segregationist policies of the National Party government, to develop their own structures and cultures.⁶ These bodies were in an unenviable position in respect of their efforts to obtain recognition and to establish power bases in the milieu of South African domestic as well as international sport. It is ironic to note that the very nature of international sports governing bodies and one of the prime pillars of their governance

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1 At the time of writing, the South African national rugby team (the 'Springboks') is rated no. 2 in the world (Source: International Rugby Board, world rankings 6 February 2006). South Africa has the 2nd highest number of participants in this sport in the world (around 582 000), and accounts for around 30.3% of all rugby players - see the document entitled 'The RFU's Environment', available on the web site of the English Rugby Football Union as http://www.rfu.com/pdfs/strategic_plan/environment.pdf (last accessed 9 February 2006).

2 At the time of writing, the South African national football team ('Bafana Bafana') is rated no. 49 in the world (Source: FIFA, world rankings January 2006).

3 At the time of writing, the South African national cricket team (the 'Proteas') is rated no. 3 in the world in One Day International cricket, and no. 6 in the Test championship (Source: International Cricket Council / LG ranking, February 2006).

4 I will use the terms 'governance' and 'regulation' in the following meanings: 'Governance' will relate to issues of

power and procedure within a sport and the organisations controlling and administering such sport. 'Regulation' will refer to outside supervision of such governance, specifically by the state and agencies of the state - borrowed from Gardiner, S; James, M; O'Leary, J et al *Sports Law* 2nd Edition Cavendish Publishing, London 2001 at 42.

5 The international condemnation of apartheid culminated in measures to exclude South African athletes (especially the traditional 'white teams' in the major sports of rugby union and cricket) from international competition. Specific measures included the Gleneagles Agreement (Commonwealth Agreement on Apartheid in Sport, 1977) and the International Convention against Apartheid in Sports (1985) - see the discussion by Valerie Collins *Recreation and the Law* E & FN Spon 1984 at 3-4. For a brief history of the influence of politics in sport in South Africa, see Jarvie in Jarvie, G (ed) *Sport, Racism and Ethnicity* Falmer Press 1991 at 175 - 189; John Nauright *Sport, Cultures and Identities in South Africa* David Philip, Cape Town 1997 at 124 et seq.

6 For a discussion of developments in South African cricket, see Vahed, G 'What do they know of cricket who only cricket know?' *Transformation in South African cricket, 1990-2000* *International Review for the Sociology of Sport* 36/3 (2001) 319 at 320 et seq.

structure (namely the principle of a monopolised national recognition system - only one sports federation is recognised per country), served to further exacerbate the problems experienced by 'non-White' athletes in South Africa during the apartheid era. While sports federations were hard at work formulating and enforcing a sports boycott against the 'apartheid teams', new Black 'national federations' formed in the post war era could not obtain international status. International federations recognised only one affiliate per country, and recognition in the case of South Africa already belonged to the established 'White' controlling bodies.⁷

Throughout this period, sport and politics were inextricably intertwined.⁸ Apart from international instruments and measures applied to boycott South African teams' participation outside our borders⁹ and the frequent political unrest and protests that accompanied our tours on foreign soil, the regime also used sport in the 1970's as a tool to try and regain respectability and reverse the trend towards isolation.¹⁰

Following South Africa's re-entry into the fold of international sporting competition in late 1991¹¹, and the first post-apartheid democratic elections in April 1994, the landscape of South African sports governance was predictably characterized by a process of rationalization and unification of the previously racially aligned sports bodies. There was increasing recognition of the need for 'nation-building' also in the context of sport, and of the urgent need to ensure the legitimisation of control over sport.¹² This process was especially evident in cricket, one of the major sports (and which had also been a specific flashpoint of international controversy during the apartheid years¹³), where the early 1990s saw the establishment of a new, unified, national governing body, the United Cricket Board of South Africa.

During this same period of rebuilding after 1994, state regulation of sport assumed a more structured guise through the introduction of a White Paper on Sport and Recreation in 1998, which called for new legislation to solidify government's regulatory framework in sport. The legislation that followed was the National Sport and Recreation Act¹⁴ and the South African Sports Commission Act¹⁵, both passed in 1998.

The White Paper had the theme of 'getting the nation to play', and dealt with sport in all its forms and levels of participation (namely mass participation, recreational sports and elite and professional sport). The basic thrust of this policy document (in terms of the structures for governance and regulation of sport) was the following:

- Overall responsibility for policy, provision and delivery of sport resides with the Department of Sport and Recreation (or DSR, now Sport and Recreation South Africa);
- Parliament has the principal responsibility for defining government policy, legislation and budget allocations - this responsibility is exercised through the Minister of Sport and the DSR, with the Parliamentary Portfolio Committee on Sport and Recreation fulfilling a monitoring role in respect of the governance of sport in line with such government policy; and
- A number of 'lead agencies' were identified, with specified contrac-

tual obligations in respect of the delivery of sport and recreation in line with government policy - these were the National Sports Council (NSC), the National Olympic Committee (NOCSA), the SA Commonwealth Games Association (SACGA), and the national federations in the different sporting codes.¹⁶

The White Paper further identified the lack of a specific empowering statute as a major factor hampering the DSR and the Ministry's authority to discharge its mandate, and was viewed as providing the framework for enabling legislation in order to achieve its goals relating to a number of key priorities. These priorities were identified as relating to development, transformation, funding for the upgrading of facilities in disadvantaged communities, encouraging mass participation in sport and recreation and the development of active lifestyles, and to develop a high performance programme geared towards the preparation of elite athletes for major competitions.

The two 1998 statutes established the SA Sports Commission (SASC) as the prime overall coordinating body for sport and recreation. The SASC would be a juristic person, funded by Parliament by means of an annual budget, and charged with performing its role under the guidance of and in consultation with the Minister of Sport and Recreation. The SASC would consist of a General Assembly, made up of representatives of national federations and multi-coded sports organizations, a number of members elected by such General Assembly and a number of members appointed by the Minister.

The Minister of Sport was charged with the power to determine general sport and recreation policy, after consultation with the SASC or the National Olympic Committee of SA (in respect of the Olympic Games). Policy so developed by the Minister would be binding on all sport and recreation bodies in SA, including national federations.

The legislation further provided that national federations would be members of the SASC, if they met the Commission's recognition criteria.

Finally, the SASC was provided with wide powers (and duties) in respect of advising the Minister on issues relating to sports and recreation policy, as well as powers in respect of funding of federations and other sport and recreation bodies.

The system established in terms of these two Acts placed extensive powers relating to the development and promotion of government sports policy in the hands of the Minister and the SASC. In respect of the national federations, this meant that they were now constrained in the performance of their private governance functions to align such governance with government policy. In fact, the legislation provided specific mechanisms to ensure compliance by federations, of which the following are examples:

- The SASC was empowered to determine recognition criteria for membership by national federations, and to withhold membership (sec 5, National Sport and Recreation Act);
- The lever of funding could be used by the SASC to encourage federations to toe the line, e.g. in respect of transformation (see section 10, National Sport and Recreation Act); and

7 See Bruce Murray & Christopher Merrett *Caught Behind: Race and Politics in Springbok Cricket* Wits University Press 2004, at 67; for discussion on the sports boycott, generally, see 63 *et seq*; Nauright *op cit.* at 124 *et seq*.

8 For a brief history of the influence of politics in sport in South Africa, see Gouws, J *Sport Management: Theory and Practice* Knowledge Resources 1997 at 184-189; Jarvie in Jarvie, G (ed) *Sport, Racism and Ethnicity* Falmer Press 1991 at 175 - 189; Mpati 'Sport and Politics', in Basson & Loubser *Sport and the Law in South Africa* Butterworths (looseleaf) CH 2-1 *et seq*, John Nauright *Sport, Cultures and Identities in South Africa* David Philip, Cape Town 1997 at 124 *et seq*.

9 See note 5 above

10 'Sport increasingly proved a means by which the government chose to display to the international community that it was prepared to adapt and reform.'

John Gemmell *The Politics of South African Cricket* Routledge, London 2004, at 77.

11 The International Olympic Committee readmitted South Africa on 9 July 1991, after the country had been expelled by the IOC in 1970 with a 35:28 vote (the IOC had earlier, in 1964, withdrawn South Africa's invitation to participate in the Tokyo Olympic Games); South African cricketers became the first team to play in official international competition in November 1991, with a hastily organised tour to India to replace the Pakistan team

who had withdrawn from their Indian tour due to threats by anti-Muslims.

12 For a discussion of developments in this regard in SA cricket, see Vahed *op cit*.

13 E.g. see the events concerning the aborted England cricket tour to South Africa in 1968, where the apartheid government objected to the inclusion of 'Coloured' expatriate player Basil D'Oliveira in the English team - see the discussion in Booth *The Race Game: Sport and Politics in South Africa* Frank Cass Publishers, London (1998) 95. The 1980s also saw a number of rebel tours by unofficial foreign teams, which led to a spate of disciplinary action by member boards of cricketing countries. The members of Graham Gooch's 'South African

Breweries English XI' of 1982 were banned from Test cricket for three years. The Sri Lankan rebels of 1982/83 were suspended from domestic cricket in any form in their own country for 25 years. The West Indies team, who toured twice in the 1982/83 and 1983/84 seasons, were banned for life (although several players continued their careers in South Africa and England). See Murray & Merrett *Caught Behind* at 208-9.

14 Act 110 of 1998

15 Act 109 of 1998

16 The national federations in the three major sports in South Africa are the SA Football Association (in football), the SA Rugby Union and the United Cricket Board of SA.

- The SASC would, through its National Colours Board (established by regulation) control the awarding of national colours to representatives of national federations.

The main area where intervention in the autonomy of sports federations (especially by the Minister) came to the fore during the past few years has been in respect of the overarching policy objective of transformation. Government policy on transformation runs like a golden thread through the provisions of the legislation, and has been the staging ground for the most visible form of active government intervention in private sports governance in recent years. More will be said on this later.

3. Recent developments in the restructuring of sports regulation

Following South African athletes' poor performance at the Sydney Olympics in 2000¹⁷, the former Minister of Sport, Mr. Ngconde Balfour, appointed a Ministerial Task Team to investigate the state of high performance sport. The team's remit was to make recommendations to address factors that impact negatively on SA teams' and athletes' sporting performances in international competition.

The Task Team's report identified a number of fundamental problems, which related mainly to the dysfunctional fragmentation of governance structures in sport and recreation, and which contributed to duplication and replication of functions and wasteful expenditure. It was specifically recognized that the Department of Sport and Recreation was challenged in respect of its capacity to deliver, specifically on the mass participation mandate envisaged by the White Paper (e.g. in the provision of infrastructure and facilities, etc). The report recommended that sports governance structures should be rationalized, in line with the 1998 White Paper's first key priority.¹⁸

Cabinet endorsed the report's recommendations on 25 June 2003, proposing the establishment of only two regulatory structures for sport and recreation, namely an expanded Department of Sport and Recreation, and a new non-governmental umbrella sports structure. A Steering Committee was appointed to implement the Cabinet decision. After wide consultation, it was recommended that the new structure be established in two General Assemblies. For this purpose, a co-operation agreement was signed on 19 August 2003 between the various existing overarching or 'macro-sports' bodies, including the SA Sports Commission (which apparently acted in this regard as a representative body of its then members, the national sports federations). This process led to the establishment of the new umbrella body, the South African Sports Confederation and Olympic Committee (SASCOC).

SASCOC was established on 27 November 2004, to replace the SA Sports Commission.¹⁹ This process was accompanied by the passing of the SA Sports Commission Repeal Act, in 2005. Since 1 April 2005, SASCOC has assumed the role of the supreme sports governing body in the country.

SASCOC and the government sport department (Sport and Recreation SA) have now each been allocated specific functions. The SRSA has taken responsibility primarily for grassroots, mass-based, community-oriented sport and recreation activities. SASCOC has taken responsibility for South Africa's high performance sports pro-

gramme, taking over the functions performed in this regard by the previous DISSA²⁰, NOC²¹, SACGA²², USSASA²³, SASSU²⁴, SASC and Department of Sport and Recreation.

SASCOC was established as a section 21-company²⁵ (non-profit organization). It is proclaimed to be the 'supreme non-governmental macro sports body' in South Africa. The organization is publicly funded through the Ministry of Sport, as well as through Lottery awards and the sourcing of private sponsorships.

The SA Sports Confederation's specific mandate relates to the promotion and development of high performance sport²⁶, and includes responsibility for the preparation and delivery of Team South Africa to multi-sport international games such as the Olympics, Paralympics, Commonwealth Games, World Games and All Africa Games²⁷; affiliation and/or recognition by the appropriate international, continental and regional sports organizations as the recognized entity for the Republic of South Africa²⁸; the establishment, monitoring, coordination and management of an academy system for sport²⁹; the selection (on recommendation from national federations) of multi-sport teams for international and representative competitions at all levels³⁰; and overseeing the bidding for and hosting of major and international sporting events³¹ (including the power to withhold approval to national sports federations or persons registered with such federations to participate in multi-sports events at national and international level³²). Amongst the quite significant powers of SASCOC *vis à vis* national sports federations in the execution of their private governance functions in their respective sporting codes, is the power (through the organisation's National Executive Board) to inquire into the administrative and/or financial affairs of member federations and, where necessary, to recommend corrective measures in this regard (and even to make recommendations to take over the administrative and/or financial affairs of a member until such affairs are put on a satisfactory footing); as well as the power to award national colours to federations and sports persons.³³

More will be said later on the quite substantial powers of this new regulatory body, in the evaluation of state regulation of South African sport in terms of the current system. In order to properly evaluate such regulation, however, it is necessary to briefly consider the recent experience of governance of South African sport by the major private sports federations and governing bodies.

4. Beyond 2000: Adventures and misadventures in South African sports governance

Recent years, especially since 2000, saw both minor tremors and major upheavals in the landscape of private governance of sport in South Africa. Promising performances throughout the 1990s by the national teams in the major sports of football³⁴, rugby³⁵ and cricket³⁶, immediately following the country's re-admission to world sport, failed to provide a platform for the growth and development of a sustained culture of success in SA sport. This was especially evident as it became clear that those governing and participating at the top levels were struggling to get to grips with the changing face of world sport, where developments included the increased influx of big money and the widespread and increasing moves towards professionalism.³⁷ Accompanying the international corruption scandal that had its nadir

¹⁷ Athletes from Team South Africa managed to win only 2 silver and 3 bronze medals

¹⁸ Priority 1 of the White Paper (1998) provides as follows: 'To confirm roles and streamline the responsibilities of the various stakeholders in sport and recreation to ensure that coordination and economies of scale are realized'.

¹⁹ This process was accompanied by the passing of the South African Sports Commission Repeal Bill, 2005

²⁰ Disability Sport South Africa

²¹ The National Olympic Committee of SA (now incorporated in SASCOC)

²² The SA Commonwealth Games

Federation

²³ The United School Sports Association of SA

²⁴ The SA Students' Sports Association

²⁵ In terms of the Companies Act, 1973

²⁶ 'High performance sport' is defined in article 1.24 of SASCOC's Articles of Association (filed in terms of section 60(1) and regulation 18 of the Companies Act, 1973) as 'the high level participation in major, international sporting events including but not limited to world championships and other international multi-sport events such as Olympic Games, Commonwealth Games, Paralympic Games and All Africa Games'.

²⁷ See section 2 of SASCOC's

Memorandum of Association (filed in terms of section 54(1) and regulation 17(3) of the Companies Act, 1973)

²⁸ Section 4.2 of SASCOC's Memorandum of Association

²⁹ SASCOC Memorandum sec. 6.3.2

³⁰ SASCOC Memorandum sec. 6.3.3

³¹ SASCOC Memorandum sec. 4.4

³² Article 21 of SASCOC's Articles of Association

³³ SASCOC Memorandum sec. 6.3.1

³⁴ 'Bafana Bafana', the national football team, won the African Cup of Nations tournament in 1996, against some of the powerhouse teams of African football.

³⁵ South Africa not only managed to successfully host its first IRB Rugby World Cup in 1995, the Springboks, the national rugby team, won the tournament by beating the New Zealand All Blacks in the final.

³⁶ The SA national cricket team managed to reach the semi-finals of the ICC Cricket World Cup in 1992, immediately following South Africa's re-admission to world cricket late in 1991, and quickly established itself in the 1990's as one of the top teams in the world.

in South African cricket in 2000, were increasing and very public examples of mismanagement and poor governance in South African sport³⁸, which, sadly, are still prevalent at the time of writing.

Most recently, the SA Rugby Union has been embroiled in an ongoing and very public saga of sporadic 'palace revolutions' among the higher echelons of the organization. The casualties of these developments have been a number of senior officials of the Union, who have resigned for a variety of reasons related to allegations of mismanagement, double-dealing and poor governance of the affairs of rugby. In April 2005, the president of the newly established SA Sports Confederation (SASCOC)³⁹, Moss Moshishi, threatened to appoint a three-man team to take over the reins at SARU. Matters appear to be coming to a head at the time of writing: August 2005 saw the publication of a damning 338-page report by SARU's in-house lawyers (the 'Heunis / Brand report'), which focused its findings on alleged mismanagement by the Union's president, Brian van Rooyen, as well as other instances of breakdown in the decision making structures of SARU.⁴⁰ In October 2005 it was announced that former SA cricket supremo, Dr. Ali Bacher, has been appointed to the Board of the SA Rugby Union by the major sponsors of rugby, in order to oversee their substantial interest in the game and to contribute towards rationalizing the governance of the Union. According to recent reports, Bacher's intervention to date has included the brokering of a deal with SARU president van Rooyen, whereby van Rooyen has allegedly undertaken to withdraw from the race for the presidency during elections to be held in February 2006, in return for the Union abandoning its investigation into irregularities based on the Heunis / Brand report.⁴¹ At the time of writing, there are calls for a Ministerial Committee of Inquiry into the affairs of SARU, or even the possibility of a judicial inquiry with presidential approval.

South African cricket is also currently embroiled in persistent rumours surrounding the poor financial position of the United Cricket Board. This follows a commission of enquiry instituted by the General Council of the UCBSA, which investigated and ultimately cleared UCB CEO Gerald Majola of alleged misconduct connected with misappropriation of funds by the previous General Manager: Finance and Administration. It appeared from this enquiry that the organization had for a significant amount of time been operating with very little in the way of written policies and procedures relating to the financial affairs of the Board, while it also appeared that there were a number of instances of senior officials holding financial interests in companies that provided goods or services to the UCB.⁴²

In football, it appears that the period from 2000 to the present has not seen much improvement over the troubles experienced by those governing the sport in the late 1990s. In 1999 former Minister of Sport, Mr. Ngconde Balfour, had given the SA Football Association an ultimatum to get its house in order or face intervention by government to run the sport. This followed a period of media reports of prolonged irregularities in SAFA's governance, especially in respect of the Premier Soccer League - this included reports of personality clashes between top officials in the League, allegations of kidnapping and death threats, and of financial irregularities.⁴³ At the time of writing, many commentators are expressing doubts about expectations for

SAFA's successful hosting of the 2010 FIFA World Cup, especially following the SA national team's dismal performance in the 2006 African Cup of Nations tournament.⁴⁴

Apart from the above examples, there have been countless reports of management problems in many South African sporting codes. While it appears that the executives in control of our major sports are starting to experience an attrition rate comparable to that among national team coaches⁴⁵, the general perception of apparently systemic incompetence, corruption and widespread dissatisfaction with those at the top is proving to be a hard pill to swallow for a sports-mad nation.

5. Evaluating the nature, role and legitimacy of the SA Sports Confederation and Olympic Committee (SASCOC) as regulatory agency in respect of high performance sport

The discussion in section 3 above has focused on recent developments in the government regulation of South African sport, and especially the process of splitting the functions of regulating sport between the existing government sport department and the new umbrella body of SASCOC. In order to evaluate this process and the expected role of the new structure, it is necessary to first consider the nature of SASCOC as an entity within the regulatory system. I will do so by focusing on its establishment and the powers it purports to hold in respect of the regulation of sport, especially in connection with the control over sports federations and governing bodies - which function, in line with the traditional notion of the nature of such bodies, as private organisations. In the discussion I will raise a number of questions regarding the legitimacy of SASCOC as a new regulatory body in SA sport.

5.1. The nature of SASCOC as a regulatory entity

The SA Sports Confederation and Olympic Committee was established as a company without a share capital, in terms of section 21 of the Companies Act of 1973.⁴⁶ This type of company is an association not for gain (or non-profit organization); a company incorporated not for commercial purposes but having as its main object the lawful promotion of religion, art, science, education charity, recreation, or any other cultural or social activity or communal or group interests⁴⁷ (in this case relating to sport). In terms of South African law, a company is essentially a partnership of which the shareholders (or members) are partners, but with a very different juristic nature - through incorporation (and obligatory registration under the Companies Act) a corporation is not simply an association of individuals but a separate juristic person.⁴⁸

The basis for incorporation of a section 21-company is found in the agreement between its members, the memorandum of association registered in terms of the Companies Act. The memorandum is the charter of the company, which 'defines the limits beyond which the company cannot go and serves as public notice, on registration, of facts of primary importance about the company in which persons dealing with it are interested and such persons are deemed to have constructive notice of the contents'.⁴⁹ The memorandum states (*inter alia*) the purpose for which the company is incorporated and the main object

37 E.g. in rugby union, which only officially embraced professionalism in 1996. For an interesting discussion of the problems faced in SA rugby, see 'Turning Buffalo into Businessmen', in Mark Keohane *Springbok Rugby Uncovered: The Inside Story of South Africa's Rugby Controversies* Zebra Press, Cape Town 2004 (at 19 *et seq*)

38 See, for example, the discussion by Le Roux, R '2003: Annus Horribilis for South African Sport?' *International Sports Law Journal* 2004/1-2 47

39 See the discussion in section 5 below

40 The Heunis/Brand report, entitled 'Report on the Investigation into Complaints Lodged with the South

African Rugby Union', dated 16 August 2005, is available online on the SA Rugby Union's web site at <http://images.super-sport.co.za/SARUReportFinalAugust2005.doc> (last accessed 2 November 2005).

41 Although it appears that van Rooyen has subsequently denied these reports

42 See the report of a UCBSA media release available online at <http://www.vivacrick-et.co.za/html/news2074.shtml> (last accessed 3 November 2005)

43 E.g. see the report entitled 'Balfour lays down law to soccer bosses', *Dispatch Online*, 27 November 1999 - available online at <http://www.dispatch.co.za/1999/11/27/sport/AABALFOU.HTM> (last accessed 3

November 2005)

44 The SA team lost all 3 its group matches in the tournament and failed to score a single goal, prompting the coach (Ted Dimutru, who was subsequently axed) to remark that the team failed to meet even the lowest expectations of the SA footballing public. It also failed earlier to qualify for the FIFA World Cup 2006 in Germany.

45 The national football team, 'Bafana Bafana', has had 12 coaches in the last 13 years (dubbed the 'Dirty Dozen' by some - see the report entitled 'SAFA's record speaks for itself: Phillips', available online on the web site of the South African Broadcasting Corporation at

<http://www.sabcnews.com/sport/soccer/0,2172,120907,00.html> (last accessed 10 February 2006)). The position of national rugby coach post 1994 has also not been synonymous with job security.

46 Act 61 of 1973 (as amended)

47 Companies Act section 21(1)(b)

48 See *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530; *Webb & Co Ltd v Northern Rifles* 1908 TS 462; and *Gibson South African Mercantile and Company Law* 8th Edition Juta & Co Ltd (2003) at 259 *et seq*; *Bamford The Law of Partnership and Voluntary Association in South Africa* 3rd Edition Juta & Co Ltd (1980) at 229 *et seq*.

49 *Gibson op cit* 275

it is to promote. Along with the memorandum, a company must also register its articles of association, which are the internal regulations of the company and subordinate to the memorandum.

From the above it is clear that the provenance of a company (also a section 21 company) remains essentially private in nature; companies are commercial or non-profit entities that function in civil society, distinct from the organs of the state. Apart from the requirements and benefits (in respect of separate legal personality) associated with legislatively prescribed registration of the entity, it remains based in the private agreement between the members.

This raises the interesting question of the exact status and legitimacy of SASCOC, a section 21-company, within the regulatory framework of South African sport. In my view there are legitimate concerns regarding the infusion of an essentially private body into the state regulation of sport, which body received state-sanctioned authority to regulate the administration of sport by private federations and sports governing bodies. In a nutshell, my concerns relate to the following characteristics of this body:

- Government, by way of the Minister of Sport and the Ministerial task team appointed in 2001, proposed the establishment of the body in order to take exclusive control of a key regulatory function of the state (namely as such regulation relates to high performance sport⁵⁰);
- The establishment of the body also received Cabinet approval by the legislature, although it is not a statutory body established by means and in terms of legislation;
- The basis for the establishment of this body lies in a cooperation agreement signed by a number of the previous sports governing bodies - most significantly the previous SA Sports Commission, which was a statutory entity⁵¹ aligned with the government sports department and had as its members national sports federations that had been accepted for membership by the SASC upon application and having satisfied certain recognition criteria set by the SASC;
- SASCOC purports to be a non-governmental organization, but receives a significant part of its funding from government (namely an annual budget allocated by Parliament and distributed through the government sports department - the other sources of funding of the organization are lottery awards and the sourcing of private sponsorships);
- SASCOC was constituted as a company, a private entity of civil society, of which the self-governing board is accountable to its members; and
- While SASCOC therefore appears to be founded upon the private law institutions of contract and agency (namely through the previous SASC's representation of private sports federations in establishing the company), it clearly exercises or purports to exercise (quasi) public powers and authority in fulfilling the government mandate of sports regulation.⁵²

In light of these facts, one is left with the impression that government has apparently 'contracted out' its legislative and executive authority to regulate high performance sport, to a private, non-statutory, institution. It is submitted that this raises valid questions as to the legitimacy of such conduct and of the authority vested in this body, especially in light of international trends in the regulation of sport.

The questions relate to a number of aspects of the regulatory function purported to be performed by SASCOC. Firstly, one must ask what real authority this body has to perform the functions and exercise the powers it is clothed with in terms of its articles of association. Mention was made above of the quite extensive powers SASCOC may assume in respect of regulating sports governing bodies' and federations' control and administration of sport and of sporting competitions at the level of 'high performance sport'. These include the power to actively intervene in the day to day running of a federation and of its financial affairs, the power to withhold rights to participation and rights in respect of hosting events, the power to award or withhold national colours and the power to liaise with international and other sports governing bodies as the recognized entity for high performance sport in the Republic. Clearly these powers place the

organization squarely at the forefront of control over top-level sport and its administration. But one must ask whether an essentially private organization with SASCOC's pedigree can legitimately take this role. Are these powers not strictly *ultra vires* a state-sponsored but private body, in as far as they affect the private governance of sport in terms of the traditional notion of sports federations as being private associations based upon the principle of voluntary association, which perform private functions and exercise private powers?⁵³

Secondly, when one considers the nature of the regulatory function prescribed to SASCOC, it is clear that the powers appear to be public in nature. While it is apparently accepted in other jurisdictions⁵⁴ as well as in South African law⁵⁵ that private sports federations and governing bodies often exercise quasi-public powers, the authority for such federations' exercise of these powers can at least be traced to contracts with their members. One must ask whether a body such as SASCOC can legitimately exercise regulatory powers based, apparently, only on state sanction. Where legislative authority is absent, on what other basis can SASCOC justify its extensive powers of regulation?

But the questions do not end there. It is also submitted that the very structure of internal decision-making within SASCOC and the exercise of its regulatory authority are suspect. My main concerns here relate to what I believe to be a significantly coercive element in the membership of the organization, as well as the fact that the system of voting rights allocated to member federations appears to deny or ignore the status and nature of the sports federations in the major elite and professional sports within the wider framework of South African sport.

5.2. Membership of SASCOC by sports federations and governing bodies

SASCOC is declared to have as its members the national and provincial sports federations governing the different sports codes. Membership occurs through application by federations and recognition by SASCOC. While this sounds like an ideal forum for South African sports federations to organise themselves collectively to promote collective and democratic decision-making in the best interests of high performance sport, there are a number of concerns relating to the very issue of membership.

The first concern is that there appears to be a very coercive element to such membership. If one accepts that SASCOC is in essence a private body, founded on the principle of contract and voluntary association by its members, it is troubling to see the extent to which sports federations are apparently forced to affiliate with the company. National federations are obliged to apply for recognition by SASCOC, and for membership of the General Assembly.⁵⁶ One might ask a pertinent question: What is the incentive for a federation to so subject itself to this private regulatory body?

The simple answer is the following:

- SASCOC has the authority to grant, and withhold, national

⁵⁰ For a definition, see note 26 above

⁵¹ Established in terms of Act 109 of 1998 - see the discussion in section 2 above

⁵² E.g. in terms of art 4.2 of SASCOC's memorandum of association one of its ancillary objects included in its main object is to be recognised by the appropriate international, continental and regional sports organisations for high performance sport and to act as the recognised national entity for the Republic of South Africa.

⁵³ As for recent judicial acceptance of this principle, see *Cronje v United Cricket Board of SA* 2001 (4) SA 1361 (TPD)

⁵⁴ E.g. in respect of the ongoing debate as to the justiciability and susceptibility to review of the decisions and rulings of sports governing bodies in the UK and EU - see, generally, the discussion in Lewis, A & Taylor, *J Sport: Law and Practice* Butterworths LexisNexis 2003,

at 9 et seq.

⁵⁵ At least to the extent of recognition of the public interest in respect of the powers exercised by sports governing bodies - see *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2001 (1) SA 1 (CC) at par 182-3 of the judgement; *Coetzee v Comitis and Others* 2001 (1) SA 1254 at 1264 of the judgement. See, however, the judgement of Kirk-Cohen J in *Cronje v United Cricket Board of SA* 2001 (4) SA 1361 (TPD) at 1375D - 1376C (and the criticism by Andrew Caiger 'Sports Contracts, Governance and the Image as Asset' Unpublished paper delivered at the Sports Law Conference held at the University of Cape Town, 6-7 February 2003 (copy on file with the author), at 10-11).

⁵⁶ SASCOC Articles of Association par 1.35 read with par 5.1.1

- colours in a sporting discipline - in fact, it appears from Regulation 12(1) of the National Colours Board (now administered by SASCOC), that national colours will only be granted to members of national federations and macro sports bodies who are members of the General Assembly and recognized as such by SASCOC; and
- SASCOC also has the authority to withhold approval for multi-sports events at national and international level, and no federation or sports person registered with such a federation may participate in such an event without SASCOC's consent.

It seems clear that there is apparently little choice for sports federations in respect of joining the organization. In fact, one could even argue that federations would owe a contractual duty to their members to join SASCOC.

Another significant concern regarding SASCOC and its operations is found in the nature of proceedings at its general meetings (the supreme decision-making forum of the organization). Here one should consider the respective voting rights of the member federations. While it is clear to all that the three major professional and elite sports in South Africa are soccer, rugby union and cricket, the relative importance of the national federations in these disciplines as 'breadwinners' of SA sport does not appear to enjoy any recognition. According to a schedule to the memorandum of the company, which lists the voting rights of member federations, the SA Football Association and SA Rugby Union each has 3 votes at general meetings, while the United Cricket Board has 1 vote.⁵⁷ This raises question when one considers the voting rights of some other, traditionally much smaller and (frankly) less important federations - compare the SA Hockey Association, SA Shooting Sport Federation, SA Weightlifting Federation and SA Wrestling Federation, each with four votes. In fact, it appears that the United Cricket Board has the same voting powers as the SA Drum Majorette Association, the SA National Scrabble Players' Association and the SA Sheep Shearing Federation!

A final concern relates to the very establishment of SASCOC and the purported mandate from the previous SA Sports Commission in representing member federations in this process. While it appears that a large number of sports federations were apparently consulted in the drafting of the SA Sports Commission Repeal Bill in 2005, through requests for participation, only three such federations reportedly responded. Again, these were all relatively minor federations in the landscape of SA sport, namely Snooker and Billiards SA, Motorsport SA and the SA Masters Sports Association.⁵⁸ While it would only be the fault of federations for not contributing to this process, legitimate questions may exist regarding the inclusivity of the process, the legitimacy of the mandate of the SA Sports Commission to bind its member federations and the maintenance of democratic principles in the functioning of SASCOC.

By way of summary, I believe that SASCOC represents a very strange animal indeed, with rather dubious powers in respect of its role in regulating a key area of South African sport. The new system of dual regulatory authorities in South Africa represents a significant departure from traditionally accepted notions of the role of the state in regulating the essentially private governance of sport. And it does so by means of a singular and peculiar entity, one that seems to have no real basis in the legislative and executive powers of the state.

6. Transformation and regulation: A rocky road ahead for South African sport?

The concerns expressed above all relate to the form of state regulation of sport under the new dispensation in South Africa. While I have posed some questions regarding the nature of the new entity charged with high performance sport as well as its internal workings and the basis for its authority to intervene in the day-to-day running of sports federations and governing bodies, there is a deeper concern relating to the very substance of government's intervention in sport. This is the issue of sports transformation.

In recent years, government intervention in SA sport (especially rugby and cricket, but also other codes) has been most visible and controversial in respect of the issue of transformation.⁵⁹ Following the

birth of our new democracy in 1994 and the subsequent rationalization and unification of our sports and sports structures⁶⁰, the institutionalization of efforts and measures aimed at ensuring sports teams that are representative of our population have touched on all aspects of South African sport, its governance and regulation. South Africa's history and legacy of social injustice has forced this issue on us; this is something that has found unique application in our domestic context. Accordingly, for example, the consistent linking of government funding of sport to transformation issues constitutes a unique phenomenon in the wider context of global sport regulation; government's interventionist role in respect of issues that are traditionally viewed elsewhere as of 'sporting interest only' (e.g. team selection), poses unique challenges to sports governance in the wider context of international sports governing bodies and their governance interest in international competition.⁶¹

The often-expressed public perception (both in South Africa and elsewhere) of the widespread 'politicisation' of South African sport appears to be an accurate one. While one should remember that the active involvement of politicians and politics in sport is not a new phenomenon in this country⁶², recent events have shown that such involvement, intervention and (one might even say) interference, are reaching new and worrisome dimensions.

Here I want to briefly mention a couple of examples: We recently saw an embarrassing and very public incident regarding the award of the fifth Super 14⁶³ rugby franchise - the Minister of Sport became involved following the SA Rugby Union Adjudication Panel's award (which had awarded the franchise to the Central Unions), on the basis of the imperative of transformation and the value of a suggested award to rugby development in the Southern and Eastern Cape region⁶⁴. A compromise was reached with the award of a Super 14 berth for the Central Unions in 2006, and a relegation system whereby the bottom SA team on the log at the end of the 2006 season will make way for a Southern and Eastern Cape region team in 2007 and 2008, the 'Southern Spears'. Apart from the fact that this process seems to have been clouded with issues relating to poor internal management and decision-making by rugby's powers that be, it is interesting to note the practical effect of the episode - while public debate and mud-slinging between various parties continued, it was reported that the new Australian Super 14 team (Perth-based 'Emirates Western Force') was well advanced in preparations for the 2006 competition. These developments received widespread condemnation from local as well as international commentators. At the time of writing (which is days before the start of the 2006 Super 14 tournament), the matter has received a fresh airing in the media. According to reports, the 'Big Five' franchises have insisted that the Southern Spears should play a relegation-qualification match against the weakest SA team at the end of the 2006 season, in order to qualify for entry to the tournament in

⁵⁷ Voting rights are determined in accordance with the provisions of par 15 of the Articles of Association. While the size of the registered membership of a federation is one of the factors determining the allocation of additional votes, additional votes are also allocated (apparently also to relatively small federations) based on their participation in the Olympic Games, the Commonwealth Games and/or the All Africa Games.

⁵⁸ See the memorandum to the SA Sports Commission Repeal Bill

⁵⁹ For a detailed discussion and criticism by the author of the sports transformation experience to date, see Louw, A M 'Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport' 2004 *Stellenbosch Law Review* Vol. 15 No 1 119, Vol. 15 No 2 225, Vol. 15 No 3 409; and Louw, A M 'Transforming South African Professional Sport: Some Observations

on Recent Developments' *Law, Democracy & Development* Butterworths LexisNexis 2005 (2) Vol. 9 193-218

⁶⁰ See the discussion in section 2 above

⁶¹ Not to mention other role-players and stakeholders with significant interest in SA sport, including sponsors and commercial partners such as broadcasters

⁶² See the discussion in section 2 above

⁶³ The international rugby competition sponsored by Australian media magnate Rupert Murdoch's Newscorp, and involving provincial or regional rugby teams from Australia, New Zealand and South Africa. The tournament has been played as the 'Super 12' since 1996, and as the 'Super 14' from 2006, involving two extra teams (one each for Australia and South Africa). For more information on the tournament, visit <http://www.supert14.com>

⁶⁴ This latter region apparently having the largest provincial / regional complement of Black rugby players in South Africa

2007. The Southern Spears have objected to this as being in flagrant contravention of the decision of SARU, and have expressed a willingness to go to court to ensure their automatic qualification for Super 14 in 2007 and 2008.⁶⁵ The saga continues.

Reports of statements by politicians regarding team selections (especially regarding the implementation of quota systems in certain sports) are also common. In fact, such intervention even went as far as the appointment of a Ministerial Commission of Enquiry into Transformation in Cricket, which condemned the UCB's attempted scrapping of race-based quotas in 2002.⁶⁶

In light of the interconnected and internationalized nature of modern sports governance and regulation, it is troubling to see that the issue of transformation has provided a major source of division between government and private organizations involved in sport. It has proven to be the single biggest burning issue upon which sports administrators are often taken to task by the Minister of Sport and members of Parliament.

This raises the question of how best to marry the needs and challenges regarding transformation with the structures of sport and the interests of stakeholders. Arguably, mass participation and development programmes, school sports and infrastructure delivery systems are the ideal vehicles for promoting such government policy goals - at elite and professional levels, the practical nature and characteristics of international global sport requires that domestic policy should not unduly interfere with existing market forces. While we have seen that the SA model of sports regulation largely adheres to international standards regarding recognition of the inherent autonomy of private organizations in sport⁶⁷, recent years have (most visibly in the context of transformation, equity and the promotion of 'representativity' in sport) seen a number of instances of rather drastic government intervention in this sphere.

Accordingly, it might be advisable to propose that government policy in sport should also follow the clear and logical demarcation of functions and responsibilities in the new two-tiered regulatory system of the SRSA and SASCOC. The ideal of transformation, equal access to opportunities for all and representativity in sport cannot be faulted - we have not yet reached a point where our 'playing fields' have been leveled. By way of example of the inequalities we still face in this

regard: The report of the Ministerial Inquiry into Transformation in Cricket in 2002⁶⁸ mentioned that in the four largest townships in South Africa (Soweto, Mdantsane, Motherwell and Botshobelo), with a combined population 8 million people, there are 7 cricket clubs. In Johannesburg, which has a white population of 700 000, there are 106 cricket clubs. Clearly many inequalities still exist.

It is however less clear whether SASCOC as a regulatory agency would be the best driver for policies and measures aimed at transforming our sport, especially in light of its key mandate of promoting excellence in high performance sport. The organization appears to be quite active in this regard: SASCOC is currently proposing a mission to declare 2005 - 2014 a decade of fundamental transformation and development in SA sport (under the banner 'Vision 2014: Towards Equity and Excellence in Sport'). In a briefing to the Parliamentary Portfolio Committee on Sport and Recreation (1 March 2005), Mr. Moss Moshishi, SASCOC President, declared that SASCOC's primary goal is to accelerate transformation through bold leadership and good strategy.

One must ask the following questions:

- Might SASCOC's stated aspirations in respect of transformation not conceivably impact negatively on its prime responsibility for high performance sport?
- Will this not perpetuate the problems experienced to date in respect of both the application of controversial measures in transformation, as well as exacerbating or failing to address existing problems in respect of the governance of the major sports?

Surely government, in promoting and requiring good governance on the part of the private institutions managing sport, should align its own functions to this imperative. In light of the nature and characteristics of the specific levels of sport now resorting under SASCOC's mandate, would such transformation agenda not best be pursued by the reconstituted SRSA in the performance of its mass participation mandate? Should the main objective not be to nurture, through mass participation and recreation programmes, a pool of *future* talent for high performance sport, rather than to pursue a 'quick fix' approach to transformation at the higher levels through political pressure on federations, as we have seen during the past decade?⁶⁹

65 See the report by Dale Granger 'Southern Spears tired of being "bullied" by "Big Five"' 3 February 2006 (available online at <http://www.iol.co.za> - last accessed 7 February 2006).

66 See the report of the Ministerial Committee of Inquiry into Transformation in Cricket (convened by the then Minister of Sport and Recreation, Mr Ngconde Balfour), dated 16 October 2002.

67 Compare the judgement in *Cronje v United Cricket Board of SA* 2001 (4) SA 1361 (TPD). This case involved an application by the late Hansie Cronje, former national cricket captain, for an order reviewing and setting aside a resolution by the United Cricket Board of South Africa (the 'UCB'). The resolution by the UCB was issued following the international scandal that arose from Cronje's proven involvement in large-scale and repeated offences involving corruption and 'match fixing', which conduct was held (by the International Cricket Council and the UCB) to constitute conduct 'wholly inimical with the whole ethos of cricket'. Cronje was replaced as captain of the national team and he subsequently withdrew from the team; when his contract with the UCB expired shortly thereafter, the UCB did not renew it. After Cronje decided to quit representative cricket and his association with the UCB, the Board passed a resolution ban-

ning him for life from all its activities and those of its affiliates. Cronje challenged this resolution, *inter alia* on the grounds that it constituted an infringement of his right to fair administrative action as contained in section 33 of the South African Constitution Act 108 of 1996, and that he had been denied the right to a fair hearing as guaranteed in terms of the rules of natural justice. In evaluating this latter question as to the applicability of the rules of natural justice to the Cricket Board's decision, Kirk-Cohen J proceeded to state that such rules did not apply to the UCB, by remarking as follows:

'The [UCB] is not a public body. It is a voluntary association wholly unconnected to the State. It has its origin in contract and not in statute. Its powers are contractual and not statutory. Its functions are private and not public. It is privately and not publicly funded ... The conduct of private bodies ... is ordinarily governed by private law and not public law. It does not exercise public power and its conduct is accordingly not subject to the public law rules of natural justice ... The respondent is not vested with any statutory powers, nor is it subject to any statutory duties ...' While the *Cronje* judgement therefore appears to express unqualified support for the notion that a sports governing body (national sports federation) is a pri-

ivate body, which does not exercise public powers and is accordingly not subject to the rules of natural justice, there have been conflicting judgements in recent years. See, for example, the dicta in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2001 (1) SA 1 (CC) (a case concerning the South African Rugby Union, then the SA Rugby Football Union), at par 182-183 of the judgement; and the unreported judgement of the Cape of Good Hope Provincial Division of the High Court in *Tirfu Raiders Rugby Club v SA Rugby Union & Others* Case No. 8363/2005. In the *Tirfu* case, the court was asked to examine the nature of the powers exercised by the SA Rugby Union and its affiliate provincial unions, *inter alia* relating to determining competitions and logs. The court observed the following (by way of Yekiso, J), at par 23-24: 'The [SA Rugby Union] exercises these powers on its members, being the Provincial Unions and other associate members. The Provincial Unions, which are members and affiliates in terms of [SARU's] Constitution, are themselves autonomous voluntary associations and in positions of authority to the clubs affiliated to them. The position of authority is clearly hierarchical, with [SARU] occupying a position of authority and the Provincial Unions and their

affiliate clubs being in a subordinate position. The relationship of authority and subordination is clearly evident. The Provincial Unions and the clubs affiliated to these Unions, in turn, have stakeholders who have a substantial interest in their very existence. These stakeholders would be the sponsors, who would have an interest through their sponsorship programmes, members of the clubs affiliated to these Unions and the rugby loving public. The public interest in these organisations cannot be over emphasized. There is, in my view, a significant public interest element involved in these organisations to constitute a need to act in a manner that affects or concerns the public.'

The court held that the actions of the Union were sufficiently public in nature to warrant application of the provisions of the Promotion of Administrative Justice Act (Act 3 of 2000), which Act defines 'administrative action' as 'any decision taken, or any failure to take a decision by ... [a] natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ...' (section 1).

68 See note 66 above

Finally, in light of what was said above regarding the rather dubious nature of SASCOC as a regulatory entity, I would also pose the question whether SASCOC can legitimately assume a role in respect of promoting and enforcing transformation among member federations. Here it is interesting to note article 25 of its Articles of Association, which deals with compliance by SASCOC with the Olympic Charter. This article specifically states that SASCOC must maintain harmonious and cooperative relations with the appropriate government department (SRSA) while preserving its autonomy and resisting any pressures of any kind, including political pressure, which would prevent compliance with the Olympic Charter. Does this leave any room for SASCOC to pursue policies of race-based social engineering in sport, which is largely a political agenda?

7. Conclusion

Generally, and by way of summary, the regulatory landscape of SA sport appears, at least on paper, to be quite healthy. Legislative intervention is limited to a relatively small number of Acts of Parliament⁷⁰, while recent restructurings have attempted to limit the previous proliferation of macro-sports bodies and organizations involved in the governance of different sports codes.⁷¹ I believe that the splitting of regulatory functions between Sport and Recreation SA and SASCOC, in respect of 'mass participation' and elite sport, is a positive development, especially as there has been justified criticism of the failure of the sports legislation to distinguish between recreational sport and other levels (especially professional sport).⁷²

However, as has been shown, the existing system of legislative provisions and practice is extracting maximum value for government in terms of the drastic and far-reaching scope and impact of its regulatory authority in these areas of activity of its citizens. These legislative provisions have a real bite.⁷³

While the foregoing discussion has attempted to highlight a few general concerns regarding both the form of state regulation of South African sport as well as its substance, there are other underlying problems that contribute to the potential for a future crisis in SA sport. Generally, one of the main concerns is the apparent failure, to date, of state regulation to acknowledge the unique context of modern global sport. At the higher levels, sport is a significantly globalised activity, and constitutes a huge international industry. Experience has shown that effective sports regulation must acknowledge the fact that domestic circumstances, needs and priorities must keep pace with interna-

tional developments and the role and authority exercised by 'outside bodies' and organizations, such as international and regional sports governing bodies.⁷⁴

It is also trite that the European model⁷⁵ of sports governance, which characterizes many of South Africa's sports, especially the three major codes, brings its own special demands of state regulators. One of the special characteristics of this system is the large measure of interconnectedness and dependency between the different levels of the 'pyramid' - there exists a symbiotic relationship between grass-roots levels of participation and the top level, which is characterized by cross-subsidization and a feeder system of talented players. It is essential for state regulators to acknowledge that regulatory measures and policies applied at any one level inevitably impacts on other levels.

Allied with this is the imperative to recognize that a similar dependency exists between the various stakeholders. In top-level professional sport, these stakeholders include the consumer public of this entertainment industry and, importantly, commercial partners such as sponsors and broadcasters. When one considers the South African government's role *vis a vis* these commercial partners in the major sports, it becomes clear that the current significant level of regulation is apparently not proportional to the interests of the various parties. By way of example: According to the United Cricket Board of SA (in a submission to the Independent Communications Authority of SA in 2003⁷⁶), in the 2001/2 year 63% of its total income derived from the sale of broadcasting rights, while government grants accounted for approximately 0.1%. During this same period, the R161 million earned by SA Rugby from broadcasting rights accounted for 55% of its total revenue. The SA Football Association and the Premier Soccer League reported that they had received no government funding during this period.⁷⁷ In light of the very low level of funding from government to the major sporting codes⁷⁸, it seems clear that regulation should explicitly acknowledge the key role played by commercial partners in constituting the very lifeblood of professional sport (especially if one considers the benefits for government through taxation in sport). This does not appear to be the case. With reference to the example from Super 14 rugby discussed above, it is doubtful that the Minister of Sport's intervention in the process of awarding a franchise paid any regard to the commercial realities of the competition or of the rights and interests of the other parties to the SANZAR agreement⁷⁹ upon which it is founded.

69 For more detailed discussion on these and other issues relating to transformation of SA sport, see the articles referred to in note 59 above

70 The sport-specific legislation includes the National Sport and Recreation Act (Act 110 of 1998), the SA Sports Commission Act (Act 109 of 1998, as repealed by the SA Sports Commission Repeal Act of 2005), the SA Institute for Drug-Free Sport Act (14 of 1997) and the South African Boxing Act (11 of 2001).

71 Compare the traditional non-interventionist approach to government regulation of sport in the UK, as discussed by Lewis & Taylor *Sport: Law and Practice* 2003 (note 54 above) at 3 *et seq.*; see also Gardiner *et al Sports Law* 2nd Edition Cavendish Publishing, London 2001 at chapters 1-3.

72 See Rochelle Le Roux 'Under Starter's Orders: Law, Labour Law and Sport', in (2002) 23 *Industrial Law Journal* 1195 at 1204

73 Some very significant legislative intervention is apparently envisaged in 2006: Parliament will debate a Sports Transformation Bill as well as amendments to the National Sport and Recreation Act in order to provide for substantial powers for government to

intervene in the management of sports federations.

74 E.g. it is expected that, following the 2006 FIFA World Cup in Germany, FIFA will probably take a much more active supervisory role in respect of the SA Football Association and local organising committee's arrangements for FIFA World Cup 2010

75 The European model involves a pyramid structure of sports organization, with a hierarchical system of governance. At the broad base is mass participation (in amateur and recreational sport), at local (e.g. club) level. Moving up the pyramid, one encounters regional, national and international competition structures. At the very top is the international governing body for the particular sport (e.g. FIFA or the International Cricket Council), which assumes ultimate control and authority for the sport, mainly through its rule-making mandate and the control of 'official' competitions and eligibility for such competitions. These international sports governing bodies are essentially monopoly regulators with inherent market dominance - the very basis for their control and authority is found in the ability to exclude other organizations and associations from usurping this power.

And this very control lies in recognition of only one representative organization at national (e.g. South Africa, SAFA) and regional (e.g. Africa, CAF; Europe, UEFA) levels.

For more on this model, see *The European Model of Sport* (Consultation Document of DG X, November 1998); Lewis & Taylor *Sport: Law and Practice* Butterworths 2003 at A1.18, B1.25, C1 *et seq.*

76 ICASA Position Paper and Regulations on *Sports Broadcasting Rights*, 25 July 2003

77 *Ibid.*

78 This has also enjoyed recognition in the report of the Ministerial Task Team on High Performance Sport, 2002 (see section 3 above):

'Because funding is limited, it has been recommended that government funding not be directed to the major, wealthy professional sports such as rugby, cricket, soccer, golf and motor racing, which have significant funding from their commercial sponsorships. Indeed the strength of some of these commercial arrangements may result in directing commercial sponsorship away from the smaller sports where success is sought. On the other hand, there may be some case for government funding at the developmental level

of these high profile sports to encourage participation from disadvantaged communities. If this is considered desirable, thought should be given to making any such contributions dependant (*sic*) 'on an equal contribution from the sport.' (At 13 of the report)

This trend is not unique to South Africa. It was recently observed that government funding for the four major spectator sports in England (football, rugby union, tennis and cricket), through the Sport England Lottery awards during 1998/9 to 2001/2, amounted to only 17% of the total Lottery sports awards - see Table 8 of the document entitled 'The RFU's Environment', available on the web site of the English Rugby Football Union as http://www.rfu.com/pdfs/strategic_plan%20environment.pdf (last accessed 9 February 2006). The last-mentioned document argues that this low percentage is surprising and inconsistent with the government's agenda of cost effectively driving increased participation. It should be noted that the promotion of mass participation is one of the cornerstones of the South African White Paper on Sport and Recreation (see section 2 above) and of the general government policy in respect of sports regulation.

It is submitted that government should be wary of assuming too active and interventionist a role in high profile (international) sport. Just as apartheid governments in the 'old' South Africa were unable to sustain domestic policies on the international stage of sport, so the global construct of those governing sport might reject such a system and again move towards exclusion of a nation that presumes to usurp powers beyond the norm. Developments in South Africa, at least from the perspective of government and its regulatory agencies, seems to have ignored trends elsewhere in the development of a 'public-private partnership' approach to sports regulation.⁸⁰

The solution would appear to lie in the maintenance of a fine balance between the need for regulation and accommodation of the interests of all stakeholders involved in sport, while at the same time acknowledging traditional notions of sports regulation as accepted elsewhere. While South Africa faces certain unique challenges (e.g. in respect of transformation and the legacy of the past, and the place of the nation as both a leader in Africa and as a developing country), it still has much to learn from other jurisdictions such as the UK and Europe. The nature of the modern global sports economy necessitates recognition that - to borrow from the words of 17th century English

poet John Donne - no government can be an island in the sea of sports regulation.

Only time will tell how successful and legitimate the new system of regulating South African sport will be. Unfortunately, however, the next five years - the run-up to South Africa's hosting of the biggest sporting event in the world - is hardly the time to be distracted by teething problems and glitches in the system.

I believe that a number of the questions and concerns raised in this piece should be addressed, sooner rather than later.

The International Sports Law Journal

⁷⁹ South Africa New Zealand and Australia Rugby (Pty) Ltd, founded by former SA rugby boss Louis Luyt, and contracting party to the Super 14 agreement with broadcasting sponsor NewsCorp.

⁸⁰ For discussion of this approach in the UK, see Lewis & Taylor *op cit* at 11 *et seq.* While courts in the EU continue to examine the actions of sporting bodies and is continually charting the limits of

judicial intervention, it appears that legislative intervention by governments in the regulation of sporting activity remains limited. See, generally, on the recognition of the 'conditional autonomy' of sporting bodies from EC law, Stephen Weatherill 'Is the Pyramid Compatible with EC Law?' *International Sports Law Journal* 2005/3-4 3.

Labour Law in South African Sport

A Season of Expectations?

by Rochelle le Roux*

1. Introduction: the constitutional context

The dawn of a new Constitutional era¹ in South Africa during the 1990s did not only pave the way for the introduction of an advanced democracy, but also guaranteed the entrenchment of fundamental human rights.² The Constitution does not only concern itself with the exercise of public power, but in certain circumstances, where a particular fundamental right is capable of application to private relationships, the Constitution also applies to such relationships.³ However, once a court is satisfied that a fundamental right applies to a private person, that person normally cannot rely directly on the Constitution for protection. If there is legislation giving effect to the fundamental right, that legislation must be applied; if there is no such legislation, the court must consider whether the common law gives effect to the right.⁴ If so, the common law must be applied. In the absence of a common law rule giving effect to the right, the court must develop the common law to give effect to that right. A private person, claiming that one of his or her fundamental rights has been infringed, can thus typically only rely directly on the Constitution for protection if it is claimed that the legislation intended to give effect to that fundamental right in question, is itself contrary to the Constitution.⁵ Section 23 of the Constitution deals with labour rights and guarantees the right to fair labour practices, the right to join a trade union and the right to engage in collective bargaining, in addition to other rights. The principal legislation giving effect to these labour rights is the Labour Relations Act 1995 (LRA) that came into operation on 11 November 1996.⁶ The distinguishing features of this legislation include the emphasis on the concept of unfairness, the introduction of a specialised labour dispute resolution structure and the high premise that is placed on collective bargaining. This article provides a general overview of unfair dismissals in South Africa and more particularly considers the application of one of the more complicated elements (section 186(1)(b)) of the definition of dismissal to sports persons. In the latter regard particular emphasis will be placed on a recent arbitration award (*SARPA obo Bands and Others/SA Rugby (Pty) Ltd*)⁷ concerning the alleged unfair dismissal of three international rugby players.

2. The South African labour dispute resolution structure

The LRA established new structures for the resolution of disputes in the workplace. These include the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court and the Labour Appeal Court.⁸ Generally, all disputes are referred to the CCMA for conciliation. Depending on the nature of the dispute, an unsuccessful conciliation will either be followed by arbitration, also conducted by the CCMA, or adjudication by the Labour Court. In certain limited instances, an arbitration award can be taken on review to the Labour Court.⁹ Labour Court judgments may be taken on appeal to the Labour Appeal Court.¹⁰ The LRA also provides for the establishment bargaining councils in respect of particular sectors and areas, comprising registered trade unions and employer associations.¹¹ Parties falling within the jurisdiction of a bargaining council are

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and 36-45. Also see J De Waal, I Currie and G Erasmus *The Bill of Rights Handbook* 4ed (2001) at 55-57

- 6 The Employment Equity Act 55 of 1998 and the Basic Conditions of Employment Act 75 of 1997 also give effect to s 23 of the Constitution as well as some of the other fundamental rights listed in the Bill of Rights that have application in the context of employment.
- 7 [2005] 2 BALR 209 (CCMA).
- 8 See Ch VII of the LRA.
- 9 See s 145 of the LRA.
- 10 In limited circumstances further appeals to the Supreme Court of Appeal and/or the Constitutional Court are possible. See *NEHAWU v University of Cape Town and others* (2003) 24 ILJ 95 (CC) and *NUMSA v Fry's Metals (Pty) Ltd* (Case 026/03) unreported judgment of the Supreme Court of Appeal delivered on 12 April 2005.
- 11 See ss 27 and 28 of the LRA.

required to refer disputes to the council for conciliation and arbitration when so permitted by the LRA.¹² Despite providing a statutory structure, the LRA encourages parties to resolve disputes through private resolution structures, where such structures have been agreed to. If a dispute has been referred to the CCMA, despite a privately agreed dispute resolution structure, section 147(6) of the LRA confers discretion on the CCMA commissioner either to proceed with the matter or to refer it for resolution through the private dispute resolution structure. The CCMA was faced with such a situation in *Augustine and Ajax Football Club*.¹³ Augustine, a professional football player, referred a dispute to the CCMA alleging that he had been unfairly dismissed by Ajax Football Club. Noting that in terms of the agreement between the player and the club, the parties agreed to refer any dispute concerning dismissals to private arbitration in accordance with the constitution of the National Soccer League, the commissioner opted to refer the matter for resolution via the private procedure. The commissioner advanced the following reasons:

There are considerably more arguments in favour of enforcing the private arbitration provisions agreed upon between the parties in this matter, the most important of these being that the dispute will be dealt with by an arbitrator who has specialist skills and knowledge in this field. The applicant enjoys no fewer rights in the private arbitration process than he would have should the matter be dealt with by the CCMA and is unlikely to suffer any prejudice should the matter be referred to private arbitration rather than arbitration under the auspices of the CCMA.¹⁴

In the event of the statutory dispute resolution procedure being followed, the LRA requires that unfair dismissal disputes be referred to the CCMA or bargaining council for conciliation¹⁵ within 30 days of the date of the dismissal.

If the dispute relates to the misconduct of the employee, the dispute must be resolved through conciliation, failing which, arbitration by the CCMA or bargaining council.¹⁶ The LRA further provides that in the case of an automatically unfair dismissal (these include disputes where the reason for the dismissal relates, amongst other things to unfair discrimination) the employee may refer the dispute to the Labour Court for adjudication if it remains unresolved after conciliation.¹⁷

The remedies for unfair dismissal are reinstatement, re-employment or the payment of compensation.¹⁸ Reinstatement or re-employment is the primary remedy but will not be ordered where the employee does not wish to be reinstated or re-employed; a continued employment relationship would be intolerable (for example, where the dismissal is related to sexual harassment); it is not reasonably practicable or where the dismissal is only procedurally unfair.¹⁹ In such circumstances compensation will be ordered and it is in this regard that the significance of the distinction between an automatically unfair dismissal and other unfair dismissals becomes clear. Section 194(3) of the LRA provides that in the case of an automatically unfair dismissal, compensation up to the equivalent of 24 months' remuneration can be awarded to the unfairly dismissed employee. In the case of other unfair dismissals, the upper limit of compensation is the equivalent of 12 months' remuneration.²⁰

3. A claim of unfair dismissal

A person claiming that s/he has been unfairly dismissed must be able to prove, on a balance of probabilities, that firstly, s/he was in fact an

employee and, secondly, that a dismissal occurred, whereupon the employer must show that the dismissal was fair.²¹ There are a number of statutory presumptions²² as to who is an employee and a sports person who plays a team sport would generally have no great difficulty in discharging this duty.²³ The more challenging issue would be to establish that a dismissal occurred. Dismissals are defined in section 186(1) of the LRA and include a number of possibilities that would not at first glance be regarded as dismissals: These are termination of the contract of employment with or without notice, *failure to renew a fixed term contract where the employee reasonably expected the contract to be renewed*, refusing to allow an employee to return to work after she took maternity leave, selective re-employment, constructive dismissal²⁴ or the material change of terms and conditions of employment after a transfer of a business as a going concern. Any one of the above types of dismissals may at any given time arise in the context of sport, but recent history has shown that the failure to renew a fixed term contract when a reasonable expectation existed that it would be renewed, has presented particular problems to sport authorities. Lance Klusener, at the time a prominent South African cricketer, reached an out-of-court settlement with the United Cricket Board of South Africa (UCB) after he referred an unfair dismissal dispute on this basis to the CCMA.²⁵ In December 2003 Hylton Ackerman, a cricket coach employed by the UCB at the time of his dismissal, succeeded with an unfair dismissal claim against his former employer on exactly the same basis.²⁶ To add insult to injury, the arbitrator also found that the failure to renew Ackerman's contract was related to his age and therefore it constituted a unfair dismissal as a result of unfair discrimination based on age - thus an automatically unfair dismissal - and the maximum compensation possible in terms of the LRA was ordered (being the equivalent of 24 months' remuneration).²⁷ The same issue repeated itself in *SARPA obo Bands and Others/SA Rugby (Pty) Ltd*. The rest of this article will deal with the implications of this provision in the context of sport.

4. Dismissal: the failure to renew

Section 186(1)(b) of the LRA reads as follows:

'Dismissal' means that an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.

Before dealing with the different elements of this type of dismissal it is necessary to comment on its origin. Until the introduction of unfair dismissal law via legislation in the late 1970s the reason for the termination of employment was more or less irrelevant. The practice of employers of concluding a series of fixed term contracts and then relying on the effluxion of time to terminate contracts, rather than providing tenured employment, clearly opened the door to abusive practices. An employee whose fixed term contract was not renewed, despite indications that it would be, was unable to challenge the termination provided the required notice was given. The unfairness or the arbitrariness of a termination simply did not concern the courts. In 1979 the then Labour Relations Act 1956 was amended to introduce the so-called unfair labour practice doctrine. This enabled the (then) industrial courts to require employers to provide a good reason for the dismissal.²⁸ This concept of fairness eventually found resonance in section 23 of the Constitution and also in the legislation (such as the LRA) that was enacted to give effect to this constitutional right.

¹² See s 191(1)(i) LRA. Cf s 147(2) LRA.

Automatically unfair dismissal disputes fall beyond the jurisdiction of a bargaining council. See s 191(5)(b)(i). Also cf *NUMSA obo Joseph and Hill Side Aluminium* (2004) 25 *ILJ* 2264 (BCA).

¹³ (2002) 23 *ILJ* 405 (CCMA).

¹⁴ *Op cit* at 407.

¹⁵ S 191(4) of the LRA.

¹⁶ S 19(5)(a) of the LRA.

¹⁷ S 191(5)(b)(i) of the LRA.

¹⁸ S 193(1) of the LRA.

¹⁹ See s 193(2) of the LRA.

²⁰ S 194(1) of the LRA. Note that remuneration is calculated with reference to the rate of remuneration on the date of dismissal. S 190 of the LRA provides that the date of dismissal is the date on which the contract of employment terminated or the date on which the employee left the service of the employer, whichever occurred first.

²¹ S 192 of the LRA.

²² S 200A of the LRA..

²³ See A Van Niekerk "Labour Law in Sport: A few Curve Balls" (1997) 15(6)

Contemporary Labour Law 1.

²⁴ I.e. the employee resigns because the employer made continued employment intolerable for the employee. See s 186(1)(e) of the LRA.

²⁵ See "Klusener gears up for war with UCB", 9 July 2003 - accessed via <http://www.supersport.co.za/article.asp?aId=88530%20&%20sportCategory=SUPERCRICKET/domesticCricket>. N. Manthorp "Zulu raids HQ cash register", (undated) - accessed via <http://www.supercricket.co.za/default.asp>

?tid=2592&scat=SUPERCRIKET/sateam.

²⁶ *Ackerman and another and United Cricket Board* (2004) 25 *ILJ* 353 (CCMA). This matter has been taken on review to the Labour Court.

²⁷ *Op cit* at 368G. The Klusener and Ackerman matters are also discussed by R Le Roux "2003: Annus Horribilis for South African Sport?" (2004) *ISLJ* 1-2 47 at 50.

²⁸ In this regard see A Van Niekerk *Unfair Dismissal* 2ed (2003) at xv-xvii, 1 and 18.

To successfully prove this type of dismissal it is paramount that the employee shows that, objectively speaking, s/he harboured a reasonable expectation that the contract would be renewed on the same or similar terms:

Employees either have a reasonable expectation of renewal or they do not. They have a reasonable expectation of renewal if the objective facts . . . show that the employee reasonably expected the contract to be renewed.²⁹

Assurances given by the employer, the reason for entering into a fixed term contract in the first place and the number of times that the contract has been renewed are examples of factors to be considered when assessing the reasonableness of the expectation.³⁰ Once, on a balance of probabilities, such an expectation is proved and there was either no renewal or the contract was renewed, but on less favourable terms, a dismissal has taken place. The LRA generally attaches consequences only to *unfair* dismissals. However, once the fact of the dismissal is established there is a presumption of unfairness and the employer, in terms of section 192 of the LRA, bears the onus to show that the dismissal was fair, both procedurally and substantively.³¹

5. Sarpa Obo Bands and Others/Sa Rugby (PTY) LTD³²

Before dealing with the facts of this matter it is necessary to consider briefly the state of South African rugby towards the end of 2003. Not only did the national team perform dismally throughout 2003, but their 2003 Rugby World Cup (2003 RWC) campaign in August 2003 ended in a miserable quarterfinal match. During 2003 there were repeated calls for the then national rugby coach, Rudolph Straeuli, to resign or be dismissed, but his call to be judged on the results at the 2003 RWC was heeded. These poor performances were further marred by claims of racism in rugby, reports of Straeuli's demeaning training rituals³³ and internal management strife. The latter eventually resulted in a palace revolution and a change of management during December 2003.³⁴

This arbitration award deals with the contractual position of three rugby players, Matfield, Bezuidenhout and Bands. (These players formed part of a cluster of five players that in rugby is referred to as the "tight five".)

At the time, once a player was selected for the national team he would normally be contracted by SA Rugby (Pty) Ltd³⁵ (the employer in this matter), either on a match-by-match basis or for a period. All three players were given contracts for the 2003 RWC. These contracts were for three months and commenced in September 2003 and terminated at the end of November 2003. In addition to this, Matfield already had a twelve month contract to play for the national team during 2003. This contract terminated in December 2003. He had had a twelve month contract with the employer since 2000, which had been renewed in 2001, 2002, and 2003. Since 2003 the players had no direct dealings with SA Rugby. All the national players negotiated their contracts directly with Straeuli and he in turn liaised with the CEO of SA Rugby (Pty) Ltd.

Despite the team's poor performance all three players performed well at the 2003 RWC and were generally complimented by the coach (Straeuli) and the media. After the 2003 RWC all three received letters from the coach which they interpreted as suggesting that they formed part of his future plans. Subsequently all three were told in person by Straeuli that they formed part of his future plans.

Straeuli resigned during December 2003 when new management took over the affairs of SA Rugby and the three players' contracts were not renewed for 2004. The South African Rugby Players Association (SARPA) referred an unfair dismissal dispute to the CCMA on behalf of the players, relying on section 186(1)(b) of the LRA. The arbitrator had little difficulty in finding that the players had a reasonable expectation that their contracts would be renewed and that they were thus dismissed.

The arbitrator made short shrift of the employer's argument that there was no objective basis for the players' expectation because the national team performed poorly under Straeuli, Straeuli subsequently resigned and the management of SA Rugby during changed December 2003;

The evidence before me (from both parties) indicates that the professional rugby environment is insecure and uncertain, characterised by a frequent change in coaches (each of whom have a different approach to how contracts should be awarded and structured) and change in management, with no clear policies or guidelines in respect of how contracts should be awarded or structured. Such an environment can result in unfair treatment and employees need to be protected. Despite a change in management, the legal entity remains the same. Players are therefore entitled to rely on the word of a coach who has implied authority and creates an expectation that they will be given contracts. Furthermore, I have already found that despite the fact the team did not perform well in the World Cup the performance of the applicants during the World Cup was outstanding, and it was evident that the coach wanted to keep and develop the talent of the tight five after the World Cup.³⁶

The employer also relied on the players' contracts that clearly stated that none of the individual players might entertain any expectation that the contract would be renewed upon expiry. This argument did not impress the arbitrator since it is a well established principle that, while the wording of the contract is important, conduct subsequent to the conclusion of the contract (as was found to be the case in this matter) may give rise to a reasonable expectation.³⁷

The employer also argued that Straeuli had no authority to give undertakings to any of the players in respect of the renewal of their contracts and that he could merely advise SA Rugby on who ought to be contracted by them. Straeuli was therefore, so it was argued, not in a position to make promises or create expectations. The arbitrator, however, accepted the evidence by and on behalf of the players that they only dealt with the coach when contracts were negotiated and concluded that the coach had implied authority to promise and negotiate contracts.

Since the players discharged the onus of proving that they were dismissed, the arbitrator - in accordance with section 192(2) of the LRA - considered whether the employer had shown that the dismissal was for a fair reason and whether it occurred in accordance with a fair procedure. This, so the arbitrator held, it failed to do and the dismissals were therefore held to be unfair dismissals.

In awarding compensation the arbitrator considered section 194 of the LRA. This section provides for a compensation award equal to not more than the equivalent of 12 months' remuneration unless the dismissal constitutes an automatically unfair dismissal, which it did not in this case.

Matfield was paid a retainer of R400 000 (approximately 50 000) in terms of his 2003 contract and he expected similar remuneration during 2004. The employer was thus ordered to pay R400 000 to Matfield. The minimum retainer paid in terms of the 2003 (annual) contracts was R300 000 and both Bezuidenhout and Bands expected to be paid at least this amount for 2003. The arbitrator thus ordered that they be paid R300 000 compensation each. In respect of Bands the arbitrator considered one further issue: On the basis of the expectation created by Straeuli, he (Bands) declined an offer to play for a British club for R1, 5 million during 2004 and it was argued that he ought to be compensated for the damages suffered as a result of refusing this offer. The arbitrator declined to make such an order. Not only is the amount of compensation subject to a statutory maximum, but the purpose of section 194 of the LRA is to put the dismissed employee in the position s/he would have been had the unfair dismissal not

29 J Grogan 'Great Expectations' (1999) 15(6) *Employment Law* 10 at 11.

30 See D Du Toit, D Bosch, D Woolfrey, S Godfrey, J Rossouw, S Christie, C Cooper, and G Giles *Labour Relations Law* 4ed (2003) at 368 and J Grogan *Dismissal* (2002) at 34. Also see *Dierks v University of South Africa* (1999) 20 *ILJ* 1227 (LC) at par 133.

31 See s 188(1) of the LRA read with s 192(2) of the LRA.

32 *Op cit*.

33 See the discussion of "Kamp Staaldraad" by Le Roux *op cit* at 49.

34 For a discussion of the state of South Africa rugby during 2003 see Le Roux *op cit* at 47-49.

35 This company is the commercial arm of SA Rugby, the governing body of rugby in South Africa.

36 *Op cit* at 219.

37 See *SA Clothing and Textile Worker's Union v Mediterranean Wooden Mills (Pty) Ltd* (1995) *ILJ* 366 (LAC).

occurred.³⁸ If the dismissal had not occurred Bands would only have received the retainer of R300 000.

6. Reservations

It is understood that SA Rugby is taking this award on review to the Labour Court.³⁹ While the rugby authorities will no doubt raise a plethora of issues, there are two aspects in particular that are, it is suggested, worth revisiting:

First, while it is correct that it would be unfair for the players to bear the brunt of the frequent changes at coach and management level, the question remains whether, objectively speaking, their expectations were reasonable. While the players no doubt harboured some expectations, the reasonableness thereof must be questioned. The reasonableness of their expectation cannot be divorced from the realities of South African rugby during late 2003 - the period during which the players allege the expectation was created. Not only was South African rugby in turmoil both on and off the field, but players know very well that different coaches prefer different playing styles and that a player who is the first choice in one coach's team may very well be a non-starter in another coach's team. This is simply the nature of (team) sport. Straeuli was under siege before, during and after the 2003 RWC, until his resignation in December 2003. It was clear to all and sundry that his resignation/dismissal was imminent. It was a highly debated issue in the media and the players could simply not have been ignorant of Straeuli's uncertain future; neither could they have been certain that they would feature in another coach's plans. It was surely not reasonable for them to think that their contracts would be renewed because they were featuring in his future plans whilst Straeuli's own future as national coach was so obviously bleak. Or is the fact that Straeuli's implied authority (to negotiate with the players) was never withdrawn by the rugby authorities sufficient to negate this? If so, would it not suggest that the word of the person with the authority to negotiate is sufficient to create a reasonable expectation *despite surrounding circumstances that suggest other possibilities*?⁴⁰ Hopefully the Labour Court will provide more clarity on this specific concern. (This also illustrates the complications of allowing the coach - whose own position is often regulated by a fixed term contract - to negotiate with players.)

Second, can it really be claimed, reasonableness aside and assuming that Straeuli had implied authority, that the position of Matfield was comparable to that of Bands and Bezuidenhout?

Matfield had had a twelve-month contract with SA Rugby since 2000. This contract was renewed on an annual basis until 2003. In addition to this contract, he also had a three-month contract relating to the 2003 RWC. It is clear that what he expected to be renewed was the twelve month contract (not his 2003 RWC contract) and the arbitrator's conclusion in Matfield's case cannot be faulted. Bezuidenhout and Bands, however, only had 2003 RWC contracts for three months. These contracts related to a specific event, repeated only every four years. If they had any expectations, were they not at best expectations that contracts of a different nature would be offered to them? While there is support for the contention that section 186(1)(b) of the LRA should be interpreted to include a reasonable expectation of permanent employment (as opposed to a further fixed term contract),⁴¹ it is doubtful whether this interpretation, even if correct, applies to this situation. Surely section 186(1)(b) contemplates the renewal of a contract that in substance would be similar before and after the renewal? Can it really be claimed that a contract governing the participation in an event of short duration is the same as a contract regulating, over a twelve month period, participation in recurring events?⁴² The fact

that Matfield was also given a three month contract for the 2003 RWC at a time when he already had a twelve month contract, clearly illustrates that the two contracts were different in substance. It is therefore suggested that while Bezuidenhout and Bands expected (perhaps even reasonably) twelve month contracts to be offered to them, it is not an expectation that falls within the ambit of s 186(1)(b) of the LRA. They certainly did not contemplate being offered what they already had i.e. another 2003 RWC contract - they expected something completely different. While the expectation and the failure to offer a twelve month contract may perhaps give rise to other legal consequences,⁴³ it is submitted that it does not amount to a dismissal within the meaning of the LRA and that the arbitrator erred in this regard.

7. Final comments

Time will tell whether the above reservations have merit. That is one matter. The reality, however, is that sport governing bodies in South Africa will always be prone to claims of this nature: (team) sport careers are short, contracts are usually fixed term and short-term, South African team sports have a history of high turn-overs of coaches, each favouring different players, coaches often double-up as managers, the form of a player is never constant, on-field strategies (suing different players) change constantly and team composition is often dictated by capricious factors such as injuries and the demands of transformation.⁴⁴

Attempts to include a disclaimer as in the above case clearly only have limited benefits since other factors may give rise to a reasonable expectation. Collective bargaining in South African sport is still very immature,⁴⁵ but the sports arena may be an area where collective bargaining can be employed to the benefit of both the sport governing bodies and the players. One of the reasons advanced in the *SARPA* case for players to have security of income (in the form of retainers) is that income protection insurance (in the case of injuries) can only be obtained if a player has a fixed income (as opposed to being paid on a match-by-match basis only). In South Africa a high premium is placed on collective bargaining. If the right to rely on section 186(1)(b) of the LRA is excluded in a collective bargaining agreement in exchange for proper income protection schemes, perhaps partly funded by the employer/governing body, it is difficult to imagine that a court will not enforce it. While such an arrangement will probably force the parties to manage the negotiation of contracts differently, it will provide more security to all concerned in an industry that is inherently insecure.

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38 In this regard the arbitrator (at 225) referred to M Olivier "Legal Constraints in the Termination of Fixed-Term Contracts of Employment: An Inquiry into Recent Developments" (1996) 17 *ILJ* 1001 at 1037.

39 J Van Der Westhuizen and D Granger "SA Rugby Set to Challenge Ruling" *Weekend Argus* 11 December 2004.

40 See *University of Cape Town v Aufder Heyde* (2001) 22 *ILJ* 2647 (LAC) at par 23.

41 See the contrary views in *Dierks v University of South Africa* (1999) 20 *ILJ* 1227 (LC) and *McInnes v Technikom Natal* [2003] 6 BLLR 701 (LC). Also see Du Toit *et al op cit* at 369, J Grogan "Great Expectations" *Employment Law*

(1999) 15(6) 10 and W Hutchinson "Uncertainties Surrounding the Renewal of Fixed-Term Contracts" (2000) 21 *ILJ* 2188.

42 These include annual tours to and from South Africa and the annual Tri-Nations competition.

43 See *Administrator of the Transvaal and others v Traub and others* (1989) 10 *ILJ* 823 (A).

44 See the comment of Waglay J in *McCarthy v Sundowns Football Club and others* (2003) 24 *ILJ* 197 (LC) at 204A-D.

45 Subsequent to the arbitration award in *SARPA*, a collective agreement was concluded, but it does not deal with this matter.

Anti-Doping Law in South Africa - The Challenges of the World Anti-Doping Code

by Portia Ndlovu*

1. Introduction

South African sports, has developed extensively since the advent of our democracy. This national awakening in sports owes its roots to the adoption of constitutionalism and the recognition, respect and upliftment of fundamental human rights in South Africa. This was confirmed in the judgment of *Coetzee v Comitis and Others*¹, where the court held that persons involved in professional sports (*in casu* the sportsperson being a soccer player) have the right to choose their occupation freely without being treated like objects.

The *Coetzee supra* decision established a value judgment based on equity thus establishing a constitutionally sound decision related to sports contracts in South African law. In a judgment by Traverso J and Ngwenya J, concurring, it was held that a contract of employment of a football player bound by rules of National Soccer League (NSL) may not contain a rule that is akin to restraint of trade when dealing with the transfer of a player from one club to another. Such a rule is unreasonable and contrary to public policy. It was thus held that such a rule is inconsistent with the Constitution and therefore invalid. In a similar case of *McCarthy v Sundowns Football Club and Others*² the court emphasized the importance of freedom in sports contracts.

Part of the development of sport in South Africa is evident in the production of world-class athletes in multi-sporting events who have graded international arenas to compete against the world's best with excellent results. Examples of these high sports achievers, to mention a few include the likes of Hestrie Cloete (high jump), Mbulaeni Mulaudzi (800m), Natalie Du Toit (paralympian swimmer), our rugby world-cup win in 1995 and our cricket team's great performances in recent one day international matches. However, this development has not been without certain pitfalls. I would like to mention three main obstacles that plague South African sports today. Firstly, unique to South African sports we have had to deal with the reality of our historical inequalities in sports. The South African Sports Commission Act³ which has now been repealed by the South African Sports Commission Act Repeal Act⁴ summarized the historical position of South African sports prior to the adoption of the Constitution.⁵ This socio-economic obstacle is being addressed through various efforts by national sporting bodies with the aim of producing talents from all social groups in South Africa. This difficult hurdle to sports in South Africa may require more than 11 years to remedy.

The second obstacle I would like to raise is that although South Africa is trying to develop as a great sporting nation, the media reports covering South African sports at the World Championships in Helsinki 2005, for example, highlighted that our efforts are simply insufficient in developing a culture of high performance sport. It was also reported, perhaps unfairly, that the South African athletes lack the 'winning culture' that is necessary to place South Africa on the map through making finals and winning medals or trophies. In the previous year again South Africa failed to perform well at the Athens Olympics finishing 43rd on the final medal table. Not to mention the recent dismal performance by the South African soccer team in the Africa Cup games Egypt in 2006. These reports and statistics show that South Africa is failing to produce enough sporting talent.⁶

Thirdly, the focus of this article, South African sport has been tainted by various doping scandals where, for example, in various codes of sport samples taken from various athletes have been found containing banned substances in the form of various stimulants or anabolic steroids. These doping scandals are clearly contrary to the spirit and law of sports. In May 2005, for instance, South Africa was in shock when our former Olympic 800 metres silver medalist

Hezekiel Sepeng tested positive for the banned steroid norandrosterone.⁷ The former Olympian protested to knowingly taking the banned substance and his case continues.⁸ In team sports, the South African Rugby judiciary had to ban Western Province hooker David Britz for testing positive for the anabolic veterinary steroid bolde-none.⁹ These doping scandals are a brief reflection on the problem of doping in South African sports. From these doping offences or scandals one is able to draw some understanding of the humiliating sanctions and consequences of doping both for the sport and the individual athlete therefore it is essential to declare war on doping through proper application of anti-doping law.

The purpose of this article is to educate South African athletes on anti-doping laws and to create awareness that it is possible to win at any level of competition without the use of banned substances.¹⁰ Further, it is essential in law to highlight that there is hope for those athletes who have talent and a desire to succeed but have been historically disadvantaged however they should seek to avoid expedient success through the use of banned substances. In light of the quest to develop as a sporting nation, it is the aim of this paper is to contribute to the legal research applicable to sport by highlighting the laws relating to doping and the challenge in applying these laws in South Africa.

2. South African Sports and Anti-Doping Law

The current legislation on anti-doping law in the Republic is contained in the South African Institute for Drug-Free Sport Act 14 of 1997. The 1997 Act has an express goal to promote participation in sports, free from the use of prohibited substances or methods intended to artificially enhance performance. Doping is defined in s 1 of the 1997 Act in relation to sports as the administration of substances belonging to prohibited classes of pharmacological agents or the application of any method intended to enhance performance artificially.

Section 10 of the 1997 Act sets out various objectives aimed at discouraging the use of drugs in sport. These objectives include *inter alia*, at s 10(1)(b) the encouragement of development programmes aimed to educate more specifically the sporting communities about the dangers of doping in sport. It is obvious from the objectives of the Institute that the aim is to eradicate the use of illegal drugs in sport, however, these exceptional legislative objectives need to be accompanied by practical education for sportspersons against doping because the reality for many athletes is that they use banned substances because they believe it is necessary for achieving world-class performances. This wrongful mindset in doping athletes themselves is contrary to our law and places in danger the health of the athletes.

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1 (2001) 22 ILJ 331 (C)

2 (2003) 24 ILJ 197 (LC).

3 Act 109 of 1998, now repealed. The preamble of the Act stated that prior to the adoption on non-racial sports organizations, the apartheid laws that existed had the effect of creating sporting movements which operated under racial policies and in that manner prejudiced and brought detrimental results to sports persons and sport both locally and internationally.

4 Act 8 of 2005.

5 The Constitution of the Republic of South Africa 108 of 1996.

6 For further obstacles that have plagued SA sport see, The International Sports Law Journal by the Asser Institute 2004/1-2. Rochelle le Roux 2003: *Annus Horribilis for South African Sport?*

7 De Jongh Borchardt *Beeld* 8 May 2005.

8 *Pretoria News* 27 January 2006.

9 Stephen Nell *Cape Times* 23 June 2005.

10 This initiative is in compliance with, s 11(2)(k) of the South African Institute for Drug-Free Sport 14 of 1997 and Article 18 and 19 of the World Anti-Doping Code.

3. Practical Application of Current Anti-doping Legislation

In terms of s 10(1)(d) of the 1997 Act,¹¹ the Institute intends to bring about the introduction of a centralized independent sample collection and testing program, which may subject any athlete to dope testing on short notice or without notice both in and out of competition. This method is to be adopted by all national sports federations and organizations. They are to achieve this by adopting uniform independent and internationally acceptable sample collection and testing procedures. Further, in terms of s 10(1)(f) Act, the Institute aims to develop and maintain drug-testing laboratories accredited by the International Olympic Committee (IOC).

It is important to mention that in applying the local laws on practical testing processes due regard must be had to the World Anti-Doping Agency's (WADA) tools for testing ethics, that being, an awareness of the rules regarding Laboratory Accreditation, Prohibited List and Therapeutic Use and Exemptions and Testing Standards as well as the Models for Best Practice, especially when securing attendance of athletes for unannounced, out-of-competition testing.¹²

It is submitted that it is now possible to measure the progress made by the Institute in achieving its anti-doping objectives in terms of the 1997 Act¹³ as the date of the statute's commencement is 23 May 1997, thus giving it eight years to date of application. Without our reflection on whether the objectives in terms of s 10 of the 1997 Act have been achieved or at least are in the process of achievement, South African anti-doping law will remain in the dark ages and it will be an academic exercise to seek to update our current law with the World Anti-Doping Code if the objectives of our local laws are neither rigorously sought nor applied in reality.

How do we measure success of the 1997 Act objectives? We ought to attempt *inter alia* as a country to establish room for efforts made through various programmes in schools for instance to educate learners on the laws relating to anti-doping and thereby discourage the use of banned substances. There should see a decline in doping statistics through exposing and rehabilitating offenders and exposing the dangers of doping.

To date its South African efforts in achieving the objectives of the 1997 Act are to a limited extent laudable as many of the doping offences have been dealt with publicly and with proper sanction. Further, the stakeholders in South African sports have reacted positively to the need for drug-free sports. This attitude by South Africa is in line with international legal trends on anti-doping. On the international circuit the efforts of WADA and the IOC should be recognized as they managed to punish various doping offenders through the annulment of illegally obtained performances. If South Africa is as aggressive against doping in sports as the rest of the legal world trends, we are going to develop as a sporting nation that truly celebrates the spirit of sports without the promotion and celebration of sports cheats.

4. Duty to publish Information on testing procedures

In terms of s 11(1)(g) of the 1997 Act, a statutory duty to develop, maintain, distribute and publish information on procedures for, and developments concerning, the collection of testing samples is created. However, this duty is not preemptory as the wording of the statute contains the word 'may' in the creation of the duties under s 11 (1). However, s 11(2) creates powers and duties of the Institute, which are preemptory as they are incumbent in the creation of effective anti-doping legislation.

In terms of s 11(2)(a) of the 1997 Act, the institute must maintain a list of prohibited substances and practices listed under the 'List of Doping Classes and Methods'.¹⁴ This list is referred to in the World Anti-Doping Code as the 'Prohibited List' and is regulated in terms of Article 4 of the Code.¹⁵ The annual update of the publication suggests the ongoing research and scientific developments that are taking place in the science of doping methods.

In terms of s 11(2)(d) of the 1997 Act, the Institute has an imperative duty to disseminate information relating to penalties likely to be imposed if athletes test positive for doping or if such athletes fail to comply with requests to provide samples for testing. Clearly a nega-

tive inference is drawn against any athlete who refuses to provide a sample for testing. With regard to who may be tested, s 11(2)(e) and ss (f) of the 1997 Act, it is within the powers of the Institute to select the athletes to be tested, to collect samples from such athletes while securing a tamper-free transit of such samples to approved laboratories. Therefore, where the legislative measures of testing have been properly adhered to it is likely that the results from the testing are true and correct, to eliminate common arguments from offending athletes who may claim to be victims of incorrect testing procedures.

5. The Institute Appeal Board

The Institute Appeal Board, which is responsible for hearing and deciding on doping disputes, is established in terms of s 17 of the Act.¹⁶ In terms of s 17(2)(a), the Appeal Board has express power to hear and decide on any dispute relating to drug taking or doping, however, this is done on an appeal level. Prior to lodging an appeal, an amount of a thousand rand must be deposited by the appellant with the Board. The amount payable is refundable if the verdict reached by the Board is in favour of the appellant; however, if the appeal is unsuccessful, the amount deposited is forfeited. In terms of s 17(6) of the 1997 Act sanctions on persons found guilty of doping shall be in accordance with the penalties laid down in the constitutions of the respective sports federations.

6. The World Anti-Doping Code

The World Anti-Doping Agency (WADA) has reacted to the problem of doping in world-wide sport by creating an international code in the form of the World Anti-Doping Code, to which South Africa is a signatory.¹⁷ At the heart of the Convention is the response by the international community to harmonize the rules relating to anti-doping in order to preserve fair play and prevent harm to the health of sports people.¹⁸

To date nothing is yet mentioned about the World Anti-Doping Code in the South African Institute for Drug-Free Sport Act 14 of 1997. Comparatively speaking, the South African 1997 Act¹⁹ does capture the spirit of the code. However, it is essential that the code is disseminated through our law either as a schedule to the 1997 Act or as a separate World Anti-Doping Convention Act so that it is easily accessible for all. This will also encourage a culture of clean sportsmanship that reflects international trends. It is proposed in this article that amendments in current South African law are necessary to reflect the position expressed in the World Anti-Doping Code.

The creation of the World Anti-Doping Code is a reaction to the reality of doping in sport which is a legal difficulty that is unique to sport. It is stated that, "a large part of sporting jurisprudence deals with disciplinary proceedings, many of them pertaining to doping cases. It is in the latter context that the Court of Arbitration for Sports (CAS) has developed principles, which it has applied consistently These principles were developed in an effort to fight doping in sport effectively and must be viewed against the backdrop of the increasing difficulty to be ahead of developments in laboratories."²⁰

The World Anti-Doping Code deals aggressively with doping in

11 South African Institute for Drug-Free Sport Act 14 of 1997.

12 Rochelle Le Roux *The World-Anti Doping Code: A South African Perspective* South African Journal for Research in Sport, Physical Education and Recreation (2004) Volume 26 (1) 67.

13 South African Institute for Drug-Free Sport Act 14 of 1997.

14 As we are living in an information age, obtaining a list of banned substances and methods should be the responsibility of persons involved in sports. Relevant to South Africa is a list of doping classes and methods banned in sport available at the website: web.uct.ac.za/depts/mmi/jmoodie/sporttab.html & www.drugfreesport.org.za/.

15 <http://www.wada-ama.org>.

16 South African Institute for Drug-Free Sport Act 14 of 1997.

17 Rochelle Le Roux *The World-Anti Doping Code: A South African Perspective* South African Journal for Research in Sport, Physical Education and Recreation (2004) Volume 26 (1) 65. (See paper for clarity on various specific aspects of the Code.).

18 Ibid.

19 South African Institute for Drug-Free Sport Act 14 of 1997.

20 Rochelle le Roux *Under Starter's Orders: Law, Labour Law and Sport* (2002) 23 ILJ 1206.

the international community. This was confirmed in the recent case of World Anti-Doping Agency (WADA) v United States Anti-Doping Agency (USADA); United States Bobsled & Skeleton Federation (USBSF); Zachery Lund and Fédération Internationale de Bobsleigh et de Tobogganing (FIBT) (as "Interested Party")²¹ In an appeal dated 2 February 2006 by WADA against the decision of USADA in respect of a doping violation by Mr Zachery Lund. USADA had made a decision not to treat Mr Lund as "a cheat" because he had been using the banned substance for medical purposes. The CAS rejected the submissions by USADA and allowed the appeal by WADA which was calling for an appropriate sentence of a two year ban on Mr Lund.²²

7. The International Convention against Doping In Sport

It is essential at this point to highlight the distinction between The World Anti-Doping Code discussed herein and the United Nations Educational Scientific and Cultural Organization (UNESCO) Convention against Doping in Sport.²³ It must be pointed out that although this paper supports and calls for the WADA Code to be adopted into South African law it must be noted that there is no legal obligation for countries to adopt the WADA Anti-Doping Code in such a manner. However, the UNESCO Convention against Doping in Sports does create an obligation on the ratifying countries to pass legislation that is consistent with it. With the understanding of the distinction between the Code and the Convention, it is respectfully submitted that greater good would be achieved in South African anti-doping law if the Convention is adopted with the force of law. The proposed adoption of the Convention against Doping in Sport will give rise to the automatic application of the WADA Anti-Doping Code in terms of Article 2 (6) as the Code is an appendix to the Convention.

At present South Africa is not on the list of member States to the Convention against Doping in Sport.²⁴ Member States either by acceptance or ratification include Australia, Canada, Cook Islands, Denmark, Iceland, Monaco, New Zealand, Nigeria, Norway and Sweden. With Drug-Free South Africa²⁵ seeking to apply international standards in the war against doping in sports it is necessary that our local legislation is amended to reflect the application of the Convention against Doping in Sports. The current South African law, the WADA Anti-Doping Code and the UNESCO Convention against Doping in Sports all reflect similar objectives therefore there is no reason barring South Africa from becoming a member State to the Convention.

It is clear from the preamble of the Convention that it is an instrument that is in line with South African as well as international law on doping. This is evident in the following words of the Convention, "Conscious that sport should play an important role in the protection of health, in moral, cultural and physical education and in promoting international understanding and peace. Noting the need to encourage and coordinate international cooperation towards the elimination of doping in sport. *Concerned* by the use of doping by athletes in sport and the consequences thereof for their health, the principle of fair play, the elimination of cheating and the future of sport.... *Mindful also* of the influence that elite athletes have on youth."²⁶ This preamble of the Convention assures all ratifying States that it is in the agenda of UNESCO to create the necessary legal instruments to eliminate practices that are contrary to the ethics of sport. This will encourage all those in the sporting community to behave with integrity.

8. The World Anti-Doping Code and the Constitution

The World Anti-Doping Code, similar to the UNESCO Convention against Doping in Sports²⁷ is based on constitutional principles and human rights²⁸ therefore it is unlikely that the legality of the rules of the Code may fail when tested against the South African Constitution. The Code itself appears to have no rules that may operate against public policy. The Code can be termed an instrument based on the promotion of human rights that seeks to promote such rights through the eradication of immoral practices in sports.

9. The Responsibility to Apply the Code: Sporting Bodies in South Africa

Recently the Department of Sport and Recreation endeavoured to restructure the controlling bodies of sport in South Africa. These efforts resulted in the creation of a sporting superstructure known as the South African Sports Confederation and Olympic Committee (SASCOC).²⁹ SASCOC is the controlling body for all high performance sport in South Africa. It is a Section 21 Company created by representatives from all sports bodies at a general meeting held on 27 November 2004. All members of the Association are listed in Schedule 1 of the company's Articles of Association. It is important to have an understanding of the controlling body of South African sports as it is the umbrella body responsible for the progress of athletes within the confines of the World Anti-doping Code. In terms of the Memorandum of Association, the main object is to promote and develop high performance sport in the Republic of South Africa. Further, SASCOC is to act as the controlling body for the preparation and delivery of Team South Africa at all multi-sport international games including but not limited to the Olympics, Paralympics, Commonwealth Games, World Games and All Africa Games. In achieving its objectives SASCOC is required in terms of clause 4 of its memorandum to assume functions relating to high performance sport which were carried out by the following controlling bodies in the Republic of South Africa:

- i Disability Sport South Africa (Association incorporated under Section 21);
- ii National Olympic Committee of South Africa;
- iii South African Commonwealth Games Association (Association incorporated under Section 21);
- iv. South African Sports Commission³⁰;
- v. South African Student Sports Union;
- vi. Sport and Recreation South Africa; and
- vii United School Sports Association of South Africa;

SASCOC's main responsibilities also include the duties to affiliate to and/or be recognized by the appropriate international, continental and regional sport organisations for high performance sport and for that purpose act as the recognized national entity for the Republic of South Africa. Initiate, negotiate, arrange, finance and control where necessary, multi-sport tours to and from the Republic of South Africa inclusive of events between teams and/or individuals. Ensure, and if necessary approve, that the bidding process relating to the hosting of international sporting events in the Republic of South Africa or any other events are in compliance with the necessary rules and regulations relating to same. Facilitate the acquisition and development of playing facilities including the construction of stadia and other sports facilities. Ensure close co-operation with both the government and private sector, relating to all aspects of Team South Africa and ensure the overall protection of symbols, trademarks, emblems or insignia of the bodies referred to in 1g within the Association's jurisdiction.

With regard to resolving South Africa's crippling social needs SASCOC has pledged to unite and commit towards an improved system

21 Case: Court of Arbitration for Sport (CAS) Ad hoc Division - XX Olympic Winter Games in Turin CAS arbitration NE CAS OG 06/001http://www.tas-cas.org/en/code/frmco.htm

22 The decision of the CAS was handed down on 10 February 2006. What we can draw from the decision is that there are vigorous endeavors by the World Anti Doping Agency in ensuring that the laws relating to anti-doping are well observed by the international community. As South Africans we can learn from these efforts when dealing with doping in South African Sports.

23 Paris, 19 October 2005.

24 portal.unesco.org/la/convention.asp?

KO=31037&language=E&order=alpha#1.

25 The South African Institute for Drug-Free Sports (SAIDS) Tel. (+27 (021) 683 7129/Fax (+27) (021) 683 7274/email drugfree@iafrica.com

26 See, preamble of the Convention against Doping in Sports, Paris 19 October 2005.

27 See, preamble of the Convention against Doping in Sports, Paris 19 October 2005.

28 Rochelle Le Roux *The World-Anti Doping Code: A South African Perspective* South African Journal for Research in Sport, Physical Education and Recreation (2004) Volume 26 (1) 73.

29 http://www.sascoc.co.za

30 Note repeal of Sports Commission Act 109 of 1998.

based upon the principles of equal opportunity, non racialism and non sexism for all persons.³¹ SASCOC is also dedicated to ensuring equitable development at national and representative level, which ensures the implementing of coordinated sports procedures and policies to ensure elite levels of athleticism, thus allowing delivery of Team South Africa by the pooling of activities, resources, experience and expertise. This express vision and goal of SASCOC is essential to creating a social balance in sport, one only hopes that what is expressed by SASCOC on paper can be achieved in practice.

With regard to anti-doping law SASCOC's Articles of Association provide in Article 26 that all members are to comply and be bound by and procure that their members comply with the Code presently in force and adopted by South Africa and the International Olympic Committee (IOC). The code is the World Anti-Doping Code adopted in Copenhagen. Although this code is part of South African law, it has not been expressly reflected in local legislation. It is proposed that the current South African law on anti-doping must be amended to give effect to the changes in sporting bodies as well as the application of the World Anti-Doping Code.

10. Conclusion

In conclusion, it is essential to remember that large investments to

keep South African sports from drug use have been made in the form of legislation and scientific research. It is also evident in the creation of the UNESCO Convention against Doping in Sports and World Anti-Doping Agency's efforts resulting in the creation of a World Anti-Doping Code that doping in sport is an international concern that seeks to undermine the integrity of fair play. Therefore, it is essential that our laws be amended to give effect to the World Anti-Doping Code and the UNESCO Convention against Doping in Sports so that matters relating to anti-doping law can be dealt with through a singular international standard. We live in a global village where sport forms a substantial aspect of that village thus harmonization and uniformity of laws relating to sport is clearly desirable. Clearly as a country we are not alone in the fight against drugs in sport, however, we are responsible for educating ourselves on the legal measures we have adopted in order to apply them in sporting bodies and in our courts.

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³¹ This goal being in harmony with the objectives of the now repealed Sports Commission Act 109 of 1998.



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Concluding statement: Richard Krajicek, Director ABN AMRO World Tennis Tournament



T · M · C · A S S E R P R E S S

THE HAGUE — THE NETHERLANDS

Sports Image Rights in Europe

Editors:

Ian S. Blackshaw and Robert C.R. Siekmann

*With a Foreword by Sam Rush, Chief Operating Officer,
SFX Sports Group (Europe) Ltd., London, United Kingdom.*

As sport has developed into a global business, the importance of sports image rights as a marketing tool to promote individual sports persons and sports teams and clubs – and, incidentally, major sports events themselves – has also evolved and become a significant player in the multi-billion dollar sports industry around the world – not least in Europe, a powerhouse in world sport and the focus of this book.

This book provides a concise legal and practical overview of the creation, protection and enforcement of sports image rights in the pre-May 1, 2004 Member States of the European Union as well as Norway and Switzerland. It also covers sports image rights in the United States of America for comparative purposes. A separate chapter deals with some of the fiscal aspects of the subject. Each chapter is devoted to a review of the applicable legal rules on sports image rights in an individual country. In addition, where appropriate, practical mat-

ters, such as the contents of contracts, are also examined and explained.

The contributors to *Sports Image Rights in Europe* are from major European law firms and are experienced in sports law in general and the field of sports image rights in particular. The book's editors are Professor IAN S. BLACKSHAW, international sports lawyer and a member of the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, and Dr ROBERT C.R. SIEKMANN, Director of the ASSER International Sports Law Centre, The Hague, The Netherlands.

www.asserpress.nl/cata/image/fra.htm

ISBN 90-6704-195-5

420 pp., hardcover

GBP 65.00 / USD 125.00

Distributed for T.M.C. ASSER PRESS by CAMBRIDGE UNIVERSITY PRESS:

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T · M · C · A S S E R P R E S S

THE HAGUE — THE NETHERLANDS

The Court of Arbitration for Sport: 1984-2004

Editors: Ian S. Blackshaw, Robert C.R. Siekmann and Janwillem Soek

With a Foreword by Luiz Roberto Martins Castro,
President of the National Sports Law Institute, Sao Paulo, Brazil.

The Court of Arbitration for Sport has come a long way since the idea of establishing it was first mentioned by Juan Antonio Samaranch, the former IOC President, who foresaw the need for a specialised body to resolve sporting disputes outside the normal court system. His aim was for CAS to become the supreme court of world sport; an aim which the pages of this book demonstrate, has been largely fulfilled. Since its creation and up to 31 December, 2003, 576 cases have been submitted, of which 550 were requests for arbitration and 26 for an advisory opinion. In 2004, there was a sharp rise in the number of cases handled by the CAS and this trend continues apace. Thus, the CAS goes from strength to strength and has a great future, having, in the words of the Swiss Federal Tribunal in a landmark judgement of 27 May, 2003, 'built up the trust of the sporting world [and is] now widely recognised ... [as] ... one of the principal mainstays of organised sport.'

This 'jubilee' book – after twenty years of operations – charts the history, including significant milestones, and achievements of the CAS and provides a range of very useful and helpful materials and valuable information. All of the contributors are well qualified, being leading practitioners and academics from many parts of the world in the field of sports dispute resolution; a number of them are members of the CAS. Some of the contributions are of a

critical nature which adds to the usefulness of the work. The subject of a developing '*lex sportiva*' is also critically examined.

This book fills a yawning gap in the existing literature on the organisation of and wide range of services provided by the CAS to 'the family of sport'. It is an invaluable tool and source of information and a reference point for all those who are involved – in any way whatever – in the settlement of sports disputes, particularly sports administrators, sports lawyers, sports marketers, and sports persons themselves, as well as students, researchers and academics with an interest in this developing field.

The book's editing team consisted of Professor IAN S. BLACKSHAW, international sports lawyer and a member of the CAS, Dr ROBERT SIEKMANN and JANWILLEM SOEK, ASSER International Sports Law Centre, The Hague, The Netherlands, supported by Andy Gibson, Griffith University, Brisbane, Australia and Prof. Steve Cornelius, University of Johannesburg, South Africa.

www.asserpress.nl/cata/cas2004/fra.htm

ISBN 90-6704-204-8 / 978-90-6704-204-8

612 pp., hardcover

GBP 85.00 / USD 150.00

Distributed for T.M.C. ASSER PRESS by CAMBRIDGE UNIVERSITY PRESS:

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Extra Time: Are the New FIFA Transfer Rules Doomed?*

by Jean-Christian Drolet**

With the Bosman decision, the European Court of Justice (ECJ) forced the Fédération Internationale de Football Association (FIFA) to change its transfer rules. These new rules, adopted in July 2001, were supposed to answer the ECJ concerns about the restriction of the free movement

Introduction

The *Bosman* decision of the European Court of Justice (ECJ) transformed the rules of international soccer² transfers, giving more freedom to the players. It also placed the Fédération Internationale de Football Association (FIFA), soccer's international governing body, in a difficult situation. They were forced to revise their rules on international transfers in order to align them to the ECJ ruling. After a lot of bargaining and dealing the new rules came in effect in September 2001. In 2005, FIFA changed the rules again, in the hope to make them more robust and prevent future contestation. The purpose of this paper is to examine these new rules and to determine whether they violate article 39 of the Treaty establishing the European Community (Treaty) by restricting the free movement of persons and if so, whether they would meet the test for legality of such rules created by the ECJ in the *Bosman* case.

What are transfer fees?

This question may seem superfluous for the soccer fan, but for the reader that does not necessarily know the ins and outs of this sport, a short explanation may be needed. There are two ways for a soccer club to get the rights on a player. First it can train him from the beginning via academies or related amateur soccer clubs. The second way is to "buy" the rights to field a player from another club, this is called a transfer. The money that is paid from the buying club to the selling club is called a transfer fee. The North American sports fans are familiar with the concept of trades where teams trade players for other players. However soccer's tradition is to transfer players for money.³

Bosman, much ado about nothing?

There is a lot of literature on the *Bosman* decision. I do not intend in going in a detailed analysis of the case, but I consider that a short history of it and an analysis of its impact on the soccer transfers is necessary to help the reader understand the context that led to new transfer rules.

History of the case

Mr. Bosman was a promising young Belgian soccer player. At the expiration of his contract he ended up in a contractual dispute with his current club. In consequence he asked to be transferred to a new club. A deal was made between Bosman, his old club and a French club for his transfer. However, the old club had doubts about the financial strength of the French club and stopped the transfer procedures. Bosman had to obtain a court order to be able to sign a contract of employment with another club. In the proceedings, Mr. Bosman asked for a permanent injunction and compensation from his old club. His main argument was that the transfer system was a violation of the right of free movement of persons within the EU and a violation of the EU competition law. The matter was referred to the ECJ by the Belgian court⁴. The ECJ therefore had to determine the legality of the transfer system. It decided that the transfer fees charged for a player that had ended his contractual relationship with the club was an illegal restriction of the free movement of persons. Regarding the competition law and the possible restriction of the market for players, the ECJ refused to consider it, since it was unnecessary for their ruling.⁵

However, before the ECJ decision, the Belgian appeal court had ruled that the transfer regulations were decisions of associations by which the clubs restrict competition for players between themselves, that transfer fees were dissuasive and tended to depress the salary of players and that the restriction on competition might constitute abuses prohibited by Article 86 (now 82).⁶ One could argue that if the ECJ did not correct this reasoning, it means that the Court implicitly agrees with it. But I think that using freedom of movement was the simplest solution for the ECJ and it had the feeling that it would give the best results without having to address the competition law questions.

The impact of *Bosman* on the transfer system in soccer

Before *Bosman*

Clubs would get a fee for the transfer of a player every time they transferred him to another club. There was always a value attached to the players. The club could not lose them for nothing when the contract had expired. However, this could lead to situations in which the price asked for a player would be higher than what the other clubs were ready to pay. The player would then suffer from this situation, having to accept the unilateral contractual offer of his club that usually included a sharp decrease in revenues or be willing to strike until he was able to get transferred. This is exactly what happened to Mr. Bosman and it forced him to sue his former club. This was not a new problem since there were English cases before *Bosman* in which the players sued their clubs to get transferred, the first one dating back to 1912.⁷

Eastham v. Newcastle United was the first successful challenge of the English transfer rules. The court ruled that the transfer fees affecting Mr. Eastham were:

"(N)ot binding on the plaintiff and are unreasonable restraints of trade"⁸.

So thirty years before the *Bosman* case, freedom was granted to the English soccer players. However, the clubs were able to maintain control on the players because of the absence of a strong players' association and of solidarity between players.⁹ This situation prevented the

* University of Hamburg, Germany.

** This contribution is an elaborated version of a paper that was presented at the Eleventh Annual Congress of the International Association of Sports Law (IASL) in Johannesburg (South Africa), 28 November/1 December 2005.

1 *Union Royale Belge des Sociétés de Football Association and Jean-Marc Bosman*, C-415/93.
2 Being Canadian I will use in this paper the term most familiar to me, soccer, for what the rest of the world knows as football.
3 Even in North America the transfer of players for money has been allowed and used in the past, the best known example being the sale of George Herman "Babe" Ruth to the New York Yankees by the Boston Red Sox in 1920.
4 The judicial war between Bosman and his club gave rise to multiple actions, motions and appeals. The following

summary only looks at the most important legal aspects of that saga.

5 The ECJ wrote at paragraph 138: "Since both types of rules (transfer fees and national clauses) to which the national court's question refers are contrary to Article 48 (now 39, free movement of persons), it is not necessary to rule on the interpretation of Articles 85 and 86 of the Treaty (now 81 and 82, EU competition law)."
6 *Bosman*, paragraphs 45 to 47, see footnote 1.
7 *Kingaby v. Aston Villa* (unreported), *Aldershot Football Club v. Banks* (unreported) and *Eastham v. Newcastle United* [1964] Ch. 413, for the unreported cases see: Greenfield, S.; *The Ties that Bind: Charting Contemporary Sporting Contractual Relations in: Greenfield, S. and Osborn, G.; Law and Sport in contemporary society*, Frank Cass Publishers, 2000, London, Ch.8.
8 *Eastham*, paragraph 160, see footnote 7.

player to use the decision as an efficient leverage during negotiations. New rules were drafted but they gave extra advantages to the good players and almost none to the marginal players.¹⁰ So the opportunity to liberate the soccer players from the restrictive transfer system existed before *Bosman*. But the *Eastham* case had little impact, mainly for the reason that it did not have a pan-European effect like *Bosman*. Also, it was not based on antitrust law but on the Common law contract doctrine of “restraints of trade”. The decision was therefore hard to import in the continental Europe jurisdictions. However, I find it notable that such a decision was not given more publicity in the soccer world; it could have brought big changes for the players.

After *Bosman* or organized chaos

The ruling of the ECJ was sharply denounced by the football community, even if it touched only about 10% of the active soccer players in Europe, the ones at the end of their contracts.¹¹ They were now benefiting from a strengthened negotiation position and they could “test the market” to get paid at their real value. The rest of the players were still affected by the transfer rules and did not gain more freedom.¹² During this period, players and clubs adjusted their behaviors in order to make the best out of the situation. Clubs that wanted to make sure that they would get something if a player left preferred to transfer players before their contract ended and receive a transfer fee instead of receiving on the field performance and the associated revenues from the player during the remainder of his contract. Additionally the clubs signed their valuable players with long term contracts. This behavior ended up being exactly as investment theory and the Coase theorem would predict.¹³ So the forecasted apocalypse did not arrive and soccer survived.

The birth of the new system

In 2001, FIFA implemented new rules to regulate transfer fees. These rules were the object of negotiations with the European Commission. Its Competition Commissioner, Mario Monti, was reported to have been personally implicated in the drafting of the rules, so most observers call them the Monti rules.

We can find the legal justification for some regulation on transfers of players in the *Bosman* decision. In paragraph 106 the ECJ writes:

“In view of the considerable social importance of sporting activities and in particular (soccer) in the Community, the aims of *maintaining a balance between the clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.*” (italics added)

In that statement, the ECJ says that it would be possible for the clubs to behave contrary to the free movement of persons and, I submit, to the antitrust laws, if these measures allow FIFA to achieve both these goals.¹⁴

These two justifications, maintaining competitive balance and encouraging the training of young players, also happen to be the traditional economic justifications for the transfer fees. Traditional economic theory of the transfer fees in soccer states that with this mechanism, the richer bigger clubs are prevented from buying all the good players. This results in a more equal repartition of soccer talent between the clubs. By having to pay a transfer fee, the cost of acquiring the player is higher and it prevents the richer clubs to “buy” a championship team every year. Also, the transfer fees allow the selling club to pay for new players or to give better salaries to the remaining ones. Always according to the traditional theory, the transfer fees also induce the clubs to invest in the training of the players since they will get a return on their investment. Professional soccer clubs are usually responsible, through football academies and amateur clubs, for the development of young players. In addition, they have to take care of the development of the players that are currently on their roster. The transfer fee is seen as the means to get back the costs of training the player that was transferred and the costs of training of the players that did not become professional players. So the costs of the single player should be adjusted to include the costs of all the players that did not

succeed to access the professional level.¹⁵ According to the traditional soccer economic theory, the situation after the *Bosman* decision gave clubs the incentive to under-invest in the training and the development of players since there is no guarantee that they would be able to get compensated for the money invested, the player being free to leave at the end of his contract. Also, this would destroy the competitive balance of the game since the price of players for the rich clubs was reduced.

The ECJ seems not to agree with the traditional sports’ economic reasoning in the case of the players at the end of their contracts. It rightly judged that the competitive balance was not helped with the existence of transfer fees, since the evidence presented by *Bosman*’s lawyer showed that the rules did not prevent the richest club from getting the best players or helped the poorer clubs. As for the second argument, the ECJ found that the transfer fees were contingent, uncertain and totally unrelated to the actual costs of training a player. Consequently, the prospect of receiving such fees could not be an incentive for any club to invest in the development of players. Finally, it found that the same aim could be achieved at least as efficiently by less restrictive methods, which impeded less on the free movement of persons.¹⁶ The ECJ with this short commentary rebuked the traditional explanation of the transfer fees proposed by the sports’ economists. This conclusion of the ECJ still does not make unanimity.¹⁷ However, seeing the results of the negotiation between the European Commission and FIFA on the new transfer rules, one must conclude that the view of the ECJ won, at least partially.

Even more recently, in 2005, the FIFA executive committee adopted a new set of rules that are supposed to correct the problem that were raised by some member clubs with the adoption of the Monti rules.

The Monti rules

These rules have not convinced the authors that studied them. They consider that they could lead to the worst possible economic result¹⁸: an under-investment in training and a destruction of the competitive balance in the leagues. However, since the same allegations were made after the *Bosman* ruling, the new rules should be examined in detail to determine if the doomsayers are right. The new FIFA rules cover both amateur and non-amateur players, but for the purpose of this analysis I will only describe and analyze the non-amateur transfer rules.

The 2001 transfer rules¹⁹

The first aspect of these rules regulates the length of professional players’ contracts. According to paragraph 4 (2) of the Regulations for the Status and Transfer of Players (Transfer Regulations), contracts should

9 The situation of professional sports players in Europe is strange since none of them seem, contrary to the North American players, to benefit from the protection of a strong players’ union.

10 Greenfield, S.; p. 137, see footnote 7.

11 Antonioni, P. and Cubbin, J.; *The Bosman Ruling and the Emergence of a Single Market in Soccer Talent*, European Journal of Law and Economics, 9:2, 157-173 (2000).

12 If you only take into consideration the abolition of the transfer fees and not the abolition of the national clauses for EU residents.

13 For the model and more explanations see Antonioni and Cubbin cited at footnote 11.

14 Assuming that these are legitimate goals, which is questionable. For more on that see S. Weatherill, *Sport as Culture in EC Law* in R. Craufurd Smith, *Culture and European Union Law*, Oxford University Press, 2004, Oxford.

15 Feess, E. and Mühlheuser, G.; *Economic Consequences of Transfer Fee Regulation*

in *European Football*, European Journal of Law and Economics, 13: 332-237, 2002, p.230.

16 *Bosman*, paragraphs 107 to 110, see footnote 1.

17 Feess and Mühlheuser, see footnote 15, develop a good model and arguments showing that there was nothing wrong with the pre-Bosman transfer system and at the other end, Antonioni and Cubbin, see footnote 11, show that there is no major fundamental difference between the pre and post-Bosman situations.

18 Feess and Mühlheuser, see footnote 15 and Feess, E. and Mühlheuser, G.; *Transfer Fee Regulation in European Football*, IZA Discussion Paper no. 423, February 2002.

19 *Regulations for the Status and Transfer of Players* (Transfer Regulations), FIFA Executive Committee, July 5 2001 and *Regulations governing the Application of the Regulations for the Status and Transfer of Player* (Application Regulations), FIFA Executive Committee, July 5 2001.

have a term of between one and five years. This is intended to prevent clubs from signing their players for unreasonably long periods of time.

Articles 13 to 20 of the Transfer Regulations contain the provisions that regulate the compensation for the training and education of young players. To make sure that the transfer fees are related to the costs of training of a young player and that they are given to the clubs that really contributed to that training. Also it designated the years between the age of twelve and twenty-one as the years in which the education of a young player occurs and that a compensation for the costs of training the player should be paid if he is transferred between the age of twelve and twenty-three. But there is an inconsistency with that goal in article 13. The article states that if it is evident that a player has already terminated his training period before the age of twenty-one, compensation shall be due until the player reaches the age of twenty-three. But the calculation of the fee shall be based on the years between twelve and the age at which it is determined that the player ended his training period. So instead of having a hard set rule, we have a soft criterion that leaves a lot of discretion to the clubs since they will most likely be the ones that determine if and when a player ended his training period. Clubs could be tempted to use that article in order to capture most of the future transfer fees attached to this player for themselves. Clubs could unilaterally declare the training period of a player over in order to capture most of the transfer fee for themselves. So article 13 could prove very problematic in the future.

Then articles 15 and 16 state that a fee should be paid every time a player changes club until the end of the season in which he reaches the age of twenty-three and that the fee should be distributed between the clubs that participated in the training and education of the player. Finally article 17 outlaws any other type of compensation or transfer fee for players under twenty-four except for the amount prescribed by the Transfer Regulations.

The formulation of the Transfer Regulations is very general and we need to look at the Application Regulations (AR) in order to completely understand the process. However, these additional regulations do not make the mechanism crystal clear, many points are still vague.

Article 6 of the AR explains how to calculate the compensation. First it establishes four categories that determine the compensation to be paid for a player. These are:

- Category 1 division 1 clubs of major soccer countries
- Category 2 division 2 clubs of major soccer countries and division 1 clubs of other countries
- Category 3 division 3 clubs of major soccer countries and division 2 of other countries
- Category 4 All the other clubs

The determination of the club category shall be made by the National Associations of the various countries in partnership with the players' representatives to make sure that the right clubs are placed in the right categories. The National Associations are granted a lot of power in the determination of the compensation for training and education. This power was probably a sweetener put in by the commission and FIFA as the result of the loss of the "obligatory transfer" prices that the National Associations had imposed prior to the *Bosman* decision.²⁰ Each year, for each category, except category 1 where it shall be based on the real costs of training a player, the National Associations shall determine a ceiling for the training costs of a player. So to determine the fee, the costs of training in that category of club will then be multiplied by the number of years the player stayed with the club of that category. Then all the years of training in all the clubs are added together to give the total compensation payable for the transfer of the player.

Article 8 of the AR then regulates how the compensation is distributed between the clubs that contributed to the training and education of the player. If the transfer is made from a club of the category 4 or 3 to a club of a higher category, then 75% of the amount shall be distributed to the clubs that trained the player, pro-rated by the years passed in each such club. It diminishes to 50% if the transfer is from a Category 2 club to a club of Category 1 and to 10% in the case of a

player transferred between clubs of the same category. The rest of the transfer fee goes to the club that transferred or "sold" the player, in addition to what it can claim as compensation for the training of the player.

Also, Chapter IX of the Transfer Rules creates a solidarity mechanism that adds itself to the transfer system: 5% of the total compensation will be paid to all the other clubs that trained the player, in a proportion determined by the age of the player at the time he was with that club.²¹ So there is a double compensation for the clubs that trained the player, first through the amount that is paid directly to them according to Article 8 AR and then from the amount received from the former club through a "solidarity tax".

Finally, it is interesting to note that the transfer fees are not declared illegal for the players that are above twenty-three years of age. These players are still subject to the post-Bosman rules, and they are likely to be transferred based on their total economic value. Also, if they are without a valid contract of employment, then they can freely negotiate their services to all clubs. So we can safely assume that this segment of the players' market will not be directly affected by the new transfer rules.

Analysis of the 2001 transfer rules

It is clear, reading the 2001 regulations that the *Bosman* case weighed heavily in their conception. However, it is very surprising to see the number of holes and vague terms that were still present in the regulations. The authors that had the opportunity to study the rules from an economic standpoint, mainly examining the incentives for training brought by the rules, found few positive points about them. In their opinion it is a system inferior to both the pre and post-Bosman situation.²²

However, there seems to be a problem of underinvestment to train and educate young players. Some kind of intervention seems to be needed to make sure that the optimal level of investment in training and education is reached. The need to invest in the training and education of the players is in the interest of all clubs. It allows them to replace the players that must retire and raises the level of competition since there is a limited number of players that a club is allowed to field. If the number of players fielded stays the same but the number of "fieldable" players grows, there will be a better quality of players in all the clubs, making the matches more exciting. This should generate more demand for the professional soccer product and consequently more revenues for all clubs, or at least for the industry as a whole²³. The intervention of FIFA, as regulator, seems a good idea following the logic of the European Commission as stated in the Helsinki report,²⁴ since it aims to correct a market failure.

In The Helsinki report, the European Commission tried to make sense of *Bosman* by stating that it understood that they were three types of rules that were involved in sport:

- 1 The "rules of the game" that are excluded from application of competition rules
- 2 The rules that are in principle prohibited by the competition rules
- 3 The rules that are likely to be exempted from the competition rules²⁵

The "rules of the game" are: the ground rules, the rules of the National Associations determining national teams and the rules necessary for the organization of competition. As confirmed by the ECJ in *Delège*²⁶, the goal of these rules is not to distort competition in sport but to allow it. Transfer fees do not seem to fit in that category.

The rules that are in principle prohibited are defined as: restrictive

²⁰ *Bosman*, paragraphs 6 to 11, see footnote 1.

²¹ Application Regulations, Article 10.

²² Feess and Mühlheuser, see footnote 15.

²³ Assuming an equitable revenue distribution.

²⁴ Report from the Commission to the European Council with a view to safeguarding current sports structures and

maintaining the social function of sports within the Community framework (Helsinki report), COM (1999) 644 final, 10/12/1999.

²⁵ Helsinki report, see footnote 24.

²⁶ *Christelle Delège v Asbl Ligue francophone de judo and others*, C-51/96 and C-191/97 (joined).

practices in the economic activities generated by sport and closing one type of market. The Commission comments that:

“(T)he systems of international transfers based on arbitrarily calculated payments which bear no relation to training costs seem to have been prohibited”²⁷.

The rules that could be exempted, according to the Commission, would be the ones that meet the *Bosman* exception of the ECJ. The Commission then adds that what is needed is:

“a system of transfers (...) based on objectively calculated payments that are related to the costs of training (...)”²⁸.

Again we see that it will be very important that the training and education costs implemented in the 2001 FIFA transfer rules have to be objectively determinable.

The Monti system tries to give more incentives to the clubs to train and educate new players. There are incentives on two fronts, first the money received each time a player is transferred and second the cost of the player to a club that decides to acquire him instead of trying to “grow” new talent. Nevertheless this system does not guarantee additional investment in training and development.

In order for the new transfer rules to be effective, the fees received by the clubs must be sufficiently high and frequent to:

- 1- Compensate the actual cost of training the player;
- 2- Compensate the costs of training the proportionate number of other players that will not reach the professional level, to the number of players that do;
- 3- Be proportionally and sufficiently higher than the positive externality to third party clubs coming from the investment made in training by the club.²⁹

If the new rules achieve these conditions, they will create an incentive for the teams to invest in training. However, the transfer fees should not be too high and prevent all transfers, since the efficient level of transfer is not zero. If the fees are under the efficient investment level, the rich clubs could decide to freeride on the investment of the other clubs. But if the fees are at the efficient level, then all clubs that want to maximize their amount of player talent will be induced to invest in the training of players in order to “grow” some of the talent that they need and sell excess talent. By allowing transfers we allow the allocation of the players from the clubs that are the most efficient to train them, or have an excess of talent, to the clubs that value them the most. The incentive game is subtle and the amount of the transfer fees should be decided with great care.

The AR require that each National Association limits the fees a club may obtain for the training of a player via a compensation fees ceiling.³⁰ This compensation ceiling should be determined using the real costs of training a player, taking in consideration the ratio of players that will never play in the professional ranks.³¹ There is nothing in the rules that prevent the clubs to agree on a fee under the ceiling. Nevertheless, a rational club would not agree to anything but the maximum amount of money possible to transfer a player, since agreeing for a lesser amount may affect all the transfers of that year and penalize it by signaling that the costs of training are lower than those determined by its National Association. So even if the wording of the article seems to give the National Associations only a power to restrain the costs of the compensation, in fact it gives them the power to determine the amount payable per year for each different category since, assuming that all clubs are rational³², there is no other choice for them than to agree to the maximum amount that the National Association allows. That situation will make the players from some countries, where the training costs are lower or determined to be so by the National Association, much less expensive. So the players are more likely to be transferred to the rich clubs in countries where training is expensive. This may create an incentive for such rich clubs to under-invest in training. Giving the power to the National Associations to determine the price of a year of training may make it very difficult to induce clubs to invest in the training and education of players more than the average national cost of such training and

education. Even if clubs are allowed to internalize some of the positive externality of training for the other clubs via the transfer fees and the solidarity system, it is not sure that the amount determined by the National Association will give them sufficient incentive to invest in training.

By letting the National Associations and not the market decide the costs of the compensation for training and education, FIFA puts the burden on them to find the efficient level of compensation that will allow the optimal level of training. It is a difficult task and it would seem a better idea to let the market decide the value of a year of training in a club of a particular category or division in a particular country. Negotiation between the clubs would make it possible to find what the market value of that year of training is. Two clubs could be in the same category but the expertise of one could make a year in that club a lot more valuable. Some kind of supervision would be needed from FIFA and the National Associations to make sure that there is no abuses in the system and to provide a conflict resolution system. Nevertheless, by leaving all the weight of the decision on the National Associations, the 2001 Transfer rules run the risk of under-valuing the costs associated with the training of the players.³³

It is also very unfortunate that the 2001 Transfer rules, in Article 5(5) of the AR, still require compensation for a young player without a contract. It seems to be in contradiction with the *Bosman* ruling. Although the ECJ said that some kind of restrictive behavior may be acceptable to incite clubs to invest in the training of players, the vagueness of the AR, that ask to “take into consideration” the absence of contract, but without prejudice to the other clubs that were implicated in the training of the player, is very dangerous. It is hard to know what the impact of this provision will be since there are a lot of ways to take something “into consideration”. It also puts in doubt the validity of the new regulations since the ECJ clearly stated in *Bosman* that the legality of a total restriction on the movement of players without contract is, at best, doubtful. It is difficult to believe that it had been impossible to create a precise criterion, like a discount percentage, that would allow a clear and objective evaluation of the absence of contract for a young player’s transfer fee. By being vague, FIFA runs the risk of seeing their rules struck down again by the ECJ.

It is my opinion that if the ECJ was asked to rule on the legality of Article 5(5) of the AR, it would declare it illegal, saying that it is contrary to Article 39 of the Treaty because of the wide discretion that is left to the clubs or the National Associations. It is my opinion that, although FIFA has tightened up its rules in the case of the compensation due for the training and education of the player, they are still not a satisfying answer to the *Bosman* ruling. To correct this situation, FIFA should add provisions that determine, with relative precision, the impact of the absence of contract on the compensation for training. A discount of 25% to 50% of the transfer fee, depending on the age of the player, could be a solution to make a player more attractive for the other clubs and facilitate the transfer of young players by preventing another *Bosman*-like situation. This would have the advantage of making the situation clear for all those involved in the transfer process. I find it surprising that such an obvious problem is still present in the 2001 rules. Apart from that they meet the *Bosman* exception by at least appearing to induce the clubs to invest in the training and education of players and by having objectively determined transfer fees. However this will depend on the ceilings decided by National Associations; if they do not reflect the real costs of training and education, there is a potential problem.

Regarding the second part of the test set up by the ECJ on the validity of the rules that restrict the market for players, I do not see how the new rules will help to maintain the competitiveness of the game in the commercial private clubs market. Rich clubs will always be able to pay the compensation for training in order to get the play-

27 Helsinki report, 4.2.1.2., see footnote 25.

28 Helsinki report 4.2.1.3., see footnote 25.

29 This has sometimes been referred to as the positive externality of training.

30 Application Regulations, paragraph 7(5).

31 Application Regulations, paragraph 6(3).

32 Unless a particular club has at a particular time a disproportionate amount of excess talent.

33 Feess and Mühlheuser, see footnote 15 and Antonioni and Cubbin, see footnote 11

ers that they want assuming that no means to reduce the gap in revenues between the clubs is implemented. As long as the revenues of the bigger soccer clubs continue to grow exponentially, the transfer fees that they are willing to pay will continue to rise. However, even if the commercial private clubs' competitive balance remains unaffected, the greater freedom for the player could benefit the national soccer teams. Milanovic³⁴ argues that the quality of international soccer has improved since national players are allowed to play in better foreign leagues. Again, in deciding which competitive balance to promote, FIFA must choose the type of soccer that it wants to encourage, since it supervises competition on both club and international levels. With the current system, the question if the level of competition at the international level will be affected at all remains open. But Milanovic seems to show empirically that the competitive balance at the international level is getting better the more liberal the rules on transfer of players are at the club level. Are the current rules liberal enough to fit in Milanovic's model? The question remains open. Also, it is uncertain whether the ECJ would accept that view since in *Bosman* it mainly looked at the competitive balance at the club level. But the argument is not without merits and should be considered.

So the compensation for training seems, at first glance, safe. But we have to take into consideration the weaknesses regarding the methods to determine the costs of a year of training in the club of a certain category. The process will need to be very strict; otherwise there is a risk that the ECJ will find it unsatisfactory. Some may find peace in the fact that the regulations were approved by the Commission³⁵, but this is no guarantee of validity since the rules that were invalidated by *Bosman* had also been approved by the Commission.³⁶

The 2005 transfer rules³⁷

They should be considered more an adjustment than a new set of rules. In force since 1st July 2005, they attempt to fix some of the problems that were found in the 2001 rules and exposed earlier in this paper.

The changes

Regarding the legal length of a player's contract, the 2005 rules keep the same duration as the 2001 transfer rules, but they add a provision regarding contracts with minors: they are now limited to three years in duration.³⁸

The transfer fees are now called *training compensation*. There are two cases that allow a club to get training compensation for a player. The first case is when the player signs his first professional contract and the second one when the player is transferred between clubs in two different national associations.³⁹

When the player signs his first professional contract, the training compensation will, according to the 2005 rules, be paid to all the clubs that trained the player, at the pro-rata of the years he passed in the said club. The training period stays the same as in the 2001 rules, the years between twelve and twenty-one.

In the second case, the transfer of a player that is already a professional, the club that acquires the player (the new club) will pay training compensation only to the former club for the duration that this club trained the player.⁴⁰ There is no complex kickback scheme like in the 2001 rules. It is important to notice that the 2005 rules do not exclude additional payments or fees on top of the training compensation when a player under the age of twenty-four is transferred.

For the training compensation in the case of transfer within an association, the National Association is in charge of determining it, subject to the approval of FIFA.⁴¹ The associations have until 2007 to adopt these rules and submit them to FIFA. The only guideline that can be found in the 2005 rules is that the national rules must be compatible with the ones of FIFA.⁴²

The 2005 rules also add a provision that abolishes any obligation to pay training compensation when a transfer happens between two clubs of the fourth category⁴³ and in an additional provision, if it is impossible to know or to find one of the clubs that trained the player, then the amount will be given to the National Association of the country in which the player acquired his training. This money should

be earmarked by the association for the training and development of young players.⁴⁴

Also, the method of classification of the clubs in the different categories and the determination of the cost of training for one category also changed. The costs of training are now determined on a confederation basis, each of them determining the costs of one year of training.⁴⁵ The confederations should base the training compensation on the real training costs of clubs, multiplied by the ratio of the number of players needed to produce one professional player. As for the categories, FIFA will publish the number of categories that the country needs to divide their professional clubs into.⁴⁶ National Associations may have only a restricted number of categories like Canada with two (the third and the fourth) or have access to all four like Germany, France, Brazil and England.⁴⁷ In order to prevent abuses, clubs that train a player between the age of twelve and fifteen will automatically be considered category four clubs.⁴⁸ The costs of training will be determined as if the new club had trained the player himself. The training compensation is determined by the category of the new club and then multiplied by the number of years the player has been trained.

Special changes for Europe

In the hope of avoiding another *Bosman*, Annex 4, Article 6 of the 2005 transfer rules creates special provisions for Europe.

Paragraph 6 (1) states that when a player is transferred to a club of a higher category, the training compensation will be calculated using the average between the costs of both clubs. If the player is transferred to a lower category, then the training compensation will be the one of the new club in the lower category.

Paragraph 6 (2) reproduces the strange 2001 rule that allowed a club to determine the end of the training period of a player. It is surprising to see that one of the main problems from a legal point of view of the 2001 rules was kept only for the market where the risks of legal challenge are the largest, the European Union. Again, the purpose that this provision will serve is unclear, it could allow clubs to manipulate the training compensation and could bring the entire rules into a potential legal pitfall.

Paragraph 6 (3) seems to solve the problem of the restriction of movement of players under twenty-four without a valid contract. If a player is without a valid contract, then no training compensation is due to his last club, unless the club can justify that he has a right to such compensation. However, this does not affect the right of the other training clubs; they will have a right to the training compensation.

The great change of the 2005 rules is that the 5% solidarity tax will be charged in all cases where a non-training compensation fee is paid for the player at any time during his career. This confirms that the transfer fees for the economic value of the player are not illegal. They are now even legal in the case of a transfer of a player under twenty-three years of age since Article 17 of the 2001 rules that prohibited them was not reproduced in the 2005 rules. This tax will apply to all international transfers and then be kicked back, according to a defined scale, to all clubs that participated in the training of the player.⁴⁹

34 Milanovic, B.; *Globalization and goals: Does soccer show the way*, Carnegie Endowment for International Peace, 7/12/2003.

35 And even that fact is debatable, see S.Weatherill at footnote 15.

36 *Bosman*, paragraphs 17 to 27, see footnote 1.

37 *Regulations for the Status and Transfer of Players* (2005 Transfer rules), FIFA Executive Committee, December 2004

38 2005 Transfer rules, paragraph 18 (2)

39 2005 Transfer Rules, Annex 4, section 2 (1)

40 2005 Transfer Rules, Annex 4, paragraph 3 (1).

41 2005 Transfer Rules, paragraph 1 (2).

42 2005 Transfer Rules, paragraph 26 (3).

43 2005 Transfer Rules, section 2 (2) ii).

44 2005 Transfer Rules, paragraph 3 (3).

45 2005 Transfer Rules, Article 4.

46 2005 Transfer Rules, paragraph 4 (1).

47 FIFA Circular 959 annex.

48 2005 Transfer Rules, Annex 4, paragraph 5 (3)

49 2005 Transfer Rules, Annex 5, Article 1

Analysis of the 2005 system

The 2005 transfer rules are now more in line with the *Bosman* decision than the 2001 ones. They also introduce a simplified system that allows a simple calculation of the transfer fees due for training and development of a player. It is refreshing to see that at least now we have an objective table to determine the costs of training in the annex of Circular 959. But the question about the incentives given to clubs by these determined amounts remains. Are these numbers realistic? Would they be considered objectively calculated and related to the costs of training in case someone would contest them in front of a tribunal? Finally, would they affect the competitive balance between the clubs?

It is strange to see that in the table published for 2005 the cost of training a player in the UEFA category four clubs is more than five times higher than in the rest of the world. Considering the variety of countries included in the UEFA, these amounts may be inefficient, giving too many incentives to the poor countries clubs and too little to the rich ones. Is it realistic to consider that the training costs in all the countries of the UEFA that include Germany, Sweden, Russia and Albania, are the same? The same may be said about the countries of the CONCACAF, which include the United States, Central America and the Caribbean. Why not let the market decide about the costs of training and its value for the acquiring clubs with some sort of supervision from FIFA? There is a dispute resolution system included in the 2005 rules that could play that role, there is already a jurisdiction on the conflicts regarding the transfer fees and their payment.⁵⁰ Also since the international transfers need to be reported to FIFA, it could have been easy to create a system to prevent abuses.

The risk of under- and overvaluation of the costs of a year of training is very present with the confederation wide training costs system. From the incentive point of view, it is even worse than letting the National Associations determine the compensation. At least, the National Associations were closer to the real costs of training of clubs than the confederations. With the current system, there are great risks that we end up with a situation in which some clubs will have an over-incentive to invest in training and others an underincentive. This situation will be inefficient.

It is a relief to see that the complete restriction clause contained in 5(5) AR of the 2001 rules was modified. This visible contradiction of the *Bosman* decision is now replaced by a less restrictive system. According to paragraph 6 (3) of the 2005 rules the current club does not have the right to a compensation for training if the player does not have a valid contract. If the club wants the compensation, it has now the onus to prove that it has nevertheless the right to such compensation. But there are no real criteria in the 2005 rules that help determine what could give the right to a club to ask for compensation in the case of a player without a valid contract. The rules are vague, there are no criteria to base the judgment on in order to determine if a compensation for training should be given to the clubs. Will the clubs be forced to prove the real costs of training the player? If this turns into a system in which the clubs have a very huge discretion, then the 2005 rules are in trouble. With time, we will hopefully be able to see some criteria come from the dispute resolution system, but they may not respect the *Bosman* test. Also, the costs of previous training of the old clubs will always follow the player, since they are never affected by the contractual situation of the player. So the players will not really be free agents until they are twenty-four years old. Additionally, the possibility to ask for additional fees on top of the training compensation looks like flirting with disaster and inviting a *Bosman* II. This is a huge failure of the 2005 rules.

Empirical studies will be needed to determine if the amount of money offered by the confederations for the training and development is enough to give the right incentive to train and develop young players. Are those numbers related to the actual costs that clubs have to pay? An audit conducted in 1991 by Ernst & Young evaluated that major league baseball teams spent an average of 7.2 million dollars each year on scouting and development costs. It would be interesting to make the same exercise about soccer and see if the numbers determined by the confederations are sufficient to compensate for the real costs.

Finally, the 2005 rules, like the previous ones, do not seem to have any significant impact on the competitive balance problem of soccer. In their actual form, the 2005 regulations stand a better chance of resisting a legal assault than the 2001 ones, but they are far from safe.

Contractual (in)stability

In addition to the new transfer fees system FIFA includes a mechanism that allows the players to end their employment contract unilaterally with their club with or without causes⁵¹. According to these rules a player is allowed to breach unilaterally his employment contract but not during the season⁵².

When breaching his contract, the player will suffer consequences. If the breach occurs in the first three years of the contract, or the first two if the player signed the contract after his 28th birthday, then the player should be suspended from official competition for four months or in the case of aggravating circumstances the suspension may be for up to six months⁵³.

Furthermore, every time a player breaches his contract, he must pay a compensation to his club⁵⁴. There are no real criteria upon which we can determine how the compensation will be calculated, if it is not provided in the contract. The regulation only states that it:

“(S)hall be calculated with due respect to the national law applicable, the specificity of sport, and all objective criteria which may be relevant to the case”⁵⁵.

The reference to the national legislation of contract may open the door to specific national contract law rules that would make it very costly and uncertain for a player to breach. If a club was able to claim for the loss of profits resulting from the departure of a very popular player, then it could mean huge sums of money to be paid that would have no relevance at all to the costs of training the players.

Article 22 then goes on to give guidelines that can be used to determine compensation: the remuneration and other benefits under the old or new contract, the length of time remaining on the existing contract, the amount of any fee or expense paid or incurred by the former club and whether the breach occurs during the period that gives rise to sport sanctions.

There are unfortunately no additional clues to help determine how much the compensation will be and who will determine it; the provisions of the regulations unfortunately do not say who is going to be responsible for their application. It is reasonable to believe that the dispute resolution, disciplinary and arbitration system created by Chapter XIV of the Transfer Rules will serve in determining it, but nothing seems to prevent either party to ask a national court to rule on the compensation⁵⁶. So even if the player and the club can agree on an amount in the contract, there are no real guidelines for them to base their negotiations or to protect this amount from a judicial review.

Analysis of the contractual stability rules

With this system, for the first time the players have the power to decide their destiny. This is revolutionary and could in theory allow a player to refuse a transfer to another club by breaching his current contract. However, the situation is uncertain for the clubs since they do not know the real length of a player's contract. Nevertheless, the parties will surely adapt themselves to the new rules and find a way to get an advantage out of them. For example, under the current regime, a three years contract for an athlete under twenty-eight at the time of signature will probably end up being enforceable to the end of the term. It is always possible for a player to breach the contract, but a four months suspension makes that choice unattractive. The player's loss of revenues is likely to be important and the typical professional

50 Transfer Rules 2005, Article 24

51 Transfer Regulations articles 21 to 24.

52 Transfer Regulations paragraph 21(c).

53 Transfer Regulations articles 21 and 23.

54 Transfer Regulations article 22.

55 Idem.

56 Pons, J.-F.; *Le sport et la politique Européenne de la concurrence: "Règles du jeu" et exemples récents*, Commission Européenne, direction générale de la concurrence, Lille 10 mai 2001, p.6. and Transfer Regulations, Article 42.



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athlete's career is short. In that context a four months suspension represents a big proportion of his future earning prospects.

With these new rules, assuming that the clubs are careful or, to use economic terminology, risk adverse, they will insist on signing the players for three or two years to have a protection against the unilateral breach of contract by the players. After that period the clubs would be possibly more willing to transfer them. The incentive to transfer will be decided by the ratio of the compensation received in case of breach of contract on the transfer market value of the player; the smaller the ratio, the greater the incentives for the club to transfer the player.

In the case of the players under the age of twenty-three there will be incentives to sign long term contracts with them since the unilateral breach of the contract will always trigger both the compensation for the breach and the compensation for training and education when the player will sign with a new club⁵⁷. The clubs will then be doubly protected against the unilateral breach.

The reference to national law will also create problems since the financial consequences of the breach of contract are very different across the world. So it would be hard for a player to actually make the choice of breaching the contract if he does not know what the financial consequences are. This will make the use of this tool unattractive for the players. Until a body of jurisprudence is constituted with regards to the amount of compensation to be paid, there will be an underutilization of these provisions or the players using them will have to do it at their own risk. Again FIFA did not manage to define an objective criterion to determine the compensation. The vague reference to the national laws does not allow the players to know precisely what would be the impact of their breach. It is unfortunate since the rules are crystal clear in other cases like article 12 that defines breach of contract with good sporting cause⁵⁸. It is unfortunate that FIFA and the Commission did not put the same care in designing the rules regarding the compensation payable for unilateral breach of contract.

Furthermore, the reference to national law could open the door to the use of all legal tool available in a peculiar jurisdiction, especially employment and contract law. This could create numerous problems and difficulty most notably if the player happens to be a minor.

The amount of the compensation should allow the efficient number of breaches to occur, but here, contrary to compensation for train-

ing and education, the amount of compensation will be determined by the market either via the courts or the player's contract. We end up with a body of rules that give us more chances to achieve the efficient level of breach. The market now seems to allow the player, via unilateral breach, to produce at the maximum level for the club that values him the most. However, the amount of compensation must be sufficient to prevent the players from using the threat of breaching only to extract higher salaries or better conditions from the clubs. So until the amount for the compensation of unilateral breach becomes predictable, it is hard to make a definite judgment on this new system.

Conclusion

It may take a long time for the new rules to come under the scrutiny of the courts again. In the past, the absence of a strong players' union to attack the restrictive rules was what mostly prevented contestation of the transfer rules. When we think that the first English case attacking the transfer rules dates from 1912, there could be numerous soccer seasons played before the current rules are tested. The absence of a strong players' union at the European level also presents a problem since FIFA did not really have a single interlocutor for the players. Despite the declarations to the effect that FIFPro was involved in their creation, this association lacks the mandate and the strength of the North American players' unions. It prevented the "under the shadow of the law" negotiations present in many North American professional sports that could have led to a stronger system. The decision of the Danish football players' union to contest the unilateral application of FIFA rules in Denmark could have provided an opportunity for the ECJ to test the new rules⁵⁹. But the players agreed to delay the case *sine die* in order to help the negotiation of a new collective bargaining agreement. If the contestation goes the distance the FIFA transfer rules are likely to be again stricken down and would have been only a way to gain time before the inevitable liberalization of the players' market.

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⁵⁷ Transfer Regulations, Article 22.

⁵⁸ A good sporting cause is defined as a situation in which the player was fielded less than 10% of the official matches played by the club.

⁵⁹ FIFPRO website:

<http://www.fifpro.org/index.php?mod=one&id=13160&PHPSESSID=25fc5f797d23a056efef9c3e1459be> July 7 2004.

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U.S. Athletic Associations' Rules Challenges by International Prospective Student-Athletes - NCAA DI Amateurism

by Anastasios Kaburakis*

This article is part of a broader research stream investigating policy and regulatory frameworks impacting International Prospective Student-Athletes (IPSAs) and their transition to the U.S. combining education and athletics. Elsewhere analyzed are the problems faced by IPSAs in particular relation to the amateurism framework as applied by the National Collegiate Athletic Association Division I (NCAA DI) when contrasted with the international federalized club-based governance model (Kaburakis & Solomon, 2005), as well as the policy recommendations that may attend to policy conflicts and the challenges faced by IPSAs, Athletic Associations, and their member institutions (Kaburakis, 2005). This research examines the legal handling of such cases through the U.S. system of jurisprudence and summarizes the important concepts from legal theory and the major lessons from precedent that may be instrumental in litigation and policy evolution on such matters.

Introduction

U.S. Athletic Associations and their member institutions frequently are called upon to resolve complex problems in regard to eligibility of International Prospective Student-Athletes (IPSAs). In order for the latter to be declared eligible for interscholastic or intercollegiate athletic participation, they need to document their valid status according to the respective Association's regulations. As is elaborated in prior literature (Kaburakis & Solomon, 2005; Kaburakis, 2005), especially in the case of National Collegiate Athletic Association Division I (NCAA DI) member institutions, there are many problems in the determination of amateur status of an international prospect, and NCAA and member institutions' staff members engage in a time-consuming and frequently ambiguous procedure when trying to reach eligibility decisions.

In this process, especially in regard to intercollegiate athletics, there are legal ramifications for the NCAA and member institutions. This study may forecast and prepare for potential legal challenges and litigation initiated by international prospects and their families, after being denied access to NCAA DI institutions and declared ineligible for intercollegiate athletics. Under the prism of U.S. Constitutional Law, there is a need for identifying the legal importance of the outcomes present tactics may have in IPSAs cases, and whether these practices should be amended in order to achieve Equal Protection of the laws for specific classes.

IPSAs are pre-empted from pursuing higher education and athletics in NCAA DI schools, due to the systems of origin and their incompatibility with the NCAA DI structure, *after* they have been offered the chance to do so by means of scholarship offers. Does that create a door through which IPSAs may successfully challenge such NCAA DI amateurism policy and their handling by member institutions and the NCAA staff? Is that considered a legal "Achilles' heel"? Is the very gift of an athletic scholarship offer to an IPSA a "Trojan Horse", use of which in U.S. courts may prove detrimental to NCAA DI member institutions and NCAA staff? Can IPSAs challenge a negative eligibility reinstatement decision by member institutions or the NCAA staff? If so, what are the chances of success in U.S. courts? For that matter, were there any IPSAs that have done so successfully in the past?

This legal analysis ultimately attempts to answer two simple, straightforward, and at the same time difficult questions: Is there something wrong in the handling of IPSAs by NCAA DI amateurism as mentioned above? If so, can they do anything about it?

These questions lead to Athletic Associations' rules' challenges, their constitutional scrutiny, the characterization of their regulations as discriminatory or not, and an analysis of basic legal concepts applicable to the cases examined. It is convenient and helpful, when discussing amateur Athletic Associations rules and their challenges, to include high school regulations and to distinguish the differences

between cases handled at the high school level and at the collegiate level. This way the contribution of this paper is twofold, for research both on interscholastic and intercollegiate athletics, with the hope that more academic research will soon target sport grassroots and youth sport development. Furthermore, International Student-Athletes (ISAs) in U.S. high schools is a fertile ground for legal and policy analysis, and future research projects may find the constitutional analysis presented here forth useful.

As noted by Wong (2002, p150), the validity of High School and Intercollegiate Athletics Associations rules, under the U.S. Constitution, has historically come under frequent scrutiny. In what follows, procedural issues of importance are analyzed, and examples of precedent case law are demonstrated. The theoretical framework and the process by which ISAs can challenge Athletic Association rules are revealed, along with the outcomes of cases that have displayed successful procedures in the past. Especially in terms of NCAA DI policy, the differences between the NCAA DI and the international sport system's legal structure have created many areas of challenges, mainly pertaining to the definition of amateur status. These differences have been particularly evident in sports such as men's and women's basketball, where most sport-specific rules are applied, and in other cases such as tennis, soccer, swimming, diving, and ice-hockey where most ISAs participation is observed (NCAA report on ethnicity 1999-2004). Such structural incompatibility between sport governing systems led to litigation and IPSAs and ISAs challenged regulations adversely affecting them, claiming -among other things- that their Due Process and Equal Protection rights were not upheld (after being offered the chance to join the U.S. system of sport by means of an athletic scholarship offer and enrolling in NCAA member institutions), or that the Association was not serving its purposes (i.e. SA welfare and competitive equity).

Fundamental legal concepts

Three important concepts regarding Constitutional Law and Athletic Associations' rules challenges should be put forth here, for a complete and proper understanding of the applicable regulations: *Judicial Review, Standing, and Injunctive Relief*.

Judicial Review

As a general rule, courts have declined to intervene in the internal affairs of Athletic Associations when membership is voluntary (Masteralexis, 2003, p.426). However, especially on the issues of amateurism and eligibility, there has been an increasing number of cases

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that were granted judicial review (Wong, 2002, p.170). In order for the latter to take place, one of the following conditions has to be met:

- The rule(s) under question violate(s) an individual's constitutional rights.
- The rule(s) violate(s) public policy and deemed fraudulent or unreasonable.
- The rule(s) exceed(s) the scope of the Athletic Association's authority.
- The rule(s) is/are applied unreasonably or arbitrarily.
- The Athletic Association is violating its own rules.

Even if the court decides to grant judicial review, it does not amend a specific regulation itself, but instead remands it to the respective Athletic Association (Wong, 2002, p.170). Violations of constitutional rights that have been identified with successful challenges of Athletic Associations' regulations were dealing with either Due Process or Equal Protection considerations (Masteralexis, 2003; Schoonmaker, 2003; Wong, 2002). Due Process refers to infringements of life, liberty, and most importantly – for Athletic Associations rules' challenges – property, which is examined further; Equal Protection involves fair application of the law, irrespective of one's national origin, among other protected classes. Both Due Process and Equal Protection considerations require the additional element of State Action to be present, in order for judicial review to be granted. The analysis that follows examines how State Action affected the outcome of various cases of Student-Athletes challenging Athletic Associations' regulations.

Standing

Equally important is the notion of proper standing (Masteralexis, 2003; Wong, 2002). For a court to decide on a case challenging associations' regulations, the SA has to show proper standing. For a plaintiff to be able to bring a case in court, he/she must meet three criteria:

- The plaintiff sustained an injury.
- The interest which the plaintiff seeks to be protected is one that falls at least arguably within the zone of interests protected by the Constitution, legislative enactments, or judicial principles. In other words, "substantiality of federal question" is explored, in a way that is investigated in the subsequent portions of this discussion.
- The plaintiff has an interest in the outcome of the case, which would entail being either directly or otherwise indirectly involved.

The aforementioned elements are of utmost importance to potential plaintiffs, who challenge the validity of Associations' regulations. If an individual Student-Athlete (SA) is not directly involved, or is not indirectly affected by a certain regulation, the crucial elements are missing, and the courts do not proceed further (Masteralexis, 2003; Wong, 2002).

Injunctive Relief

Provided that a plaintiff has established the elements of judicial review and standing, the crucial step is seeking injunctive relief against a rule that adversely affected him/her, e.g. by rendering a SA ineligible and not allowing him/her to compete (Masteralexis, 2003; Wong, 2002). Practically, an injunction of some form allows a SA to compete and not suffer irreparable harm from not participating in competition as a result of the challenged regulation. Injunctive relief prevents from future wrongdoings, as opposed to punishment of past actions. Bearing in mind modern systems of jurisprudence and the administration of justice, injunctive relief becomes the single most important element a plaintiff pursues, as it allows for competition, while a trial or appeal is still pending. Instead of filing for monetary damages, injunctions are oftentimes preferred in regard to legal strategy. Forms of injunctions are:

- Temporary Restraining Order.
- Preliminary Injunction.
- Permanent Injunction.
- Specific Performance.

A temporary restraining order is issued in emergency situations and is usually effective for 10 days. The plaintiff should establish that he/she is facing irreparable harm, and that monetary damages would be an inadequate remedy. A preliminary injunction is granted to a plaintiff prior to a full trial on the merits of a legal action and lasts throughout the trial process of the case. Temporary restraining orders and preliminary injunctions aim at preserving the status quo, i.e. in cases where initial eligibility was granted by the Athletic Association, until the rights of the litigants can be determined. To be awarded a preliminary injunction the plaintiff must prove four elements:

- A substantial threat of irreparable harm without the preliminary injunction.
- The balance of the hardships favors the plaintiff.
- The plaintiff possesses a likelihood of success on the merits of the pending case.
- Granting the injunction serves the public interest.

A permanent injunction involves the same four elements, but is awarded after the full hearing of the case and it remains enforced until the completion of the lawsuit. The injunction of specific performance refers to specific contractual issues (especially pro-sport contracts and involuntary servitude prevention) and will not be analyzed here.

The entity deciding on injunctive relief matters takes into consideration three important factors before issuing judgment: nature of the controversy, objective of the injunction, and the comparative hardship to both parties (Masteralexis, 2003; Wong, 2002). As will be explored further, the problematic nature of injunctive relief has discouraged many potential plaintiffs from pursuing their cases and seeking injunctions; however it becomes evident that the means of federal cases and using the legal weapons provided by the Constitution have proved useful in long series of litigations.

Basic Constitutional Principles

The first important step in a case involving an IPISA and a challenged Athletic Association rule involves the element of *State Action*. If the Athletic Association is recognized as a State Actor, then it has to uphold a plaintiff's constitutional rights (Altman, 2003; Wong, 2002). There are two directions where cases have led in terms of such constitutional claims: *Due Process* and *Equal Protection*.

At this point it should be reiterated how crucial the actual offer of an athletic scholarship is for the plaintiff. Oftentimes, it is the key to litigation in the U.S. opening up the door to a property right, which was afforded to a non-U.S. citizen (e.g. by means of an athletic scholarship), and literally allows the IPISA to uphold that right through the legal means provided by the U.S. Constitution. Making a clear distinction, it may be much harder for a plaintiff who seeks to preempt an interscholastic Athletic Association from declaring him/her ineligible, compared to a plaintiff within the realm of NCAA DI, where the conditions for the creation of a property right appear more transparent.

To succeed in a federal constitutional claim, three factors must be present:

- State Action
- Claim is not frivolous
- Claim concerns a right of sufficient importance for a federal court.

State Action

In order for constitutional rights' violations to be brought to a federal court, the defendant must meet the State Action requirement (Altman, 2003; Wong, 2002). State Action means any action taken directly or indirectly by a state, local, or federal government. Additionally, any public school, state college, or state university, or any of their officials, can be held to meet the State Action requirement. Moreover, private organizations that are performing public functions or are authorized under state laws also constitute State Actors. The subject of whether a specific Athletic Association regulation falls under the State Actor requirement has been one of the most controversial issues in recent legal history (Altman, 2003; Wong, 2002). Through the course of litigation and case law, two theories

have evolved to determine which action in the private sector constitutes State Action:

Nexus or Entanglement theory examines whether a state's involvement or entanglement with a private actor's conduct is sufficient to transform the latter into State Action and thus subject to constitutional review.

Public Function theory renders private parties' actions as State Actions, should they undertake actions or assume powers that usually are characterizing state entities.

According to the latter theory, private activities only constitute State Action if:

- The activities involve a function that traditionally has been performed only by the government; or
- The private entity's assumption of the function substantially replaced the government's traditional performance of the function (Altman, 2003; Wong, 2002).

In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), the U.S. Supreme Court ruled that the High School Athletic Association for the State of Tennessee was a State Actor, and therefore subject to litigation for violations of the 1st and the 14th Amendment. The court held that members of the state government were so involved in the Association that the latter must be considered a State Actor. Using the wording of the court "... the association's regulatory activity is State Action owing to the pervasive entwining of state school officials in the association's structure, there being no offsetting reason to see the association's acts in any other way". It is important to note how procedurally significant the element of State Actor requirement is, and the fact becomes evident in the analysis that follows.

One of the most important cases in the past dealing with amateur Athletic Associations and their regulatory framework, dealt with the NCAA and its legal characterization. In the highly controversial case of *NCAA v. Tarkanian*, 488 U.S. 179 (1988), the U.S. Supreme Court, in a 5-4 decision, reversed a prior judgment by the Supreme Court of Nevada, and ruled that the National Collegiate Athletic Association cannot be held a State Actor. University of Nevada Las Vegas head basketball coach Jerry Tarkanian brought the case against the NCAA arguing that his constitutional rights had been violated by the sanctions against him and his program, after evidence of NCAA violations. Using the Supreme Court's wording, "...it would be more appropriate to conclude that the university conducted its athletic program under the color of the policies adopted by the Association, rather than those policies were developed and enforced under color of the law of Nevada" thus the NCAA could not be held a State Actor, and did not deprive Tarkanian of his constitutional rights. However, as can be noted in recent cases, a body of court decisions grant judgment on cases involving NCAA rules, to achieve fairness and uphold a plaintiff's constitutional rights; rights that pertain to Due Process and Equal Protection.

Due Process

Going into the actual legal analysis and the process by which SAs can challenge Athletic Association rules that deprive them of rights upheld by the Constitution, Due Process, via the 5th and 14th Amendment, refers to certain fundamental rights (Schoonmaker, 2003, Wong, 2002):

"No person...shall be deprived of life, liberty, or property without due process of law" (5th Amendment)

"...Nor shall any state deprive any person of life, liberty, or property without due process of law..." (14th Amendment).

One definition of Due Process came after *Pennoyer v. Neff*, 95 U.S. 714 (1877): "Due Process is an expected course of legal proceedings which have been established in our system of jurisprudence for the protection and enforcement of private rights".

Since the element of State Action is identified, then the question that follows deals with the right that was deprived (Life, Liberty, or Property interests). Ultimately, the plaintiff's constitutional rights pertaining to Due Process will have been violated either by means of procedural, or substantive Due Process.

Procedural Due Process reflects upon the rights to a hearing and advanced notice of the latter. It examines the decision-making process that is followed in determining whether a rule has been violated and what sanction should be imposed. In order to provide fairness courts examine and weigh the interests that are being argued. Through the *Matthews v. Eldridge* case, 424 U.S. 319 (1976) the Balancing Theory test was developed. According to the balancing test, criteria that should be evaluated in determining the extent of procedural due process are:

- The private interest affected by the official action.
- The risk of an erroneous deprivation of such interest through the procedures used, and the probable values of the additional or substitute procedural safeguards.
- The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Substantive Due Process is one of the two main elements of legal focus used in Athletic Associations regulations' challenges. Substantive Due Process requires that the rule under scrutiny be reasonable and fair in both application and content. It is generally accepted in legal procedure and challenges regarding constitutional issues that, if the regulation does not involve fraud, mistake, collusion, or arbitrariness, courts decline to interfere with internal affairs of Athletic Associations.

Since the focus is ISAs challenging Athletic Association rules, the first question to be answered deals with what is the fundamental right being deprived. Mostly, this deals with the right of property. Types of property for Due Process purposes are not identified, which initiates a series of legal arguments as to whether the right allegedly deprived constitutes a property interest.

Wong (2002) defines property as "all valuable interests that can be possessed outside oneself, which have an exchangeable value or which add to an individual's wealth or estate". In *Board of Regents v. Roth*, 408 U.S. 564 (1972), property is defined as all interests to which an individual may be deemed "entitled". Entitlement to property has to be more than an abstract and ambiguous need or desire. Some form of current interest in or current use of the property has to be established. Due Process protection is only triggered where there is actual deprivation of the entitled right (Wong, 2002). Furthermore, the inquiry in Substantive Due Process investigation is twofold:

- Does the rule challenged have a proper purpose?
- Does the rule clearly relate to the accomplishment of that purpose?

This analysis leads to the examination of the legal characterization of an athletic scholarship. It is generally accepted legal theory (Wong, 2002, Schoonmaker, 2003, Breaux, 2005) that there is a property interest in a scholarship, by means of the benefits derived by it. However, the element of participation in athletic activities as part of the extracurricular program in academic institutions has been evasive and controversial as to whether it would be considered a privilege or a protectable right.

The important distinction to be made once more is between interscholastic and intercollegiate athletic participation. Plaintiffs in the latter area, especially dealing with DI NCAA athletics, have succeeded claiming property interests due to the proximity of college sports and professional sports¹. Therefore, not only can a plaintiff argue that a property interest was deprived based on the immediate monetary value of an athletic scholarship (*Gulf South* case), but the opportunity of landing a professional contract has been examined and found closely related to the fundamental right of property (*Hall* case, protected property right based upon future opportunity to play professional basketball).

In *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F. Supp. 602 (D. Minn. 1972), a college student-athlete was found to have a protectable property interest in a future professional con-

1 *Hall v. University of Minnesota*, 530 F. Supp. 104 (D. Minn. 1982); *Gulf South*

Conference v. Boyd, 369 So.2d 553 (Ala. 1979)

tract. Nevertheless, depending on the jurisdiction, courts have had conflicting opinions on the subject; a number of courts shift toward a numerical reasoning, exploring how many college athletes turn professional in a respective sport². Those decisions argued that there is no legitimate property interest in a future professional contract, as it would be deemed too speculative a concept to fall under federal and substantive due process protection. At the same time, certain courts have added an interesting twist, deciding that a protectable property interest is found only if there is a professional league in that particular sport (Wong, 2002, p209). The latter's significance becomes intensified, bearing in mind women's professional sport leagues in the U.S. that are facing or have faced survival problems (soccer, basketball).

In the high school area, the major opinion is that there is no present monetary value and interest, causing the pendulum to lean toward the privilege and not the protectable property right interest³. Courts have found that the interest to a college athletic scholarship is too speculative to receive protection, and this is even more so evident, courts argue, on the possibility of obtaining a future professional contract (Wong, 2002, p209). The recent trend in some sports for high school SAs to make the transition straight to the professional leagues of their respective sports gives rise to further arguments and examination on a case-by-case basis.

What ISAs, their families, and legal representatives have had challenges with, bearing in mind the differences in the legal systems around the world, is that it has been difficult to establish a protectable right to an education, and thus extend it to participation in interscholastic athletics. Cases have dealt with appeals against State High School Athletic Association regulations preventing high school exchange SAs from participation, thus arguably costing them opportunities for exposure and the chance of earning an athletic scholarship⁴. It is useful to add that both the Department of State and the respective Council on Standards for International Educational Travel (CSIET) have implemented legislation that allows exchange program students (the ones who have been affiliated with a registered exchange program) to participate in extracurricular activities as part of their educational experience, and that includes athletics⁵. State High School Athletic Associations have conformed to these regulations and have amended their respective bylaws, so that they can accommodate international exchange students.

However, the fact remains that there is no constitutional right to education, as the Supreme Court affirmed in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). At the state level, a right to an education may be granted by requirements of school attendance. The latter, either explicitly or implicitly, establishes a protectable property right to an education, abiding by the Due Process clauses of the U.S. Constitution, as is found in *Pegram v. Nelson*, 469 F. Supp. 1134 (M.D.N.C. 1979), and *Goss v. Lopez*, 419 U.S. 565 (1974). Such a right to an education is also applicable to non-citizens joining legitimate foreign exchange educational programs, as posed in the regulations of the State Department and the CSIET.

Furthermore, it is important to mention that many courts have decided that a protectable right to education does not refer to the total educational process, covering athletics, but instead focuses on classroom learning, rendering extracurricular activities privileges. Examples are found in *Indiana High School Athletic Association v. Carlsberg*, 694 N.E. 2d 222 (Ind. 1997), *Scott v. Kilpatrick*, 237 So.2d 652 (Ala. 1970). However, importantly for foreign students and IPSAs joining foreign exchange programs with education -arguably- as the main motivating factor⁶, there have been cases that did, in fact, establish a right to an education extending to extracurricular activities, and specifically sports' participation (Schoonmaker, 2003, p445). These cases are: *Duffley v. New Hampshire Interscholastic Athletic Association*, 446 A.2d 462 (Sup. Ct. N.H. 1982), *Stone v. Kansas State High School Activities Association*, 761 P.2d 1255 (Kan. App. 1988), and *Moran v. School District #7, Yellowstone County*, 350 F. Supp. 1180 (D. Mont. 1972). Using the court's wording from the latter case: "...sports are an integral part of the total educational process. This educational process is extremely important, and sports participation may not be denied when

there is no reasonable basis upon which to distinguish among the various parts of the educational process..."

Equal Protection

The 14th Amendment of the U.S. Constitution declares: "No State shall... deny to any person within its jurisdiction the equal protection of the laws". Next to the federal character of the aforementioned Due Process clauses, an IPSA is protected at the state level by any form of discriminatory practices, including those that fall within regulatory frameworks of Athletic Associations, should the element of State Action exist. The Equal Protection provision requires that no person be singled out from similarly situated people, or have different benefits bestowed or burdens imposed, unless a constitutionally permissible reason for doing so exists (Wong, 2002; Clausen, 2003).

In order to determine whether an alleged discriminatory practice is permissible, reference is first made to the affected class. The class affected by the practice under scrutiny will determine the standard of review used by the court. This is precisely where IPSAs as a protected class are fortunate, as the highest level of review, strict scrutiny, is imposed, if it is established that an alleged discrimination was based on their national origin or alienage. Along with race, national origin (foreign birth) and alienage (foreign domicile) are specifically protected classes by the U.S. Constitution. The legal extension of Equal Protection in cases of discriminatory practices referring to national origin or alienage is that the highest standard, which is strict scrutiny, demands the defendant Athletic Association demonstrates that the rule is supported by a compelling state interest (Wong, 2002; Clausen, 2003).

If the defendant fails to bear that crucial burden of proof, the plaintiff can be successful in a specific case that jointly invades the suspect classes of national origin or alienage, in relation to the right of property and the interests that one may have according to the aforementioned analysis. An example would be the regulations of an Athletic Association that govern amateurism and eligibility rendering an IPSA ineligible for interscholastic or intercollegiate athletics participation; should it be found that by the evidence brought forth no compelling state interest is served, the regulation would be found unconstitutional, thus allowing for further action and/or injunctive relief. The following section will scrutinize case law on the matter of equal protection, as well as NCAA DI amateurism rules and eligibility decisions challenged by IPSAs on the grounds of Due Process.

- 2 *Hall v. NCAA*, 985 F. Supp. 782 (N. D. Ill 1997); *Knapp v. Northwestern University*, No. 95-C-6454 1996 U.S. Dist. LEXIS 12463 (N.D. Ill Aug. 23, 1996)
- 3 *Ryan v. California Interscholastic Federation*, 94 Cal. App. 4th 1048 (Cal. Ct. App. 2001); *Jordan v. O'Fallon Township High School*, 706 N.E.2d 137 (Ill. App. Ct. 1999); *Indiana High School Athletic Association v. Carlsberg*, 694 N.E.2d 222 (Ind. Ct. App. 1997); *Mississippi High School Activities Association v. Coleman*, 631 So. 2d 768 (Miss. 1994); *Palmer v. Merluzzi*, 868 F.2d 90 (3rd Cir. 1989); *Stock v. Texas Catholic Interscholastic League*, 364 F. Supp. 362 (N.D. Tex. 1973); *Taylor v. Alabama High School Athletic Association*, 336 F.Supp. 54, (M.D. Ala. 1972); *Robinson v. Illinois High School Association*, 195 N.E. 2d 38 (Ill. App. Ct. 1963)
- 4 For more: *Indiana High School Athletic Association v. Vasario*, 735 N.E.2d 238 (S. Ct. Ind. 2000); 726 N.E.2d 325 (Ind. Ct. App. 3rd Dist. 2000) www.daytondailynews.com/project/content/project/athletes/

- 0317enforcement.html, www.doe.state.in.us/legal/pdf/case_reviews/cr_010201-10.pdf, and especially www.doe.state.in.us/legal/pdf/case_reviews/cr_001219-8.pdf
- 5 For more: www.ifyeusa.org/pdf/csiet_guidelines.pdf, www.csiet.org/mc/page.do?sitePageId=751, and especially § 5 at exchanges.state.gov/education/jexchanges/academic/hstudent.htm
 - 6 Alternatively, one might argue that the main motivation for IPSAs joining CSIET-acknowledged programs during their senior year of high school is increased exposure while participating on athletics teams, thus attracting college coaches' attention. Considering increased competition opportunities afforded to these prospects by their clubs and national teams, in conjunction with Vassilakopoulos (2005) points on development of a sound financial base for European sport, it may be supported that the IPSAs who will deny the opportunities for international athletic participation have education as the main motivating factor for pursuing an experience at U.S. high schools and universities.

Case Law

Although there has been much discussion concerning NCAA amateurism, there have been relatively few legal challenges for the NCAA's position. Reece (1975) collected and critically evaluated 34 cases involving the rules of the NCAA. His timeframe (1970-1974) was crucial in terms of policy development and court decisions concerning NCAA rules in general and amateurism in specific.

The cases Reece (1975) studied targeted 11 rules of the NCAA, including amateurism, and the so-called "foreign student" rule. Impressively, only three of the 34 cases concluded with the courts disallowing an NCAA rule, due to constitutional scrutiny. Even more remarkably, two of those three NCAA losses occurred in the "field" of amateurism, and the "Foreign Student" rule. What is also of great importance is that in nine of the 14 cases the courts found State Action established by the NCAA.

The NCAA's "Foreign Student" rule contained a classification according to alienage that was found to be unjustified and discriminatory. Under its terms, foreign students lost a year of eligibility for every year after their nineteenth birthday in which they had participated in athletic competition. No such limitation was placed on American citizens. Plaintiffs (*Howard v. NCAA*, 367 F. Supp. 926, 1973) argued that the rule was arbitrary, unreasonable, excessively vague, and designed to favor American citizen students over aliens (Reece, 1975).

Judge Gesell's opinion on the matter is useful: "*While the NCAA is properly concerned with preventing older players coming from abroad on the pretext of educational objectives and dominating championship competition because of age and prior sports activity, it was not demonstrated to the Court's satisfaction that there are not other less restrictive means available for accomplishing these objectives. The flat age restriction, stated in the vague terms of the rule's reference to any team or individual participation in athletic competition, results in arbitrary discrimination against aliens. To meet a felt need, the Association has, in effect, thrown the baby out with the bath.*"

The court declared the "Foreign Student" rule to constitute a denial of Equal Protection under the 14th Amendment of the U.S. Constitution and the Association was permanently enjoined from any future enforcement of the rule. The decision was affirmed by the Court of Appeals under *Howard U. v. NCAA*, 510 F. 2d 213 (1975).

In *Buckton v. NCAA*, 366 F. Supp. 1152 (1973), one of the most important cases applicable to IPSAs and ISAs challenging NCAA DI amateurism, the Association's Constitution was tested for validity of the amateur clause, alien clause, and its jurisdiction over ice hockey players. The Court -again- found that State Action was present; therefore, the Association was subject to constitutional scrutiny. Judge Joseph L. Tauro's comments transcend time and offer invaluable insight on subjects this study is dealing with:

"These regulations constitute and impose disparate eligibility standards, one for student-athletes who have played hockey in the U.S. and another for those who have played in Canada. Because the regulations in effect classify plaintiffs, who are resident aliens, differently than their American counterparts, they are inherently suspect and this court is required to subject such classification to strict scrutiny.

A Canadian boy who wants to play hockey at a pace more challenging than at a pick-up level must join one of these (civic groups) teams... this requires a boy to transfer his residence and schooling to the Metropolitan area where the team is located. When he does, it is customary for him to receive room, board, and limited educational expenses from his team, as did the plaintiffs in this case.

An American boy, on the other hand, can leave his home town to attend a prep school for the same dual purpose of playing hockey while receiving an education. When he does, he may receive financial aid from his school to meet his room, board, and educational expenses. Such aid may have even greater dollar value than the aid received by plaintiffs in this case, and yet the American boy need not fear any sanction by the defendant Association.

As stated, the aid received by the American and Canadian student-athletes may be precisely the same, both as to character and dollar value, but the defendant Association would brand the Canadian a professional

while accepting his American counterpart as an amateur. This clearly amounts to a disparity in treatment, a classic example of classification which is subject to judicial review."

This excerpt embodies all the IPSAs arguments against any rule interpretation that would render them ineligible, merely because of the sport structure in their country of origin. Moreover, it directly refers to an important point, in terms of the dollar value of the actual expenses, or the total economic impact of athletic participation in U.S. high school or Amateur Athletic Union (AAU) competition, as opposed to that of e.g. a youth club overseas. Reiterating a suggestion for future research, the financial impact of athletic participation in the U.S. high school and AAU system as opposed to foreign sport structures may involve entertaining the hypothesis of a more commercialized youth sport in the U.S. when compared to overseas youth sport leagues. A question might be: "Who is more of a professional, according to NCAA DI amateurism principles? U.S. High School and AAU players or foreign junior club ones?" In strict financial terms, at this point, conjectures cannot be refuted with economic data. If such a study found, as Judge Tauro above argued, that aid afforded to young prospects (international and U.S.) in its totality is approximately the same, then the application of an NCAA DI amateurism rule rendering an IPSA ineligible, while the respective U.S. SA would be considered eligible, would not make rational or legal sense, and would be subject to judicial review.

In summarizing his decision, Judge Tauro acknowledged that the damages suffered by the two hockey players would be much more than those suffered by the Association. Implications of professionalism are far worse than being academically insufficient (Reece, 1975). This landmark decision provided the basis for the NCAA to alter amateurism guidelines, especially as they pertained to ice hockey.

Rivas Tenorio v. Liga Atlética Interuniversitaria, 554 F. 2d 492 (1st Cir. 1977), was an interesting twist from a procedural standpoint, as the trial court failed to administer strict constitutional scrutiny in reviewing the regulation under question. The Appeals court reversed and remanded the matter to the district court, as it established that an Athletic Association rule was discriminatory. According to the challenged regulation non-Puerto Ricans were banned from competing in intercollegiate competition if they enrolled after their 21st birthday. Plaintiffs Elsy Rivas Tenorio and Bellanira Borrero Castillo were citizens of the Republic of Colombia. On the basis of the challenged regulation promulgated and enforced by the defendants, they were deprived of medals and prizes won at and were denied future participation in certain intercollegiate track and field competitions held annually in the Commonwealth of Puerto Rico. Defendants were the Liga Atletica Interuniversitaria (LAI), the equivalent in Puerto Rico of the NCAA in the U.S., and the individual members of its executive committee. The precise wording of the court in 1977:

"We emphasize that the constitutional difficulties which prompt our reversal arise by virtue of the regulation's facial command that non-Puerto Ricans be treated differently from Puerto Ricans. We do not in any manner impugn the desires of LAI officials to purge intercollegiate athletics in Puerto Rico of professionalism, nor do we in any way suggest that efforts to accomplish that result which are evenhanded between Puerto Ricans and non-Puerto Ricans will run afoul of the Constitution. See Shelton v. NCAA, 539 F.2d 1197 (9th Cir. 1976). But the Constitution does require that actions taken solely on alienage grounds cannot stand unless the standards set forth above are satisfied, and defendants admit that the actions here challenged were taken on the basis of a regulation which on its face so discriminates."

Thus, the *Rivas Tenorio* case alerted Athletic Associations' officials of outright discriminatory rules. Enforcement of such rules would be preempted, regardless of whether the rules served the stated purpose of the Athletic Association. Hence, the Appeals court agreed with the *Buckton* and the *Howard* decisions, in calling for less restrictive means to serve an Athletic Association's "purging of professionalism" purpose.

In a closely related Equal Protection case, *Fusato v. Washington Interscholastic Activities Association*, 970 P.2d 774 (Wash. Ct. App. 1999) found that the Athletic Association had violated the plaintiff's Equal Protection rights, discriminating against her due to her nation-

al origin. Using the court's wording: "...the WIAA failed to meet its burden - showing a compelling state interest served by the challenged rule - and made no effort to demonstrate that the least restrictive regulatory means were used to accomplish the stated purposes of their rules". In this case, the court applied the strict scrutiny test, which would mean that the Association would have to demonstrate a compelling state interest to uphold its rule that allegedly discriminated against foreign SAs. Unless the whole family "unit" moved to the respective High School District, the rule mentioned, the SA would not be allowed to compete immediately. An interesting note from this case is that the plaintiff was found not to have a property interest in her high school athletics participation.

Useful insight is obtained by the case of *NCAA v. Lasege and University of Louisville*, 53 S.W.3d 77 (S. Ct. Ky. 2001). A trial court granted Lasege and University of Louisville a temporary injunction, which was affirmed in the Court of Appeals. The Supreme Court of Kentucky granted interlocutory relief at the request of the NCAA, vacating the prior decision. The crucial issue was amateurism, and the impact of a specific relationship the ISA had with a professional club team. The trial court suggested that the NCAA had ignored what it described as "overwhelming and mitigating circumstances" including economic and cultural disadvantages, a complete ignorance of NCAA regulations, and elements of coercion associated with execution of the contracts. The court believed the NCAA's determination conflicted with the NCAA's own amateurism guidelines and past eligibility determinations regarding athletes who had engaged in similar violations. The court expressed its doubts about whether the first contract signed by Lasege was legally enforceable as an agency contract both because of Lasege's minority at the time he executed it and because the trial court disputed that the contract created an agency relationship. The court concluded that a clear weight of evidence suggested Lasege committed these violations not in order to become a professional athlete, but only to obtain a visa which would allow him to become a student-athlete in the United States.

The trial court found that Lasege would suffer substantial collateral consequences from an erroneous and adverse eligibility determination, balanced the equities in favor of Lasege, and ordered "the NCAA and its members ... to immediately restore the intercollegiate eligibility of Muhammed Lasege so as to allow him to participate in all NCAA basketball contests". The trial court also addressed U of L's concern that the NCAA could impose sanctions under NCAA Bylaw 19.8 if the injunction was subsequently vacated. NCAA Bylaw 19.8 allowed the NCAA to seek restitution from member institutions that permit student-athletes found ineligible by the NCAA to compete for their athletic teams pursuant to court orders which are later vacated. The trial court therefore declared that NCAA Bylaw 19.8 is invalid because "it prevents parties from availing themselves of the protections of the courts" and ordered: "... that the University of Louisville shall abide by this injunction and shall not prohibit Muhammed Lasege from engaging in intercollegiate basketball."

After the trial court entered the temporary injunction, Lasege played basketball for U of L during the 2000-2001 season. In the ensuing process, the Appeals Court denied the NCAA's motion, and the NCAA sought relief at the Supreme Court of Kentucky. The latter supported the NCAA and pontificated on relevant cases:

"This case demonstrates that courts are a very poor place in which to conduct interscholastic athletic events, especially since this type of litigation is most likely to arise at playoff or tournament time. If an injunction or restraining order is granted erroneously, it will be practically impossible to unscramble the tournament results to reflect the ultimate outcome of the case. Since, by definition, temporary injunctions attempt to place the parties in a position most likely to minimize harm before the court can finally decide the issues raised in a complaint, trial courts are asked to make significant decisions with less-than-complete information. As such, these determinations differ from most decisions reached by trial courts. There are no "drive-through windows" on courthouses for a good reason - judicial decision making demands thought and deliberation of all relevant evidence..." Longshot" claims which have little hope of prevailing when the buzzer sounds will not justify injunctive relief."

In his dissenting opinion, Justice Johnstone agreed with the fact there should be no "drive-through windows" while offering injunctive relief. Answering, however, the majority's argument that the trial court substituted the review of the NCAA, he remarks: "I would agree that there has been a substitution of judgment in this case, but it has been the majority substituting its judgment for the trial judge." The dissenting opinion furthermore argues that the NCAA did not satisfy the requirements set by the Kentucky Court of Appeals in *Maupin v. Stansbury*, Ky. App., 575 S.W.2d 695 (1978) about the necessary proof of "extraordinary cause". Thus, it should not have succeeded in achieving interlocutory relief, which led to the revision of the prior decisions that granted the ISA injunctive relief and allowed him to compete.

NCAA v. Yeo, 114 S.W.3d 584 (3rd Ct. App. TX, 2003), is the most recent case in which a decision was reached, where an ISA succeeded in challenging the NCAA's amateurism and eligibility regulations. Yeo's crucial argument was that she had established a protectable property right, through her swimming honors captured in International and Olympic competitions. To fully capture the ramifications of the *Yeo* case, it is useful to quote the opening statement of the Appeals Court opinion: "To characterize this as a case presenting a unique fact pattern requiring a decision of first impression would be an understatement".

Joscelin Yeo, a native of Singapore and the nation's most visible athlete, had competed in the 1992 and 1996 Olympic Games before coming to the U.S. She later competed in the 2000 and 2004 Games. In 1998 she enrolled at the University of California at Berkeley, whose swim coach at the time, Michael Walker, also coached the Singapore national team. Before the 2000-2001 academic year, Walker left Berkeley to coach at the University of Texas at Austin, and Yeo chose to follow Walker to Texas. NCAA rules regarding transferring athletes (Bylaw 14.5.5.1) required Yeo to sit out of collegiate competition for a full academic year (after Berkeley rejected Yeo's request for a waiver of the regulation under Bylaw 14.5.5.2.10), which she did in 2000-2001. Yeo began swimming for Texas in the fall of 2001. But because she had participated in the Olympic Games in the fall of 2000 instead of enrolling in classes - athletes must be enrolled for the time they sit out to count under 2000-2001 NCAA rule 14.1.6.2.2.1.2- Texas erred in letting her compete.

When Berkeley officials protested to the NCAA, Texas acknowledged its error and declared Yeo ineligible to compete for part of the winter. In March 2002, the NCAA SA Reinstatement (SAR) staff ordered Texas to withhold Yeo from four events to make up for the ones it had mistakenly let her compete in earlier in the year. Among the events Yeo was to miss would be the upcoming 2002 women's swimming and diving championship, and she argued that being barred from that meet, when her planned participation had already been promoted, would "harm her reputation as an athlete" and undermine potential endorsements. UT-Austin appealed the SAR staff's decision to the SAR Committee (SARC)⁷. At that point, for the first time, UT-Austin informed Yeo of the problem and advised her to "plea for sympathy" (case transcript, § 5) with the SARC. The latter upheld the staff's decision and required Yeo to sit out the Championship meets. At that point UT-Austin advised Yeo to seek independent legal counsel, which she did, suing UT-Austin and its vice president for institutional relations and legal affairs, Patricia Ohlendorf. Yeo's side sought to enjoin them from disqualifying her from competing in the championship meet two days later and for a declaration that UT-Austin had denied her procedural due process as guaranteed by the Texas Constitution.

It is important to follow the procedure of the *Yeo* case: The same day (March 20th 2002) Yeo moved for an injunction, the trial court granted Yeo a temporary restraining order. As was examined above this development is the deciding factor, in order for the SA to be able to compete with a trial pending. On March 21, the NCAA intervened

⁷ For more on the NCAA DI internal mechanism and SAR process refer to Kaburakis & Solomon (2005).

in the action, but Yeo moved to strike the intervention, and after a hearing later that day, the trial court granted Yeo's motion. The next morning, the NCAA sought mandamus relief from the court of appeals, and UT-Austin appealed from the temporary restraining order. That afternoon, the court of appeals denied the petition for mandamus and dismissed the interlocutory appeal for want of jurisdiction. Thus, Yeo won the important procedural battle and was able to compete in the championship meet.

In November 2002, after a trial to the bench, the trial court rendered judgment for Yeo, declaring that UT-Austin had denied Yeo procedural due process guaranteed by the Texas Constitution, thereby depriving her of protected liberty and property interests. The court permanently enjoined UT-Austin from declaring Yeo ineligible in the future without affording her due process and from punishing her for participating in past competitions, including the 2002 women's championship. The trial court also awarded Yeo \$ 164,755.50 in attorney fees through an appeal to the Texas Supreme Court.

After the championship meet in March 2002, Yeo graduated from UT-Austin, received a Rhodes Scholarship, and ended her college swimming career. Yeo currently pursues graduate studies in Oxford, England⁸. None of the parties involved in the litigation⁹ argued that the case had become moot, because the injunction prevented the NCAA from imposing retroactive sanctions under its "Restitution Rule" (at the time Bylaw 19.8; 19.7 in the 2005-2006 NCAA DI Manual). The latter was challenged in the *Lasege* case as well¹⁰.

Conclusion

This paper reviewed the legal procedure and Constitutional Law elements that are applicable on IPSAs cases dealing with NCAA DI amateurism and eligibility rules. IPSAs may pursue injunctive relief against an ineligibility decision in order not to lose the opportunity to participate in intercollegiate athletics. The reason for this is that enrollment in an American educational institution and the offer of an athletic scholarship opens up a door to the U.S. court system. Legal questions raised in this article and this research entailed an examination of past cases featuring foreign SAs being adversely affected by NCAA regulations and decisions. This study established the following points:

- * Courts do not always decline to intervene and grant judicial review when dealing with Athletic Associations' rules challenges. Even in the much-contested area of NCAA DI (after the Tarkanian case in 1988) there have been decisions rendered on these matters
- * There have not been many (successful for that matter) cases against amateurism and eligibility rules moved by international plaintiffs. It may be argued that this is due to the resources' limitations and the unfamiliarity with the system that was mentioned above
- * After investigating the NCAA internal mechanism, NCAA DI amateurism regulations, and the circumstances that are applicable to IPSAs cases in reference to the system of sport governance in their region, it cannot be safely said that there are inherently discriminatory rules against IPSAs, nor that the Association is not serving its purposes (such as Institutional control, Competitive Equity, and SA welfare). These matters need to be examined on a case-by-case basis, as they have been dealt with so far by the U.S. system of Jurisprudence

* After examining especially the *Buckton*, *Howard*, *Lasege* and *Yeo* cases, useful conclusions include:

1. A "Foreign Student" rule would not pass Constitutional review under the scope of Equal Protection and the application of the strict scrutiny test by the courts. Neither in the *Howard*, nor the *Rivas Tenorio* case were restrictive rules based on alienage and national origin found to serve compelling state interests
2. The mere fact that IPSAs come from a different philosophical, cultural, structural, educational, and athletic background, does not mean that they should be rendered ineligible, if they otherwise did not jeopardize their eligibility. As the *Buckton* and the *Lasege* (trial and appeals court) decisions demonstrate, particular circumstances in each region might be deciding factors for judicial decision-making, e.g. acknowledgments by the judges in

these two cases that the Canadian Junior hockey-club system and the International club-based system should not per se render an individual ineligible for intercollegiate athletics participation

3. The *Lasege*, *Yeo* (trial and appeals court) and other cases mentioned above (under Due Process and Property right) establish a Property interest in an athletic scholarship and -under circumstances (which in the *Yeo* case involved global recognition and past extraordinary athletic achievement)-intercollegiate athletics participation
4. As the *Yeo* case and its procedural development points out, it may be appropriate -and shrewd in terms of legal strategy-to pursue a case against a state institution as opposed to a questionable State Actor, such as the NCAA
5. The *Yeo*, *Lasege*, and other recent cases or out-of-court settlements (Bloom, Neuheisel, and MIBA/NIT¹¹) may alarm NCAA administrators, who need to operate preemptively in order to avoid consuming litigation in the future, e.g. render amateurism and eligibility decisions in uniform, non-conflicting fashion, consider revision of rules that appear frequently as major themes of litigation (even though the "Restitution Rule" under NCAA Bylaw 19.7 has exactly that purpose; to ensure that decision reversals in court will be impacting the institution and SAs under question, as well as have specific consideration and value, in the case of paying back broadcast revenue, championships awards, and related items of value; Bylaw 19.7 -arguably- does not deter institutions from initiating litigation against the Association per se).

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- 8 For more on Yeo: http://www.collegeswimming.com/index.php?show=views_news&id=3
www.utexas.edu/education/kinesiology/0304KHEAnnRpt.pdf
- 9 On August 26th 2005, the Texas Supreme Court, in *NCAA v. Yeo*, 171 S.W.3d 863, 48 Tex. Sup. J. 1016 (Tex. 2005), reversed the Appeals' Court decision and ordered that Yeo receive nothing. According to the Texas S. Ct. the Texas Constitution provides no protection for students' participation in extracurricular activities, as was established in *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 561, 28 Tex. Sup. Ct. J. 554 (Tex. 1985). In a nutshell, the Texas S. Ct. denied Yeo her previously acknowledged property interest in intercollegiate athletics participation.
- 10 In Texas, the NCAA's Restitution Rule was handled in: *NCAA v. Jones*, 1 S.W.3d 83, 84, 87-88, 42 Tex. Sup. Ct. J. 636 (Tex. 1999).
- 11 For more: *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp. 2d 545, 2004 U.S. Dist. LEXIS 20418 (S.D.N.Y., 2004), <http://judiciary.house.gov/OversightTestimony.aspx?ID=166>
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Fair Play from a EU Competition Perspective

by Alex van der Wolk*

1. Introduction

Sports have always been in the heart of people. We love to participate in sports and, equally, we love to watch sports. Stadiums and venues have been erected to enable the public to quench this thirst for sportsmanship and entertainment. However, stadiums and venues have limited seating capacity, but thanks to the transmission of signals, people from all over the world can be virtually present at the game.

Because sports broadcasts are, next to films, the most popular programmes on television, the demand for them by broadcasting organisations is very high. Evidently, it is of great interest to broadcasting organisations to have the exclusive right to televise a game or event for a given territory and they are therefore often willing to pay large sums of money to acquire this right. Organisations selling the broadcasting rights in turn rely more and more on the income flowing from TV rights sales and will thus seek ways to maximise this income.

The objective of this article is to give an overview of cases which the European Commission has dealt with regarding the sale of sports broadcasting rights. The cases have been examined from the perspective of competition law. I will only give a general outline of each case and describe the outcome, as the focus is on presenting an overview of the various cases concerning TV rights and sport.

2. Screensport/EBU

On 19 February 1991, the Commission gave a Decision in relation to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.524 - *Screensport/EBU Members*). The parties in this case were the European Broadcasting Union and a company called Screensport. The issue was a television exchange system called "Eurovision".

The European Broadcasting Union (EBU) is a consortium of broadcasting organisations, which was established in 1950. Membership to EBU is open to broadcasting organisations from member countries of the International Telecommunications Union (ITU), provided that it is a broadcasting service of national character and importance. The broadcasting organisation also needs to fulfil a number of additional requirements, amongst which the requirements to cover the entire national population or a substantial part thereof, to provide balanced programming to all sections of the population and to produce a substantial number of their own broadcasts. As such, they have many of the characteristics of public broadcasters, and indeed most of the members are public broadcasting organisations.

The EBU had adopted a television exchange system called "Eurovision". Eurovision enables members of EBU to acquire the broadcasting rights of events (including sports events) in various countries. The system is based on reciprocity: whenever a broadcasting organisation covers an event that is of potential interest to other members of EBU, it offers the signal free of charge to the other members, provided they will do the same in return.

In this case, a company called Screensport, which is a transnational satellite television sports channel, registered a complaint at the Commission, concerning the refusal of EBU to grant sublicenses to sports events to Screensport, with the effect that Screensport was deprived from competition with the EBU and its members. Screensport also complained about the joint venture between EBU and certain members on the one hand and News International on the other, whereby a transnational satellite television sports channel called "Eurosport" was established.

As a result of its actions, EBU had obtained the exclusive rights to

a number of major international events. With the exclusive broadcasting on the Eurosport channel, companies like Screensport, were allegedly discriminated against and prevented from providing meaningful competition.

The Commission determined that at the time there were only two transnational commercial television channels, namely Screensport and Eurosport, which both used the same satellite and which were therefore direct competitors for the same geographic audience, programme material, sponsors and advertisers. Third parties (i.e. non-EBU members) can only acquire access to Eurovision material by means of sublicenses. Under the provisions adopted by EBU, sublicenses were only available for deferred transmissions and were subject to an embargo and various other restrictions regarding the timing and volume of transmissions. Eurosport, however, has unconditional access. This, according to the Commission, restricts competition and trade within the common market. The Commission consequently held that the joint venture agreement of members of the Eurosport Consortium and News International constituted a breach of Article 85(1) EEC where it affected the access to the Eurovision system.

In a subsequent Decision, the Commission was of the opinion that the joint negotiations concerning rights and their acquisition could also have a positive effect on technological development on both the national and the international level. It also benefits both consumers, by means of more, diversified, and higher-quality sports programmes, and (public) broadcasting organisations. This decision can be regarded as a qualification of the EBU Decision concerning the Screensport complaint. The Commission stated that the Eurovision system falls under the exemption of Article 85(3) as long as EBU complies with the requirement of indispensability. Most importantly, EBU and its members must ensure that (some form of) third party access shall be maintained. If restrictions are imposed upon non-members, it must be done in a favourable manner.

In a Commission Decision of May 2000 an exemption was granted to the Eurovision system. The Commission acknowledged the improvement in the production and distribution of goods and promotional technical and economic progress, and benefits to consumers. By imposing a number of restrictions and conditions securing third party access, the European Broadcasting Union secured an exemption from Article 81 in respect of its Eurovision system.

In 2002, Métropole Télévision, a French television network, lodged an appeal against the Commission Decision before the European Court of First Instance (in joint cases T-185/00, T-216/00, T-299/00 and T-300/00 of 8 October 2002). Although EBU's system allowed non-members access to sports events, it only allowed access to events which the members had declined to broadcast. If a member had claimed an event, or only intended to broadcast part of the event, this meant that non-members could no longer acquire the rights to it. Moreover, in case the non-member was a non-commercial broadcasting organisation, it was only allowed delayed transmission (i.e. no live coverage). In practice, the rights to live coverage that are not used by members, are not offered to non-members. Sublicenses for delayed transmission and highlights are available, but only at the conditions set by EBU (for instance a minimum of one hour after the event and no earlier than 22:30). This practice in effect hampers competition.

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The Commission erred in granting the exemption and the Court declared the Decision to be void.

3. Deutscher Fussball Bund

In 1999, a case was brought before the European Commission regarding the central marketing of TV and radio broadcasting rights for certain football competitions in Germany (Case no. IV/37.214 - DFB).

In January 1999 the Commission invited third parties to reflect on the request of the Deutsche Fussball Bund (DFB) for a negative clearance or exemption concerning the collective selling of the television and radio broadcasting rights for the 'Bundesspiele'. The Bundesgerichtshof (BGH) had ruled in 1997 that the matches of German clubs in the UEFA Cup and the UEFA Cupwinner's Cup had to be marketed individually. The DFB put forward a number of arguments in favour of collective marketing systems, aiming mainly at the redistribution of revenue to weaker clubs, ultimately preserving professional football in Germany.

In October 2003 the Commission released a notice in which an exemption to the joint selling prohibition was granted to the Deutsche Fussball Bund. The new marketing model that was proposed by the parties closely resembled the model UEFA had implemented earlier. Joint selling was allowed, albeit that individual clubs regained their right to sell the match if the League did not succeed in selling it. Also, the rights were divided into nine packages according to distribution markets (television, internet, mobile telecommunications, etc.) and the nature of the rights (live coverage, summary, highlights, etc.). Clubs were allowed to sell rights to their home game matches to free-to-air broadcasters. The clubs were also allowed to exploit unused rights of the league. The league, however, remained entitled to the parallel, non-exclusive marketing of the corresponding package.

On 18 June 2004, the Commission informed the DFB and the League Association (Ligaverband) of its preliminary assessment within the meaning of Article 9(1) of Regulation (EC) no. 1/2003. The league association had committed itself to a package selling system, in which broadcasters have the choice between nine types of packages, of which 3 packages are non-exclusive. These nine packages held the right to live, near live, and delayed transmissions, secondary and third exploitation, transmissions over the Internet and mobile phones and the transmission of highlights. Furthermore, clubs would retain the right to sell their home games within the EEA to a free-to-air TV broadcaster 24 hours after the match for one-off free-TV broadcasting of up to the full match. Also, each club is entitled to show a summary of a match on the Internet, one hour and a half after its home and away games.¹ In addition, every club could sell its home games to mobile phone operators in the EEA, without restriction. As regards radio coverage of matches, clubs can sell their home games for non-live and live broadcasts.²

In the Commission Decision of 19 January 2005 the Commission has brought her case to an end, as she considers that there are no longer grounds for action. The Commission has decided that the commitments as described in her preliminary assessment shall be binding on the Liga-Fussballverband e.V. and that the decision shall be applicable until 30 June 2009.

4. UEFA

Although the UEFA case regarding the central marketing of the commercial rights to the UEFA Champions League (Case no. IV/37.398 - UEFA) was brought before the European Commission after the DFB case, it was decided earlier. The outcome formed the model for the DFB case and proved to be a breakthrough in the collective versus the joint selling dichotomy.

On 10 April 1999 UEFA asked for a negative clearance or exemption concerning the collective sale of the commercial rights to the UEFA matches. The commercial rights are the television rights on the one hand, and the sponsorship rights, supplier rights, licensing rights and intellectual property rights on the other. UEFA only markets the commercial rights to the group stages and final phase of the Champions League. The qualifying phase has been left to the nation-

al associations, or their affiliated organisations, to market.

UEFA's central marketing is based upon the Regulations for the UEFA Champions League, often referred to as "the Regulations". Based on article 1(6), UEFA shall exploit the commercial rights. According to the redistribution of the revenue of the commercial rights, marketed by UEFA, every club participating in the Champions League receives a certain percentage.³

UEFA argued that at least it is co-owner of the commercial rights of the Champions League, because "it has created the format and concept of the Champions League, which has established a brand identity that is entirely distinct from the identities of the competing clubs". Also, UEFA burdens itself with a range of organisational services, such as administration and regulation, organisation of match venues, selection of service providers, insurance, etc. Most importantly, UEFA bears the financial risk for the success of the Champions League, as UEFA guarantees participants a minimum amount, irrespective of the actual revenues.

In July 2003 the Commission decided in favour of the arrangements UEFA had drawn up. UEFA amended its regulations concerning the broadcasting of its matches, by granting the clubs a further going right to sell their matches individually.

The qualifying rounds in the UEFA Champions league do not fall under the supervision of UEFA, in terms of the sale of broadcasting rights; clubs sell these individually. This involves 80 clubs playing 160 matches. Furthermore, UEFA will offer its TV rights in several small packages on a market-by-market basis. The format of the package varies with each market in the Member State in which the rights are being offered. If UEFA has not managed to sell the rights within one week after the draw for the group stage of the UEFA Champions League, the individual clubs regain their (non-exclusive) right to sell the match as well, parallel with UEFA.

Regarding the Internet rights, UEFA has stipulated that both UEFA and the individual club may provide video content of the match (the individual club obviously only of the match it played in) an hour and a half after the match finishes. Its reason for not "live streaming" the match is that technical developments do not permit high quality featuring. UEFA recognises however, that in the near future this will change, making it necessary to revisit this provision.

Regarding UMTS services, UEFA has drawn up the provision that to a maximum of 5 minutes after the action has taken place, an audio/video content via UMTS service may be made available (technical transformation delay). The content is based on the raw feed produced for television. UEFA intends to build a UMTS wireless product that will be based on an extensive video database to be developed by UEFA.

Audio rights may be sold both by UEFA and the individual clubs.

Finally, both UEFA and the individual clubs are entitled to exploit the physical media rights of DVD, VHS, CD-ROM, etc.

The Commission is of the opinion that UEFA's joint selling arrangement leads to the improvement of production and distribution by creating a quality-branded league-focused product sold via a single point of sale.

5. Formula One Racing

In June 1999 the Commission started investigating Formula One and other international motor racing series, as it suspected the FIA of abusing its positions by means of its "Concorde Agreement". This Agreement limits the sale of TV rights, and also imposes restrictions upon participants in FIA concerning competing matches.

The Formula One Championship is organised by the Fédération Internationale de l'Automobile (FIA). The TV rights to this event are

- 1 With a 30 minute maximum restriction until 1 July 2006, after which this restriction will no longer be active.
- 2 Live broadcasts carry the restriction of a maximum of 10 minutes per half.
- 3 Including the clubs who are eliminated in the qualifying phase, with 9% of the revenues generated by the contracts con-

cluded by UEFA; see Article 18(9) of the Regulations. Percentages are also attributed to UEFA's member associations (7.5%), for budgetary and administrative purposes (5%), and for football related financial measures (10%). The largest sum (68.5%) is allocated to the 24 participating clubs.

sold by a company called Formula One Administration Ltd. (FOA). These rights are marketed by yet another company, called International Sportsworld Communicators (ISC). Both the FOA and the ISC are owned by the same person.

By requiring a FIA license to take part in an international motor sports event, the FIA blocks series which compete with FIA events. Anyone holding a license is prohibited to enter or organise any other event than those authorised by FIA. Breach of this provision results in the withdrawal of the license. By this practice, the FIA controls access of the input to other series or events.

Furthermore, the FIA claims the TV rights to all the motor sports events it authorises. Anyone wishing to establish an international series is not only forced to obtain authorisation from the FIA (otherwise the series would have no input), but also to assign all TV rights to the event to a competing promoter, namely the FIA, who in turn, assigns the rights directly to the FOA.

Also, the Concorde Agreement and promotion contracts impose serious restrictions on participants, so as to protect the Formula One championship from competing championships. Circuits used for Formula One races cannot be used for races that compete with Formula One. Formula One teams are not allowed to race in any other series comparable to Formula One. And finally, broadcasters are heavily fined if they televise anything which the FOA deems to constitute a competitive threat to the Formula One championship.

The Commission is of the opinion that if the FIA has not lawfully acquired the broadcasting rights, it cannot validly assign these rights to FOA and ISC.

FIA amended its regulations in 2001. Although FIA did not agree with the Commission's objections, they still agreed to modify some of their arrangements. Teams are now allowed to compete in other championships and FIA rules will never be enforced so as to prevent or impede competition or the participation of a competitor. Competing events and series within the Formula One discipline will be possible. The companies involved have agreed to lower or remove barriers to entry for the creation and operation of other motor sport series, in particular those that might compete with Formula One.

The Commission closed its investigation on 30 October 2001, after having examined the amendments to the provisions. Because the FIA has now sold its TV rights, a conflict of interests or any influence over the commercial exploitation of the TV rights no longer exists.

6. The downstream market

Most Commission Decisions so far concerned the selling of broadcasting rights in an upstream or downstream market. In September 1999 a Commission Decision would follow relating to a proceeding under Article 81 of the EC Treaty, regarding the technical provisions involved in the sports broadcasting sector (IV/36.539 - *British interactive Broadcasting/Open*).

This decision concerned the notification to the Commission of the creation of a joint venture company called British interactive Broadcasting Ltd (BiB). The joint venture is between BSKyB Ltd, BT Holdings Limited, Midland Bank plc and Matsushita Electric Europe Limited.

BiB will be providing digital interactive television services to consumers in the United Kingdom. BiB will need to set up the proper infrastructure to provide this service. An important element of this infrastructure is a digital set-top box. BiB will subsidise the retail-selling price of digital satellite set-top boxes, satellite dishes and low-noise blocks.

One of the parents of BiB is BSKyB; a broadcaster of analogue pay television services ("pay-TV") delivered by the ASTRA satellite for direct-to-home and cable reception in the UK and Ireland. BSKyB operates on both the retail and the wholesale level. It launched a digital pay-TV service in 1998 using the digital set-top box, satellite dish and low-noise block, which BiB will subsidise.

The European Commission was of the opinion that the digital interactive television services market is a separate market. One must assess the retail-demand substitutability for digital interactive television services by service providers to content providers.

The Commission also identified several different product markets among the digital interactive television services and pay-television services markets: a) the pay-television market, determining that there is no reason to distinguish between markets for analogue and digital pay television; b) the market for the wholesale supply of films and sports channels for pay-television, stating that the wholesale supply of film and sports channels forms a separate market; c) the technical services for digital interactive television services and pay television, stating that the relevant product market is that for technical services necessary for digital interactive television services and for pay-television; and d) the customer access infrastructure market for telecommunications and related services, this market includes the traditional copper network of BT, and the cable networks of the cable operators.

The Commission was concerned that the combination in a single company of activities relating to the subsidisation of set-top boxes and the operation of services using the set-top box, would lead to a lack of transparency in the operation of the subsidy recovery mechanism which could allow the parties to confer benefits on their own downstream operation in comparison with third parties. After the notification of the Commission, BiB separated itself into two companies: one for subsidies of set-top boxes and one for the creation and operation of BiB interactive services.

First of all, the joint venture between BT and BSKyB was at stake. The Commission determined that BT and BSKyB were potential competitors in the provision of digital interactive television services. Both have sufficient skills and resources to launch such services and both would be able to bear the technical and financial risks of doing so alone. The creation of BiB eliminates this potential competition, and the restriction of competition between them is appreciable. Furthermore, there are a number of provisions in the joint agreement that also restrict competition.

However, BiB filed for an exemption under the provision of Article 81(3) of the EC Treaty, which has been granted. By the joint venture, the parties have overcome the current technological limitations of both satellite broadcast technology and narrowband telecommunications customer access infrastructure. The introduction of a new service is a benefit to consumers. Also, the sale of set-top boxes has been conditioned by a number of provisions; one of them being the fact that a set-top box does not require a subscription to BSKyB's digital pay-television service. The third party access to BiB subsidised set-top boxes will be guaranteed, also because of the market position of BSKyB. Finally, BSKyB must supply its wholesale of film and sports channels to cable and digital terrestrial competitors either with or without interactive applications. This must be done at the choice of the purchaser on a non-discriminatory basis. This prevents BSKyB from bundling interactivity at the wholesale supply level with its channels to the detriment of both competitors to BiB on the digital interactive television services market and its own competitors in pay-television.

Following the case of BSKyB in the UK there was a largely similar case in March 2000. The Commission handed down a decision declaring a concentration to be compatible with the common market (Case no. IV/M.0037 - *B SKY B / Kirch Pay TV*) according to Council Regulation (EEC) no. 4064/89.

KirchPayTV is a company that operates pay-TV services in Germany and Austria and has a 40% percent interest in a Swiss pay-TV service. KirchPayTV offers a number of services to its subscribers, amongst which movies and live sports events.

The British company BSKyB and KirchPayTV made arrangements for a joint operation, that would give BSKyB the joint control with Kirch of KirchPayTV.

The Commission largely defined the relevant markets as it did in the BSKyB case (BiB); regarding the relevant product market, the pay-TV market is different from the free-to-air market and the demand substitutability on final consumers for digital interactive services is likely to be distinguishable from alternative sources of supply. Concerning the market for pay-TV programming, the Commission held that films and sports are pay-TV's "drivers". The Commission did not consider it necessary to determine whether separate markets

existed for film broadcasting rights and rights to broadcast sporting events.

The Commission recognised that KirchPayTV was in need of this operation to maintain its position on the pay-TV market in Germany. It also acknowledged that the decoder infrastructure and encryption technology in Germany is largely controlled and owned by KirchPayTV. An undertaking wishing to enter the market will be obliged to use Kirch's technical infrastructure, and therefore be reliant on its direct competitor. After having entered the market of pay-TV, an undertaking needs to be able to offer programmes that are interesting to German viewers. This comes down to a certain amount of films and sports programming. As Kirch holds long-term contract with almost all of Hollywood's major production and film companies, as well as the sports broadcasting rights for pay-TV markets of many major events (including German Bundesliga football and Formula One), the amount of programming that would be available to a new entrant is small. The conclusion is that new entrants to the German pay-TV market would have to make substantial investments of capital.

By joining their efforts, KirchPayTV and BSkyB are able to offer a digital interactive television service to the pay-TV market, with sufficient film and sports programming to render its business. The objective is to combine powers of supplying content and supplying infrastructure. In the literature this has been called the "control of content versus the control of access" dichotomy. If one undertaking holds both, it may constitute a dominant position, foreclosing market access to new entrants. The Commission in this case determined that together KirchPayTV and BSkyB would not have more buying power in terms of capital for the UK and German market as they would have separately. Both already had the buying power to engage in tied buying, and together this will not change. By securing third party access to Kirch's technological platform, the Commission assures that there will not be an abuse of Kirch's dominant market position.

What the Commission had decided for Germany, could also be applied to Italy, as is demonstrated by the Commission Decision of 29 June 2000 (Case no. IV/M.1978 - *Telecom Italia / News Television / Stream*) according to Council Regulation (EEC) no. 4064/89.

The case concerned the joint control of Stream, an operator of satellite and cable digital pay-TV in Italy, by Telecom Italia and the British News Television (News). The joint control concerns the market of pay-TV, a market that is distinct from the market of free-to-air television. At the time of this Decision the market penetration of pay-TV was only 5-15%; the pay-TV market is still at a very early stage.

Telecom Italia largely provides the transmission infrastructure and thereby capacity of Italy over both satellite and cable transmission. Because of the relatively small role of cable as a transmission medium in the pay-TV market, the Commission did not engage in a predicament regarding the evolution of this medium.

Objections to this joint control of Stream came from Telepiu, an undertaking that is the direct competitor of Stream in providing pay-TV programming.

The Commission decided that the joint control of Stream was compatible with the common market and with the EEA Agreement. Telepiu already owned 70-80% of the broadcasting rights to the most profitable premier movies and approximately 60% of the exclusive rights to the Italian Football League matches. The vertical integration between Stream and News did not seem to prospectively foreclose the acquisition of broadcasting rights by Telepiu and hinder the competition in this sector.

Throughout the cases concerning sports and competition law, UEFA has been an important player. The case concerning joint selling has been mentioned above, and apart from this UEFA was engaged in other cases. In April 2001 the Commission gave a decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case 37.576 *UEFA's Broadcasting Regulations*).

This decision related to the rules of UEFA regarding broadcasting regulations. The object of UEFA's broadcasting regulations is to provide national football associations with a limited opportunity to

schedule domestic football fixtures at times when they are not liable to be disrupted by the contemporaneous broadcasting of football to the detriment of stadium attendance and amateur participation in the sport.

The regulations aim at ensuring that spectators are not deterred from attending football matches. It involves the right of national associations to block the broadcasting of (UEFA) football on a Saturday or Sunday, due to the fact that this is when a majority of the weekly football matches is played.

Third party objections to this regulation come from the consideration that this way the acquisition of football live broadcasting rights becomes risky, as a broadcasting organisation never has the certainty that he can transmit the match live. Also, this practice would hamper technological evolution, now that for instance Internet broadcasting, which is not limited to a certain geographic area, would have to take into account all territorial blocked periods, thereby making it nearly impossible to broadcast over the Internet.

The Commission considered that both the upstream market and the downstream market was involved by this practice. Regarding the upstream market, there is a separate market for the acquisition of broadcasting rights to football events played regularly throughout every year and the UEFA Champions League and UEFA Cup. Because events are played throughout the year, the Commission was of the opinion that UEFA's broadcasting regulations do not appreciably restrict competition. Regarding the downstream market, the Commission determined that here there was no appreciable restriction on the competition for advertisers and/or subscribers either.

In sum, there may be some limitation on the freedom of broadcasters to televise live UEFA sports events, but this does not appreciably restrict competition.

The Commission dismisses the claim that Internet transmissions are affected by the regulations with the argument that "webcasting" is not at its full potential yet and therefore cannot establish a profound coverage of the market. There is no ground for action under Article 81(1) of the EC Treaty.

European Court of Justice, Judgement of the Court of First Instance (Third Chamber), *Metropole Television (M6), Suez-Lyonnaise des Eaux, France Télécom and Télévision Française 1 SA (TF1) v Commission of the European Communities*, Case T-112/99, 18 September 2001.

In 2001 a case was brought before the European Court of Justice, concerning the creation of a service called *Television par Satellite* (TPS). TPS was set up in the form of a partnership between four major companies active in the television sectors and telecommunication and cable distribution sectors. The case relates to a Commission Decision of 3 March 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty. The object of TPS is to "devise, develop and broadcast in digital mode by satellite a range of television programmes and services, against payment, to French-speaking television viewers in Europe". TPS had certain contractual clauses with its shareholders (i.e. the broadcasting and telecommunications companies), guaranteeing the exclusivity and non-competition to TPS over competitors in the market.

In the contested decision it was made out that the operation affected the market in the acquisition of broadcasting rights and the marketing of special-interest channels. It was recognised that films and sport are the two most popular pay-TV products, and the acquisition of broadcasting rights for such programmes is necessary in order to put together a sufficiently attractive range of programmes to convince potential subscribers to pay for receiving these television services.

The Commission found that there were no grounds for action pursuant to Article 85(1) of the EC Treaty in respect of the creation of TPS. With regard to the contractual clauses between TPS and its providers of sports broadcasts, the Commission concluded that there were no grounds for action in respect of the non-competition clause for a period of three years and that the exclusivity clause and the clause relating to special-interest channels could benefit from an exemption under Article 85(3) of the Treaty, also for a period of three years. The case was brought by the shareholders of TPS.

The applicants were of the opinion that the Commission had infringed Article 85(1) of the Treaty in deciding that the exclusivity clause and the clause relating to the special-interest channels do not constitute restriction of competition within the meaning of that provision and, alternatively, that those agreements must be classified as restrictions that are ancillary to the creation of TPS. The Court rejected the objection of the parties, because the exclusivity clause is not objectively necessary for the creation of TPS. The argument for this is that general-interest channels do not constitute a separate programme category or a type of content that is essential for pay-TV, but creating exclusivity regarding this type of programming actually restricts competition.

The applicants also argued that the Commission should have applied Article 85(1) of the Treaty in the light of a rule of reason rather than an abstract rule. Under a rule of reason, an anti-competitive practice falls outside the scope of the prohibition in Article 85(1) of the Treaty if it has more positive than negative effect on competition on a given market.

The Court dismisses this argument, stating that although the rule of reason has been applied in competition cases, it cannot be interpreted as establishing the existence of a rule of reason in community competition law. Therefore the pro and anti-competitive effects of an agreement do not have to be weighed. The Commission did assess the restrictive nature of those clauses in their economic and legal context in accordance with the case law. In doing so, the Commission rightly found that the effect of the exclusivity clause was to deny TPS' competitors access to such programmes. Regarding the clause relating to the special-interest channels, the Commission found that it resulted in a limitation of the supply of such channels on that market for a period of 10 years. The objection was rejected.

In Community competition law the concept of an "ancillary restriction" covers any restriction which is directly related and necessary to the implementation of a company's main operation. If an operation is difficult or not possible at all, a restriction may be regarded objectively necessary. Furthermore, the restriction must be observed in light of duration and scope.

The ancillary restriction is disproportionate when it comes to both the general-interest and the special-interest channels, as it is not necessary for the company's main operation. Its disadvantage in respect to its competitors will diminish with time. The exclusivity clause is not necessary to obtain this end.

The Court came to the conclusion that having exclusivity in special-interest channels (like sports programming) is an important factor, but not as necessary for the existence and competition of a new channel that it requires exclusivity and non-competition clauses. Although TPS greatly benefits from exclusivity regarding sports broadcasting, clauses like the ones in the case at hand were considered to unnecessarily restrict the market.

7. Conclusion

Sports remain a product in great demand in the arena of broadcasting. Providers of sports broadcasts (i.e. the organisations holding the initial broadcasting rights) would very much like to be able to sell their rights collectively. Unsold individual rights would be equally sold, and the selling of these rights would be centralised. From a competition law perspective this is, however, not acceptable. It restricts competition when there is only one provider.

Broadcasting organisations would very much like to have exclusivity in acquiring broad-casting rights to sports events. Sports broadcasting is a good way to commit consumers to one's channel, whether pay-TV or public broadcasting. Also in this field it is not desirable that there is too much exclusivity. Sports broadcasts should not all require a decoder in order to be able to view them. Everyone should be able to watch sports at a reasonable price or even free of charge. By securing that a single provider or reseller cannot own all rights, or foreclose the market, the European Commission and European Court of Justice have attempted to regulate trade in this highly valued product.

But sports is still more than just a product. It is part of our culture and part of our community. Everyone should have access to sports, and sports should be available to everyone.

The International Sports Law Journal

Euro 2000 and Football Hooliganism

by Hans Mojet*

1. Introduction

In 1994, it was decided that the European football championship (Euro 2000) would be organised by the Netherlands and Belgium. UEFA and the national football leagues of both countries established the Euro 2000 Foundation, which played a central role in the organisation of Euro 2000. The governments of both organising countries were also involved. They and the Euro 2000 Foundation cooperated closely in order to tackle the problem of football hooliganism. This article will describe the legal framework used in the Netherlands to combat hooliganism. It will start by giving a brief description of the actors involved in the organisation of the championship and of their responsibilities. Secondly, the relevant international legal framework will be described. Thirdly, the applicable national policy and legal framework will be discussed. As regards both, the discussions and/or procedures preceding the entry into force of the legal document or policy concerned will be described first, to be followed by a discussion of the actual policy or document as it was eventually adopted. Subsequently, the actual implementation of the policy and/or legal document during Euro 2000 will be evaluated.

2. The organisational framework of EURO 2000 - organisations involved and their competences/tasks

In 1994, the Netherlands and Belgium were appointed as organising countries for the European football championship in 2000. On 30 June 1997, the Dutch and Belgian Ministers of Home Affairs concluded an agreement of cooperation concerning the European football championship for country teams in 2000. The cooperation would start from 1 July 1997. The Ministers would coordinate the public services involved in the organisation of Euro 2000 in both countries. In addition, a project organisation was established in both countries. In the Netherlands, this was the National Project Group Euro 2000 (*Nationale Projectgroep EK 2000*). Both the Dutch and the Belgian national football federations submitted a performance bond to UEFA (the European football organisation), without prejudice however to the own responsibility of the candidates/teams, UEFA and the local authorities. The Dutch Football Federation (KNVB) and the Belgian association Belfoot 2000 then founded the Euro 2000 Foundation, which was established in Eindhoven (in the Netherlands) and which was to organise the championship. The responsibility for the organisation of the championship was shared between the Euro 2000 Foundation, UEFA and the national football federations of the Netherlands and Belgium.

In their agreement of 30 June 1997, the Dutch and Belgian

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Ministers of Home Affairs expressed their intention to formulate a common policy in the following fields: policy and tolerance limits; security measures; infrastructure around the football stadiums; a common framework for the organisers' obligations concerning security, ticket sales and supporters' separation; stadium bans; the sale of alcohol in and around the stadiums; organised transport of supporters; mutual police assistance and exchange of police liaisons; the organisation of social events and the treatment of supporters and the supply of information to them; and media policy. A working group of civil servants met regularly and reported to both Ministers on the progress concerning measures for the protection of public order and security and concerning common initiatives and opinions on the cooperation before and during Euro 2000. Both countries would strive to limit the use of police forces during the tournament as much as possible.

Besides the Minister of Home Affairs, other Dutch Ministers were also involved in the preparations for Euro 2000. A governmental direction committee was formed comprising the Ministers of Home Affairs and Justice and the Secretary of State for Sport. The mayors of the match towns would also be involved, as they were responsible for the maintenance of public order in their towns. The Minister of Justice would be responsible for the admittance and expulsion policy for football supporters and for criminal investigations initiated against supporters. The Secretary of State for Sport would be responsible for sports policy, events, supporters' transport and facilities. The Minister of Home Affairs dealt with the contacts with his Belgian counterpart, the policy framework for Euro 2000, tolerance limits, ticket selling policy and the minimum standards for a good organisation of the stewards. Other Ministers involved were the Minister of Transport (responsible for the infrastructure) and the Secretary of State for Economic Affairs (responsible for tourism and Holland promotion).

A special Euro 2000 Centre (*EK centrum*) was established. This Centre had a central role in the preparations for the championship. It provided information on the championship, directed the interdepartmental and administrative harmonisation of tasks and provided support to the administrative direction of Euro 2000. In addition to the Belgian government and the Euro 2000 Foundation, the Centre represented the Dutch government in the organisation. In order to reinforce the coordination of the preparations for Euro 2000 a special project director-general was appointed. The appointment of a special high official would ease high level contacts with other organisations and would guarantee the required attention of the management in the Dutch civil services. Within the Dutch police forces a special football commissioner was appointed.

Finally, the Bi-national Police Information Centre (BPIC) was established. This Centre was founded especially for Euro 2000 by the Netherlands and Belgium in order to exchange operational information between the police services of both countries.

3. The international legal framework used during EURO 2000

The Dutch government wanted to limit the use of police forces as much as possible. The championship would imply the use of a considerable part of Dutch police resources, but this was not supposed to lead to unsafe situations in other parts of the country. Public order had to be maintained. In order to organise this properly, the Dutch government also used certain instruments of international law. First of all, it used the Schengen Treaty to reintroduce border controls. Secondly, it concluded a treaty with Belgium, the Treaty of Bergen op Zoom, making police intervention possible. Thirdly, the Dutch and Belgian governments issued a number of Joint Statements with the British and German governments concerning police and criminal cooperation. These documents will now be described

3.1. The Schengen Treaty

In June 1985, Germany, France and the Benelux countries concluded the Schengen Agreement on the gradual abolition of checks at their common borders. Article 2(1) of the Convention Implementing the Schengen Agreement (adopted in 1990) provides that internal borders may be crossed at any point without any checks on persons being carried out. The second paragraph of Article 2, however, states that an

exception is possible "where public policy or national security so require". If this is the case, a Contracting Party has to consult with the other Contracting Parties before reintroducing border checks. The border checks can only be carried out for a limited period. If public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures and inform the other Contracting Parties thereof at the earliest opportunity.

After consultations with the Belgian government, the Dutch government decided to carry out border checks during the football championship. Both governments tried to follow a common policy in as many fields as possible. Whether actual checks would be carried out, was dependent on information on possible threats to public order. After consulting with the other Contracting Parties of the Schengen Agreement (in accordance with Article 2 of the Convention Implementing the Agreement), both the Belgian and the Dutch governments decided to and did carry out border checks during the championship.

3.2. The Treaty of Bergen op Zoom

In April 1999, the Dutch and Belgian Ministers of Home Affairs concluded the Treaty of Bergen op Zoom concerning cross-border police intervention in order to maintain public order and security during the European football championship in 2000. Specific regulations concerning additional information on the Treaty were also published in each country (each country drafted its own regulations). The central point of view in the Treaty was that foreign police services would only be used for secondary, passive and supporting missions (of a defensive nature), in order to make more domestic police services available for important, more far-reaching missions (of an offensive nature). In the Netherlands, the Treaty did not require ratification by Parliament because of its temporary validity, but in Belgium it did.¹

The Treaty had to facilitate mutual police cooperation between the two countries during Euro 2000. Article 1 defines cross-border police intervention as follows: each intervention on the basis of the Treaty of police officers of one Contracting Party on the territory of the other Contracting Party, aimed at the prevention of infringements of public order and public security. The Treaty applied only to the regular police forces in the Netherlands, not to the Royal Netherlands Military Constabulary (*Koninklijke Marechaussee*).

Article 2(1) provided that cross-border police intervention could only take place after a written request from one Contracting Party to the other Contracting Party. This request had to be directed to the competent authority in the other Contracting Party. In the Netherlands, the National Coordination Centre was the competent authority on behalf of the Minister of Home Affairs. In Belgium, the Mixed Intelligence and Coordination Cell (*Gemengde Inlichtingen en Coordinatiecel*, *GICC*) functioned as the competent authority on behalf of the Belgian Minister of Home Affairs. The Dutch National Coordination Centre coordinates government policy in case of unexpected crises and in case of large-scale events taking place in the Netherlands (such as Euro 2000).

According to the Treaty, the competent authority decides upon the request without delay and communicates its decision to the competent authority of the requesting party. If no request can be made by the Sending State because of the urgency of the situation, the Sending State may go ahead with the cross-border police intervention (Article 2(3)). The Sending State shall, however, contact the Receiving State as soon as possible after it has started the intervention. The competent authority may take over the intervention at any time it decides to do so.

Before a request for cross-border police intervention would be sent, the National Coordination Centre (the competent authority in the Netherlands), had to examine the necessity of the intervention using the following criteria (as published in the Dutch regulation executing the Treaty):

¹ Article 7(c) of the Kingdom Act containing Regulations on the Approval and Publication of Treaties and the

Publication of Decisions of International Organisations (*Rijkswet goedkeuring en bekendmaking verdragen*).

- a. is it reasonably necessary to make use of Belgian police assistance?
- b. are the efforts to be delivered by the police or military police truly inadequate or not sufficiently readily available?
- c. is the Belgian police, with a view to the expertise present, the equipment available and the term within which it has to be deployed, the appropriate vehicle to deliver the needed assistance?

The request for police intervention had to contain a description of the nature of the desired cross-border police intervention and its operational necessity. For this request several model forms were drafted (Dutch regulation executing the Treaty).

The commanding officer of the police unit or the police officer crossing the border had to be informed as soon as possible of the decision referred to in Article 2. The commander of the cross-border police unit or the cross-border police officer had to carry or be in possession of a summary (list) of means carried to the Receiving State/Host State (Article 3). According to Article 4, the cross-border police units and police officers functioned under the authority of the local authority which is competent for the maintenance of public order and security. They performed their duties under the operational command of the commander who is competent for the maintenance of public order and security on the terrain/area where the cross-border police intervention takes place. Article 5 made it possible for the Sending State to deliver means for the maintenance of public order on the request of the Host State.

According to Article 6, the police units and officers carrying out a cross-border police intervention were competent, with due observance of the applicable legislation of the Host State, to:

- continue the immediate protection or close protection of persons if these persons entered the territory of the Host State;
- carry out patrols: monitoring a designated area of the Host State for the purpose of collecting information and locating persons, animals, vehicles or objects which threatened or might threaten public order and security;
- check: checking the entrance of a designated area or preventing entrance to a certain area, thereby aiming to enforce compliance with the legal measures of the Host State and to maintain public order and security;
- direct traffic;
- search: systematically going through a certain area in order to track persons, animals, vehicles or objects, which threatened or might threaten public order and security;
- accompany: to travel with a group of persons for the purpose of preventing incidents and maintaining public order and to keep them under continuous supervision, to call the group or members of the group to account for their behaviour and to indicate their responsibility or liability for the possible consequences of their behaviour.

As regards equipment, Article 7(1) provided that cross-border police officers should wear their uniform and that they might carry, as far as allowed in the Host State, their personal weapon and baton which were part of their personal equipment. When giving immediate or close protection however, they were not obliged to carry the aforementioned weapons. Other weaponry (than the personal weapon and baton) could be carried, if this was in accordance with the nature of the police intervention and with the orders of the competent commander (as referred to in Article 4). The second paragraph of Article 7 provided that other duty weapons might be carried, if they could not be laid down and stored on the territory of the Sending State. These weapons might, however, not be used.

The use of violence or the execution of a security body search by cross-border police officers was allowed if in accordance with the orders of the locally competent commander and under the same conditions which applied to police officers of the Host State. The use of the weapon which is part of the personal equipment was exclusively allowed in case of self-defence. The applicable law concerning self-defence was to be the law of the Host State (Article 8).

The cost of the cross-border police intervention, including the cost

caused by total or partial loss of carried equipment, weaponry and means, would weigh on the Sending State. Costs of housing and living of the cross-border police units and officers might be borne by the Host State (Article 9). The Host State was liable for any damage caused by cross-border police intervention according to Article 2(1) of the Treaty or caused by means delivered by itself to the Sending State. In case of urgency (Article 2(3)), Articles 42 and 43 of the Convention Implementing the Schengen Agreement would be applicable. According to these provisions officers operating in the territory of another Contracting Party (to the Schengen Convention) shall be regarded as officers of that Party with respect to offences committed against them or by them. The Sending State shall be liable for any damage caused by them during their operations, in accordance with the law of the Contracting Party in whose territory they are operating. The Contracting Party in whose territory the damage was caused, shall make good such damage under the conditions applicable to damage caused by its own officers. Besides, the Contracting Party whose officers have caused damage to any person in the territory of another Contracting Party shall reimburse the latter in full any sums it has paid to the victims or persons entitled on their behalf. Finally, Article 43 provides that in certain cases no mutual reimbursement between the Contracting Parties takes place.

Article 14 of the Treaty obliged the Contracting Parties to carry out an evaluation of the effects of the Treaty. Because of the different way of implementation and because of the different regulations executing the Treaty, two separate evaluations were written. From these evaluations a short document was composed containing some common conclusions and recommendations. The Treaty was applied 38 times: 37 times when one of the persons who accompanied a football team crossed the border (a police officer was added to each football team who could provide information to the team) and one time for the accompaniment of English and German supporters by the Dutch police who travelled by train from Charleroi (Belgium). I will now briefly discuss the Dutch evaluation, to be followed by a description of the common recommendations.

During a joint exercise prior to the tournament, some problems arose in connection with the functioning of cell phones and radio traffic in the border areas. During the tournament, there were problems with the voicemail of the cell phones of two Dutch police platoons when they failed to function. In addition, experience revealed that the actual situation in which an action takes place sometimes differs from the situation as described in the request from the competent authority. This occurred when a Dutch police platoon had to be split in Belgium, as it suddenly became clear that not one, but two trains of supporters had to be accompanied from Charleroi to the Netherlands. However, no serious problems arose in all these cases. A final problem arose when vehicles of the Dutch police were not allowed to pass Luik (Liège), as the local police commander refused to let them. Most Belgian police officers were unaware of the planned arrival of the Dutch police platoons in Belgium.

The Dutch evaluation contained four concrete recommendations.² First, it was considered necessary to hold more joint exercises prior to the tournament (instead of only one, as had been the case), in order to be able to cope with any complications. Secondly, it had to be ensured that the available means of communication functioned everywhere: these had to be tested in an exercise situation. Thirdly, a scenario should be drafted which, among other things, would clarify which action was to be taken at what time and where and in what type of situation and by whom. Fourthly, it was considered that the Treaty had to take into account situations where police intervention takes place when these situations are different from the situations outlined in the Requesting State's request. Although such situations did not occur during the tournament, it might be desirable to include in any future treaties a clause making it possible to deal with such situations by mutual consent. A comparison of the Dutch and Belgian evaluations reveals the cultural differences between the countries.³

2. Evaluation of the Treaty of Bergen on Zoom, Ministry of the Interior and

Kingdom Relations, Directorate of Police, June 2001.

Certain situations were interpreted differently and another approach would have been chosen.

The joint evaluation of the Treaty showed that it was generally considered to have been satisfactory: the Treaty had functioned well and efficiently.⁴ It was considered necessary to guard against cultural and terminological differences between countries preventing efficient cooperation in maintaining public order. However, a certain measure of flexibility in the application of the provisions would also be needed, as well as holding more joint exercises in advance in order to counter possible practical problems (especially concerning the means of communication). Finally, it was concluded that the use of police officers to accompany the different football teams had worked well.

Both the Belgian and the Dutch Ministers of Home Affairs also considered it useful for the future if a more general bilateral treaty concerning police intervention were drafted. Such a treaty could apply to e.g. police accompaniment in the cross-border movements of groups (football supporters, demonstrators) so as to prevent transfer problems; the maintenance of public order during cross-border sporting events (e.g. accompanying cycle races and taking the necessary traffic measures); the accompaniment of VIPs; protection of certain transports (money, art, nuclear transports); the execution of specific (defensive) missions/assignments on the territory of the other country (e.g. guarding buildings or goods), or; the provision of assistance in case of a disaster or calamity. The scope of such a treaty should not have to be limited to police intervention for the maintenance of public order. Instead, it should function as a general bilateral treaty concerning cross-border police cooperation.

3.3. Joint Statements with third countries

With two countries responsible for the organisation of Euro 2000 the Dutch and Belgian Ministers issued Joint Statements. The Joint Statements were signed with Germany and the United Kingdom and one additional Memorandum of Understanding was signed with the United Kingdom.

In February 2000, the British Home Secretary, the Belgian Minister of Home Affairs and the Dutch Ministers of the Interior and Justice signed a Joint Statement concerning cooperation in the preparations for the European Football Championship 2000. The cooperation would be based on a resolution of the Council of the European Union concerning the fight against football hooliganism.⁵ It would also be based on the principle of "good hospitality" and "the awareness that optimal security measures are a prerequisite for making Euro 2000 a festive sports event." Five topics were addressed in the Joint Statement: international police cooperation, monitoring of flows of supporters, exchange of information, international legal assistance, and finally a description of the organisational structure in the Netherlands and in Belgium for Euro 2000. I will now discuss the first four topics.

International police cooperation between the organising countries and the United Kingdom would focus on the gathering and sharing of intelligence concerning the numbers, behaviour and risk to public order posed by supporters both before and during Euro 2000. It also had to focus on developing close and effective working relationships between the respective police forces. For this reason, English police officers would be available as liaison officers for the Bi-national Police Information Centre. They would also be available to gather information on English fans and to advise local police forces in the Netherlands and Belgium in locations where the English national team would play and/or where the English supporters would be present. The host countries of Euro 2000 would ensure adequate task briefings, orientation, escorts, accommodation, meals, transport, accreditation and means of communication for the English police officers as well as physical safety (ensured by the local host police organisation).

Concerning the monitoring of supporter flows the Ministers agreed that the English police services would monitor England supporters from the start of their journey in the UK to UK exit points. They would inform the host countries about the number, behaviour and destination of England supporters. On arrival at their destination,

the national or local police force of the host country concerned would be responsible for policing supporters. These national or local police forces would also police the return journey of England supporters to exit points from Belgium and the Netherlands. On arrival in England, local police forces would take over. British Transport Police would be responsible for escort tasks on the Eurostar up to Brussels.

The third aspect of the Joint Statement concerned the exchange of information: the English police services would produce an intelligence analysis and would update this right up to the end of the tournament. The analysis would focus on the number and behaviour of England supporters and the potential risk posed to public order. This intelligence analysis would be available to the central Belgian and Dutch services tasked with processing information on football supporters (in the Netherlands the Bi-National Information Centre). The English liaison officer mentioned above would be updated by police services in the United Kingdom (on the numbers, behaviour and destination of England supporters travelling to the tournament from England) and by the Belgian and Dutch police services (on the course of the championship in general and on the behaviour of English supporters in particular). Upon the supporters' return to the UK, the Bi-national Police Information Centre would inform police services in England of the supporters' anticipated behaviour, particularly if disturbances were expected. Throughout the tournament, English police officers based in the host countries would inform the host police forces on the behaviour and the threat posed to public order by England supporters. The English police officers had to comply with the regulations in force in the host countries concerning data registration and storage.

The Ministers agreed to provide the greatest possible measure of mutual legal assistance in criminal cases, based on existing treaty arrangements. They expressly referred to one particular treaty in this field: the European Treaty on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959) and the Supplementary Protocol to this Treaty (Strasbourg, 17 March 1959).

In addition to the Joint Statement, the British Home Secretary signed a separate Memorandum of Understanding with the Dutch Minister of Justice regarding the exchange of information concerning persons convicted of offences related to football measures. This Memorandum was of a more general nature, as it was not only specifically directed towards Euro 2000. It applied to matches played in the Netherlands, England and Wales between teams from these countries/territories (para. 1). The information to be exchanged would relate to nationals of the Kingdom of the Netherlands residing in the Netherlands and British nationals residing in England or Wales who had been convicted of an offence relevant to the aforementioned matches. They had to be convicted for one of the following offences: assault, destruction of property or goods, public disorder, verbal harassment and abuse, discrimination, intimidation and threats, refusal to comply with official instructions, resisting police instructions, recklessness or any offence under the Arms and Ammunition Act. Mutual exchange of information would take place concerning criminal convictions for the aforementioned offences (thereby applying Article 4 of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters).⁶ In addition to information on irrevocable criminal convictions of persons having the British or Netherlands nationality and residing in one of these countries, a performance bond would be mutually supplied by both Ministers (for which a model form was included in the Memorandum of Understanding).

3 Evaluation of the Treaty of Bergen op Zoom, Ministry of the Interior and Kingdom Relations, Directorate of Police, June 2001. Belgian evaluation, "The Treaty concerning cross-border police action".

4 Evaluation of the Treaty between the Netherlands and Belgium concerning cross-border police intervention for the purpose of maintaining public order and

security during the European Football Championship for country teams in the year 2000, Conclusions and recommendations.

5 Resolution of the Council of the European Union concerning the handbook for international police cooperation, and measures to prevent and combat violence and disturbances around international football matches.

The German Home Secretary signed a Joint Statement with the Belgian Minister of Home Affairs and the Dutch Minister of the Interior and Justice. This Joint Statement was an almost exact copy of the first Joint Statement described above: it concerned international police cooperation, monitoring of flows of supporters, exchange of information, international legal assistance, and finally a description of the organisational structure in the Netherlands and in Belgium for Euro 2000. The cooperation would be based on the same principles as the cooperation with the United Kingdom. The Central Information Point for Sport Efforts (*Zentrale Informationsstelle Sporteinsätze*) would fulfil the intelligence function in Germany.

4. National legal framework

4.1. Dutch aliens policy

4.1.1. Dutch visa policy during EURO 2000

The Dutch and Belgian governments developed a common visa policy for Euro 2000 on the basis of the Schengen instructions concerning visa.⁷ The policy applied to Romanian, Turkish and former-Yugoslavian nationals. Applications for visas were dealt with in cooperation with the Dutch and Belgian diplomatic representations in these three countries.

Visa applicants had to produce a ticket for Euro 2000, containing the name of the applicant or the number of the ticket, which had to correspond to a name on the list supplied by the national football federations of participating countries to the organiser of Euro 2000 (the Euro 2000 Foundation). Other general requirements for obtaining a visa were that the applicant had to possess a valid travel document, as well as sufficient means of support and a hotel reservation or an invitation from a person who would act as guarantor. The visa would furthermore be refused if the applicant constituted a threat to public peace, public order, national security and international relations of the Schengen countries. The last two grounds of refusal were, however, seldom used. The other two concepts (public peace, public order) were rather widely construed. A threat to public order could exist if an alert for the concerned applicant was introduced in one of the lists of wanted persons (such alerts are part of the Schengen Information System, see Article 1 of the Convention implementing the Schengen Agreement). An applicant was also considered to constitute a threat to public order if he committed offences during his entry into the country.

Where Yugoslavia was concerned, the applicant could not be on the EU visa sanction list. Schengen visas were issued independently by the diplomatic missions of the countries. Visa applications for family members without a ticket who were travelling with applicants who did have a ticket were assessed by the visa services. The visas obtained for Euro 2000 were valid for a period of one month and for several trips.

For two other categories of nationals different rules existed. The first category was made up of third-country nationals (non-EU members) to whom no visa requirement applied. This concerned nationals from the Czech Republic and Slovenia. To them, the same rules applied as to those who did have a visa requirement.

Secondly, a different regime was in place for nationals of EU Member States or States belonging to the European Economic Area. They were in a favoured position, as the grounds for their refusal at the border were far more limited. They could only be refused after special instructions from the Minister of Justice. Refusals could be issued in case the EU or EER national in question posed an *actual* threat to public order or national security, suffered from certain serious diseases or would become a burden on the State or public bodies. Entry could also be refused in case the EU or EER national lacked a valid identity card or passport. These rules were laid down in the Aliens Decree after having been transposed from a European directive. This directive (Directive 64/221) concerns the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. After the European football championship a new

Aliens Decree was adopted (Article 8.7 of the new Decree contains exactly the same provisions as were to be found in the old Decree).

If EU or EER nationals lodge an appeal against the refusal of entry, they are in principle allowed to await the hearing of their case in the Netherlands. Their immediate departure may only be ordered for a "pressing reason" (Article 100 of the Aliens Decree [old]). If the person concerned asks for a preliminary injunction against his/her immediate departure, removal cannot take place until the court has rejected this request. The person in question is allowed to be detained during the waiting period. The Minister of Justice (who is responsible for aliens and immigration policy) indicated that the measures described were not often applied at the border. All these procedures were transposed into Dutch law from European legislation.

In a letter to the Dutch parliament, the Minister of Justice indicated that the concept of "*actual* threat to public order" is considerably less wide than the concept of "threat to public order",⁸ while the concept of "pressing reason" can be applied even less frequently than the concept of "*actual* threat". European case law was not clear on this point. The Minister wrote that because of the lack of a clear framework of case law, there was a certain margin of discretion. The Minister had therefore decided that a smooth course of events during the European football championship was of such major importance that a (potential) serious disturbance thereof could result in a refusal to admit EU nationals. If the persons concerned should indicate that they wished to appeal from this decision, a "pressing reason" would be assumed to exist (in view of the proper functioning of Euro 2000) to prevent the foreign national from awaiting his appeal in the Netherlands. However, during a parliamentary debate the Dutch Minister of Home Affairs indicated that a stadium ban issued by one of the participating countries would not be a sufficient ground in itself to refuse entry to the Netherlands.⁹ No entry would be allowed in case of drunkenness, misbehaviour during the journey, possession of weapons or in case the person in question was under the influence of drugs.¹⁰

4.1.2. Supervision and return

Before the European championship the Minister of Justice indicated that the maintenance of public order would be guaranteed primarily by criminal law means.¹¹ For the three categories of aliens described above (persons with a visa requirement, third-country (non-EU) nationals without a visa requirement and EU nationals) different rules were in place.

First, if a person with a visa obligation did not fulfil the conditions for crossing the border, the chief constable could, after assent from the visa service, cancel the visa (or limit it in case of a Schengen visa) and could order the person concerned to leave the Netherlands immediately.

For the second category the same conditions applied, with only one difference: if the person concerned no longer fulfilled the conditions for crossing the border, his residency status in the Netherlands would be terminated by operation of law. The chief constable was independ-

6 Article 4 of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters reads as follows:
Article 22 of the Convention shall be supplemented by the following text, the original Article 22 of the Convention becoming paragraph 1 (see below) and the below-mentioned provisions becoming paragraph 2:
"Furthermore, any Contracting Party which has supplied the above-mentioned information shall communicate to the Party concerned, on the latter's request in individual cases, a copy of the convictions and measures in question as well as any other information relevant thereto in order to enable it to consider whether they necessitate any measures at national level. This communication shall take

place between the Ministries of Justice concerned." Paragraph 1 of Article 22 of the Convention reads as follows:
"Information laid by one Contracting Party with a view to proceedings in the courts of another Party shall be transmitted between the Ministries of Justice concerned unless a Contracting Party avails itself of the option provided for in paragraph 6 of Article 15."

7 Official Report of the Lower House, Parliamentary document 26 227, no. 27.
8 Parliamentary document 26 227, no. 27, 2-4.
9 Official Report of the Lower House, 1999-2000, 10-625.
10 Parliamentary document 26 227, no. 17, 9.
11 Parliamentary document 26 227, no. 27, 4-5.

ently competent to notify the person concerned to leave the Netherlands immediately.

Concerning the last category, the Dutch Aliens Act distinguished between the term Community national and EU national. The first term concerned EU nationals who may derive rights from favourable EU law. The term "EU national" was broader, but the Minister of Justice did not expect this difference to be of any importance during border checks. In most cases, an EU national would have to be considered a Community national. Only in case it was clear that an EU national had come to the Netherlands for the sole purpose of disturbing public order (according to his/her own testimony) he/she could be considered a non-Community national.

Community nationals would lose their right of residence if they posed an *actual* threat to public order. According to the Minister, European legislation indicated that only in exceptional cases an actual threat might be assumed. A term of four weeks was allowed for leaving the country, with exceptions only permitted for urgent reasons (with possible deviations). In case of criminal proceedings involving an EU national, the Minister preferred eventually combining these with expulsion under aliens law.

The Minister indicated that based on the elements listed he suggested the following guidelines. Immediate removal was possible (i.e. in case of an "actual threat" and a "pressing reason") when the Community national had been convicted of an offence during Euro 2000 which according to the law was punishable by a minimum of four years' imprisonment, for instance a conviction for acts of violence in a public place committed in association with one or more persons as laid down in Article 141 of the Criminal Code). The sole fact that someone had committed such an offence would in itself not be sufficient to justify expulsion; the person concerned also had to be convicted of the offence. These policy lines were laid down in the Interim Communication to the Aliens Circular (*Tussentijds Bericht Vreemdelingencirculaire*). Generally speaking, the tolerance limit would be very low where the behaviour of supporters was concerned.

In a discussion in the Dutch parliament on Euro 2000, the Minister of Justice indicated that the government and the immigration services would find out the intentions of foreigners coming to the Netherlands at the earliest possible moment.¹² The Royal Netherlands Military Constabulary was competent to decide on the entry of non-EU nationals, but it had to seek agreement with the Dutch Immigration and Naturalisation Service (*IND*) for decisions concerning EU nationals. In such cases, the IND has authority over the military police.

On the eve of the European football championship, traffic measures were taken at the Dutch border with Germany. This was the result of cooperation between the Dutch Ministry of Transport, the Dutch military police and the German Border Guard (*Bundesgrenzschutz*).¹³ The border with Germany was the only Dutch border where controls took place; no controls took place at the border with Belgium.

4.1.3. Evaluation

In general, the aliens policy worked well during Euro 2000, as the Dutch government indicated in its evaluation. The organisations responsible for border controls, admittance and expulsion of aliens (customs, the Dutch Immigration and Naturalisation Service and the military police) had cooperated well. The exchange of information between England and the Netherlands concerning British hooligans had had a positive effect on the tournament, as had the intensive border checks in Germany and in England.¹⁴ The Minister of the Interior would use these positive experiences in further negotiations at the European level aimed at combating football hooliganism. There had been, however, some confusion about the different legal systems in the Netherlands, the United Kingdom and Germany, as the Minister indicated during the discussion in Parliament on the evaluation. For example, English hooligans had been sent home without a conviction. This had prevented further prosecution in the United Kingdom.¹⁵

4.2. Selling arrangements for tickets

At the beginning of 1999, the Dutch and Belgian governments had already determined the framework for the selling of Euro 2000 tickets. Their views were laid down in the "Euro 2000 ticket strategy". The way in which the ticket sales were arranged had to result in the least possible deployment of police forces. To this end, the selling of tickets had to be controlled. Two main features of the selling arrangement would therefore be to separate supporters of different teams as much as possible and to prevent supporters from remaining unanimous. This framework was communicated to the Euro 2000 Foundation and to UEFA.¹⁶ A maximum of two tickets would be sold per person and tickets were not transferable.

The Dutch government took the view that the organising party - UEFA - would in principle be fully responsible for taking the necessary measures (among which, if the worst came to the worst, the exclusion of country teams in case of serious riots).¹⁷ The Dutch and Belgian governments obliged the Euro 2000 Foundation to use a closed selling system. The rules for ticket sales were laid down in the Foundation's general terms and conditions. It was agreed that the UEFA and its associated federations (the official sellers) would provide lists with names and the corresponding seats for tickets sold by them. These lists would be supplied to the organiser (the Foundation) and to the police. The Foundation would also register the nationality of the buyer as well as the country which the supporter claimed to support. This system as much as possible had to guarantee supporter separation by means of seat allocation. In addition, UEFA would apply the available (internal) sanctions to associated federations which failed to observe the agreements between UEFA, the Euro 2000 Foundation and the Dutch and Belgian governments. UEFA considered exclusion from the championship a possible sanction, but this could also complicate matters in respect of security and possibly even be counter-productive.¹⁸ The European Commission subsequently decided that the selling arrangement was in conformity with EU competition rules.

Black trade in tickets might thwart all these plans. The question of how to prevent black trade in tickets dominated the parliamentary debates preceding Euro 2000. This fear of black trade was not unjustified: the Euro 2000 Foundation twice had to warn ticket agencies, which had engaged in intermediary purchasing and selling of tickets. Civil claims brought by the Foundation against agencies for black trading in tickets were successful. In the first of these cases the President of the District Court of The Hague considered that the sales system of Euro 2000 contributed to the safeguarding of public order and security during the tournament, which was "a substantial interest".¹⁹ For this reason, the general terms and conditions (concerning ticket sales) of the Euro 2000 Foundation were held to be not unreasonably onerous. The infringement of the closed selling system constituted an unlawful act with respect to the Foundation. The selling system did not constitute a breach of European competition law either, since an exemption had been requested from the European Commission, hence no invalid restriction of competition, nor any abuse of a dominant market position had occurred. The company *European Tickets 2000* was ordered to cease its intermediary selling immediately. In the second case, the President of the District Court of Amsterdam decided in the same vein: the company concerned, *Cupido Tickets Bemiddelingsbureau*, immediately had to cease intermediate selling, as this was held to be unlawful and in breach of the general sales conditions of the Euro 2000 Foundation (which were not unreasonable).²⁰

Furthermore, in a letter to the Dutch parliament the government

12 Parliamentary document 26 227, no. 28, 12.

13 Parliamentary document 26 227, no. 29, 8.

14 Parliamentary document 26 227, no. 33, 5-6.

15 Parliamentary document 26 227, no. 36, 7-8.

16 Parliamentary document 26 227, no. 1.

17 Parliamentary document 26 227, no. 3.

18 Parliamentary document 26 227, no. 6 and Parliamentary document 26 227, no. 10.

19 President of the District Court of The Hague, 12 May 2000, *Stichting EURO 2000 et al. v. European Tickets 2000*.

20 President of the District Court of Amsterdam, 9 June 2000, *Stichting EURO 2000 v. Cupido Tickets et al.*

outlined three policy options for further avoiding black trade in tickets:²¹

- Sticking to the letter of the earlier agreements on ticket sales, i.e. the Euro 2000 Foundation would remain the central actor concerning ticket sales. The Foundation could, for example, start civil law actions against ticket selling agencies. An advantage of this option would be that the responsibility was of and would remain with the organiser, as had been agreed previously. There would be no public order problems around the stadiums, as strict controls would not need to take place. It would, however, be a disadvantage that the actual outcome of civil law actions is unclear beforehand and that the enforcement of stadium bans and supporter separation would be jeopardised.²²
- Tightening the agreements and organising intensified controls. There were two possibilities within this option: person-by-person checks or spot checks (in addition to the already agreed directed and selective checks). Intensified ticket controls would make the policy which had been communicated more credible (identification is obligatory, everybody can be checked). Person-by-person checks would have a preventive effect. These checks would, however, require a great number of police and could lead to more problems with public order caused by persons who were refused entry at the stadium gate. Apart from this, it was still not possible to prevent black sales abroad. A final disadvantage would be that earlier agreements with the Euro 2000 Foundation and Belgium would have to be reviewed.²³
- Introducing a criminal law provision. In Belgium, the Football Act (*Voetbalwet*) prohibited black trade in tickets and traders could be punished. A specific criminal law provision would certainly have advantages, as the government could combat black trade by it. If a civil law action would fail, criminal proceedings could still supply a clear answer. In addition, this would create a common policy in the Netherlands and Belgium. However, whether such a provision would actually prevent hooligans from travelling to the championship was still uncertain. It was also possible that trade would move underground to networks which were removed from view. Prosecution would only have an effect after the championship and require huge numbers of police. If a criminal law provision were the preferred option, there would be very little time to complete the legislative process before the championship. Tightening the regime would give a negative image to the tournament, which was supposed to be a festive occasion. A final disadvantage would be that a criminal law provision would concern highly specific *ad hoc* legislation for the European championship. To penalise civil law breaches of general terms and conditions applying to sales would also be quite unusual for the Dutch legal system. If such a penalisation were the preferred option, it would preferably have to be embedded within a broader system aimed at the maintenance of public order.²⁴ During the discussions on ticket sales, the Minister of Justice indicated that criminal law would only be used as the ultimate remedy.²⁵

These considerations caused the Dutch government to opt for the intensification of ticket controls: ticket controls would be stricter than initially planned. Spot checks would take place in addition to the previously agreed directed, selective controls on the basis of police information.

Certain parties in Parliament were, however, not satisfied with this choice (the Christian Democratic Party and the leftist Green Party): they feared possible disturbances of public order and put forward an initiative Bill in which black trade in tickets would be prohibited. The Dutch parliament, however, rejected this proposal. The Minister of Justice used some new arguments against the proposal: it would thwart the activities of the Euro 2000 Foundation, which was itself responsible for the organisation of the tournament. The Foundation already had sufficient means for combating black trade in tickets. Besides, it would be difficult to draft a provision in which the reprehensible behaviour would be described. By the use of intermediaries the commercial trading of tickets could be covered, whereas ordinary

citizens could have innocent and good reasons for resale. A wide description would lead to problems concerning evidence and enforcement. The Belgian Football Act did not differ very much from the Dutch policy framework, except that it created the possibility to impose administrative and legal sanctions (these were not possible in the Netherlands).²⁶

The Dutch government expected positive effects to result from the publicity strategy, which aimed to discourage people from visiting the championship in the Netherlands without a valid ticket (i.e. a ticket in their name). Guidelines were jointly decided on with all the other actors involved in the organisation of the championship. It was agreed with the Euro 2000 Foundation and the Belgian Minister of Home Affairs to hold directed and selective ticket controls. Controls would take place on the basis of police information. The following elements would be influential: the fact that supporters of some participating states had a tradition of rioting (e.g. Germany, United Kingdom), the character of the match (risk match), the history of conflicts between supporters of participating states and relevant police information concerning risk supporters, which could also come from police spotters travelling with supporters from the participating countries. Controls would not only take place at the stadium gates, but could also take place in a wider area, a perimeter, around the stadium (into which only people holding a ticket would be allowed). The local mayor was given the authority to establish such a perimeter. By these measures, it was possible to ease some of the pressure caused by controls at the stadium gates alone.²⁷

Specific information concerning the (mis)behaviour of supporters during their (train) journey or during their stay elsewhere in the country (or in Belgium) would be provided on the day of the match in the match town (the surroundings of the stadium, but also elsewhere in the city centre). The directed and selective control strategy would primarily be aimed at known risk supporters. Information concerning risk supporters from the Euro 2000 Foundation or from associated federations in participating countries would also be used. In addition, use would be made of the possibilities for collecting public order information (within the area of responsibility of the mayor, see below). Also used would be information from (inter)national risk and threat analyses: the organisation aimed to achieve a made-to-measure approach per match. On the basis of the general municipal bye-laws of the match towns, intensified repressive action could be taken against public trading in black tickets around the stadiums, but also in other parts of the city centre and other places where supporters gathered in the match towns.²⁸

During the tournament only a limited number of forged tickets for the final match were found. The evaluation after Euro 2000 was quite positive concerning the selling arrangements for tickets. For the first time in the history of European (and World) Cup Championships a ticket system was used in which the organisation could know in advance which persons had bought a ticket. During the tournament hardly any controls took place as to whether tickets were in the proper name. Furthermore, no public order considerations had been raised which would have justified these controls. According to the Dutch government, the ticket system had had a clearly preventive effect. It had had a connection with security through the intended separation of supporters and due to checks for stadium bans.²⁹ Given the fact that the initiative Bill concerning the punishment of black trading had been rejected, the government was now pleased that it had not been adopted. In the end, some 222 persons had come into contact with the police and the courts because of black trading. This indicates that there were sufficient alternatives for combating black trading.

21 Parliamentary document 26 227, no. 10.

22 Parliamentary document 26 227, no. 10, 4-5.

23 Parliamentary document 26 227, no. 10, 5-6.

24 Parliamentary document 26 227, no. 10, 6-7.

25 Parliamentary document 26 227, no. 17 (General consultation), 9.

26 Parliamentary document 26 227 no. 16, 4-5.

27 Parliamentary document 26 227 no. 19, 9-11.

28 Parliamentary document 26 227 no. 19, 9-11.

29 Parliamentary document 26 227, no. 33, 2-3.

And as the government had intended, civil proceedings also led to satisfactory results.

4.3. Stadium bans

During the preparations for Euro 2000 the possibility of stadium bans was discussed. The Dutch government proposed the introduction of an international stadium ban and several European countries consequently discussed this proposal, providing that a ban issued in one country would also be in force in other European countries. This was a complicated matter, however, as all these countries had different ways of imposing (national) stadium bans. There were stadium bans arising from civil law, administrative law and criminal law. In each system, governments had a different degree of influence or interest in the imposition of bans. During two seminars on the subject, several European countries expressed their willingness to mutually exchange further information concerning stadium bans.

The Dutch government did not rule out the conclusions of bilateral agreements on this issue with other countries. In all likelihood, an agreement with the United Kingdom would soon be concluded on the basis of which the United Kingdom could prohibit English hooligans (whose identities were known in the Netherlands) from leaving the United Kingdom. This would especially concern an exchange of information on convictions for football-related offences (as described in guidelines of the Dutch Public Prosecution Service).

As a result of the EU resolution of 9 June 1997, the Euro 2000 Foundation inserted specific rules in its general terms and conditions. In the EU Resolution, the Ministers of Sport invited their national sports associations to examine how stadium bans imposed under civil law could be made to apply to football matches in a European context.³⁰ On 30 April 2000, UEFA asked the associated national federations to provide the Euro 2000 Foundation with information concerning holders of a stadium ban. This concerned bans arising from civil law for which responsibility lay with the football organisations concerned. Several football federations responded to this request, including federations from non-EU countries.³¹ The Dutch government indicated that six of the 15 EU Member States possessed the instrument of the civil law ban. Only in four Member States football organisations actually used the instrument of stadium bans. Only the United Kingdom, Spain and the Netherlands had stadium bans arising from both civil and criminal law, whereas France only had a criminal law stadium ban.

In a letter to the Dutch parliament the government indicated that the Public Prosecution Service in its guideline *Football hooliganism and violence* had abandoned the criminal law stadium ban (including a duty to report to the police) in favour of stadium bans arising from civil law.³² This had happened after urgent requests of the Dutch football federation (KNVB). Prohibitions arising from civil law had proven effective and would fit in with the system of responsibility for the organiser.

Furthermore, the government indicated that the KNVB, the clubs and the police were elaborating a new duty for supporters to give themselves up to the police. This approach still needed extensive work and would require a certain effort on the part of the clubs, which were expected to urge supporters who had misbehaved to turn to the police. This would have to take place in exchange for some kind of reward, e.g. making part of the stadium ban conditional so that it applied for a shorter period of time.

In addition to the system of stadium bans arising from civil law, the Public Prosecution Service could still demand a criminal law stadium ban with a duty to report as a special condition. Article 14c of the Dutch Criminal Code makes this possible. The disadvantages of this type of ban were the long period of time before it could be issued and uncertainty concerning the fact whether the courts would impose such an additional penalty.³³ If imposed, going against the ban would result in a prison sentence. During a parliamentary debate, the Dutch Minister of Justice observed that the fact that a hooligan had a criminal record might cause his/her home country to refuse to issue an exit visa.³⁴

Participating states paid particular attention to the distribution of

tickets for Euro 2000: they wanted to prevent hooligans with a stadium ban from travelling to the football championship. However, according to the Minister of Justice, a stadium ban would not be sufficient reason in itself for expelling a person from the country, unless, for example, this person was drunk or refused to obey police orders. Dutch nationals with a stadium ban had to report to the police, but it would be difficult to take action in case they failed to show up.³⁵ In its evaluation of the championship the Dutch government repeated its wish to use the instrument of civil law stadium bans against hooliganism. In 2001 a working group would present a report on this issue. The Dutch government intended to expand the exchange of information on stadium bans and football-related antecedents with a view to border controls and the enforcement on site of the bans. It also wished to examine the possibilities for extending the applicability of existing legislation concerning stadium bans to a larger area than just England and Germany.³⁶

4.4. The collection of information on supporters

In order to predict the behaviour of football supporters, the Dutch government made use of information from its own police services and from police services abroad. Efforts were needed to ensure that the information reached the right place within the police organisation. It also needed to be made clear who was responsible for any action to be taken based on the information received.

The maintenance of public order during the tournament also required the collection of information. This led to discussions concerning the question of whether Dutch police possessed sufficient powers and means for the collection of information. Article 2 of the Police Act 1993 provided the legal basis for the collection of information for the purpose of maintaining public order. The possibilities offered by Article 2 were limited by the extent to which a certain collection method might lead to "a more or less complete image of certain aspects of someone's life". If such an image were to emerge, the privacy of the person concerned would have been infringed. Article 2 would then cease to suffice as a legal basis, and a specific legal basis would be needed. The Dutch Ministers of Home Affairs and Justice indicated that in practice no such privacy infringements had taken place.

In a letter to the Dutch parliament, the two Ministers gave an overview of the available possibilities/methods for the collection of information among supporters/hooligans who may pose a threat to public order.³⁷ They alleged that with a view to Euro 2000 measures were needed soon. A manual would be drafted concerning the methods of information collection for public order purposes by the police and concerning the procedures which had to be followed. On the basis of the *Council Resolution concerning a handbook for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches* EU Member States were asked for assistance: how could they contribute towards preventing violent supporters from leaving their countries during the tournament?³⁸ They were also asked in which way they were able to provide important information concerning these persons on the basis of their national legislation.

During the preparations for Euro 2000, the use of special methods of investigation for the collection of information on supporters was also discussed. The Minister of Justice was, however, reluctant to make use of the Special Methods of Investigation Act (*Wet Bijzondere Opsporingsmethoden*, *Wet BOB*). The available instruments for collect-

30 Resolution of the Council on preventing and restraining football hooliganism through the exchange of experience, exclusion from stadiums and media policy, 9 June 1997.

31 Parliamentary document 26 227, no. 10.

32 Parliamentary document 26 227, no. 19.

33 Parliamentary document 26 227, no. 19.

34 Parliamentary document 26 227, no. 24, 10-11 (General consultation).

35 Parliamentary document 26 227, no. 28, 12 (General consultation).

36 Parliamentary document 26 227, no. 36. (General consultation).

37 Parliamentary document 26 227, no. 18.

38 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.

ing information concerning threats to public order were considered to be adequate. Besides, use of the Special Methods of Investigation Act could only be made after criminal offences had taken place for which provisional detention was allowed. Police informers would, however, be used during the championship.

4.5. Supporters policy and the stewarding of supporters

The organiser of the championship (UEFA and the Euro 2000 Foundation) would have the primary responsibility for security in and around the stadiums: it was to supply a document to the government in which the planned security organisation would be described.³⁹ The Dutch government drafted a plan concerning supporters policy which concerned policy with respect to spectators, the supply of information to and transport of supporters. The Dutch Ministry of Sport launched a project - "fan coaching Euro 2000" - by which it aimed to secure the active participation of fan and supporters' organisations in promoting tolerance and fair play by ensuring the best possible stewarding before and during the tournament.⁴⁰

An agreement was concluded between the government and the Euro 2000 Foundation on the numbers of stewards which would be used, and their quality requirements. The Foundation stipulated the condition that the participating countries would ensure the proper accompaniment of their own supporters. Football federations were obliged to send stewards along with the supporters (after a request by the Foundation via UEFA). They had to supply written information prior to the championship concerning the way in which the stewards would accompany the supporters.⁴¹ In the match towns, what were termed "football embassies" were created: they had to provide information to Euro 2000 visitors and answer queries and solve problems. The match towns themselves were responsible for the fan embassies. In the stadiums there would be (as a norm) one Dutch steward for every 75 spectators, in addition to the (extra) foreign stewards (who came on top of the Dutch stewards).

Stewards had the following tasks: they would receive and accompany the spectators and they would execute the entry controls. They also referred the spectators to their seats. The stewards also monitored compliance with the regulations concerning (internal) order in the stadiums. They provided information to all parties concerned and notified them of possibly threatening situations. Stewards acted in a preventive way in any situation which might threaten public order.

Use was made of fan coordinators recruited from the fan organisations from the participating countries. They constituted teams, which were there where groups of supporters from their countries stayed. The coordinators had to provide the supporters with information and service and acted as contact persons for the fans. The coordinators received instructions in advance concerning their tasks. The fan coordinators could fall back on what were called pilots from Belgium and the Netherlands. These were professionals who usually worked for their own target group, the fans of professional football organisations. In every match town, the communication and supply of information was organised via a permanent contact person. This contact person communicated guidelines from the government or police services to the pilots, who in turn communicated the information to the fan coordinators.⁴² Around the stadiums, perimeters were created within which stewards (with the support of the police) could control tickets held by persons inside the perimeters. As expected, all participating countries sent stewards with their supporters. Supporters from Yugoslavia and Turkey were accompanied by stewards speaking their language.

The Dutch government was positive in its evaluation of Euro 2000 concerning stewarding and supporter accompaniment. A proper supply of information to supporters was a crucial factor for success. After the good results during the championship, the Dutch Secretary of State for Sport intended to discuss with her European colleagues a possible further expansion of the network of stewards which had been built up before and during the European football championship. This network could then be part of preventive accompaniment of supporters.⁴³ The guidelines for police treatment had also been satisfactory.

No alcohol was sold in the stadiums. Around stadiums and public

areas where supporters' events took place, alcohol could only be sold under the conditions formulated by the local mayor.

4.6. Methods of detention

During the years before Euro 2000 it became clear that the legal instruments to combat large-scale disturbances of public order had their shortcomings. Dutch criminal and administrative law did not provide adequate possibilities for detaining large groups of hooligans for a short period of time. Therefore, a number of Bills were proposed to the Dutch parliament in order to tackle this problem. The new legal provisions were not specifically aimed at the European football championship, but were however useful to combat possible disturbances of public order during the tournament. The different legal provisions in Dutch law concerning temporary detention and the legal changes in these provisions before Euro 2000 will now be discussed.

4.6.1. Administrative detention

The new Articles 154a and 176a of the Municipalities Act (*Gemeentewet*) made it possible to arrest large groups and transfer them to a certain location, where they could be detained if necessary to prevent disturbances of public order. Police, local government and the Public Prosecution Service had regularly asked for such a possibility. As the detention was laid down in an Act under administrative law, the detention was called "administrative" (contrary to the criminal detention provided in the Criminal Code).

The explanatory memorandum to the Bill provides much information on the considerations of the government concerning the necessity of the instrument of administrative detention.⁴⁴ Therefore, certain parts of it will be discussed here. First I will give an overview of the measures/competences available before the law concerning administrative detention came into force to deal with large-scale disturbances of the public order.⁴⁵ Secondly, the actual proposal concerning administrative detention will be described. And thirdly, the relationship between administrative detention and the protection of human rights will be discussed.

According to the Municipalities Act the mayor is already competent to take action in case of a disturbance of public order (Article 172 of the Municipalities Act) and in case of riotous movements and serious disorders or in case it is gravely feared that these could arise (Articles 175 and 176 of the Municipalities Act). In these cases the mayor is authorised to give emergency orders or draft emergency by-laws to counter the situation. The mayor is also given competences in the field of maintaining public order in the general municipal by-laws of each municipality. These bye-laws may contain prohibitions to assemble and prohibitions to engage in disorderly conduct and disorderly drunkenness, or an obligation (for supporters) to continue on their way after crossing the municipality limits. They may contain prohibitions to enter or loiter near the stadium without the consent of the police or to enter the municipality, prohibitions to carry objects of which it can be reasonably assumed they are intended to disturb public order, prohibitions to carry and/or use alcohol on the public highway and alcohol bans in stadiums.

The government was of the opinion that Articles 175 and 176 of the Municipalities Act offered insufficient legal basis for measures of detention, and although the Criminal Code (in Article 141) and the Criminal Procedural Code (in Article 540) also provided measures concerning disturbances of public order contained provisions, which could be used during disturbances of public order, these did not offer the possibilities considered necessary by the government either (the provisions in question will be discussed further below).

Administrative detention could be used in case of a riotous movement or serious disorder, or in case it was feared that these could arise (cf. Article 175 of the Municipalities Act).⁴⁶ The provision was aimed

39 Parliamentary document 26 227, no. 1.

40 Parliamentary document 26 227, no. 8.

41 Parliamentary document 26 227, no. 17.

42 Parliamentary document 26 227, no. 26.

43 Parliamentary document 26 227, no. 33.

44 Parliamentary document 26 735, no. 3.

45 Parliamentary document 26 735, no. 3.

4-7.

at events of a mass character. For this reason, this power could only be applied 1) against groups designated by the mayor, which 2) had collectively failed to obey the mayor's orders (i.e. direct emergency orders or emergency bye-laws). Both requirements had to be fulfilled. Furthermore, administrative detention had to be limited to situations in which such a measure was strictly necessary. It could only be applied if the regular public order and emergency competences were expected to be inadequate.

A distinction was made between foreseeable (Article 154a) and non-foreseeable (Article 176a) situations. The first category had to be regulated as much as possible in the general municipal bye-laws. Foreseeable events, like demonstrations and happenings or risk matches (in cities with professional football clubs), in which the measure of administrative detention could be used, had to be expressly listed in such bye-laws. For non-foreseeable situations Article 176a was drafted as a residual provision: here administrative detention was linked to the competence to give emergency orders and bye-laws.

The fact that administrative detention based on Article 154a had to be expressly regulated, was the result of Article 5 of the European Convention for the Protection of Human Rights (ECHR) concerning the right to liberty and security. The infringement resulting in detention has to concern provisions, which have been explicitly designated (by the municipal council) as provisions whose infringement may lead to administrative detention. The case law concerning Article 5 ECHR makes clear that the provision concerned has to be accessible and foreseeable, i.e. it has to be sufficiently clear for the persons concerned which behaviour is ordered or prohibited. For example, a general prohibition to disturb public order would not be specific enough, as this disturbance may comprise a great deal of behaviour.

Article 154a of the Municipalities Act provides that the municipal council confers the power to order administrative detention upon the mayor. Before ordering detention, the mayor must have expressly designated the groups concerned which are disturbing public order by mentioning explicit features of the group, for example, by referring to "persons who manifest themselves as football supporters of the team of X by their clothing, equipment or behaviour". The mayor also determines the place where the detention takes place. Before the detention order is given, the group concerned should have been given the opportunity to still obey the bye-laws in question. If it fails to make use of this opportunity, the group may be transferred to the designated location. An order in council provided further requirements for the place of detention.⁴⁷ It should provide reasonable freedom of movement and sufficient safeguards for the protection of the detainees. Furthermore, if reasonably possible, the detainees should be able to use a toilet, a telephone and be given any necessary medical care. Information concerning their detention must also be provided to them. The detention may not exceed a period of 12 hours. Finally, the detainees must be given the opportunity of registering as detainees, so that they can prove their detention in case they decide to lodge an objection. The system of administrative legal protection applies to the decision ordering administrative detention, but there are some exceptions ensuring expeditious treatment of the cases (if possible even during the detention, by way of a preliminary injunction).

In the explanatory memorandum to the Municipalities Act, much attention was paid to the relationship between administrative detention and human rights protection.⁴⁸ Administrative detention is not directed at criminal prosecution. Its only aim is to protect public order and security. Now that administrative detention is laid down in an Act of Parliament, this provides the legal basis required by Article 5 ECHR. As mentioned above, the infringed rule has to fulfil the requirements of accessibility and foreseeability deriving from the *Sunday Times* judgment.⁴⁹ In addition, the detention can only be based on one of the limitative grounds referred to in Article 5. Administrative detention can be said to constitute a detention which aims to enforce compliance with a legal obligation. Article 5 allows detention in case of an infringement of a legal obligation, also in case the detention aims to ensure compliance with this legal obligation. Administrative detention is therefore allowed when imposed for this

particular reason. Administrative detention cannot be considered the result of a "criminal charge" under Article 6 ECHR (concerning fair trial). Furthermore, the detainees have to be approached as separate individuals, not just as a group, and their adequate legal protection has to be ensured. The administrative detention has to be in accordance with the principles of subsidiarity and proportionality: the mayor has to examine if the administrative detention is really/actually necessary. According to the Minister of Justice, all these requirements were fulfilled in the provisions concerning administrative detention.

All match towns had taken the necessary legal and logistical measures in order to ensure administrative detention during the tournament in case this measure would be needed. Regular exercises took place before the tournament to practice the use of this new legal instrument. The government stated that it was very pleased that municipalities could now dispose of a new instrument in order to combat large-scale disturbances of public order.⁵⁰

4.6.2. Provisions in the Criminal Code and the Criminal Procedural Code
During the period of preparations for Euro 2000 two other Bills were submitted to the Dutch parliament: one concerning an amendment to the Criminal Code and one concerning an amendment to the Criminal Procedural Code.

The amendment to the Criminal Code concerned the provision on acts of violence in a public place. Persons who contributed to this violence, e.g. by inciting other people, could not be prosecuted under the provision prohibiting acts of violence in a public place. By redrafting the provision, the prosecution of co-authors would be made possible, which would also contribute to the effectiveness of criminal law to deal with disturbances of public order by acts of violence in a public place. This was not only considered necessary for Euro 2000, but would also be of great help in the future.⁵¹

Since the codification of the Criminal Code in 1886, the concept of co-perpetratorship has undergone a change in the sense that it is now more broadly interpreted. The character of acts of violence in a public place has also changed. Nowadays, such acts usually concern a deliberate and prepared confrontation with the police and preventing the collection of any evidence is part of this strategy, according to the Minister of Justice. Most of the time people committing acts of violence in a public place hide their faces (e.g. with balaclavas) and therefore cannot be recognised, nor prosecuted. In case of large-scale disturbances of the public order, it is often difficult to track the offenders. For this reason, a wider interpretation of the concept of co-perpetratorship had to be laid down in Article 141 of the Criminal Code.

Contrary to the previous text ("persons who commit acts of violence in a public place with combined efforts (*met verenigde kracht*)..."), the text had to be changed as follows: "persons who commit acts of violence in a public place in association with one or more persons (*in vereniging*) ..."). This would ease the burden of proof. No longer did it have to be proved that someone had personally committed "an act of violence". It would suffice, if the person concerned had intended to commit acts of violence in a public place in association with one or more persons and his contribution had been sufficiently significant. The requirement of cooperation in Article 141 remains the same. The difference is that it now suffices that the suspect was part of the group instead of having to be an individual perpetrator. According to the Minister of Justice, the risk that innocent people caught up in the group would be prosecuted was negligible, now that such persons would lack any intention to commit acts of violence in a public place and would therefore not be prosecuted. The new provision in the Criminal Code should also have a preventive effect. During Euro 2000, the new provision proved useful and was used reg-

46 Parliamentary document 26 735, no. 3, 8-21.

47 Administrative Detention (Locations) Decree (*Besluit plaatsen bestuurlijke ophouding*).

48 Parliamentary document 26 735, no. 3, 21-33.

49 Judgment of the European Court of Human Rights, *The Sunday Times vs. the United Kingdom*, Application no.

00006538/74, 26/04/1979, para. 49.

50 Parliamentary document 26 227, no. 33,

3-4.

51 Parliamentary document 26 519, no. 3.



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ularly. About a quarter of all offences committed during the tournament concerned acts of violence in a public place and were tried on the basis of the new Article 141.⁵²

The second Bill concerned the judicial order for maintaining public order.⁵³ According to Articles 540 and 543 of the Dutch Criminal Procedural Code (*Wetboek van Strafvordering, Sv.*) the courts may, in case of suspicion of offences for which no preventive custody is allowed and “if a great risk of repetition or continuation of this offence exists” (Article 540 *Sv.*), issue a binding-over order to maintain public order, thereby preventing these offences (Article 543 *Sv.*). The suspect has to declare his obedience and the judge may ask the suspect to give security. If neither a declaration nor security is given, the suspect can be taken into police custody (545 *Sv.*), which is also possible if the suspect fails to comply with the order (Article 548 *Sv.*).

The Bill concerning criminal detention is complementary to the administrative detention. After the adoption of the Bill it became possible to use the procedure of binding-over orders under strictly defined conditions for preventively maintaining public order. The procedure was made more suitable for countering large-scale disturbances of public order. In case administrative detention would not satisfy, the criminal detention after judicial orders could be used. It was made possible to bring in administrative detainees to the examining magistrate, in order to judge if the assembled evidence justified a deprivation of liberty of a longer duration. If prevention of repetition or continuation of the offence by the orders mentioned in Article 543 cannot be sufficiently ensured, and the maintenance of public order requires this urgently, the examining magistrate may also order detention. This situation would mostly occur in case of mass disturbances of public order, e.g. by hooligans. As examples of persons against whom this detention can be used, the Minister of Justice mentioned suspects who wish to remain anonymous and suspects belonging to the hard core of a group of violent football hooligans. Due to the smooth progress of the tournament, the enlarged competences of Article 540 et seq. of the Criminal Procedural Code were not used.⁵⁴

5. Conclusion

In general, the 2000 European football championship passed off quietly in the Netherlands. As intended, it proved possible to limit the use of police forces as much as possible. The responsibility for the organisation of the championship lay with the Euro 2000 Foundation, UEFA and the Dutch and Belgian national football federations.

During the years preceding Euro 2000, international cooperation was started with Belgium and with Germany and the United Kingdom. During the championship, border checks were reintroduced and no problems arose. The evaluation of the Treaty of Bergen op Zoom concerning cross-border police intervention proved that not everything had gone as planned during an intervention of the Dutch police in Charleroi. Means of communication failed and more flexibility was needed for cases where the actual situation differed from the situation described in the request (even though the evaluation did not admit that this had been the case during the event described). Another recommendation from the joint evaluation was that a detailed scenario for interventions be drafted. In general, the Dutch and Belgian government were satisfied with the functioning of the Treaty, even to the extent that they expressed the desire to draft a more general joint treaty concerning cross-border police intervention. In the field of aliens policy, it was concluded that the exchange of information with other countries had functioned well, but some confusion had arisen due to differences in the various legal systems, which made it impossible for countries to prosecute their own nationals who had committed offences in the Netherlands.

Prior to the football championship, the Dutch parliament had paid much attention to its policy concerning ticket sales. The government opted for a system in which all buyers of tickets were registered and could be traced. This closed selling system was unique in history and

was used for the first time. Much was expected from the publicity strategy before the tournament. No prohibition arising from criminal law was introduced for black sales in tickets; a draft Bill from Parliament to this end was rejected. The government refused to introduce such a prohibition as it would give a negative image to the championship (Belgium did have this prohibition in place, however). The Euro 2000 Foundation did have to bring legal action against two companies, which infringed the general sales conditions of the Foundation by intermediary selling of tickets. In both cases the Foundation was successful, as sales by the two companies had to be stopped. Ticket controls took place in a perimeter around the stadiums.

The possibility of an international stadium ban was also discussed. Differing legal systems however prevented its use. UEFA did ask the national football federations to exchange information concerning stadium bans with a view to the tournament. In the Netherlands, a ban arising from civil law coupled with a duty for Dutch hooligans to report to the police was considered most effective (instead of a ban arising from criminal law). Both types of bans existed in the Netherlands, but the Public Prosecution Service preferred the ban arising from civil law (after urgent requests from the Dutch national football federation). Furthermore, the collection of information on hooligans was considered satisfactory. Use was made of international cooperation and of the European police handbook.

UEFA and the Euro 2000 Foundation shared primary responsibility for the stewarding of supporters and for the supporters policy. Participating states were obliged to send their own stewards with their supporters. Football embassies were established in the match towns and fan coaches ensured a good functioning of the accompaniment of supporters. There was a good system for the provision of information. It worked so well that the Dutch State Secretary of Sport wanted to continue to work with the system after the tournament.

The widening of possibilities to detain persons causing public disorder proved useful during the tournament. The new instrument of administrative detention and the widened provision concerning the use of acts of violence in a public place in association with one or more persons were often used. Administrative detention concerned the detention in a certain place of groups of persons designated in advance for a period of 12 hours in case of large-scale disturbances of public order. In the provision concerning acts of violence in a public place, the concept of co-perpetratorship was enlarged to include persons inciting other persons to violence, so that these could now also be punished.

In general, all measures taken to ensure the smooth passing of Euro 2000 proved to be effective. When international cooperation took place, some confusion at times arose, but this did not lead to serious problems. Good communication, especially prior to the match concerned, proved crucial. Communication can prevent cultural or legal differences from complicating mutual cooperation. With respect to the selling of tickets, one may wonder whether the measures had sufficient preventive effect now that any penalisation under criminal law was lacking and the outcome of civil actions is always uncertain. However, introducing such penalisation would have to outweigh the disadvantage of the extra need for police supervision and enforcement. The closed selling system coupled with registration worked quite well. The different legal nature of the stadium bans in the participating countries made it difficult to adopt a joint European policy on this point. Powers to combat effectively mass acts of violence in a public place proved essential. The “public-private partnership” between the Dutch and Belgian governments with UEFA and the Euro 2000 Foundation with clear responsibilities for the two latter entities also led to satisfying results.

⁵² Parliamentary document 26 227, no. 33, 3.

⁵⁴ Parliamentary document 26 227, no. 33, 3.

⁵³ Parliamentary document 26 825, no. 3.

Conflicts and Some Possible Ways of Resolving them in Europe*

by Ian Blackshaw**

Introductory Remarks

Sport is now a global industry worth more than 3% of world trade and almost 2% of the combined GNP of the enlarged European Union comprising 25 Member States with a total population of 450 million¹. It is not surprising, therefore, that the world's major consumer corporations are falling over one another in their rush to sign up sports personalities, like the Beckhams of this world, to promote and endorse their products and services.

As Anne M. Wall has pointed out:

*"Athletes can be ambassadors for the products and services they use. Their endorsement and positive publicity can lift consumer brand awareness, enhance brand image and stimulate sales volume. Upon introduction, licensed products that carry a celebrity's name can establish instant credibility for the brand in the market place."*²

Indeed, many such personalities are in demand to endorse and promote, through their fame and notoriety in the sporting world, a range of products marketed by a variety of companies.³

This is fine and dandy as long as the corporations and their products are not in competition with one another. Exclusive deals are the order of the day. So branding conflicts are not an uncommon phenomenon in sport and need to be resolved.

The Problem: Conflicting Sports Sponsorships and Endorsements

The problem of conflicting sponsorships and endorsements can arise in various situations. For example, where a sports personality, who has his own individual clothing sponsor, competes in a sporting event which is sponsored by a rival clothing manufacturer, whereby, under the terms of the event sponsorship, all competitors are required to wear that rival's sports wear bearing its distinctive logo.

Again, the problem also crops up where the individual sports personality, with his own sponsor, is a member of a team and the team sponsor is a competitor of the sponsor of the individual concerned. This is particularly acute in football, which is not only the world's favourite game, but also the most lucrative, because of its wide appeal as a vehicle for brand promotion and exposure.

So what happens when a footballer has his own shirt sponsor, whilst the sponsor of the team strip is a competitor? How can such conflicts be resolved?

Generally speaking, with some difficulty, by employing a combination of common sense, pragmatism, and negotiation. But this can be a rather 'hit and miss' way of doing things in practice. Let us take a few examples of how such conflicts are dealt with in some major European sporting countries.

Some European Solutions

England

When it comes to players in the English FA Premier League (FAPL), the world's most financially successful National League, the new players' standard contract, introduced for the 2003-2004 season, contains some important and useful provisions for dealing with the problem in clause 4.⁴

These provisions are quite strict and are legally binding on the player in a "Club Context" which is defined as follows:

"Club Context" shall mean in relation to any representation of the Player and/or the Player's Image a representation in connection with the name colours Strip trademarks logos or other identifying characteristics of

the Club (including the trademarks and logos relating to the Club and its activities which trademarks and logos are registered in the name of and/or exploited by any Associated Company) or in any manner referring to or taking advantage of any of the same."

In practice, therefore, the exploitation of a player's celebrity status is restricted when it comes to using the player's image in his club kit. However, clause 4.3 of the FAPL contract specifically recognises that the player may have "commitments...when on international duty in relation to the Player's national football association..." And clause 4.2.2 of the FAPL contract allows a player to have his own boots sponsorship and a goalkeeper to have his own gloves sponsorship.

Furthermore, the player's general freedom to conclude other image rights and promotional/public relations deals outside the FAPL contract is specifically provided for in clause 4.5, which reads as follows:

"Except to the extent specifically herein provided or otherwise specifically agreed with the Player nothing in this contract shall prevent the Player from undertaking promotional activities or from exploiting the Player's Image so long as:

4.5.1 the said promotional activities or exploitation do not interfere or conflict with the Player's obligations under this contract; and

4.5.2 the Player gives reasonable advance notice to the Club of any intended promotional activities or exploitation."

Also, clause 4 of the FAPL contract is negotiable under the terms of clause 4.11, which provides (in part) as follows:

"Nothing in this clause 4 shall prevent the Club from entering into other arrangements additional or supplemental hereto or in variance hereof in relation to advertising marketing and/or promotional services with the Player or with or for all or some of the Club's players (including the Player) from time to time."

Obviously, in practice, the possibility of changing the terms of the contract applies to the more established and better known English Premier League players! Commercial negotiation is always a matter of relative bargaining power.

The overall aim and effect of clause 4 of the FAPL contract is to prevent players from endorsing the brands, products and services of the competitors of the League's principal sponsor(s), currently 'Barclaycard'. Otherwise, the value of that sponsorship would be diluted.

* This is an abridged version of a paper presented to a Conference on Co-Branding Issues in Various Industries organised by the Benelux Chapter of the Licensing Executives Society International and held in Rotterdam, The Netherlands, on May 25th, 2005.

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1 Branding has played a significant role in making sport such big business. This process is often referred to as the 'commodification' of sport. For more on this subject, see 'Sports Law' by Simon Gardiner, Mark James, John O'Leary,

Roger Welch, Ian Blackshaw, Simon Boyes and Andrew Caiger Third Edition August 2005 Cavendish Publishing London.

2 See 'Sports marketing and the law: protecting proprietary interests in sports entertainment events' Marquette Sports Law Journal 1996 at p. 154.

3 Sports 'stars' like David Beckham, Venus and Serena Williams and Tiger Woods earn more off than on the field of play through lucrative sponsorship and endorsement deals.

4 The full text of clause 4 of the standard FA Premier League Players' Contract is set out on pp. 341-343 of the Book 'Sports Image Rights in Europe' by Ian S. Blackshaw and Robert C.R. Siekmann (Eds.) 2005 TMC Asser Press, The Hague, The Netherlands.

France

In France, the matter is governed by article 511 of the Charter of Professional Football. When signing the contract of employment, each player agrees in a specific addendum to grant to his club the right to exploit his image and/or name, collectively or individually, provided at least five players' image and/or names are exploited in the same way.

A collective exploitation of those rights can be entrusted, partially or entirely, to the French Football League, to centralise exploitation and control.

Since 1 July, 1998, players are free to use boots and gloves bearing brands or logos of their own choosing.

Germany

In Germany, the matter is generally governed by contract and the applicable legal rules.

Thus, in clothing sponsorship contracts, an individual sports person can only assign rights that have not yet been granted to someone else. So, if a footballer agrees in the employment contract with his club to use a specific strip, he cannot sign an outfitter contract for himself with some other manufacturer. He can only exploit any rights that have not been 'exhausted' in his club contract of employment.

However, as such rights are generally granted to the club on an exclusive basis, it is clear that the individual player's room for manoeuvre is very restricted - if not non-existent.

The Netherlands

In the Netherlands, such conflicts are often settled through the Courts.

For example, in the case of *Notten cum suis and KNVB* (Royal Netherlands Football Association),⁵ after it had been customary for several years for players in the Dutch football team to enter into their own football boots contracts, the KNVB changed over to a contract with Adidas, under which the Dutch team players were obliged to wear Adidas boots. The Utrecht District Court found against the KNVB, because there had been no consultations with the players in advance about the change to the normal procedure and the monies arising from the Adidas sponsorship contract were enjoyed only by the KNVB. So, the principle of prior contractual rights applied.

This same principle was also applied by the Breda District Court in the case of *Ajax-Umbro and Brian Roy-Borsumij*, involving a contract entered into by the player, Brian Roy, with a clothing supplier, Borsumij, prior to his joining Ajax, who had a deal with Umbro but were aware of the player's existing contract.

Under the provisions of section 46, Book 2, of the Dutch Civil Code, sports bodies can, in certain circumstances, impose legally binding obligations on their members in relation to third parties regarding sponsorship and other rights. This statutory provision reads (in translation) as follows:

"To the extent that the contrary does not follow from the articles, the association may stipulate rights for and on behalf of its members and, in so far as this has been explicitly provided by the articles, enter into obligations for the same and on their behalf. It may take legal action for and on behalf of the members to enforce such stipulated rights, including the right to claim damages."

In this context, the case of *KNVB and Feyenoord*⁶ is the leading authority. It was held that, in order to impose obligations on members, the statutes of the sports body must be clear and that it is not

sufficient for the sports body to use general and vague language. In this case, the Royal Netherlands Football Association (KNVB) wished to bind all the Dutch Clubs in the Premier Division to certain arrangements made with a third party regarding the right to televise home games. The Amsterdam Court of Appeal held that the statutes were not concrete enough and too generally worded for the claimant Feyenoord to be bound by the obligations owed to the third party concerned. For someone to be legally bound by a stipulation of this kind, the nature of the obligation concerned must be clearly set out in the statutes. Otherwise, the effect of general wording would be tantamount to the Clubs having given the KNVB full discretionary powers, which was not, in fact, the position.

Norway

In Norway, the Norwegian Football Federation (Norges Fotballforbund) (NFF) in their agreements with players provide that the players can enter into up to three personal sponsorship agreements, provided that they do not conflict with the federation's sponsorship programme. And, furthermore, that one of the three individual sponsorship agreements must be for charitable purposes!

The rationale of the NFF restrictions is purely a commercial one to protect the value of the exclusive rights of sponsorship sold by the NFF to their own sponsor(s).

Under the arrangements, the NFF must accept the personal sponsor prior to the individual player concluding the corresponding agreement. In practice, the NFF co-signs the agreement. Either way, potential conflicts can be identified and nipped in the bud. And, thus, expensive and lengthy law suits avoided.

Concluding Remarks

The problem of sports branding conflicts involving sports personalities and teams/clubs and how to resolve them is a thorny and commonplace one. This is largely the result of the popularity of sports branding in its different forms and the demands made by sponsors for product/service category exclusivity in their sports marketing arrangements.

In some cases, these conflicts are not only foreseen by sports bodies, but are also provided for in their Regulations and/or their standard forms of player contracts. In other cases, the parties may have to rely on legal solutions through the Courts - largely based on the application of general principles of contract law. Because of the need, in many cases, for such conflicts to be resolved quickly, mediation may provide an effective alternative dispute resolution method.

In the majority of cases, potential conflicts are often solved, in practice, by creative marketing solutions and other pragmatic *ad hoc* arrangements, particularly in relation to award ceremonies and the press conferences that inevitably follow them. It has not been unknown for some sports persons to wrap themselves in their national flags, not as a sign of patriotism, but as a means of covering up a conflicting brand or logo on their sports clothing!

One thing, however, is clear, as sports personality branding continues to grow in importance - not least in financial terms - there is much work for sports lawyers, especially in those cases where amicable and pragmatic solutions cannot be achieved in a conflicting situation.

⁵ Utrecht District Court, 23 February, 1976.

⁶ Amsterdam Court of Appeal, 8 November, 1996.

Sports, Recreation and the Environment*

by Brian Brooks**

A survey of contemporary literature on international sports and law discloses that, in many areas, the more things change the more they remain the same. In ancient Egyptian and Greek times, for example, a central question was how to resolve sporting disputes. These disputes ranged from violence between contestants to brawling between opposing spectators, insulting players from other cities, threats against the referee, throwing objects onto the playing field and disrupting the game. Those ancient issue have a contemporary ring, especially in the context of professional sport, and demonstrate that sporting and recreational activities have long attracted a response from the legal system. Today violence in recreation and sport is normally regulated by domestic criminal, contractual, tort (delict) or administrative law.

The continuity of issues is interesting. Of greater interest, however, is what is not discussed in the contemporary literature in the area.. Few, if any, of the modern commentaries mention the impact of sport and recreation on the environment and the law's response to this impact. That is a significant omission because sporting and recreational activity is as much controlled by law as any other social behaviour. A simple example is the effect of a sports stadium which raises such issues as: the size and design of the stadium and its surrounding infra-structure; noise; traffic; drunken behaviour; crime; vendors; littering; advertising.

This paper, then, will focus on the role of environmental protection laws and will use as a model the development of golf courses and golf estates as golf is seen as both a sport and a recreational activity. Golf courses, and especially golf resorts, are man-made re-arrangements of the natural environment. Therefore construction and maintenance of a golf course must conform to the range of modern laws which attempt to ensure that environmental issues are addressed from the outset and that the impact on the environment is monitored constantly. The challenge is to integrate environmental considerations into sustainable development. The argument will be that the environmental issues raised by sport and recreation are matters of global concern. While examples will be drawn from around the world most attention will be paid to the Republic of South Africa.

I. Introduction

"The most notorious debate among golf course development in recent years has been the plan to create a \$311 million project consisting of 592 luxury homes, hotels, restaurants, and a 7,276-yard golf course in Tepoztlan, Mexico. Opponents of the golf course claim that golf-course projects use dangerous chemicals and too much water as well as induce higher property taxes and disrupt culturally intact communities. The site of development in Tepoztlan will be located on 462 acres of communal land within a national park and a biological corridor that harbors Aztec ruins and 28 endemic species of animals (Planet ENN, 1996). The high amount of water necessary for the project is estimated by developers to be approximately 800,000 gallons a day for peak irrigation (which is nearly five times that pumped daily by Tepoztlan). This brings about much debate because of the town's ongoing problems with water shortage."

Syrengeles, C., *Golf and the Environment* (a seminar at the University of California, Irvine, June 1997) darwin.bio.uci.edu/~sustain/global/sensem/Syrengeles97.html last accessed 2005/08/16

"The Estoril Portuguese Open was nearly called off this week because of a dispute over environmental issues on the Oitavos course, host club Quinta da Marinha said. As late as yesterday the club was insisting that areas containing protected species of animals and plants should not be used, but they eventually relented after pressure from the European Tour."

The Australian Friday April 1 2005

"While golf enthusiasts flock to Pebble Beach for its international tournaments and revel in the man-made rearrangement of its natural landscapes, environmentalists have spent the past few decades quietly mourning the intrusion of greens, bunkers and clubhouses on their beloved Del Monte forest. And now their mourning has turned to rampant activism."

The Sunday Independent (UK) May 1st, 2005 at page 16

"Keeping golf courses green and luxurious takes between 1.4 million and three million litres of water a day. Picture this: every household in South Africa is entitled to a basic supply of 6 000 litres of clean water a month. The water used on a single golf course could supply at least 7 000 households with this."

Mail and Guardian (RSA) May 20 to 26 2005 at page 8.

"The golf industry in Spain generates 2,357 million euros every year."

Suplemento Especial in *Ronda*, (the magazine of the Iberia Group, Spain) June 2005 at page 7

"Developers ride roughshod over laws: (Mail and Guardian) investigates the toothless laws that golf estates developers are ignoring"

Mail and Guardian September 9 to 15 2005 at page 8

"Perhaps no issue is more likely to have a significant impact on the game of golf in the 21st century than that of how golf courses and golf course maintenance affect the environment."

James T. Snow, National Director of the United States Golf Association Green Section cited at www.afcee.brooks.af.mil/ec/golf/intro.asp last accessed 2005/08/16

II. Continuity of interests

In late November 2004 the International Association of Sports Law held its 10th Congress. The venue was Athens, home of the modern Olympic Games. The three conference themes would have been comprehensible to ancient Greeks: sports institutions and sports law; resolution of sports disputes; sports law and the Olympic Games. There was a total of sixty-one papers within those three themes and many of the papers would also have been recognized by the ancients. Three examples will make the point: "The influence of the law concerning the Ancient Olympic Truce on shaping the shared perceptions of the Panhellenes"; "The Demosthenes extract on unintentional manslaughter." ; "Aggression against referees in Greek basketball." The proceedings were published and join a growing body of literature on sports and law. A leading text in the area is *International Sports Law*¹ and at the Athens Congress the author was awarded a special prize for academic contribution. The contents of that eminent textbook would also be generally recognizable to much earlier generations. There are chapters on the Olympic Games, on dispute resolution in sports, on the rights, duties and eligibility of athletes, on violence amongst competitors and amongst spectators, on sports as an

* This contribution is an elaborated version of a paper that was presented at the Eleventh Annual Congress of the International Association of Sports Law (IASL) in Johannesburg (South Africa), 28 November/1 December 2005.

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Business and Economics at MonashSA. He expresses his thanks to two colleagues at MonashSA: Claudia Holgate of the School of Arts for her guidance in matters environmental and Jean Struweg of Buseco for his research assistance in matters golfing.

¹ Nafziger, James, *International Sports Law* (Second Edition, 2004,

instrument of foreign policy. Some papers at the Congress, and some chapters in the leading text, would have been foreign to the ancients. "Police electronic surveillance of spectators" and "The prevalence and nature of age discrimination practices in UK sport and recreation organizations" were two papers which may not have been understood by ancient Greeks and Egyptians. Nor would they have necessarily been stirred by a chapter on "Ambush Marketing" or "The Gleneagles Agreement and Code of Conduct" or "Sports Legislation in Mexico." It is also highly unlikely that they would have remarked on the absence of papers and chapters addressing the contemporary issue of environmental protection. Yet to a modern reader the absence of attention in conferences and books to the impact of sporting and recreational activities on the environment is striking. This is all the more remarkable given the existence of legislation directly addressing the issue.

III. The environmental impact of golf

There are numerous jokes about the game of golf. A well-known one is the observation that golf is just a good walk ruined. While that kind of remark is part of folk wisdom there is more serious authority for the proposition that golf is not a mere game or social pastime. Indeed a court has gone as far as ruling that golf is not a mere game or pastime or amusement like bicycling or walking or rowing. This was decided when four golfers appealed their conviction for breaching the then law which prohibited the playing of sport in a public place on a Sunday. Four golfers were charged and convicted but on appeal the conviction was overturned. The appeal court took the view that a game was in the nature of a conflict and that as each golfer was playing for himself then he was not engaged in a game.²

That golf is indeed more than a game is illustrated by the observation that in the United States of America, golf is second only to baseball in the frequency with which it gives rise to litigation.³ Clearly, golf is a very serious business.⁴ And it is this recognition of golf as a business which brings us to the central theme of this paper.

The number of persons playing golf is increasing rapidly all around the world. This growth in playing numbers is accompanied by a proliferation of golf courses and, even more importantly, by the proliferation of golf resorts. By the latter is meant, essentially, expensive houses built around, or immediately adjacent to, a golf course. In other words, the massive world-wide interest in golf means that property developers use the availability of golf as a major attraction in marketing their residential projects. In August 2005 a South African commentator observed that "[D]ivide the number of golfing estates among the number of genuine golfers and it's perfectly obvious that there is a massive oversupply of golf estates."⁵ Recently Aymerich Golf Management, a company involved in the planning, development and professional management of golf courses in Spain and Portugal, presented a survey on the golf industry in Spain. According to the survey the golf industry generated nearly 2,375 million euros, an increase of 252% since 1997. The survey also estimated that the value of a home increases by an average of 20% through being located close to a golf course. In Spain the turnover produced by the re-evaluation of residential homes located in golf resorts reached 837 million euros in 2005. This has a direct impact on the economic value of the golf industry in Spain. At present the number of Spaniards who play golf is very low by world standards. There is evidence that this is changing fast. Therefore there are optimistic forecasts for the growth of the property business in Spain, the forecast being linked directly to golf resorts. Both golf supply and demand have been growing at a rate of 12% annually in Spain over the past few years which underscores the industry's enormous potential. There are 290 existing courses in Spain with a total of 300 more in the developmental stage.⁶ There are currently more than 14,750 golf courses in the U.S. alone, and about three new ones open each week.⁷

In that foregoing recital something important is missing: an analysis of the impact of golf and golf-resort development on the environment. In March 2005 the Portuguese Open golf tournament was nearly called off because of a dispute over environmental issues at the host club. The club was insisting that areas containing protected animals

and plants should not form part of the competitive course. Newspaper articles reported that the club eventually relented after pressure from the European Tour.⁸ In May 2005 a United Kingdom newspaper carried a story of a golf resort in California which had gained planning approval for "a major expansion of the resort, including an eighth 18-hole golf course, a resort complex with 160 visitor suites, residential and employee housing, an equestrian centre and a driving range." The article commented that "the problem with the plan is that it will involve chopping down about 17 000 more Monterey pines, increase tourist traffic and augment what is already a less than tender human imprint on the landscape."⁹ In the same month a leading South African weekly newspaper carried an article headed "The great golf estate debate" in which it observed that "Golf courses are usually on estates - security villages of a few hundred houses outside existing urban centres - surrounded by high walls with a carefully guarded entrance. This can not only change the landscape, but also limit access to beaches and other natural areas while increasing land prices and making land restitution difficult."¹⁰ Earlier the Western Cape's Department of Environmental Affairs had commissioned a report on the impact of golf estates. The report found that at least 22 of the proposed developments in the province would result in the loss of prime agricultural land.¹¹

The impact of golf courses and golf estates upon the natural landscape, and on the usurpation of agricultural land use, is something which is easy to see. Less visible but of equally dramatic impact are other sources of damage to the environment stemming from golf. In South Africa, and in many other countries, water is an increasingly scarce resource. Golf courses use an astounding amount of water. It is estimated, for example, that to maintain those picture-perfect courses created in the desert at Palm Springs in California up to a million gallons of water a day might be pumped into the ground.¹² The Worldwatch Institute, which monitors global environmental trends, estimates that in the USA "golf courses cover more than 1.7 million acres and soak up nearly 4 billion gallons of water daily."¹³ In the Republic of South Africa it has been reported that "[K]eeping golf courses green and luxurious takes between 1.4 million and three million litres of water a day. Picture this: every household in South Africa is entitled to a basic supply of 6 000 litres of clean water a month. The water used on a single golf course could supply at least 7 000 households with this."¹⁴ South Africa is a water-scarce country with only slightly more fresh water available per capita than Israel. Predictions are that in less than twenty years demand for water will exceed the capacity to supply. As South Africa's population grows, and hopefully becomes more affluent, demand for water will increase. The question thus arises: should allocating water for golf courses be a priority?

Leaving that question aside we should now note that the mentality driving most golfers, and therefore golf course developers, is "the greener the better." This has been described as the Augusta

Transnational Publishers, New York)

2 Oehley and Others v Rex (1908) EDC 38. Other laws, also long repealed, forbade the playing of sport in a public place on a Sunday. A prosecution against golfers failed, the court holding that the venue, a private golf course, was not a public place: S v Rosenberg and Another 1972(3) SA 91(T)

3 Parmanand, *Sports Injuries in the Civil Law* (1987) 156

4 For an illustration of this see *Cobra Golf Ltd v Rata* [1997] 2 All ER 150(a trade mark and unlawful competition dispute involving the use by a manufacturer of golf clubs of the logo and design of another manufacturer).

5 *Sunday Times* 21 August 2005 in Business Times Section at page 1

6 The data on Spain is drawn from the *Suplemento Especial* inserted in *Ronda*, the magazine of the Iberia Group, June 2005.

7 Proquest, Green Golf, proquest.umi.com.ezproxy.lib.monash.edu.au/pqdlink?index=7&sid=1&srchmode last accessed 2005/08/16

8 *The Australian* Friday 1 April 2005. It is tempting to ask the nature of the "pressure" exerted? It is most likely that it was commercial pressure.

9 *The Sunday Independent*, May 1st 2005 at page 16.

10 *Mail and Guardian* May 20 to 26 2005 at page 8.

11 *ibid*.

12 *supra* note 6

13 "Thirsty golf courses drive environmental protests", Scripps Howard News Service, <http://www.knoxstudio.com/shns/story.cfm?pk=GOLFCOURSE-04-22-04&cat=AN> last accessed 2005/08/16

14 *Op cit* note 8

Syndrome.¹⁵ Augusta National is the golf course which hosts The Masters tournament each year. Augusta was created from a former nursery in Georgia. It is a garden of free-blooming azaleas and dogwoods and seemingly weed-free turf with immense areas of manicured fairways alongside multi-hued bushes and shrubs and century-old towering trees. Given a choice a golfer will choose the greener the better and developers will have in mind the Augusta course. "No other golf course is indicative of perfection in every sense" and since its establishment in 1934 Augusta National has been "the yardstick by which other courses are measured."¹⁶ Very few courses, however, have as much water available as Augusta whose "natural" look comes at a price which raises a wide range of other environmental issues surrounding golf. Not all of these issues are immediately apparent to the human eye. An example is the dispute mentioned earlier when a golf club was initially unwilling to host a European Tour event out of concern for protected species of animals and plants. Land appropriated for golf is frequently the habitat of dozens of species of both animals and plants which are vital to a healthy environment. Thus a golf course can easily destroy an environment which has been a source of food and shelter to reptiles, fish, birds, frogs and toads, rats and mice as well as a range of flora.¹⁷ Equally damaging to the environment are all the fertilizers, pesticides, fungicides, and herbicides which are necessary to maintain the course. The New York Attorney General's office found in a 1991 study, for example, that some Long Island golf courses applied more than 25 tons of pesticides annually on courses that were not even used year-round. That's more than six times what farmers typically use per acre.¹⁸ Amongst other things the chemicals necessary to maintain the course leach into waterways and create further damage to the surrounding environment.¹⁹

IV. The response

A. The Political Response

Given the environmental impact of golf courses and golf resorts and the increased awareness of developers the next question is this: what has been the political response of governments? The answer is that there is a range of responses. The spectrum runs from no regulation, to various levels of intervention and regulation, to prohibitions on development. In Spain, for instance, despite a massive increase in golf course and golf resort construction, there is still no legislation that regulates the construction of such installations.²⁰ The other end of the spectrum of responses is captured by a report in a South African daily newspaper that the "Land Affairs Minister Thoko Didiza is considering a resolution calling for a moratorium on the development of new game farms and golf estates" in the Province of the Western Cape.²¹ The resolution, which supported the shelving of "elitist" developments was endorsed by delegates to the National Land Summit in July 2005. In August 2005 the President of South Africa launched a stinging attack on golf estates saying that they, along with gated communities, "perpetuate apartheid settlement patterns"²²

An interesting example of a government intervention at a midpoint on the spectrum is found in New Zealand. In August 2004 the Minister for the Environment and the Revenue Minister announced tax changes which are designed to encourage businesses to be more environmentally responsible. "The Government plans to make tax deductions available for environmental expenditure, such as the cost of preventing, mitigating or remedying the discharge of contaminants, monitoring the effects of pollution and testing options for dealing with environmental issues."²³ The relevance to this for golf courses and golf resorts is obvious.

B. The Legal response

Between the extreme positions along the spectrum of intervention are countries which have enacted legislation to regulate land development and to protect the environment.²⁴ The law can be very narrow and exact or be cast in broad terms. Examples of narrow, directive legislation are found in England, the country with the most courses in Europe, where irrigation systems are permitted to cover only the so-called "green platforms", the most sensitive parts of the course, and in

countries in more arid regions which require that irrigation water for golf courses come from waste water treatment or desalination plants.²⁵

An example of a broadly expressed piece of legislation is found in New Zealand's Resource Management Act 1991. The purpose of the Act is "to promote the sustainable management of natural and physical resources". Clearly the legislation would apply to any proposed golf course development. Teeth is given to the Act in section 9 which provides that :

- "(1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless that activity is -
 - a Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
 - b An existing use allowed by section 10 or section 10A"

Clearly the nature of the control will depend on the rules in the particular district plan and is likely to be different for a golf course than for, say, a residential or industrial area.²⁶

In the Commonwealth of Australia the State of New South Wales has enacted general environmental planning laws found in the Environmental Planning and Assessment Act 1979 which sets out, in section 79C, the matters which need to be taken into account when deciding whether or not to approve any development. Depending whether the proposal impacts on other matters it may require an environmental impact assessment or be subject to other assessment and specific consents under that or other legislation. For example, if there is any natural water course within the area proposed to be developed, an approval is required under the Rivers and Foreshores Improvement Act 1948. There have been several recent cases on golf courses in the New South Wales Land and Environment Court.²⁷

In the Republic of South Africa an examination of laws relevant to protecting the environment begins with the Constitution Act 1996(Act No.108 of 1996). In that part relating to the "Bill of Rights" section 24(a) provides everyone the right to an environment that is not harmful to a person's health and well-being. Section 24(b) provides everyone the right to have the environment protected through reasonable legislative and other measures. An example of legislation to protect the environment, based on the constitutional power, are sec-

¹⁵ supra note 5 at page 19

¹⁶ Golf Course Environmental Management
<http://www.afcee.brooks.af.mil/ec/golf/mangolf.asp> last accessed 2005/08/16

¹⁷ The destruction of the Monterey pines at Pebble Beach mentioned earlier is a dramatic example. See note 7 supra.

¹⁸ Proquest, Green Golf,
http://proquest.umi.com.ezproxy.lib.monash.edu.au/pqdlink?index=7&sid=1&src_hmode=Last accessed 2005/08/16

¹⁹ Science Blog: Golf Courses and the Environment
<http://www.scienceblog.com/cms/node/8578> last accessed 2005/08/16

²⁰ supra note 5. The same seems to be the case in Mexico

²¹ *Sunday Times*, August 7 2005 at page 12

²² How golf became the President's bogey", *Sunday Times* 21 August 2005 in the Business Times section at page 1. In the following month a different South African weekly publication carried a detailed analysis the central theme of which was that : "When President Thabo Mbeki criticised golfing and polo estates for being elitist empires, he probably had no idea quite how difficult it is to stop them rolling on." The article gave a number of illustrations, including recent court cases in which objectors to developments lost their cases: *Mail and Guardian* September 9 to 15 2005 at page 8.

²³ *Law Talk* Issue 632, 30 August 2004 at page 10.

²⁴ Space does not allow a full examination of the wide range of relevant legislation. Two examples of legislation which will not be dealt with here but which have a direct impact on golf course development are found in South Africa. One is the National Environmental Management Biodiversity Act(No 10 of 2004). Another is the Gauteng Tourism Act 1998.

²⁵ *Supra* note 6 at page 20

²⁶ To ensure that each district plan is considered the New Zealand Environment Court publishes its roster of hearings. An example is the roster for January to June 2005 which was published in *Law Talk*, Issue 637, 6 December 2004 at page 8. *Law Talk* is the official journal of the New Zealand Law Society and is published fortnightly.

²⁷ *Canyonleigh Environment Protection Society Inc v Wingecarribee Shire Council No. 40286 of 1996* [1997] NSWLEC 109(8 August 1997); *Bardwell Valley Golf Club Limited v Rockdale Council* [1994] NSWLEC 50(13 April 1994); *Friends of Katoomba Falls Creek Valley Incorporated v Minister for Planning No. 40034 of 1995* [1995] NSWLEC 6 (31 January 1995)

tions 21, 22 and 26 of the Environment Conservation Act 1989. Another example, which mirrors the the New Zealand district plans approach in South Africa, is found in the National Environmental Management Act(NEMA)(No.107 of 1998).

The Act provides for environmental implementation plans and environmental management plans to be prepared by provincial and national government departments. The purpose of the plans is to coordinate the environmental policies, plans and programmes and decisions of various government departments at a local and provincial level which exercise functions that affect the environment.²⁸ The aim is to minimise the duplication of procedures and provide consistency in the protection of the environment across South Africa as a whole. In the past the regulation of the environment had been fragmented and sometimes incomplete legislation, mainly at provincial but in some sectors also nationally. At present there are eight national departments exercising functions which may affect the environment²⁹ and six which exercise functions that involve the management of the environment.³⁰ The 1998 Act was amended in 2004 by the National Environmental Management Amendment Act, 2004(Act No.8 of 2004) and the amendments related to new environmental impact assessment regulations. Those regulations are to be promulgated at various times by the Minister of Environmental Affairs and Tourism.³¹

The new co-ordinated approach starts with a process common to many countries and known as an Environmental Impact Assessment (EIA). This is a detailed study of the environmental consequences of a proposed course of action. An environmental assessment or evaluation is a study of the environmental effects of a decision, project, undertaking or activity. It is most often used within an Integrated Environmental Management (IEM) planning process, as a tool to support a decision when different options are compared. More recently there has emerged another instrument for integrating environmental issues into the formulation of plans and programmes. This new approach is described as Strategic Environmental Assessment (SEA). Broadly put, the difference between an SEA and an EIA is that the latter concentrates attention on the effect of the development on the environment, and frequently is focused on minimising individual impacts, while the former identifies the opportunities and constraints which the environment places on development. In other words, the fundamental benefit of an SEA is that it aims to integrate the concept of sustainability into the formulation of plan and programmes. Several SEAs have recently been undertaken in South Africa. The problem is that these studies have been undertaken in the absence of an agreed understanding of the methodology of an SEA. Further, there are no legislative requirements for an SEA in South Africa. It is true that the NEMA makes provision for the development of assessment procedures to ensure that the environmental impact of proposed land use is considered but this a long way short of the SEA approach of integrating sustainability into the development of plans and programmes.

What must not be overlooked in an examination of the legislation which protects the environment is the penalty provisions and an increasing willingness by environmental protection agencies to use these provisions. An example is the United States where the criminalization of environmental law continues to be one of the fastest growing components of the U.S Environmental Protection Agency's enforcement programme. During 2001 the EPA initiated 482 criminal cases and referred 256 of them to the U.S.Department for prosecution.³² In New Zealand there is increasing attention to "restorative justice processes in the exercise of the enforcement jurisdiction under the Resource Management Act."³³

C. The Response of the Golf Industry

In some countries legislation is clear as to the obligations on sport and recreational bodies. In the National Sport and Recreation Act (N.110 of 1998) of the Republic of South Africa, for example, is found a specific provision in section 12 which enacts as follows

"Environment and sport and recreation.-

- 1 All sport and recreation activities must be conducted in such a way that the environment is not adversely affected.

- 2 The governing body of any sport or recreational body must lay down guidelines which are aimed at the protection of the environment."

This type of legislation reflects the government's reaction to the impact of golf courses and golf resorts on the environment and it is therefore not a surprise to learn that golf course developers are quick to assert that they are alert to the need to protect and if possible enhance the environment.³⁴

An example of this was reported in a South African newspaper in 2004. The report concerned a new golf estate development on an island in the Vaal River in the north west of the country. The report disclosed that there will be 300 luxury homes and an eighteen hole course on the 110 hectare island. The designer of the development was announced as being the former world number one player, Mr Nick Price. The article further reports that this will be Mr Price's first undertaking in South Africa and that he is "thrilled at the prospect." In the article, humorously headlined "What Price the perfect estate course?", Mr Price is reported as insisting that the houses will not detract from the natural surroundings. He is quoted as saying: "The island is truly a beautiful piece of land and my goal is to carefully blend the course and the houses into the environment so that everything is easy on the eye."³⁵

Similar remarks by developers were carried in a South African golf magazine early in 2005. The magazine carried an article on the plans of a consortium which has acquired an existing game farm which it plans to develop into a world-class golfing estate inside a "best of breed" game reserve and in the process creating "a unique and exciting housing estate and resort facility." The project manager was quoted as saying that "[T]he sensitive integration of the development with the environment as well as the local community is of paramount importance to us. Our housing concepts and the accompanying architectural and landscape guidelines bear testimony to the commitment that we have made to uplifting and enhancing the environment."³⁶

It is possible to be cautious about the claims of golf course developers to be environmentally sensitive. One reason is the documented damage reported elsewhere in this paper along with the failure of objectors to win their cases in court.³⁷ The second is the clear evidence that South African companies tend not to report social and environmental issues that the company faces.³⁸ Reporting is voluntary and it is likely that some golf development companies decide, perhaps for perfectly good reasons, not to make the report.

On the other hand, it is true that there is evidence of an approach

28 Interestingly, the New Zealand parliament has recently amended the Resource Management Act 1991 with the expressed objective of "improving decision-making under the Act." See comments In *Law Talk* Issue 637, 6 December 2004 at page 8.

29 Those Departments are listed in Schedule 1 to the National Environmental Management Act 1998 and are: Environmental Affairs and Tourism; Land Affairs; Agriculture; Housing; Trade and Industry; Water Affairs and Forestry; Transport; Defence.
30 *Ibid*: Environmental Affairs and Tourism; Water Affairs and Forestry; Minerals and Energy; Land Affairs; Health; Labour.

31 It is significant that the same problem of fragmented and sometimes incomplete legislation and the absence of comprehensive national legislation has also characterised the regulation of bio-diversity in South Africa. An attempt to address this problem is found in the National Environmental Management: Biodiversity Act (No.10 of 2004) which entered into effect on 1 September 2004.

32 Whitely, Weinstein, Arnold, Meezan, "The expanding criminalization of environmental laws", *Florida Bar Journal*, Jan.2003, page 30.

33 *Law Talk*, Issue 637, 6 December 2004 at page 8

34 See for example *Earthyear* (Mail and Guardian, Auckland Park, South Africa) Volume 6, 2004 pages 60-63; *Suplemento Especial supra* note 5.

35 *The Star* (Johannesburg), Thursday 29 July 2004 at page 25

36 *Golf Digest* (South Africa) February 2005 page 67.

37 See notes 12-15, 18-20, 22-23, 28, 18 and 23 *supra*

38 KPMG's survey of Integrated Sustainability Reporting in South Africa for 2003 reveals that while more and more companies are providing some disclosure on environmental matters much of this disclosure is at best superficial and general: KPMG(2003), *Integrated Sustainability Reporting in South Africa* at page 2

to golf course development which is sensitive to the environment. An illustration is the experience in Canada a decade ago when a course was developed in Toronto. Three trees only were removed and the developers used European native grasses that require very little fertilizer and water and the golf course superintendents use one pesticide and that is for snow mold in the winter.³⁹ More and more developers are becoming aware that the efficient use of water is directly related to the type of grass which is planted and highly technical water systems are now common.⁴⁰ The United States Golf Association has a research project on turf grass and is investigating ways to breed new varieties of grass that require little water, pest control or fertilizers and is analyzing pesticides to find those less likely to leach into ground water.⁴¹ Golf associations worldwide have compiled guidelines to help clubs maintain and improve their facilities in accordance with good environmental practices. The Spanish Golf Federation, for instance, has published three books which have been distributed to each golf club in the country⁴² and in South Africa consumer golf magazines now carry regular features educating the public about how a golf course can successfully interact with the environment.⁴³ In the United States, the US Golf Association has its own Green Section which regularly publishes books for the local golf industry on topics such as bird conservation and water management on golf courses.⁴⁴ In the course of the last decade the Green Section has invested more than 20 million euros on an environmental research programme on grass.⁴⁵ In 2002 the US Golf Association funded an Executive Summary on the Environmental Impact of Golf and has subsequently provided research papers for the golf industry on such diverse topics as turf management and sharing a golf course with raptors.

In September 1997 an initiative was launched by the Royal and Ancient Golf Club of St. Andrews and the European Tour. The initiative was entitled "Committed to Green" and was based on the belief that sound environmental practices are good for the future of golf. A set of environmental performance indicators is used to measure the impact of golf course development on the environment. The South African Golf Association is a member of the "Committed to Green" initiative and has developed an environmental programme aimed at the conservation of nature and natural resources for the benefit of the game in that country.

The most recent evidence of golf in South Africa being committed to green is found in the magazine *Compleat Golfer*. Each year the magazine ranks the top courses in the country. The new criteria in the grading process includes examining the course as a whole "adding marks for routing (how the holes fit together), conditioning (general turf management and consistency of greens), memorability, design balance (how the two nines compare) and landscape management (eco-friendliness)."⁴⁶

The English course Royal Birkdale, venue of Open Championships, recently produced a book describing in detail the many plants and animals which made the famous links course their home. In South Africa the crowned plover is probably the most common sight on golf courses, particularly in the Johannesburg area where the birds guard their nest and eggs with jealous aggression. Even when the world's best golfers competed at the Houghton Golf Club in the

Dunhill Championship the plover was given right-of-way with cordons around their nests. In ordinary events club golfers are given a free drop if their ball lands too close to a nest.⁴⁷ In the Western Cape Province of South Africa is found the Erinvale Golf Club. Not only does the club have an abundance of Egyptian geese but it also has an environmentally sensitive area to the left of the 16th hole. That area cost a professional golfer the South African Open title when he was not allowed to play his ball from this sensitive area and had to take a penalty drop.⁴⁸

In the United States, more and more golf designers are taking as their benchmark the Collier's Reserve Country Club in southwestern Florida. The club opened in 1994 and as a result of its efforts a prestigious environmental award was bestowed on the club. According to manager Tim Hiers, Collier's concentrated on "wildlife conservation, energy efficiency, waste management, water conservation and habitat enhancement. The results are clear to see: 39 acres of created lakes and wetlands. More than 130 acres of habitat preserve. Deer and bird feeders made of 100 per cent post-consumer recycled materials. Some 500,000 newly planted native plants which require little, if any, irrigation, pest control or fertilizers. And stockpiled timber that serves as home to bobcats and possums, foxes and rabbits."⁴⁹

V. Conclusion

Golf has come nearly full circle in its relationship to the environment. The game began as an ecologically benign pursuit. There was little impact on the landscape. This continued for generations. Then in the second half of the 20th century golf development ran roughshod over the environment. Of recent times there has been increasing legal regulation and a growing awareness by developers of both legal and societal responsibilities. The legislation is often very broad and this allows golf designers and developers, and existing clubs, to go beyond what is required by law. Many do go beyond the legal requirements and have adopted environmental principles which guide their activities. The adoption of these principles, and their expression in handbooks and other publications, makes it clear that the golf industry recognizes that the most significant challenge facing golf in the 21st century is how courses and their maintenance affect the environment. This has overturned the mid-twentieth century notion that golf and the environment are opposed concepts. Today there is a widespread, and growing, awareness that every golf course must be developed and maintained in a manner which recognizes the unique conditions of the ecosystem of which it is a part.

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39 Leonetti, C., "Green Golf" in *The Environmental Magazine*, Norwalk, May 1995, Vol.6, Issue 3 at page 22

40 *Suplemento Especial op cit*

41 *supra* note 33

42 *Suplemento Especial op cit*

43 *Earthyear supra* note 34 at page 61.

44 *Ibid* at page 60.

45 *supra* note 14 at page 20.

46 *Sunday Times Sport* 21 August 2005 at page 21 (emphasis added). Interestingly,

a rival magazine which also ranked the top one hundred golf courses in 2005 makes no mention of the environment in its list of seven criteria: see *Golf Digest* South Africa, February 2005 at page 60.

47 *supra* note 12 at page 63.

48 *ibid*.

49 Leonetti *supra* note 33.

Sport, 'Horseplay' and the Liability of Young Persons

by David McArdle*

Introduction

The basis of this paper is the English Court of Appeal's recent decision in *Blake v Galloway*,¹ a negligence action that arose after the claimant, aged 15, was struck in the eye by a piece of bark thrown by his friend during play. The circumstances of the case are somewhat out of the ordinary: both parties were members of a jazz quintet comprising adolescent boys; from the facts of the case it appears that they had met together away from school and home² in order to practice; and there is no indication that any adult supervision was either offered or expected. The case is thus unusual (although by no means unique) in English law in that it concerns an injury sustained by a young person and where liability has attached to an individual of similar age rather than to a school, a local authority or similar entity that might have been regarded as *in loco parentis*.³

This unusual set of circumstances may have contributed to the difficulties that taxed the courts in this case. At first instance, counsel for both parties accepted that the duty of care had been breached and the case turned upon the relevance of consent and contributory negligence. On appeal, the Court of Appeal held that the duty of care had not been breached at all and, consequently, that neither *volenti* nor contributory negligence had a role to play.

However, while the Court of Appeal's interpretation of events was undoubtedly correct it proceeded to consider whether injuries sustained in the course of 'horseplay' were conceptually similar to cases arising from sporting injury. That question being answered in the affirmative, the Court of Appeal went on to hold that the 'sports torts' cases were the appropriate authorities upon which this case should be determined. Consequently, the Court of Appeal judgments refer exclusively to previous sports injury rulings, notably (but not exclusively) *Caldwell v Maguire*⁴ and the particularly problematic case of *Wooldridge v Sumner*.⁵

In this paper it is argued that these sports injury cases bear but a passing resemblance to *Blake*, for what determines whether a particular activity is a 'sport' does not reside in those factors that the Court of Appeal identified. Although it is tempting to regard an activity as a sport simply by virtue of the fact that it possesses certain traits, 'horseplay' is far removed from sports practices and the Court of Appeal's contention to the contrary has little to commend it. Worse, the decision to approach the case as analogous to a sports injury claim may well have been avoided had the courts been made aware of a case that was far more relevant than any of the cited sports injury cases – namely the Court of Appeal's decision in *Mullin v Richards*.⁶

This paper will thus present a brief analysis of *Caldwell* before moving on to the facts of *Blake* and the judgment therein. A discussion of *Mullin* will show that a proper consideration of it would have circumvented some of the difficulties that may arise in future horseplay cases, for *Blake* carries with it the potential for undesirable consequences for personal injury cases that arise out of horseplay where the defendant is a minor instead of, or in addition to, a local education authority or similar.

The ruling in *Caldwell v Maguire and Fitzgerald*

Caldwell was a professional jockey who sustained injury when the two defendants caused his mount to collide with an inside rail during a race. In dismissing Caldwell's claim in negligence the trial judge found that, although the defendants had certainly been careless and their actions had been in breach of the Rules of Racing, they were not liable for the claimant's injuries.

On appeal, the Court of Appeal upheld the first instance decision and approved⁷ the trial judge's enunciation of certain principles that

the courts ought to consider in determining whether the duty of care has been breached in a sports injury case, namely:

- That each participant in a lawful sporting contest owes a duty of care to all other participants;
- That duty is to exercise all care that is objectively reasonable in the prevailing circumstances for the avoidance of injury to other participants;
- The prevailing circumstances include the sport's objectives, the demands it makes upon contestants, its inherent dangers, its rules, conventions and customs and the standards, skill and judgement that may be reasonably expected of a participant;
- Bearing in mind the nature of sport and the test outlined above, the threshold of liability will be high. Proof of mere error of judgement or a lapse of skill or care will not be sufficient to establish breach of duty;
- In practice, it may be difficult to prove a breach of duty unless there is proof that the defendant's actions amounted to a reckless disregard for another's safety.

On appeal, it was argued that the last two points were 'unduly restrictive', and although that criticism was rejected the Court of Appeal stressed that the threshold for liability was a high one. Judge, LJ held that there was a distinction in sporting contests between conduct that could properly be regarded as negligent and that which amounted to 'errors of judgement, oversights or lapses of attention' of which any participant might be guilty:⁸ some mistakes are an inherent part of playing the game and should not result in legal liability. The Court of Appeal further stressed that the last of these points is an expression of the degree of evidence required to prove a breach and did not perceive it as the creation of a new legal standard of care. *Caldwell* is certainly not authority for the proposition that the standard of care is 'reckless disregard' in the sense of that which has mistakenly been taken to pertain to cases that concern injuries inflicted by sports participants – a confusion that has arisen because *Wooldridge v Sumner* has been much misunderstood. The enunciation of those five principles means that *Caldwell* ought to have heralded the demise of 'reckless disregard' as anything other than an evidential standard,

The ruling in *Blake v Galloway* and the difficulties with it

In *Blake* the 15 year-old applicant was struck in the eye by a 4cm-long piece of bark thrown by his friend, also aged 15. The accident occurred during what the judge at first instance described as 'high-spirited and good-natured horseplay'¹⁰ involving the parties and three other boys of the same age. There was no intention to injure and the boys had not been deliberately aiming the bark chippings at one another's heads, but at first instance the judge held the duty of care had been

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1 [2004] EWCA Civ 814.

2 The quintet had met at residential holiday accommodation in South-West England:

www.helpfulholidays.com/property.asp?ref=L35&year=2005 (last accessed 20th February 2006).

3 Hunter-Jones J "In Defence of *In Loco Parentis* as the Standard of Care for School Children" (2005) 6 *Education Law Journal* 173.

4 (2002) PIQR 6.

5 [1962] 2 QB 43.

6 [1998] 1 All ER 920.

7 (2002) PIQR 6, para 30-41 per Judge, LJ.

8 (2002) PIQR 6, para 37.

9 [1963] 2 QB 43.

10 [2004] 3 All ER 315at 317.

breached; rejected a defence of *volenti* on the grounds that the claimant did not consent to the specific risk of injury to the head, but reduced damages in the agreed sum of £23,500 by 50% to reflect contributory negligence. On the issue of negligence the judge held 'I do not think that...the defendant took sufficient care to make sure that injury to the applicant's head did not take place...In the particular circumstance of this case there was, although consent to participate in a game which might have caused injury, no consent to the injury to the applicant's face'.¹¹ Put another way, the judge was of the view that the participants in the game tacitly agreed to exercise a degree of skill and judgment in avoiding one another's faces; hitting one another elsewhere on the body was legitimate but hitting one another on the face would amount to negligence. This amounts to a fundamental misunderstanding of the whole concept of *volenti*, but this in turn reflects the fact that historically the relationship between the concept and sports injury cases (broadly defined) has been problematic by virtue of the reliance erroneously placed upon the ruling of Barwick, CJ in the Australian case of *Rootes v Shelton*.¹²

On appeal, the Court of Appeal overturned the judge's finding that the injury had been caused by a negligent act, preferring instead to take the view that it 'was a most unfortunate accident'¹³ for which no liability could attach. The judge at first instance had not specifically addressed the duty of care issue, having been invited by counsel for the defendant to proceed on the basis that the key issue was one of consent, but in any event the judge's ruling was 'clearly wrong'.¹⁴ Because the duty of care had not been breached the defendant could not be liable in negligence; there being no negligent act, there were no grounds upon which either *volenti* or contributory negligence should have been considered.

The case gives rise to several difficulties, the most significant of which for the purposes of this paper¹⁵ is the assertion that 'horseplay' is analogous to organised sports practices. With respect, this is not a contention that can withstand serious scrutiny. Dyson, LJ said the similarities between the two were physical contact or the risk thereof; the making of instinctive decisions by participants in response to the actions of others; and the possibility that the physical activity results in a risk of physical harm. He felt the only difference between a sport and what occurred in *Blake* was the absence of formal rules, but he did not regard that as particularly significant. However, that failure to appreciate the significance of the rules of sports practices undermines the credibility of the whole judgment. The purposes of the rules of sports are either to make it more interesting to gamblers (hence the use of gloves in boxing and the handicapping system in horseracing) or to regulate what the participants may or may not do in their quest for excitement.¹⁶ What was at stake in *Blake* was a mere diversion, not a pursuit that any of the participants could win. In marked contrast to the motivations of sports participants (particularly the professionals in both *Wooldridge* and *Caldwell*) the children would simply stop playing and move on to something else when they got bored or distracted. If there are no formal rules, whether they be written down or not, there is no sport and any attempt to draw an analogy between the two is destined to lack credibility.

Dyson, LJ also stated that 'no authority has been cited to us dealing with negligence in relation to injury caused in the course of horseplay as opposed to a formal sport or game'.¹⁷ While that was indeed the case, the mere fact that no authorities are cited does not mean they do not exist, and with that in mind, a far more appropriate authority to cite in *Blake* would have been *Mullin v Richards*.¹⁸ It is remarkable that counsel for the defence¹⁹ in *Blake* failed to cite it, preferring instead to advance the 'sports injury' line of cases and contend that *volenti* came to the aid of a defendant who, it was accepted by all concerned, had breached the duty of care.

The case of *Mullin* arose after a fifteen year-old schoolgirl sustained an eye injury when engaging in what the court described as 'mock fencing' with a classmate. The girls were hitting one another's 30cm long rulers with force; so much so that the defendant's broke and a shard of plastic entered her friend's eye, resulting in the loss of all useful vision from it. At first instance the court held that the class teacher had not been negligent in her supervision of the girls but that the

defendant had been so. Damages of £27,500 were awarded, subject to a deduction of 50% to reflect the injured party's contributory negligence.

Although the judge referred to the incident as 'mock fencing' on one occasion he consistently defined it as 'horseplay' thereafter, and while a similar incident of 'horseplay' fell to be regarded as analogous to a sport in *Blake* neither at first instance nor on appeal in this earlier case did the courts suggest the event could be so regarded, and on its facts *Mullin* has far more in common with *Blake* than did either *Caldwell* or *Wooldridge*. In *Mullin* and *Blake*, it was held at first instance that the duty of care had been breached but that damages were subject to a reduction for contributory negligence. On appeal in both cases the key issue was whether the ordinarily prudent and reasonable fifteen year-old would have realised the activity gave rise to a risk of injury, and the Court of Appeal overturned the first instance decision on the ground that there was insufficient evidence to justify a finding that the accident was indeed foreseeable. In *Mullin* there was no evidence that the rulers had a propensity to break; there was no evidence that either of the participants had used excessive force in their play; and the practice had not been banned by the school on the ground that it was regarded as dangerous.²⁰ The Court of Appeal in *Mullin* adopted the Australian High Court's approach in *McHale v Watson*²¹ to the relevance of the participants' age to the issue of forcibility, and thus held that what was relevant was whether an ordinarily prudent child of the same age would have appreciated the risk of injury rather than whether an ordinarily prudent adult would have done so.

Conclusion

Mullin gave rise to several issues that would later tax the judge and the Court of Appeal in *Blake*, and factually the two cases - fifteen year-old friends engaging in high-spirited, spontaneous horseplay that culminated in an unfortunate accident in which an (eye) injury was sustained - are sufficiently close to render *Mullin* a far more appropriate authority than were either *Caldwell* or *Wooldridge*. Those two cases had both concerned the activities of equestrian professionals being paid to do their job to the best of their ability, the issue being whether they did it negligently in the circumstances. If the throwing of bits of wood chipping is analogous to a sports practice, then *Blake* creates a scenario under which the throwing of stones, fencing with rulers, snowball fights and traditional playground games like 'tag' and 'bull-dog' could similarly be regarded as analogous. Such cases would thus be dealt with through the application of the *Caldwell* principles - under which, let us remember, the threshold of liability is a high one, the proving of which involves adducing evidence of a 'high degree of

11 [2004] 3 All ER 315 at 318.

12 (1967) 116 CLR 383; McArdle D and James M "Are You Experienced? 'Playing Cultures', Sporting Rules and Personal Injury Litigation after *Caldwell v Maguire*" (2005) 13(3) *Tort Law Review* 193

13 [2004] 3 All ER 315 at 323 per Dyson, LJ

14 [2004] 3 All ER 315 per Dyson, LJ.

15 But see McArdle D and James M "Are You Experienced? 'Playing Cultures', Sporting Rules and Personal Injury Litigation after *Caldwell v Maguire*" (2005) 13(3) *Tort Law Review* 193; McArdle D "The Enduring Legacy of Reckless Disregard" (2005) 34(4) *Common Law World Review* 316; James M and McArdle D "Player Violence or Violent Players? Vicarious Liability for Sports Participants" (2004) 12 (3) *Tort Law Review* 131

16 Elias N and Dunning E *Quest for Excitement: Sport and Leisure in the Civilising Process* Blackwell 1986.

17 In similar vein, Baker J in a first-instance ruling in *Etheridge v Kitson* (1998) unreported 14th December made

the point that 'it seems unusual that there has been no more authority in this country (on the matter of what would be ordinarily prudent behaviour on the part of a fifteen year-old) than there has.' In that case the court relied upon *Mullin* and *McHale* and, again, made no reference to the sports personal injury cases.

18 [1998] 1 All ER 920.

19 I am indebted to my colleague Bill Stewart for reminding me that counsel for the claimant would also have been obliged to draw the case to the court's attention even if were adverse to the claimant's argument. While one can argue that, once all parties had agreed the duty of care had been breached *Mullin* was not 'in point' in *Blake*, it remained at the very least potentially persuasive or helpful to the court. One other case on point here is the Australian first-instance ruling in *Copping v State of South Australia and Lightbody* [1997] SADC 3632.

20 Contrast with *Kearns v Kent CC* [2002] EWCA Civ 1539.

21 (1966) 115 CLR 199.

carelessness' which may in practice require evidence of a reckless disregard for the claimant's safety. Even taking into account the age of the participants, this invokes a standard of care that might not fall far short of behaviour that is tantamount to criminal and thus raises implications about an insurance company's obligation to indemnify the defendant,²² as was at issue in the Australian case of *Copping v State of South Australia and Lightbody*.²³ Worse, liability for injuries thus sustained may even be dealt with on the basis of the utilisation of 'the tort that never was' - the mythical test of 'reckless disregard' for which *Wooldridge* is supposedly the authority but which was, in reality, nothing more than an articulation by Diplock and Sellers, LJ of

an evidential standard. Far more preferable would be for *Blake v Galloway* to be overruled to the extent that it purportedly applies *Wooldridge*, and, in any subsequent cases on the question of young persons' liability for horseplay injuries, for *Mullin v Richards* to be properly advanced as the relevant authority.

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²² James M "Liability for Professional Athletes' Injuries: An Analysis of Where the Risk Lies" [2006] 1 *Web Journal of Current Legal Issues*.

²³ [1997] SADC 3632.

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Player's Contracts in Bulgarian Football

by Tzvetelin Simov and Boris Kolev*

On 15 November 2005 SENSE, in cooperation with the ASSER International Sports Law Centre and Ernst & Young Bulgaria, organized a seminar on "Player's Contracts in Professional Football - EU Law and the Challenge for Bulgaria" in Sofia. Speakers were Dr Robert Siekmann, the Centre's Director, Roberto Branco Martins, lecturer on Labour and Sport at the Law Faculty of the University of Amsterdam and research fellow of the Centre, Milen Rusev, senior partner at the law firm of PI Partners Dinova & Rusev, Tzvetelin Simov, managing director of Bulwark Ltd., and Boris Kolev, associate in the law firm of Djingov, Gouginski, Kyutchukov, and Velichkov. The seminar's chairman was Julian Mihov, international tax manager at Ernst & Young Bulgaria.¹

The practical purpose of the seminar was to respond to the then popular idea in Bulgarian football to shift players' contracts from the regime of employment law to that of private law. Bulgarian football officials and the Association of Bulgarian Football Players hereby sought to solve the difficulties of football clubs who were unable to pay their part of the social security contributions due for their players on time, which meant they risked losing their licence and the right to participate in the championship.

At the end of the 2004-2005 season the Bulgarian champion CSKA Sofia, for example, risked losing its license for the next championship due to unpaid debts to the National Social Security Institute (hereinafter: NSSI). CSKA managed to solve its problems and retain its license, not however as a result of paying its debt, but due to an agreement between CSKA and the NSSI allowing CSKA to pay off its debt in instalments. The debt was therefore not yet considered due at the time of licensing for the next season. Another football club from the Bulgarian A division, Pirin Blagoevgrad, attempted to apply the same strategy. However, it turned out that the repayment agreement submitted to the Licensing Commission was a forgery and the club was expelled from professional football.

The replacement of employment law contracts with private law contracts and equating football with a liberal profession and players with self-employed persons were considered suitable measures for addressing the problem concerning the payment of social security contributions. In order to find a legal basis for the adoption of these measures Bulgarian football officials relied on the provision in the Bulgarian Social Security Code authorizing the NSSI to propose to the Council of Ministers a procedure for dealing with the social security aspect of self-employment. They attempted to convince the Director of the NSSI to propose that football players be included in the list of persons pursuing a liberal profession by means of an amendment to the Ordinance of the Council of Ministers on the Social Security of Self-Employed Persons (hereinafter: the Ordinance).

More specifically, the seminar on 15 November was called upon to provide, *inter alia*, answers to the following questions:

1. May football be considered a liberal profession by nature, notwithstanding the legal possibilities for its treatment as such?
2. Are private law contracts and the status of self-employed person for Bulgarian football players compatible with Bulgarian law, FIFA Regulations and the European *acquis* in the field of sports with a view to the Bulgaria's accession to the EU as scheduled for the beginning of 2007?

A distinguishing feature of a liberal profession is that persons who practise such a profession do so at their own risk and expense. By contrast, employment is defined in EU case law and Bulgarian legal doctrine as a relationship, whereby a person for a certain period of time

performs services for and under the direction of another person, in return for which he/she receives remuneration. Persons pursuing liberal professions enter into private law contracts and owe as consideration certain results agreed between the parties, unlike employees, whose main obligation is to provide labour to their employers. In order to be able to clarify which of these two definitions best suits the relationship in sport we will examine the parallel between individual sports and collective sports.

In Bulgarian sports there are many examples of individual athletes who might be considered self-employed persons pursuing a liberal profession. For instance, Bulgarian top sprinter Ivet Lalova prior to being severely injured took part in a competition in Greece on behalf of the Greek club Panionis. At the end of the competition, i.e. upon the fulfilment of the duties for which she had been contracted and for which she had received remuneration, which was to run the 100 metres once or twice (depending on the number of participants), the contract expired automatically. Would it be justified to claim that Panionis was Ivet Lalova's employer, who could require from her the performance of services for a certain period of time, who had disciplinary power over her and who bore or shared the risks associated with her activity including the social security risks?

A similar example is provided by the young Bulgarian tennis player Cecil Karatancheva who participated in a tournament in France on behalf of the tennis club Cherno More Elit Varna and in the German Tennis Bundesliga for the German tennis club Moerns 08, besides participating individually in tournaments of the World Tennis Association. Which of the aforementioned organizations could reasonably be considered to be the employer of Cecil Karatancheva?

These two examples demonstrate that arguments in favour of granting individual athletes the status of self-employed persons can be very convincing and well-founded. Of course, individual athletes are not prohibited from concluding employment contracts, but for them this choice does not logically arise out of the specifics of the contractual relationship which they establish.

The situation is very different in respect of the relationship between a club and a player in collective sports and particularly in football. If a given football player were entitled freely to enter into numerous contracts with different clubs, each regulating his participation in a single match or series of matches or in a particular tournament, this would mean that a player from the Spanish Primera Division, for instance, could play one match for Barcelona and play another match in the next round for Real Madrid. Given the current state of affairs in world football this is clearly absurd.

The actions of every individual sportsman within the collective are directed by the coach or the manager of the club. Individual players are not able to perform the sport on their own, but only as part of the team. Furthermore, players cannot train individually and cannot just attend the official matches of the club, but instead have to comply with a previously established training schedule. Players are obliged to contribute labour whenever the coach so requires. Professional football players are not allowed to play for another club during the term of validity of their contract, which means that in practice they are only able to sign one professional contract at a time, based on which they should be covered by social security accordingly. Therefore, the

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1 This article also discusses some points presented by the other speakers at the seminar.

definition of employment as developed in EU case law² fits the relationship between players and clubs one hundred percent..

Although materially speaking quite artificial, a regime by which football players are treated as self-employed persons for tax and social security purposes could be successful. The question however is whether Bulgarian law as currently in force allows this?

The Physical Education and Sports Act (hereinafter: Sports Act) currently in force does not contain any rules on the player-club relationships. Only one provision lists among the requirements to be met by professional sports clubs that they must contractually determine the rights and obligations of professional athletes according to their status. This means that at least where the Sports Act is concerned there are no statutory obstacles for any particular type of contract to be concluded.

Still, the freedom to choose any type of contract is not entirely unlimited. Pursuant to the Bulgarian Labour Code, all contracts concerning the provision of labour must be concluded in the form of an employment contract. Consequently, regardless of what the parties call their contract, it will be considered an employment contract if it concerns the provision of labour or contains the necessary elements of an employment relationship. This provision is intended to prevent employers from circumventing the tough obligations under the Labour Code to the detriment of employees. The applicability of the Labour Code cannot be contested by arguing the supranational FIFA Regulations for the Status and Transfer of Players (hereinafter: FIFA Regulations) either, as these explicitly require that contracts shall be in accordance with applicable law.³ With the absence of a "sports" exception in the Labour Code and of detailed regulations concerning the player-club relationship in the Sports Act which could exclude the application of more general rules, the Bulgarian Labour Code will generally apply to sportsmen.

The Bulgarian Income Tax Act further provides a definition of liberal professionals by expressly listing professions which are qualified as liberal. A person pursuing a liberal profession would also be any other person whose activities are performed for their own account. Football players are neither included among the professions listed, nor do they perform their activity for their own account as we have seen above. Therefore, any amendment of the Ordinance which is not synchronized with corresponding and preceding amendments of the Income Tax Act would lead to contradictions between secondary and primary legislation. Such contradictions could only be avoided if the legal basis for the amendment were provided for in a legal instrument that within the hierarchy of legal norms enjoyed the same status as the Income Tax Act, for example, the Sports Act. However, it is obvious that such an amendment of the Sports Act with respect to sportsmen in collective sports would lack all justification.

A possible shift to private law contracts as the legal basis for player-club relations in Bulgarian football is not supported by EU law or the FIFA Regulations either. The Bosman case clearly refers to football players as "workers"⁴ and the definition of employment as developed by the European Court of Justice clearly fits club-player relations in all collective sports. The FIFA Regulations provide that every player designated as non-amateur by his national association shall have a written contract with the club employing him.⁵ At first glance, the FIFA Regulations do not seem to indicate that a specific type of contract is mandatory, but they do define club-player relations as an employment relationship by their use of the term "employing", which would not be used in respect of individual service providers. Consequently and inevitably, where there is an employment relationship, the contract in question must be an employment contract.

This confirmation of the employee status of Bulgarian football players however does not resolve the problems concerning the social security contributions and compliance with the UEFA licensing criteria. Despite the absence of support in EU law and the FIFA Regulations for the introduction of private law contracts for footballers, ample reason may be found in the law and practice of other countries in Central and Eastern Europe with a legal and economic background comparable to that of Bulgaria and with a domestic football competition of comparable quality. Countries like the Czech

Republic, Poland, Slovakia and Slovenia are still reluctant to introduce employment law as the legal basis for contracts with professional football players, even if they are now EU Member States. According to football representatives in these countries, avoiding the strict employment law regime is a precondition for the employers (i.e. the clubs) to survive as profitable business enterprises. A football official from the Czech Republic even stated that if Czech employment law should become applicable to footballers, most Czech clubs would go bankrupt.⁶

If even the most economically powerful countries from Central and Eastern Europe face such problems, the situation in Bulgarian football is not likely to be radically different. The withdrawal of his investment by the wealthy and well-known president of one of the leading Bulgarian football clubs Levski Sofia, Michael Chorney, was one of the first signs that the practice of funding clubs out of a love for football alone without seeking a profit would probably come to an end very soon. Without a good performance by the Bulgarian football clubs in European club competitions such as the Champions League and the UEFA tournament which offer the most scope as sources of income and without important (from a financial point of view) transfers of Bulgarian players to foreign clubs coupled with a lack of state support, the gradual reduction of the value of broadcasting rights for the local championship and tightened criteria for licensing, clubs are facing increasing difficulties in their attempts to cover their running expenses, of which social security and health insurance contributions for their players are part.⁷

The problems therefore do not stem so much from the qualification of the football relationship as an employment relationship, but rather from the consequent application of other provisions of employment law, which are largely unsuited to the specifics of playing football for a living.

First of all, the Bulgarian Labour Code provides for the possibility of the unilateral termination of a fixed-term contract by the employee who may give three months' notice. Players' contracts with their clubs are as a rule fixed-term contracts, which would mean that a football player would be entitled to leave his club at his own discretion without even having completed a single full season with the team. In Lithuania, for instance, the Law on Physical Culture and Sport provides that a professional player may not leave his club until his contract expires and all his obligations towards the club have been fulfilled.⁸ The Bulgarian Sports Act lacks a similar provision, which means that if the Labour Code applies without limitations players are indeed free to leave before the end of the season.

Secondly, employment law does not provide for the payment of compensation to the employer for expenses which the employer has incurred for the purpose of educating and training the player and for improving his skill. Such a provision is necessary to justify any claims for payment of a transfer fee in case the player wishes to change clubs before the age of 23, as both the FIFA and Bulgarian Football Union Regulations provide.

Thirdly, fines are the most commonly used penalty in football, but the Labour Code does not list these among the sanctions applicable to employees.

Finally, the need for athletes to observe a strict health regime often

2 Case 66/85, *Lawrie Blum v. Land Baden-Württemberg* [1986] ECR 2121.

3 Article 4, point 2, of the FIFA Regulations for the Status and Transfer of Players.

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

5 Article 4, point 1, of the FIFA Regulations for the Status and Transfer of Players.

6 See the report "Promoting Social Dialogue in European Football - Candidate Member States" prepared by the Dutch Federation of Professional Football Clubs (FBO) together with the ASSER International Sports Law Centre ("the Report").

7 The long-awaited breakthrough of Bulgarian clubs in European tournaments actually occurred this season. Three Bulgarian clubs, namely CSKA Sofia, Levski Sofia and Litex Lovetch, managed to reach the group stage of the UEFA Cup Tournament. Litex Lovetch and Levski consequently went through to the 1/16 finals. At the time of writing, Levski Sofia is expecting to play a second match against the Italian club Udinese in the 1/8 finals after a successful scoreless draw in the first (away) match.

8 See the Report.

means that club managers have to interfere in the private lives of footballers, while the Labour Code specifically prohibits employers from interfering in their employees' private lives. In case of applicability of the Labour Code, the club would be considered as the employer.

On the whole, the Labour Code favours the employee and does not allow the employer to deviate from its provisions to the detriment of the employee. No doubt this threatens the stability of the sports contract.

In Bulgaria, one possible solution for eliminating the discrepancies would be to insert a provision into the Sports Act which would allow sportsmen to sign special sports contracts and would make the Labour Code applicable only with respect to issues not specifically addressed by the Sports Act. The role of the NSSI in this could be to supervise these contracts so as to ensure the improvement or at least preservation of the basic social rights of footballers according to national employment law.⁹

The implementation of such a solution, however, is far from easy and would require a strong lobby in Parliament. For this reason, Bulgarian football representatives have preferred to try to achieve a similar result through amendments of the Ordinance, which were intended to put football players on an equal footing with actors, notaries, sole traders and other liberal professionals whereby the tax regime for artists would become fully applicable to them and the employment law regime would cease to apply. However, in these attempts no considerations were given to other collective sports, such as basketball, volleyball, handball, etc. which could put forward the same arguments to claim preferred status for players of these sports.

The involvement of other sports organizations was, however, considered as an unnecessary complication. This attitude of the Bulgarian football officials actually reflects the world trend for perceiving law and law-making as instruments for the protection of the interests of a small group, probably with close ties and connections with the public authorities. Bulgarian legislation has recently been enriched with Acts like the Patronage Act, which clearly evidences the tendency for creating privileged regimes for certain classes and professions. Drafts of other Acts like the In-house Legal Counsel Act, the Veterinarians Act, the Agricultural Academy Act and the Act on Independent Evaluators were submitted for discussion in the previous Bulgarian Parliament. In this context, it would not be surprising if the adoption of a special law on the status of football players were also suggested in the future.¹⁰ The trend of the enactment of such laws is the logical result of the fact that law is currently considered more as a collection of ad hoc decisions than as a concept, philosophy or attitude. To deny the nature of law as a corpus juris and as meta-law inevitably gives rise to primitive pragmatism to justify individual decisions and rules.¹¹ In this sense, the Bulgarian football representatives, albeit unconsciously, have acted in compliance with the contemporary perceptions of law. Their failure to procure privileged status for footballers through

amendments to the Ordinance is not likely to prevent them from future attempts at legislative level to attain this goal.

The contemplated change of the status of football players from employees to self-employed persons was relied upon to solve the problem of compliance with licensing rules as it should have affected tax charges, more specifically, should have reduced the tax base by 50% through the deductibility of statutory professional expenses for footballers. Consequently, football players would also have paid less social security and health insurance contributions. The final amount of tax due in such cases is determined on the basis of the annual return at the end of the year. If the annual income of a player would have risen above BGN 50 000 he would have had to register for VAT.

However, the paradox inherent in the entire plan was that even if it had been realized it would not have led to any substantive reduction of the tax and social security burden for the clubs. The new UEFA licensing requirements oblige clubs to keep their net assets at a positive value. To that end, income from players' transfer fees has to be capitalized and its value entered as a long-term intangible fixed asset in the annual financial statements of the clubs. This requirement can already be met under the law currently in operation in Bulgaria. No amendments would therefore be necessary for this reason. However, the true incentive for amendment of the law might be found in the low rate of amortization of group assets, among which playing rights are considered to be included.¹²

The issue of the status of football players in Bulgaria and the type of contract that they play under also has another aspect. With a view to the near membership of Bulgaria in the EU it is very important what legal framework the potential investors in Bulgarian football will face: will it be familiar to them and harmonized with EU law and practice or will it consist of rules that are specific only for Bulgaria? Players are the most precious assets of every football club and for this reason investors have to know clearly what regime covers the players' activities and they have to be able to predict the costs associated with this as well as understand how these costs are reflected in the financial statements of the clubs. From the player's point of view, however, every player should be able to rely on a uniform framework of rights and obligations applying in the common European labour market.

The International Sports Law Journal

⁹ A similar solution is discussed in the Report with respect to Poland.

¹⁰ One precedent for such special legislation in the field of football was the adoption of the Act on the Protection of Public Order in case of Sports Events. Although the title of the Act refers to sports event in general, it was actually intended to address the problem of football hooliganism.

¹¹ See Harold J. Berman, *Law and Revolution, The formation of the Western Legal Tradition*, Harvard University Press.

¹² In 2003, a similar amendment to the Corporate Taxation Act was enacted with respect to the purchase of software as a long-term fixed asset. Currently, the period of amortization of software is 2 years, which is more realistic than the previous period set at 5 years prior to 2003.



SIXTH ANNUAL ASSER INTERNATIONAL SPORTS LAW LECTURE

Nationality and Sport: Public Law v. Sports Law

- with reference to the Kalou case -

Tuesday 4 April 2006

Venue: TMC Asser Institute, The Hague

Opening: 16.00 hours

Chairman: Nicole Edelenbos, Partner Boer & Croon Executive Managers and former Director of Feyenoord Rotterdam
Speakers: Prof. Gerard-René de Groot, Faculty of Law, University of Maastricht
Jelle Kroes, Everaert Immigration Lawyers, Amsterdam
Dr Stefaan van den Bogaert, University of Maastricht

Establishment, Competences, Organization and Functioning*

by Alexandru Virgil Voicu**

Introduction

Arbitration is not a novelty in Romania. Modern judicial institutions began the process of their establishment and development from the 19th century onwards and this process was eased by the political and social regime as it emerged under the Organic Standing Order.¹ In 1865, the rules concerning ad-hoc private law arbitration were amended in Book 4 of the Code of Civil Procedure (Arts. 340-371). Of this amendment, 18 provisions were inspired by the civil procedural law of the Canton of Geneva dating from 1819, 5 provisions derived from French civil procedural law as it was laid down in 1842, and 8 were based on relevant general principles.²

This amendment of private law arbitration remained largely unchanged, despite minor modifications in 1900 and in following years, and even in the 1948 provisions of the Code, up until the year 1993. However, between 1948 and 1990 the amendment was never applied to domestic issues, but only to cases involving foreign rights. Still, the spirit of both private law arbitration and of commercial rights has always been present, both before and after the world war periods, and continues to be present today.³ For this reason, I fully agree with the proposal made by Mr Octavian Morariu, who was the former President of the National Agency for Sport, during the enactment of the law concerning the prevention and proof of doping in sport and of the law concerning the organization and functioning of the National Disciplinary Committee for Sport to rename the Committee as the Court of Sports Arbitration, but the proposal was rejected on the basis of "arguments in connection with the Ministry of Justice".

Court of arbitration for sport

The need to introduce an arbitration institution especially intended for resolving conflicts arising as a result of sports activities caused the 1983 proposal of IOC President E.S. Juan Antonio Samaranch to become reality in the shape of a "court of arbitration, that would operate with a legal department directly or indirectly related to sport".⁴ Therefore, taking into account that organized sport "cannot pretend to be unconnected with the legal order",⁵ the Court of Arbitration for Sport (CAS) was established with its headquarters in Lausanne, Switzerland.

Sports impact on the most diverse areas of society and as such may give rise to a variety of conflicts, ranging from conflicts of a "strictly sporting" nature to conflicts concerning economic matters. In light of this, the CAS has a general competence to hear all disputes which may arise during or after sports activities and in connected fields, e.g. conflicts arising out of sponsorship contracts, management contracts, contracts between organizers and advertisers, contracts concerning TV broadcasting rights, service contracts, employment contracts, violations of the World Anti-Doping Code, hooliganism, doping test procedures and penalties,⁶ etc.

The CAS's involvement results from an arbitration agreement which is concluded either before or after the dispute arises. The CAS may act as the first instance to hear a case if the parties concerned request this. The CAS may also act as the last instance in cases where the dispute first has to be brought before the judicial bodies of a sports federation, a National Olympic Committee, etc. The CAS operates using a simple and clearly defined procedure which allows a decision to be rendered and executed as swiftly as possible; only in cases in which the problem is of an exclusively property law nature will the parties involved have to contribute towards procedural costs

in accordance with a prior agreement, but in all other cases the CAS renders its services for free. In the exercise of its functions the CAS is completely independent from the IOC. In order to achieve the swift resolution of disputes arising from sports activities, but also to save the considerable costs involved in hearings before ordinary courts, many federations and national and international associations have provided a special clause in their statutes stating that the CAS is the exclusively competent appeals body to review decisions of the sports bodies' internal judicial organs. Even the IOC has decided that in certain cases disputes concerning IOC decisions under the Olympic Charter may be resolved through arbitration before the Court of Arbitration for Sport (Olympic Charter, Chapter II, Article 19, point 4). The CAS Statute in addition to the regular arbitration procedure also provides for accelerated reconciliation proceedings upon the request of either party and with the consent of both parties.

The need to introduce sports arbitration

Obviously, there are many more judicial bodies worldwide involved in sports arbitration which are too numerous to describe here. Suffice it to say that the expansion of professional sports often necessitates some kind of review of the sports organizations' decisions which affect the rights of private individuals. It is to be expected that such disciplinary bodies have the necessary experience concerning the regulations applicable in their particular sport, but they do not always have the required knowledge of criminal law, private law, employment law, tax law, social security law, etc.⁷ Participants in sports activities are and should also be subjects of legal rules applying to all citizens. The fact that he or she is a famous athlete or that a sports club may act as a legal person does not absolve those in breach of state laws or public order of liability under the law. Violations of the sporting rights of others cannot be justified by simply brandishing the term "sport" or "athlete". For this reason, the positive need has emerged to bring into existence courts of arbitration for sport, even if they go by a different name, like the National Disciplinary Committee for Sports in Romania.

* Paper presented at the conference organized on the occasion of the 80th anniversary of the Faculty of Physical Education and Sport Sciences of the Semmelweis University, Budapest, 26-28 October 2005.

** Professor at the Babes-Bolyai University, Faculty of Physical Education and Sport, Cluj-Napoca, Romania.

1 Fischer-Galati, St., Giurescu, C. D., Pop, I. A., "O istorie a românilor", Fundatia Culturală Română - Centrul de Studii Transilvane, Cluj-Napoca, 1998, pp. 202-204.

2 Ciobanu, V. M., "Tratat teoretic și practic de procedură civilă", Vol. II, Editura National, Bucuresti, 1997, p. 595 și urm., cu trimitere la Popa, M., Ciobanu, V. M., *Aspecte privind arbitrajul ad-hoc*, Revista de Drept Comercial nr. 1/1991, pp. 25-26.

3 Ibidem, p. 595, cu trimitere la Vasilescu, P., "Tratat teoretic și practic de proce-

dură civilă", Vol. IV, Iasi, 1939, pp. 98-218.

4 Gilbert Schwar, *Tribunalul de Arbitraj al Sportului*, în "Primul seminar juridic. Legislatia Sportivă în Europa: Evoluție și armonizare, Moscova - 19-20 septembrie", Comitetul Olimpic Român, Centrul de Cercetări pentru Probleme de Sport, Bucuresti, 1992, pp. 130 și urm.

5 Ibidem.

6 Andrea Pinna, *The Trial and Tribulations of the Court of Arbitration for Sport - Contribution to the Study of the Arbitration of Disputes concerning Disciplinary Sanctions*, The International Sports Law Journal (ISLJ) 2005/3/4 pp. 8-17.

7 "Study on national sports legislation in Europe", Council of Europe Publishing, F-67075 Strasbourg Cedex, 2. 5. 3., lucrare tradusă și editată în l. română de Centrul de Cercetări pentru Probleme de Sport, Bucuresti, 2000.

The National Disciplinary Committee for Sport (NDCS)

Legal form and headquarters of the NDCS

The NDCS was established by law no. 551 of 30 November 2004 concerning the organization and functioning of the National Disciplinary Committee for Sport.⁸ According to the Article 1 of this law the NDCS is organized and functions as a deliberation body of the National Agency for Sport without individual legal personality, but independently applying the judicial competences attributed to it under Article 2 of the law. The NDCS operates on the basis of regulations concerning its organization and functioning which have to be approved by an order of the President of the National Agency for Sport. The NDCS has its headquarters inside those of the National Agency for Sport, i.e. in Vasile Conta Street no. 16, sector 2, Bucharest.

Jurisdiction of the NDCS

The Committee is competent to hear appeals against decisions in the last instance when all other remedies have been exhausted. These decisions may originally have been made by internal disciplinary committees or other organs with disciplinary duties that are part of the national sports federations' organizational structures, by district associations or by the municipality of Bucharest concerning sport, by professional leagues and by the Olympic (and Sports) Committee. The Committee is further competent to hear appeals against decisions of the National Committee of Action against Violence under Article 2(1). According to Article 2(2) the Committee may hear appeals on the following types of violations: a) non-compliance with provisions of the statutes and regulations of the sports organization when such non-compliance is punishable through penalties imposable by the internal disciplinary committee; b) unsportsmanlike behaviour or attitude or gestures of aggression against referees, fellow athletes, officials or spectators; c) public statements by leaders, technicians, referees or athletes which may inspire team or spectator violence; d) unjustified absence from competitions when called upon to play in a national team; e) manipulation or modification, directly or through another person, of sports equipment resulting in a violation of technical requirements irrespective of the particular area of sport; f) unauthorized participation or non-participation in or backing down from any contest or competition; g) any other violations that fall within the competence of the internal disciplinary committee.

The jurisdiction of the NDCS under paragraphs 2 and a) may be invoked by any interested party and appeals may be lodged within 15 days from the publication of the contested decision.

The procedural rules under which the Committee can hear appeals are to be approved by an order of the President of the National Agency for Sport. From the moment when the Committee has been seized of a case the procedure becomes mandatory. Appeal against the decision lies to the administrative law section of the Court of Bucharest within 15 days from the decision's publication. If the parties do not opt to make use of the resolution procedure before the Committee they can submit the case to an ordinary court in accordance with the general rules of law under Article 282(2) ("the decisions of judicial bodies concerning objections against the decisions of public judicial authorities and other judicial organs are not open to appeal unless the law states otherwise") and Article 299(3) of the Code of Civil Procedure (paragraph abrogated by point 45 of Article I of Law no. 219 of 6 July 2005 concerning the Government's approval of the emergency ordinance (receiving order) no. 138/2000 for the modification and completion of the Code of Civil Procedure, published in the Official Monitor, Part I, no. 609/14 of July 2005).

NDCS staff

The Committee has 61 members. Members of the Committee must be natural persons and in addition must fulfil all of the following requirements: a) be a Romanian national; b) have sufficient mastery of private law; c) have an impeccable reputation; and d) be licensed to practice law or hold a diploma in legal sciences or in physical education and sport or have known experience in sport.

It is further stipulated that in order to be lawfully established at least 21 of the NDCS's members must have studied law, i.e. roughly one third (Article 3(3) of law no. 551/2004).

NDCS members are appointed in accordance with the rules of procedure along the following lines: a) 25 members are appointed by the National Agency for Sport; b) 10 members are appointed by the Romanian National Olympic Committee; c) 15 members are appointed by the national Olympic sports federations; d) 8 members are appointed by the national non-Olympic sports federations; e) 2 members are appointed by the professional leagues; f) 1 member is appointed by the National Academy of Physical Education and Sport. NDCS members are granted a conference allowance of 25% of the economic middle income for each conference, to a limit of 50% per month.

Directorate Council of the NDCS

The Committee is led by a Directorate Council consisting of 7 members. Committee and Directorate Council members are given a four-year mandate. This mandate can be renewed only once. Any member of the NDCS appointed in accordance with the requirements set out above can be a member of the Directorate Council. Membership of the Directorate Council is divided as follows: a) 3 members from the group appointed by the National Agency for Sport; b) 1 member from the group appointed by the Romanian National Olympic Committee; c) 1 member from the group appointed by the national Olympic sports federations; d) 1 member from the group appointed by the national non-Olympic sports federations; e) 1 member from the group appointed by the professional leagues.

The Directorate Council has the following tasks: a) validate the composition of panels; b) adopt all the necessary measures for the parties' procedural protection; c) fulfil any other functions as mentioned in law no. 551/2004 or in the NDCS regulations. The Directorate Council is headed by a president, who is assisted in the fulfilment of his duties by a vice-president.

The president of the Directorate Council's main task is the organization of the panel and the administration involved in the submission to and hearing by these panels of cases. The vice-president of the Directorate Council assists the president in the fulfilment of these duties and may also lawfully deputize for him. The president and vice-president are elected from among and by the members of the Directorate Council by secret ballot.

The Committee's secretariat is provided by the National Agency for Sport taking into account the maximum number of employees it is allowed to have and the amount set aside for salary expenses under the Agency's budget. The secretariat has the following tasks: a) receiving and recording requests, memorandums and documents from the parties in accordance with the law and the NDCS regulations; b) archiving documents received; c) ensuring the circulation of documents for the formation of the panel and obtaining acceptance forms and compatibility statements from the parties in respect of the panel members nominated by them; d) taking care of the necessary formalities for convening the Directorate Council; e) fulfilling any other tasks under the law or the NDCS regulations.

The Directorate Council are called by the president to meet twice a year or however many times necessary. The Directorate Council is lawfully convened if at least half of its members plus one are present. Decisions of the Directorate Council are adopted by the majority vote of the members present.

The Committee hears appeals in panels of 3 members. Panels are formed as follows: 2 members are appointed by the president of the Directorate Council upon the proposal of the parties to the dispute, while the third member who is also to act as president of the panel, is appointed by the president of the Directorate Council on his own initiative. Only members of the Committee can be nominated and appointed as panellists.

⁸ Legea no. 551 din 30 noiembrie 2004 privind organizarea și funcționarea Comisiei Naționale de Disciplină

Sportivă, publicată în Monitorul Oficial al României, Partea I, no. 1.161 din 8 decembrie 2004.

Incompatibilities

Committee members cannot be nominated or appointed as panellists when they have a personal interest in the outcome of the dispute. Members of the Directorate Council can only act as panellists in panels hearing challenges of regular panel members. The parties are to deposit their nominations for panel members from among the Committee members at the secretariat. The secretariat then requests from the nominees an acceptance form and a statement of compatibility. Declarations are given at the members' own responsibility, but are scrutinized by the Directorate Council. In case incompatibilities are stated or found to exist or a member does not accept his/her nomination, the parties are so notified by the secretariat and the nomination procedure is repeated for the party whose member was incompatible or refused the nomination. The verification of compatibility for the president of the panel is also carried out by the Directorate Council based on the same principles. Within 5 working days from the date of acceptance by and verification of the compatibility of all panel members proposed by the parties, the president of the Directorate Council validates the formation of the panel. Apart from through the prior compatibility screening described above, parties may at any time during the proceedings up to the expiry of the fixed period after which deliberations are to begin challenge any member of the panel in accordance with the NDCS regulations. Challenges are decided by members of the Directorate Council.

Expenses and taxes

The Committee's functioning expenses are paid from the state budget, through the budget of the National Agency for Sport. The Committee's dispute resolution services are exempt from tax.

Regulations for the organization and functioning of the NDCS

In accordance with Article 13 of law no. 551/2004, the regulations con-

cerning the organization and functioning of the NDCS⁹ and the NDCS rules of procedure¹⁰ were approved by an order of the president of the National Agency for Sport, "within three months of the law's entry into force".

Final provisions

Within 6 months from the law's entry into force, the national sports federations, district associations and the Bucharest municipality, sports clubs, professional leagues and the Romanian National Olympic Committee had to begin bringing their statutes into line with law no. 551/2004.

After 6 months of the law's entry into force any decisions rendered by the internal disciplinary committees or similar bodies of sports organizations in cases that according to the new law fall within the jurisdiction of the NDCS shall be null and void.

Conclusions

The establishment of the National Disciplinary Committee for Sport in Romania will certainly contribute to bringing sport further within the reach of the law. In addition, decisions concerning sport rendered by the Committee or by ordinary courts as the case may be will contribute to the formation of a body of case law and doctrine, which is essential for bringing sport within the framework of civilized behaviour and good morals, within the limits of the law and legal responsibility.

The International Sports Law Journal

⁹ Ordin no. 207 din 27 mai 2005 pentru aprobarea Regulamentului privind organizarea și funcționarea Comisiei Naționale de Disciplină Sportivă, publicat în Monitorul Oficial al României, Partea I, no. 601 din 12 iulie 2005.

¹⁰ Ordin no. 208 din 27 mai 2005 privind aprobarea Regulamentului de procedură al Comisiei Naționale de Disciplină Sportivă, publicat în Monitorul Oficial al României, Partea I, no. 601 din 12 iulie 2005.



SECOND ASSER/SINZHEIMER ANNUAL INTERNATIONAL SPORTS LAW LECTURE

organised in cooperation with the Hugo Sinzheimer Institute for Labour Law

The Court of Arbitration for Sport and Lex Sportiva

Tuesday 9 May 2006

Venue: Faculty of Law, University of Amsterdam

Opening: 15.30 hours

Chairman: Dr Robert Siekmann, ASSER International Sports Law Centre
Speakers: Prof. Ian Blackshaw, Member of CAS
Domenico Di Pietro, Mayer Brown Rowe & Maw, London
Ousmane Kane, CAS
Roberto Branco Martins, Hugo Sinzheimer Institute
Dr Janwillem Soek, ASSER International Sports Law Centre
Emile Vrijman, Scholten Law Firm
Prof. Andrea Pinna, Faculty of Law, Erasmus University
Rotterdam

10 years of Bosman

The Fight for Player Freedom Continues*

Bosman is and always will be a landmark judgment in sports law. By its ruling in Bosman in 1995 the European Court of Justice underlined that sport, just like any other economic activity, is subject to ordinary rules of European law. Until then, the federations had been convinced that sport was 'specific' and only needed to abide by its own laws. Today, however, it is common knowledge that all are to respect the law, including the federations.

The Bosman case confirmed two principles.

1. A professional footballer at the end of his contract is free. No transfer fees can be demanded for him: freedom of movement and freedom of employment.
2. European clubs may not restrict the number of players from EU countries: no discrimination based on nationality.

Both these principles had a huge impact. According to the chairman of F.C. Antwerp this meant a four thousand million Belgian francs loss in transfer fees for this Belgian club. Moreover, EU boundaries were thrown wide open for players from EU countries.

Eastern Europe

The subsequent Balog case (1991) concerned a Hungarian who played for Charleroi. His contract had expired, but five million Belgian francs were demanded for him as a transfer fee. Charleroi argued that the Bosman ruling only applied to EU countries and at the time Hungary was not an EU Member. In this case too it was held that players from other European countries were free after the expiry of their contract.

Worldwide

Very recently (December 2005) Latin American professional football players also regained their freedom at the end of their contract after the FIFA's Arbitration Committee (*Dispute Resolution Chamber/ DRC*), which is composed of representatives of the football federations and the players' union FIFPro, terminated the Uruguayan transfer arrangement under which players after the expiry of their contract could still be unilaterally obliged to play for their club for a further three years. The case in question concerned two Uruguayan professional footballers, Bueno and Rodriguez, who had signed an agreement with the French club PSG and were not allowed to make the switch. The additional requirement of another three years' compulsory playing was declared void.

Extension of contracts

Players are therefore free at the end of their contract. In practice, however, this is far from the truth. Players simply do not reach the end of their contract anymore. They now sign contracts for a definite period, around 5 years or longer (de De Boer brothers signed on for 7 years, while Ronaldo signed on for 9) and selling begins in the course of the contract. Players who are approaching the end of their contract are put under pressure to renew. One example was the case of De Beule where the club's chairman made it quite obvious that if De Beule failed to renew his contract he would no longer be playing in the first team. These bold words led to a breach of contract. De Beule was released and now plays for a different club. But De Beule is only the tip of the iceberg. Pressure is usually applied in silence. Stoica (Anderlecht) was another example of someone who got into trouble for refusing to renew his contract, but he finally left to join FC Brugge for free. This, however, is truly the exception.

Another way to circumvent Bosman is the clause inserted in players' contracts for a definite period whereby the club unilaterally

reserves the right to extend the agreement. This has apparently been tried in the Netherlands and in other countries besides (Italy, among others). Obviously, such a provision turns the employment contract into one of indefinite duration as the player can no longer be certain for how long the contract will apply, which means that the player can terminate the agreement by simple notice.

Human trafficking

That human trafficking still abounds in sport becomes clear from amongst other things the fact that Beveren was ordered by a tribunal (TAS) (*Arbitration Tribunal for Football/ATF*) in Berne, Switzerland, to pay over one million euros equalling 30% of the transfer fees for the sale by Beveren of black professional footballers which were supplied to Beveren by an Ivory Coast football nursery.

Repayment of training fees

FIFA and UEFA have not sat idly by either, and have devised ways to start the money flowing again. In 2004, FIFA set up a worldwide system of repayment of training fees under which players who sign their first professional contract before the age of 23 have to reimburse the club that trained them. More specifically, reimbursement is required for training received between the age of 12 and 21. The sums involved are not to be sniffed at. For example, a player trained by Anderlecht for ten years would have to repay 70,000 euros per year's training received, i.e. 700,000 euros in all.

Bosman II

Clearly, this is once again in breach of the free movement of workers in the European Union and goes against Bosman. It is therefore no surprise that a case is already pending against the FIFA system, as it happens in Denmark. No less than ten professional footballers' unions and FIFPro support the Danish players' union in this new legal battle which will once again have dramatic results for football.

"Home-grown players"

The nationality question has also been placed on the agenda. UEFA wants to promote the notion of home-grown players and contends that a club should line up at least some of these players. This proposal, however, is also doomed for being indirectly discriminatory on grounds of nationality, which is prohibited by European law.

People never learn.

Social Dialogue

It is high time that at least at European level a true European Social Dialogue was set up between sports employers on the one hand and footballers' unions on the other in order to reach agreement on these and other issues connected with contracts, pension rights, training, etc. on a collective bargaining basis. The professional footballers united in FIFPro are in favour, as are the professional leagues. Only FIFA and UEFA are still hesitant. The European Parliament would do well to take the initiative in this matter so as to also point the European Commission in the right direction. Only through a mature dialogue will football be able to regain its footing.

Roger Blanpain**

* Presentation at the FIFPro Conference on "10 Years After Bosman: Should we have another Bosman case or Can we avoid another Bosman case?", Council of Europe, Palais de l'Europe, Strassbourg, 14 December 2005.

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Labour Law, the Provision of Services, Transfer Rights and Social Dialogue in Professional Football in Europe*

From the study "Promoting the Social Dialogue in European Professional Football (Candidate EU Member States)" which was carried out by the T.M.C. Asser Institute on behalf of the European Commission in 2004 (see ISLJ 2004/3 pp. 31-33) it emerged that in many new or candidate Member States contracts for the performance of certain services are used between clubs and their players in addition to or even instead of regular employment contracts. One of these candidate Member States was Bulgaria whose entry into the European Union is anticipated for 2007. During a seminar in November 2005 that was organised in Sofia by SENSE in cooperation with the Asser Institute and on behalf of Ernst & Young Bulgaria and which dealt with "Players' Contracts in Professional Football: EU Law and the Challenge for Bulgaria" it became clear that a complete shift had occurred from employment contracts back to performance of services contracts under civil law. This is a remarkable development, as by this, Bulgaria, only a little over a year before it is set to accede to the EU, has drifted away from the "EU sports acquis" towards which it should in fact be heading! The main reason that countries prefer to use service contracts in professional football is the fact that in this situation clubs do not need to contribute to the players' pensions or pay social security contributions. From a financial point of view these contracts are therefore net contracts and the player simply has to take care of insurance and building up a pension himself. The player is regarded as an artist, because football is a special branch of industry which simply cannot be compared with ordinary business and industry. The illusion persists that if a contract is not *called* an employment contract, it cannot *be* an employment contract. The same applies for the contract's contents: if the contract says that the player performs services, then that is what the player does, according to this line of reasoning. But this is simply pulling the wool over one's own eyes at the detriment of the players. It is setting the cart before the horse.

It is not the format, but the facts which are decisive. A player may give a brilliant acting performance like Dennis Bergkamp or follow his instincts as if he were a ballet dancer, the coach - in Bergkamp's case: Arsène Wenger - decides whether and where (what position) he plays. This is clearly a relationship of authority, which is a characteristic which the EC Treaty links with the free movement of workers, whereas the freedom to perform services is something completely different. Services are not performed on the basis of instructions of the client or under the authority of the client. Furthermore, there can be multiple clients at any one time or a succession of clients. This would imply that a player during one single season would first play for this club and then for the other and then for the next, whereas this is never the case with such frequency. There are in fact too few transfer periods to make this possible. Or rather: transfer periods inherently conflict with the notion of service contracts; if they were service contracts, there would not be any transfer periods at all! In any case, most players are not Dennis Bergkamp, but hard-working folk who follow the coach's instructions to the letter and most ballet dancers are not self-employed, but are employees of a ballet company. Typical service providers are tennis pros who hire and fire their own trainers, organise their own team of supporting staff and are contracted per tournament by the tournaments' organisers. Service providers can be found in individual sports like tennis, not in team sports like football!

There is another aspect to this case. In Bulgaria a system of competition rights, also known as federation rights, operates. This involves the registration, the admission of players, more particularly: the player's pass, which is the embodiment of the right of a player to compete in a competition. The person who owns this pass or these rights, de facto owns the player's transfer rights. Competition rights are the final element of using service contracts. After all, service contracts provide players with the absolute freedom to stay or go! But if they no longer own these rights themselves, they cannot go anywhere, in other words, they cannot join a different club. The rights are owned by their club or

by their agent or even by a players' fund (investment fund). In Brazil, for example, agents literally carry player's passes in their pockets, or it may even be that several advisers have rights. Players' funds, not an entirely unknown phenomenon in Europe, help clubs to attract players, but hold on to the transfer rights themselves. They want to retrieve their investment or even see a return. The player, however, only has a contract with the club. The club has assigned the transfer rights to the fund or can only let the player transfer with the fund's permission. In this way, the player's freedom of movement is severely restricted, regardless of whether the restriction takes the form of a player's pass or a players' fund. In the case of the player's pass, the player has at some point assigned the pass to his agent(s). This is actually a void act, as the player's pass exclusively serves as the player's ID and entitles him to take part in competition. For this reason, the pass remains the property of the national football federation, just like an ordinary passport remains the property of the state. If it falls into the hands of a third party, that is illegal. Such parties are not then allowed to do business with it and dispose of the player's deployability. The transfer system has been abolished, but "slavery" still exists in professional football! A person cannot be the property of another person, not even by his own consent, and not even when this consent was not forced. It goes against the Universal Declaration of Human Rights and all rights and instruments deriving from it. This involves a principle of *jus cogens* from which no one under the rule of law can deviate.

There is a third aspect concerned with this case. A Social Dialogue between management and labour for the purpose of, for example, drawing up a collective agreement requires that the employers have organised themselves as such. On the basis of service contracts this is not possible, because then the player is legally a self-employed person, who should in principle be able to give instructions in return to the other party, i.e. the club, which have to be carried out as performance. In the case of an employment contract, the focus is on the employee as a person, whereas in a service contract it is on the service to be performed. The fact that both notions - employment contract on the one hand and service contracts on the other - are included in the EC Treaty separately obviously has a reason. It is a reflection of general international principles or labour law that this distinction is made. These principles do not permit that employees remain unprotected, as if they were their employers' plaything. In the first and the last instance, this is a question of a philosophy of norms and values surrounding labour in a civilised world. Why not let Dennis Bergkamp continue to practice his pirouettes under the protection of an employment contract as a professional footballer? A collective agreement, by the way, is of course the most appropriate instrument to regulate matters differently in, provided this is not contrary to public order. If the social partners would wish to introduce a third option, in addition to or somewhere in between the employment contract and the service contract, in other words, a special "football contract" this should in principle be possible, if it were not so difficult to imagine how, now that in the team sport of football there can de facto only be a relationship of authority between the club and the player. It is equally difficult to imagine how the handling of player's passes and transfer rights could be legalised by means of a collective agreement. Currently, at European level a Social Dialogue is still in the making. On the employees' side there is the world players' union FIFPro, but on the employers' side, matters have not yet sufficiently crystallised. Self-appointed candidates there are currently the "League of Leagues" (Association of European Union Premier Professional Football Leagues/EPFL) and G-14.

Robert Siekmann

* Presentation at FIFPRO Conference on "10 Years After Bosman: Should we have another Bosman case or Can we avoid

another Bosman case?", Council of Europe, Palais de l'Europe, Strassbourg, 14 December 2005.



Father Kevin Lixey LC, Vatican, lecturing at the 5th Asser/Clingendael International Sports Lecture on Religion and Sport in The Hague on 9 June 2005. From left to right: Mr Bert Konterman, Sports Witnesses Foundation, Dr Robert Siekman, ASSER International Sports Law Centre and Ms Sanne Bijlhout, MaroquiStars Foundation.

SIXTH ASSER/CLINGENDAEL INTERNATIONAL SPORTS LECTURE

The European Union and Sport: Law and Policy

Tuesday 6 June 2006

Venue: Clingendael Institute, The Hague

Opening: 16.00 hours

Chairman: Dr Robert Siekmann, ASSER International Sports Law Centre

Speakers: Prof. Stephen Weatherill, University of Oxford, United Kingdom

Jean-Louis Dupont, Hannequart & Rasir Law Firm, Liège, Belgium

Theo van Seggelen, Secretary-General of FIFPro

Toine Manders, Member of European Parliament

and others

The Programme Note to the picture on the wall reads as follows:

HE, WHO BELIEVES IN MIRACLES, ALWAYS WINS

By Ann-Sophie Lehmann

Karl Hubbuch's litho *Miracle* shows how a certain goal is miraculously prevented. Hubbuch (1891 - 1979) was a representative of the *Neue Sachlichkeit*. He was born in Karlsruhe, and studied at the Academy there and in Berlin. In 1925, he became a professor at the Karlsruhe Academy of Art.

The miraculous football match was created around 1924 in Berlin. During this period, the German artist made a number of allegorical prints in which he exposed the political and social situation in the Weimar Republic and the monopoly of the church. As opposed to contemporaries like George Grosz, who strongly influenced the content of his work, Hubbuch used a completely different visual language. His characters are not caricatures or mere outlines, but are portrayed realistically and in great detail. He did, however, make use of the technique of collage which had been developed by John Heartfield and others at the beginning of the 1920s: by placing the figures and events in an alien environment he emphasises his message to the viewer. This is also the case in *Miracle*: a game of football is taking place in a church-like space, which is open at the back and offers a view of a harbour. A goal has just been scored; and the goalkeeper is lying down on the floor, beaten. At least, so it seems, because suddenly a grinning angel appears who manages to stop the ball after all. The players angrily wave their fists, perplexed by this heavenly intervention. Behind the goal the winning club's trainers and managers are seated: the Pope, bishops, cardinals and priests, applauding and smirking about their 'miracle'. The t-shirts of the disappointed opponents say 'evang...' (one of the earliest documented examples of shirt advertising). No fair play is thus possible in the contest between the catholic and the protestant church, or, in other words: he, who believes in miracles, always wins. Hubbuch's ironical caricature is reminiscent of 16th-century reformational prints which portray the conflict between the new and the old church as a battle and the representatives of the catholic church as henchmen of the devil. One example is a print from 1546 by Lucas Cranach The Younger entitled *Unterschied zwischen der wahren Religion Christi und falschen Abgöttischen lehr des Antichrists in den fürnehmsten stücken*.

The semi-nude negress as a heathen onlooker, the sculpture of the Blind Justice (or synagogue?), with the Fall of man on the side of the niche and the crucified Christ elevated over all, the dogmas of the catholic church seem to have been summarised: sin and redemption, conversion and incarnation.

From: Ieder z'n voetbal - Het voetbal in de beeldende kunst 1900-2000 (To Each His Own Football - Football in the Visual Arts 1900-2000), Kunsthal Rotterdam / Waanders Uitgevers, Zwolle, 2000, at page 31.

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SUPERSTITION AND SPORT: JOHAN CRUYFF'S RITUALS

1. Johan Cruyff never cleaned his football shoes (we are talking about the early years 1966, 1967, 1968...). Whether someone else cleaned them instead history does not reveal; I know quite a number of footballers who do not clean their shoes but leave this to their wives, without any superstition or compulsive behaviour involved (just indolence, it is whispered).
2. Tonny Pronk was the only one allowed to touch Johan's shoes. Apparently, however, this ritual was not essential, because when Cruyff left for Barcelona he had enough money to take Tonny Pronk along at reasonable expense just for touching his shoes, but yet, he did not
3. Exactly fifteen minutes before kick-off he would start changing.
4. Exactly three minutes before the game would start, he would have a massage (it was quite fortunate really that the other players did not copy this ritual or Ajax would have had to provide eleven masseurs).

5. Before he got down from the massage table, Ajax's then masseur and attendant Salo Muller would have to say to him: 'Johan, have a really good game!'
6. Johan would then rise and raise two fingers of his right hand as a signal that he would score two goals. Even if he accidentally scored three, or one, or none, this would not change next time's ritual of the two raised fingers!
7. Before going outside himself, everyone had to have left the dressing room (and again, how fortunate that others' rituals were to leave as the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth!)
8. Before leaving the dressing room, he would stick a piece of gum in his mouth.
9. At the time when Gert Bals was goalkeeper for Ajax and would, as captain, enter the pitch first, the players would walk in file to the centre circle, Bals would halt on the centre spot, and the other players would fan out around him and stand on the circle (it was just like an old-fashioned revue show with a touch of the comical about it), Johan Crujff, who was the last in file, would cross the middle circle all the way to its farthest point and in passing Gert Bals, he would give his captain a friendly, mild tap in the belly region, just like many an art lover at the museum cannot resist briefly stroking the rounded forms of an Arp statue.
10. Crujff, who always carried the ball, would run to the goal after greeting the audience, while Bals would already be on its way there and get between the posts, so that Johan could shoot the ball into his hands once.
11. At the moment of kick-off, Johan would spit out his piece of gum, which he had meanwhile kneaded into a supple little ball, and kick it in flight. If it landed in the other team's half (the chances of which must have been greater when Ajax was kicking off, at least when he was a centre forward, but in the opposite case he could of course always take up position at the intersection of the middle line and the centre circle), the game would go well for Ajax! (The first time that Ajax played the Europe Cup I Final on 28 May 1969, Crujff forgot his chewing gum and Ajax lost by 4-1. 'It did cross my mind a couple of times during the game,' he later declared. After that game, Theo van Duivenbode was sacrificed as the "scapegoat", he no longer had a place in Ajax, while we now know that Wrigley was the true villain.)

Nico Scheepmaker in: Ton van Rietbergen and Bastiaan Bommeljé (eds), De bal - Berichten van het voetbalveld (The Ball - Reports from the Football Pitch), Utrecht 1989, at pp. 64-66.

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Participants in the International Sports Law Course of Anglia Ruskin University, Cambridge and Chelmsford, United Kingdom attended the annual intensive week at the T.M.C. Asser Institute in The Hague in cooperation with the Institute's International Sports Law Centre.

The week was coordinated by course director John O'Leary of Anglia Ruskin University's Law Faculty. The main teaching team further consisted of Prof. Ian Blackshaw, honorary fellow of the ASSER International Sports Law Centre and inter alia a member of CAS and Prof. John Wolohan, Ithaca College, New York. The week's central themes were dispute resolution and sports business issues. During the course week participants visited the stadium of Dutch Premier League club Sparta Rotterdam, the so-called "The Castle", for a tour and a presentation by general manager and director Mr Peter Bonthuis on the most traditional club of all Dutch professional football clubs, which dates back to 1888.



From left to right: Ian Blackshaw, John O'Leary, Robert Siekmann, Emile Vrijman, and John Wolohan in the Asser Institute's Library during the Anglia Ruskin University International Sports Law Course at the T.M.C. Asser Institute, The Hague, 5/10 March 2006

Football Players May Take The Shots But Who Calls Them?

Football remains the super power of European sport. The British public may have been going wild over England's performances in the Ashes Series, but Flintoff's heroics barely caused a ripple in mainland Europe. Football is the biggest sport and it continues to be big business. As the money involved continues to grow so does the power struggle between the player, the club and the national teams. The relationships become more complex and the law becomes more important.

The first £1,000 football transfer took place in the UK in 1905, and 100 years later the system is still under scrutiny. The professional footballer has tended to be treated as a unique category of workman throughout the world, being both an employee and a transferable commodity, but slowly the players have been using laws of employment in the National and European Courts to gain the upper hand. In England Jimmy Hill did it in 1961 when the maximum wage was abolished, George Eastham did it in 1963 when the retain and transfer system was ruled illegal, and of course in the late 90's Jean-Marc Bosman rocked the football empire throughout Europe by changing the balance of power forever.

Have the Clubs had enough? Are they fighting back? The UK is a fertile battleground. Chelsea are seeking compensation from Mutu following his sacking by the Club, and the authorities have heavily fined Ashley Cole (together with Chelsea and Mourinho) for recently meeting Chelsea without Arsenal's consent, to whom he was under contract. Was the Cole affair simply a tabloid feast, or will it have any long term consequences? Have the Clubs been protected by the decision or will the case further erode the Clubs' power?

Ashley Cole was found guilty of breaching Premier League Rule K5 which states that a Player under contract shall not directly or indirectly make any approach to another club without having obtained the prior written consent of the existing club to whom he is contracted.

Cole argued that rule K5 was an unlawful, and therefore unenforceable, restraint of trade. His argument was based on the fact that Rule K5 prevents him from (i) talking to another club about the possibility of that club making an offer to Arsenal for his transfer; and (ii) investigating whether another club would be interested in employing him after his Arsenal contract expires. In effect the claim was that the rule prevents an employee from being able to advance his career by considering alternative employment opportunities.

It has not been denied that the rule is capable of being a restraint of trade, but the Premier League did argue that the restraint was lawful, i.e. enforceable, as a result of being both limited and reasonable - it was in the public's interest so as to protect competitive integrity and contractual stability.

The original Disciplinary Commission found for the Premier League agreeing with the public interest argument. Symbolically the Commission concluded that *"...we cannot escape the conclusion that if the restraint was removed, the number of transfers would increase and that the balance between players' agents and Premiership Clubs would tilt significantly in favour of agents (and their incomes). We consider this as a potent consideration"*.

Whilst the fine was reduced on appeal the guilty verdict was not overturned. And whilst the lawyers had their fun, Cole signed a new deal with Arsenal in any case. If nothing else, the Chelsea meeting may have helped Cole's bargaining position with Arsenal. Whilst the Club may have won the battle, a cynic might conclude that the player won the war.

What are the chances of the decision being overturned if Cole took it further to the Court of Arbitration for Sport for example? The Rules have evolved through collective negotiations involving the Leagues, player representatives (the PFA), and the governing body

(the FA). A key aspect of such a collective bargaining agreement is that each interested party has to accept some bad to go with the good. If Rule K5 was to be amended to favour the players, would they be simply rejecting elements of the bad? It is impossible to guess which way a court would go, but it is important to point out that Cole still had 2 1/2 years left to run on his contract. The Committee which heard the original case didn't feel that its place was to "tinker" with the rules but did acknowledge that Rule K5 could be amended by a more appropriate body to take into account the "Shaka Hislop" example which was raised in evidence. Hislop's Portsmouth contract was due to expire on 29 June 2005, and at the time of the Cole hearing, Portsmouth had not decided whether to renew his contract or not. Under Rule K5 Hislop had to wait until the third Saturday of May before being able to contact other clubs without Portsmouth's consent. This left the 36 year old with just 5 weeks to find alternative employment in the event that Portsmouth did not renew. Hislop is reported to have stated *"I do not see why I should go cap in hand to my current employer in order to ensure that I am still in a position of being able to support my family"*.

The positions of Cole and Hislop are clearly not only different on the pitch. The remaining term of their contracts is clearly a very important distinction.

Whilst the Hislop argument is indeed persuasive, how would any change work in practice if for example any player in his last year or 6 months of a contract was entitled to discuss a move to another club without his current club's consent? It is thought that any removal of the Rule may lead to shorter contracts, which may lead to destabilisation, and in fact a weakness of the players' position allowing clubs to jettison players with injuries or a lack of form. Questions of integrity would also be raised. The Committee itself reported that *"if a player is playing against a team with whom he has contracted or is in the process of negotiating a contract, supporters might perceive (albeit erroneously) that he might be playing within himself"*. This of course could be particularly problematic if relegation issues are at stake.

We may well find out what might happen by looking at the international stage. Whilst the Cole affair was subject to Domestic Rules, Fifa has recently changed its regulations which affect international transfers. From 1 July 2005 Article 18 of the new Fifa Regulations accepts that negotiations can take place between a player of one club with another club provided that (i) notice is given, and (ii) no new deal can actually be concluded unless the player has less than 6 months left on his existing deal.

This means that under the international rules a player could be playing in the Champions League Semi final against a team he is contracted to play for the following season.

Fifa imposes certain Regulations on national associations - one of those is that Article 18 should be incorporated from the 2007/8 season. Certainly incorporation will heal the illogical differences faced by a player who is the subject of a domestic transfer and a player who is subject to an international transfer, but will it lead to questions of integrity? Does Article 18 further erode the Club's position? Article 18 does seem to give the Players a little more freedom but had Article 18 been in force at the time of the Cole affair, he still wouldn't have been able to sign a contract with Chelsea, as his contract would have had longer than 6 months to run. Hislop on the other hand would have enjoyed more freedom than he did. The future is not clear yet and this issue may be one that has a way to run yet.

This article has so far simply focused on one aspect of the player/club relationship, and I am already out of space. There are many other facets of the player/club relationship that can be examined, just as there is a raft of issues which relate to the relationship s

between the player, club, and the national team. Should clubs be forced to release players to play for 45 minutes and risk injury in international friendlies. Graeme Souness recently queried the logic and compared it to a company loaning someone a piece of machinery for it to be returned damaged. However, the most interesting recent issue arose recently in Germany where there were threats to exclude players from the national team if they did not wear German FA sponsor adidas branded boots. Huge potential conflicts arise here, not least con-

cerning the players' personal boot sponsors, but this issue warrants an article in its own right. The power struggles go on.

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Protecting the Olympic Brand

After a long and gruelling contest, London finally won the race to host the Summer Olympic Games in 2012. Now the real work - and, indeed, expense, estimated at many billion pounds - begins. Apart from putting in place and implementing a whole range of contracts, including ones for building the Olympic venues and infrastructures and official sponsorship and merchandising programmes, the organising committee will also need to take measures to protect the Olympic brand itself. These measures are a *sine qua non* for hosting the Games and a vital ingredient for their financial success. And this will need statutory support. The recent Queen's Speech at the opening of the new Parliament foresaw the introduction and passage of an Olympic Act, which, amongst other things, would make provision for this important matter.

The most famous Olympic symbol, the five interconnected rings in blue, yellow, black, green and red symbolising the Olympic movement already enjoy special trademark protection at the international and national level. Internationally, the Olympic Rings are protected by the so-called Nairobi Agreement on the Protection of the Olympic Symbol of 1981. In the UK, there is existing legislation, the Olympic Symbol etc (Protection) Act of 1995. Under this Act, they can only be used with the consent of the British Olympic Association (BOA). Infringers face civil and criminal penalties. The BOA is also the custodian, on behalf of the International Olympic Committee (IOC), of the Olympic Motto (*Citius Altius Fortius* - 'Faster Higher Stronger') and certain other words, such as 'Olympic(s)', 'Olympiad(s)' and 'Olympian(s)'.

However, it is clear that this legislation will need to be brought up to date to deal with the protection of the organising committee's logo for the London Games and not least the increasing phenomenon of 'ambush marketing'. This is a form of unfair marketing practice - the

Olympic movement calls it 'parasite marketing' - in which a party, wishing to jump on the Olympic marketing bandwagon, claims, usually as part of its advertising and marketing programme, an association with a major sports event, such as the Olympics - often dubbed the greatest sporting show on earth! - that it does not have. And - perhaps more importantly - for which it has not paid a penny!

The real culprits are the major corporations, especially the major sports goods manufacturers, and they have become quite creative in trying to get around the law on trademark protection and the law on unfair competition. Some people applaud the 'ambush markets' for their ingenuity; whilst the IOC takes a dim view of 'ambush marketing' - regarding it as stealing - and cracks down on it wherever legally and practically possible to do so. In order to protect its major sponsors, who pay millions of dollars for the privilege of associating themselves and their products and services with the Games. And likewise to protect the organising committee's sponsors and commercial partners, who have also paid substantial sums. Indeed, apart from taking any appropriate legal action against offenders, for example, getting an injunction to stop their activities, the IOC has adopted a 'naming and shaming' policy, whereby they expose them to the world's media. This obviously has to be done very carefully, to avoid any counterclaims for defamation or trade libel. There have even been calls to jail 'ambush marketers'!

The organising committee of the Beijing Games in 2008 has already in place a comprehensive programme to protect the Olympic Brand from unfair marketing practices, and London will also need to put in place a robust programme too. Not only to protect the integrity of the Games themselves, but also the UK's considerable financial investment in organising and staging them.

Ian Blackshaw

Nationality and Sport

On 10 November 2005 an important scientific conference was held at the Olympic Museum at Lausanne concerning the theme of *Nationality in Sports: Issues and Problems*. The conference was organized by the CIES (Centre International d'Etude du Sport) which is a renowned institution associated with the University of Neuchâtel (Switzerland) and sponsored by the FIFA. The importance of this one-day conference is already amply illustrated by the participation in the concluding panel of IOC President Jacques Rogge, high representatives of four international sports federations (i.e. basketball, ice hockey, skating and skiing) and of the 800m world record holder Wilson Kipketer.

The issues connected with the conference's theme are highly topical and over the past few years have only become more important. The core of the problem is the extreme diversity of the legislation concerning the acquisition of "ordinary" nationality in the world community of states. The conditions and required residency periods for

naturalization differ greatly per country. In one country, a candidate national must have resided in that country's territory for at least three years in order to be eligible for naturalization, while in another country this may be five years, and in yet another country ten. States have further established quite diverse additional requirements as to the necessary degree of integration. On the other hand, however, the legislation in some countries permits that a foreigner is naturalized almost instantly for reasons of general, national interest! Traditionally, the sports community in principle follows the "ordinary" public law rules concerning nationality. However, already in the past considerable obstacles were put into place by, for example, the international basketball federation FIBA to prevent accelerated naturalization, or rather, to avoid its consequences by applying residency requirements in respect of the adopted country. A well-known example is the FIFA rule that once a player has played for a particular country in a binding international match (European Championships, World

Championships: qualifiers and tournament matches) that player can never play for another country again, regardless of possible naturalization or even dual nationality. Another useful measure is the “waiting period”: during, for example, two years following his/her naturalization, the athlete may not play for his/her new country. The general starting point is the doctrine of the genuine link between a person and a country as developed by the International Court of Justice at The Hague in one of its classic public international law judgment, the *Nottebohm* case. In this way, what has become known as a “sporting nationality” has developed in addition to ordinary nationality, whereby the sporting nationality is decisive for the question of whether the athlete may play for a particular country in international matches, championships and competitions such as the Olympic Games and the Football World Championships.

Organized sports now finds itself forced to tighten the rules further. Rules concerning the “sporting nationality” are in fact as divergent between the various international sports federations as they are between the different national public laws concerning nationality. Top sports today equals commerce and is a matter of national prestige. This gives rise to national sports federations and national public authorities doing a one-two. If a certain wealthy country is able to naturalize one of the world’s top long distance runners from another poorer country just like that, that country will suddenly have won a place on the map. Individual sports such as athletics are perfectly suited for this type of “coup”. However, in team sports, situations like these cannot be ruled out either! Moreover, the long distance runner will also see his/her financial situation improve considerably as compared to if he/she had continued to run for his/her country of origin. This also indicates the conflict of interests between the possibilities for further development of the top athlete, who after all has to make a living from his/her sport, i.e. the interests of the “market” on the one hand, and the way in which sports is organized world wide, namely based on territorial nationality, i.e. state borders, on the other hand. This has resulted in the “commercialization of the passport”. Naturalization is the perfect tool for this type of “muscle drain” (cf. “brain drain” in connection with scientists) at the level of national sports representation.

Of course organized sport has to defend itself against the phenomenon of naturalization. For this purpose, it would make sense to harmonize or unify the rules concerning sporting nationality and to seek a common denominator with refinements where necessary per type of sport (either individual or a team sport) and branch of sport, etc. Here clearly is a task for the international sports law community! This does however require a prior investigation into all the underlying facts and circumstances. For example, one cannot blame an individual athlete who is one of the world’s top runners for trying to seek domicile

elsewhere when only three athletes per country may be delegated to the Olympics and he/she was outrun in the national qualifiers by three fellow countrymen simply because his/her country belongs to the world’s top in long distance running. Every athlete after all seeks to attain the highest possible level. It is therefore recommended that these rigid rules for participation are made more flexible by issuing additional “wild cards” based on the world ranking or some other effective system.

Last year in the Netherlands the gifted Ivory Coast footballer Salomon Kalou who is a striker for the Rotterdam football club Feyenoord applied for naturalization with a view to the upcoming Football World Championships in Germany in 2006. Amongst others, Johan Cruyff, national coach Marco van Basten and the Minister for Sports supported his application which was, however, rejected by the Minister for Aliens Policy and Integration. Kalou subsequently started proceedings against the State of the Netherlands before the administrative courts, on which occasion Van Basten promised Salomon Kalou a place in the line-up for the 2006 World Cup for which the Dutch team had meanwhile qualified. During the proceedings, expert in nationality law Professor Gerard-René De Groot, who holds a Chair at Maastricht University and was also one of the speakers at Lausanne, indicated the manifest applicability of what are known as the top athletes regulations which permit accelerated naturalization by derogation from the standard requirements. The court ordered the Minister to re-evaluate her decision and improve the reasoning underlying it, following which the Minister appealed to the Council of State as the highest administrative law judicial instance. The outcome there was identical. The Minister did not, however, amend her position.

Never before has the Dutch national team attempted opportunistically to reinforce itself by means of naturalization. I am a principled opponent of such practices, especially because Salomon Kalou by opting to play for the Ivory Coast may still perform at the World Championships, and even appear together with his older brother Bonaventure Kalou, who is an ex-Feyenoord player and currently playing for Paris Saint-Germain. In addition, fate has ironically ruled that the Netherlands and the Ivory Coast are to be in the same group during the pool stage of the Championships and will therefore have to play each other! From the perspective of sport, another consideration is that Salomon Kalou missed out on the entire qualification process for the World Championships and that his participation will be at the expense of another player who possibly did contribute to some degree to the Dutch team’s qualification for the 2006 World Cup.

Robert Siekmann

CAS Provisional and Conservatory Measures: An Underutilised Resource

After twenty-one years of operations, the work of the Court of Arbitration for Sport (CAS) based in Lausanne, Switzerland, in providing a forum for the effective settlement of sports-related disputes of various kinds, has become well known within and outside the international sporting world. And, in fact, is the subject of a timely new Book entitled, *The Court of Arbitration for Sport 1984-2004* published by the TMC Asser Press, of which the writer is Co-Editor.

However, one service - and, indeed, an important one in practice - offered by the CAS is less well known and, to date, relatively underutilised. And that is the possibility of the granting of provisional and conservatory measures in appropriate cases.

Article R37 of the CAS Code of Sports-related Arbitration (3rd edition, January 2004) empowers the CAS to offer the parties in dispute certain protective measures within a very short timeframe. Added to which, article 44.4 of the Code provides for expedited measures to be ordered by the CAS, with the consent of the parties. This is a measure which is very valuable in relation to sporting disputes, where deadlines and time pressures often apply. For example, a sports person or a team who has been denied eligibility to compete in a particular sporting event, which is soon to take place, needs to have their dispute settled very quickly, if the possibility of competing is to remain open and not lost through any delay. Again, article 48 of the Code

also allows a party to obtain a ‘*stay of execution*’ of the decision appealed against, provided a request to that effect is made at the time of filing the statement of appeal with the CAS. This measure is particularly apposite in appeals against suspensions for doping offences. But it has also been invoked in a variety of other cases, including a decision to have a football match played on neutral territory to avoid a risk of terrorism in the host club’s country. If the request is not made at the time of filing the appeal, it is lost; the assumption being that there is no urgency, otherwise this would have been pleaded at the outset.

Article R37 of the Code does not specify or limit the kinds of preliminary measures that the CAS Arbitrators can issue in a given case. But traditionally in arbitral proceedings, these measures tend to fall into three categories:

- measures to facilitate the proceedings, such as orders to safeguard vital evidence;
- measures aimed at preserving the *status quo* during the proceedings, such as those that preserve the object of the proceedings; and
- measures that safeguard the future enforceability of the decision, such as those concerning property.

For example, in the infamous so-called ‘*Skategate*’ case during the 2002 Salt Lake City Winter Games, an order was imposed on the judges not to leave the Olympic village before the CAS Ad Hoc Division had investigated the circumstances in which the disputed medal had been awarded. Again, orders have been made in doping cases to preserve samples taken during a disputed doping control. However, preliminary measures can never exceed the object of the dispute. Thus, such measures cannot be issued against anyone who is not a party to the dispute; or anyone else who is not bound by the arbitration agreement signed by the applicant seeking the preliminary measures.

Furthermore, under the terms of article R37 of the Code, in appeal proceedings, the parties by agreeing to the CAS Procedural Rules “*waive their rights to request such measures from state authorities.*” In other words from the local courts. However, such implied waiver does not apply to parties in cases under the CAS ordinary arbitration procedure (ibid.). Thus, in such proceedings, the parties can apply for similar measures from the competent local courts.

Again, under article R37, provisional and conservatory measures may be made conditional on the provision of security by the party seeking them. Such security is often a financial guarantee to be given by the applicant seeking such measures against any possible loss suffered by the party subject to the restraining measures in case the applicant is not ultimately successful in the proceedings. This happens in civil litigation quite often when an interim injunction is awarded by the court.

The criteria for granting CAS preliminary measures are not stated in article R37 of the Code, but are spelled out in the equivalent article dealing with the granting of such measures by the CAS Ad Hoc Division operating at the Olympic Games. This is article 14 of the Arbitration Rules for the Olympic Games; and provides, in paragraph

2, that, when deciding whether to award any preliminary relief, the following considerations shall be taken into account:

- whether the relief is necessary to protect the applicant from irreparable harm;
- the likelihood of success on the merits of the claim; and
- whether the interest of the applicant outweigh those of the opponent or other members of the Olympic Community.

It is not clear whether these considerations are cumulative or alternative, but, in practice, CAS Arbitrators have wide powers in relation to procedural matters. Also, reference may be made to the following view, with which the writer would entirely agree, expressed by an Ad Hoc Panel sitting at the Salt Lake City Winter Olympics:

“... *each of these considerations is relevant, but that any of them may be decisive on the facts of a particular case.*” (CAS JO-SLC 02/004, COA v ISU, CAS Digest III, pp. 592 & 593).

In other words, CAS Arbitrators should take all the circumstances of the particular case into account, including the above criteria, when deciding whether or not to grant any preliminary relief.

Another important issue that needs to be addressed is the extent to which any preliminary measures granted can be legally enforced either by the CAS Arbitrators themselves or with the assistance of the ‘*state authorities*’. This is a controversial subject that would merit a lengthy article in its own right. Suffice to say that, in practice, the measures carry a high degree of moral authority and, therefore, National and International Sports Federations tend to comply with them; and through their own internal regularity mechanisms also tend to ensure that sports persons under their jurisdiction also comply. Apart from this, failure to comply will weaken the position of the defaulting party in the subsequent proceedings. So it is in that party’s interest to conform. As for enforcement by state courts, that is a matter of local law. For example, Swiss Law provides for ‘*judicial assistance*’ under the provisions of article 183(2) of the Swiss Private International Law Statute of 18 December, 1987, which states that, if the party concerned does not comply voluntarily, “*the arbitration tribunal may call upon the assistance of the competent judge.*” This becomes more problematic when the provisional measures are to be enforced outside Switzerland. For example, in Germany, this is not a legal problem as German law allows German courts to authorise the enforcement of provisional measures ordered by an arbitral body with its seat outside Germany. But in Italy it is a problem, because Italian law does not recognise the jurisdiction of arbitral bodies to grant provisional measures and will not, therefore, enforce them.

It is clear that the CAS is able to grant parties in dispute very valuable, relevant and generally effective kinds of interim protection and relief at an early stage in the proceedings; and these measures deserve to be better known and more widely used by the sporting community to ensure that fairness – an essential element in sport – and justice are duly served.

Ian Blackshaw



Lawful and Determined Purposes Required for Legal Personality of Sports Structures in Romania

Context

It is well established that not every group of natural persons is (or may become) a legal entity which would give it a distinct legal personality. In order to acquire the status of a *legal entity*, a group must fulfill *three essential conditions*, and according to Art. 26 (e) of *Decree no 31/1954*, these conditions are: (1) an independent structure; (2) a distinct patrimony of its own; and (3) a distinct and lawful purpose. All these conditions have to be *cumulatively* observed, and the non-fulfillment

of any of these conditions may lead, in principle, to the rejection of legal personality. The status of legal personality is important for a multitude of reasons in Romania, such as to ensure that sports activities are carried out only under the supervision of qualified and competent sports structures. And due to Romania’s impending EU membership (in 2007 or 2008), the country’s integration within EU sports organizations will be substantially dependent on well-functioning local sports structures.

Discussion

The main purposes underlying the existence of a legal person may be *economic, patrimonial*, such as gaining profits, but may also be non-*patrimonial* or charitable purposes (*i.e.*, such as would be the case with charitable associations, unions of artists, professional associations, sport structures (with legal personality), trade unions, associations and foundations, etc.). This purpose may correspond to the general and public interests of society, of a particular social category, or even to those of the members of the afore-mentioned associations, of those constituting the legal person, provided that such interests are *lawful, i.e.* do not contradict the imperative legal norms and public order. The scopes of activities of the legal entity must be *specified and detailed* within its by-laws or statutes for the sole reason that legal entities in Romania do not enjoy the general civil law capacity (as in case of natural persons), but they have a special legal capacity, limited to concluding legal acts *corresponding* to their scopes of activity. Therefore, the courts generally deny the existence of legal personality where the scopes of activity are vaguely indicated and imprecise so that such scopes could not indicate the limits of such legal capacity, or in case of associations or foundations, their legal existence is not recognized if the necessary correlation between the respective patrimony and the scopes of activity which it will serve is lacking.

In this context, we have to mention that, pursuant to *Law no 69/2000 on Physical Education and Sports*, physical education and sports activities would have to fall within the detailed scopes of activities of sports structures (and not within that of business associations in general, except for joint stock (*i.e.*, Inc., Corp., etc.) sports companies). Until the enactment of the regulations regarding the establishment of sports structures, some activities, such as *physical exercise practiced for the purposes of maintaining a proper physical condition (fitness)* fell within the scopes of activity of some types of commercial companies as well - although, pursuant to the explanatory text of the Romanian Classification of Economic Activities Code (CAEN), Class 9304 on Activities of physical condition maintenance referred to something other than sports activities, *i.e.* "activities pertaining to a good physical condition, such as: services offered by public baths, saunas, solariums, steam baths, spas, centers for weight loss and massage".

This subterfuge relating to so-called sports activities, is generally carried out solely to generate profits, ignoring the negative consequences arising from sports activities improperly conducted or administered by unqualified persons. This was (and still is) possible because the law did not (and still does not) explicitly require the competent authorities' approval for the functioning of such business associations having a scope of activity connected to health activities...so that one of the essential conditions for acquiring legal personality by business associations, *i.e. the lawful character of the scopes of activity* was altered. Of course, for such reasons, there are restrictions upon merchants to indicate their scopes of activity. To this end, Article 287 of *Law no 31/1990 on Commercial Companies* provides that "the activities that cannot form the scope of activity of a commercial company are to be established by the state". Besides the lists with activities which may not be carried out by such companies, there are other restrictions stemming from certain normative acts, from the relevant jurisprudence and not only from governmental decrees".

Implications

The carrying out of certain physical education and sports activities by business associations other than so-called joint stock sports companies results in numerous negative consequences because the Romanian National Sports Agency cannot exercise its supervision competence and obligations upon such business associations. Nevertheless, the legality of excessive marketing of physical education activities (obtained by tolerating their existence - undisturbed by those who

should ensure the maintenance of the legal order - and by applying legal sanctions) received legal justification through the issuance of Order no 601/26.11.2002 by the President of the National Commission for Statistics regarding the updating of the classification of the activities of the national economy - CAEN -, which entered into force starting with 1 November 2003. Therefore, by invoking the fact that the updating process took into account the provisions of EC Regulation no 29/2002 amending Regulation 3037/1990 regarding the classified list of the activities within the EEC - NACE Rev. 1.1.(art. 2) Class 9304 on Activities of physical condition maintenance included the additional language: "centers for physical [body] maintenance (fitness)".

It is necessary to make the following specifications: 1. According to the provisions of Law no 69/2000 on Physical Education and Sports in Romania (specifically, Art. 2(3) and (5)), "Education and sports comprise the following activities: physical education, sports for the public-at-large, professional sports, *fitness*"; 2. Practicing physical education and sports is a right of each individual (right which must be protected and guaranteed) which can be exercised without discrimination and which is guaranteed by the state. The exercise of this right is free and voluntary and is performed independently or within *sports associative structures*. From these provisions it follows that fitness activities have to fall solely within the scopes of activities of the sports structures regulated in Title IV, "Sports Structures" of Law no 69/2000 - according to the principle of the specialty of capacity of the legal persons.

Therefore, the afore-mentioned Order no 601/2002 issued by the President of the National Commission of Statistics must be revised in order to take into consideration the necessity of protecting natural persons - persons practicing fitness - in light of the provisions of Law no 24/2000 regarding the technical norms for the drafting of legal statutes(as amended by Law no 189/2004), so that the rights of those persons practicing fitness within a business association structure will be protected and the effective management of these business associations will be ensured.

Alexandru Virgil Voicu*

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Address to the Congress of the International Association of Sports Law

Johannesburg, South Africa, 28 November 2005

by Sam Ramsamy*

At the official opening of the Congress of the International Association for Sports Law, I bring you greetings and salutations from Count Jacques Rogge, President of the International Olympic Committee (IOC). He would have loved to have been here but other obligations arranged well in advance of his receiving your invitation to attend have reluctantly compelled him to decline.

Nevertheless, he has asked me to represent him at the opening of the Congress and he conveys his good wishes and hopes that the Congress will be a success and that the deliberation would be fruitful.

I have been asked by the organisers to also be the guest speaker at this formal function.

Although I am a member of the IOC, I would like to make it clear that the views and opinions are mine personally and not those of the President of the IOC.

In the last few days two issues that dominated the South African sports pages were, firstly, the feats performed by George Best, the British footballer, who passed away on Friday and, secondly, the attractive incentives offered to South African swimmer Roland Schoeman to represent the tiny Gulf State of Qatar in international competitions.

It is widely known that George Best's superb football performances were repeated in bed and in pubs. Sadly, one of the abuses resulted in his premature death. Whether this matter will be discussed at your Congress I am not too certain.

However, the policy of Qatar to lure sports stars to change nationality and record medal success for that country with the offer of astronomical and unbelievable sums of money is certainly a concern for most South Africans. Some other African countries have lost some of their sports stars to Gulf States recently. But the Schoeman element is the first to emerge in South Africa.

Rules governing the changing of nationalities are imprinted in the regulations of nearly all International Federation statutes. The Olympic Charter also enunciates this very clearly.

At its recent Congress in Helsinki, Finland, the IAAF (International Association of Athletics Federations) has agreed that there will be a three-year wait before an athlete can represent one's new country in a nationality change.

In the past the IOC and the international Federations have been very understanding in allowing athletes to move from one country to another. And the regulations were formulated to ensure that neither the athlete nor the consenting countries are seriously compromised. The incentive of benefits might have, in some cases, been subtly concealed. But the element of blatant financial rewards to buy success at national level is a totally new phenomenon. The issue of ethics now arises.

On perusing your programme of activity for the next two days, I gathered you will be discussing a wide range of themes in relation to Fighting Abuse in Sport.

Recently, Match-Fixing has been brought to the fore in Germany. So has the issue of Racism at football matches. Here, in South Africa, the main topic is still transformation in sport. We have refrained from using the term "affirmative action" as this term is exploited by some elements to mean reverse racism. Transformation in sport basically means providing all citizens with equal opportunities. I have repeatedly stated that, in the past, because of the system of apartheid, South African representative teams in most sports were made up exclusively

from the previously advantaged sector of our society, which comprised a mere 20 per cent of the population. And they held their own in the international arena. How much better would our teams perform if the same opportunities are provided for the remaining 80 per cent of the population? That is our aim for transformation.

I often quote the example of a school child who is aware of the majority population groups in South Africa, the USA, the United Kingdom and France. If during the March-Past of the athletes at the Olympic Games the country identification of the various countries is removed this child will have great difficulty in identifying the South African team.

Two major issues that the IOC had to confront in recent years has been the offer of financial and other benefits provided to some IOC members in the voting for certain bid cities to host future Olympic Games. I am pleased to state this matter has been satisfactorily resolved.

The Ethics Commission of the IOC has introduced measures to counter such future abuses in this field. I personally believe that some of the measures are relatively Draconian.

The matter of drug abuse in sport is a continuing challenge. The revelations at the BALCO laboratory in California have indicated that policing is not yet complete. The regulations governing doping abuses in Major League Baseball in the USA - which I understand you will discuss during the course of the Congress - have highlighted the debate of doping and professional sport.

The rights of sportsmen and women cannot be ignored when discussing sports laws. When Australian TV magnate Kerry Packer took on the cricket authorities, it transformed international cricket and the playing status of cricketers. The Bosman case provided a new dimension for the movement of footballers from one club to another. Of course, Americans amongst us will say that this matter was resolved a long time ago in the USA.

We live in a highly commercially regulated sports era and therefore the establishment of unambiguous rules and regulations is becoming increasingly crucial. We need to be especially vigilant because some athletes want to win at all costs. These, together with their minders, will examine all avenues to record a win.

We must not allow the Al Capone way:

I am surprised that so many people turn to crime when there are so many legal ways to be dishonest.

The IOC, realising that there is no universal standardised jurisprudence for sport, established the Court of Arbitration for Sport (CAS). CAS has now become the final arbiter for judgement on sport.

Some of us might not be totally happy with some of the decisions meted out by CAS. The case of Spanish skier, Johann Mühlegg, at the Winter Olympic Games in Salt Lake City comes immediately to mind. Having won two Gold medals in earlier events, Mühlegg passed the relevant doping tests. But when he again won another medal later he tested positive and the medal was withdrawn. But he was allowed to retain the medals he had won earlier. Even IOC President, Jacques Rogge, although accepting CAS's decision on the judgement, was unhappy that he was allowed to retain the medals won earlier.

The debate now becomes one of morality and the law. We talk about sportsmanship. What is the correlation between sportsmanship and the law?

I leave this question to you.

Not long ago a batsman (now called a batter) in the game of cricket, never waited for the decision of the umpire when he felt that he

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(FINA), Formerly President of the National Olympic Committee of South Africa.

was fairly dismissed. He just walked back to the dressing room. I'm sorry, it was not all batsmen. Barry Richards, formerly of South Africa and now living in Australia, once said that the only time an Australian batsman walked was when he ran out of bus fare.

Now it seems all batsmen, irrespective of nationality, have run out of bus fare.

Cricket still holds its moral high ground though. No cricketer is allowed to dispute the umpire's decision. Even an indication of dissent in body language is heavily penalised. It is so different in football. Very seldom does an offence go undisputed.

Good luck on your deliberations. I look forward to hearing of the conclusions at the end of the Congress.

Sports Business - Law, Practice and Precedents

By Richard Verow, Clive Lawrence and Peter McCormick

Second Edition 2005, Jordan Publishing Limited, Bristol United Kingdom, pp. 498 + xix, ISBN 0 85308 8616

Sport is now big business - worth more than 3% of world trade. And, as the authors point out, in the UK, sport is now bigger than the chemical, agricultural or motor industries. The high standards of international sports events means that, in order to compete in them, sports persons cannot pursue other careers. Sport has become their professions and livelihoods. Success on the field of play guarantees success off the field of play. Indeed, sport, sports events and sports persons have become commodities - to be bought and sold to the highest bidders. This Book, therefore, will fill a need for sports persons, sports bodies and all others involved in the promotion and marketing of sport and sports events to have up to date information and guidance on the legal aspects of the business side of sport. The law is stated as of 1 January, 2005.

Written by practitioners in this field, the Book covers a wide range of issues. These include the role played by intellectual property rights, including trademarks and copyright, as well as the controversial topic of the ownership and commercial exploitation of database rights (there is full coverage of the recent surprising European Court of Justice decision in the case of *British Horseracing Board Limited v William Hill Limited*); the related topic of media rights, including the ever controversial subject of sports broadcasting rights; sports marketing agreements, including sponsorship and merchandising; and key issues in employment agreements, including player transfers and the increasingly important matter of discrimination, especially between male and female sports persons, which is still a matter of some concern in several sports, including golf and tennis. All of these issues are helpfully put into context by the authors in an introductory chapter dealing with the status and powers of sports governing bodies, within whose framework and under whose aegis the commercialisation of major sports events operates.

Perhaps the real value of the second edition of this Book is the new and expanded section on Precedents, which covers some 140 pages. These Precedents include a wide range of standard form agreements, such as sponsorship and merchandising agreements; event management agreements; 'pourage' agreements with concessionaires; broadcast licence agreements; and employment agreements. The Book also, helpfully, includes a separate CD-ROM of the Precedents, thus enabling the reader to adapt and customise the standard agreements to their own particular needs.

The Book is completed with some useful Tables, including a Table of Cases and Statutes and a Table of Codes of Practice. There is also a short, but adequate Index.

However, the Book does have some shortcomings. The subject of EU and National Competition Law and Sport is cursorily and summarily dismissed in four and half pages. This is a pity, given the increasingly interventionist role being played by the

Competition Directorate of the Commission, National Competition Authorities, such as the UK Competition Commission, as well as the European Court of Justice itself in the field of potentially anti-competitive sporting restrictions and restrictive trade practices of an economic nature. There is no mention, for example, of the *Mecca-Medina* or *Piau* cases.

Likewise, the Book would also have benefited from a chapter on the fiscal aspects of the sports business, especially tax mitigation schemes. An increasingly important subject in many sports, including football and tennis, where the financial rewards are stratospherically high, as the recent cases of David Platt and Dennis Bergkamp of Arsenal Football Club and Andre Agassi demonstrate.

Again, there could have been a fuller treatment of sports image rights (a subject of growing importance and, admittedly, one dear to the heart of this reviewer!), instead of the paltry two and a half pages devoted to it. Although there is a brief mention in the chapter on employment issues of the English FA Premier League Standard Player Contract, there could also have been a mention of the important provisions of clause 4 of this Agreement, which specifically deals with the image rights of players, and, in particular, conflicts between individual and team rights. And also a sports image rights licence agreement could have been usefully included as one of the Precedents.

Notwithstanding, all in all, this Book provides a welcome and workmanlike overview of sports business law and can be recommended to all those involved in any way in the commercialisation and promotion of sport, which, as the authors quite rightly conclude, is set to continue to increase in the foreseeable future, despite the concerns of the 'Corinthians' amongst us.

Ian Blackshaw

Introduction to Sports Law in South Africa

By Rian Cloete and Steve Cornelius (Editors)

LexisNexis Butterworths, Durban 2005, pp. 246, ISBN 0 409 05006 7

The Editors of this Book, both South African Sports Lawyers and Academics, are to be congratulated on producing a work, which is not only a first in its field, but also a very useful contribution to the growing literature on International Sports Law. As they point out in their Introduction, in South Africa as indeed elsewhere - the law is taking an everincreasing interest in sport and there is a growing need, therefore, for sports persons, sports bodies and others involved in sport to be aware of their legal rights and also - perhaps more importantly - their legal obligations.

After a General Introduction to South African Sports Legislation, including a review of the main provisions of The Safety at Sports and Recreational Events Bill of 2005, introduced as a result of recommendations made in a Commission of Inquiry into the

Ellis Park soccer disaster of April 2001, in which 43 soccer fans died in a crush, the Book deals with a wide variety of legal issues affecting sport. These include such basic and important matters as Sports Contracts; Sports Governance; Doping and Disciplinary Proceedings; and Employment Issues. As well as Risk Management and Liability for Sports Injuries and also the all-important and developing subject of Sports Commercial Rights, including combating the growing and pernicious practice of 'Ambush Marketing'. Indeed, South Africa has been leading the way in the regulation of this particular field, introducing special legislation in connection with the Cricket World Tournament hosted by South Africa in 2003, rendering 'Ambush Marketers' not only liable to fines but also to two years' imprisonment for a first offence and five years' imprisonment for a subsequent offence! To complete the line up of topics, the Book also includes a

Chapter on Dispute Resolution and the Court of Arbitration for Sport, contributed by your reviewer.

The contributors are all experts in their respective fields and the standard of the contributions is consistently high, without wishing, so far as your reviewer's contribution is concerned, to be immodest!

One attractive feature of the Book is the deliberate absence of footnotes, the limiting of cases cited to the key ones and the clear and concise text and presentation of the material, making the Book more readily accessible to a wider range of readership, without losing any of the precision expected in a legal work.

The Book also includes some useful and practical annexes (including the Regulations on South African Cricket Players' Agents); tables of statutes and South African and international cases; and a workman-like Index.

All in all, the Editors are to be congratulated on producing a fine piece of work and have also well and truly lived up to their expressed wish that the Book will be "useful and informative". And I, therefore, have no hesitation whatsoever in wholeheartedly recommending it.

Ian Blackshaw

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The International Sports Law Journal (ISLJ) can be
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ISLJ No. 1-2 (2006) © by T.M.C. Asser Instituut
ISSN 1567-7559

Abstracting services: SPORTDiscus (SIRC),
<http://www.sirc.ca>

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