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This issue contains the results of two studies that were commissioned to the ASSER International Sports Law Centre recently. In September/November 2005 Mr Janwillem Soek researched national Sport Acts and provisions on Sport in Constitutions worldwide, in particular focusing on the definition of "sport" and on objectives of the *ratio legis* underlying the legislation. This study was commissioned by the Netherlands Ministry for Sport due to the fact that the government were considering the introduction of a Dutch Sport Act and wished to examine whether this would be instrumental for the country, notwithstanding the fact that the Netherlands traditionally belongs to the group of Western-European countries whose administrations are "non-interventionist" in relation to sport. In May 2006 Robert Siekmann finalized a study on the possible participation - in accordance with EU criteria and in addition to FIFPro - of the European Association of Professional Leagues (EPFL) and G-14, which has the official status of a European Economic Interest Grouping, in a future Social Dialogue in the European professional football sector.

In the field of applied research, proposals were submitted to the European Commission this year on "Good Governance in Sport: Preventing and Combating Malpractices of Sport", under the AGIS Programme 2006 of the Directorate-General of Justice, Freedom and Security, on "Removing Obstacles to the Mobility of Professional Sportsmen in the EU post Bosman: Recommendations on the Application of Free Movement Laws to Sport", in cooperation with Edge Hill University, United Kingdom, in the framework of the 2006 European Year of Workers' Mobility Pilot Projects (Directorate-General of Employment, Social Affairs and Equal Opportunities) and regarding the invitation to tender for a study on the training of sportsmen and sportswomen in Europe (Directorate-General of Education and Culture).

This issue of ISLJ also contains two contributions which are prepublications from books being produced by the Centre which will be published by T.M.C. Asser Press at the beginning of next year. Professor Weatherill's contribution is the introductory chapter to a book on the selling of broadcasting rights in Europe. Luiz Roberto Martins Castro's contribution is the chapter on Brazil in *Player's Agents Worldwide: Legal Aspects*. In the first months of 2007, *The Council of Europe and Sport: Basic Documents* will also appear in print. It is the fifth publication in the series of Asser volumes of basic documents on international sports law (Statutes and Constitutions, Doping Rules and Regulations, Arbitral and Disciplinary Rules and Regulations as well as The European Union and Sport).

Finally, the ISLJ's contributing editor Ian Blackshaw is congratulated for having been appointed Visiting Professor in International Sports Law this summer at Anglia Ruskin University at their Cambridge and Chelmsford campuses.

The Editors

The Sale of Rights to Broadcast Sporting Events under EC Law

by **Stephen Weatherill***

1 Introduction - the constitutional context

Although it may be intuitively appealing to assume that an integrated market for Europe inevitably brings with it an integrated regulatory strategy underpinning that market, the EC Treaty does not provide for this. Article 5(1) EC declares that 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.' This is commonly referred to as the principle of 'attributed competence'. It is constitutionally fundamental. Accordingly the EC possesses no general regulatory competence and it cannot 'self-authorise' an increase in its own competence. It may act only in the areas in which the Member States have granted it a mandate. Extension of the grant rests with the Member States acting at times of periodic Treaty revision.

The *principle*, then, is that the EC possesses only limited powers. The *practice*, however, is that those limits are rather loosely drawn and tend to be stretched. The EC has a sphere of influence that extends considerably further than one may initially appreciate on an inspection of the formal text of the Treaty. This troubling trend is vividly captured by the catchphrase *competence creep*.[1] It is troubling because EU Treaty ratification is conducted in each Member State according to local constitutional requirements but it is performed everywhere on the basis that only a *limited* grant of power is being made to European level. Lawmaking excess at EC level represents a constitutionally illegitimate shifting of power to EU level which tends to weaken such controls over executive action as exist within national political cultures. So Article 5(1) does not state a technical rule. It states a rule that is fundamental to the chosen distribution of functions to different levels of democratic governance in Europe. Its violation is likely to induce protest from domestic constituencies such as national Parliaments and constitutional courts, and, perhaps in the long term most alarming of all, citizens are likely to suffer alienation from the complexity that flows from incremental drift in the growth of multilevel governance. Unwarranted or, at least, inadequately explained patterns of centralisation tend to generate resistance in any quasi-federal system. [2] This is why 'competence anxiety' emerged explicitly on to the reform agenda in the Treaty of Nice's Declaration on the Future of the Union and subsequently in the Laeken Declaration, and this is why the Treaty establishing a Constitution, endorsed by the Heads of State and Government in 2004 but unlikely now to be ratified, proposed to clarify and re-organise the Treaty rules governing competence, and additionally to freshen the system for monitoring the existence and exercise of competence by bringing in new actors from outwith the uncritical EU family - most of all, it is national Parliaments that are invested with the responsibility to stop creep according to a new *ex ante* monitoring system. [3]

Pending such reforms, we must make do with the current system. And currently the principal motor of competence creep is the ambiguity and functional breadth of the relevant Treaty provisions, underpinned by a perceived readiness practised by the EU's institutions to exploit textual ambiguity in order to extend their sphere of influence beyond that foreseen by the Treaty. The argument, then, is that there is a structural weakness in the EC Treaty which tends to promote rising centralization at the expense of local autonomy. [4]

As far as legal ambiguity is concerned, the principal issue is the poor way in which Article 5(1)'s principle of attribution is put into operation in the Treaty. The Treaty's general *modus operandi* is not to declare particular sectors off-limits the EC nor to reserve particular functions to the Member States. Instead Article 5(1) EC is made specific in its application to particular sectoral competences by a chaotic pattern of provisions granting legislative authority to the EC scattered throughout the Treaty. These provisions vary in scope and intensity and they vary in their impact on residual national regulatory autonomy. They are the confused and confusing consequence of incremental Treaty revision. It is disturbingly difficult to set out clearly an account of the nature of EC competence and its effect on State competence [5]. This is the fertile soil of competence creep: it is hard to marshal operationally useful constitutional arguments *against* EC intervention. This is most of all true of two Treaty provisions in particular: Articles 95 and 308 EC. These are not sector-specific competences of the type typically added in recent bouts of Treaty revision. [6] They instead envisage a broad competence to act in pursuit of the Community's objectives. The limits that are imposed - in short, a tie to market-making under Article 95 and a tie to the EC's objectives under Article 308 - are limits that lack precision. And most significant of all they have been driven by a long-standing readiness among the Member States acting unanimously in Council to assert a broad reach to the EC's legislative competence. The growth of the programmes of consumer and environmental protection supply well-known examples of legislative activity pursued in the name of the harmonization programme and, in the latter instance, pursuant also to Article 308 (ex 235) at a time when the political will was firm, yet when the Treaty was deficient in explicit legislative competence to act in these realms. [7] The gulf between principle and practice in the assertion of legislative competence undermines the impression given by Article 5(1) EC of a sturdy

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1 Cf. M. Pollack, 'Creeping Competence: The Expanding Agenda of the European Community' (1994) 14 Journal of Public Policy 95; S. Weatherill, 'Competence creep and competence control' (2004) 23 YEL 1.

2 For comparative inquiry see e.g. K. Nicolaidis and R. Howse (eds), The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union (Oxford: OUP, 2001) especially Ch.3, J. Donahue and M. Pollack, "Centralization and its Discontents: The Rhythms of Federalism in the United States and the European Union", and Ch.4, D. Lazer and V. Mayer-Schoenberger, "Blueprints for Change: Devolution and Subsidiarity in the United States and the European Union"; E. Young, "Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism" (2002) 77 N.Y.U.L.Rev. 1612; D. Halberstam, "Of Power and Responsibility: The Political Morality of Federal Systems" (2004) 90 Virginia Law Rev. 731.

3 Cf. e.g. S. Weatherill, 'Better Competence Monitoring' (2005) 30 ELRev 23; G. Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time' (2006) 43 CMLRev 63; I. Cooper, 'The Watchdogs of Subsidiarity: Natioanl Parliaments and the Logic of Arguing in the EC' (2006) 44 JCMS 281.

4 Cf. e.g. A. Von Bogdandy and J. Bast, 'The European Union's Vertical Order of Competences: the Current Law and Proposals for its Reform' (2002) 39 CMLRev 227; A. Dashwood, 'The Relationship between the Member States and the European Union/ European Community' 41 CMLRev (2004) 355; D. Hanf & F. Baumé, 'Vers une Clarification de la Répartition des Compétences entre l'Union et ses Etats Membres?' 38 CDE (2003) 135.

5 Cf A. Von Bogdandy and J. Bast, op cit, esp 239-250; G. de Burca and B. de Witte, 'The Delimitation of Powers between the EU and its Member States', Ch 12 in A. Arnull and D. Wincott (eds), Accountability and Legitimacy in the European Union (Oxford: OUP, 2002); F. Mayer, "Die Drei Dimensionen der Europäischen Kompetenzdebatte" WHI-Paper 2/02 (Walter Hallstein Institut, available via http://www.whi-berlin.de); V. Michel, "Le Défi de la Repartition des Compétences" (2003) 38 C.D.E. 17.

6 Cf eg Art 152 on public health, Art 153 on consumer protection, Arts 174-176 on environmental policy.

7 See S. Weatherill, "Consumer Policy", in P. Craig and G. de Burca (eds.), The Evolution of EU Law (Oxford, OUP, 1999); J. Scott, EC Environmental Law (Harlow, Longman, 1998).

defence of State autonomy from EC incursion beyond the limits authorised by the Treaty. It is Articles 95 and 308, the functionally broad legal bases, that lie at the heart of this intensification of regulatory ambition.

So EC law reaches further than Article 5(1) EC might lead one to expect because the 'limits' to EC powers on which Article 5(1) insists are in fact ill-drawn and, for those opposed to proposed EC action, hard to rely on. But there is more to 'competence creep' than simply *legislative* (over-)ambition. EC law exercises supervision over policy choices within the Member States not simply in circumstances where it has adopted secondary legislation but also where those policy choices conflict with the achievement of the objectives mapped out in the Treaty, most prominently those connected with the construction of an integrated trading space across the territory of all the Member States. The centrally important Treaty provisions in this context are those concerning free movement and competition. The basic structure of the law governing free movement is readily described. National measures which obstruct inter-state trade are forbidden unless a justification for their continued application is shown to exist. This pattern is found in the EC Treaty - Articles 28/30 (goods), 39 (workers), 43/46 (right of establishment), 49/55 (services), 56/58 (capital) - but has been the subject of a vast body of case law in which the Court, while remaining true to this basic Treaty framework, has taken on the task of re-writing the law in terms that are far more elaborate than those found in the skeletal style of the Treaty. The competition rules are found in Article 81 and 82. They supplement the dedication of the free movement rules to the creation of an integrated trading space, while also serving to control other types of anti-competitive practices that stretch beyond market-partitioning. So Article 81, dealing with cartels and restrictive practices, and Article 82, dealing with dominant undertakings, control practices that tend to maintain the fragmentation of markets along national lines and other practices which harm the functioning of the market in other ways, such as price-fixing.

In reflecting on the EC's capacity to exercise an influence that is a good deal broader than Article 5(1) EC might suggest, the crucial point about these Treaty provisions is their functional breadth. What is at stake in the application of the free movement rules and the competition rules is the achievement of the Treaty's economic objectives. That is how the provisions are structured, and accordingly any field of national policymaking which tends to come into conflict with the quest for market integration is subject to review in the light of its impact on the EC rules on free movement or competition. So even though the EC may lack a *legislative* competence in a particular field does not at all mean that the matter rests in the province of national regulatory autonomy. The matter may perfectly conceivably be influenced by the EC Treaty's provisions directed at economic integration.

Accordingly internal market law has a wide functional sweep. For example the EC enjoys no general competence to legislate for the maintenance of press diversity or for a viable public health care system. Indeed, in the latter instance the relevant Treaty provision equipping the Community with a tightly confined legislative competence is explicitly deferential to Member State responsibilities to provide health care. [8] And yet in so far as national choices in such realms come into conflict with the drive to integrate markets, national measures fall within the scope of EC trade law and their permissibility falls for judicial determination pursuant to the Treaty. [9] National regulatory choices have to assessed in the light of their impact on wider processes of integration. One might, of course, object to the values that the Court attaches to particular interests when it makes these decisions; additionally, one might choose to reflect on whether a judicial forum is the appropriate place to make such choices.[10] The deeper such case law intrudes into national practices that reflect sensitive cultural, moral and social choices the more acute such anxieties become. But, as a general observation, the case law offers the Court the opportunity to weed out unrepresentative and outdated manifestations of national-level decision making that are hostile to, and inappropriate in, an integrating European market of the type to which the Member States have committed themselves under the EC Treaty. And the fact that the EC lacks legislative competence in an area is absolutely no bar to it becoming the subject of radical reform under the influence of the prohibitions imposed by the Treaty provisions on free movement and competition law. Even in the few instances where the Treaty seems to guard against disruption of national autonomy, such as Article 295 which rules out prejudice to systems of property ownership in the Member States, the reality is that the influence of the Treaty rules governing economic activity has been sufficient to exert significant influence over State choices. Areas of truly exclusive State competence are few and, were it otherwise, the achievement of the core objectives of the Treaty would be gravely imperilled. The conclusion, then, is that for those who would wish to keep the EC at bay, Article 5(1) offers a good deal less comfort than may first appear likely. Most of all, the 'limits' to EC powers to which reference is made is Article 5(1) are limits that are remarkably loosely fixed.

The anxiety that Article 5(1) is taken less seriously in practice than its constitutional importance should demand is reinforced by appreciation of the surrounding institutional context. The current system of 'competence control' is founded on an assumption of *ex ante* restraint by the political institutions and *ex post* review by the Community judicature. So in principle an act should not be adopted if it trespasses beyond the scope of the mandate conferred by the Treaty and, if it is, it is susceptible to annulment by the Court. But the prevailing allegation is that the institutions do not offer a reliable checking mechanism. It has typically been Member State executives, acting in Council, that have been the primary actors in this centralising process of 'creeping competence'. Action has not infrequently been taken 'in Brussels' by national politicians as a rather convenient way to escape domestic constraints over policy reform - it is Article 5(1) EC and the very legitimacy of the EC that ultimately suffers from such opportunism. But neither Commission nor Parliament are regularly heard to raise audible voices of protest. The operational vagueness of Article 5(1) EC, and in particular the loose edges of the functionally broad competences provided by Articles 95 and 308, have been exploited by the EC's own institutions to strain the limits of the Treaty mandate. And did the Court adopt a disapproving tone? Rarely! Admittedly the vaguer the scope of an attributed competence, the tougher the Court's task in determining whether its bounds have been exceeded in the case of a particular challenged act but even so the 'competence sceptic' harbours deeper reservations about the Court's readiness to police the Treaty's limits. A dubious milestone is *Procureur de la Republique* v *Adbhu* [11] in which the Court famously hailed environmental protection as 'one of the Community's essential objectives' at a time when only legislative practice, and not the text of the Treaty itself, could justify such a claim. The case law is admittedly not one-dimensional. In *Tobacco Advertising* - more properly, *Germany* v *Parliament and Council* [12] - the Court for the first time annulled a Directive as lying beyond the competence attributed to the EC by the Treaty. The measure harmonised rules governing the advertising of tobacco products, but the Court found that it made an inadequate contribution to building the internal market and concluded that this was fatal to its validity as a measure of harmonisation. The judgment stands as an assertion of a *constitutionalised* reading of competence prevailing over purely political preferences. A connection should be made with Opinion 2/94 on Accession to the European Convention on Human Rights, in which the Court ruled that such

8 Art 152(5) EC.

9 Onpress diversity see Case C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR I-3689; on health care see Case C-157/99, B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ, H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen [2001] E.C.R. I-5473; Case C-372/04 ex parte Watts judgment of 16 May 2006.

10 Cf e.g M Poiares Maduro, 'Striking the elusive balance between economic freedom and social rights in the EU', Ch 13 in P Alston (ed), The EU and Human Rights (Oxford, OUP, 1999); R Craufurd Smith, 'Community Intervention in the Cultural Field', Ch 2 in R Craufurd Smith (ed), Culture and European Law (Oxford, OUP, 2004); P Oliver, 'Competition and Free Movement: Their Place in the Treaty', Ch 10 in P Tridimas and P Nebbia (eds), European Union Law for the 21st Century - rethinking the new legal order (Oxford, Hart Publishing, 2005).

11 Case240/83 [1985] E.C.R. 531.

12 Case C-376/98 [2000] E.C.R. I-8419.

accession falls beyond the current scope of the competence granted to the EC by its Treaty. This finding matches *Tobacco Advertising* for it too makes explicitly plain that there are judicially policed limits to the Treaty's functionally broad competences, *in casu* Article 308 (ex 235). [13] At their core these judgments assert fidelity to the principle of attributed competence in Article 5(1) EC. The legislature may not act in a manner that leads to amendment of the Treaty. But it is too soon to portray the Court as a consistently reliable guardian of 'State rights'. *Tobacco Advertising* establishes a test which is far from precise. [14]. And in subsequent applications of the threshold test the Court has by contrast offered no relief to applicants seeking the annulment of measures in rulings including *Netherlands v Parliament and Council* [15], *R v Secretary of State ex parte BAT & Imperial Tobacco* [16], *Swedish Match* [17] and *Alliance for Natural Health* [18] - even though in some of these cases some powerful arguments were advanced against the validity of the adopted measures. The Court has also taken the opportunity in these rulings to emphasise that it will not lightly interfere with the exercise of legislative discretion in matters requiring complex assessment. So legislative harmonization is far from dead. *Tobacco Advertising* increasingly looks like a highly atypical case, and the recent case law deepens the concern that the Court cannot or will not effectively police the limits of legislative ambition in line with the dictates of Article 5(1) EC.

Equally, in the trade law field, the allegation is commonly made that the Court is very quick to assert the functional reach of the Treaty provisions on free movement and competition law, while very slow to accept that there is any case for insulating particular activities at national level from the supervision of EC law. The ruling in *ex parte Watts* encapsulates the Court's approach in a number of fields where EC trade law sweeps far beyond the limits of EC legislative competence:

> '... although Community law does not detract from the power of the Member States to organise their social security systems and decide the level of resources to be allocated to their operation, the achievement of the fundamental freedoms guaranteed by the Treaty nevertheless inevitably requires Member States to make adjustments to those systems. It does not follow that this undermines their sovereign powers in the field' [19]

This has become a standard formula in cases where the achievement of economic integration collides with Member States powers to act in realms where the Community is not competent to act as a substitute *legislator*. Social security is a common example [20]; taxation is another [21]; and even the maintenance of public order and the safeguarding of internal security have been revealed as matters of national competence that are nevertheless reviewable in so far as their pursuit impedes cross-border trade. [22] Free movement law stops States acting, in the absence of justification for chosen practices that impede cross-border trade. The Community cannot go further than this: it cannot set the ground rules for the organization of social security systems or taxation or for preserving public order. The EC does not become a substitute regulator, to the detriment of the autonomy of national choices, but it confines the exercise of that autonomy. Naturally one may argue that the Court is being disingenuous in declaring that the achievement of the fundamental freedoms requires legislative adjustment by the Member States while not undermining 'their sovereign powers in the field'. Surely the impact of free movement law is radically to circumscribe the scope of sovereign State choices? Perhaps so: and yet it is submitted that this is embedded deep in the structure of the Treaty. The Court is simply following the logic of the Treaty itself. The Treaty does not place particular sectors of economic activity beyond the reach of its basic rules. To interpret it in a way that manufactured such exclusions would subvert the whole aim of the Treaty. So, in order to make sense of the Treaty, the Court is correct to interpret the free movement and competition rules in an expansive manner. But those provisions do not automatically outlaw practices. Instead they put them to the test of justification. And it is in that process of justification that the Court is called on to recognize the particular features of each industry. This is where the Treaty often provides little help. It is here, then, where EC law intervenes in areas where the Treaty maps out no policy framework, nor even any legislative competence, where the need for an operationally useful 'EC policy' makes its sternest demands.

2 The nature and purpose of an 'EC policy'

The purpose of this paper's Introduction, which presents the constitutional background, is to provide an insight into just how challenging the depiction of EC law governing the sale of rights to broadcast sporting events under EC law really is. The EC has no general legislative competence in these realms. The rights in question are property rights, and they initially fall to be determined under national law. Certainly they will differ State by State within the EU. Article 295 EC goes so far as to provide that 'This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'. Does this place matters pertaining to rights to broadcast sports events off-limits the EC, so that, for example, anti-competitive agreements between right-holders would not be subject to EC competition law? Absolutely not! In the field of free movement the Court has consistently subjected national laws on property ownership to review in so far as they involve nationality-based discrimination. For example in *Albore* 23 exemption of Italian nationals from the requirement of obtaining an authorisation to buy a property in certain parts of the national territory led to unjustified discrimination against nationals of other Member States and an impermissible restriction on capital movements between Member States. In similar vein the capital provisions of the Treaty preclude the application of national rules requiring a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency. [24] The lesson here is that Article 295's statement that 'This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership' refers to the autonomy of the Member States to structure their own chosen systems of property ownership. But the way in which those systems are operated is subject to review for compatibility with the basic expectations of EC trade law. [25] This is symptomatic of the EC's claim to assert a very broad functionally-based review of national law and practice pursuant to the Treaty provisions on trade law. It means that practices pertaining to broadcasting rights are subject to the Treaty competition rules, notwithstanding the terms of Article 295 EC. And that in turn means that the particular context of the marketing of sports rights must be taken into account against a rather thin and unhelpful Treaty background.

For sport generally, the story of its subjection to EC law follows closely the narrative set out above. In short, the reach of EC trade law goes far beyond the limitations on the EC's *legislative* competence under the Treaty, and this brings in its wake the need to develop a 'policy' that is driven by the dictates of trade integration yet is also appropriately sensitive to the particular needs of sport. This is remarkably challenging- and frequently fiercely controversial. Famously the

13 Opinion2/94, Accession by the EC to the ECHR [1994] E.C.R. I-1759.

14 See for example use of imprecise adjectives and adverbs in the judgment such as genuinely, likely, probable, appreciable and "remote and indirect" in paras. 84, 86, 97, 108, and 109 of the judgment respectively. Cf. J. Usher, "Annotation" (2001) 38 C.M.L.Rev. 1519.

15 Case C-377/98 [2001] ECR I-7079.

16 Case C-491/01 [2002] ECR I-11543.

17 Case C-210/03 [2004] ECR I-0000.

18 Cases C-154/04 & C-155/04 [2005] ECR I-0000.

19 Case C-372/04 note 9 above, para 121.

20 Cf eg Case C-512/03 J E J Blankaert judgment of 8 September 2005.

21 Cf eg Case C-446/03 Marks and Spencer v Halsey judgment of 13 December 2005.

22 Case C-265/95 Commission v France [1997] ECR I-6959.

23 Case C-423/98 Albore [2000] ECR I-5965.

24 Case C-222/97 Trummer and Mayer [1999] ECR I-1661, Case C-464/98 Westdeutsche Landesbank v Stefan [2001] ECR I-173.

25 Cf eg E-M Kieninger, 'Securities in movable property within the Common Market' (1996) 4 ERPL 41; J Rutgers, 'The Rule of Reason and Private law or the Limits to Harmonization', Ch 9 in A Schrauwen (ed), Rule of reason: rethinking another classic of European Legal Doctrine (Europa Law Publishing, Groningen 2005); U Drobnig, H J Snijders and E. Zippro (eds), Divergences of Property Law, an Obstacle to the Internal Market (Sellier, Munich, 2006).

European Court confirmed in a pair of cases decided in the 1970s that EC law is in principle capable of application to sport. In both *Walrave and Koch v Union Cycliste Internationale* in 1974 [26] and *Donà v Mantero* in 1976 [27] the Court took the opportunity to explain that in so far as sport constitutes an economic activity, it falls within the scope of application of Community law. The Community lacks legislative competence in the field of sport. Indeed, even today, the word 'sport' is absent from the EC Treaty itself. But in so far as sport generates practices of economic significance, they are in principle subject to the control of EC law, most prominently the Treaty rules governing free movement and competition. This approach was triumphantly confirmed by the European Court in *Bosman*. [28] Sport, like other sectors such as education, taxation, environmental policy and consumer protection, demonstrates how the law of the EC may exercise a wider influence than a formal inspection of the text of the Treaty may lead one to expect, primarily because of the extended reach of the rules governing the building of an integrated, competitive market. This constitutional point underpins subsequent rulings of the Court in the field of sport and it also informs the Commission's batch of interventions into the sports field on the basis of the competition rules of the Treaty.

The EC's institutions have been firm on this point. The economic implications of sporting practices are enough to bring them within the scope of the Treaty, even if their purpose may be not be profit-making, and, with isolated unfortunate exceptions [29], the main issues before the Court and Commission have concerned the question whether particular practices with an economic impact reflect permissible concern to secure the effective organisation of the game, rather than the question whether the EC can claim any jurisdiction in the first place. And therefore here too the EC has been forced to develop a means to understand how its trade law provisions - free movement and competition law - intersect with sport, an activity which is untouched by the explicit terms of the Treaty and for which the Treaty therefore offers no direction on how, and whether, to load in concern for its peculiar economic, social, and cultural features.

This is fascinating, but it is awkward and controversial too. The landmark ruling in *Bosman* delivered in 1995 is vividly emblematic. Although, as explained, the Court had twenty years earlier identified that sport is in principle subject to EC law, it was only in *Bosman* that EC law was seen to have practical force. Famously, the consequences of the ruling were that nationality-discrimination in club football had to be eliminated and the transfer system had to be radically amended. EC law did not stipulate what replacement transfer system should be introduced, if any - that would overstep its mandate - but it did require the elimination of existing unlawful practices. [30] Sport was accordingly forced to undergo significant adjustment as a result of the demands of EC law. The vital point for present purposes is that the Court did not deny that football in particular, or sport in general, possesses unusual characteristics that distinguish it from 'normal' commercial sectors. Rather, the Court insisted only that the economic significance of sport secured its subjection in principle to EC law and that those unusual characteristics should then be taken into account in shaping the application of the law. There is, then, room for acknowledging that 'sport is special', but that room exists within the jurisdiction of the institutions of the EC.

Is there an 'EC policy' to be discerned in such circumstances? The anxiety is that it may mislead to use a term such as 'policy' which suggests a degree of order and systematization that the EC may be constitutionally incapable of delivering. And yet it is not so misleading. In paragraph 106 of its *Bosman* ruling the Court remarked that:

> 'In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.'

The practices challenged in the case did not adequately contribute to these aims and they were judged to fall foul of Article 39 (ex 48) EC. But the Court's recognition in *Bosman* that sport has 'considerable social importance' and that it has two distinct legitimate aims set the scene for subsequent inquiry into exactly what type of practice might permissibly be pursued by governing bodies in sport in conformity with Community law in circumstances where 'normal' commercial actors would expect to be condemned for violation of the Treaty. The ruling in *Bosman* strongly supports the view that a policy of sorts may be shaped in the application of the trade law provisions of the Treaty which is sensitive to the particular context and the particular sector of the economy which is involved. One might, of course, dispute the particular choices made by the EC's institutions, most prominently the Court and the Commission. But *Bosman* shows that the case law of the Court embraces a certain vision of the nature and functioning of sport.

So what is at stake in this paper is the exploration of an area of law in which the EC necessarily proceeds in an incremental manner. The opportunities for its institutions to shape a 'policy' is constrained both by the constitutional limitations on the matters to which they may pay attention - Article 5(1) looms large! - and also by the accidental patterns of litigation, which may cause practice to develop according to unexpected, eccentric rhythms. This concerns most prominently the Court and the Commission, both of whom are responsible for individual decisions applying the law, though the broader policy direction periodically offered by the Council, the European Council and the Parliament may also serve to embroider the tapestry. It is therefore of the highest importance to ensure that one does not over-state the possibilities of a systematic account of relevant EC law. The pattern of EC law cannot be systematic in the way that a national system may be, because of the limits set by Article 5(1), because of its inevitable entanglement with diverse national law and practice and also because of the accidents of litigation which rarely throw up the opportunity for the adjudicating institutions to handle easy cases that will make good law. On the other hand, this is not necessarily to concede that EC law is ripe for criticism. A qualitative account of its role is required. That the EC Treaty does not lends itself to the shaping of a comprehensive policy of the type that one would expect to find in a national setting does not entail that it is flawed, only that it is different.

There is accordingly a rich literature exploring the concept of EC sports law and policy. [31] It explores *inter alia* how the institutions of the EU seek to piece together a coherent approach to the regulation of sport against a Treaty background which is not at all dedicated to elucidating the peculiarities of sport; how diverse public and private actors, at national, European and international level, seek to exploit EC law to achieve their objectives or to keep it at bay in order to protect their privileges; and generally how EC law erodes the self-regulatory paradigm which has for so long been dominant in sports governance. This is not a challenge that is in any sense unique. In fact, across a great many areas of EC law, policy and practice, one is confronted by the need to make some sort of systematic sense of a set of

26 Case 36/74 [1974] ECR 1405.
27 Case 13/76 [1976] ECR 1333.
28 Case C-415/93 [1995] ECR I-4921.
29 In Case T-313/02 *David Meca-Medina and Igor Majcen v Commission* [2004] ECR II-0000 the Court of First Instance allowed itself to be lured down the misleading path of uncritically separating out sport from its commercial impact: see further S Weatherill, 'Anti-doping rules and EC Law' [2005] European Competition Law Review 416. The case is pending on appeal before the Court: Case C-519/04 *David Meca-Medina and Igor Majcen v Commission*.
30 Cf. B. Dabscheck, 'The Globe at their Feet: FIFA's New Employment Rules' (2004) 7 Culture, Sport and Society 69; J.-C. Drolet, 'Extra Time: Are the New FIFA Transfer Rules Doomed?' [2006] 1-2 International Sports Law Journal 66. See also A. Egger and C. Stix-Hackl, 'Sports and Competition Law: a Never-Ending Story?' [2002] European Competition Law Review 81.
31 E.g. R. Parrish, Sports law and policy in the European Union (Manchester University Press, 2003); S. Greenfield and G. Osborn (eds.), *Law and Sport in Contemporary Society* (Frank Cass Publishing, London, 2000); H.-E. Meier, 'The Rise of the Regulatory State in Sport', conference paper available via http://regulation.upf.edu/ecpr-05-papers/hemeier.pdf (2005); L. Barani, 'The Role of the European Court of Justice as a Political Actor in the Integration Process: The Case of Sport Regulation after the Bosman Ruling' (2005) 1 Journal of Contemporary European Research 42; S. Van den Bogaert and A. Vermeersch, 'Sport and the European Treaty: a Tale of Uneasy Bedfellows' (European Law Review, forthcoming).

laws and practices that are not constitutionally dedicated to dealing with the particular subject matter of concern. Take EC consumer law. This comprises the application of the free movement rules of the Treaty to control national measures that impede consumer choice in the wider market - including national measures, as famously in the *Cassis de Dijon* case [32], that are themselves presented as measures of consumer protection; the body of measures that have promoted market integration by harmonising national consumer law and thereby creating a species of re-regulatory EC consumer law; a package of soft law measures and policy statements on the priorities to be pursued by EC consumer policy; and, last and certainly least, the tiny batch of binding EC measures that have been adopted under Article 153, the narrowly-drafted legislative authority granted to the EC in the specific area of consumer protection with effect from 1993 on the entry into force of the Maastricht Treaty. This package is not capable of being analysed as a pre-planned system of consumer law. For constitutional reasons, combined with reasons of political opportunism, the law has evolved in a much less rigorous fashion. But the product is not random. There are thematic connections that bind together the EC's interventions into consumer law. Commentators have debated the weight and merits of principles and techniques that pervade the *acquis* such as information disclosure, party autonomy and inquiry into substantive unfairness. They have sought to discover how much 'system' is at stake and to recommend ways to develop law and practice further. [33] This is typical of the search for an 'EC policy' in many areas. EC law and practice 'spills over' to provoke new academic sub-disciplines, as the 'Europeanisation' of many policy sectors that are in explicit terms subject to only a limited interventionist competence granted by the EC Treaty gathers pace. [34] The general lesson is that a programme presented as an exercise in securing market freedom inevitably involves a sustained commitment to rule-making within which a host of public and private actors jockey for position and influence. [35] And the EC has to shape a policy of sorts on all manner of things. Such is the *practice* of attributed competence, guaranteed as a *principle* of EC law by Article 5(1) of the Treaty.

So now to consider the law governing the sale of rights to broadcast sporting events under EC law. The EC is not equipped with general competence in the field of property law. Nor is it so equipped in the field of sport. Here, then, is a gloriously illuminating case study into competence creep and policymaking in a constitutionally murky setting. What does it mean to speak of an 'EC policy' in such ambiguous realms?

My argument is that simply to present the law - or still worse the rules - is to mislead. The ground is less stable than would be the case in a typically national system. But nonetheless my argument is that the EC's institutions deserve respect for creating something that is a good deal more valuable, coherent and reliable than mere case-by-case dispute resolution. The free movement rules are not without significance, but most of all this has occurred in the shadow of the Treaty competition rules.

3 EC competition law

3.1 The general purpose of competition law

The market rarely functions perfectly. Producers and suppliers may be immunised from the discipline of competition and the consequent need to satisfy the consumer. As a general observation one may suppose that, in the absence of effective competition between producers and suppliers the 'invisible hand' of the market will be ill-directed. And, as an equally general observation, competition law is motivated by the objective of improving the functioning of the market as a whole.

In modern economies competition law and policy is typically directed at the suppression of practices on the 'supply-side' that the market system, supported by private law, cannot root out unaided. Under a general (though not unconditional) assumption that competition is a desirable process, competition law and policy is aimed at ensuring the market is reshaped into a competitive environment.

The restraints which would be removed by such laws could be behavioural or they could be structural. Behavioural restrictions would include cartels and restrictive practices agreed by producers and/or suppliers. Producers may prefer collusion to competition. Instead of trying to undercut each other's prices in order to increase sales, they may prefer to arrange a common selling price. This will make life altogether more comfortable for producers, but at a cost to the consumer: price competition will be suppressed. Such cartels appear antagonistic to the fundamental notion of the competitive market. Legal intervention may be justified as a method of correcting the imperfection introduced by producer collusion. Producers must be free to compete, but they are not free under the law to surrender that freedom. The regulatory authority charged with the supervisory task must therefore devise a legal response to the damaging effects of cartels on free competition. Horizontal agreements - those concluded between parties at the same stage of the production or distribution process, that is, firms who are supposed to be rivals - tend to be those which the law greets with most evident suspicion. Vertical deals tend to be far less pernicious and will often ostensibly improve distribution arrangements and, by injecting new sources of supply into a market, may frequently be pro-competitive (though careful case-by-case analysis is always required). So as a general proposition the law is much more permissive in its treatment of vertical agreements than it is of horizontal agreements. Here, however, is where sport may be special. 'The 'horizontal' relationships in organized sport are different in character from those which prevail - and are often anti-competitive - in 'normal' industries. Sports leagues are characterized by the unavoidable interdependence of the participants. This will be re-addressed below.

Structural impediments would include monopolies where the pattern of the market is not competitive, irrespective of the behaviour of firms. Put simply, in a monopoly the price and quality of what is produced are dictated by the choice of the producer, not the operation of the market dictated ultimately by the consumer. The law could be used to forestall the creation of monopolies (for example, by forbidding mergers) or to destroy existing monopolies (for example, by forcing large firms to sell off assets). The law would thus root out inhibitions on free competition. But the conventional approach to monopolies is to regulate them - a middle way between preventing monopoly power from coming into existence and destroying it once it has: to accept the existence of dominant economic power but to regulate the firm so that it cannot behave independently. For example, the firm may be subjected to price control or quality standards; it may be obliged to deal equitably with customers, existing or prospective. The essential point is that, once a firm has crossed a threshold of economic power which renders it in part immune from the pressure of competition, it becomes liable to act inefficiently and/or unfairly. There is then a rationale for exercising regulatory control which would not apply if it were economically weaker. In fact such controls in one sense mimic the results which would obtain were a competitive market in operation. In that case, an individual firm's prices would be controlled by reference to those set by rivals, but in a monopoly a regulatory authority may assume that function. The question of the precise level at which prices should be set (in the absence of guidance

32 Case 120/78 Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649.

33 E.g. - and by no means adopting the same outlook - S. Weatherill, *EU Consumer Law and Policy* (Cheltenham, Elgar, 2005); N. Reich and H.-W. Micklitz, Europäisches Verbraucherrecht (Baden-Baden, Nomos, 2003); S. Grundmann, W. Kerber and S. Weatherill, Party Autonomy and the Role of Information in the Internal Market (Berlin, de Gruyter, 2001); H. Rösler, Europäisches Konsumentenvertragsrecht (Munich, CH Beck, 2004); K. Riesenhuber, Europäisches Vertragsrecht (Berlin, de Gruyter, 2003).

34 E.g. on environmental law see J. Scott, EC Environmental Law (Harlow, Longman, 1998), J. Jans, European Environmental Law (Groningen, Europa Law Publishing, 2000), esp. Chs. I and III; on labour market regulation and social policy more generally see J. Kenner, EU Employment Law: From Rome to Amsterdam and Beyond (Oxford, Hart Publishing, 2003), C. Barnard, EC Employment Law (Oxford, OUP, 2000); on family law see E. Caracciolo di Torella and A. Masselot, 'Under construction: EU family law' 29 ELRev (2004) 32; on health care law see T. Hervey and J McHale, *Health Law and the European Union* (CUP, Cambridge 2004).

from the operation of the market) then becomes a point of detail, but one which is itself likely to be controversial.

In some areas, however, the purity of competition will not provide the best of all possible markets. Limits on competition may rationally be recognised as desirable. This compromise is often denoted by the comment that the law seeks 'workable' not 'perfect' competition. Desirable behavioural limitations on competition may include collaboration on research and development, where the pooling of resources may secure more effective research work carried out in common instead of duplication of superficial efforts. Desirable structural limitations may be observed in markets which are inappropriate for competition: 'natural monopolies' illustrate this phenomenon. In these circumstances there is a place for competition law, but its function will not be to insist on competition. Instead, the law may be employed to permit beneficial agreements among firms. This implies a need for legal tests apt to distinguish between desirable and undesirable agreements and for institutions charged with the function of making the appropriate assessments.

3.2 Competition law in Europe

These general perceptions may be seen to underpin competition law throughout Europe. And they serve also to introduce the structure of Articles 81 and 82 EC, the twin pillars of EC competition law. In Europe competition law and policy have always held a high profile as part of the process of market integration and regulation. The first of the European Communities, the European Coal and Steel Community established in 1952 by the Treaty of Paris, included competition policy provisions. The European Economic Community came into existence in 1958 as the creation of the Treaty of Rome and was of much broader scope than the Coal and Steel Community. That Treaty also included a Chapter entitled 'Rules on Competition', comprising three sections, 'Rules applying to Undertakings', 'Dumping' and 'Aids Granted by States'. Enforcement powers were conferred on the Commission by Regulation. Some of the common policies of the Community emerged slowly over the later part of the twentieth century, with heavy reliance on the laborious development of secondary legislation; this is true of social policy and it is true of fields such as consumer policy and environmental policy. In sharp contrast, however, the fundamental principles of competition policy have always been firmly embedded in the very fabric of the Treaty. The main pillars are Articles 81 and 82 of the EC Treaty (ex 85 and 86), governing cartels and monopolies respectively. The competition rules act as a cornerstone of the activities of the EU, prominent among which remain the establishment of 'a system ensuring that competition in the internal market is not distorted'.[36] The European Court has gone so far as to describe Article 81 EC as 'a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.' [37] For the EU, it should also be borne in mind that competition policy operates to regulate a market which is not integrated after the fashion of a national market. This lends to it a special, interventionist flavour not found in a national system.[38]

3.3 European Community Law of Cartels and Restrictive Practices

EC restrictive practices law is based on the overall perception that supply side collaboration carries the potential to damage the operation of the market. Article 81 (ex 85) is the relevant provision of EC law, which reads as follows:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
   a directly or indirectly fix purchase or selling prices or any other trading conditions;
   b limit or control production, markets, technical development, or investment;
   c share markets or sources of supply;
   d apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   e make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of any agreement or category of agreements between undertakings;
   - any decision or category of decisions by associations of undertakings;
   - any concerted practice or category of concerted practices;

   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
   a impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   b afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 81(1) contains the basic prohibition. The application of Article 81(1) is based on the effects of an agreement. It does not matter what form the collaboration takes provided it has an effect which restricts or distorts competition (to summarise Article 81(1)). Article 81(2) contains the sanction for violation of the prohibition, namely the nullity of the agreement (though, as mentioned below, the perpetrators may also be fined). Article 81(3) sets out the criteria for exemption of an agreement falling within Article 81(1). It is here that the insight that not all collaboration is harmful is overtly reflected. Article 81(3) is more precisely drafted than a simple cost/benefit analysis, but its broad purpose is to permit the pursuit of agreements that, though restrictive of competition, are nevertheless beneficial. In practice, since the application of Article 81(3) solely through individualised decisions would be inefficient, the Commission has long found it prudent to issue Block Exemption Regulations. These govern particular categories of collaboration such as research and development [39] as well as providing a more general shelter for vertical agreements (between traders at different levels in the distribution chain). [40] The content of the Block Exemptions is drawn from Article 81(3); in relation to particular deals, they constitute the concrete clause-by-clause expression of the abstract requirements of the criteria for exemption in that Article. [41] Strictly, there is no obligation to adhere to a Block Exemption Regulation: firms may draft a novel agreement and seek to show it falls within Article 81(3). However in practical terms, it is common to choose the convenient route of compliance with the Block Exemption where that is available.

At the institutional level within the EU, the administrative application of the prohibition on anticompetitive agreements affecting trade between Member States contained in Article 81 rests with the European Commission, specifically with the Competition Directorate General within the Commission. A supervisory jurisdiction is exercised, initially, by the Court of First Instance, with the possibility of an appeal to the European Court of Justice. The involvement of national bodies is also central to the practical administration of the rules. Both national courts and national competition authorities have responsibilities to apply the EC competition rules. [42]

35 M. Egan, Constructing a European Market (Oxford, OUP, 2001).
36 Art.3(g) EC.
37 Case C-126/97 Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I-3055.
38 See e.g A. Albors-Llorens, 'Competition Policy and the shaping of the Single Market', Ch. 12 in C. Barnard and J. Scott (eds), The Law of the Single European Market (Oxford, Hart Publishing, 2002).
39 Reg. 2659/2000 OJ 2000 L304/7.
40 Reg. 2790/1999 OJ 1999 L336/21.
41 For a detailed examination, see R. Whish, Competition law (London, Butterworths, 5th ed, 2003), pp.168-174, Chs. 15 & 16.

3.4 Public and private enforcement of Article 81

All three paragraphs of Article 81 are susceptible to enforcement by both the Commission and national agencies. This has not always been so. Outside the sphere of Block Exemptions it used to be the case that the Commission enjoyed the exclusive right to decide whether or not to grant an exemption pursuant to Article 81(3). This meant that commercial parties were required to notify practices to the Commission in search of the protection of exemption. This was burdensome for all concerned. It made a bottleneck of the Commission. It was changed by Regulation 1/2003. [43] Exemption is no longer dependent on a Commission decision. Firms do not notify agreements to the Commission in the hope of securing exemption. Instead they make their own assessment of what is allowed and what is not. Mistaken choices are tackled ex post facto, by an investigation initiated by the Commission and/ or in proceedings before national courts or tribunals who, thanks to Regulation 1/2003, are equipped with the competence to apply Article 81(3) which was denied them for the first 40 years of the lifetime of EC competition law. This system decentralises the application of EC competition law, and increases the number of responsible authorities.

The Commission's main preoccupation in devising the modernised system of decentralised enforcement recently instituted by Regulation 1/2003 has been to improve efficient use of enforcement resources. Exemption is no longer its task alone. It is able to rely on national agencies to judge whether the Article 81(3) criteria are satisfied. This allows the Commission to re-allocate the resources it previously spent on dealing with notification of (often benign, sometimes trivial) practices by firms in search of exemption. These resources will be re-routed to the front-line of the campaign to root out and eliminate hard-core hidden cartels, which would of course never have been notified anyway under the old system. [44] The Competition Directorate General in the Commission is powerfully equipped to pursue this quest. Powers conferred initially by Regulation 17/62, but now extended by and rooted in Regulation 1/2003, include powers to enter and to search premises and to seize documentation. Failure to co-operate may attract financial penalties which are independent of sanctions that may be imposed should a violation of the substantive rules come to light. The Commission also rules on whether a violation of Article 81 has occurred and is empowered to impose fines on the participants up to a ceiling of 10% of the firm's world wide turnover. [45] The Commission enjoys a considerable discretion in fixing an appropriate fine, although it is directed by Article 23 of Regulation 1/2003 to consider in particular the gravity and duration of the infringement. Guidelines on the Commission's method in setting fines have been issued [46] and they are supported by a 'Leniency Notice' [47], which, by offering partial or total immunity from fines, is designed to encourage 'whistle-blowing' by participants in unlawful anti-competitive practices. Secret cartels are often best destroyed from within. Fines imposed by the Commission have exceeded £50 million on occasion and although the principle of proportionality ensures that most fines are much less severe, the availability of such powerful investigative powers combined with potential penalties of such magnitude mean that taking EC competition law lightly is not a practical option for business.

The principle of the direct effect of EC law has always meant that enforcement may be achieved through national courts in addition to activity by the Commission. This is blandly recited in Regulation 1/2003 which provides in Article 6 that 'National courts shall have the power to apply Articles 81 and 82 of the Treaty'. In principle the victim of a cartel incompatible with EC law could initiate proceedings at national level to secure an order that the practice should terminate. As a matter of Community law national courts must effectively protect Community law rights. The landmark ruling in *Francovich v Italian State* 48 established that in appropriate circumstances this may include an obligation to order compensation in the event of loss suffered as a result of breach of EC law. The case concerned liability incurred by the State. In *Courage v Crehan* [49] the European Court applied this principle in the sphere of competition law in a case involving two private parties. It observed that the practical enforcement of Article 81 would be promoted if it were accepted that an individual could claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. The desire to maintain effective competition therefore prompted the Court to rule as a matter of EC law in favour of private actions for damages before national courts in the event of infringement of the Treaty competition rules. [50]

An action at national level may be initiated in parallel with a complaint to the Commission.[51] As part of that package the Commission has developed a policy of pursuing complaints only where there is a Community interest in doing so, leaving other matters to be pursued by the complainant at national level. This attempt to organise enforcement priorities and to promote decentralisation has secured judicial support.[52] The Commission is eager to rely ever more heavily on national-level enforcement. To this end, for example, it recently issued a Green Paper to promote discussion of how to facilitate private actions for damages for breach of the competition rules. [53]

Private enforcement of EC competition law before national courts is accordingly a practical feature of the system and although it used to be flawed by the inability of national courts to apply Article 81(3), that obstacle was lifted by Regulation 1/2003. National courts are now expected to apply Article 81 in its entirety. In this sense the ordinary courts of the Member States are also courts responsible for the application of EC competition law.

As explained, Regulation 1/2003 was directed at 'decentralising' enforcement of EC competition law, thereby to improve its effectiveness. Not only national courts but also national competition authorities are intended to form part of this scheme. National competition authorities are also enabled to apply Article 81 in its entirety.

The point of the pattern of enforcement crafted under Regulation 1/2003 is supposed to be that it will be tough to hide anti-competitive practices. There are many pairs of enforcement eyes and many places to challenge unlawful conduct. A solution had to be found for the risk of duplication of effort - or, worse, the risk that an agency in one Member State may go one way in enforcing the law, an agency elsewhere a different way and the Commission in a different direction again. The Commission, aware of these risks, has begun to establish a pattern of co-operation between responsible bodies pursuant to Articles 11 - 16 contained within Chapter IV of Regulation 1/2003. What is foreseen by these provisions is a 'network' of European competition agencies designed to encourage consistent application of the law within the newly decentralised system. The Commission has duly published a Notice on cooperation within the Network of Competition Authorities. [54] It is also explicitly provided that where the Commission initiates proceedings this shall 'relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82.' [55] So the Commission can, in effect, pull rank.

Moreover it is explicitly - and logically - stated that neither national courts nor competition authorities may take decisions which would run counter to a decision already adopted by the Commission. [56] In fact this makes concrete in a particular case the general consequences that flow from the European Court's celebrated insistence that with-

42 See for detail Whish note 41 above Chapters 7 and 8.
43 OJ 2003 L1/1.
44 Cf e.g. H. Gilliams, 'Modernisation: from policy to practice' (2003) 28 ELRev 451; J. S. Venit, 'Brave new world: The modernization and decentralization of enforcement under Articles 81 and 82 of the EC Treaty' (2003) 40 CMLRev 545.
45 Article 23 Reg 1/2003.
46 OJ 2006 C00/00, available via http://ec.europa.eu/comm/competition/antitrust/legislation/fines_en.pdf.
47 OJ 2002 C45/3.
48 Cases C-6, C-9/90 [1991] ECR I-5357.
49Case C-453/99 [2001] ECR I-6297.
50 Cf. A. Komninos, 'New prospects for private enforcement of EC competition law' (2002) 39 CMLRev 457; G. Monti, 'Anticompetitive agreements: the innocent party's right to damages' (2002) 27 ELRev 282; and, more generally, C. Jones, Private Enforcement of Antitrust Law in the EU, UK and USA (OUP, 1999).
51 Art.7(2) Reg. 1/2003 confers standing for these purposes on 'natural or legal persons who can show a legitimate interest'.
52 Case T-24/90 Automec v Commission [1992] ECR II-2223.
53 COM (2005) 672.
54 OJ 2004 C101/43.
55 Article 11(6) Reg. 1/2003.
56 Article 16 Reg. 1/2003.

in the scope of the EC Treaty EC law is supreme over national law and must accordingly be applied by national courts in preference to any conflicting national law. [57] Regulation 1/2003 also makes explicit the answer to the question whether a practice which may affect trade between Member States but which does not restrict competition within the meaning of Article 81(1) or which fulfils the conditions for exemption under Article 81(3) may be subject to prohibition based on national law. It may not. [58] So, in the particular context of competition law, the constitutional relationship between EC law and national law is such that it prevents Member States relying on domestic law to authorise practices which fall foul of Article 81 EC; and, moreover, it disallows stricter national approaches to practices that are within the jurisdictional reach of, but compatible with, Article 81. These constitutional rules have less overt practical significance than one might initially imagine, because in most parts of Europe domestic competition law today chooses to follow the EU's model [59], not least in order to reduce the costs that would be incurred by business in complying with the layers of diverse regulation. So clashes are rare in practice. [60] But in so far as they occur the constitutional primacy of the EC rules is guaranteed. Therefore understanding the treatment of sale of broadcasting rights under EC law is absolutely vital to any national competition lawyer in Europe.

3.5 Control of the abuse of a dominant position: European Community Monopoly Law

Article 82 (ex 86) acts as the EC monopoly control provision, although the terminology used is prohibition of 'abuse of a dominant position'.

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

a directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions:
b limiting production, markets or technical development to the prejudice of consumers;
c applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Any control system must devote careful attention to the proper definition of a monopoly. Products may be interchangeable. The sole producer of widgets is not in a monopoly in economically meaningful terms if there are available sources of gizmos, a product that is readily interchangeable with widgets. If the widget producer hoists prices, consumers can switch to gizmos. There is no rationale for treating the market as a monopoly enjoyed by the widget producer. More subtly, even where a producer is the single source of widgets, for which there is no other interchangeable product, there is no monopoly if other producers are capable of altering their techniques in order to enter the market for widget production. In such circumstances, consumers have no immediate alternative supply source, but prices should nevertheless be held down to competitive levels because the sole active producer knows that price rises will attract new firms into the market, offering lower prices and consumer choice. Markets should therefore not be assessed as static. They should not be treated as monopolistic where they are in fact 'contestable'. The need to define markets with care applies equally to geography as to product. The only British producer has no monopoly if the British market is open to external competition from sources of supply based in other countries. Monopoly law, like competition law generally, deals with the state of markets, so that where those markets change shape, the application of the law too must adjust.

These issues of market definition are critical in any policy of monopoly control. An underestimation of actual or potential competition will lead to an overestimation of market power. This in turn may prompt an intervention in the name of monopoly control where there is no monopoly. However, if a monopoly is identified, control may be judged appropriate in light of the potential damage caused by the absence of competition, ultimately to the detriment of the consumer.

The chief relevant piece of evidence that a firm has sufficient economic strength to render it subject to the Article 82 obligation not to abuse a dominant position is its ability to act in the market independently of normal competitive pressures. Article 82 applies to firms able to ignore the demands of 'competitors and customers and ultimately of consumers'.[61] In this matter careful economic analysis of the state of the market is vital, lest intervention be over-hasty or, at the other extreme, unduly reluctant. In practice the Commission's Notice on market definition, published in 1997, is helpful in explaining the factors which the Commission takes into account in determining whether the structure of the market is tainted by dominance and therefore properly subjected to public intervention in the name of controlling abuse of market power. [62] The Notice offers as a guideline a test based on inspection of consumer behaviour. If a 5-10 per cent non-transitory change in the price of a widget does not lead to consumers switching to buying a gizmo instead, then the widget is not regarded as forming part of the same market as the gizmo. They do not compete with each other. So for example in *1998 Football World Cup* [63] the Commission applied this test and found that consumers of tickets for the Finals of the Football World Cup did not treat that product as interchangeable with tickets for other football or sports events or other forms of entertainment. This analysis led the Commission to the conclusion that there was a separate market for the supply of World Cup tickets alone. The competition organisers were free of effective competitive constraints on that market. They enjoyed dominant market power and, by applying terms that discriminated on the basis of nationality, they had unlawfully abused it.

Monopoly law is typically structured to tolerate the existence of monopolies while regulating the exercise of monopoly power. Article 82 bears precisely this stamp. Abuse is unlawful, dominance per se is not. The firm that is assessed to possess dominant market power is judged to fall under a 'special responsibility' [64] not to abuse that power. The organisers of the 1998 Football World Cup were fined not for holding monopoly power over distribution of tickets, but rather for using that dominant market power to discriminate in favour of purchase by French consumers. Dominant firms may not set unfair prices or act improperly to segregate the market. The most strikingly interventionist feature of Article 82 is that it may be applied in order to require a reluctant dominant firm to respond to consumer demand. In this vein, the Commission found a violation of Article 82 in *ITP, RTE, BBC*.[65] The three television companies printed separate guides to future programmes, using copyright which they held over their own listings to prevent the appearance of a single, integrated publication. A consumer of the information was thus forced to buy three separate guides. The Court of First Instance upheld the Commission finding that an abuse had occurred in *RTE, BBC, ITP v Commission*[66] and the European Court subsequently dismissed appeals by two of the

57 The landmark decision was Case 6/64 *Costa v ENEL* [1964] ECR 585. In the competition law field the best-known decision is Case 14/68 *Walt Wilhelm* [1969] ECR 1, although, as mentioned in the text above, Reg 1/2003 has now addressed some relevant outstanding issues, cf Whish note 41 above, pp.75-77.
58 Art 3(2) Reg. 1/2003.
59 Cf G. Dannecker and O. Jansen, *Competition Law Sanctioning in the European Union* (Kluwer Law International, 2004).
60 But see further below for different approaches to collective selling of broadcasting rights.
61 E.G. Case 322/81 Michelin v Commission [1983] ECR 3461. See also Whish note 41 above, Chs. 1 & 5; W. Bishop and M. Walker, 'The Economics of EC Competition Law: Concepts, Application and Measurement' (2nd ed, 2002), esp Chs 3, 4.
62 Commission Notice on market definition OJ 1997 C 372/5.
63 Decision 2000/12/EC [2000] OJ L5/55. For comment see S Weatherill, '0033149875354: Fining the Organisers of the 1998 Football World Cup' [2000] *European Competition Law Review* 275.
64 Case 322/81 note 61 above.
65 Decision 89/205 OJ 1989 L78/43, [1989] 4 CMLR 757.
66 Cases T-69, T-70, T-76/89 [1991] ECR II-485, 535, 575.

television companies.[67] The firms were obliged to make their listings available to third parties, subject to payment of a reasonable fee. The protection of the consumer interest is explicit in this decision, which imposes consumer choice on unwilling firms. Both courts observed that the companies had abused the economic power they enjoyed under their copyright by unjustifiably preventing the appearance of a new product for which there was potential consumer demand. Admittedly the decision is exceptional. Were Article 82 routinely used to strip exclusivity out of the hands of holders of intellectual property rights, commercial incentives to invest in innovation would be diminished. This perception is plainer from subsequent case law. In *Oscar Bronner GmbH v Mediaprint* [68] Oscar Bronner claimed that Mediaprint was acting in breach of Article 82 by refusing to include Bronner's newspaper in its home-delivery delivery service (for which Bronner was prepared to pay). It failed. It had not been established that it was economically unviable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme. Mediaprint was entitled to keep Oscar Bronner out of the distribution network it had itself built up, even if that might diminish the consumer's opportunity of gaining ready access to Bronner's product. The exercise of an exclusive right may, in exceptional circumstances, involve an abuse condemned by Article 82, but that had not occurred in Oscar Bronner. So Article 82 is an important provision but holders of monopoly power are not reduced to the puppets of regulators. [69]

Enforcement of Article 82 lies in the hands of the Commission and national courts and tribunals. Much of the comment above relating to Article 81 may be applied *mutatis mutandis* to Article 82. Violations of Article 82 tend to involve particularly large undertakings, and fines are commonly at the higher end of the scale. Article 82 is directly effective and may consequently be enforced before national courts at the suit of private individuals. And, consistently with the account given above of the constitutional relationship between EC and national law, it is not permitted that national law approve practices that are prohibited by Article 82. EC law must remain supreme over national law. However, a distinction from Article 81 applies here: whereas a practice which may affect trade between Member States but which does not restrict competition within the meaning of Article 81(1) or which fulfils the conditions for exemption under Article 81(3) may not be subject to prohibition based on national law, by contrast it is envisaged that a Member State may take stricter action against unilateral conduct which goes beyond that foreseen by Article 82. [70]

These provisions apply to the sale of rights to broadcast sporting events. The detail is explored more fully below, after a brief portrayal of the economic context.

4 The economic context of sport and broadcasting

Bosman [71] has been widely treated as a far more significant agent for change in sport in recent years than is realistic. Of course the judgment has brought to an end intra-EU/EEA nationality discrimination in club football, and, by generating adjustment of the scope of the transfer system, it has altered the nature of the relationship between player and club. [72] But the dominating issue in professional sport over the last decade and a half has been the transformation of the broadcasting sector. Sweeping deregulation and doses of privatisation have combined with extraordinarily rapid technological change affecting the delivery of media and audiovisual services to convert broadcasting into a fiercely competitive and volatile sector. [73] It is well known that broadcasting undertakings, and in particular new market entrants seeking to establish awareness of their presence among potential customers, have chased the acquisition of rights to transmit sports events with a zeal that reflects the intense appeal of sports coverage to viewers (and to advertisers). Football and Formula One motor racing sit in a lucrative position at the top of the European tree. Media companies have vigorously pursued the acquisition of contractual rights - most of all, new entrants want exclusive rights to broadcast the most popular events, where, in some cases, consumers have a 'must see!' attitude. [74] In some cases media groups have even tried to secure a controlling interest in sports clubs themselves [75] or, at least, a lesser stake that increases their influence on decisions to sell rights [76]. Simple economics dictates that the explosion in the number of actors on the demand-side of the market combined with the relative difficulty in increasing the supply of truly attractive events leads to vast increases in the prices charged by the sports industry for broadcasting rights. Most recently the English Premier League was reported to have sold the rights to broadcast matches over a three-year period beginning in 2007 for a combined total of £1.7 billion. The cost to broadcasters of the three-year deal that stretched from 2004 to 2007 was only just over £1 billion. [77] It is plain that rights to broadcast sports events, as a saleable commodity, have become sufficiently lucrative in recent years to transform the whole structure of professional sport as a commercial enterprise. Opportunities to sell branded merchandise, such as club shirts, have provided another explosion of revenue, further enriched by the growing appreciation of the need to protect and exploit image rights. The fan who pays at the gate is no longer the main source of revenue for sports clubs. The alteration of the transfer system post-*Bosman* is frankly a sideshow compared with this cascade of commercialisation. [78]

So the prominence of EC law's intervention in sport in recent years is above all the consequence of the 'commercialisation' of the sector, in particular as a result of its close association with the helter-skelter development of the broadcasting industry. In fact, much of the most economically significant sports-related material that tumbled into the Commission's in-tray in the late 1990s was concerned directly or indirectly with broadcasting. In some respects the Commission's recent preoccupation with sport has been driven by its need to monitor the commercially much more important broadcasting sector, in which it is profoundly anxious to forestall practices that will facilitate existing incumbents' anxiety to impede new entrants. And it is highly plausible that the pace of technological change will increasingly throw up new forms of rapid mass communication, generating intensified fragmentation in the pattern of supply of audiovisual services. This will fuel yet more demand for rights to broadcast sports events, and bring with it yet more challenges for EC competition law. [79]

It is Article 81 that has been the main area of activity. As the case

67 Joined Cases C-241/91P and C-242/91P RTE and ITP v Commission [1995] ECR I-743.

68 Case C-7/97 [1998] ECR I-7791.

69 See in similar vein Case C-418/01 IMS Health [2004] ECR I-5039.

70 Art 3(2) Reg. 1/2003.

71 Case C-415/93 note 28 above.

72 See e.g. J.-P. Dubey, La libre circulation des sportifs en Europe (Staempfli Bern/ Bruylant Brussels, 2000).

73 Relevant documents on the Commission's quest for 'modernisation' of the regulation of the sector may be accessed via http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/index_en.htm.

74 On inelasticity of demand for major events see Comm. Dec. 2000/400 Eurovision OJ 2000 L151/18 (annulled, but not on the point of market definition, in Cases T-185/00 et al M6 and others v Commission [2002] ECR II-3805); Comm. Dec. 2000/12 1998 Football World Cup OJ 2000 L5/55.

75 E.g. in 1999 the UK competition authorities blocked a proposed merger between BskyB, a satellite broadcasting company, and Manchester United, a football club, on the basis that it would operate contrary to the public interest; Cm 4305, 1999. Among other factors it was thought that competition in the market for acquisition of broadcasting rights would have been restricted by BskyB's more intimate involvement with the supply-side and that the gulf between rich and poor football clubs would be widened. For comment see F. Tassano, 'Are Vertical Mergers Harmful?' [1999] European Competition Law Review 395; D. Harbord and K. Binmore, 'Toeholds, takeovers and football' [2000] European Competition Law Review 142.

76 E.g. in the UK the consequence of the blocking of the BskyB/ Manchester United merger, supra note 75, has been the acquisition by media companies of minority but not insignificant stakes in football clubs; see A. Brown, 'Sneaking in through the back door? Media company interests and dual ownership of clubs', Ch. 8 in S. Hamil, J. Michie, C. Oughton and S. Warby (eds.), Football in the Digital Age: whose game is it anyway? (Edinburgh, Mainstream Publishing, 2000).

77 'Sky retains Premiership title after £1.7 bn TV rights auction', The Independent Saturday 6 May 2006.

78 See generally e.g. S. Morrow, *The People's Game? Football, Finance and Society* (Macmillan, 2003); Hamil et al note 76 above; I. Blackshaw and R. Siekmann (eds), *Sports Image Rights in Europe* (Cambridge University Press, 2003).

79 Cf D Geradin, 'Access to content by new media platforms: a review of the competition law problems' (2005) 30 ELRev 68.

involving ticketing for the 1998 World Cup [80], the regulation of agents [81] and the ongoing *Oulmers* litigation [82] make clear one could certainly not exclude the possibility that Article 82 could play a role in review of sporting practices in cases of non-substitutable products and services. This is particularly pertinent in circumstances where a sports federation which enjoys monopoly power in making the rules that govern the sport makes decisions with direct commercial implications. This may apply in the case of sale of broadcasting rights. In *FIA (Formula One)* part of the Commission's objections related to rules that provided a financial disincentive for contracted broadcasters to show motor sports events that competed with Formula One. [83] The Commission was satisfied with a solution according to which the FIA retreated to a regulatory role, thereby releasing broadcasters to make their own commercial choices about which events to show. In principle then, the practices of sports governing bodies that have an impact on the broadcasting sector are subject to control under Article 82 EC where they go beyond what is necessary for the functioning of the sport. Put another way, in such circumstances a sports regulator becomes (also) a commercial undertaking.[84] However, most of the relevant activity has focused on control of selling of rights pursuant to Article 81.

The selling of broadcasting rights in Europe takes many forms. One of the best known is the 'Eurovision' set of arrangements, which involve the collective buying and sharing of rights and which demonstrate the pressing commercial impetus towards cross-border collaboration in the European market for broadcasting services which has for regulatory, linguistic and cultural reasons long been fragmented along national lines. But how does Article 81 apply? The Eurovision system has been the subject of two favourable exemption Decisions by the Commission, both of which have been duly annulled by the Court of First Instance for want of accurate analysis. [85] This is doubtless rather embarrassing for the Commission, though the saga, which will be examined in depth below, is illuminating and emblematic of the complexity of the calculations at stake. However, as a general observation there is no automatic objection to such arrangements under the competition rules of the EC Treaty. In fact, it is entirely plausible that such arrangements are pro-competitive in so far as they group together operators who would not have the economic power to enter into the relevant transactions on an individual basis. However, the detailed way in which such schemes are structured, in particular in so far as they may damage the position of parties excluded from the arrangements, may generate anti-competitive concerns, and this has generated considerable activity at EC level. There are three issues which dominate the law governing the sale of broadcasting rights. First, exclusivity: what is the legal approach to the sale of rights to a buyer who acquires an exclusive right? Second, collective selling: what is the legal approach to the sale of rights in circumstances where the sellers join together, typically as members of a League operating collectively? Third, collective purchasing: what is the legal approach to the acquisition of rights in circumstances where the purchasers join together? There are also further issues concerning limitations on the disposal of broadcasting rights - by sports federations ('blocking rules') or by the EC regulator ('protected events' legislation). These matters are now examined in turn.

5 Exclusive selling

5.1 The scope of the prohibition

Article 81 prohibits agreements which have as their object or effect the prevention, restriction or distortion of competition within the common market, subject only to the possibility of exemption in accordance with the criteria set out in Article 81(3). So one may suppose that where a seller agrees to supply a buyer with rights to broadcast sports events on an exclusive basis, Article 81 is engaged. After all, the exclusivity of the deal shuts out other would-be competitors who are unable to gain access to the content. And yet this would be to go too far. This approach, taken to its logical extreme, would mean any contract is subject to control under Article 81. This would be to extend the Treaty competition rules beyond their intended purpose. It is instead necessary to focus in a more economically informed manner on what should be the proper reach of Article 81. And simply because a seller grants exclusivity to a buyer of rights does not mean that Article 81(1) is automatically engaged.

One of the Court's most important early examinations of the issue arrived in *Nungesser v Commission.* [86] The case involved the transfer of technical knowledge. The agreement conferred exclusive rights for Germany on Nungesser. The Court observed that a so-called open exclusive licence involved the owner undertaking not to grant other licences in respect of the same territory and not to compete himself with the licensee on that territory. Did this have the effect of preventing or distorting competition within the meaning of (what is now) Article 81 of the Treaty? The Court acknowledged that the grant of exclusive rights for a limited period is capable of providing a further incentive to innovative efforts. To prohibit an exclusive licence would cause the interest of undertakings in licences to fall away, which would be prejudicial to the dissemination of knowledge and techniques in the Community. So the Court concluded that 'the grant of an open exclusive licence, that is to say a licence which does not affect the position of third parties such as parallel importers and licensees for other territories, is not in itself incompatible' with the Treaty. So Article 81(1) does not automatically catch the sale of an exclusive right, even though such may initially appear to be a 'restriction' on trade. In fact it is no more than trade itself! But the implication is clear - this is not an unconditional exclusion of the application of Article 81. And in *Nungesser* the Court made clear that it would not countenance a licence which suppressed parallel trade: that is, one under which the parties to the contract propose, as regards the products and the territory in question, to eliminate all competition from third parties, such as parallel importers or licensees for other territories.

As suggested above, vertical deals generally have pro-competitive implications because they inject fresh competition into the market. They deserve, and typically receive, positive regulatory treatment, albeit not unconditionally so. Exclusivity is commonly a necessary element in a successful vertical deal. The grant of exclusivity is hugely attractive to the buyer, who may thereby be induced to invest much more confidently in the quality of the product - itself a clear consumer benefit.

In this vein the case law that has followed the Court's important lead in *Nungesser* is vast and is not usefully set out here at length. [87] *Coditel* should however be mentioned for its sector-specific relevance: it is one of the earliest cases in which the Court set out clearly that an exclusive licence for the distribution of films is not without more to be regarded as a violation of Article 81(1). [88] The important general point is that the Court is prepared to accept that some apparent restrictions on trade are immune from control under Article 81(1), provided that they are (loosely put) necessary as part of a package for

80 Dec 2000/12 note 63 above.

81 Cf Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-000 (Article 82 applicable in principle but no breach). An appeal against the CFI decision was dismissed in Case C-171/05P *Laurent Piau v Commission* judgment of 23 February 2006.

82 Pending Case C-000/06, referred to the European Court by Tribunal de Commerce de Charleroi in May 2006. For background see S. Weatherill, 'Is the Pyramid Compatible with EC Law?' 2005/3-4 International Sports Law Journal 3.

83 COMP 35.163, Notice published at OJ 2001 C169/5.

84 Fixing the limits of the notion of the 'undertaking' for the purposes of determining the limits of the application of the Treaty competition rules is an awkward problem that extends far beyond sport: see e.g. Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK* [2004] ECR I-2493; Case C-222/04 *Cassa di Risparmio di Firenze* judgment of 10 January 2006.

85 Dec. 93/403 Eurovision OJ 1993 L179/23 granting exemption under (what is now) Art 81(3) was annulled in Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others* v *Commission* [1996] ECR II-649; and the subsequent exemption granted by the Commission in Dec. 2000/400 Eurovision OJ 2000 L151/18 was annulled in Cases T-185/00 et al *M6 and others v Commission* [2002] ECR II-3805. See further below.

86 Case 258/78 [1982] ECR 2015.

87 See, for exhaustive treatment, Whish note 41 above, Chapter 16. See also R. Subiotto and T. Graf, 'Analysis of the Principles applicable to the Review of Exclusive Broadcasting Licences under EC Competition Law' (2003) 26(4) World Competition 589.

88 Case 262/81 [1982] ECR 3381.

securing the conclusion of desirable deals. Put another way, what may appear to be a constraint on competition is unaffected by Article 81 where it is unavoidably required to sustain the functioning of an arrangement which is unobjectionable in the light of EC law. [89] In this sense Article 81 must be interpreted in its true economic context. The Court of First Instance has helpfully captured what is at stake:

> '...it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 81(1) of the Treaty. In assessing the applicability of Article 81(1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned ..... ' [90]

In a similar vein of insistence on a realistic (and not unthinkingly broad) reading of Article 81(1) the Court of First Instance has recently explained that:

> 'The examination required in the light of Article 81(1) EC consists essentially in taking account of the impact of the agreement on existing and potential competition ... and the competition situation in the absence of the agreement ..., those two factors being intrinsically linked.' [91]

So, adopting this line of analysis, the sale of rights on an exclusive basis does not necessarily fall within the scope of Article 81. It may not be a restriction on competition. One should consider *inter alia* what would happen *without* the exclusive deal; if the answer is 'no deal at all' then the conclusion may be that far from restricting competition the exclusive deal in fact would have helped to inject fresh competition into the market. But unduly tight or lengthy restrictions will not escape subjection to Article 81 in this way. Nor would the Court countenance a licence which suppressed parallel trade. And an agreement conferring exclusive rights should be assessed in the context of any 'network effects' that are involved if that is relevant in the particular market - that means, an agreement's impact on competition must not be assessed in isolation if the economic reality is that the agreement is not an isolated transaction. [92]

So the sale of rights on an exclusive basis is not of itself subject to condemnation as a violation of Article 81(1). It depends on the precise terms and it depends on the particular market. This then translates into the detailed decision-making. Close attention to relevant market conditions is quite correctly the norm. [93] And this provides the key to determining what restrictions stretch beyond what is necessary for the protection of the seller's interests and what is therefore caught by the prohibition in Article 81(1).

How to apply these principles of law to the sports sector? As already sketched above, technological change and ubiquitous deregulation has combined to ensure that the market to acquire rights to broadcast sports events on an exclusive basis has become hugely commercially significant. Under the pressures imposed by this volatile situation, the Commission's preoccupation with the need to set out a tolerable clear indication of its approach was manifest in an important and influential paper published in 1998 by an official in the Competition Directorate-General, Anne-Marie Wachtmeister. In that paper, crisply entitled Broadcasting of Sports Events and Competition Law [94], it is stated that 'Exclusivity is an accepted commercial practice in the broadcasting sector'. It maximises profitability for the buyer and is the key to building up a new audience. But 'duration, quantity and upstream and downstream market power need to be examined in order to assess whether the exclusivity seriously restricts competition'. Following the lead of the Commission's 1997 Notice on Market Definition [95], the paper is significant and valuable for its insistence on the central function of proper market analysis for these purposes. This allows assessment of the foreclosure effect of the exclusive arrangement - it is this that determines whether Article 81(1) bites.

Appreciation of the structure of the demand-side of the market will condition the application of the rules. In Champions League [96] the Commission defined the market as one for the acquisition of television broadcasting rights for football events played regularly throughout the year. So international club competitions are part of the same market as national club competitions. Acquisition of exclusive rights to broadcast a popular football competition may be handled differently from acquisition of rights to broadcast a sport of interest only to a minority of viewers such as weightlifting or bog-snorkeling. The markets are different: so, for example, a 5-year exclusive deal would, it is submitted, be highly unlikely to escape the application of Article 81 in the former case but may conceivably do so in the latter. Seven years of exclusivity was provisionally reckoned by the Commission to be too long in Dutch football.[97] Similarly in FIA (Formula One) [98] broadcasters had exclusive rights for the contracted territory that were too long in the Commission's estimation. The agreed solution was to cap the length of new free-to-air broadcasting contracts at three years, albeit with exceptional provision for five-year deals where a particular need to encourage investment is present. The fundamental issue is whether broadcasters can access other sources of material that will allow them to compete effectively. The less plausible this is, the more serious the foreclosure effect.

Some *very* popular events are, in the eyes of consumers, stand-alone events: they will not watch something else as a substitute. In such circumstances the supplier's market power is very strong. [99] An abiding regulatory concern in such circumstances is the damage done to the consumer by lengthy exclusive deals, which, moreover, have the capacity to shut the door on potential new competitors, who, though not in themselves the target of legal protection, are nevertheless important players in shaping a market that will fulfil the objectives of the Treaty. What this means in practice is that exclusive selling of rights to 'premium' sports events attracts close regulatory concern. The longer the grant of exclusivity, the more acute the regulator's scepticism. But this must be balanced against the perception that, as mentioned above, a grant of exclusivity is hugely attractive to the buyer, who may thereby be induced to invest much more confidently in the quality of the product - itself a clear consumer benefit. A balanced assessment of a deal is always vital.

Licensing on a territorial basis is common in the sale of sports rights. However, this is not of itself treated as artificial market-partitioning which would be condemned as a violation of Article 81. Rather it reflects reality. Tastes and preferences do show divergences when one crosses a frontier. [100]

Sub-licensing rights as a mitigation of an exclusive arrangement might be sufficient to win a green light. [101] The issue here is damage to competition: provision for sub-licensing lessens the risk. As ever, the assessment depends on the market conditions. In some circum-

89 Cf e.g. Case C-250/92 Gottrup Klim v DLB [1994] ECR I-5641; Cases T-374/94 et al *European Night Services v Commission* [1998] ECR II-3141. For an account of the nuances in the relevant case law see Whish note 41 above pp.106-131.

90 Case T-112/99 Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom v Télévision française 1 SA (TF1) [2001] ECR II-2159.

91 Case T-328/03 *O2 (Germany) GmbH v Commission* judgment of 2 May 2006, para. 71.

92 Case C_234/89 Delimitis [1991] ECR I_935; Case C-306/96 Javico et al v Yves St Laurent Parfums [1998] ECR I-1983; and case C-214/99 Neste Markkinoiniti Oy [2000] ECR I-11121.

93 Although this is not to say that decision-making practice is completely internally consistent: cf Subiotto and Graf note 87 above; H. Fleming, 'Exclusive Rights to Broadcast Sporting Events in Europe' (1999) 20 European Competition Law Review 143.

94 A.-M. Wachtmeister, Broadcasting of Sports Events and Competition Law, Competition Policy Newsletter (Brussels, European Commission, number 2 of 1998 (June), available via.http://ec.europa.eu/comm/competition/speeches/index_1998.html.

95 Note 62 above.

96 Dec 2003/778 OJ 2003 L291/25 para. 79. See further below.

97 IV/36.033 KNVB/ Sport 7 OJ 1996 C228/4.

98 COMP 35.163, Notice published at OJ 2001 C169/5.

99 On inelasticity of demand for major sports events see Comm. Dec. 2000/400 Eurovision OJ 2000 L151/18 (annulled, but not on the point of market definition, in Cases T-185/00 et al M6 and others v Commission [2002] ECR II-3805); Comm. Dec. 2000/12 1998 Football World Cup OJ 2000 L5/55. In the case of films, cf Case IV/36.237 TPS 1 OJ 1999 L90/6.

100 Cf Case 262/81 note 88 above.

101 Cf Eurovision, note 85 above, and more fully below in connection with collective purchasing.

stances, where the threat of market foreclosure is minimal, sub-licensing obligations will not be required. At the other extreme, where an exclusive deal threatens severe market foreclosure, even sub-licensing might not be enough to haul the arrangement out of the grip of Article 81(1)'s prohibition. Wachtmeister summarises the position in the following terms: 'Sublicensing should not be regarded as a solution to all the competition issues which arise. In most cases it will be necessary and sufficient to deal with, for example, exclusivity which is of an excessive duration or scope'. [102]

The Commission has decided that Pay-TV constitutes a market that is separate from television funded by commercial advertising and public television financed through a combination of feed and advertising. [103] Because sources of funding are different the conditions of competition are different too. For advertising-financed television there is a direct commercial relationship between the supplier of the programme and the advertiser. On Pay-TV the relevant relationship is between supplier and viewer as subscriber. The point is that practices within one sector do not have an impact on the other, once one has concluded the absence of substitutability means that the markets are not the same, and that this therefore conditions the assessment under competition law. That means, more specifically, that anxieties about the acquisition of a high market share in one form of television by firm Z would not be alleviated by the fact that firm X has a high market share in another form of television.

5.2 Exemption

If an agreement does not fall within Article 81, it is immune from intervention based on the relevant EC rules. If an agreement does fall within Article 81, this does not mean it is automatically prohibited. Article 81(1)'s prohibition is supplemented by Article 81(3) which gives scope for exemption. So sale of rights to broadcast sports events on an exclusive basis could conceivably fall within Article 81(1), yet secure an exemption pursuant to Article 81(3).

Article 81(3) contains two positive and two negative criteria that must be satisfied by an agreement in order to secure entitlement to exemption. The practice must 'contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'; and it must not 'impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives', nor 'afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.

In the case of sale of rights to broadcast sports events on an exclusive basis, one could readily imagine that the deal could be presented as a contribution to improving the production or distribution of goods or to promoting technical or economic progress because of the incentives created by the grant of exclusivity to penetrate new markets and to improve the quality of the product in order to increase market share - all of which is perfectly conceivably in the interest to consumers. The precise conditions of the deal would need to be scrutinized in order to be satisfied that it is not marred by restrictions which are not indispensable to the attainment of its objectives. It would also be necessary to ensure that the parties to the deal are not afforded the possibility of eliminating competition in respect of a substantial part of the products in question, which plainly requires careful examination of the structure of the particular market in question. The Commission's Notice on market definition is helpful and influential on this point. [104] In fact, in all cases careful examination of the prevailing market structure is essential in determining the application of not only Article 81(1) but also Article 81(3). Accordingly existing decisions can be no more than illustrative of general approach and in no sense reliable 'precedents'. However, as a general observation, one could readily envisage that sale of rights of an exclusive basis could in appropriate circumstances - in particular where the market remains sufficiently competitive despite the exclusive tie-up - secure an exemption pursuant to Article 81(3) even if it falls within the scope of Article 81(1).

There is little practice to report in the sports sector. On one of the very few occasions on which the Commission has entered these waters a 'comfort letter' expressing a favourable view of conformity with the requirements of Article 81(3) was issued in relation to a five-year exclusive deal to supply rights to broadcast football matches struck between BBC, BSkyB and the English Football Association. [105] A significant factor prompting the Commission's readiness to shine a green light was the concern to allow BSkyB, then a fledgling satellite broadcaster, a sturdy platform on which it could develop a durable presence in the market. Absent such special considerations which prompt benign regulatory scrutiny one would not normally expect to see such an extended period of exclusivity permitted in a market for such popular events.

In the Commission's Helsinki Report on Sport, published in 1999 [106], a list of practices declared to be likely to be exempted from the competition rules included the sale of an exclusive right, limited in duration and scope, to broadcast sporting events. Of course, in strict jurisdictional terms, such practices may not even fall within Article 81 in the first place, in which case there is no need to address the question of exemption - and indeed it would be improper to do so. [107] But if exemption is required the Commission has here sketched the conditions for a favourable attitude.

In law the key text is the Block Exemption Regulation on Vertical Restraints. This is Commission Regulation 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. [108]

Regulation 2790/99 is based on an assumption, amplified in its Preamble, that vertical agreements are apt to improve economic efficiency by facilitating better coordination between the participating undertakings. They tend to permit the reduction of transaction costs. Nonetheless such efficiency gains must be balanced against anti-competitive effects which may follow from agreed restrictions contained in vertical agreements. The cost-benefit calculation is heavily affected by the market power of the undertakings concerned: to what extent is their commercial freedom of action confined by competition from other suppliers? Article 3 therefore establishes a threshold based on market share. [109] The Regulation withholds the benefit of a block exemption from agreements where the share of the relevant market accounted for by the supplier exceeds 30%. Below that crucial market share threshold of 30%, exemption is permitted to vertical agreements falling within the scope of the Regulation - although even then, below the threshold, certain types of severely anti-competitive restraints are not granted the green light. Article 4 excludes from the scope of exemption vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

a the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

b the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except:

- the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,

102 Note 94 above.

103 Case IV/M469 MSG Media Service OJ 1994 L364/1; COMP/38.287 *Telenor/Canal +* (2004).

104 Note 62 above.

105 OJ 1993 C94/6.

106 COM (1999) 644 and/2. For comment see S. Weatherill, 'The Helsinki Report on Sport' (2000) 25 ELRev 282.

107 Cf Case T-328/03 note 91 above, paras. 109-116: the CFI was unconvinced by the Commission's preference to treat such matters in the light of Art. 81(3) instead of Art. 81(1) and annulled the Exemption Decision. See similarly Cases T-374/94 note 89 above. Embedded in these detailed disputes is a larger issue about the precise relationship between analysis conducted under Article 81(1) and under Article 81(3): for recent exploration see R. Nazzini, 'Article 81 EC between time present and time past: a normative critique of "restriction of competition" in EU law' (2006) 43 CMLRev 497.

108 OJ 1999 L336/21.

109 Article 9 amplifies the method of calculation.

- the restriction of sales to end users by a buyer operating at the wholesale level of trade,
- the restriction of sales to unauthorised distributors by the members of a selective distribution system, and
- the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

c the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;

d the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;

e the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier to selling the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.

Article 5 supplements this. Exemption is not available in the case of any of the following obligations contained in vertical agreements:

a any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years. A non-compete obligation which is tacitly renewable beyond a period of five years is to be deemed to have been concluded for an indefinite duration. However, the time limitation of five years shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer;

b any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services, unless such obligation:
- relates to goods or services which compete with the contract goods or services, and
- is limited to the premises and land from which the buyer has operated during the contract period, and
- is indispensable to protect know-how transferred by the supplier to the buyer, and provided that the duration of such non-compete obligation is limited to a period of one year after termination of the agreement; this obligation is without prejudice to the possibility of imposing a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain;

c any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

So there are clauses in such agreements which EC competition law will simply not tolerate. In particular, deep-rooted anxiety about territorial segmentation in the European market is visible in these provisions.

There are several reasons - among them the rules concerning market share stipulated in Article 3 of the Regulation - why it will be abnormal for a contract for sale of rights to broadcast sports events on an exclusive basis to fit within Block Exemption Regulation 2790/1999. This does not mean that such arrangements cannot be exempted. An agreement that falls outwith a Block Exemption falls to be assessed on its own merits in the light of the criteria governing exemption contained in Article 81(3) EC. The approach found in the Block Exemption would, one would suppose, compare with the approach to assessing conformity with Article 81(3) on an individual basis. After all, Regulation 2790/1999 makes concrete the application of the Article 81(3) criteria to a particular type of deal. But, as mentioned, there is little regulatory practice to report in the sports sector. There might be an anxiety that the law is not very predictable. There is some truth in this. It has been suggested that a grant of three years' exclusivity should normally be permitted, even if the content is of premium quality. [110] This is probably about right. But markets differ and so therefore do legal assessments. 'Know your regulator' is good advice, although even here the elimination of the Commission's monopoly over the grant of exemption pursuant to Article 81(3) by the 'modernisation' Regulation 1/2003 [111], effective from 1 May 2004, means that proceedings before national courts and competition authorities are also features of the legal map where exemption is at stake. [112]

Ultimately it seems correct to conclude that the law governing exclusivity in the selling of rights to broadcast sports events is an application of general EC competition law. Sport is a little bit special, in the sense that acquisition of exclusive rights to broadcast the top events is doubtless of unusually great commercial importance, but in law it is not so very special. Market analysis is of central importance, as is true in all cases involving the grant of exclusive rights. The next issue for consideration is potentially rather different.

6 Collective selling of rights to broadcast matches

Rights to broadcast sports events are commonly sold on a collective basis. So it is typical, though not at all inevitable, that a sports league will sell rights to broadcast matches en bloc (perhaps on an exclusive basis, perhaps not), rather than leaving individual clubs to sell rights to broadcast individual matches. This is collective selling. It plainly raises questions about the application of the Treaty competition rules. Is this not a case of a restriction of competition? The collective arrangements replace the market that would otherwise exist for purchase of rights from the individual participants in the league. It is, in fact, a horizontal arrangement between operators at the same level of the market - the clubs, suppliers of rights to broadcast matches - and as explained above horizontal agreements are treated with great caution in orthodox thinking about competition policy.

And yet - as also suggested above - horizontal agreements in sport require careful appreciation. The relationship between clubs in a sports league is not precisely the same as the relationship between producers of sausages or makers of tractors. There is a necessary interdependence between clubs in a sports league. Each participant needs the others to survive as credible rivals, against whom to compete. A market's sole producer of sausages or sole maker of tractors enjoys great economic power, for consumers have no choice. A solitary sports team is of no interest to anyone. It needs rivals. So in a sports league the horizontal relationship prevailing between the clubs is not that same as that which one finds in a normal market and the law must take account of that, or else risk mishandling the peculiar economic context in which the sports league operates.

6.1 The phenomenon of 'interdependence' in sports leagues

As a general observation, one would expect the peculiar economic interdependence of clubs in a sports league to be reflected in rules which secure a certain equality between clubs designed to keep alive healthy competition. Systems of internal wealth distribution would not exist in 'normal' industries, but in sport they are indispensable, though, of course, fixing the desirable ambit of such intervention requires refined calculation. [113] One would suppose that the establishment of a 'solidarity fund' within a sport, to which wealthier clubs are required to contribute from the proceeds of, inter alia, the sale of broadcasting rights and ticket income and on which poorer clubs may draw for financial support, would escape supervision under EC competition law. It would not restrict competition within the meaning of Article 81(1) EC; rather, it is an arrangement that is inherent to the

110 J Taylor and A Lewis, Sport: Law and Practice, Butterworths 2002, p.414, para. B2.290.

111 OJ 2003 L1/1.

112 As mentioned above, Regulation 1/2003 foresees a pattern of co-operation within the 'network' of European competition agencies designed to encourage consistent application of the law within the newly decentralised system: see Arts 11-16 Reg 1/2003 and the Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C101/43.

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Presentation

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business of professional sport. And there are other matters that are agreed collectively between participants in a sports competition which are, loosely, the rules of the game, rather than restrictions on competition within the meaning of the EC Treaty. Examples include fixing the numbers of players per team [114] and the scheduling of fixtures. A similar approach has been taken to rules forbidding multiple ownership of football clubs. [115] Eliminating any suspicion of match-fixing is indispensable to genuine sporting competition, and therefore any consequent restriction on commercial opportunity to acquire football clubs could not be regarded as a restriction falling within Article 81(1) EC. Such arrangements do not fall within the scope of Article 81 at all. [116] My own view is that this is given a perfectly coherent legal explanation by the adoption of the Court's *Wouters* formula. In *Wouters* [117] the Court stated that in applying Article 81(1) account must be taken of 'the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives .... It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives'. The case had nothing to do with sport. It concerned Dutch rules prohibiting multidisciplinary partnerships between members of the Bar and accountants. But the statement of principle that the notion of a restriction falling within Article 81(1) must be assessed in context is readily capable of general application. One would in this vein employ *Wouters* to underpin an argument that the overall context in which sports regulation occurs, built around pursuit of a broad objective of fair and balanced competition, produces effects which though apparently restrictive of competition are nonetheless inherent in the pursuit of those objectives. That means that a sports rule which exerts a restrictive effect which goes beyond what is needed to achieve its objectives is subject to control under EC law. [118] But what may appear to be a constraint on competition is unaffected by Article 81 where it is unavoidably required to sustain the functioning of an arrangement which is unobjectionable in the light of EC law. [119]

6.2 Collective selling - law and practice

Collective selling of broadcasting rights is different. If rights are available only on a collective basis - so that a purchaser can buy only the output of the whole League - then a market for acquisition of rights belonging to individual clubs has been suppressed. Admittedly the precise nature of the legal right that is at stake is dictated by national law. [120] The Commission has tentatively decided to proceed on the basis that there is co-ownership of rights to broadcast matches held by a competition organiser and the clubs. [121] But the essential point is that even though EC law does not determine the ownership or content of such property rights, it does affect the way in which the rights are exercised. This illustrates the constitutional point made earlier that the Treaty competition rules have a much wider sweep than the EC's legislative powers. Sport escapes the latter but it does not escape the former.

Under the collective system, broadcasters are forced to compete for one package, and are unable to deal with individual clubs, among whom there would otherwise be competition in selling. [122] It is admittedly plain that clubs would have nothing to sell unless other clubs agreed to play against them. Fixtures cannot be arranged unilaterally - this is the nature of sport. But once clubs agree to play against each other, the subsequent decision to sell rights to broadcast matches on a collective basis is restrictive of competition. And whereas it may well be convenient for sports leagues, and perhaps even for (some) broadcasters too, to arrange the sale of rights on a collective basis, it is by no means necessary to do so to make the league viable. [123] So collective selling restricts competition within the meaning of Article 81(1) EC, in so far as it has an effect on inter-State trade. It is unlawful unless it is justified.

This preference normally to treat collective selling as a restriction falling within the scope of Article 81(1) is visible in the important Commission policy document published in 1998 under the name of Anne-Marie Wachtmeister and considered above. [124] This document connects the legal analysis to broader policy concerns by adding the warning that '[s]uch restrictions on output could in turn slow down the development of new broadcasting technologies at the national and cross-border levels'. And the subjection of collective selling to Article 81(1) is precisely the line of reasoning formally adopted by the Commission in *Champions League*, the most important decision dealing with collective selling of television rights (albeit not one that exhausts the interest in the matter for the future).

In July 2001 the Commission sent a statement of objections to UEFA, European football's governing body, complaining that its arrangements for the sale of broadcasting rights to the 'Champions League', the principal (and hugely lucrative) European club football competition, infringe Article 81. [125] UEFA sells rights collectively on behalf of all participating clubs. It has preferred to sell to broadcasters on an exclusive basis, typically under arrangements covering a period of several years. The Commission is careful to observe that it does not object to collective selling of sports rights as such. [126] However, it states that it considers that UEFA's scheme constitutes a substantial restriction on competition, not least because of the foreclosure of the market to potential entrants into a sector capable of dynamic evolu-

113 For economic analysis, see e.g. J. Quirk and R. Fort, Pay Dirt: the Business of Professional Team Sports (Princeton University Press, 1997); S. Dobson and J. Goddard, The Economics of Football (Cambridge U.P., 2001); S. Rosen and A. Sanderson, "Labour Markets in Professional Sports" (2001) 111 The Economic Journal F47; L. Buzzacchi, S. Szymanski and T. Valletti, "Equality of opportunity and equality of outcome: open leagues, closed leagues and competitive balance" (2003) 3 Journal of Industry, Competition and Trade 167.

114 Cf Cases C-51/96 & C-191/97 Deliege v Ligue de Judo [2000] ECR I-2549.

115 COMP 37.806 ENIC/ UEFA, IP/02/942, 27 June 2002.

116 Cf summary in P. Roth (ed.), Bellamy and Child's European Community Law of Competition (Sweet and Maxwell, 5th ed., 2000), para. 4-150; also J.-F. Pons, "Sports and European Competition Policy" and S. Weatherill "Sports under EC Competition Law and US Antitrust Law", Ch. 6, pp.75-92, and Ch. 8, pp. 113-126, respectively in B. Hawk (ed.), International Antitrust Law and Policy: Annual proceedings of the Fordham Corporate Law Institute for 1999 (Yonkers, New York, USA: Juris Publishing Inc., 2000); K. Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?' (2001) 38 *CMLRev* 613. See also Parrish note 31 above, esp Chapter 5 on competition law, building an analysis on a separation between 'a territory for sporting autonomy and a territory for legal intervention' (p.3).

117 Case C-309/99 J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten [2002] E.C.R. I-1577.

118 The CFI's failure to appreciate this is the principal source of my criticism of Case T-313/02 *David Meca-Medina and Igor Majcen v Commission* note 29 above. Para 55 of the judgment is especially unfortunate.

119 A decision such as Case C-250/92 Gottrup Klim v DLB [1994] ECR I-5641 should therefore be seen as running in the same direction as Case C-309/99 Wouters note 117 above. For an account of the nuances in the relevant case law see Whish note 41 above, pp.106-131; cf also Nazzini note 107 above. AG Lenz's Opinion in Bosman carries traces of this approach, Case C-415/93, note 28 above, esp. paras. 262-276. Also relevant in insisting on a contextual appreciation of the scope of Article 81(1) is Case C-67/96 *Albany International BV* [1999] ECR I-5751 (esp paras. 59-60). The Court accepts that a restriction of competition is inherent in collective agreements between organisations representing employers and workers, but is prepared to place the matter beyond the reach of Article 81(1). The reason lies in the need to interpret the provisions of the EC Treaty as a whole. The social policy objectives pursued by such agreements and recognised by the Treaty would be seriously undermined if Article 81(1) caught such arrangements.

120 Cf M. Beloff, T. Kerr and M. Demetriou, Sports Law (Oxford, Hart Publishing, 1999), pp.134-6, 153-6; D. Brinckman and E. Vollebregt, "The Marketing of Sport and its Relation to EC Competition Law" [1998] ECLR 281; I. Nitsche, "Collective Marketing of Broadcasting Rights in Europe" [2000] ECLR 208; J Taylor and A Lewis, Sport: Law and Practice, Butterworths 2002, pp.404-406. This aspect is also emphasised by Wachtmeister note 94 above.

121 Paras 118-124 of Dec 2003/778 Champions League OJ 2003 L291/25, considered more fully below.

122 The collectively sold package may be (and increasingly is) broken down into constituent units - live matches, recorded highlights, etc - but this does not affect the basic issue, which is the suppression of sales by individual clubs. Moreover, rights may be, but need not be, sold exclusively - exclusivity is a matter that is distinct from collectivity.

123 Cf M. Cave and R. Crandall, 'Sports Rights and the Broadcast Industry' 111 The Economic Journal F4 (2001), esp. at F18.

124 'Broadcasting of Sports Events and Competition Law' note 94 above.

125 IP/01/1043, 20 July 2001

126 "Background Note", Memo 01/271, 20 July 2001.

tion, and that although it in principle recognises the need for wealth distribution and solidarity within the sport, the UEFA arrangements go beyond what is necessary to achieve these legitimate ends.

UEFA duly responded by proposing an amended system involving, in short, an 'unbundling' of the package of rights available for purchase. More operators, including internet content providers as well as more traditional public and private broadcasters, will be able to acquire a degree of involvement in the coverage of the Champions League. This is an important point with obvious thematic connections to the general attitude of the Commission to the importance of ensuring that deals have the minimum effect of foreclosing the possibility of entry into developing markets. So much restriction is tolerated - only so much. The Commission expressed itself favourably disposed to this plan for competitive diversification which, it considered, would benefit football fans while also assisting the growth of new technology in the media sector. [127]

The Commission concluded its investigation by adopting a formal Decision in the Champions League case in July 2003. [128] It concluded that the collective selling arrangements restricted competition within the meaning of Article 81(1). This was not a set of arrangements that were indispensable for the organisation of sport. Rather, this was a commercial choice, with significant implications for the competitive process. The Commission accepts that football clubs are bound to co-operate in organising a league, so, for example, agreeing fixtures would not be a 'restriction' on competition, but it concluded that recognition of this special relationship of interdependence does not justify treating an agreement to sell rights to broadcast matches in common as anything other than a restriction which can stand only if exempted according to the orthodox criteria set out in Article 81(3). [129]

So could the deal be exempted pursuant to Article 81(3)? According to the Commission - yes!

The system created a single point of sale for defined 'packages' of matches, which the Commission considered generated efficiencies that were of a particularly significant magnitude as a result of the elimination of the need for broadcasters to deal with many different clubs subject to different ownership structures in different jurisdictions throughout Europe. Transaction costs were kept relatively low. (Identification of this advantage was also a factor in the Commission's earlier favourable treatment of *Eurovision* [130]). Moreover, the joint selling scheme for the 'Champions League' tightened UEFA's grip on the competition's organisation and allowed the commercially advantageous 'branding' of the competition as an unfragmented European product. Media operators would share in the advantages and they would be duly transmitted to consumers. The restrictions on competition were judged indispensable to provide these economic gains and competition would not be eliminated in respect of a substantial part of the media rights in question. The Article 81(3) criteria for exemption were satisfied.

In general *Champions League* demonstrates how the detailed application of Article 81 promotes the broader regulatory concerns of the Commission in its handling of the broadcasting sector. Collective selling has clear economic advantages, but it has costs too, specifically in the elimination of competition on the supply-side. At stake is a balance. The length of the contract is carefully scrutinised: the opportunities for new players to enter the market to acquire rights forms part of the assessment, especially where, as here, technological progress holds out the possibility of significant and rapid innovation that should yield benefits to the consumer. [131]

This important Decision was widely expected to assume a high profile in future treatment of rights' selling arrangements within national sports Leagues under both EC and national competition law. For example, Herbert Ungerer, a senior official in the Competition Directorate-General, used it as a blueprint [132], providing a checklist of relevant factors emerging from the case. The Commission expects to see:

An open tender
An unbundling of the offer to allow more than a single buyer
No excessive exclusivity - duration of the order of three years will often be acceptable
No automatic renewal, which is often just a disguised extension of the duration of exclusivity.

These are necessary elements in the quest to prevent vertical foreclosure, though Ungerer added that some markets may raise extra concerns where, for example, joint selling leads to excessive concentration in the downstream market. Where the single buyer can acquire the pool of matches, there may be regulatory concerns.

6.3 Champions League - application to collective selling at national level

The expected powerful influence of *Champions League* has become reality.

In fact, in advance of the Commission's Decision in 2003 on UEFA's arrangements for collective selling of rights to broadcast the Champions League, there had been some inquiry into selling by national leagues pursuant to national competition laws.

In Germany, collective selling in the *Bundesliga* was condemned by the competition authorities but subsequently granted statutory approval. [133] The matter was also examined at the some length by the UK's Restrictive Practices Court in its 1999 ruling which found in favour of the legality of collective selling arrangements practised within the English (football) Premier League. [134] It is, of course, perfectly possible that national competition law shall pursue different objectives from those mandated for EC law by its Treaty, for good or bad reasons. The UK's Premier League case was decided under the antiquated and subsequently repealed Restrictive Trade Practices Act, which had little in common with the effects-based EC system and which was vulnerable to the criticism that it lacked economic nuance. [135] The UK has subsequently changed the law in order to establish a domestic model that is much more closely aligned with the EC model. [136] Indeed, as mentioned above [137], in most parts of Europe domestic competition law is largely a replica of the EU's model. However, this paper is concerned to examine EC competition law, not domestic competition law. So although approaches taken within the Member States may be of interest for the purpose of comparative reflection, the key practical point focuses on the relationship between EC competition law and national competition law. This was explained above. Within the scope of the EC Treaty EC law is supreme over national law and must accordingly be applied by national courts in preference to any conflicting national law. A national court may not rely on national law to permit a set of arrangements which are contrary to the prohibition contained in Article 81. This, of course, reveals the limits of concessions made to sport under national law, whether in statutory form or through judicial decision-making. A practice that, for example, did not affect trade between Member States would lie outside the scope of Community competition law. It could therefore be

127 IP/02/806, 3 June 2002; O.J. 2002, C196/3.
128 Dec 2003/778 OJ 2003 L291/25.
129 Dec 2003/778, paras. 125-131.
130 Note 85 above, and see more fully below on collective purchasing. The CFI annulled the Commission's Decisions in *Eurovision* but did not take issue with the identification of these economic benefits flowing from the arrangements.
131 On this aspect of Champions League in particular see N. Petit, 'The Commission's Contribution to the Emergence of 3G Mobile Communications: an Analysis of Some Decisions in the Field of Competition Law' [2004] ECLR 429, 436-437. See subsequently the Commission report of 21 September 2005 into the provision of sports content over third generation mobile networks, available via http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/new_media/3g/final_report.pdf.
132 Speech delivered in Barcelona, 'Commercialising Sport: Understanding the TV Rights Debate', 2 October 2003.
133 s31 Gesetz gegen Wettbewerbsbeschraenkungen as amended with effect from 1 January 1999.
134 Re the supply of services facilitating the broadcasting on television of Premier League football matches [1999] UKCLR 258.
135 Cf S. Szymanski, 'Hearts, minds and the Restrictive Practices Court case', Ch. 23 in Hamil, et al note 76 above; also P. Spink and P. Morris, 'The battle for TV rights in professional football' pp.165-196 in A. Caiger and S. Gardiner (eds), Professional Sport in the EU: Regulation and Re-Regulation (TMC Asser Press, 2000).
136 The Competition Act 1998 is the key statute.
137 Cf note 59 above.

dealt with as the State authorities please, even according to assumptions that contradict those underpinning EC competition law. But, as this paper has explained, in practice the EC's jurisdictional reach is broad. It will be relatively uncommon for matters with an economic impact to be of purely local concern. Not only international sports events but also the more popular national competitions provide a particularly good example of products with growing transnational appeal. And once the matter falls within the scope of the EC Treaty, the doctrine of supremacy dictates that EC law must prevail over national law in case of conflict.

So, notwithstanding the statutory approval granted to collective selling in Germany and the judicial green light allowed in the UK pursuant to the Restrictive Trade Practices Act, the Commission duly intervened and asked that the participants notify the agreements to it. In law the application of Article 81 cannot be undermined by diverse national regulatory preferences.

In the case of the German Bundesliga commitments to loosen the prevailing form of collective joint selling were made legally binding by a Commission decision. Under the agreed new arrangements collective sale of broadcasting rights is not eliminated but it should occur in a manner which is open, transparent and non-discriminatory. In particular, the Bundesliga has undertaken to offer unbundled packages of rights for a duration not exceeding three seasons. The aim is plainly ensure that all rights are regularly offered to a large number of operators, in order to foster competition and choice in the market. Moreover, clubs are permitted to sell their own branded services to their fans, and there is provision for wider scope to sell new media products and services. This is plainly designed to stimulate innovation. [138]

The Competition Commissioner Neelie Kroes's summary is illuminating in its depiction of the Commission's aspirations in the application of Article 81 in such circumstances: 'This decision benefits both football fans and the game. Fans benefit from new products and greater choice. Leagues and clubs benefit from the increased coverage of their games. Readily available premium content such as top football boosts innovation and growth in the media and information technology sectors. Moreover, open markets and access to content are an essential safeguard against media concentration.' [139]

Joint selling of rights to broadcast matches in the English Premier League has similarly been handled in the light of *Champions League*. It was mentioned above that the English Premier League was reported to have sold the rights to broadcast matches over a three-year period beginning in 2007 for a significantly higher sum than that which it had extracted from broadcasting for the preceding three-year period - up from just over £1 billion to some £1.7 billion. [140] From the perspective of Article 81, the most striking point concerns the identity of the buyer. Under the 2004-2007 deal (and earlier ones) the purchasing broadcaster was Sky, a subscription channel. Its determination to acquire exclusive rights to show live Premier League matches was firmly in line with the perception that broadcasters desperately need exclusive access to 'premium' sports events in order to build up a profit-making base of subscribers. This, however, contradicted the Commission's general policy preference for wider involvement in downstream markets for the acquisition of rights to broadcast sports events and, more specifically, the Commission declined to accept that such arrangements could continue in England in conformity with Article 81. A statement of objections was issued by the Commission in 2002, declaring the Commission's concern that the arrangements for joint selling restricted competition contrary to Article 81. Eventually, after protracted and occasionally acrimonious negotiation [141], the Commission announced in March 2006 it had brought its investigation to an end, and that it had accepted binding commitments from the Premier League relating to future selling. [142]

The core features of the agreed new system involve open and competitive bidding, and the availability of a wider range of rights, including those pertaining not only to television but also to mobile phones and the internet. For live television no fewer than six packages would be put on sale, with no buyer permitted to acquire all six. The anxiety to prevent a monopoly, albeit one limited in time, that will tend to make the market rigid is evident. In fact, Sky has retained its grip on the lion's share of matches, buying four of the six packages while two were acquired by an Irish based broadcaster, Setanta. It remains to be seen whether this system will really improve the consumer's lot. [143] Do consumers really want choice and price competition in this newly fragmented downstream market or would they prefer, as in the past, to be able to get all available matches from a single source at a single price?

6.4 Collective selling - unresolved questions about the place of 'solidarity'

Champions League is an important but not exhaustive treatment of the legal issues at stake in the collective sale of rights to broadcast sports events. An open question is whether collective selling can be justified by reference to the need for organisational solidarity in sport. Consider resources raised from collective selling which are then distributed within the game in a fashion which reflects not only relative success and popularity but also the need to sustain lively competition - 'horizontal solidarity'. Broader still, consider the use of resources raised by collective selling of rights to broadcast professional sport to nurture the 'grass roots' of the game - 'vertical solidarity'. The basic point is that, in accordance with orthodox economic logic, the fact that the collective system of selling has restricted supply will ensure that the price paid by buyers will be higher than the (aggregate) price that would have been paid for rights sold on an individual basis by clubs. The losers are third parties - the purchasing broadcasters. From their perspective the restriction on competition caused by the collective agreement between clubs causes a diminution in choice and an increase in price. And although the system may indeed allow clubs to raise more revenue than would otherwise be possible and may also permit them to make administratively convenient arrangements to distribute that income among clubs and to the grass roots, the fundamental question is just why the sports industry should be permitted to improve its position at the expense of third parties, a category here covering both existing broadcasters and potential broadcasters kept out of the market by the restrictions imposed on supply.

Champions League does not address this issue. In pursuit of exemption UEFA advanced an argument founded on solidarity. [144] It argued that raising revenue in this way enabled it to share income for the general benefit of the game. The Commission accepted the desirability of promoting a balance between clubs playing in a League. It also accepted the value in encouraging the supply of young players. These objectives may be realised by cross-subsidy from rich to poor. This, of course, loudly echoes *Bosman*. The Commission expressed itself in favour of the 'financial solidarity' principle, and referred to its endorsement in the Nice Declaration on Sport, examined further below. But - crucially - could such desiderata suffice to outweigh the restrictions on competition inherent in a system of collective selling? In *Champions League* the Commission skipped clear of this point. It did not need to decide it. The criteria for exemption were already made out as a result of acceptance of the contribution of joint selling to delivering efficiencies, suppressing transaction costs and improving the brand.

The issue avoided by the Commission is of great legal and political delicacy. It is one to which the Commission has been gently and cautiously drawing attention for some time. In its Helsinki Report on Sport, published in 1999 [145], the Commission sketched its view of the role of a "European Sports Model". This possesses a number of features, most prominently grouped around the contrasts drawn with

138 COMP/C.2/37.214, OJ 2005 L134/46.
139 IP/05/62, 19 January 2005.
140 'Sky retains Premiership title after £1.7 bn TV rights auction', The Independent Saturday 6 May 2006.
141 Eg 'Sky and Brussels at war over Premiership rights', The Observer 11 September 2005 (Business Section, p.1).
142 IP/06/356 22 March 2006.
143 For criticism of the Commission's assumptions see D. Harbord and S. Szymanski, 'Football Trials' [2004] ECLR 117; D. Geey and M. James, 'The Premier League-European Commission Broadcasting Negotiations' (2006) 4 ESLJ, available via http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume4/number1.
144 Paras 164 - 167 of the Decision, note 128 above.
145 COM (1999) 644 and/2. For comment see S. Weatherill, 'The Helsinki Report on Sport' (2000) 25 ELRev 282.

North American sports practice. [146] For the Commission, European sport is characterised by, among other features, the notion of solidarity, stretching from the apex of the sport to the "grass roots". This has a direct connection with the question of the permissibility of collective selling of broadcasting rights. The Commission commented in the Helsinki Report that any possible exemption granted to collective selling arrangements would have to take account of the benefits for consumers and the proportionate nature of the restrictions in relation to the end in view. This is orthodox fare under Article 81(3) EC. It observed that it is therefore appropriate "to examine the extent to which a link can be established between the joint sale of rights and financial solidarity between professional and amateur sport, the objectives of the training of young sportsmen and women and those of promoting sporting activities among the population". In similar vein Commissioner Monti has cautiously suggested that "financial solidarity between clubs or between professional and amateur sport" could be a relevant factor in assessing whether to grant an exemption to collective selling. [147] This is strikingly less orthodox as an articulation of the matters that are properly taken into account under Article 81(3). This line of thinking hints intriguingly at use of the power to exempt restrictive practices as a method for insisting that fostering the social and educational function of sport is a condition for giving a green light to collective selling. The cartel is permissible provided its proceeds are shared throughout the sport for the sake of its general health. [148]

Is this sound as a matter of law? It is submitted that the orthodox approach under Article 81 would be to condemn collective selling as an unlawful restriction on competition between clubs and broadcasters and to expect clubs to sell rights on an individual basis. Only then, once this has occurred, would the issue of sport's need for internal organisational solidarity be properly invoked. It would be permissible and plausibly rational (in the service of an interesting competition) for participant clubs to work together to distribute proceeds from these individual sales in a manner which reflects the collective need to sustain healthy competition. One may also suppose that the clubs have some incentive to water the grass roots of the game with part of the income generated. That is to say, the sports-specific anxiety to sustain an attractively competitive league would be reflected only after third party broadcasters have enjoyed the right to participate in a 'normal' competitive market for sale of rights. The question whether there any room for sport to argue that its special interests should prevail over those of broadcasters - that collective selling should be permitted, despite its detrimental impact on broadcasters, because sport is entitled to maximise its revenues and/or entitled to raise money collectively so as to facilitate its ready internal distribution, is unresolved.

I am sceptical. The approach to be found in the Commission's 2004 guidelines on the application of Article 81(3) is committed to preventing any stretching of the criteria for exemption beyond those found in Article 81(3). [149] Objectives identified elsewhere in the Treaty may play a part in the appreciation of whether an apparent 'restriction' really constitutes a practice falling within Article 81(1): what may appear to be a constraint on competition is unaffected by Article 81 where, analysed in its proper context, it is required to sustain the functioning of the activity in question. [150] However, as explained above, collective selling may be appealing to those running a sports league but it is not an indispensable element in its functioning. As a restriction on competition it therefore falls within the scope of Article 81(1). This then places the focus on the possibility of exemption pursuant to Article 81(3). Arguments designed to justify the restriction on competition must be apt to be routed through one of the criteria set out in Article 81(3). The Commission's 2004 Guidelines seem to reveal a preference to barricade Article 81(3)'s walls against incursion by what may loosely be termed 'non-economic' factors. On this reading, if a practice is incapable of exemption pursuant to Article 81(3) it cannot be saved by reference to horizontal Treaty provisions such as Article 151(4). And if it merits exemption under Article 81(3), it cannot be denied it for neglect of other interests. 151 This implies that the promotion of cultural objectives which are not congruent with decision-making orthodoxy under Article 81 is possible only under other Treaty provisions. It cannot yet be stated with confidence that the Commission has got this right, although this line of reasoning does bear some resemblance to the Court's attitude to the relevance of the horizontal provisions of the Treaty in the exercise of the competence to harmonise under Article 95. The conditions for recourse to Article 95 must first be satisfied before any question of the impact of the horizontal provisions can arise. [152] My suspicion is that the defence of collective selling that falls within Article 81(1) by resort to arguments of solidarity (rather than the essentially economic arguments which prevailed in *Champions League*) is weak. Sport should find other means to promote solidarity which do not impose costs on third party broadcasters and ultimately on consumers, such as internally-arranged sharing of income.

7 Collective Purchasing

The matter of collective purchasing of rights also requires attention. As a general observation there is no automatic objection to such arrangements under the competition rules of the EC Treaty. In fact, it is entirely plausible that such arrangements deserve favourable treatment in so far as they group together operators who would not have the economic power to enter into the relevant transactions on an individual basis; and/or because they permit the economically efficient reduction of transaction costs. However, the detailed way in which such collective purchasing schemes are structured, in particular in so far as they may damage the position of parties excluded from the arrangements, may generate anti-competitive concerns, and this has generated activity at EC level.

One of the best known features of the European broadcasting sector is the 'Eurovision' set of arrangements. These involve both the purchasing and the sale of rights. This system has over time been handled rather awkwardly, even ineptly, by the Commission, but nevertheless it is possible to glean from the decision-making practice and its judicial scrutiny a tolerably clear impression of what is permitted and what it not.

The background to 'Eurovision' is provided by the European Broadcasting Union, an association of radio and television organizations set up in 1950 and based in Switzerland. It represents its members' interests in the field, including by the promotion of exchanges of radio and television programmes. Reflecting the history of the European broadcasting sector, most members had traditionally been public-sector organizations or bodies entrusted with the operation of a public service and commonly enjoying a monopoly. Times change: so too does technology. In 1984, the EBU for the first time admitted as a member a private television organization, the French company Canal Plus. In general the pattern of the sector began thereafter rapidly to change - to fragment - as ownership structures and regulatory patterns altered and technological development occurred. The tensions involved in these changes are visible in the interventions of the

146 Cf L. Halgreen, European Sports Law: a Comparative Analysis of the European and American Models of Sport, (Copenhagen, Forlaget Thomson, 2004); S. Weatherill, 'Resisting the Pressures of Americanization: the influence of European Community Law on the 'European Sport Model", pp.155-181, in Greenfield and Osborn note 31 above.

147 Speech delivered in Brussels at a conference on "Governance in Sport", 26 February 2001, available as Speech/01/84 via http://europa.eu.int/comm/sport/key_files/comp/a_comp_en.html.

148 Support for this approach is expressed by the Committee of the Regions, Opinion on the European Model of Sport, OJ 1999 C374/56, para. 3.8.

149 OJ 2004 C101/97. See esp. para 42. Cf also Wachtmeister note 94 above who states that 'Competition law is not the right instrument for achieving cultural or regulatory aims' but also tentatively raises the same possibility in connection with solidarity as Commissioner Monti note 147 above.

150 Cf discussion of Case C-309/99 Wouters note 117 above; and also Case C-67/96 *Albany International BV* note 119 above.

151 For a summary of the unclear scope of 'non-economic' aspects to Article 81(3) see Whish note 41 above, pp125-128; see also O. Odudu, *The Boundaries of EC Competition Law: the Scope of Article 81* (OUP, 2006), Chapter 7; E. Psychogiopoulou, 'EC competition law and cultural diversity: the case of the cinema, music and book publishing industries' (2005) 30 ELRev 838. Neither Commission nor Court has yet offered satisfactory explanation of the impact of Article 151(4) EC on Article 81 EC.

152 Case C-376/98 Germany v Parliament and Council [2000] ECR I-8419, *Tobacco Advertising*.

Commission, supervised by the Court of First Instance, into Eurovision.

Through 'Eurovision' itself, which has been in existence since 1954, the EBU organises the exchange of television programmes. Members offer to the other members, on the basis of reciprocity, their news coverage of important events and their coverage of current affairs and of sports and cultural events taking place in their countries. This, of course, is generally helpful in enabling all members to provide a high quality service in the relevant fields to their own viewers. And, as part of this scheme, members of the EBU are able to participate in a system of joint purchasing of television rights to international sports events, also embracing the sharing of rights once acquired.

Originally the benefit of the services of the EBU and Eurovision was exclusively reserved to their members. However, from 1988 the governing statutes envisaged that contractual access to Eurovision could be granted to associate members and non-members of the EBU.

The Commission's investigation into the Eurovision system began in the late 1980s, as the wave of change broke over the broadcasting sector. It was prompted in particular by complaints by third parties about their inability to extract sub-licences to broadcast material acquired by the collective action of the members of the 'Eurovision' scheme.

In 1993 the Commission issued its first Decision. [153] It found that the joint purchasing arrangements struck between the members of EBU restricted competition within the meaning of Article 81(1). However, it concluded that the system yielded significant economic benefits. This was sufficient to persuade the Commission that an exemption pursuant to (what is now) Article 81(3) should be granted. Its duration was five years. The Commission's green light was conditional upon the acceptance of sub-licensing of rights to third party non-members as an element in the Eurovision scheme.

This, however, was an outcome that did not satisfy some third parties. The matter was brought before the Court of First Instance in search of annulment of the Commission Decision. The applicants before the CFI had, in differing ways and for differing reasons, found themselves unable to gain the level of access to the EBU's services that they desired. Their application was successful. [154] The Court of First Instance focused in particular on the EBU's exclusion of purely commercial channels. In its Decision the Commission had found this to be a distortion of competition within the meaning of Article 81(1) which was nonetheless indispensable within the meaning of Article 81(3). But the Court considered the Commission had failed adequately to demonstrate that the EBU membership rules were objective and sufficiently clear so as to enable them to be applied uniformly and in a non-discriminatory manner. Therefore, in the absence of such analysis, the rules, as restrictions on competition, could not be deemed 'indispensable'.

The EBU reconsidered its position and prepared a revised set of rules. The Commission subsequently adopted a further exemption Decision in favour of Eurovision. [155] It found a restriction of competition between members who would, without the collective purchasing scheme, have competed against each other to acquire rights, but it found that collective purchasing reduced the transaction costs that would have been associated with a plethora of separate negotiations. In general, the arrangements ensured that more sporting events were broadcast by a larger number of broadcasters. The Article 81(3) criteria were met.

This favourable treatment was based on significantly adjusted arrangements making the jointly purchased rights more readily available to non-members, including pay-TV operators. [156] As the Commission recognises in its Decision this is a matter of huge commercial sensitivity given the surrounding environment of escalating prices of rights to broadcast major sports events. [157] And accordingly the temptation to proceed once again to litigation was irresistible. The matter was once again the subject of judicial review initiated by broadcasters aggrieved at their position 'on the outside' of the EBU. Once again the Commission Decision was declared unlawful. [158] The Court of First Instance objected to the rules governing the sub-licensing scheme and also to the thoroughly unhelpful way in which they were applied in practice. The Commission had contended that the sub-licensing scheme guaranteed that live transmission rights which were not used by EBU members would be made available to their non-member competitors. The CFI examined the system and it did not agree. This meant that the Commission's view that the sub-licensing scheme prevented the elimination of competition in the relevant market was not well-founded and that therefore the Commission had made a manifest error of assessment in the application of Article 81(3).

The background to this litigation is, of course, provided by the increasing ferocity of competition in the market for rights to broadcast major sporting events. What conclusions should be drawn from this saga about the expectations of EC law in the shaping of collective purchasing arrangements in the broadcasting sector? First of all, accurate economic analysis is vital. It must be demonstrated that there is a violation of Article 81(1). This is not inevitable. [159] In particular where individual operators would lack the necessary economic strength to enter relevant markets to purchase rights, a collective system may be viewed as a means to promote new competition and therefore, examined in its proper economic context, not as a restriction on trade within the meaning of Article 81(1) at all. Market analysis in the *Eurovision* cases revealed, however, that a sufficient degree of restriction of competition was the product of the collective purchasing scheme and that therefore in that case Article 81(1) was triggered. Even if a deal is caught by Article 81(1), it may be eligible for exemption pursuant to Article 81(3). This requires compliance with the four criteria, two positive, two negative, contained therein. It is perfectly conceivable that such criteria could be satisfied by a collective purchasing agreement - just as in *Champions League* the Commission came to the conclusion that collective selling generated economic benefits to the sellers in the shape of improved branding of the product and reduction of transaction costs. [160] Collective purchasing, as a general observation, goes some way to tackling the costs generated by the fragmentation along national lines of much of the European broadcasting sector. As the Commission accepted in *Eurovision* - and on this point it was not contradicted by the CFI - collective purchasing is capable of reducing transaction costs by eliminating the need for multiple individual negotiation and it can promote the wider distribution of programmes. But any restriction on competition must be carefully scrutinised - in the terms of Article 81(3) it must be 'indispensable' to achieve the claimed economic benefits of the practice. The principal lessons of the Commission's travails in Eurovision involve understanding the importance of paying attention to the impact on third parties of the arrangements under scrutiny. It is here that objectionable anti-competitive features are most likely to arise. And the CFI twice refused to accept the Commission's view that as much as possible had been done to alleviate the damaging effect of the Eurovision scheme on the competitive position of non-members. So the Decision granting an Article 81(3) exemption was not upheld.

There is no necessary objection to membership rules *per se*. But they must be objective and sufficiently clear so as to enable them to be applied uniformly and in a non-discriminatory manner. Rules which do not meet these criteria cannot be treated as 'indispensable' and so cannot be exempted under Article 81(3). Moreover, sub-licensing arrangements are clearly treated as a necessary element in any possible exemption under Article 81(3), given the market power exercised by the members of the EBU acting collectively through Eurovision.

153 Dec. 93/403 Eurovision OJ 1993 L179/23.

154 Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others* v *Commission* [1996] ECR II-649.

155 Dec. 2000/400 Eurovision OJ 2000 L151/18.

156 See paras 28-37, 106-110 of Dec. 2000/400 note 128 above.

157 Paras 50-58 of Dec. 2000/400 note 128 above.

158 Cases T-185/00 et al *M6 and others v Commission* [2002] ECR II-3805. For comment see A. Herold, 'Rules governing the acquisition by third parties of television rights for sporting events under *Eurovision* in breach of the European competition law' *International Journal of Communications Law and Policy* Winter 2002/2003 Issue 7, 1.

159 See in particular para 64 of the judgment in Case T-185/00 et al note 158 above, citing the seminal Case 262/81 note 88 above.

160 Dec. 2003/778 note 128 above.

The CFI insists that the rules governing sub-licensing as well as their practical management should form part of the examination into whether the Article 81(3) criteria are satisfied.

8 Blocking rules

A Commission Decision of April 2001 addressed UEFA's rules permitting national football associations to prohibit the broadcasting of football matches within their territory during a two-and-a-half hour period on a Saturday or Sunday corresponding to the normal time at which fixtures are scheduled in the relevant country. This, one would suppose, impedes the commercial freedom of broadcasters to conclude deals to show matches at designated 'blocked'times, but it serves the end of sustaining a lively atmosphere in stadia by encouraging spectators to attend matches 'live' rather than merely fester in front of a television set. The Commission concluded that the rules fell outwith the scope of application of Article 81. In the Press Release concerning this matter Mr Monti is quoted as observing that the decision "reflects the Commission's respect of the specific characteristics of sport and of its cultural and social function" [161]. However, the text of the formal Decision published by the Commission reveals a different, narrower story [162]. The Decision is in fact based on routine market analysis. The Commission finds that the UEFA rules do not appreciably restrict competition within the meaning of Article 81(1) [163]. It explicitly states that it therefore need not assess the extent to which the televising of football exerts a negative impact on attendance at matches [164]. The Decision is, admittedly, built on appreciation of the specific nature of the market for rights to broadcast football matches, just as all competition decisions take proper account of applicable market conditions, but it is to go too far to make Mr Monti's breezy claim that it reflects the Commission's respect for sport's "cultural and social function". It would be more accurate to state that market analysis conducted under Article 81 has led to a conclusion which does not assert a basis for interference with the autonomy of football governing bodies to choose to 'block' the broadcasting of matches. It is not the Commission's business to embark on an assessment of sport's cultural and social function, except in so far as it may be relevant under Article 81(3), and, even though the criteria governing exemption are not necessarily wholly incapable of influence by what may be loosely termed 'cultural factors', as discussed above, such broader considerations are scrupulously excluded from the formal Decision on UEFA's blocking rules, which is confined to Article 81(1) alone.

9 Burdens imposed because of the distinctive nature of sporting competition: 'protected' or 'listed' events

Legislation governing "protected" or "listed" events is popularly supposed to have been introduced in order to ensure that particularly high-profile sporting fixtures are available to the general public without the need to pay a subscription to the broadcaster, but, at least in its EC dimension, this is in fact a misleadingly inflated view of the degree of legal intervention that exists. The relevant legislation at EC level is a good deal less interventionist, and a good deal more ambiguous, than the common misperception holds.

9.1 'Listed events' under the 'Television without Frontiers' Directive

The so-called "Television without Frontiers" Directive, Directive 89/552, was amended by Directive 97/36 [165], and it is the latter Directive that provides the source of the relevant provisions. The Directives are based on the Treaty provisions governing co-ordination of laws in the establishment and services sectors [166] and are accordingly measures of market integration, operative in a sector technologically well suited to transfrontier growth. Because several Member States have regimes which, in differing ways, involve some degree of intervention into the manner of broadcasting major sporting events, it was decided that some attempt be made to supply an EC-level framework for resolving the collision between such regimes and the quest for an integrated European market. This, of course, is a classic example of the endemic tendency of a policy of trade integration to spill over into other sectors. Because States have taken a stance on patterns of intervention designed to limit market freedoms, the EC, devising a regulatory framework for a broader European market, must respond by making its own choices about the content of the regime that shall be adopted at European level. So co-ordination and harmonisation is much more than a technical process of fixing a framework of common rules for a common market; instead it involves inevitable and sensitive selections of regulatory style and philosophy. So, in this instance, questions of sport and culture, in respect of which the EC lacks any general legislative competence, are nevertheless drawn on to its legislative agenda as a result of the wide-ranging functional impact of the programme of harmonisation and co-ordination of laws. In this vein, recital 25 of Directive 97/36 observes that Article 128(4) EC (now Article 151(4)) "requires the Community to take cultural aspects into account in its action under other provisions of the Treaty". Harmonisation is permissible only provided a sufficient contribution to market-building is demonstrated, but in shaping the content of the harmonised regime it is perfectly proper for cultural policy to be taken into account, just as consumer policy and public health policy affect the shaping of market-integrative rules at EC level [167].

So, offering a fine illustration of these regulatory ripples, the opportunity was taken on the amendment effected by Directive 97/36 to include new provisions on "protected events" in the EC regime. [168] But, as one may have anticipated, given the sensitivity of the issues at stake, there is no question of the matter being dealt with exhaustively at EC level. In fact, the EC rules governing protected events are a very strange beast indeed. Of particular relevance to the current paper, they illustrate the point that the EC's policy on sport is extraordinarily ill-defined to the point of challenging the very validity of the claim to constitute a 'policy' at all.

The relevant provision is Article 1(4) of Directive 97/36, which among other things provides for the insertion of a new Article 3a into Directive 89/552. Article 3a provides that

> "Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television".

The underlying anxiety is plainly that broadcasters to whom a fee must be paid by viewers to secure access to transmissions will acquire exclusive rights to major events with the consequence that the general population will be deprived of the opportunity to view such events for free [169], but the word "may", the fourth word in this extract, is vital to grasping the nature of the regime. There is no obligation imposed on Member States. The Commission has properly emphasised that this is a "voluntary provision". [170] The issue is national choices, not EC requirements. Article 3a of Directive 89/552 does not define more precisely the circumstances in which the power conferred may or should be exercised. Having introduced the notion of events of "major importance for society", the provision proceeds simply to

161 IP/01/583, 20 April 2001.

162 Comm. Dec. 2001/478 OJ 2001 L171/12.

163 Paras. 49-61 of the Decision. The Commission will monitor change in market structure, particularly in the wake of the "Internet revolution", para. 56.

164 Para. 59.

165 OJ 1989 L298/23, OJ 1997 L202/60 respectively. See generally on this regime C. A. Jones, "Television without Frontiers" (1999-2000) 19 YEL 299.

166 Articles 47(2) and 55 (ex 57(2) and 66) EC.

167 Articles 153(2), 152(1) EC. Cf Case C-376/98 note 152 above; for discussion of the impact of this case on cultural aspects of harmonised laws see I. Katsirea, "Why the European broadcasting quota should be abolished" (2003) 28 ELRev 190.

168 See R. Craufurd Smith and B. Boettcher, "Football and Fundamental Rights: Regulating Access to Major Sporting Events on Television" (2002) 8 European Public Law 107.

169 "Free" television for these purposes means "broadcasting on a channel, either public or commercial, of programmes which are accessible to the public without payment in addition to the modes of funding of broadcasting that are widely prevailing in each Member State (such as licence fee and/or the basic tier subscription fee to a cable network", Recital 22.

170 Third Report on the application of Directive 89/552, COM (2001) 9, p.8.

require a Member State which choose to exercise this power to draw up a list of events which it considers to fall into this category, and then to notify the Commission of measures taken or to be taken to protect them from falling into the hands of broadcasters who will act in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such event on free television. These measures are to be scrutinised by the Commission and published in the Official Journal. A complementary transnational dimension is added by Article 3a(3) of Directive 89/552. This provides that Member States shall ensure that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State as carrying major importance for society. This is, of course, necessarily a mandatory rather than voluntary provision as far as Member State authorities are concerned; were it otherwise, one State's choices would be readily undermined by another's lack of concern in so far as broadcasters established in the latter State had acquired rights "listed" by the former State.

The event of "major importance for society" is a category which is amplified in the Preamble [171], but which is nevertheless inevitably subjectively defined. As one would have readily predicted, State practice varies. The majority of States have designated no events as carrying major importance for society pursuant to Directive 89/552 (as amended). Those that have exercised the available power have made very different choices. [172] It comes as no surprise that no Member State apart from the United Kingdom reckons the televising of Test match cricket to fall within the preferred scope of protection; nor that Italy alone lists the San Remo music festival. But there is wide variation even in connection with events which one would suppose would be of more-or-less equally powerful interest State by State. The Finals of Football's World Cup, staged every four years and won by a European country as often as not, are "listed" in their entirety in the United Kingdom, whereas as far as Germany, Austria and Ireland are concerned only the Final, Semi-Finals, Opening Match and matches of the respective national team are included on the list, while Italy lists only the Final and matches of the Italian national team. Moreover, the lists change. Denmark notified the Commission of its list in 1999 but withdrew this with effect from the beginning of 2002 and it now operates no list of the type recognised by Directive 89/552. [173]

As yet there has been little relevant litigation. In *Infront WM AG v Commission* the applicant (formerly the Kirch Media Group) objected to the UK's list, which affected rights which it owned and which consequently affected its commercial position. [174] However, the decision of the CFI casts no light on the regime generally. Infront challenged the letter sent by the Commission to the British authorities advising them that it had no objections to the notified measures. The CFI concluded that this letter was susceptible to judicial review because, by triggering the mechanism of mutual recognition foreseen by the Directive, it was endowed with binding legal effect and it also found the applicant to possess the necessary standing for the purposes of Article 230(4). [175] The CFI then annulled the decision for procedural reasons. The College of Commissioners had not been consulted. The ruling demonstrates that access to the Community courts for disgruntled rights-holders is possible, but the decision reveals nothing about more profound questions concerning the willingness of the Community judicature to inquire into the Commission's role under Article 3a of the Directive and/or the choices made by Member States. However, the Directive appears to establish a relatively loose set of discretionary rules. One would not imagine a court would lightly interfere with decisions taken within its framework, even though it is plain that the decisions in question are likely to have considerable commercial impact.

9.2 The nature and purpose of the régime

In commercial terms this type of legislation, introduced at national level and reflected in the EC's Directive, has the potential to be very significant indeed. Technological growth and, in particular, the rise of privately-owned broadcasting companies, a sector that has flourished since deregulation became fashionable beginning in the late 1980s, has injected a great many more players on to the demand-side of the market and, with supply of major sporting events incapable of parallel increase because of consumer attachment to the existing small pool of established major events [176], the cost of acquiring rights to major sporting events has accordingly increased dramatically in recent years. Indeed, as addressed earlier, it is well known that broadcasters seeking to enter new markets regard acquisition of exclusive sports rights as the pre-eminent method for rapid acquisition of a viable market share. This characteristic has further contributed to the race upwards in pricing. Traditional "free" public broadcasters now find themselves operating in a much less cosy competitive climate than that which prevailed twenty years ago. In so far as this legislation governing "protected events" enshrines a priority for such broadcasters it may be thought beneficial to consumers for it improves the chances of popular events being available for free viewing. From the perspective of the sports industry, by contrast, direct or indirect interference with the right to sell to the highest bidder is commercially alarming, and may call into question the opportunity fully to exploit an extraordinarily lucrative market. And this may diminish the level of investment in the quality of the product, which is likely to be to the detriment of consumers. So this is a complex situation. At the very least, one cannot avoid the conclusion that rules requiring the availability of sports events on 'free' television do not offer the consumer a free lunch.

An appetite for litigation is one likely outcome of this commercially sensitive yet loosely defined set of rules [177], but at a deeper policy level it is far from clear quite why this type of regime exists. Some - a minority [178] - of Member States have chosen to adopt relevant legislation, and this, in Directive 89/552 (as amended), has then become the subject of 're-regulation' undertaken by the EC as part of the process of building an integrated EU-wide broadcasting market. But *why* protect sports events in this way? A troublingly unbalanced 1996 Resolution of the European Parliament considers "it essential for all spectators to have a right of access to major sports events, just as they have a right to information" while paying no attention to the costs that right-holders incur as a result of the legal safeguarding of such a "right". [179] Recital 18 to Directive 97/36 refers to a "right to information" and to ensuring "wide access by the public to television coverage" of events of major importance to society. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that the right to freedom of expression shall include the right to "receive and impart information without interference by public authorities and regardless of frontiers". This formulation is now also to be found in Article 11 of the EU Charter of Fundamental Rights of the European Union, proclaimed at Nice in December 2000 [180], which is to be interpreted to conform with the Convention [181]. True, Article 10 of the ECHR adds that States are not

171 They should be "outstanding events which are of interest to the general public in the European Union or in a given Member State or in an important component part of a given member State ..", Recital 21; Recital 18 refers non-exhaustively to the "Olympic games, the football World Cup and European football championship".

172 The most recent consolidated list of measures may be found at OJ 2003 C183/03, and includes measures notified by Italy, Germany. Austria, Ireland and the United Kingdom. This is, however, out-of-date. The Commission's Fifth Report on the application of the Directive reveals that in 2004 Belgium notified measures and in 2005 France did so: COM (2006) 49, para.3.3. For a full list, see http://ec.europa.eu/comm/avpolicy/reg/tvwf/implementation/events_list/index_en.htm.

173 The list was an 'utter failure', Halgreen note 146 above p.131.

174 Case T-33/01 judgment of 15 December 2005.

175 The Commission has brought an appeal before the Court on this point: Pending Case C-125/06P *Commission v Infront WM* OJ 2006 C108/7.

176 This is discussed above: on inelasticity of demand for major events see Comm. Dec. 2000/400 Eurovision OJ 2000 L151/18 (annulled, but not on the point of market definition, in Cases T-185/00 et al M6 and others v Commission [2002] ECR II-3805); Comm. Dec. 2000/12 1998 Football World Cup OJ 2000 L5/55.

177 Case T-33/01 note 174 above.

178 Note 172 above.

179 Resolution on the broadcasting of sports events, OJ 1996 C166/109.

180 OJ 2000 C364/1.

to be prevented from requiring the licensing of broadcasting or television enterprises, a proviso absent from Article 11 of the EU Charter. But in any event this seems to bear no relevance to the specific issue of 'protected' or 'listed' events.

Information is power and the discourse of fundamental rights is deservedly prominent in analysis of law and policy in the broadcasting sector. [182] The promotion of pluralism in media markets has an initimate connection with sustaining the vibrancy of our democracies. [183] Nevertheless it is a strenuous effort to devise an intellectually satisfying and rational basis for this particular piece of legislation. The Commission's April 2003 Discussion Paper [184] understandably attempts no such thing, confining itself to seeking views on whether the procedures governing protected events should be more tightly defined. Several responses to the Discussion Paper advocated a clarification of the purpose of the system but most - again, understandably - exhibited a primary interest simply to defend their own interests. For example, both the BBC and ITV praised the regime, while by contrast UEFA criticised the legislative favouritism of one type of broadcaster over another.

What seems to be at stake here is some notion of citizen entitlements. But can one truly consider that the watching of doubtless exciting and interesting sports events properly engages the language of fundamental rights? Such a proposition exceeds what is currently recognised as the scope of the right to information under the law of the European Convention. [185] One may go so far as to condemn such an approach as apt to demean the quality and dignity of rights discourse. And, moreover, the card of fundamental rights is a trump, but not one held by only one player. The rights to freedom of expression of broadcasters are in no small measure damaged by these interventionist provisions, whereas both the EC legal order and that of the European Convention recognise that commercial parties fall within the personal scope of this regime, albeit that their rights are not absolute. [186]

The obscurity of the regime's objectives is matched by its textual lack of lucidity. Given this huge commercially sensitive issue, it is astonishing that the provisions of the EC Directive are so imprecise, yet that imprecision is testimony to the awkward issues that arise when sport as commerce and sport as hot topic in society merge and, in the melee, public and private actors scramble to promote their particular interests. Once a State draws up the list of events that it perceives as being of "major importance for society" it is entitled to take measures to ensure that broadcasters do not broadcast those events on an exclusive basis "in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television". That may be interpreted to cover intervention that requires coverage on free television. That would plainly severely reduce the price that any other broadcaster would be willing to pay; exclusivity is worth a large premium to the commercial broadcaster eager to increase its portfolio of subscribers and interested advertisers. This would also involve a profound interference with the exercise of the property rights of sporting bodies [187]. But is the Directive properly interpreted in this way? Might it be that the public broadcaster is guaranteed access only to the bidding process on a non-discriminatory and transparent basis, so that there is a "possibility" for the general population to have the opportunity of viewing the event on free television, but that it has no legal basis for complaint if exclusive rights are ultimately awarded to a broadcaster with a smaller audience and access to the services of which is dependent on payment by viewers? That would not simply be a question of price, for a free broadcaster may be able to promise a larger audience which may be more attractive to a sporting body aiming to enhance its long-term popularity and to satisfy its sponsors than the short-term profit represented by a higher fee paid by a broadcaster whose services are not available free of charge to the viewer. But, admittedly, according to this interpretation, economic gain not access of the general population would be the key factor in the awarding process.

There is no ruling of the European Court on this point. In *R v Independent Television Commission, ex parte TV Danmark 1 Ltd* [188] the English House of Lords concluded that a Member State in which a broadcaster is based is required to prevent the exercise by that broadcaster of exclusive rights in such a way that a substantial proportion of the population in another Member State would be deprived of the possibility of watching a listed event on television. Regrettably no reference to Luxembourg was made under Article 234 EC. The Commission for its part has done no more than briefly mention this case in its fourth report on the application of Directive 89/552 in the context of a broad comment that application of Article 3a in the period under review had been "satisfactory" [189], an approval repeated in the Discussion Paper released in April 2003 as part of the Commission's consultation exercise on the Directive [190].

My conclusion is that the combination of national and EC legislation governing "protected events" diminishes the commercial value of the rights to broadcast such events by interfering in the ability of the holder of the rights to extract the highest price the market would yield. The advantages generated by this intervention, and the rationales for legislating in this way, are remarkably under-explained. What is required is a balancing of the competing interests. If this has been done by the EC legislature, then it has been kept very quiet. The impression is that sport is subjected to a 'special' regime without any sufficiently careful examination of what is and should be at stake.

10 What is the EC's 'policy' on the sale of right to broadcast sports events?

This paper began by situating the examination of the EC's treatment of the sale of rights to broadcast sports events not only in the wider context of EC law's treatment of sport and of broadcasting but also, broader still, in a context which questioned the extent which it is really helpful to discuss such matters under the ambitious label of a 'policy'. Given the constitutional limits of EC action, of which Article 5(1) EC represents the key assertion, and given, in addition, the incremental nature of the development of EC intervention in the field (principally involving the Court and the Commission presiding over the application and interpretation of the Treaty competition rules), one might be sceptical of any claim to a 'policy' which is even modestly coherent. The 'protected events' legislation simply adds to the impression of incrementalism. It is far from clear how, if at all, matters such as cultural concerns, and vertical redistribution of wealth - which form part of the European Model of Sport envisaged by the Commission [191] - are properly seen as part of EC law's permitted concerns. This is the consequence of the EC's confinement to pursuit of objectives for which it is given authority by its Treaty, as well as use of only the means with which it is equipped by the Treaty. This, in short, is the effect of Article 5(1) EC. And it is the source of the criticism regularly levelled at the EC by those involved in sport: not simply that it 'doesn't understand sport' but that its Treaty constitutionally disables it from appreciating the breadth of sport's impact, concerns and activities.

I would accept that there are legitimate sources of concern here.

181 Article 52 EU Charter.

182 See generally R. Craufurd Smith, Broadcasting Law and Fundamental Rights (Clarendon Press, Oxford, 1997).

183 See e.g., with particular emphasis on the EU context, M. Arino, 'Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps', (2004) 54 Communications and Strategies 97.

184 Available via http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/consultation_2003/index_en.htm

185 Cf more fully Craufurd Smith and Boettcher note 168 above.

186 E.g. Case C-260/89 ERT v Dimotiki [1991] ECR I-2925; Case C-368/95 Vereinigte Familiapress Zeitungs- und vertriebs GmbH v Heinrich Bauer Verlag [1997] ECR I-3689; Informationsverein Lentia and others v Austria A No 276 (1993). See D Wyatt, "Freedom of Expression in the EU Legal Order and in EU Relations with third countries"in J Beatson and Y Cripps (eds), Freedom of Information: Essays in Honour of DGT Williams (Oxford: Clarendon Press, 2000); Craufurd Smith note 182 above esp. Ch. 7.

187 Cf Jones note 165 above 326-336.

188 [2001] 1 WLR 1604.

189 COM (2002) 778, p.10. The fifth - and most recent - Commission Report, note 172 above, is similarly anodyne.

190 Available via http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/consultation_2003/index_en.htm. As one might expect, the BBC response to the Commission is warmly supportive of the House of Lords ruling.

191 See in particular the Helsinki Report note 145 above.

And the institutions of the EU have attempted to bridge this perceived gap - in my opinion not always happily. Neither the Declaration on Sport attached to the Amsterdam Treaty nor the Declaration on 'the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies' annexed to the Conclusions of the Nice European Council would win awards for legal precision. Nor were they so designed. They are essentially political statements, with no pretence to subvert the Court's determination to apply the fundamental Treaty rules governing free movement and competition law to sport. Indeed this was expressly acknowledged by the European Court in *Deliege* [192] and in *Lehtonen* [193]. And yet such 'soft law' commitments, even drafted in the brittle style favoured at Amsterdam and Nice, carry weight. The lawyer should not discard such pronouncements without appreciating their capacity to generate a political dynamic to embed the discourse of a 'European Model of Sport' in institutional practice. It is here that the EU commits itself to a *political* recognition of the social and cultural virtues of sport which transcends its *legal* mandate; and it is here that one may identify how the evolution of policy (of a sort) is driven by a much broader pattern of sources than binding rules alone. [194]

This is 'task expansion' or (more pejoratively) 'competence creep'. [195] The problem is that in so far as such policy statements promise a good deal more than the EU can deliver, they may be damaging to the EU's legitimacy. If the EU is constitutionally unable to address matters lauded in the Nice Declaration such as respect and nurturing of 'the code of ethics and the solidarity essential to the preservation of' sport's social role and sport's contribution to 'integration, involvement in social life, tolerance, acceptance of differences and playing by the rules, and /or if lacks the material resources to promote such virtues, then it is unwise to raise citizens' expectations in this manner. The Commission's Helsinki Report on Sport might be vulnerable to similar criticism. [196]. After all, it begins by vaingloriously claiming that it 'gives pointers for reconciling the economic dimension of sport with its popular, educational, social and cultural dimensions.' Ultimately the problem is that there are severe constitutional limits on what the EC can achieve in defence of the 'European Sports Model' should the richer clubs choose to abandon all or part of it, and yet, by suggesting otherwise, the Commission is already setting itself up for criticism of its weakness should developments such as 'breakaway' closed competitions occur. And periodic support for initiatives such as the 'European Sports Forum' again lend an impression of a Commission ready to embrace the whole social and cultural baggage of sport despite its thin legal competence and its inadequate human and material resources. I think this is dangerous!

Is the EC really capable of adding value by developing general policies in this area? And in any event is 'sport' really a sufficiently homogenous phenomenon to attract a 'policy' anyway? Professional sport and recreational sport are different worlds. My case is not at all that it is irredeemably false to talk the language of an 'EC policy on sport', but my case is that one needs to be appropriately modest in choosing such a mode of discourse for fear that the gulf between breadth of the EU's stated political aspirations and its more limited legal competence and material resources generates disenchantment. [197] After all, if the 'European Model of Sport' in football collapses under the pressure of the voracious commercial appetite of the major clubs it will not be the Commission's fault, so why court danger by embracing so vividly an endangered species which the Commission cannot protect?

However, in the particular case of the sale of broadcasting rights to sports events it is, in my view, appropriate to good deal more positive about the shape of EC law. I believe that the competition rules have been used in a sensitive way that meets the assumptions of EC law and the aspirations of sporting bodies and federations.

What are the relevant themes that help to understand the nature and purpose of the EC rules governing the sale of rights to broadcast sports events?

Sport is special in the need for internal organisational solidarity and this provides an economic incentive to pursue, and a legal reason to authorise, the agreed distribution of wealth between participant clubs in a league. The issue of collective selling of broadcasting rights pitches this legitimate objective of sports clubs against the expectation of third party broadcasters that output shall not be restricted in this fashion. The Commission's apparent willingness, aired in its Helsinki Report, to link exemption of collective selling to wealth distribution throughout the sport, from top to bottom, represents an attempt to offer inducements to sustain the pattern of vertical solidarity within a sport that it regards as characteristically European. However, its legal competence to insist on even this as a condition of exemption is far from clear and it has chosen cautiously to evade the issue in *Champions League*. [198] As explained above, that Decision emphasises economic reasons for exempting collective selling arrangements based principally on reducing transaction costs. It chooses to circumvent the question of whether arguments founded on the promotion of (vertical or horizontal) solidarity are within the scope of Article 81(3) EC.

Certainly the application of such rules should pay due regard for the peculiar characteristic of mutual interdependence which marks the relationship between participants in a professional sports league. This is a sports-specific issue, but it is perfectly capable of forming part of appropriately nuanced economic and legal analysis. After all, the application of Article 81 is always conditioned by the particular context in which arrangements are struck. The Court's fundamentally important decision in *Wouters* should increasingly serve as the starting point in determining whether an apparent restriction on competition is properly pulled within the grip of Article 81(1) [199]. The Court stated that "account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives .... It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives". This observation was delivered in the context of rules prohibiting multi-disciplinary partnerships between members of the Bar and accountants but can readily be transplanted to underpin an argument that the overall context in which sports regulation occurs, built around pursuit of a broad objective of healthy equality of competitive opportunity, produces effects which though restrictive of competition are nonetheless inherent in the pursuit of those objectives. [200] Only if a restriction on competition within the meaning of Article 81(1) is at stake does the inquiry move to the possibility of exemption pursuant to Article 81(3).[201] This is sports law and sports economics, and it is central to deciding how to control governing bodies whose regulation of sport has a spillover impact on commercial activities.

In sum, I consider that the EC's approach to the regulation of rights to broadcast sports events under EC competition law reveals an emphasis on market analysis which is not blind to the particular characteristics of professional sport.

192 Cases C-51/96 & 191/97 note 114 above, paras 41-42 of the judgment.

193 Case C-176/96 [2000] ECR I-2681, paras 32-33 of the judgment.

194 This dealt with at some length by Parrish note 31 above, esp in Chapter 2 and, with particular reference to the Amsterdam Declaration e.g. at pp.15-16, 19, 104, 176, 196; cf also Halgreen note 146 above pp.56-64.

195 Cf note 1 above.

196 Note 145 above.

197 I have made this argument in particular in S. Weatherill, 'Sport as Culture in European Community Law', Ch. 4, pp.113 - 152, in R. Craufurd Smith (ed), Culture in European Union Law (Oxford University Press, 2004). For general discussion see K. Foster, "How can Sport be Regulated?" Ch. 14 in Greenfield and Osborn note 31 above; R. Parrish, "Reconciling Conflicting Approaches to Sport in the European Union", pp.21-42, and K. Foster, "Can Sport be Regulated by Europe? An Analysis of Alternative Models", pp.43-64, both in A. Caiger and S. Gardiner (eds), Professional Sport in the EU: Regulation and Re-Regulation (TMC Asser Press, 2000); S. Weatherill, "'Fair Play Please!': Recent Developments in the Application of EC Law to Sport" (2003) 40 CMLRev 51. All the sources cited at note 31 above are relevant.

198 Note 128 above.

199 Case C-309/99 note 117 above. Strains of this approach are evident in AG Lenz's Opinion in Bosman.

200 The Commission's decision in ENIC/UEFA note 115 above cites *Wouters*. For its invocation in relation to salary caps see S. Hornsby, "The harder the cap, the softer the law?" (2002) 10 Sport and the Law Journal 142.

201 As in *Champions League* note 128 above and in *Eurovision* note 85 above.

11. Conclusion

Article 5(1) EC confines the Community to action 'within the limits of the powers conferred upon it by this Treaty'. It enjoys no explicit power to regulate sport. However, sporting practices may collide with the realisation of the EC Treaty's economic objectives, and accordingly the central trade law provisions, most of all those concerning competition law, have been used to induce significant change in European sport. The functional breadth of EC law has as an inevitable consequence the shaping of a type of 'EC sports policy', within which a range of public and private actors, at national, European and international level, seek to exploit the possibilities provided by the existence of an EC tier of governance in order to achieve their objectives. EC law, in short, does not stipulate a form of governance into which sporting bodies must fit, but it does break open some of sport's often long-standing assumptions.

This interventionist capacity creates a complex mix and, given the constitutionally ambiguous background and the incremental pattern of decision-making, it cannot be expected to yield a 'policy' that is wholly coherent or satisfying. One may indeed go further and wonder whether a European policy on sport is *ever* likely to display a compelling coherence, given the diversity of aspirations and structures that characterise sport in its professional, amateur and recreational forms. And yet there is a degree of order that one can identify in the EC's approach, and the case of the sale of rights to broadcast sports events offers an illuminating case study into the way in which EC law is able to secure the application of its fundamental economic law provisions without disregard for the sector-specific concerns of the industry subject to the rules.

Bosman [202] remains centrally important. The Court ruled that existing practices in sport - the player transfer system and nationality-based discrimination in club football - were incompatible with EC law. It did not - it could not - dictate what should be introduced to replace the unlawful rules. That was a choice belonging to the sports authorities, acting in the shadow of the control exercised over their autonomy by the EC Treaty. But the Court did *not* simply treat football as an industry like any other. It accepted the salience of its legitimate interests in 'maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results' and 'encouraging the recruitment and training of young players.'

This is the model used in this paper to examine EC law governing the sale of rights to broadcast sporting events. EC law does not require that private or public actors behave in a pre-determined manner. But its rules confine the scope of their permitted autonomy to arrange their affairs. So EC law, most of all EC competition law, has an impact on sporting practices, even without any explicit mandate to legislate granted by the Treaty. EC law governing the sale of rights to broadcast sporting events has four principal concerns. The first addresses the control of sale of broadcasting rights on an exclusive basis; the second addresses the collective selling of broadcasting rights; the third addresses the collective purchasing of broadcasting rights; the fourth deals with the restrictions that may be placed on sale of broadcasting rights by national governments, which are then reflected at European level in the 'protected events' provisions of Directive 89/552 (as amended).

With respect to the first of these concerns, this paper has made the case that the emphasis on market definition and market power which lies at the heart of the normal approach under EC competition law to assessing the compatibility of exclusive deals with Article 81 is perfectly appropriate in its deployment in the case of sale of rights to broadcast sports events. There are no issues which are unique to sport, though it is certainly true that the Commission's sensitivity to the acquisition of exclusive rights to 'premium' events for an extended period reflects the profound concern about damage to market flexibility in the technologically and commercially volatile broadcasting sector which may be inflicted in such circumstances.With respect to the second of these concerns, the Commission in *Champions League* refused to accept the claim that collective selling is a necessary element in the organization of a professional sports league. Instead it treated it as a restriction on competition between suppliers of broadcasting rights. Rightly so, it is submitted. Collective selling is a commercial choice designed to strengthen the grip of suppliers at the expense of choice enjoyed by buyers. As is true of any restriction on competition caught by Article 81(1), exemption remains possible pursuant to Article 81(3) and the Commission's Decision in *Champions League* demonstrates that sport, like any other industry, is able to secure exemption provided that adequate consequent economic benefit is shown. Similarly, in dealing with the third of the concerns, the treatment of collective purchasing in *Eurovision* reveals that such arrangements will fall within Article 81(1) where they cause a sufficient degree of market foreclosure, but that their economic benefits may justify the grant of an exemption, albeit that effective provision for sub-licensing is likely to be a pre-condition to reliance on Article 81(3) for fear that otherwise there will follow an unacceptable elimination of competition in relevant markets.

The issue left untouched in *Champions League* is one that may in future test the receptivity of EC competition law to the special expectations of sport - could an agreement to sell rights on a collective basis, falling within Article 81(1), secure exemption pursuant to Article 81(3) even where economic benefits of the type identified in *Champions League* are missing but where the income is used to strengthen vertical and/or horizontal solidarity within the sport? I have doubts whether Article 81(3) can be stretched in this way. However, I consider that there are other ways in which sport can promote its interest in vertical and/or horizontal solidarity without the need to distort the market for sale of broadcasting rights by maintaining collective arrangements that fail to meet the criteria for exemption stipulated by Article 81(3). Most of all leagues could commit to more vigorous internal distribution of wealth. On the fourth and final concern of Ec law in this area, that pertaining to restrictions to sale of 'protected' or 'listed' events, I confess that I find the relevant provisions hard to understand and generally unhelpful. In this instance the combination of interested national and European actors - most prominently headline-seeking politicians - has created an intervention that is hard to explain on any rational commercial or cultural basis.

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

Professor Stephen Weatherill speaking at the Sixth Asser/Clingendael International Sports Lecture on The European Union and Sport: Law and Policy, *in The Hague on 6 June 2006.*

Sport in National Sports Acts and Constitutions: Definition, Ratio Legis and Objectives

by **Janwillem Soek***

1. The Regulation of Sport[1]

In December 2001, Dutch Members of Parliament tabled a motion concerning the advisability of enacting national sports legislation. As a result of this, the State Secretary for Sport requested Professor Heiko van Staveren, Professor of Sport and Law at the Free University of Amsterdam, to write an Opinion. The general question needed answering whether sports legislation at national level would be appropriate. In his Opinion entitled "Sports legislation at national level appropriate?" which was published at the beginning of September 2003 Van Staveren concluded that there was no reason to enact national legislation specifically concerning sport (p. 13). The State Secretary followed this conclusion: there was insufficient reason to establish special legislation for sport.

Some years later - in the second half of 2005 - it became apparent that the Dutch government was still struggling with the question of sports legislation which covered different perspectives (football hooliganism, doping, a foundation for sports policy, the granting of subsidies, etc.). The starting point was not that a Sports Act had to be prepared, but that a solid and careful study had to be undertaken into the usefulness and need for a "foundation" for the sports policy of the Dutch government.

From that perspective, the T.M.C. Asser Institute in November 2005 was asked by the Ministry of Sport to examine by means of a 'quick scan' which countries in the European Union had enacted a Sports Act. In these Acts, the definition of the term "sport" had to be examined in addition to the factors which had motivated the various legislators to enact such laws.

By means of a questionnaire which was distributed worldwide and investigations on the Internet, the Institute managed to obtain the Sports Acts of some 50 countries from all continents.[2] In addition, it was found that although 26 countries do not have a special Sports Act in place, they do have one or more provisions on sports contained in their Constitution.[3]

The collected information sheds light on how the position of sport in society is viewed in the various countries.[4] One restriction which was inherent to the Ministry's assignment is that no information has been collected on countries that do not have a Sports Act or provisions on sport in their Constitution. However, it must be presumed that in these countries rules have been established concerning sport in some other way than through a Sports Act.

Below, we will first deal with the definition in the Sports Acts of the term "sport" and subsequently describe the reasons for which the various legislators decided to enact these Acts. Finally, a few words will be devoted to the provisions concerning sport in the different Constitutions.

2. The Term "Sport"

In the academic Opinion mentioned above it is observed that "sport will be difficult to define in such a way that the field in which the law has effect is clearly delineated. This in itself is already an impediment to just rules. It is not possible to refer to a treaty definition either. Both the convention against football hooliganism and the anti-doping treaty steer clear of defining sport." (p. 5) However, this disregards Article 2 of the European Sports Charter of the Council of Europe[5] - although this is not a treaty - and the references it contains to both these treaties. Article 2 defines sport as:

"a [...] all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.
b This Charter complements the ethical principles and policy guidelines set out in:
  i the European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular at Football Matches,
  ii the Anti-Doping Convention."

Various legislators have also "risked" defining the concept. By this they have created a legal framework of human activity within which their laws are applicable. On the other hand - and contrary to what one might expect - not every Sports Act contains a definition of sport.[6] In these cases, sport is presumed to be a social phenomenon that does not need defining further. Where the various Sports Acts do contain definitions of sport, these are usually in the form of references and do not touch upon the essence of the phenomenon. There is no homogeneous approach to the concept whatsoever. There are definitions determined by the objective of sport (e.g. competition or health), or the capacity in which sport is played or the social function of sport.

2.1. Objectives of sport

Sport may be considered physical activity for a specific purpose, which may be either sportive and physical competition or health.

2.1.1. Objective no. 1: competition

The Croatian Sports Act[7] defines sport as: "physical activities and games that are organized so as to attain sporting achievements realised

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1 Cf. previously also: André-Noël Chaker, Study on national sports legislation in Europe, Council of Europe Publishing, July 1999.

2 Europe: Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Macedonia, Malta, Poland, Portugal, Romania, Slovak Republic, Spain, Sweden, Switzerland, Ukraine; Americas: Argentina, Brazil, Canada, Chile, Colombia, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Peru, Uruguay, USA, Venezuela; Africa: Mauritius, Republic of South Africa; Asia: Mongolia, People's Republic of China, Singapore, Taiwan; Oceania: Australia.

3 Albania, Andorra, Armenia, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Cambodia, Congo (Brazzaville), Cuba, Denmark, Georgia, Germany, Honduras, Moldavia, Monaco, Norway, Russian Federation, San Marino, Serbia and Montenegro, Slovenia, Surinam, Syria, Turkey, United Kingdom, Vietnam.

4 From the research, a picture also emerged of the relationship between the government and (organized) sport in the different countries. Most countries recognize the autonomy of sport, although some have a system in which the State intervenes. Examples of these are: Brazil, Chile, Denmark, France, Greece, Hungary, Italy, Luxemburg, Malta, Mauritius, Mexico, Mongolia, Portugal, People's Republic of China, Romania, Republic of South Africa, Singapore, Slovenia and Spain.

5 Recommendation No. R (92) 13 Rev of the Committee of Ministers to Member States on the Revised European Sports Charter, adopted by the Committee of Ministers on 24 September 1992 at the 480th meeting of the Ministers' Deputies and revised at their 752nd meeting on 16 May 2001.

6 The Sports Acts of Argentina, Brazil, Bulgaria, Finland, Canada, El Salvador, Guatemala, Italy, Lithuania, Nicaragua, Austria, Portugal, People's Republic of China, Taiwan, USA, Republic of South Africa and Switzerland do not define the term "sport".

7 Law on Sport, I. General Provisions, Art. 1, 2.

according to defined rules of competition (sporting competitions)". The Sports Act of Luxemburg[8] contains a similar definition: "Par sport de compétition, on entend le sport qui se déroule dans un cadre organisé en fonction de règles et de classements." The *Ley del Deporte* of Chile[9] considers sport to be: "[...] aquella forma de actividad física que utiliza la motricidad humana como medio de desarrollo integral de las personas, y cualquier manifestación educativo-física." Under the Mongolian Law of on Physical Culture and Sports[10] sport is: "[...] competitions formed as a result of physical culture development and activities for preparations to and participation in them". The Estonian Sports Act[11] also recognizes an educational goal, as it defines sport as: "[...] playing activity of a predominantly competitive and physical nature, or a corresponding educational activity."

2.1.2. Objective no. 2: health

Under a number of Sports Acts the objective of sport in addition to being an activity in a competitive setting may also concern the physical or mental development of the athlete. The Croatian Sports Act[12] also considers sport to be: "[...] physical activities and games that are done in an organized way for the improvement of health or for recreation". The Irish Sports Council Act[13] provides a similar definition, although this is given to distinguish between "competitive sport" and "recreational sport". Competitive sport concerns: "[...] all forms of physical activity which, through organised participation, aim at expressing or improving physical fitness and at obtaining improved results in competition at all levels." The Latvian Sports Act[14] shows a similar mixture of aims. In this Act the term "sport" is understood to mean: "individual or fixed activity of any type for maintenance and improvement of physical and mental health as well as for acquisition of success in sports competitions". The Maltese Sports Act[15] also combines objectives: "Sport includes all forms of physical or mental activity which, through casual or organised participation or through training activities, aim at expressing or improving physical and mental well-being, forming social relationships or obtaining results in competition at all levels", as does the Swedish Sports Act:[16] "[...] sports activities mean performance-oriented competitive sport and health-oriented broad sports activities and exercise which include a central element of physical activity." In the Czech Sports Act:[17] "[...] the concept of sport denotes all forms of physical activities performed within and outside organisations and aimed at the harmonious development of physical and mental condition, health consolidation, and achievements in sports competitions at all levels." The definition in the Mongolian Sports Act[18] is also concerned with health: "Physical culture is a component of the social culture and means activities for creating intellectual and material values for the purposes of developing the human body, strengthening health and improving the activity of mobility". The Sports Act of Iceland[19] adds mental health to physical health as a goal where it defines sport as any physical training for the purpose of improving physical and mental ability, health and stamina. China[20] "[...] advocates citizens' participation in social sports activities so as to improve their physical and mental health." The term "social sports activities" is not defined further.

It is possible to separate the two distinct purposes of sport, but they are usually considered complementary.

In various Sports Acts the definition of the term "sports" also indicates - possibly in addition to what sport should be understood to mean - in what capacity sport is played and the social function of sport.

2.2. The capacity in which sport is played

The definitions of sport in many Sports Acts make a distinction as to the capacity in which sport is played so as to define the scope of the various provisions. The Canadian Sports Act[21] provides that: "[F]or the purposes of the Fitness and Amateur Sport Act, "amateur sport" means any athletic activity when engaged in solely for recreation, fitness or pleasure and not as a means of livelihood [...]." Sport can thus be divided into different categories in accordance with the capacity in which it is engaged in. The Sports Act of Estonia[22] also makes this distinction between recreational and competitive sport: "[...] recreational sport - essentially a non-competitive physical activity aimed at taking care and strengthening of health; competitive sport - sports activity aimed at achieving success in public sports competition". The Irish Sports Act[23] also contains this distinction, as "competitive sport" is defined as: "[...] all forms of physical activity which, through organised participation, aim at expressing or improving physical fitness and at obtaining improved results in competition at all levels" and "recreational sport" is defined as: "[...] all forms of physical activity which, through casual or regular participation, aim at expressing or improving physical fitness and mental well-being and at forming social relationships". The Sports Act of Luxemburg[24] provides that: "[P]ar sport de loisir, on entend toute activité à caractère sportif pratiquée à titre essentiellement récréatif, ainsi que celle pratiquée pour des raisons de santé ou de resocialisation." And that: "Par sport de compétition, on entend le sport qui se déroule dans un cadre organisé en fonction de règles et de classements." The Sports Act of Malta[25] concerns only competitive sport and "excludes those activities held for therapeutic or clinical purposes or are part of the activities of health institutions or health centres [...]". The Sports Act of Venezuela[26] does not define sport, but it does distinguish between "Deportes Federados" and "Deportes No Federados". A "Deporte Federado" is any sport that is played according to the rules and regulations of the relevant international sports federations and that is monitored at national level by the relevant national federation. The Mexican Sports Act[27] considers sport to be an institutionalized and regulated activity which is exercised in competitions with the aim of achieving maximum performance. This Act also distinguishes between recreational sport and sport for physical education purposes on the one hand and competitive sport on the other. Professional sport as opposed to recreational sport has a commercial or profit objective. The Mongolian Sports Act[28] only deals with professional sports. "Professional Sports mean sports that ensure interests of viewers and professional sports organizations aimed basically at gaining profit with participation of only professional sports people." The Sports Act of Mauritius[29] also distinguishes between two categories of sport, but they are individual sports and team sports: "[I]ndividual sport means any sport which an individual practices on his own, either in a competition or game, [...]", while "Team sports means sports practised by a group of players forming one team, either in a competition or game [...]". The Swedish Sports Act[30] combines the objective of sport with the capacity in which it is

8 Loi du 3-8-2005 concernant le sport, Art. 6. Le sport de compétition.
9 Ley Del Deporte De Chile, de 30-1-2001, Ley-19712, Tit. I, Principios, Objetivos y Definiciones, Art. 1º.
10 The Law of Mongolia on Physical Culture and Sports, 31-10-2003, Ch. 1 - Common Provisions, Art. 3. Definitions of the Law, 3.1.2.
11 Sports Act, passed on 15-6-1998 (RT I 1998, 61, 982), Ch. 1 - General Provisions, § 2. Definitions.
12 The Law about Sport, I. General Provisions, Art. 1, 1.
13 Irish Sports Council Act, 1999, No. 6 of 1999 Part I. Preliminary and General, 2.- (1).
14 Sports Law, Published: "Vestnesis", 13 Nov. 2002, No. 165 (2740), Section 1. 10).
15 Sports Act, Sports, Cap. 455. 1, Ch. 455, Sports Act, Part I - Preliminary, 2.
16 Ordinance Concerning Government Grants to Sports Activities (1999:1177), Definitions, Section 2.
17 Act No.115/2001 on Support of Sport, 28-2-2001, § 2 (2).
18 The Law of Mongolia on Physical Culture and Sports, 31-10-2003, Art. 3. Definitions of the Law, 3.1.1.
19 Legislative Act on Sports, Art. 1.
20 Sports Law of the People's Republic of China (adopted by the Fifteenth Session of the Standing Committee of the Eighth National Peoples Congress on August 29. 1995), Ch. 1 General Provisions, Art. 5.
21 Fitness and Amateur Sport Regulations, C.R.C., c. 868, Interpretation 2.
22 Sports Act, passed on 15 June 1998 (RT I 1998, 61, 982), Ch. 1 - General Provisions, § 2. Definitions, 2).
23 Irish Sports Council Act, 1999, No. 6 of 1999, Part I - Preliminary and General , 2.- (1).
24 Loi du 3 Août 2005 Concernant le Sport, Art. 5.
25 Sports Act, Part I - Preliminary, 2.
26 Ley del Deporte, Título II - De la Organización Deportiva del País, Capítulo II - De los Entes del Sector Privado de la Organización Deportiva, Sección Segunda - De las Entidades del Deporte Federado and Sección Quinta - Deporte No Federado.
27 Ley del Sistema Estatal del Deporte, Capítulo I - Disposiciones Generales.
28 The Law of Mongolia on Physical Culture and Sports, 31-10-2003, Ch. 1 - Common Provisions, Art. 3. Definitions of the Law, 3.1.2.
29 The Sports Act 2001 (No. 41 of 2001), Part I - Preliminary, 2. Interpretation.
30 Ordinance Concerning Government Grants to Sports Activities (1999:1177), Definitions, Section 2.

engaged in: "sports activities mean performance-oriented competitive sport and health-oriented broad sports activities and exercise which include a central element of physical activity." In the Brazilian *Lei Péle*[31] a distinction is made between official and unofficial sports (*práticas formais e não-formais*). The unofficial sports are characterized by the unique way in which they are played. For professional sport a number of specific fundamental principles apply: financial and administrative transparency; fair administration; the social responsibility of the sports-governing bodies; participation in the organization of the sport as provided by the law; and respecting the distinction between professional and amateur sport. The Brazilian Sports Act defines professional sport as sport in which an employment contract exists between the club and the athlete. In the Chilean Sports Act[32] the distinction is between educational, recreational, competitive and top sports. The Colombian Sports Act[33] differentiates even further as to the capacities in which sport can be played: sport for shaping body and mind; sport as a social phenomenon; top sports; professional sports; College sports; competitive sports; amateur sports; and Federation sports.

In several Sports Acts no direct distinction is made between the various ways of practicing sports, but it can often be inferred from other definitions. The Italian Sports Act[34] for example defines the term "professional sports persons" whom it considers to be: "[...] athletes, trainers, technical-sports managers and athletic coaches who carry out remunerated sporting activities on a continuous basis in the framework of the disciplines governed by CONI and who obtain qualification from the national sports federations, in accordance with the rules laid down by the federations themselves, in observance of the directives laid down by CONI itself for distinguishing amateur activities from professional ones". In the Latvian Sports Act[35] the professional athlete is defined as "a natural person who is preparing himself for and is about to participate in sports competitions on a labour contract basis for an agreed payment". The Lithuanian Sports Act[36] also indirectly reveals what the difference is between professional and amateur sports. This Act defines the professional athlete as follows: "An athlete shall be considered a professional athlete, if his salary for preparing for competition and participating therein is paid by the sport organisation with which the athlete has concluded an agreement (contract) for sport activity".

2.3. The social function of sport

In the *Ley del Deporte* of Chile[37] the various social functions of sport are set out. Sport are those forms of physical activity which make use of the human capacity to move as a medium for human development; all forms of physical educational manifestation, either general or specific, that are realized through collective participation aimed at social integration and the development of society; with a view to maintaining or recovering health; the various forms of sport that use competition as a form of social expression and that are structured by rules of play concerning competing. In addition, the Chilean law defines education through sport as implementing learning processes and education by professionals or technical staff with a degree in the field of physical activity for the purpose of developing persons in particular with respect to agility, industriousness and the necessary skills to practice different sports; learning fundamental principles of ethics; techniques and regulations of the disciplines in sport and the systematic and permanent practice of sports activities for children, youngsters and adults. The Colombian Sports Act[38] also defines the social function of sport. Sport in general is considered the specific behaviour of persons that is characterized by a unique attitude combined with competitive effort or fighting spirit and expressed by means of physical or mental exercise within different disciplines and standards as established within a framework respecting moral, civil and social values.

As one of only very few institutions the Council of Europe has formulated a definition of sport which attempts to capture sport's essence. And even then certain human activities which we consider sport cannot be brought under its scope, such as sports in which physical activity plays only a minor part. Chess and chequers, for instance, can hardly be considered physical activity. The survey into the definitions of sport in the various Sports Acts has shown that the different legislators have all used a teleological description of sport. As will emerge later on in this contribution, the drafters of the Constitutions in which provisions on sport are contained have also taken this approach.

3. Ratio Legis

For certain specifically named groups of occupations and professions rules can be established that are different from the rules that are generally applicable in society. Can practitioners of sport in general be considered to form such a group? If we answer this question in the affirmative, does this mean that special legislation should be enacted for this group? The academic Opinion took a clear stance on this issue. Legislation concerning football hooliganism and doping "which would apply exclusively to sport would isolate sports from [...] other areas". Professor van Staveren in his Opinion took the view that both football hooliganism and doping must be regarded as phenomena which, although linked to sport, are not by definition exclusive to sport. "Both these phenomena also occur outside sports in which case they are termed vandalism and violence and drug abuse [...]". One does not need to share this view, as indeed many legislators apparently do not, given the provisions in their Sports Act concerning these phenomena,[39] while it may be assumed that outside these Acts they have also made rules to prevent and prosecute drug abuse and acts of vandalism and violence.

There are many other factors besides the fight against hooliganism and doping which may have caused the different legislators to enact a Sports Act. One of the main reasons is the creation of a national policy for sports, as many Sports Acts testify. The Czech Sports Act[40] for example provides on the scope of the legislation: "The Act defines the position of sport in society and specifies the tasks of the ministries, other administrative agencies and the scope of authority of territorial self-governing units in the support of sport." In addition to this general ambition, the various Sports Acts contain other motives for their conception, which are listed below.

31 Lei Nº 9.615, De 24 de Março de 1998, Capítulo I - Disposições Iniciais, Art. 1º.

32 Ley del Deporte de Chile, de 30-1-2001, Ley-19712, Tit. I - Principios, Objetivos y Definiciones.

33 Ley 181 de 1995, Título I - Disposiciones preliminares, Capítulo I.

34 Legge No. 91/81 Sul Professionismo Sportivo, Section I - Professional Sport, Art. 2 - Sports professionalism.

35 Sports Law, published: "Vestnesis", 13 Nov. 2002, No. 165 (2740), Section 1. Terms Used in this Law, 2) 9) athlete.

36 Law on Physical Culture and Sport of the Republic of Lithuania, 20-12-1995 No. I - 1151, Ch. V. Professional Sport, Art. 29. Professional Athlete.

37 Ley del Deporte de Chile, de 30-1-2001, Ley-19712, Tit. I - Principios, Objetivos y Definiciones.

38 Ley 181 de 1995, Tít. I - Disposiciones preliminares, Cap. I.

39 Provisions concerning hooliganism and doping abuse may be found in the Sports Acts of Bulgaria, Canada, Chile, Estonia, France, Ireland, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Mauritius, Ukraine, Austria, Poland, Portugal, Romania, Serbia, Spain, Taiwan, Czech Republic, Venezuela and Switzerland. Provisions concerning vandalism can be found in the Sports Acts of Bulgaria, Colombia, Estonia, France, Luxemburg, Malta, Mauritius, Mongolia, Portugal, Romania, Serbia and Spain.

40 Act No.115/2001 on Support of Sport, 28 February 2001, § 1. Verg. Argentina: Ley del Deporte, Ley 20.655, de 21 de marzo de 1974, Cap. I Principios generales, Art. 1; Austria, Land Niederösterreich, NÖ Sportgesetz, § 1 Präambel; Land Oberösterreich, Landesgesetz vom 12. Juni 1997 über das Sportwesen in Oberösterreich (Oö. Sportgesetz), 1. Abschnitt Allgemeine Bestimmungen, § 1 Ziel; Brasil, Lei nº 9.615, de 24 de março de 1998, Cap. I - Das Disposições Iniciais, Art. 1º; Lei nº. 8.672, de 6 de julho de 1993, Cap. I - Das Disposições Iniciais, Art. 1º; Chile, Ley del Deporte de Chile, de 30 de Enero de 2001, Ley-19712, Tit. I, Principios, Objetivos y Definiciones, Art. 1º; Ecuador: Constitución Política de la República del Ecuador, Sección undécima: De los deportes, Art. 82; El Salvador: Decreto Nº 300.- La Junta Revolucionaria de Gobierno, Ley General de los Deportes de El Salvador, Tit. I: Disposiciones Preliminares, Cap. I: Del Objeto de la Ley, Art. 1 c.q. Cap. II: De la Política Deportiva, Art. 2; Estonia: Sports Act, Passed on 15 June 1998 (RT I 1998, 61, 982), Ch. 1 - General Provisions, § 1. Scope of the Act; Finland: Sports Act, Adopted in Helsinki on 18 December 1998. 1054/1998, Ch. 1 - General regulations, Section 1 - Purpose of the Act; Guatemala: Constitución Política de la Republica de Guatemala, Articulo 91 and Articulo 92; Iceland: Legislative Act on Sports, Art. 2; Latvia: Sports Law,

3.1. Health

An important reason for enacting a Sports Act is to improve citizens' health and physical development.

Argentina[41]
"El Estado atenderá al deporte en sus diversas manifestaciones considerando como objeto fundamental: la utilización del deporte como factor de la salud física y moral de la población".

Bulgaria[42]
"The purpose of physical education and sport is the improvement of the health and physical development of the nation by systematic physical exercise and sport by people of all ages."

Canada[43]
"to promote physical activity as a fundamental element of health and well-being."

Croatia[44]
"The Republic of Croatia has a particular interest in physical activities and games that are organized and carried out for the improvement of the health of children and young people, or for the improvement of the health and recreation of disabled persons, and for the attainment of supreme sporting achievements;"

People's Republic of China[45]
Art. 1: "This law is formulated [...] for the purpose of promoting the cause of sports, enhancing the health of the people, raising the level of sports activities, and accelerating the construction of socialist material and spiritual civilization."
Art. 2: "The State shall promote the cause of sports, carry out mass sports activities, and enhance the health of the whole nation. All efforts concerning the cause of sports shall be based upon the promotion of physical development activities throughout the nation [...];"

Citizens are encouraged to integrate physical activity in their daily routine in order to improve their health.

Canada[46]
"[...] to encourage all Canadians to improve their health by integrating physical activity into their daily lives"

Compulsory sport in schools can also be included in the Sports Act.

Malta[47]
"Physical Education and Sport shall be taught and practised in all primary and secondary schools [...]."

3.2. Organization

In order to be able to improve the physical well-being of citizens by means of sport, certain conditions have to be put in place to facilitate the systematic practice of physical activity and sport.

Canada[48]
"to assist in reducing barriers faced by all Canadians that prevent them from being active."

A Sports Act can create the organizational and legal basis for the administration and the promotion of physical development and sport. Such Acts regulate relations between the sports organizations, the State and local authorities.

Estonia[49]
"This Act provides the general organisational and legal basis for the management and promotion of sports; relations between sports organisations, state and local government bodies and the principal tasks in the development of sports;"

Mongolia[50]
"The purpose of this law is to determine the organization [...] and legal basis of physical culture and sports [...];"

The Mexican Sports Act has as its objective the creation of a general basis for coordination and cooperation between the Federation (Mexico), the states, the federal districts and the municipalities and the harmonization of policy and cooperation in the field of culture and sports between public and private organizations.

The Sports Act may also regulate professional sport.

Lithuania[51]
"This Law [...] regulates professional sport [...]".

3.3. The position of sport in society

A Sports Act may be used to determine the position of sport as a human activity in society.

Czech Republic[52]
"This Act defines the position of sport in society as an activity beneficial to the public [...]."

3.4. Ideological purposes

The preamble of the Nicaraguan Sports Act formulates its *ratio legis* as follows: "The People's Sandinista Revolution has as its historical purpose to contribute to the development of a new mankind which is necessary to guarantee the physical and mental well-being of the population. Sport promotes the integration of man in society and helps strengthen the ties of brotherhood between the nations in an atmosphere of peace and mutual respect."

3.5. Ethical values

A Sports Act can also be used to propagate respect for fellow human beings and for cultural differences between them.

Published: "Vestnesis", 13 Nov. 2002, No. 165 (2740), Sect. 2. Purpose of this Law; Lithuania: Law on Physical Culture and Sport, December 20, 1995 No. I - 1151, Ch. 1. General Provisions, Art. 1 - Purpose of the Law; Mexico: Ley Del Sistema Estatal Del Deporte, Cap. I - Disposiciones Generales, Art. 1; Nicaragu: Constitución de Nicaragua, 1987, Cap. III: Derechos Sociales, Articulo 65; Panamá: Constitución Política de la República de Panamá de 1972, Reformada por los Actos Reformatorios de 1978, Cap. 40, Articulo 82; Peru: Ley General Del Deporte, Ley No. 27159: Promulgada el 26. Julio 1999, Título I: Disposiciones Generales, Art. 1º.- Objeto de la Ley; Portugal: Lei de Bases do Sistema Desportivo, Lei n.º 1/90 de 13 de Janeiro, publicada no DR, Iª s, n.º 64, de 17 de Março de 1990, Cap. I - Âmbito e princípios gerais, Art. 1.º - Objecto; People's Republic of China: Law of the People's Republic of China on Physical Culture and Sports (Effective Date:1995.10.01—ineffective Date:), Ch. I General Provisions, Art. 1; RSA: National Sport and Recreation Act, No. 110 of 1998 (Assented to 24 November I998.), Preamble; Spain: Ley 10/1990, de 15 de octubre, del Deporte, Título Primero - Principios Generales, Art. 1.; Switzerland: Loi fédérale encourageant la gymnastique et les sports, du 17 mars 1972 (Etat le 27 novembre 2001), I. But, Art. 1; Taiwan: National Sports Act, Art. 1; Uruguay: Ley de Administracion Publica y Empleo, Fomento y Mejoras de Uruguay, Seccion XII, Tit. I: Fomento Del Deporte, Cap. 1: De los clubes deportivos, Art. 66; USA: Ted Stevens Olympic and Amateur Sports Act, SubCh. I - Corporation, §220503. Purposes; Venezuela: Ley del Deporte, Gaceta Oficial Nº 4.975 Extraordinario de fecha 25 de septiembre de 1995, Título I, Disposiciones Generales, Art. 1(.

41 Ley del Deporte, Capitulo I, Art. 1(b).
42 Law for the Physical Education and Sport, Art. 2(1).
43 Physical Activity and Sport Act, 3(a).
44 The Law on Sport, Art. 3.
45 Sports Law of the People's Republic of China. See further: Finland: Sports Act, Ch. 1, Section 1; Liechtenstein: Sportgesetz, Art. 2, 1) and Taiwan: National Sports Act, Art. 1.
46 Physical Activity and Sport Act, 3(b).
47 Sports Act (1).
48 Physical Activity and Sport Act, 3(c). Cf. the Bulgarian Law for Physical Education and Sport, Art. 2(2), first sentence.
49 Sports Act, § 1. Cf. Canada: Physical Activity and Sport Act, 4.(2) (b); Iceland, Legislative Act on Sports, Art. 2; Latvia, Sports Law, Section 2; Lithuania, Law on Physical Culture and Sport of the Republic of Lithuania, Art. 1; Czech Republic, Act No.115/2001 on Support of Sport, § 1.
50 The Law of Mongolia on Physical Culture and Sports, Art. 1, 1.1.
51 Law on Physical Culture and Sport of the Republic of Lithuania, Art. 1.
52 Act No.115/2001 on Support of Sport, § 1.

Finland[53]
"The purpose of this Act is also to promote equality and tolerance, cultural diversity and the sustainable development of the environment through sports";

Malta[54]
"The State recognises that no discrimination should be permitted on the grounds of sex, race, colour, religion or political opinion or residence within different localities of Malta in the access to sport facilities or to sport activities;"

Mongolia[55]
"The purpose of this law is to [...] regulate relations established between the participants in them;"

Ensuring doping-free sport may also be considered an ethical value.

Canada[56]
"The Government of Canada's policy regarding sport is founded on the highest ethical standards and values, including doping-free sport, the treatment of all persons with fairness and respect, the full and fair participation of all persons in sport [...]";

Malta[57]
The purpose of national sport is to [...] cultivate ethical attitudes [...]."

3.6. Dispute resolution
In a Sports Act rules concerning the settlement of disputes can be included.

Canada[58]
"The Government of Canada's policy regarding sport is founded on [...] the fair, equitable, transparent and timely resolution of disputes in sport;"

3.7. Safety
The Sports Act may contain rules which have to guarantee the safety of sports activities.

Latvia[59]
"[...] principle of safety which intends that sports activities process within safe environment and they are managed and run by qualified sports workers."

3.8. Financing
The Sports Act may provide a basis for the financing of sport.

Mongolia[60]
"The purpose of this law is to determine the organizational and economic [...] basis of physical culture and sports [...]."

Austria[61]
"Der Bund fördert den Sport, soweit es sich um Angelegenheiten von internationaler und gesamtösterreichischer Bedeutung handelt. Die Gewährung von zweckgebundenen Zuschüssen an Gebietskörperschaften wird hiedurch nicht berührt;"

People's Republic of China[62]
"The State shall ensure that sports facilitate economic development, the development of national defence, and social development. The cause of sports shall be included in national economic and social development programmes."

The Sports Act may also establish that funding is made available for sport-scientific research.

People's Republic of China[63]
"The State shall promote physical education and sports science research, apply advanced and practical findings from sports science and technology, and base the development of the cause of sports on science and technology."

3.9. International participation
The Sports Act may provide rules concerning the inclusion of the national sport in the international sports movement.

People's Republic of China[64]
"The State shall encourage international sports exchanges. International sports exchanges shall uphold the principles of independence, equality and mutual benefits, and reciprocal respects. They shall also safeguard state sovereignty and dignity and abide by the international agreements that the People's Republic of China has concluded or entered into."

3.10. National prestige
A Sports Act may also be concerned with the prestige that is conferred upon the State if its citizens excel in the field of sport.

Bulgaria[65]
"[...] raising the sport prestige of the nation is of priority in the social policy of the state and the municipalities."

3.11. Recreation and entertainment of the people
A Sports Act can promote the recreational and entertainment value of sport.

Argentina[66]
"El Estado atenderá al deporte en sus diversas manifestaciones considerando como objeto fundamental: la utilización del deporte como factor educativo coadyuvante a la formación integral del hombre y como recurso para la recreación y esparcimiento de la población [...]"

3.12. Other reasons
There are several more objectives which legislators may have intended. Argentina for example through its *Ley del Deporte* attempts to stimulate the educational function of sport; to support the sound development of the sports sector in order that the national teams and athletes competing for Argentina at international level may deliver a sound performance; to foster good relations between the different layers of sport, i.e. amateur sport, Federation (competitive) sport and professional sports; and to make sport readily available to youngsters as sport as a means of recreation contributes to a balanced and stable structure of society.

In the Brazilian *Lei Péle* (which was drafted by footballer Péle when he was Minister of Sport during the years 1995-1998) the following fundamental principles have been laid down: the sports movement is subject to national regulation; the practitioner of sport has autonomy, both as a natural and as a legal person; democratic access to practicing sports; the social aspect that it is a task for the State to support the sports sector, both for official and unofficial sports; the distinction

53 Sports Act, Ch. 1, Section 1 (second sentence).
54 Sports Act (2).
55 The Law of Mongolia on Physical Culture and Sports, Art. 1, 1.1. Cf. further the Republic of South Africa National Sport and Recreation Act, Preamble; Taiwan, National Sports Act, Art. 1.
56 Physical Activity and Sport Act, 4.(1).
57 Sports Act (4). Cf. Latvia, Sports Law, Section 3; Liechtenstein, Sportgesetz, Art. 2, 2).
58 Physical Activity and Sport Act, 4.(1). Cf. Republic of South Africa National Sport and Recreation Act, Preamble.
59 Sports Law, Section 3, 3).
60 The Law of Mongolia on Physical Culture and Sports, Art. 1, 1.1.
61 Bundesgesetz vom 12. Dezember 1969, betreffend Förderungen des Sportes aus Bundesmitteln (Bundes-Sportförderungsgesetz), Abschnitt I, § 1. (1).
62 Sports Law of the People's Republic of China. Art. 3. Cf. Estonia, Sports Act, § 1; Latvia, Sports Law , Section 2.
63 Sports Law of the People's Republic of China, Art. 7.
64 Sports Law of the People's Republic of China. Art. 9. Cf. Estonia, Sports Act, § 1; Latvia, Sports Law, Section 2.
65 Law for Physical Education and Sport, Art. 2(2) (second sentence).
66 Ley del Deporte, Capitulo I, Art. 1(a).

between professional and amateur sport; the national identity that is created through the practice of sport; education through sport; the moral and physical development of society through sport; harmonious interaction between the different regional sports organizations; and to guarantee the safety of every sports participant both physically and mentally. For professional sport a number of additional special fundamental principles apply: financial and administrative transparency; fair administration; the social responsibility of sports-governing bodies; participation in the organization of the sport as provided by the law; and respecting the distinction between professional and amateur sport.

The *ratio legis* of the Colombian Sports Act is highly ambitious, namely: to support, develop, expand, propagate, plan, coordinate, implement and monitor the practice of sport, recreation and the use of leisure time and to promote the extracurricular education from a young age upwards in all layers and social classes of society in accordance with the principle of equal access for all citizens to sound physical and mental schooling/development. It also aims to implement and develop physical education as part of the integrated development of society as a whole and of the individual who has a place in society. A special objective of the Act is to create a national system of sport, recreation, use of leisure time, extracurricular education and physical education.

The factors which have motivated the various legislators to enact a Sports Act are many and diverse. The most important and most frequently mentioned reasons can also be found in the Constitutional provisions concerning sport.

4. Constitutional Provisions Concerning Sport

A large number of countries have included one or more provisions concerning sport in their Constitution. Various Constitutions even have a separate paragraph on sport.[67] The Constitutions of some countries order the legislator to enact legislation in the field of sport.[68] In the Constitutions of some of these countries it is provided that the State shall ensure the protection of citizens' health and in this context will promote the development of sport.[69] Others among these countries links the promotion of sports activities undertaken by the citizens to the promotion of culture,[70] education[71] or recreation.[72] One country links the promotion of sport on its territory to the promotion of all the mentioned policy areas of the State.[73]

5. Conclusions

In many countries the legislator has considered it appropriate to either devote one or more provisions of the Constitution to sport or to enact a separate Sports Act. In the Netherlands the starting point has been that a Sports Act could not function as the field in which such an Act should have effect cannot be delineated. In the Netherlands it was considered desirable to start from a definition that would touch upon the essence of sport. However, in the different Sports Acts which have been examined, such an "essential" definition was not found. The legislators in question have all taken a pragmatic approach. By these laws they merely intended to promote various objectives in society for the benefit of the citizens, to improve the organization of the sports sector or to combat certain excesses linked to sport.

Annex

Constitutional Provisions and Sports Acts[74]

Albania	*Draft Constitution 1998, Art. 59(1), f)*	
Argentina	Ley del Deporte	
Armenia	*Constitution, Art. 34*	
Austria	Bundesgesetz vom 12. Dezember 1969, betreffend Förderungen des Sportes aus Bundesmitteln (Bundes-Sportförderungsgesetz)	
	Land Burgenland	Gesetz vom 11. Dezember 2003 über die Sportförderung im Burgenland
	Land Kärnten	Kärntner Sportgesetz 1997 - K-SpG 1997
	Land Niederösterreich	NÖ Sportgesetz
	Land Oberösterreich	Landesgesetz vom 12. Juni 1997 über das Sportwesen in Oberösterreich (Oö. Sportgesetz)
	Land Salzburg	Gesetz vom 21. Oktober 1987 über die Organisation und Förderung des Sports im Lande Salzburg (Salzburger Landessportgesetz 1988)
	Land Steiermark	Gesetz vom 21.Juni 1988 über das Sportwesen im Land Steiermark (Steiermärkisches Landessportgesetz 1988)
	Land Tirol	Kundmachung der Landesregierung vom 12. September 1972 über die Wiederverlautbarung des Landessportgesetzes
	Land Vorarlberg	Gesetz über die Sportförderung und die

67 Brazil: Constitution, 5-10-1988, Tit. VIII Social Order, Ch. III Education, Culture, and Sports, Section III Sports, Art. 217 [Sports, Practice, Associations]; Ecuador: Constitución Política de la República del Ecuador, Sección undécima: De los deportes, Art. 82; Guatemala: Constitución Política De La Republica De Guatemala, Artt. 91-92; Mexico: Constitución Federal de 1917 con Reformas Hasta 2004 (Vigente), Tít. Tercero, Capítulo II - Del Poder Legislativo, Sección III - De las Facultades del Congreso, Art. 73; Paraguay: Constitution, 20-6-1992, Part I On Basic Principles, Rights, Duties, and Guarantees, Ch. VII On Education and Culture, Art. 84 On the Promotion of Sports; Turkey: Constitution 1982, Part Two — Fundamental Rights and Duties, Ch. Three — Social and Economic Rights and Duties, Art. 59 Development of Sports, (1). It is worth noting that Art. 59(2) provides that "The State shall protect successful athletes".

68 Italy: Constitution, Part II Organization of the Republic, Title V Regions, Provinces, Municipalities, Art. 117 [State and Regional Legislative Power], (3); Panama: Constitución Política de La República de Panamá de 1972, Reformada por los Actos Reformatorios de 1978, Capitulo 40, Art. 82.

69 Armenia: Constitution, 5-7-1995, Ch. 1 The Foundations of Constitutional Order, Art. 34; Bulgaria: Constitution, Ch. Two Fundamental Rights and Obligations of Citizens, Art. 52 [Health Care], (3); Chile: Constitución Política de la República de Chile de 1980, Artículo 107; People's Republic of China: Constitution, 4-12-1982, Art. 21; Spain: Constitution, Title I Basic Rights and Duties, Ch. III Guiding Principles of Economic and Social Policy, Art. 43 [Health Protection, Sports, Leisure], (3); Ukraine: Constitution, Ch. II - Human and Citizens' Rights, Freedoms and Duties, Art. 49.

70 Cuba: Constitución Política de la República de Cuba de 1976, Incluye reformas de 1978, 1992 y 2002. Actualizada hasta la Ley de Reforma Constitucional 2002, Capítulo I - Fundamentos Políticos, Sociales y Económicos del Estado, Art. 9, b); Surinam: Constitution, Ch. VI Social, Cultural and Economic Rights and Obligations, Eleventh Section - Youth, Art. 37 c.

71 Greece: Constitution, adopted on 11-6-1975, Art. 16 [Education], (9); Macedonia: Constitution, Ch. II Basic Freedoms and Rights of the Individual and Citizen, Part 2 Economic, Social, and Cultural Rights, Art. 47; Portugal: Constitution 2-4-1976, Section III Economic, Social, and Cultural Rights and Duties, Ch. II Social Rights and Duties, Art. 64 Health, (2) b), Art. 70 Young People, (1) c) Physical education and sports; Ch. III Cultural Rights and Duties, Art. 79 Physical Education and Sport; Syria: Constitution, Ch. 1 Basic Principles, Part 3 Educational and Cultural Principles, Art. 23 [Socialist Education, Arts, Sports], (3).

72 Nicaragua: Constitución de Nicaragua, 1987, Capitulo III: Derechos Sociales, Art. 65; Peru: Constitucion Politica del Peru, Tit. I - De la Persona y de la Sociedad, Capitulo II - De los Derechos Sociales y Economicos, Art. 14º; Spain: Constitution, Tit. VIII Territorial Organization, Ch. III Autonomous Communities, Art. 148 [Competences], (1) 19).

73 Croatia: Constitution, Dec 1990, last Amendment on: 2-4-2001, Ch. III Protection of Human Rights and Fundamental Freedoms, Part 3 Economic, Social, and Cultural Rights, Art. 68 [Science, Culture, Arts, Sports].

74 See for the full texts of the legislation listed: www.sportslaw.nl under Documentation.

		Sicherheit bei der Sportausübung Land Vorarlberg
	Land Wien	Gesetz über die Regelung des Sportwesens in Wien (Landessportgesetz für Wien)
Belarus	*Constitution, Art. 45*	
Brazil	*Constitution, Art. 5, (0)(a), Art. 24, (0), IX, Art. 217*	
	Lei Nº 9.615, De 24 De Março De 1998	
	Lei Nº. 8.672, De 6 De Julho De 1993	
Bulgaria	*Constitution, Art. 52(3)*	
	Law for Physical Education and Sport	
Cambodia	*Constitution, Art. 65*	
Canada	Physical Activity and Sport Act	
	Fitness and Amateur Sport Regulations	
	Manitoba Fitness and Amateur Sport Act, C.C.S.M. c. F120	
Chile	Ley del Deporte de Chile, de 30 de Enero de 2001	
Colombia	Ley 181 de 1995	
Rep. Congo (Brazzaville)	*Constitution, Art. 104(2)*	
Croatia	*Constitution, Art. 68, Art. 134(1)*	
	Zastupnièki Dom Sabora Republike Hrvatske (Law ont Sport)	
Cuba	*Constitución Política de la República de Cuba de 1976, Arts. 9, b), 15, b), 39, c), g), 43, 52, 103, 105, g), 106, g)*	
Cyprus	*Constitution, Art. 23, 4., 8., Art. 87*	
Czech Republic	Act No.115/2001 on Support of Sport	
Denmark	Top Sports Act	
Ecuador	*Constitución Política de la República Del Ecuador, Art. 82*	
El Salvador	Decreto Nº 300.- La Junta Revolucionaria de Gobierno,	
Estonia	Sports Act	
Finland	Sports Act 1054/1998	
France	Loi relative à l'organisation et à la promotion des activités physiques et sportives	
Greece	*Constitution, Art. 16(9)*	
Guatemala	*Constitución Política de la Republica de Guatemala, Arts. 91, 92*	
Honduras	*Constitucion de la Republica de Honduras 1982, Arts. 123, 174*	
Ireland	Irish Sports Council Act, 1999	
Iceland	Legislative Act on Sports	
Israel	Sports Law, 5/48-1988	
Italy	*Constitution, Art. 117(3)*	
	Legge n. 91/81 sul professionismo sportivo	
Latvia	Sports Law	
Liechtenstein	Sportgesetz	
Lithuania	*Constitution, Art. 53*	
	Law on Physical Culture and Sport of the Republic of Lithuania	
Luxemburg	Loi du 3 août 2005 concernant le sport et portant	
Macedonia	*Constitution, Art. 47(5), Art. 117(2)*	
Malta	Sports Act	
Mauritius	The Sports Act 2001	
Mexico	*Constitution, Art. 73, XXIX*	
	Ley del Sistema Estatal del Deporte	
Mongolia	The Law of Mongolia on Physical Culture and Sports	
Nicaragua	*Constitución de Nicaragua, 1987, Art. 65*	
Panama	*Constitución Política de la República de Panamá de 1972, Art. 82*	
Paraguay	*Constitution, Art. 84(1), Art. 168(1)*	
	Ley de Estimulo y Fomento del Deporte	
People's Republic of China	*Constitution, Art. 21(2)*	
	Sports Law of the People's Republic of China	
Peru	Ley General del Deporte	
Poland	*Constitution, Art. 68(5)*	
	Qualified Sports Act 29-7-2005	
Portugal	*Constitution, Art. 64 (2)b). Art. 70(1)c), Art. 79*	
	Lei de Bases do Sistema Desportivo	
Republic of South Africa	National Sport and Recreation Act	
Romania	Law No. 69 of 28 April 2000	
Russian Federation	*Constitution, Art. 41*	
Serbia	Law on Sport of the Republic of Serbia (17 December 1996)	
Singapore	Singapore Sports Council Act	
Spain	*Constitution, Art. 43(3), Art. 148(1) 19)*	
	Ley 10/1990, de 15 de octubre, del Deporte	
	Basque Provinces Ley del Deporte del Pais Vasco	
Surinam	*Constitution, Art. 37*	
Sweden	Ordinance concerning government grants to sports activities (1999:1177)	
Switzerland	*Constitution, Art. 68*	
	Loi fédérale encourageant la gymnastique et les sports	
Syria	*Constitution, Art. 23(3)*	
Taiwan	National Sports Act	
Turkey	*Constitution, Art. 59*	
Ukraine	*Constitution, art. 49*	
	Law on Physical Culture and Sport 1993	
Uruguay	*Constitución Política de la República Oriental del Uruguay de 1967, Art. 297*	
	Ley de Administracion Publica y Empleo, Fomento y Mejoras de Uruguay	
USA	Ted Stevens Olympic and Amateur Sports Act	
Venezuela	*Constitución de la República Bolivariana de Venezuela, Arts. 111, 184, 272*	
	Ley del Deporte	
Vietnam	*Constitution, Arts. 41, 43*	

Maitre Jean-Louis Dupont speaking at the Sixth Asser/Clingendael International Sports Lecture on The European Union and Sport*, in The Hague on 6 June 2006.*

Revised or New Test Procedures: What CAS Requires

by **Richard H. McLaren***

Introduction

The World Anti Doping Code, {the WADA Code} that applies to all Summer Olympic sports, came into effect just in time for the opening of the "Welcome Home" Olympic Summer Games in Athens, Greece in August 2004.[1] Since that time, challenges to the Code have become more numerous and increasingly complex. One of the more common tactics in these challenges has been to attack both the revisions to established testing procedures and the introduction of new testing procedures by WADA accredited laboratories. This paper explores what limitations, if any, have been imposed on the use of revised or new testing procedures established by WADA for legal purposes. Revisions to the testing procedures for nandrolone and erythropoietin, - two prohibited substances - as well as the introduction of a new testing procedure for blood doping by transfusion, illustrate the challenges to the legal mettle of the Court of Arbitration for Sport {CAS} brought about by greater scientific understanding. The test procedure for nandrolone was originally based on the premise that there was no naturally occurring production of the substance[2] in the human body. However, thanks to the evolution of scientific understanding, the scientific community has recognized that nandrolone is produced naturally in the body in small quantities, a discovery that has required an adjustment in the laboratory testing procedure[3] by the implementation of a threshold limit for the substance. The year 2005 brought with it the recognition that a phenomenon described as "active" urine requires another refinement in the test procedure.[4] A similar evolution of scientific understanding has occurred with respect to the test procedure for erythropoietin. By virtue of studying these testing developments we can explore the following theme: Can progress in testing continue in light of the CAS requirements? The same proposition and theme is also addressed by examining what was required to accept the introduction of flow cytometry as an analytical technique for detection of the prohibited method of homologous blood transfusion in the case of Tyler Hamilton.[5]

In light of these developments, the challenge for CAS will be both in accommodating revisions and in permitting the introduction of new testing procedures to deal with new situations. In so doing, the cost and process of legal acceptance for new procedures cannot continue to be as expensive. The accommodation of change and innovation must be realized while ensuring the protection of athlete's rights.

1. Nandrolone

Nandrolone (also referred to as 19-nortestosterone) is an anabolic-androgenic steroid used to build muscle mass and is a prohibited substance under the WADA Code. In addition to the substance itself, there are nandrolone precursors such as 19-norandrostenedione, 19-norandrostenediol and norethisterone, that are also prohibited substances that are easily purchased as dietary supplements.[6] Upon entering the body, these precursors may be metabolized into nandrolone and produce the same metabolites as if nandrolone had been directly ingested.

Following consumption, nandrolone is quickly metabolized by the body which requires that the detection procedure be based upon testing for the presence of nandrolone metabolites that are then excreted in the urine. The major metabolite of nandrolone that is currently tested for is 19-norandrosterone {19-NA}.[7] It was initially thought that 19-NA was not produced endogenously in the body. Based on this premise, the presence of 19-NA in a sample, in any amount, had indicated the administration of a prohibited substance. However, in 1996, with the introduction of gas chromatograph/mass spectrometery {GC/MS} technology that could detect even minute quantities of substances such as 19-NA, it was quickly understood that low concentrations of 19-NA could be produced endogenously.[8] Published scientific studies later confirmed the endogenous production.[9] The endogenous production of 19-NA was first recognized in pregnant females,[10] but eventually it was determined that endogenous 19-NA could be produced in males as well.[11] As the scientific understanding of 19-NA grew, guidelines emerged, developed by various laboratories such that a positive result would not be reported unless the concentration of nandrolone in a urine sample exceeded set levels.[12]

a. The Early CAS Jurisprudence

The acknowledgement by the scientific community and anti-doping bodies that nandrolone metabolites could be produced endogenously initially led to some confusion in nandrolone cases decided by CAS. Part of the problem was a lack of proper codification of the allowable limits for 19-NA. Additionally, the state of scientific knowledge at the time suggested that low concentrations of 19-NA should be interpreted cautiously. There were three CAS cases involving nandrolone heard

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1 For a discussion on the procedure and jurisprudence of CAS and its evolving application to the provisions of the WADA Code see Richard McLaren, "CAS Doping Jurisprudence: What Can We Learn" (2006) 6 I.S.L.R. 4 (Sweet & Maxwell, London).

2 As discussed in *Bernhard v/ITU* CAS 1998/222 at para. 10 {"*Bernhard*"}.

3 For scientific papers recognizing human production of nandrolone in small quantities see Le Bizec B, Monteau F, Gaudin I, Andre F. "Evidence for the presence of endogenous 19-norandrosterone in human urine." (1999) 723 J Chromatogr B. Biomed Sci Appl. 157-72. Dehennin, L., Bonnaire. Y., Plou, P. J. "Urinary excretion of 19-norandrosterone of endogenous origin in man: quantitative analysis by gas chromatography-mass spectrometry." (1999) 721 J Chromatogr B. Biomed Sci Appl. 301-07. To view WADA's detection limits for Nandrolone see WADA Technical Document TD2004NA, "Reporting Norandrosterone Findings"; p. 2.

4 WADA Explanatory technical note: stability of 19-norandrosterone finding in urine May 13, 2005. ["Explanatory Note"].

5 *Tyler Hamilton v/ USADA & UCI* CAS 2005/A/884, issued 10 February 2006 {"*Hamilton*"}.

6 The IOC Medical Code Prohibited Class of Substance under *anabolic Agents (class C)* was expanded to include these substances as at 31 January 1999. See IOC Medical Code January 1999 & Supplement 2000. See *Nandrolone Review* A Report to UK Sports Council From the Expert Committee Chaired by Professor Vivian James, in January of 2000. See www.uksport.gov.uk. {"Nandrolone Review"}.

7 Nandrolone Review, *supra* note 7 at para. 8.

8 See *Bernhard, supra* note 3 at para. 10.

9 Le Bizec et al., *supra* note 4.

10 Resnik, Y., Herrou M., Dehennin, L., Lemaire, M., Leymarie,. P. "Rising plasma levels of 19-nortestosterone throughout pregnancy: determination by radioimmunoassay and validation by gas chromatography-mass spectrometry" (1987) 64(5) J Clin Endocrino Metab. 1086-8.

11 Le Bizec et al., *supra* note 4.

12 These guidelines which established thresholds for the presence of 19-NA were initially set out in a document entitled *Analytical Criteria for Reporting Low Concentrations of Anabolic Steroids (August 1998)* {"Analytical Criteria"} produced by a subcommittee of the IOC Medical Commission. They can be found as an appendix to *Nandrolone Review* a report to UK Sport in January of 2000. See www.uksport.gov.uk. These guidelines had the nature of a recommendation addressed to the IOC laboratories and did not constitute a legal rule. See *Bernhard*, supra note 3 at para. 11.

in 1998 which involved discussion of a "grey zone"[13] where the concentration of 19-NA falls between 2 ng/mL and 5 ng/mL in men.

During the hearing in *Mason*,[14] the first of these cases, there was testimony that uncertainty existed among experts as to the maximum concentration of nandrolone produced by the human body. Some scientists were skeptical about whether concentrations of nandrolone metabolites found in the "grey zone" would be sufficient evidence to assume a doping offence. It was thought at the time that further investigations would be required in order to confirm a positive result in the "grey zone". However, in the case of *Mason*, there was greater than 5 ng/mL of 19-NA in his sample, which was above the "grey zone", and he was found to have committed a doping offence. In the next case, *Bouras*,[15] there was further reference to a cautious area between 2 ng/mL and 5 ng/mL; however, Bouras tested over 5 ng/mL for nandrolone.

The "grey zone" doctrine had a more significant effect in the case of Olivier Bernhard,[16] a Swiss triathlete who had a positive test for nandrolone where his A sample had 3 ng/mL of 19-NA. His B confirmed that there was 19-NA present in the urine, but there was no reported concentration for that sample. In an attempt to prove that the 19-NA in his urine was produced endogenously, Bernhard had further independent testing for nandrolone carried out on himself. This testing indicated that Bernhard endogenously produced between 2 and 3 ng/mL of 19-NA. The Panel in *Bernhard* stressed that the threshold of 2 ng/mL for 19-NA set out by the IOC Medical Commission had the nature of a laboratory recommendation or presumption, and not a legal rule. The Panel stated:

> It is therefore appropriate to determine whether the actual state of medical science still allows a conclusion or, at least, permits a presumption that the existence of nandrolone metabolites in the urine result from external application of nandrolone.[17]

Thus it appears that CAS may not accept scientific presumptions regarding testing procedures that are found to be contrary to the actual state of medical science.

Interestingly, the Panel found that it was beyond scientific doubt that low concentrations of nandrolone metabolites falling within the "grey zone" can be the result of endogenous production of the human body. The evidence indicated that there was a remote and decreasing probability that the 19-NA present has been produced endogenously as its concentration increased through the "grey zone". The legal impact of this finding was that the scientific presumption of a doping offence when the 2 ng/mL threshold was exceeded could not be considered to be absolute and irrebutable and could not be upheld. Therefore, in situations where the concentration of 19-NA falls within the "grey zone", the Panel held that sanctioning bodies were required to provide additional evidence in support of the presumption of an offence, or to at least exclude all other causes. Since the ITU had not presented such evidence, while Bernhard had presented evidence to rebut the scientific presumption, the Panel did not find that there had been a doping offence.

In 1999, CAS readdressed the concept of a "grey zone" in nandrolone testing. In the case of long distance swimmers Meca-Medina and Majcen[18] the CAS Panel clarified the situation stating that no such "grey zone" exists and relied instead on the 2 ng/mL threshold. This position was later affirmed the following year in the case of Alexander Leipold,[19] who was stripped of the gold medal in freestyle wrestling at the 2000 Sydney Summer Olympic Games for testing positive for nandrolone. One of the many challenges that Leipold made against his positive result was that the 2 ng/mL threshold was not reliable since endogenous production of nandrolone metabolites could exceed this level.

The CAS Panel did not accept his arguments. The situation had changed significantly since the earlier cases which discussed the "grey zone". The 2 ng/mL threshold for nandrolone metabolites had been incorporated into the Olympic Movement Antidoping Code (OMAC) and therefore was a rule that had to be applied by the Panel. Further, the scientific evidence had changed such that the Panel was satisfied that the 2 ng/mL threshold for 19-NA provided scientifically reliable proof of an exogenous administration of nandrolone. Published scientific studies as well as the experience of accredited laboratories supported the reliability of the 2 ng/mL threshold. Leipold's expert witness had not put forth any scientific studies that cast doubt on the reliability of the threshold, and merely put forward the view that there had not been sufficient study to eliminate the possibility that concentrations of endogenously produced 19-NA could exceed 2 ng/mL. The Panel found that this was not sufficient to show that the threshold was not scientifically reliable. However, the Panel did express some concerns that the evidence in support of the reliability of the threshold could be stronger. Nevertheless, they explained:

> [T]he Panel acknowledges that the IOC and other sports federations face an extremely difficult task in attempting to keep pace with the imagination and resources of cheats who seek to obtain an unfair competitive advantage in the increasingly lucrative world of sport. The Panel recognises that the IOC and sports federations must enact doping control rules based upon the best available scientific information and even if this information is, at times, rather limited.[20]

The CAS Panel in *Leipold* thus recognized that anti-doping test procedures must be evaluated based on the current state of scientific knowledge, but that scientific evidence is, unfortunately, not always foolproof.

The threshold for nandrolone remains a rule under the WADA Code. The 2006 WADA Prohibited List clearly states that an *Adverse Analytical Finding* with respect to 19-NA will be considered to be proof of exogenous origin of the metabolite. The threshold for reporting an *Adverse Analytical Finding* for 19-NA is 2 ng/mL. The original limit for women was 5 ng/mL, but this has recently been reduced and it is now 2 ng/mL as it is for men.[21]

The early inconsistencies in the CAS jurisprudence described above were caused partly by the evolution of scientific knowledge, rather than legal or jurisprudential issues imposed by the CAS. These inconsistencies were also a result of the lack of clarity in the scientific regime of the sanctioning bodies and their accompanying legal structure including the relationship between laboratory guidelines, the lists of prohibited substances and anti-doping rules.

Despite the clear acceptance by CAS of the 2 ng/mL threshold for 19-NA, athletes continue to challenge that limit. In addition to arguing that the threshold is simply unreliable, athletes have also asserted that certain factors such as intense exercise can cause temporary production of nandrolone over the allowable limit. Other athletes have made challenges alleging errors in the way that the concentration of nandrolone metabolites is reported and calculated.

i) The Exercise Induced Challenge

The issue of whether exercise can lead to production of endogenous nandrolone has been controversial. Some studies have suggested that exercise has no effect on production of endogenous 19-NA,[22] while other studies indicate that there is a very slight increase in the amount of 19-NA produced endogenously after exercise.[23] However, most of

13 *Mason v/ UCI* CAS 1998/212{"*Mason*"}; *Bouras v/* IJF CAS 1998/214 {"*Bouras*"}; *Bernhard*, supra note 3.
14 *Mason*, supra note 14.
15 *Bouras*, supra note 14.
16 *Bernhard*, supra note 3.
17 *Ibid.* at para. 8.
18 *Meca-Medina and Igor Majcen* v/*FINA* TAS 1999/A/234 and 235.
19 *Leipold v/ IOC* CAS 2000/A/310 {"*Leipold*"}.
20 *Ibid.* at para. 81.
21 These limits with respect to an *Adverse Analytical Finding* for 19-NA are set out in WADA Technical Document TD2004NA, *supra* note 4. The change to the limit for 19-NA in females occurred in August 2004, the effective date of the Technical Document.
22 Schmitt N, Flament MM, Goubault C, Legros P, Grenier-Loustalot MF, Denjean A. "Nandrolone excretion is not increased by exhaustive exercise in trained athletes" (2002) 34 Med Sci Sports Exerc. 1436-9.
23 Robinson N, Taroni F, Saugy M, Ayotte C, Mangin P, Dvorak J. "Detection of nandrolone metabolites in urine after a football game in professional and amateur players: a Bayesian comparison" (2001) 122 Forensic Sci Int. 130-5.

the studies indicate that the production of 19-NA arising from exercise is minimal and falls well below the 2 ng/mL threshold. The only studies that have demonstrated 19-NA levels generated by exercise that are higher than the 2 ng/mL threshold suffer from a fatal flaw: they do not confirm that the subjects are not administering exogenous nandrolone, either intentionally or unintentionally.[24]

In his defence, Djamel Bouras[25] asserted that the 2 ng/mL limit for nandrolone metabolites could be exceeded by endogenous production due to exercise at a time when the "grey zone" was still acknowledged and the threshold was still on shaky ground. However, even at this early stage in the jurisprudence regarding nandrolone, the CAS Panel accepted evidence that stress, dehydration, and physical effort could not have a significant influence on the endogenous production of 19-NA and could not lead to a concentration of 19-NA greater than 1 ng/mL. The CAS has continued to maintain this approach to allegations of exercise-induced production of nandrolone.

In the case of Costa Rican swimmer Claudia Poll,[26] Poll claimed that the determination of a 7 ng/mL concentration of 19-NA in her urine could have been caused by exercise, and that the threshold of 5 ng/mL (at the time) was too low.[27] The CAS Panel rejected her arguments, finding that scientific research had established that exercise could not lead to a concentration of 19-NA over the allowable limit. Furthermore, the threshold for reporting nandrolone positives for females was scientifically backed by the majority of medical opinions which stated that "stress and physical exertion has no impact on the quantity of the substance".[28] In rejecting Poll's argument the panel relied on expert testimony indicating that the 5 ng/mL limit was in fact very cautious and substantially higher than the concentration of 19-NA known to occur in non-pregnant females. The legal challenge was answered by the analysis of the scientific literature presented in evidence and evaluated by the CAS Panel. This process reflected the time tested legal technique of weighing the evidence before the adjudicators and making a judgement. The CAS has demonstrated through the decisions of its panels that it is able to address such challenges.

ii) Calculation Challenges

While some athletes challenged the validity of the 2 ng/mL limit, others challenged the accuracy of reporting and the calculations involved in determining whether their sample exceeded the threshold limit. As with all scientific measurements, there is a range of uncertainty in the calculated concentration of 19-NA in an athlete's urine sample. To establish a doping offence, it is reasonable that a sanctioning body must show not only that the concentration of 19-NA in the urine sample is greater than the limit, but also that the range of uncertainty of the concentration falls entirely above the 2 ng/mL threshold. In the *Poll* case, Poll challenged the way in which the analyzing lab had reported the range of uncertainty of the concentration of 19-NA in her urine sample. She argued that the way in which the uncertainty was reported did not comply with the rules set out by the International Organisation for Standardisation (ISO). The Panel found that even though a WADA draft document recommended using an expanded range of uncertainty, the way the uncertainty was in fact reported did not violate the ISO rules and that in any case, the range of uncertainty was well above the threshold limit regardless of the way in which it was calculated. Importantly, the Panel made it clear that it was not bound to apply the ISO standards, rather, it was bound to apply the FINA rules and to ensure that the analysis was done properly. The Panel noted that the CAS relies on the accreditation process of the labs and does not have the authority to intervene or impose its views on what it believes are appropriate laboratory procedures to be applied by these accredited labs.

The above challenge is a variation on the earlier theme that the structure of the testing rules that form the backdrop to the legal regime lacked precision and clarity. The CAS panel applied a purposive approach to the interpretation of the documentation to conclude that the laboratory was working within the prescribed parameters.

Fundamental to the maintenance of a respected adjudication process and the integrity of the jurisprudence arising therefrom is a profound need to conduct a careful and meticulous review of scientific data, journal articles and expert testimony. The CAS has been on the whole vigilant in its conduct and review of scientific data, articles and expert testimony despite diversity of view within the scientific community on some matters. Such vigilance is essential for the continuing success of the CAS. The error committed by the IAAF Doping Review Board (which conducted doping arbitrations at the time) in the Merlene Ottey case is illustrative of the negative impact that lack of vigilance can reek upon an organization.[29]

Another case illustrating the importance of accuracy when reporting the detection of nandrolone is the case of British triathlete Spencer Smith,[30] who tested positive for nandrolone in the 1998 Hawaiian Ironman. At one point in the hearing the anti-doping lab director stated that an error had recently been discovered, and that the reported concentration of 19-NE should have been 3 ng/mL instead of 8 ng/mL. Due to this discrepancy between the results that were initially reported and the corrected results, the CAS Panel did not find that Smith had committed a doping offence. The Panel stated that when doubt has been raised with respect to a testing procedure, the benefit of that doubt must go to the suspected athlete.

Despite what occurred in the Spencer Smith case, the rules of most IFs and the WADA Code provide that minor irregularities in sampling, custodial, and testing procedures will not normally invalidate a finding of a doping offence. In the case of Czech tennis player Petr Korda,[31] the athlete attempted to defend himself against a charge of nandrolone doping by relying on several minor deviations from the established procedures for sampling and testing. The Panel applied Section U of the ITF rules at the time, which stated that any deviations from anti-doping control procedures do not invalidate the finding, procedure, decision, or positive test result, unless that deviation raises a material doubt as to the reliability of the finding, procedure, decision or positive test result.[32]

b) Ingestion Without Intention Challenges

i) Contaminated Supplements

At the turn of the millennium there seemed to emerge a large number of cases in which athletes tested positive for nandrolone. Athletes blamed their positive results on ingesting nandrolone unintentionally through contaminated or unlabelled dietary supplements or through foods that contained nandrolone.[33]

Contaminated supplements can occur either through deliberate or

24 See the *Nandrolone Progress Report* to UK Sport Council from the Expert Committee on Nandrolone chaired by Dr. Vivian James (February, 2003) at paras. 13-22. Available at www.uksport.gov.uk.

25 *Bouras*, supra note 14.

26 *Poll v/FINA* CAS 2002/A/399 {"*Poll*"}.

27 This threshold limit came from a subcommittee of the IOC Medical Commission who produced a document for the guidance of accredited laboratories: *Analytical Criteria for Reporting Low Concentrations of Anabolic Steroids (August 1998).* It can be found as an appendix to *Nandrolone Review* a report to UK Sport in January of 2000. See www.uksport.gov.uk.

28 *Poll*, supra note 27 at para. 51.

29 In the decision dated 7 July 2000, the Doping Review Board accepted expert testimony that incorrectly took account of dehydration causing Merlene Ottey's urine sample to be concentrated. To account for such circumstances when the specific gravity of an athlete's urine sample is greater that 1.02, a correction factor is applied to the threshold limit in order to compensate for the concentration of the urine. This has the effect of raising the thresholds over which a positive analytical result will be reported by the analyzing laboratory. What the Review Board did was to apply the correction factor to lower the results of the analysis resulting in the reading being apparently below threshold for women. The Review Board had been misled in its deliberations by an expert providing the incorrect calculation method. The disrepute this brought upon the IAAF may have been one of the contributing factors leading the IAAF in Edmonton, Alberta in 2001 to agree to join the CAS system and refer doping arbitrations to CAS.

30 *USA Triathlon v/ Spencer Smith* (CAS, Lausanne, 31 May 2000).

31 *ITF v/ Korda*, CAS 99/A/223.

32 A similar provision is found in article 3.2.2 of the WADA Code, which states that departures from International Standards that do not cause an Adverse Analytical Finding will not invalidate the results. However, if an athlete is successful in establishing that a departure occurred, the sanctioning body bears the burden of proving that the departure did not cause the Adverse Analytical Finding.

33 *Kicker Vencill v/ USADA*, CAS 2003/A/484 {"*Vencill*"}.

accidental mislabelling of products or the accidental mixing of ingredients by manufacturers in the course of producing a supplement. Such potential problems have been greatly intensified by greater access to the Internet which has facilitated both knowledge and access to supplements and their purchase by people worldwide. The extent of the problem was dramatically illustrated by an 2002 IOC study of 634 non-hormonal dietary supplements from 13 countries.[34] Ninety-four (14.8%) of the tested supplements were found to contain prohibited anabolic-androgenic steroids not listed on any label. From at least that date, or possibly even earlier, athletes have been warned about the risks associated with taking dietary supplements. Despite these warnings however, the CAS jurisprudence is rife with examples of athletes who have taken a supplement that has resulted in an adverse analytical finding.[35] Though the problem has been alleviated somewhat by legislation regarding supplements introduced by the United States government,[36] the problem continues.[37] However, it has now shifted away from nandrolone to steroids that are undetectable in standard laboratory screening procedures. The challenge for the testing labs to keep up with the substance manufacturers is obvious. The question is, how does the CAS deal with this challenge?

Both the WADA Code, and the variations adopted by many international federations provide for strict liability with regard to doping infractions, such that the mere presence of a prohibited substance in the athlete's body is considered to be a doping offence, even if the substance was ingested unintentionally. As a result of this strict liability, an athlete who ingests nandrolone unintentionally will still be deemed to have committed a doping offence. However, if the athlete can establish that the ingestion of a prohibited substance such as nandrolone was unintentional, then it is possible that there could be a reduction in the sanction they receive.[38] In such cases, CAS must determine whether or not nandrolone entered the athlete's body in the way claimed by the athlete, and whether the athlete should bear some responsibility for the inadvertent ingestion.

ii) Other Claims of Ingestion

One potential source for the unintentional ingestion of nandrolone is its possible presence in the organs of certain animals that might then be eaten by humans. This concern is best illustrated by the case of *Meca-Medina and Majcen v/ FINA*.[39] Meca-Medina and Majcen both tested positive for nandrolone at the same event, and claimed that their positive results were due to the consumption of a certain dish served at the hotel where they were staying. They claimed that this dish, called "Sarapatel" contained uncastrated boar offal and that consumption of this meat led to their positive test results. As a result of strict liability, the athletes bore the burden of proving that the nandrolone in their bodies was due to the consumption of this dish. A scientific study had been performed where it was observed that consumption of uncastrated boar meat could indeed lead to the presence of nandrolone metabolites that exceeded the allowable limits for a certain time period. Despite the new scientific findings, the athletes were still unsuccessful in establishing that the nandrolone metabolites in their samples were the result of the consumption of boar meat. The evidence and the nandrolone test results were not sufficiently consistent with this explanation, even if it were theoretically possible.

Scientific research has continued to support the notion that the organs of certain animal species could lead to a positive finding for 19-NA.[40] But other athletes such as Myriam Léonie Mani[41] who have relied on this defence have not been successful. Part of the reason for this is that the Nandrolone Progress Report to the U.K. Sports Council now advises athletes that it recommends that boar and horse meat be avoided.[42] The WADA Code, and most other doping rules, place a high degree of responsibility on the athlete for what they consume. The known prevalence of nandrolone contamination in dietary supplements as well as certain specified foods should make an athlete wary of taking supplements that have not been properly assessed for the presence of contaminants and of eating certain types of meat. Accordingly, panels may decide not to reduce the sanction of an athlete or to reduce it only minimally because the athlete should have taken more precautions. The case law seems to support this proposition. For example, U.S. swimmer Kicker Vencill[43] was unsuccessful in obtaining a reduction of his suspension for unintentionally taking nandrolone through unlabelled dietary supplements.

The jurisprudence involving contaminated supplements or food products relies upon the principle of strict liability to place a burden of proof by explanation on the athlete. That obligation is an onerous and expensive one to undertake. There is only one CAS case,[44] of which I am aware, that has resulted in an exoneration as a result of a discharge of the burden of proof. The legal technique of strict liability is the core reason for this being the case.

iii) Unexplained Challenges

The most difficult issue that has arisen with respect to nandrolone contamination is the eight ATP tennis players that tested positive for nandrolone within a period of 11 months between August 2002 and July 2003.[45] While these cases did not reach the CAS level, it demonstrates the difficulties that can arise in nandrolone testing. All of these athletes had concentrations of nandrolone metabolites that were consistent with the contamination of dietary supplements. Importantly, analysis of these samples revealed that they all shared a distinct signature, suggesting a common source. The ATP had been supplying the athletes with electrolyte tablets, and the circumstantial evidence known and available at the time indicated that these tablets were the likely source of the positive nandrolone tests.

While normally athletes are guilty of a doping offence no matter what the reason for the presence of a prohibited substance in their system, in this case, at the time of the hearing there was evidence that the sanctioning body (the ATP) had been responsible for the unintentional ingestion of nandrolone by the athletes. As a result, the independent doping tribunals that heard these cases applied the principle of equitable estoppel, preventing the ATP from obtaining the benefit of its strict liability rules because they had been the likely agent responsible for their breach. The ATP could offer no other evidence to establish intention or that a doping offense had occurred. Thus, the allegations of a doping offence remained unsubstantiated and the athletes were exonerated because the cases had not been proven. Further scientific investigation after the cases had been processed later revealed that the electrolyte tablets in question were not in fact contaminated with nandrolone. Furthermore, even after the ATP had

34 See the discussion of the study and other ones in the *Nandrolone Progress Report* to UK Sport Council from the Expert Committee on Nandrolone (February, 2003) at p. 5 paragraph 4 and subsequent.

35 *Leipold*, supra note 20; *Aanes v/ FILA*, CAS 2000/A/317; *Demetis v/ FINA* CAS 2002/A/432; *Vencill, supra* note 34; *IAAF v/ ÖLV & Elmar Lichtenegger*, CAS 2004/A/624; *Guest v/ CGC & TC*, CAS C.G. 02/001; *Knauss v/ FIS*, CAS 2005/A/847.

36 For a long time prohormones such as 19-norandrostenedione and androgestinedione could be sold as dietary supplements, however, the implementation of the *The Anabolic Steroid Control Act* of 2004 has made distributing and possessing these types of compounds illegal under U.S. federal law.

37 The UCLA accredited laboratory at the request of the Washington Post tested five dietary supplements in 2005. Four contained steroids that were previously undetectable and the other contained THG, only recently discovered during the BALCO scandal. See: Amy Shipley "Chemists Stay a Step Ahead of Drug Testers" *The Washington Post* (18 October 2005), E01, online: http://www.washingtonpost.com/wp-dyn/content/article/2005/10/17/AR2005101701622.html.

38 See the WADA Code provisions on reduction in sanctions for no fault or negligence or no significant fault or negligence at article 10.5. See Richard McLaren, "Exceptional Circumstances: Is it Strict?" (2005) 5 I.S.L.R. 32 (Sweet & Maxwell, London).

39 CAS 99/A/234 and 235; CAS 2000/A/270.

40 De Wasch K, Le Bizec B, De Brabander H, Andre F, Impens S. "Consequence of boar edible tissue consumption on urinary profiles of nandrolone metabolites. II. Identification and quantification of 19-norsteroids responsible for 19-norandrosterone and 19-noretiocholanolone excretion in human urine." (2001) 15 Rapid Communications in Mass Spectrometry. 1442-1447.

41 *IAAF v/ CMR & Mani*, CAS 2003/A/448.

42 *Nandrolone Progress Report* to UK Sport Council from the Expert Committee on Nandrolone (February, 2003).

43 *Vencill, supra* note 34.

44 *French v/ Australian Sports Commission and Cycling Australia* CAS 2004/A/651 issued 11 July 2005.

stopped distributing supplements, many tennis players continued to exhibit low levels of nandrolone when tested, and these samples continued to have the same unique signature. This controversy has still not been resolved, but recent discoveries relating to nandrolone testing might possibly provide some explanation.

c) The Challenge of Changing Scientific Knowledge

The challenge that changing scientific knowledge has presented in nandrolone testing is demonstrated by the case of the New Zealand swimmer Trent Bray.[46] Bray's A and B samples showed concentrations of 19-NA at 4 and 3.5 ng/mL, respectively. Bray complained that the positive result was due to the fact that his urine sample had been held up in customs and was thus in transit for two weeks during the summer. Bray claimed that the urine samples stored at high temperature for such a period of time could undergo degradation and bacterial activity. The Panel did not accept Bray's arguments, as the urine sample appeared normal when it finally arrived at the laboratory. Further, the Panel did not accept that degradation or bacterial activity could lead to the formation of nandrolone metabolites. Bray attempted to show that 19-NA could be formed in the sample through the transformation of endogenous hormones such as testosterone or androsterone into 19-NA. However, Bray's expert witnesses were only able to show that such a transformation was a theoretical possibility. There was no scientific evidence suggesting that such a transformation did actually occur. The Panel stated:

> Careful evaluation of the evidence before it has led the Panel to the conclusion that a pathway from testosterone or androsterone to 19-norandrosterone outside the human body may be theoretically conceivable but that absent any scientific evidence to this effect it remains pure speculation on which the Panel is unwilling to base its decision.[47]

In the result, Bray was found to have committed a doping offence and received a suspension of two years. However, while the chemical pathways put forward in Bray's defence were at the time merely theoretical, scientific knowledge has advanced since then.

Recent scientific studies have resulted in the discovery of a phenomenon described as *active* or *unstable* urine that could potentially affect the results of nandrolone testing.[48] It is possible for a urine sample to incubate its own metabolites of nandrolone (though it is rare and only occurs under certain conditions). WADA has taken steps to understand and recognize this phenomenon and they have modified their testing procedures in order to detect it and to eliminate the possibility of false positives.[49] While the recent discoveries and the modifications to the testing protocol have not yet been the subject of a CAS ruling, these issues will no doubt be raised in future cases involving positive tests for nandrolone.

The research has revealed that in certain rare circumstances, a chemical reaction can occur in the bottle after a urine sample has been provided, whereby two endogenous hormones, androsterone (A) and etiocholanolone (E), are converted into 19-NA and 19-NE, metabolites of nandrolone that are tested for in doping analysis. Urine samples that exhibit this phenomenon, known as "unstable urine", exhibit certain unique characteristics. These samples exhibit cloudiness and are highly concentrated, and high temperature appears to be a factor in the chemical reaction. Furthermore, the phenomenon tends to occur when the ratios of the amount of A, E, 19-NA, and 19-NE found in the sample meet certain criteria. To date, the research indicates that the highest concentration of 19-NA that has been recorded as a result of the phenomenon is 5.4 ng/mL.[50]

While WADA has maintained the 2 ng/mL limit for the presence of 19-NA in an athlete's urine sample, they have modified the testing procedures for samples that fall within a range of 2 to 10 ng/mL. First, a urine sample that produces a result in this range must exhibit the known characteristics of unstable urine; otherwise, the result will be considered positive for nandrolone. If a urine sample does exhibit the characteristics of unstable urine, a "stability" test will be performed. In essence, the stability test is a method of determining whether the chemical reaction that constitutes the phenomenon of unstable urine can be demonstrated to occur in the athlete's urine sample.

CAS has not yet knowingly dealt with an unstable urine case. When it does, the legal requirements used previously to assess the acceptance of the variation in the testing procedure amongst the scientific community will be examined and weighed to come to the appropriate legal conclusions. This legal technique of weighing the evidence before the adjudicators and making a judgement is well understood and can be seen to be operating in many doping cases. These developments should present no new challenges from the point of view of CAS.

While the WADA modification to the nandrolone testing procedure may prevent the "unstable urine" problem from causing false positives in the future, there may be little that can be done about cases in the past. In many cases, there may no longer be any urine samples that are available in order to test for the "unstable urine" phenomenon. It is possible that several "borderline" cases in the past, such as the tennis cases discussed above, may actually have been examples of unstable urine.

d) Summary

The assessment of a doping infraction is always based upon the scientific knowledge of the day. The foregoing review of the testing procedures for nandrolone as a prohibited substance clearly reveals that the ever expanding boundaries of scientific knowledge can ultimately call into question a result that was accepted as hard fact only years or months before. Some years ago it was thought that nandrolone did not occur naturally in the body. Later, it was recognized that it occurred naturally in pregnant women and in small quantities in men. Consequently, thresholds were introduced to accommodate this change in scientific knowledge. Today, those thresholds have been modified to a unisex level with a special procedure to account for the possibility of concentrated urine or active, unstable urine that may incubate its own nandrolone in the bottle. The CAS has not yet reviewed all of these challenges to the nandrolone testing procedure. To the extent that they have, none have so far resulted in legal obstacles being placed in the way of the development of revisions to the procedure. The concern must then be that in light of these developments, some athletes may well -if tested today- be found not to have produced an adverse analytical result based on the evolution of scientific understanding related to testing for the substance. They are the victims of the changing state of scientific knowledge. At least in the sport of men's professional tennis, the adjudication system protected some of the athletes by the estoppel applied to the strict liability regime.

2. Erythropoietin

The naturally occurring protein hormone erythropoietin (EPO) is produced by the kidney and causes the production of new red blood cells (erythropoiesis).[51] The function of EPO is to stimulate the bone marrow to produce more red blood cells, which carry oxygen throughout the body. An increased amount of red blood cells can be extremely beneficial to all athletes, but particularly endurance athletes, because it provides for uptake of greater amounts of oxygen, allowing athletes to increase their level of exertion and to maintain that level for longer periods.

Using genetic engineering, artificial forms of EPO have been devel-

45 See ATP Press Release "ATP Expands its Efforts to Determine Cause of Low-Level Nandrolone in Test Results", March 10, 2004, online: http://www.atptennis.com/en/antidoping/nandrolone_release.pdf; See also "WADA Report on ATP Cases", July 2004, online: http://www.wada-ama.org/rtecontent/document/wada_atp_report.pdf.

46 *Bray v/ FINA*, CAS 2001/A/337.

47 *Ibid.* at para. 49.

48 Thieme, D., Anielski, P., Grosse, J., Hemmersbach, P., Lund, H., Rautenberg, C., "Kinetic of in-situ demethylation of deuterated endogenous steroids in urine samples" In: W. Schänzer, H. Geyer, A. Gotzmann, U. Mareck (eds.) Recent advances in doping analysis. Sport und Buch Strauß, Köln (2004) 177-188.

49 Explanatory Note, *supra* note 5.

50 *Ibid.*

51 Françoise Lasne and Jacques de Ceaurriz, "Recombinant erythropoietin in urine", (2000) 405 Nature 635.

oped that have typically been used to treat diseases such as anemia caused by renal failure. Both the natural and synthetic forms of EPO effectively stimulate the production of red blood cells. As a result, many athletes are turning to the administration of artificial EPO as a means of enhancing their performance, which constitutes a doping offence under the WADA Code.[52] Synthetic EPO exists in several forms. The first type of artificial EPO to be developed was known as recombinant EPO, {rEPO}, and is produced by splicing the human EPO gene into cultured animal cells. More recently, another form of artificial EPO called darbepoietin has been developed using a similar process, but differing in that it involves an EPO gene sequence that has been specially engineered. The naturally produced version of EPO is sometimes referred to as endogenous EPO or urinary erythropoietin (u-EPO).

The human body does not naturally produce rEPO or darbepoietin, and its presence in the body of an athlete is therefore indicative of the intentional administration of an external substance.[53] The challenge for the WADA accredited laboratories has been to find a test procedure that identifies artificial EPO and validly and reliably distinguishes it from endogenous EPO. As the testing procedures for EPO have evolved, the CAS continues to hear new challenges to EPO analytical positive results. In hearing these challenges, the CAS has had the opportunity to consider the scientific and legal standards that must be met by a new testing procedure. By reviewing the history of the EPO test in the context of the CAS jurisprudence, any limitations that have been imposed on the use of the testing procedure for legal purposes can be examined to determine if the test is acceptable to establish a doping offence.

a) The Original Direct Urine Test

The direct urine test for rEPO was first introduced at the Olympic Games in Sydney, Australia in 2000 and was used in combination with an indirect blood test for rEPO.[54] The indirect blood test was conducted first, but could not conclusively prove use of rEPO on its own. If the indirect blood test suggested possible use of rEPO, then the direct urine test - which directly indicates the presence of r-EPO in the urine - is used.[55] The laboratory procedures for carrying out the analysis were first introduced just prior to the Sydney Games and have gone through a number of refinements since that time.

Since only the direct urine test is used as definitive proof of the presence of rEPO, most of the scientific challenges to the EPO testing procedures heard by CAS have focused upon it. The direct urine test distinguishes between endogenous EPO and artificial EPO based on differences in the complex sugar chains that make up a significant part of an EPO molecule. Even though rEPO is produced using the natural human gene for EPO, the production of rEPO in animal cells as opposed to human cells causes rEPO molecules to exhibit differences which cause them to have different electrical charges. The direct urine test distinguishes between rEPO and endogenous EPO based upon the difference in charge.[56]

After some preparatory steps, the urine sample is run through a gel in which a pH gradient has been set up by running an electrical current through it. Depending on the charge on a molecule, it will move to a different location on the gel, allowing for the separation of different forms of EPO molecules. Afterwards, all of the different forms of EPO molecules (both endogenous and artificial) are visualized using an antibody that recognizes EPO. Eventually, an image called an electropherogram is produced, showing the different forms of EPO (also called isoforms) present in a urine sample.[57] Endogenous EPO consists of many different isoforms that occupy the central region of an electropherogram, in between the acidic and basic regions. In contrast, rEPO consists of only five isoforms that occupy the basic range of the electropherogram.

Though there can be some overlap between the endogenous EPO isoforms and the rEPO isoforms on an electropherogram, it is usually quite clear from observing an electropherogram whether rEPO is present in a urine sample. In order to deal with the fact that endogenous EPO isoforms could overlap with rEPO isoforms, certain criteria for interpreting the electropherograms were developed. These criteria were designed such that, by using them, the risk of false positives would be negligible. Many of the initial scientific challenges to the EPO testing procedure heard by CAS involved these interpretation criteria.

The first cases adjudicated around the world did not arise until 2001. The jurisprudential basis for the acceptance of rEPO testing began with the Court of Arbitration for Sport {CAS} decision in *Meier* v. *Swiss Cycling*.[58] That case arose in the era when each international sports federation made its own rules about doping in contrast to the harmonized rules of WADA, which established international standards for testing. In the *Meier* case, the CAS Panel accepted that the *direct urine test*, as it was then referred to, was reliable and might be applied to distinguish endogenous EPO from exogenous EPO producing an adverse analytical result.[59]

Following the *Meier* decision the next case, *UCI v. Hamburger*,[60] CAS challenged not the general reliability of the test but whether there was a laboratory standard of 80% basic area isoforms percentage {BAP}. This interpretation technique involved a visual and quantification test to interpret the electropherogram.[61] The Panel in *Hamburger* found that the international federation did not have to follow the IOC practice of requiring an 80% BAP in its own anti-doping rules. However, the evidence was that the laboratory doing the testing followed the practice in any event. The Panel held that in so doing it must apply the 80% BAP method of interpretation to both the "A" and "B" sample and that it had not done so. Therefore, no doping infraction had occurred because, according to the criteria used at the time by the laboratory, the "B" sample did not confirm the "A" sample.

The EPO test procedure appeared to be on a slippery slope in the CAS jurisprudence given that *Meier* had been found to have committed a doping offense and *Hamburger* had not. These decisions reflect the parallel developments in the earlier CAS jurisprudence on nandrolone being influenced by changing understandings of the science and its interpretation. The early inconsistencies in the CAS EPO jurisprudence were caused by the lack of clarity in the scientific regime

52 As an aside in October of 2005 American champion skier Bode Miller was quoted in the newspapers as saying the sporting playing field cannot and should not be made level, Miller said. "Nothing's equal," Miller said. "If you want to make it equal, then make everything legal. So you can do whatever the hell you want."

53 See Françoise Lasne, *et al.*, "Detection of Isoelectric Profiles of Erythropoietin in Urine: Differentiation of Natural and Administered Recombinant Hormones" (2002) 311 Analytical Biochemistry 119-126 at 120 stating that ... *endogenous EPO is synthesized in the human kidney, whereas recombinant EPO is synthesized in Chinese hamster ovary cells.*

54 The indirect blood test for EPO is described in: Robin Parisotto, *et al.*, "A novel method utilising markers of altered erythropoiesis for the detection of recombinant human erythropoietin abuse in athletes" (2000) 85 Haematologica 564-572.

55 See Rymantas Kazlauskas, *et al.*, "Strategies for rhEPO Detection in Sport" (2002) 12 Clinical Journal of Sport Medicine 229-235.

56 Françoise Lanse, "Double-blotting: a solution to the problem of non-specific profiles of erythropoietin in urine: differentiation of natural and administered recombinant hormones." (2001) 253 J. Immunol Methods. 125-131.

57 Don H. Catlin,. *et al.*, "Comparison of the Isoelectric Focusing Patterns of Darbepoetin Alfa, Recombinant Human Erythropoietin, and Endogenous Erythropoietin from Human Urine" (2002) 48 Clin. Chem. 2057-2059.

58 CAS 2001/A/345 {"*Meier*"}.

59 The words of the Panel were: *This "direct method" combines an isoelectrical focussing with a double immunal blotting. The method is based on the finding that artificially produced rEPO behaves differently in an electrical field than human nEPO and can therefore be distinguished from one another. A second basic assumption of the test method is that, as is the case with many steroids, the production of natural hormones is reduced when an artificial hormone is introduced...*

60 CAS 2001/A/343 {"*Hamburger*"}.

61 The basic area percentage {"BAP"} method of interpreting the EPO test was described as follows in *IAAF v/ MAR and Boulami* CAS 2003/A/383: *[O]ne of the 100% r-EPO control samples is used to establish a horizontal dividing line ... drawn at the bottom of the most acidic rung of the 100% r-EPO sample. ... The EPO ladder of the athlete urine sample in question is then examined relative to the horizontal baseline. ... [A] machine then measures what percentage of the surface area of these rungs appears above the horizontal baseline in the basic area of the gel.* This percentage figure is the BAP. It is one of several methods of interpreting the electropherograms although in the early testing days it was the predominant method.

and its accompanying legal structure through the prohibited list of a particular sports federation. The lack of precision in the jurisprudence was not the result of legal or jurisprudential issues imposed by the CAS.

b) The Refinement of the BAP Test Interpretation Criteria

The next step in acceptance of the rEPO testing methodology came in the case of Moroccan steeplechaser Brahim Boulami[62] who disputed the validity of the test based on the BAP (80%) guideline that had been previously used to establish the presence of rEPO. He argued that the percentage of basic isoforms in endogenous EPO were higher than previously thought. Boulami also argued that the rEPO test had not been internationally accepted or validated by the scientific community, did not fulfil standard requirements, and that the laboratory was not properly accredited to perform the test.

In rejecting Boulami's arguments the CAS Panel found the test to be reliable and internationally accepted for the purpose it served. The percentage of basic isoforms in endogenous EPO was not higher than previously thought among the general population. As such, the respondent failed to cast doubt on the proposition that the 80% cutoff was reasonable and largely eliminated the risk of false positives in urinary rEPO tests.

Boulami's argument that the rEPO test had not been internationally accepted or validated by the scientific community was also rejected. The test was accepted by all previous CAS Panels. The Panel accepted the evidence that the risk of false positive at the 80% BAP cutoff was extremely low. Boulami's final argument based on the laboratory's lack of specific accreditation to conduct the rEPO test was not accepted by the CAS Panel. However, the Panel did find that the lack of accreditation for the specific test meant that the IAAF had the burden of proving that the test was conducted in accordance with the scientific community's practices and procedures and that the testing lab had satisfied itself of the validity of the test before using it. The Panel stated that this burden-shifting rule "provides the necessary balance between the needs of IOC laboratories to implement new, reliable testing methods as quickly as possible, on the one hand, and the interests of athletes and the sporting community in ensuring trustworthy test results, on the other."[63]

The *Boulami* case represented a new departure in the jurisprudence in that the purposive approach to interpretation of the rules and framework was articulated. It involved undertaking an analysis of the scientific literature presented in evidence and evaluated by the CAS Panel with a view to balancing the competing interests of the various constituent needs. This process reflects the time tested legal technique of weighing the evidence before the adjudicators and making a judgement. Once again the CAS proved to be quite able at dealing with such challenges.

Following the *Boulami* case, the next development in the acceptance of the EPO testing procedure came in *USADA* v. *Sbeih*.[64] Sbeih claimed that the 80% BAP threshold was not an appropriate criterion to determine a positive result for rEPO. The CAS Panel thoroughly rejected this argument, citing previous CAS cases where the 80% BAP threshold had been accepted. Also, another scientific study was available indicating that at 80% BAP, the risk of false positive is actually 1 in 500,000 as opposed to the 1 in 3,161 figure that had been stated in *Boulami*. Furthermore, evidence was presented that technology had advanced such that a threshold below 80% BAP might be used without risking the possibility of a false positive. Interestingly, other more recently developed criteria that could be used to determine the presence of rEPO instead of 80% BAP were described in the *Sbeih* case. Sbeih's EPO test was also positive for rEPO according to these other criteria.

The *Sbeih* case was a further illustration of the analysis of the scientific literature presented in evidence and evaluated by the CAS Panel. It also provided the foundation for the eventual elimination of the BAP as an interpretation criterion in EPO testing.

c) The Elimination of the BAP Criterion

The use of criteria other than 80% BAP to determine a positive result for rEPO first came about in early 2005 in *USADA v. Bergman*.[65] Bergman was an American cyclist who was found to have tested positive for rEPO. Despite the fact that both his "A" and "B" samples had BAP's just below 80%, USADA charged him with a doping offence, which Bergman appealed to CAS. Bergman argued that 80% BAP was a standard threshold and that BAP values below this level could not be proof of a doping offence. The CAS Panel held that the UCI anti-doping rules allowed USADA to prove the doping offence "by any means" and that the CAS had never ruled that the 80% BAP threshold was absolutely required in order to prove the presence of rEPO in a urine sample.

The Panel was comfortably satisfied that new scientific findings established that the presence of rEPO could be proven even with BAP values less than 80%. The Panel relied on recent research that demonstrated that the risk of false positives at 80% BAP had been much lower than was originally thought. Criteria other than the BAP could also be relied upon when the BAP is below 80%. Bergman's sample was positive according to these other criteria, including the new WADA criterion for EPO testing described in Technical Document TD2004EPO, entitled: *Harmonization of the Method for the Identification of Epoetin Alfa and Beta (EPO) and Darbepoietin Alfa (NESP) by IEF-Double Blotting and Chemiluminescent Detection.* The new WADA criterion was not yet in force at the time of Bergman's positive result, but was evidence that further supported the Panel's finding that a doping offence had been committed.

Dovetailing and building upon previous jurisprudence can be seen in the *Bergman* case, despite the lack of precedent in arbitration. The CAS Panel weighed and evaluated the case before it, but was mindful that some of the ground it was covering was not new. It determined that its role in the balancing of interests, spoken of in the *Boulami* case, required it to be satisfied that the risk of a false positive for an athlete was at an acceptably low level to establish the doping offence.

d) The Most Recent Version of the EPO Test Procedure

The demise of the BAP criteria arose at the outset of 2005. The new WADA criterion for determining the presence of rEPO described in the technical document TD2004EPO came into force as the relevant international standard for interpreting the electropherogram.[66] That document sets out three identification criteria for rEPO. It also states that: "*Further research and experience has indicated than the identification criteria below are more discriminating than the "80% basic bands" rule..."* and that the 80% BAP threshold should no longer be used.

The testing procedure for the detection of EPO has been under scrutiny in each phase of its refinement over the four years it has been the subject of review by CAS. The most recent phase, discussed above, will also likely gain acceptance by CAS as the *obiter dicta* in *Bergman* would suggest. However, we will have to await developments in this area to assess whether the CAS jurisprudence will be a barrier to the evolution of science and the refinement of the testing procedure for rEPO.

e) The Active and Effort Urine Refinement to the Test Procedure

To date, most of the CAS jurisprudence regarding EPO testing has focused on the interpretation of the electropherogram and the fact that endogenous EPO isoforms might overlap with rEPO isoforms. However, the most significant threat to the acceptance of the EPO testing procedures has arisen through the recognition of certain rare phenomena that can cause alterations to the profile of endogenous EPO isoforms.

The first such phenomenon to be recognized is known as "active urine". The "active urine" phenomenon does not normally occur during EPO testing. However, in rare circumstances it may occur in par-

62 *IAAF v/ Boulami* CAS 2003/A/452 {"*Boulami*"}.
63 *Ibid.* at para. 5.49.
64 *NACAS* AAA No. 30 190 001100 03 {"*Sbeih*"}.
65 CAS 2004/O/679 {"*Bergman*"}
66 See WADA Technical Document TD2004EPO, entitled: *Harmonization of the Method for the Identification of Epoetin Alfa and Beta (EPO) and Darbepoietin Alfa (NESP) by IEF-Double Blotting and Chemiluminescent Detection* {"WADA TD2004EPO"}.

ticular individual urine samples. The phenomenon may be the result of multiple factors such as storage at high temperature, enzymatic activity, or bacterial contamination.[67] These factors may act to degrade EPO molecules, causing isoforms to be eliminated or to move to locations on an electropherogram that are different from their normal location.

The "active urine" phenomenon was first recognized in the summer of 2003, and the first publicized example of the "active urine" phenomenon occurred in the case of Bernard Lagat,[68] a Kenyan middle distance runner. Lagat's "A" sample tested positive for EPO just prior to the 2003 World Championships in Paris, forcing him to withdraw from the competition. About a month later, testing of Lagat's "B" sample revealed that his urine sample exhibited the active urine phenomenon, leading to his exoneration. The newly introduced "activity test" that had been implemented by the laboratory indicated that urine "activity" was indeed taking place.[69]

There has been little discussion of the active urine phenomenon or the activity test in the CAS jurisprudence so far. The activity test was mentioned with only minor comment in the *Sbeih* case; however, the Panel recommended that information concerning the activity test be provided to the athlete as part of the laboratory packet. Currently, the details of the activity test are spelled out in WADA Technical Document TD2004EPO.[70] The stability test that is performed to test for the "active urine" phenomenon is in many ways analogous to some of the new testing procedures that have been implemented to deal with the "active urine" phenomenon that has been observed in nandrolone testing.

It is likely that the stability test and its effectiveness in dealing with the "active urine" phenomenon will be subject to more intensive scrutiny in future CAS jurisprudence. If this aspect of the EPO testing procedure is challenged in the future, it may be necessary for anti-doping laboratories to provide evidence to CAS showing that the stability test is effective in preventing the "active urine" phenomenon from interfering with the results of EPO testing procedures.

The second rare phenomenon that has been recognized as altering endogenous EPO profiles is described as "effort urine". "Effort urine" has only been recognized recently, and the phenomenon is not fully understood; however, it does seem to arise on certain rare occasions, when athletes provide urine samples after particularly intensive exercise.[71] While the scientific basis of the "effort urine" phenomenon is still being examined, the phenomenon is recognized by anti-doping laboratories and can be distinguished from positive and negative test results for artificial EPO. Several WADA accredited laboratories are participating in research designed to further understand what causes the "effort urine" phenomenon.

New interpretation criteria for the EPO testing procedure have been issued to accredited laboratories in response to the "effort urine" phenomenon.[72] The new criteria have not yet been formalized into a technical document, since further research is required before the phenomenon is fully understood.

The "active urine" and "effort urine" phenomena have brought the EPO test under attack from athletes who have tested positive and claimed that these or similar phenomena have caused a false positive result in their case. These athletes are claiming that the current EPO testing procedure is unreliable and that positive results should not be declared until a new test for EPO is developed.

The most publicized EPO case has been that of Belgian triathlete Rutger Beke,[73] who has created considerable controversy in the media with respect to EPO testing.[74] Rutger Beke initially tested positive for EPO in September 2004. In March 2005, the Flemish Doping Commission suspended Beke for 18 months. However, Beke appealed the decision, and in August 2005 the Flemish Disciplinary Commission exonerated him of the doping offence. According to press reports,[75] Beke worked with scientists who showed that Beke could test positive for rEPO after intense exercise, without having taken rEPO. Since Beke's alleged false positive results occurred after intense exercise, it appears that Beke's case could have been an example of the "effort urine" phenomenon. However, the explanation of Beke's testing results provided by the scientists who worked with him appears quite complex.

The work conducted by Belgian scientists used to exonerate Rutger Beke was pre-published online in Blood Journal on February 21, 2006.[76] The article claims that after intense exercise, urine samples taken from Beke can produce a false positive caused by a substance that is not EPO. The experiments described in the article appear to demonstrate that the antibody used to identify and visualize the various isoforms of EPO also binds to other substances. The potential cross-reactivity of the EPO antibody has also been mentioned in another recent scientific article written by Khan *et al.*[77] This might cause these other substances to appear on an electropherogram and potentially be mistaken for rEPO isoforms. The Beke article further notes that the athlete suffers from proteinuria, a condition where abnormally large amounts of protein are excreted in the urine during intense exercise. The presence of extra protein in urine would make it more likely that the EPO antibody would bind to a protein unrelated to EPO. Interestingly, the association of proteinuria with intense exercise suggests a possible connection with the "effort urine" phenomenon that has been recognized by WADA.[78] However, the authors of the article also make it clear that their results do not invalidate the test for rEPO as a whole, since the possibility of any false positive risk is likely restricted to only a very few athletes who have a medical condition similar to the one exhibited by Beke. They also note that the risk of any false positive could be prevented by taking very simple steps.

The scientific evolution in knowledge and interpretation of the test procedure reveals a similar course of learning to that involving nandrolone. The CAS jurisprudence had to date been supportive in recognizing these evolutionary changes in the EPO testing procedure. It appears that CAS has not created barriers to the evolution of the science, based on the decision in *IAAF v/ Eddy Hellebuyck*.[79] The case arose out of an appeal by the IAAF of the USADA and NACAS/AAA adjudication process in which the full sanction for ineligibility was not applied. The athlete on this appeal took up the opportunity to have his case heard *de novo* as permitted under the Code of Sports Related Arbitration. All of the matters previously challenged in other cases were raised and confirmed as already decided in *Hellebuyck*. The case then went one step further and dismissed new arguments based on the one scientific article[80] used to cast doubt on the reliability of

67 See Report of Dr. Hans Heid (8 October 2003) entitled "Report of B-sample testing in the laboratory of Prof. W. Schänzer, Institute of Biochemistry, Germany, Sport University, Cologne", online: http://www.letsrun.com/2003/lagatfull.doc {"Heid Report"}.

68 "Lagat fails drugs test" *BBC Sport* (3 September 2003), online: BBC Sport http://news.bbc.co.uk/sport1/hi/athletics/3078642.stm.

69 Heid Report, *supra* note 68.

70 WADA TD2004EPO, *supra* note 67.

71 See WADA document "Clarification About the EPO Detection Method" (29 September 2005), online: http://www.wada-ama.org/rtecontent/document/EPO_QA.pdf {"WADA Clarification"}.

72 WADA Clarification, *supra* note 72.

73 Duncan Mackay "EPO test flaws may be failing athletes" *The Guardian* (20 September 2005), online: Guardian Unlimited Sport http://sport.guardian.co.uk/athletics/story/0,10082,1573843,00.html.

74 There has been another controversy in the press involving the German sprint cyclist Hondo who held a Swiss racing license and was cycling for a Swiss team. He used a provision of Swiss law applicable only to litigation where everyone involved is of Swiss nationality or connection to have the cantonal court of Vaux (district of Lausanne, Switzerland) issue a stay suspending the first level finding of a doping infraction for the use of EPO until the appeals division of CAS has heard and determined the appeal. The circumstances were wrongly reported in some of the media as the CAS having reversed an EPO suspension. In fact it was the cantonal court provisionally suspending the application of the first instance arbitration decision to impose a two year period of ineligibility on Hondo. On 19 April 2006 Hondo finished second in the cycling season opener at the Tour of Lower Saxony in Germany.

75 *Supra*, note 74.

76 Monique Beullens *et al.*, "False Positive Detection of Recombinant Human Erythropoietin in Urine Following Strenous Exercise" (2006) Blood, pre-published online on 21 February 2006; DOI 10.1182/blood-2006-01-0028 {"Beke article"}.

77 Alamgir Khan, *et al.*, "New urinary EPO drug testing method using two-dimensional gel electrophoresis" (2005) 358 Clin Chim Acta 119-130 ["Kahn *et al.* article"].

78 *Supra*, note 72.

79 CAS 2005/A/831 {"*Hellebuyck*"}.

80 Beke article, *supra* note 77.

the testing result. At the hearing, Hellebuyck relied on one major point of criticism: the possible cross-reactivity of the EPO antibody. Hellebuyck introduced the scientific article written by Khan *et al.*[81] into evidence and argued that the potential cross-reactivity of the antibody introduced a serious risk of false positives. Hellebuyck also argued that the exoneration of Rutger Beke by the Flemish Disciplinary Commission demonstrated that the test for EPO was flawed. While the scientific article concerning Rutger Beke[82] was not available at the time of the hearing, the Panel decided to admit the article into evidence and to allow further submissions subsequent to the hearing.

In deciding this case, the Panel considered the testimony of expert witnesses for both parties to the dispute. The Panel did not only consider the new scientific evidence; it also weighed this evidence against previous scientific literature and jurisprudence concerning the validity and reliability of the test for rEPO. The Panel found that the claims concerning cross-reactivity of the EPO antibody were not sufficient to establish doubt about the reliability of the testing procedure. The Panel found that potential cross-reactivity of the antibody did not lead directly or indirectly to the conclusion that the testing procedure was unreliable. The Panel further stated that the case of Rutger Beke was not suitable for calling the reliability of the testing procedure into question. The decision of the Flemish Disciplinary Commission was not available, nor were the laboratory results and documentation from Beke's original positive test. Finally, the Panel considered the scientific article published by the scientists who had worked with Rutger Beke. The Panel pointed out that the scientific study was conducted on only a single subject. Further, the Panel found that, even if the study were correct, the depiction of the alleged false positive electropherogram shown in the article was clearly different from the electropherogram produced during Hellebuyck's testing procedure. Thus, the article was not sufficient to cast doubt on the results of the testing procedure carried out in Hellebuyck's case.

The difficulty presented by these challenges to the testing procedure is the time and cost involved to determine if CAS will accept the test as being reliable. It is frequently, especially for any one athlete, prohibitively expensive to challenge the test procedure. Given the current approach of CAS every individual case must challenge the procedure and be able to support that challenge with scientific expert testimony and reference to the scientific literature. This is not an efficient way to establish the legal reliability of a particular test. An alternative dispute resolution {ADR} mechanism needs to be developed to handle such legal objections to the testing procedure.

f) The Test for Darbepotien (Aranesp)

Both the *Meier* and *Hamburger* cases were released just prior to the Salt Lake City Winter Olympic Games in February of 2002. The famous trilogy of cross-country skiing cases arose dramatically on the last day of the Salt Lake City Games dealing with the artificial substance darbepoietin (or Aranesp), a wholly synthetic version of rEPO.[83] That synthetic version of rEPO was developed by the manufacturer to show up in the acidic band of the electropherogram. The result is very readily observed and creates no issues of interpretation similar to those of other rEPO forms. The result is a very clear and distinctive visual test that requires nothing more to declare the adverse analytical result.[84]

This refinement of the test was actually developed while the Salt Lake Games were ongoing. The CAS, in the cross-country skiing trilogy of cases, had little difficulty in describing why the test could be accepted. During those Winter Games, three cross-country skiers had the first positive tests for darbepoietin. Previously, EPO testing had been used to detect the presence of only rEPO. Darbepoietin (or Aranesp, the brand name) was slightly different from both endogenous EPO and typical recombinant EPO. Darbepoietin was a modification of the erythropoietin hormone that had been specially engineered to be more effective than rEPO in treating diseases such as anemia. One of the main benefits of using darbepoietin as opposed to rEPO is that darbepoietin has a much longer half-life in the body than rEPO. As a result, patients that required treatment for anemia required fewer doses in order to achieve similar results.

The first case involving darbepoietin involved two members of the Russian cross-country skiing team, Larissa Lazutina and Olga Danilova.[85] The IOC and FIS sanctioned both athletes, and both appealed those decisions to CAS, where their cases were heard together. Lazutina and Danilova claimed that the detection of darbepoietin was only experimental, and that it had not yet been legally or scientifically accepted. They further argued that it was not acceptable to use the test for detecting rEPO in order to detect a different substance, darbepoietin.

The CAS Panel deciding the merits of the case made a simple statement about what had to be shown in order for them to uphold Lazutina and Danilova's positive results and the scientific test that had led to those results. They stated that in addition to showing that the skiers' samples had been properly collected and the chain of custody was complete, the IOC had to prove that "the test used was a reliable test for the discovery of the presence of a prohibited substance."

The CAS Panel accepted the evidence of several witnesses who described the test used to detect both rEPO and darbepoietin and claimed that it was reliable, and preferred that evidence to the testimony of a witness who did not provide any direct evidence against the reliability of the test, but rather claimed that the test had not been sufficiently validated through publication and discussion in the medical community. Importantly, the Panel accepted testimony that there was no problem in detecting darbepoietin using the test that had been established for detecting rEPO, and that the test needed no modification. In conclusion, the Panel found that the methodology of testing for rEPO and darbepoietin was scientifically sound, and that the results produced by the tests were reliable.

There was also a positive test for darbepoietin at the Salt Lake City Olympics involving another cross-country skier, Johann Muehlegg[86] of Spain. Though Muehlegg's case was very similar to that of Lazutina and Danilova, Muehlegg's appeal to CAS was heard by a different Panel, who made findings about the EPO test procedure that supplemented those made by the Panel in the Lazutina and Danilova cases. The arguments that Muehlegg made in his defense were more extensive than those put forward in Lazutina and Danilova.

The Panel dismissed the first of Muehlegg's arguments regarding whether darbepoietin is a prohibited substance by finding that under the OMAC rules, "analogues and mimetics" of substances such as rEPO are also prohibited. The panel found that darbepoietin produces physiological effects that are similar to those produced by rEPO, and on an evaluation of all of the evidence found that darbepoietin was an analogue and mimetic of a Prohibited Substance.

The panel gave more consideration to Muehlegg's claim that the Salt Lake City lab that had performed the test had not been specifically accredited to perform that test at the time of the Games. The panel accepted Muehlegg's claims that the lack of accreditation to perform the specific EPO test in question did have the affect of rendering inoperative the presumption in favour of the laboratory. Importantly though, in Muehlegg's case, the Panel was quick to point out that the lack of accreditation was not fatal, and did not mean that the lab was not capable of conducting the EPO test. The Panel made clear what would be required in order to uphold the validity of the

81 Khan *et al.*, *supra* note 78.

82 Beke article, *supra* note 77.

83 *Lazutina* v/ *IOC*: CAS 2002/A/370 {"*Lazutina*"}; *Danilova* v/ *IOC*: CAS 2002/A/371; *Lazutina* v/ *FIS*: CAS 2002/A/397; and *Danilova* v/ *FIS*: CAS 2002/A/398; *Lazutina and Danilova v/ IOC*, 4P. 267/2002 (27 May 2003) (Swiss Federal Tribunal); *Muehlegg v/ IOC*: CAS 2002/A/374 {"*Muehlegg*"}.

84 The CAS Panel in *Muehlegg* made the following findings regarding the detection of Aranesp (or darbepoietin): *The Panel must conclude on all of the evidence before it that Aranesp has its own unique fingerprint which shows 4 bands clearly ... in the acidic range.* And in another section of the decision: *[T]he Panel concludes that the direct urine test employed to detect r-EPO can also be applied to detect Aranesp. The notable difference between the two applications is that Aranesp does not require a threshold safety margin to protect against false positives because of overlap, as does r-EPO.*

85 *Lazutina* v/ *IOC* CAS 2002/A/370; *Danilova* v/ *IOC* CAS 2002/A/371; *Lazutina* v/ *FIS* CAS 2002/A/397; and *Danilova* v/ *FIS* CAS 2002/A/398.

86 *Muehlegg*, *supra* note 84.

EPO test: "What must be established to the comfortable satisfaction of the Panel is that the testing procedure as carried out was in accordance with the prevailing standards and practices of the scientific community."[87]

After reviewing all of the evidence, the Panel did find that the testing carried out in Muehlegg's case was in accordance with the scientific community's practices and procedures. In support of its conclusion that the "direct urine test" used by the lab was a valid method to detect the presence of EPO, the Panel referred to numerous published scientific studies and several scientific meetings. Importantly, the Panel rejected Muehlegg's argument that the ongoing development of the direct urine test implied that the test was still in a trial stage and was therefore not valid. The Panel stated that "the fact that the laboratories wish to improve their testing methods, and further improve the rEPO test, does not result in the test being invalid."[88]

Muehlegg also criticized the lack of an objective threshold indicating the presence of darbepoietin. The Panel was nonetheless comfortably satisfied that there was unlikely to ever be any significant overlap between darbepoietin isoforms and endogenous EPO isoforms. The Panel found that darbepoietin had been engineered in such a way as to leave a distinctive fingerprint, which had been confirmed by scientific work. Therefore, the Panel found that EPO test that had been used to detect rEPO was also valid to detect the presence of darbepoietin, even without the use of objective thresholds, such as the 80% BAP threshold. The Panel found that the testing results established Muehlegg's use of darbepoietin without doubt.

The darbepoietin cases provide a discrete segment of EPO jurisprudence from other forms of rEPO. In accepting the test procedure the cases do not reflect any new developments in the CAS jurisprudence. However, they point up a deficiency in the overall system of hearing doping cases. Each case has to be heard individually and proven. The Salt Lake trilogy underscores in dramatic fashion the costs and time involved for the IOC who had to prosecute the cases. Each case required the scientific proof of the test in order for it to be acceptable and each athlete had to deploy their own experts to raise the challenges to the test. Once again the development of an ADR process for the acceptance of new scientific procedures or the evolutionary revision to prior procedures would cut costs and make the system more balanced and fair for all.

3. Blood Transfusion: A New Test Procedure

The emergence of the new test for darbepoietin EPO at the Salt Lake Winter Olympics and for blood doping by homologous blood transfusion at and subsequent to the Athens Summer Olympics have raised questions concerning the standard CAS will use to determine if an analytical testing procedure of the scientific community is acceptable to establish the presence of a prohibited substance. The pursuit of such cases is enormously expensive and very time consuming. They represent a different challenge to CAS but more particularly to the overall system of doping control and the determination of a doping offence.

The introduction of a new test for the detection of blood transfusions was the subject of a CAS appeal in the case of Tyler Hamilton.[89] As with the EPO and nandrolone cases the scientific analytical methodology leading to the conclusion of a doping infraction was challenged. Similarly, although the basic scientific methodology was a well-known and widely used analytical technique, known as flow cytometry, it had never been used before to sanction an athlete for the presence of transfused blood.

The flow cytometry technique is used to detect the presence of mixed populations of red blood cells. In almost all cases, a person's red blood cell population should be uniform as the characteristics of the cells are determined by genetics. Therefore, the presence of a mixed population of red blood cells should suffice as proof that there has been a transfusion of another person's blood. Flow cytometry distinguishes between different red blood cell populations based on differences in the presence of cell surface markers, similar to the major markers that determine blood types (eg. A, B, AB, or O). When conducting a transfusion, it is not necessary to match other minor cell markers, however. The testing procedure to detect transfusion exploits the differences in the presence of minor cell markers that would be expected if a transfusion had taken place.

Hamilton's challenge to the testing procedure used to detect homologous blood transfusions was based on two grounds. First, he argued that that testing procedure had not been sufficiently validated and that there had been a lack of proper control studies and examination of false positives. Second, he argued that even if his sample did prove the existence of a mixed red blood cell population, the mixed red blood cell population was not due to transfusion but rather due to chimerism, an extremely rare phenomenon where an individual's genotype can differ amongst different cells.

The Panel first addressed the issue of chimerism. Hamilton had taken a DNA test during the course of the hearing, the results of which indicated that he was not a chimera. This result was accepted as fact by the Panel despite the contrary opinion of one of Hamilton's expert witnesses.

Then, the Panel assessed the scientific merits of both the process of the flow cytometer test and the interpretation of the testing results. In this respect the challenge for CAS was no different than that it faced in *Bergman* in EPO testing or the various challenges in nandrolone testing. The Panel considered that the use of flow cytometry had an established history in the medical field, in contrast to the testing procedure used to detect EPO. The blood transfusion testing procedure was a test of identification, not measurement, and thus did not require a measurement of uncertainty or a percentage threshold. The blood transfusion testing procedure had been published in peer reviewed journals, and the experts of both parties agreed that the proof of principle of the test had been established.

The Lausanne laboratory that had performed the testing procedure on Hamilton's sample was not specifically accredited to perform the blood transfusion testing procedure. As noted in the cases of *Boulami* and *Muehlegg*, this lack of accreditation was not fatal, but simply placed the burden of proving that the test procedure was in accordance with the practices and procedures of the scientific community upon USADA and the UCI. The Panel discussed the development of the use of flow cytometry in sport, and came to the conclusion that at the time of Tyler Hamilton's positive test, the test as conducted by the Lausanne laboratory was valid and reliable. The Panel stated that the validity of the test had been accepted by the broader scientific community. Further, shortly after the time of Hamilton's positive test, the Lausanne lab received ISO accreditation to perform the blood transfusion testing procedure using a protocol that had only changed minimally and immaterially from the protocol used at the time of the Hamilton test.

The Panel also addressed the arguments raised by Hamilton suggesting that the test was unreliable. Notably, Hamilton relied on inconsistent statements made by some witnesses to impeach their credibility. However, the Panel found that the prior inconsistent statements were generally attributable to the exchange of contrary views during the development of the test, a time when it would be natural for those developing the test to look critically at how it was being implemented. As the tests were validated and accepted, these contrary views were reconciled. The Panel also addressed the many incidents of false positive results supposedly generated by the testing procedure that were alleged by Hamilton. The Panel examined each individual allegation, and determined that none of them were sufficient to suggest that the testing procedure as conducted on Hamilton's sample was likely to produce false positive results. Among the various reasons for the alleged false positives was that they were produced intentionally as an example, they were produced during a system malfunction which was noted in the result produced, or they were produced because of problems that had been fixed well before Hamilton's positive test.

In the end the CAS Panel was comfortably satisfied that the testing procedure as applied to Hamilton's sample was reliable. The test con-

87 *Ibid.* at para. 7.1.7.
88 *Ibid.* at para. 7.3.2.3.
89 *Hamilton*, supra note 6.

firmed the presence of a mixed red blood cell population which arose due to transfusion of another person's blood. Accordingly, it was held that Hamilton had committed the doping violation of homologous blood transfusion.

The *Hamilton* case decided by CAS was an appeal from a decision at the USADA level.[90] The validity and reliability of the test procedure was also challenged at that level, where the NACAS/AAA Panel dealt with the scientific evidence in the same way and came to a similar conclusion. The CAS appeal of that decision raises the same issue of the costs of scientific proof that arose in the darbepoietin cases after Salt Lake because the appeal is *de novo*. The sanction imposed upon the athlete at first instance was already into the second year by the time the result of the appeal was pronounced on 10 February 2006. The time and cost of this challenge was enormous. Once again, an ADR process to permit a single challenge on the testing procedure would be more efficient and effective for everyone and would remove the burden of these challenges on a particular athlete, international federation or national anti-doping organization.

4. Conclusion

The CAS has accommodated well to the changes in test procedures involving nandrolone and EPO substances. A review of the history of those substances in the CAS jurisprudence reveals how dependent athletes' cases are on the state of scientific knowledge at the time of the hearing. As science evolves, so to does the testing procedure. However, along with these evolutions comes the possibility that prior cases may well turn out to have been false positives, as will cases now being caught with the new test procedure.

The introduction of new test procedures as was done in part for Aranesp, and entirely for blood transfusions, suggests that while CAS can adapt and accommodate the challenges to the procedure and make reasoned conclusions, the costs of the challenges in the initial cases is enormous for both athlete and international federation. A better system of developing acceptance for new test procedures must be found. I would suggest that an alternative dispute resolution process would be a less costly and more effective system for resolving testing procedure issues than the one off challenges now undertaken in these matters.

90 *USADA v/ Hamilton*, AAA No. 30 190 00130 05 (2004).

The CAS Ad Hoc Division at the XX Olympic Winter Games in Turin

by **Andreas K. Zagklis***

Introduction

Almost ten years after the first Ad hoc division (AHD) of the Court of Arbitration for Sport (CAS) was set up for the Games of the XXVI Olympiad in Atlanta (1996), the CAS organised another AHD for the XX Olympic Winter Games in Turin (2006)[1]. The mission of this sixth edition of the "Olympic"[2] AHD was to resolve all legal disputes arising "on the occasion of or in connection with the Olympic Games"[3], for a period of ten days preceding the Opening Ceremony (31 January 2006) and until the closing of the Games (26 February 2006)[4].

During the said period the AHD received 10 applications that could be entertained, which led to seven final awards[5] and - for the first time - a consent award[6]. Also, a case was closed before the CAS President or a Panel decided on an application for interim measures[7]. The number of cases and awards should not be compared with previous AHD for Winter Olympic Games[8] without keeping in mind the fact that the CAS and CAS AHD's consistent jurisprudence on legal issues that gave rise to numerous cases in the past (e.g. judicial control of field of play rules) now practically impedes the filing of applications concerning such disputes.

The purpose of this article is a) to present briefly the cases' factual background and b) to approach a variety of procedural and substantial issues, with which the CAS AHD in Turin has enriched and evolved the jurisprudence delivered to it by previous CAS AHD editions.

1. Summary of cases

1.1 CAS OG 06/001 [WADA v/ USADA, USBSF & Lund]

The World Anti-doping Agency filed an application against the decision of the United States Anti-doping Agency to give a public warning to the US skeleton runner Zachary Lund and to disqualify him from the 2005 World Cup event in Calgary, Canada. The WADA requested a two-year suspension be imposed, starting from the CAS ruling, as a consequence of Mr Lund's testing positive to the substance *finasteride* (masking agent) on 10 November 2005. The CAS AHD Panel partially upheld the appeal and set aside the decision made by USADA. The Panel was satisfied that Mr Lund bore no *significant* fault or negligence regarding his - admitted - doping violation and therefore sanctioned him with a one-year period of ineligibility, starting on the date of the positive doping test. As a result, Mr Lund, was disallowed from participating in the Olympic Winter Games.

1.2 CAS OG 06/002 [Schuler v/ Swiss Olympic Association]9

The Swiss snowboarder Ms Andrea Schuler contested before the CAS AHD the decision made by the Swiss Olympic Association (NOC for Switzerland) not to select her for the Olympic Games (women's half pipe event). The athlete submitted that she had met the criteria set forth by both the Swiss Olympic and the Swiss ski federation; thus, her non-selection was arbitrary. The Panel dismissed Ms Schuler's application considering that the respondent exercised its discretion in a reasonable, fair and non-discriminatory manner and in accordance with the rules.

1.3 CAS JO 06/003 [Azzimani v/ Comité National Olympique Marocain]

The Sole Arbitrator appointed by the CAS AHD President to decide this case dismissed the application filed by the Moroccan ski athlete Mr Samir Azzimani against the decision of his NOC not to enter him in the XX Olympic Winter Games. Since Mr Azzimani and another Moroccan athlete faced health problems, the CNOM decided to withdraw from the Olympics. Mr Azzimani considered his non-selection a breach of the Olympic Charter; according to his submissions, the selection criteria, the principle of non-discrimination and his (human) right to practice sport were violated. The respondent submitted only a series of medical reports regarding the applicants' recent injury, on which the decision appealed from was based. The CAS AHD Sole Arbitrator decided not to hold a hearing and dismissed the application observing that CAS cannot deal with the question if an athlete can or not enforce his NOC to enter him/her in the Olympics[10]. The Panel also noted that there was no violation of the Olympic Charter and that the athlete was still in a recovery period after a shoulder dislocation.

1.4 CAS OG 06/004 [Deutscher Skiverband & Sachenbacher-Stehle v/ FIS]

The German Ski Federation and the German cross-country skier Ms Evi Sachenbacher-Stehle filed an application in order to cancel the "Notification of Start Prohibition" issued by the International Ski Federation (FIS). Following a blood screening/testing on 9 February 2006 that showed a level of *haemoglobin* above the maximum tolerated values, Ms Sachenbacher-Stehle was obliged by the FIS not to start any competitions for five consecutive days. As a result, the athlete would be forced to miss her first Olympic Games event on 12 February 2006. The athlete further asked the Panel to declare that the levels of haemoglobin were naturally elevated and had no connection with any haematological disease. The Panel refused to make a medical expert's judgment and dismissed the application; moreover, it was convinced that the athlete did not have a naturally high level of haemoglobin.

1.5 CAS OG 06/005 & 06/007 [Abernathy v/ FIL]

Ms Anne Abernathy, a 52 year old athlete also known as "Grandma Luge", was heading to a unique record of participating in the Winter Olympics for a sixth time. Ms Abernathy, the only athlete to represent the Virgin Islands in the Turin 2006 Winter Olympics, suffered

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1 The Tribunal was presided over by Judge R.S. Pathak (India) and Mr Robert Briner (Switzerland); it was composed of nine arbitrators selected by the ICAS from the CAS list of arbitrators: Mr Massimo Coccia (Italy), Mr Kaj Hobér (Sweden), Mr Malcolm Holmes (Australia), Prof. Akira Kotera (Japan), Mr Peter Leaver (United Kingdom), Mr Dirk-Reiner Martens (Germany), Prof. Richard McLaren (Canada), Mr Hans Nater (Switzerland), Mrs Maidie Oliveau (USA). The CAS Office was headed by its Secretary General, Mr Matthieu Reeb. For a detailed comment on the structure of the CAS AHD and especially on the "closed" list of arbitrators selected by the ICAS Board, see Rigozzi A., *L'arbitrage international en matière de sport*, Helbing & Lichtenhahn, Basle 2005, pp.301-308.

2 The ICAS has also created Ad hoc divisions that were either seated at the city of the sporting event (e.g. Commonwealth Games: Kuala Lumpur-1998, Manchester-2002, Melbourne-2006) or on-demand (European Football Championships-2000 & 2004, FIFA World Cup-2006, Paralympics -2000 & 2004).

3 Olympic Charter (ed. 2004), Rule 61.

4 CAS Arbitration Rules for the Olympic Games ("the Ad hoc Rules").

5 CAS OG 06/001, 06/002, 06/003, 06/004, 06/006, 06/008, 06/010.

6 Settling the dispute arising out of two applications: CAS OG 06/005 & 06/007.

7 The respondent (IOC) accepted the applicant's request for a stay of execution of its decision.

8 Nagano 1998: 6 awards; Salt Lake City 2002: 7 awards.

9 See also in: *CaS* 2/2006, p.215 et seq.

10 See also CAS OG 02/003 [Bassani-Antivari v/ IOC], *CAS Awards - Salt Lake City 2002 & Athens 2004,* p.29 et seq.

an injury (wrist fracture) during an official training on 12 February 2006 and was transferred to the hospital. Subsequently and after having missed the official weigh-in, the International Luge Federation (FIL) applied its rules and did not include her in the race list. "Grandma Luge" and Virgin Islands were thereby not to be considered as participants in the XX Olympic Winter Games. The athlete challenged this decision by filing two applications with the CAS, the second following unsuccessful deliberations with the FIL.

The CAS AHD Panel appointed to hear the case invited the parties during the hearing to reach an amicable solution. After a one-hour break, the terms of the final settlement were supported by the Panel and included in a consent award, by which the FIL was directed to write to the IOC in order to request that the name of Ms Abernathy be included in the *results* list of the women's luge event without a start number but with the notation DNS (did not start). The parties also agreed that the - challenged - decisions of the Race Director and the Jury during the Women's luge event were correct.

1.6 CAS OG 06/006 [Canadian Olympic Committee v/ ISU]
The Canadian Olympic Committee (COC) filed an application with the CAS AHD on 16 February 2006, the day after the A-Final of the ladies' short track speed skating. The COC requested the CAS to order the International Skating Union (ISU) to instruct its referee to review the race's videotape. The COC was seeking determination of whether a "kicking out" infraction was committed by the winner of the race, Ms Evgenia Radanova, a Bulgarian skater. Possible disqualification of Ms Radanova would result in Canadian athletes advancing to the second (Ms Anouk Leblanc-Noucher) and third (Ms Kalyna Roberge) place respectively. For this reason the COC accompanied its application with a request for extremely urgent preliminary relief, i.e. the postponement of the medal ceremony. In addition, the applicant requested a declaratory judgment on the issue of a suggested conflict between provisions contained in the ISU rules, while it submitted that the head referee (although he did not refuse to receive a protest) "discouraged" the Canadian team leader to file a protest against his own discretional decision not to view the instant digital replay. The President of the CAS AHD within a very short time-limit[11] and without hearing the respondent's views dismissed the application for preliminary relief, because the celebration of the medal ceremony would not irreparably harm[12] the Applicant's interests. The Panel denied the application since a) the applicants never filed a written protest according to the ISU rules or alleged the referee for exercising his discretion in bad faith, and b) there was no reviewable decision for the Panel to consider.

1.7 CAS OG 06/008 [Dal Balcon v/ CONI & Federazione Italiana Sport Invernali]
The Italian snowboarder Ms Isabella Dal Balcon challenged the decision made by the Italian Olympic Committee (Comitato Olimpico Nazionale Italiano - CONI), not to select her for the women's parallel giant slalom event of the Turin 2006 Winter Olympics. Ms Dal Balcon's submission was that she had met the criteria orally announced to her by the Italian team coach, that no written selection criteria were ever provided to her and that a late change in the criteria had led to her non-selection. She asked the Panel to set aside the decision and to include her in the Italian snowboard team to take part in the Winter Olympics' parallel giant slalom event. The respondents, CONI and the Italian Winter Sports Federation (Federazione Italiana Sport Invernali - FISI) put forward that FISI and CONI accepted *per se* the proposal by FISI's Technical Direction (DA Snowboard) and that the rules were amended two days before the end of the selection period in order to avoid unfair application of the original criteria due to - *inter alia* - athletes' injuries.

The CAS AHD Panel upheld the appeal considering the late amendment of the criteria to be arbitrary and annulled the challenged decision. Given the fact that the Panel was provided by the respondents with detailed scoreboards showing the selection standings after applying the original and the amended criteria respectively and, since the Olympic Games' tight schedule made a referral of the case to CONI and FISI practically impossible, the Panel ordered the respondents a) to place Ms Dal Balcon in the Olympic Team of Italy, b) to determine the other members of the female snowboard team.

1.8 CAS OG 06/009 [B. v/ IOC]
As explained above, the present case did not lead to a final award. In fact, the procedure before the CAS AHD was brought to an end at a very early stage, even before a CAS AHD Panel was constituted, since the main purpose of the application, i.e. the stay of execution of a disciplinary sanction, was voluntarily accepted by the IOC upon notification by the CAS. In view of the fact that an appeal based on the same factual background is pending today before the regular CAS procedure (Appeals Division), the writer would preferably not enter into details. From a scientific point of view also, the evaluation of this case should better await the outcome of the appeal.

1.9 CAS OG 06/010 [Australian Olympic Committee v/ FIBT]
The FIBT Rules provided the North American Challenge Cup (22 January 2006) to be a qualification criterion for the Olympic Winter Games: the first two teams would qualify for the Olympics. The Brazilian team ranked first whereas the Australian third. Almost two weeks after the race, on 14 February 2006, the Brazilian Olympic Committee announced that Mr Dos Santos, a member of its 4-man bobsleigh team, had tested positive in an out-of-competition control that took place on 9 January 2006. The athlete, although not provisionally suspended, was sent back to Brazil by his own NOC and was replaced. He also exercised his right to have the B sample opened and tested.

Following these incidents, the Australian Olympic Committee (AOC) filed an application to the CAS AHD asking for an order to declare the Brazilian 4-man team ineligible to compete in the Olympic Winter Games and to declare instead the Australian 4-man bobsleigh team eligible to compete in the same Games. The Panel held that the process following an adverse analytical finding had not been yet completed and therefore no anti-doping violation had been found at that time. Consequently, there was no need to address the issue of a suggested *lacuna* in the respondent's (International Bobsleigh and Skeleton Federation - FIBT) rules and the appeal was denied.

2. Analysis

2.1 Procedure
The procedures before the CAS AHD in Turin were not as common as one could have expected before the CAS Court Office opened its doors in late January. The sense that, as a result of previous CAS AHD awards, the Federations and the IOC had become more careful in drafting their rules, respecting the principle of due process and decision-making[13], together with the consistent CAS jurisprudence on results cases[14] did not seem to leave so much space for novelties.

Nonetheless, the CAS AHD division set up a number of records in the AHD's history, namely the first case to be decided by a Sole Arbitrator, the first case to be decided without holding a hearing, and the first appeal filed by WADA.

11 The application was filed at 2:26pm. In view of the medal ceremony scheduled to take place later that afternoon, it was not possible for the President of the CAS AHD to constitute a Panel immediately. Therefore, the President issued a Procedural Order on an application for extremely urgent preliminary relief at 5:30pm.

12 See article 14 para.2 of the Ad hoc Rules.

13 This may be considered the most valuable contribution of a Tribunal within the society (in this case: sporting event) in which it was created and operates. The same could be seen as a consequence of CAS's "corrective jurisprudence" (Nafziger J., 'Lex Sportiva", *ISLJ* 2004/1-2, p.4) over IF's decisions, or in other words be described as "la crainte du juge est le commencement de la sageusse" (see the relevant - anonymous - quote in Martens D.-R./Oschütz F., "Die Entscheidungen des TAS in Athen", *SpuRt* 2005/2, p.59).

14 See Beloff M., "The CAS Ad hoc division at the games of the XXVIII Olympiad in Athens", *ISLR* 2005, p.9. Also, Vieweg K., "Fairness and sports rules: a contribution to the problem of "field of play" rules", in: Panagiotopoulos D. (ed.), *Sports Law: Implementation and the Olympic Games* (10th IASL Congress - Athens 25-27.11.2004), p.208 et seq.

A look at the most interesting points of this CAS AHD's jurisprudence, following the steps of a - more or less - usual procedure before the CAS AHD:

a) *Application*: "The application shall include a copy of the decision being challenged, where applicable"[15]. The Panel in OG 06/010 having to deal with an appeal against the decision of FIBT *not* to act to disqualify the Brazilian Bobsleigh team held that *"4.1 [...] the application is admissible as the CAS Ad hoc Rules specify the decision is to be attached, if applicable, which was not the case here."*. Of course, this does not mean that a first instance decision is not at all necessary. The CAS AHD in fact exercises only one of the four functions[16] of the Court of Arbitration for Sport: the appeals arbitration procedure[17]. Therefore, the CAS AHD cannot operate in any other way but as a second-instance body, as the Panel implied in the case OG 06/006: *"43. [...] the Referee's decision was not protested in accordance with the [ISU] Regulations. It follows there is no reviewable decision for the Panel to consider."*

b) *Sole Arbitrator*: "In the event that it appears appropriate under the circumstances, the President of the ad hoc Division may, in his discretion, appoint a sole arbitrator"[18]. The President of the CAS AHD exercised such discretion upon constituting the Panel to hear the case OG 06/003. The Ad hoc Rules do not specify which "circumstances" are to be taken into consideration by the President when deciding to appoint one or three arbitrators. Article 50 para.1 of the Code of Sports-related Arbitration (CAS Code) indicates that a sole arbitrator is to be appointed when "the President of the [Appeals] Division considers that the matter is an emergency". Given that the case OG 06/003 was decided only few hours before the opening ceremony of the Winter Olympics and that the dispute was of a rather uncomplicated character, it is apparent that the CAS AHD President did not deviate from the criteria of the CAS Code.

c) *Hearing*: The award in the case OG 06/003 will be referred to in the future as the first not to follow a hearing. Applying a newly inserted amendment to the Ad hoc Rules ("If it considers to be sufficiently informed, the Panel may decide not to hold a hearing and to render an award immediately"[19]) the sole arbitrator issued his decision[20] without calling the parties to a hearing. The parties had produced all relevant documentation, while the sole arbitrator informed them of his decision to apply the said provision. The fact that applicant and respondent resided far from Turin (in France and Morocco, respectively) should also be taken into account.
Like in previous CAS AHDs the cases in Turin involved other persons than the applicant(s) and the respondent(s). The notions of "interested party" and "observer" where once more utilized, albeit always with the approval of the initial parties to the dispute. The "interested parties" are usually persons likely to be affected by the outcome of the proceedings e.g. in a selection case, the athletes already selected that may be removed from the Olympic team if the appeal is upheld. The participation or representation of these interested parties to the proceedings is invaluable for the purposes of the CAS AHD, since they have the chance to be heard and are subsequently bound by the award. In cases like the OG 06/008, decided only some hours before the official training sessions or the race itself would commence, no real supporter of either justice or sport (or both) would like to experience a new *Pérez*21 story, i.e. a sequence of arbitration proceedings on the basis of the same facts. Apart from the "interested parties"[22], the status of "observer" was awarded in several cases[23] of general interest to the IOC, i.e. the institution responsible for the organisation of the Olympics, and in one case to WADA[24] that was co-responsible for the limits of haemoglobin prescribed in FIS Rules. No applicant or respondent in any of the above cases did contest the presence and participation of interested parties and observers.

d) *Award*: The CAS AHD awards usually uphold, modify or set aside a decision rendered by an IF, an NOC, an OCOG or the IOC. In the case OG 06/005 & 06/007 the Panel took the initiative to invite the parties to reach an amicable settlement. The parties, that had already failed to reach an agreement before the CAS AHD hearing, this time determined the terms of their settlement in less than an hour. This precedent, apart from underlining the efficiency of the CAS AHD as a body that successfully applies alternative dispute resolution in sport, can prove to be more than useful in the future, when applied - like in Turin - adequately[25].

Since the procedure before the CAS AHD is free, the awards are rendered without costs[26]. Free access to the Court's jurisdiction was encouraged not only by supplying any interested individual through the website or the Court Office[27] with standard application forms, but also through organising a special list of *pro bono* lawyers, in cooperation with local bar associations. Like in Sydney, a number of local (Italian) attorneys were willing to offer their legal services - without receiving any remuneration - to parties involved in at least three arbitration proceedings before the CAS AHD.

Finally, CAS Panels in Turin made also extensive[28] use of the discretion provided to them by the Ad hoc Rules[29] to communicate the operative part of the award prior to the reasons. This alternative appeared to be the only choice in cases where the hearing ended after midnight and the circumstances obliged a decision by the morning after, like in case OG 06/002. There is no doubt that the said provision allows a Panel to render well reasoned and detailed decisions that have nothing to envy of regular CAS awards. Therefore, although the procedure before the CAS AHD remains fast and flexible, almost tailor-made, the quality of the awards delivered from highly experienced CAS arbitrators contributes not only to CAS AHD jurisprudence, but also to regular CAS jurisprudence, as will be shown below.

2.2 Legal Issues

2.2.1 Jurisdiction

A number of CAS AHD Panels had dealt with the issue of the jurisdiction of the CAS AHD before the beginning of the Turin 2006 Winter Olympics[30]. The jurisdiction of the CAS AHD over an NOC[31], an IF[32] or even an NF[33] is mainly based on their participation

15 Article 10 para.2 of the Ad hoc Rules.

16 See Reeb M., "The role and functions of the Court of Arbitration for Sport (CAS)", *ISLJ* 2002/2, p.24.

17 Limited as well by Rule 61 of the Olympic Charter (Olympic-related cases) and Article 1 of the Ad hoc Rules (timeframe).

18 Article 11 para.2 of the Ad hoc Rules.

19 Article 15 (c) para.3 of the Ad hoc Rules.

20 In French; only the third award in French out of a total number of 51 awards rendered by six editions of CAS AHD for the Olympic Games. See also CAS OG 96/006, Mendy v/ AIBA, *Digest of CAS Awards I,* p.409; CAS OG 2000/004, COC & Kibunde v/ AIBA, *Digest of CAS Awards II*, p.617 et seq. It should also be noted that both procedures that have - until now - involved a French federation [CAS OG 2000/014 (FFG v/ SOCOG)] and the French NOC [CAS OG 04/008 (CNOSF v/ ISF & IOC)] were conducted in English, language used to draft the respective awards as well.

21 The question whether Mr Angel Pérez, a former Cuban citizen, could participate for the United States in the kayak competition of the Sydney 2000 Olympic Games gave rise to three different arbitrations and respective awards delivered by the CAS AHD. See CAS OG 2000/001, 2000/005 and 2000/009 in: *Digest of CAS Awards II*, pp.595, 625 and 651.

22 Case (Interested Party): OG 06/001 (FIBT), OG 06/002 (Swiss-Ski), OG 06/006 (IOC, Bulgarian O.C.), OG 06/008 (Posch, Ranigler, Boccaccini, Trettel), OG 06/010 (Brazilian Bobsleigh Association, Brazilian O.C.)

23 Cases OG 06/004, OG 06/005 & 06/007, OG 06/010.

24 Independent Observer Program of WADA, in the case OG 06/004.

25 Although the CAS AHD resolves disputes through arbitration, where the parties are *in principio* the ones to determine the course of their case, two main arguments may be raised concerning settlements before the CAS AHD: a) the CAS code does not provide for conciliation in the appeals arbitration procedure, but only in the "Special provisions applicable to the ordinary arbitration procedure" (Art. R42); b) the disciplinary (particularly doping) cases are excluded from the cases that may be submitted to CAS mediation (Art. 1 of mediation rules). See Cane Ou., "The CAS Mediation Rules" in: Blackshaw I./Siekmann R./Soek J. (eds.), *The Court of Arbitration for Sport 1984 - 2004*, TMC Asser Press, The Hague 2006, p.195: *"[...] The CAS submits such disputes to the appeals arbitration procedure, given the need to have a position of principle rather than a negotiated solution for these issues"*.

26 Article 22 of the Ad hoc Rules.

27 See OG 06/009.

28 In cases OG 06/002, 06/004, 06/006, 06/008, 06/010. Reasons followed usually later the same day or the day after.

29 Article 19 para.2.

30 See McLaren R., "Introducing the Court of Arbitration for Sport: the Ad hoc division for the Olympic Games", *Marquette*

in the Olympic Games and their obligation to apply the Olympic Charter, as associations recognized by the IOC. Another necessary requirement for every last instance body, i.e. the exhaustion of internal legal remedies, had also been in the spotlight in a couple of cases[34]: the respondent has the right not to raise (or to raise it and subsequently to abandon[35]) such question, obviously in favour of a faster solution of the dispute which is already brought before the CAS AHD. Also, the question whether the earlier text of article 1 of the Ad hoc Rules[36] required in any case a *validly enclosed* entry form by the applicant, had been answered in the affirmative[37], restricting temporarily[38] the selection cases to reach the CAS AHD.

The CAS AHD in Turin very early faced a new challenge: to interpret the time-limit set in article 1 of the Ad hoc Rules: "[...] for the resolution by arbitration of any disputes [...] insofar as they arise during the Olympic Games *or during a period of ten days preceding the Opening Ceremony of the Olympic Games*"(emphasis added). The question was the following: In case a decision is issued *before* the CAS AHD jurisdiction starts but the appeal challenging such decision is filed (within the time limit of the appeal and) *after* the period of CAS AHD jurisdiction has started, does the CAS AHD have jurisdiction to hear the case? When exactly does a dispute arise?

In the case OG 06/001 the Panel said:

> *"[2.6] The Panel, therefore, has to decide whether the dispute arose within the period of 10 days preceding 10 February 2006*[39]*. WADA received the FIBT files sometime after 23 January 2006*[40]*. Then it considered the file, and having done so, made this appeal on 2 February 2006. The appeal was well within the period permitted for appeal by the USADA Protocol, and the 21 days permitted by Art. 13.5 of the FIBT Doping Control Regulations.*
> *[2.7] It was open to WADA to decide not to appeal, if it so wished. However, in the Panel's opinion, it would not be possible to say that, on the facts of the present case, a dispute had arisen until WADA had decided to appeal and notified its decision to do so. That notification was given within the 10 days preceding the Opening Ceremony".*

The same opinion was followed also by the Panel in the case OG 06/002: *"[3.13] It was open to Ms Schuler to accept the Swiss Olympic's determination or decide to appeal. Accordingly, in the Panel's opinion, it would not be possible to say that a dispute had arisen until Ms Schuler had decided to appeal and had filed notice of her appeal. That notice was given within the 10 days preceding the Opening Ceremony, and, also, well within the 21 days permitted for a regular appeal to the CAS Appeals Division."*

Obviously, a dispute arises when the party affected by a decision chooses to challenge it. And the Panels in both the above cases had no other indication of the applicant's choice to challenge the first instance decision than the application/appeal itself, filed well within the CAS AHD period of jurisdiction. From a clearly theoretical point of view, the CAS AHD jurisdiction could now be expanded to decisions[41] rendered 31 (or more)[42] days before the Opening Ceremony of the Olympic Games.

2.2.2 Doping

Like in the previous edition of CAS AHD in Athens, disputes following an adverse analytical finding were not the majority[43]. Despite that, each one of the three doping cases raised and interesting issue.

a) Rare as it may be after the introduction of the WADA Code in 2003[44], the Panel in case OG 06/001 considered that the athlete bears no significant fault or negligence and imposed a reduced (one-year) period of ineligibility. The Panel said: *"[4.11] The burden on the athlete to establish No Fault or Negligence is placed extremely high... [4.14] In these circumstances, the Panel concludes that Mr Lund, on his own admission which was contained on the Doping Control Form, committed an anti-doping violation and cannot escape a period of ineligibility. The Panel arrives at this decision with a heavy heart as it means that Mr Lund will miss the XX Olympic Winter Games. The Panel found Mr Lund to be an honest athlete, who was open and frank about his failures. WADA did not suggest otherwise. For a number of years he did what any responsible athlete should do and regularly checked the Prohibited List. But in 2005, he made a mistake and failed to do so. However, even then he continued to include on the Doping Control Form the information that he was taking medication which was known to the anti-doping organisations to contain a Prohibited Substance, and yet this was not picked up by any anti-doping organization until his positive test in late 2005.*

4.16 The Panel finds this failure both surprising and disturbing, and is left with the uneasy feeling that Mr Lund was badly served by the anti-doping organisations.

4.17 However, for the reasons already given, he cannot escape all liability. Art. 10.2 of the FIBT Doping Control Regulations and the WADA Code enable a Panel to take the "totality of the circumstances" into account in deciding whether there has been No Significant Fault or Negligence. The Panel finds that Mr Lund has satisfied it that in all of the circumstances he bears No Significant Fault or Negligence, and, therefore, reduces the period of ineligibility from two years to one year."

b) Furthermore, in two awards rendered by the CAS AHD in Turin the Court denied to enter into examining and deciding purely medical issues. In case OG 06/004 the Panel said: *"[4.11] The relief requested presupposes that we find the Athlete to have a high naturally elevated level of Hb. [...] Far be it for this Panel to substitute its views to those of the experts who have declined to grant the dispensation to this Athlete for a naturally high elevated level of Hb over the past 3 years. We are being asked to make a medical expert's judgement through the guise of canceling a Notification of Start Prohibition. It is not for this Panel to perform an evaluation similar to that contemplated by the FIS B.4.8, which would apply for the duration of the Olympic Games."*

Also, regarding the matter if a substance should be - or not - on the prohibited list, the Panel in the case OG 06/001 followed the (regular) CAS jurisprudence[45]: "*[4.7] It was submitted on behalf of Mr Lund that the Panel should decide whether Finasteride should have been on the Prohibited List at all. The Panel declined to enter into that debate. [4.8] If International Federations or antidoping organisations are unhappy with the contents of the Prohibited List, they must persuade WADA to*

S.L.R. 12/1 (Fall 2001), p.524 et seq. A landmark decision on this topic was issued by the New South Wales Court of Appeal on 1 September 2000 [Raguz v/ Sullivan & ORS]; see the judgement as well as the memorandum drafted by the President of the Ad hoc Division in Sydney in: Kaufmahn - Kohler G., *Arbitration at the Olympics*, Kluwer Law International, The Hague 2001, pp.41-78.

31 CAS OG 2000/002 [Samoa NOC v/ IWF], *Digest of CAS Awards II*, p.604.

32 CAS OG 2000/006 [Baumann v/ IOC, German O.C. & IAAF], *Digest of CAS Awards II*, p.637.

33 CAS OG 2000/014 [FFG v/ SOCOG], *Digest of CAS Awards II*, p.685. NFs accept CAS AHD jurisdiction through their membership to an IF which itself is subject to CAS AHD jurisdiction.

34 CAS OG 02/004 [Canadian O.A. v/ ISU], *CAS Awards - Salt Lake City 2002 & Athens 2004*, p.41.

35 CAS OG 2000/012 [Neykova v/ FISA & IOC], *Digest of CAS Awards II*, p.676.

36 "[...] for the resolution by arbitration of any disputes covered by Rule 74 of the Olympic Charter and by the arbitration clause inserted in the entry form for the Olympic Games, insofar as [...]" (emphasis added)

37 CAS OG 02/003 [Bassani-Antivari v/ IOC] and CAS OG 02/005 [Billington v/ ISU], *CAS Awards - Salt Lake City 2002 & Athens 2004*, pp.34-35 and pp.50-52 respectively. See Leaver P., "The CAS Ad hoc division at the Salt Lake City Winter Olympic Games 2002", *ISLR* 2002, pp.48-49.

38 Article 1 of the Ad hoc Rules, as adopted by the ICAS in New Delhi, on 14 October 2003, now reads: "[...] for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as [...]".

39 The date that the Opening Ceremony of the XX Olympic Winter Games in Turin took place.

40 The decision was made on 22 January 2006.

41 Especially concerning selection disputes.

42 10 days (article 1 of the Ad hoc Rules) plus the 21-days (or more, depending to each NOC's/IF's etc. rules) time limit for a regular appeal to the CAS appeals division.

43 See Di Pietro D., "The Ad hoc division of the Court of Arbitration for Sport at the Athens 2004 Olympic Games", *ISLJ* 2005/3-4, p.23.

44 See Niggli O./Sieveking J., "Éléments choisis de jurisprudence rendue en application du Code mondial antidopage", Jusletter 20. Februar 2006, http://www.weblaw.ch/jusletter/Artikel.asp?ArticleNr=4573&Language=1&Print=1>

45 CAS 2005/A/921 [FINA v/ Kreuzmann & German Swimming Federation].

change the list. It is not within the jurisdiction of this CAS Panel to make that decision."

c) Finally, the Panel in case OG 06/010 distinguished between an adverse analytical finding and a doping offence. Only the second could possibly give rise to a selection dispute, forcing the Panel to interpret the FIBT Rules and conclude on the consequences of a personal doping offence on the team's results. The Panel said: *"An adverse analytical finding is simply a report by the Anti-Doping laboratory that a sample is positive for a prohibited substance. Thereafter, the applicable Anti-Doping regulations (FIBT Regulations in this case) provide for an extensive process, including the athlete's rights: to ask for a B sample test, be present at the testing of the B sample, and to have a hearing to contest the adverse analytical finding. Only after that process has been completed and the adverse analytical finding is confirmed is an anti-doping rule violation found. [...] No decision that Dos Santos committed an antidoping rule violation has been rendered by any authority. The adverse analytical finding announced by the BOC in apparent disregard for Rule 14.14 of the FIBT Regulations that prohibit such public disclosure is not a decision pursuant to Article 13 of the FIBT Regulations which may be appealed to CAS. [...] The Application fails at the outset and therefore there is no need to interpret the meaning of Article 11 of the FIBT Regulations with respect to the effect that his doping infraction would have had on the "team" of which Dos Santos was a part at the Challenge Cup."*

2.2.3 Selection and Qualification

While the main sources of disputes for regular CAS are now doping and football, the CAS AHD usually deals with doping and selection cases. This second pillar of CAS AHD jurisprudence attracted most attention than any other during the Turin Winter Olympics. This is due to the simple fact that the CAS AHD - *inter alia* - entertained the (eventually successful) appeal of Ms Isabella Dal Balcon, an Italian snowboarder who contested her non selection to the Italian Olympic team (case OG 06/008). The legal impact of the award in the said case may not prove to be equivalent to its social impact[46], caused by the fact that the Italian snowboard team had to be reconstituted one day before the official training sessions would start. But again, this is a question that cannot be safely answered before the next edition of CAS AHD in Beijing.

Although two *prima facie* similar selection cases (OG 06/002 and OG 06/008) did not have the same result (Ms Schuler failed in her appeal while Ms Dal Balcon succeeded) the CAS AHD in Turin maintained a consistent approach to this type of disputes. Firstly, both Panels recognized their authority to control the application of purely objective selection criteria. Secondly, given the fact that the selection process may in some cases involve subjective criteria as well, like the trend of performance[47], the Panel in the Schuler case declined to control such subjective evaluation, unless it was made in bad faith or in a discriminatory manner: *"As said, given that Ms Schuler had to be compared with some male snowboarders, internal trials would have been of no avail. [...] The Panel is of the opinion that the language of the Snowboard Selection Guidelines [...] requires the assessment of the World Cup results not simply as objective criteria but assessed in relation to the performance trend towards the end of the selection period. This indicates a clear subjective evaluation. [...] In the Panel's view, unless selection rules set forth completely objective criteria (e.g., ranking or points in a given competition), a selection process must always rely in some fashion or other on the subjective judgment of the persons who select the athletes. [...] The Applicant does not claim that the Respondent acted in bad faith or in a discriminatory manner, so any arbitrariness is excluded."*

Adopting the same point of view, the Panel in the case OG 06/003 dismissed the appeal of the Moroccan athlete Mr Samir Assimani against the decision of his NF and NOC not to inscribe him (or any other athlete) to the Olympic Games. The Panel said: *"[14.] Selon la jurisprudence constante de la Chambre ad hoc du Tribunal Arbitral du Sport (TAS), il n'appartient pas au TAS de trancher la question de savoir si un/une athlète a le droit de forcer son CNO à l'inscrire aux Jeux Olympiques (voir CAS OG 02/003 Bassani-Antivari v/IOC). [15.] Sans entrer dans les détails, le Panel constate que le Demandeur n'a pas soumis des faits ni des indices démontrant que le Comité National Olympique Marocain avait violé la Charte Olympique. Tout au contraire, le Défendeur a expliqué de façon convaincante qu'il y avait des raisons de santé valables pour fonder sa décision de refus d'inscrire le Demandeur pour les XXèmes Jeux Olympiques d'Hiver de Turín 2006 [...] 16. Ainsi, il apparaît que la décision du Comité National Olympique Marocain du 6 février 2006 n'est point frappée d'arbitraire".*

On the other hand, arbitrariness was not excluded in the Dal Balcon case, where the (initial) criteria set forth by the competent federation and national Olympic committee were completely objective: results obtained as from 14 October 2005 in World Cup competitions, an escalating coefficient to be applied to the three races prior to the Games and also any podium result obtained to be taken into account (the October 2005 criteria). Since there were no podium results for any athlete, the results in all five World Cup competitions would be of crucial importance for the athletes. Albeit that, a new criterion created by CONI and FISI was communicated orally to the team members the day prior to the final competition: the *two best results* obtained by each athlete in the Parallel Giant Slalom races in the World Cup would be used for the final classification and the selection of the Olympic team (the 2-best rule). The Panel said: *"The October 2005 criteria clearly state that the selection criteria should be as objective as possible. A statement of principle this Panel agrees with as did the Panel in the Schuler v/Swiss Olympic Association CAS OG 06/002 [...] The October 2005 criteria have no provisions regarding how to use the selection criteria when an athlete is injured or does not race because the coach substitutes another athlete. To resolve this dilemma the 2-best rule was announced the day prior to the final race to all present at the meeting of athletes. That rule was not communicated to the Applicant who was not present at the meeting. It was, of course, unknown to all the athletes until it was formulated two days before the competition and announced to all present the day prior to the final competition."*

And the Panel concluded: *"The 2-best rule is a radical alteration to the original criteria. It came too late in the selection process to be fair particularly as it was not announced in a complete fashion and communicated to the Applicant. Therefore, the Panel finds the 2-best rule to be arbitrary and it would be unfair and unreasonable in all the circumstances to apply it."*

As already mentioned, the Panel stressed that, contrary to the Schuler case, the competent Italian NF (FISI) used no discretion in the final selection: *"FISI accepted the direction of DA Snowboard albeit on the changed criteria that this Panel has found to be arbitrary and unfair and therefore to be disregarded [...] The Panel in Schuler declined to intervene in the legitimate exercise of discretion by the national federation. There was no discretion used in this case."*

Conclusion

The experience of three Summer Olympics and another three Winter Olympics of the CAS AHD has rewarded the Court with priceless know-how. In addition, the average of almost nine cases per Olympiad shows that the CAS AHD is now a *conditio sine qua non* for the successful organisation of the major sporting event in the world. Every two years the CAS attempts to succeed in its own "triathlon" (fair - fast - free), which, above all, requires a unique balance between the speed of the procedures (24h) and the quality of the justice served (fairness in sport). The CAS AHD in Turin was another example of flexible procedures, always at the disposal of the Olympic Movement, and consistent jurisprudence. The road to Beijing is now open for legal debates[48] on how the role of the CAS AHD can evolve in its second decade of life. In the author's opinion, given the high stakes that the participation in the Olympics entails, the selection / qualification disputes will be the nucleus of the CAS AHD jurisprudence in the near future.

46 If the participation to the Olympics is every athlete's dream, then the participation to the Olympics that take place in the athlete's own country is an once-in-a-lifetime experience.

47 In German: "Formkurve", see OG 06/002, p.8 [5.9].

48 See Tucker G./Rigozzi A./Wenying W./Morgan R., "Sports Arbitration for the 2008 Beijing Olympic Games", in: Blackshaw I./Siekmann R./Soek J. (eds.), *The Court of Arbitration for Sport 1984 - 2004*, *op.cit*, pp.160-179.

Legal Aspects of the Representation of Football Players in Brazil

by **Luiz Roberto Martins Castro***

Introduction

Firstly, before going into the sporting question and, more specifically, the regulations governing football players' agents in more detail, it is important to bring to the attention of the reader who is unfamiliar with the Brazilian political regime that Brazil is a federal democratic state under rule of law.

According to the terms of its Federal Constitution, promulgated in 1988, Brazil is formed by an indissoluble union of autonomous political collectivities. The form of government adopted by the Brazilian state is the federal system, with the federation consisting of a union of autonomous regional collectivities that the doctrine calls federated States (the name adopted in our Federal Constitution), Member-States or, simply, States, the most frequently-used term.[1] Currently, Brazil comprises 27 (twenty seven) States and 1 (one) Federal District (our Federal capital, Brasilia).

As a result of the federative regime adopted by our Constitution, each State possesses legislative powers for a number of specific matters. In addition to the States, as is the case in other countries, the municipalities also possess legislative powers; however, and here Brazil differs from the vast majority of other countries in the world, the municipalities have their own legislative council that is autonomous and independent from the mayor. Therefore, whether at national, state or municipal level, the legislative power is autonomous and independent from the government.

Under the terms of Article 24, subsection IX of the Constitution, the right to legislate on sport is concurrent between the Federation and the States, with the municipalities having no legislative powers on sporting matters and only having the right to supplement federal or state legislation where applicable.

When there is concurrent legislative matter between the Federation and the States, the powers of the former are limited to establishing general rules, in other words it is the Federation's responsibility to set out the basic legislation and the States' responsibility to supplement it.

In Brazil, therefore, the Federation is responsible for the legislative regulations governing the activity of footballers' agents, while each State may legislate on the matter in a supplementary fashion. Currently, at least up to the date of writing of this work[2], we have only federal norms governing the matter.

Brazilian Sporting Structure

As a result of the political division described above, the Brazilian sporting structure differs somewhat from other sporting structures throughout the world, and mainly from those of European countries. Whereas in Europe, sporting clubs and societies join together in national federations[3] which, in turn, join International Federations, in Brazil, due to its being a federative state, clubs[4] group themselves together in regional federations[5], (restricted to the geographical boundaries of each State and Federal District), which in turn combine to form National Confederations[6]. This is why Brazilian national sporting bodies joining International Sports Federations are known as Confederations and not Federations as is the case elsewhere in the world[7].

Thanks to this association, international sporting rules that are to be applied in Brazil are sent to the Confederations, who also have the responsibility for enforcing them.

The legal basis for the assimilation and immediate receptivity of international sporting norms is article 1, paragraph 1 of the Pelé Law[8], which determines that: "Formal sporting activity is regulated by national and international norms and by each sport's rules of play, accepted by the respective national sports governing bodies."

The Brazilian body affiliated to FIFA is the Brazilian Football Confederation (Confederação Brasileira de Futebol - CBF), to whom norms issued by FIFA are sent and with whom the responsibility lies for representing FIFA throughout Brazil with regard to any international football-related regulations.

The CBF receives FIFA's orders, obligatorily passing them on to the State Federations which, in turn, pass them on to their affiliated clubs. Thus, FIFA's international laws regulating the activities of footballers' agents are received in Brazil by the CBF, which then passes them on to the other bodies that it governs without any option for queries.

It is also worthy of note that, taking into account the existence of the State Federations, and since they are responsible for forming the National Confederations, the right of vote in elections for national sporting directors belongs to the regional federations and not to the clubs disputing the national championships, which in many instances results in serious conflicts in sports politics.[9]

Representation of Footballers - the Brazilian Reality

It is well known that Brazil is one of the world's greatest producers of quality footballers, which is why a huge number of Brazilian players are transferred every year to overseas teams.[10]

As a result of these transfers, the business of representing footballers

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1 Silva, José Afonso da *in* Curso de Direito Constitucional Positivo, Editora RT, São Paulo, 6th Edition, São Paulo, 1990, pages 88,89.

2 July 2006

3 Examples: Deutscher Fussball-Bund, Koninkijke Nederlandse Voetbal Bond, Federação Portuguesa de Futebol, Federazione Italiana Giuoco Calcio, Fédération Française de Football, Real Federación Española de Fútbol.

4 Legally named "Entidades de Prática Desportiva". [Sports clubs]

5 Legally named "Entidades Regionais de Administração do Desporto". [Regional Sports Governing Bodies]

6 Legally named "Entidades Nacionais de Administração do Desporto". [National Sports Governing Bodies]

7 Examples: Confederação Brasileira de Futebol, Confederação Brasileira de Vôlei, Confederação Brasileira de Basquete.

8 The Brazilian federal law regulating the general norms governing sport, promulgated on the 24th of March 1998, when Mr Edson Arantes do Nascimento (known universally as Pelé) was Minister for Sport, and for which reason the law bears his name.

9 To learn more about the structure of sport in Brazil, see Álvaro Melo Filho - "*O Novo Estatuto da CBF no contexto Jus-Desportivo*" *in Revista Brasileira de Direito Desportivo, vol 07-* jan/jun 2005, Editora IBDD/IOB, São Paulo, pp 9 - 30.

has become extremely lucrative and attractive in Brazil, to such an extent, indeed, that even without any intake of new agents by the CBF in 2005 and 2006, Brazil has 121 (one hundred and twenty one) agents mentioned on the FIFA website. Brazil is the fourth country in the world with the largest number of agents; only Italy, England and Germany have more.

These agents are identical all over the world, regardless of their nationality, and must obligatorily adhere to FIFA's rules of conduct and income limits. They are subject to any penalties imposed either by FIFA or by the National Federation that issued their licence and may also, in the event of a dispute with other agents or clubs, seek intervention by FIFA, the National Federation or CAS/TAS. In other words, they belong to the "International Football System".

Since Brazil is a country of continental dimensions[11] and since football is played in practically all of its 5,560 municipalities[12], the 121 agents licensed to practice there are insufficient in number to meet the demand and volume of work generated by the country's professional and amateur players.

This is why we have an anomalous juridical figure in Brazil, a different kind of agent known as the "Footballer's Manager".

The Footballer's Manager is usually someone with fewer qualifications, or an ex-player, who doesn't normally meet the financial and technical criteria necessary to become a CBF agent[13].

However, as a result of his contacts with players and coaches, the manager often approaches young players who, for any number of reasons (social, educational, financial or cultural) end up being attracted by the promise of a placement or transfer to a club.

At this point it should be noted that two distinct situations may arise; firstly, that the manager is honest and, secondly, that he is not.[14]

Assuming that the manager is honest, he will ask the player for a document authorising him to act on his behalf. With this document in his possession, the manager will then set about finding a club in which to "place" the player he is representing. If he really does have good contacts, then he may well find a club for the young player, negotiating a salary for him that will vary in accordance with his footballing skills.

If the player is really good, the manager may be able to negotiate a good salary for him with the club, or even a share for the player in future negotiations for another club.

In these cases, the manager usually receives 10% (ten percent) of the player's salary and a percentage of any future transfer fees which the player may receive. The amount that the manager may receive from a future sale will depend very much upon the deal negotiated between manager, club and player but usually, allowing that the manager is honest, the sale will be negotiated in the first instance with the player and the manager's commission will generally be paid by the club rather than by the player.

In many cases, until such time as the manager finds a club for the young player, he will pay somewhere to provide board and lodging for him. The managers call this "investment". Such acts help to further increase trust and enhance the personal relationship between player and manager.

It is extremely commonplace for there to be partnership agreements between managers and CBF agents. Frequently, when a manager "discovers" a more talented player, or if one of "his" players is becoming highly successful, they tend to seek out CBF agents to offer a partnership deal.

Under this partnership, it is the agent's responsibility to try to arrange for the player to play in an overseas or top Brazilian team and in these instances the manager and agent usually sign a contract setting out the specific manner in which the income resulting from a future transfer deal will be split.

We will now analyse the situation in which the manager is dishonest or is not acting in the player's best interests.

In these cases, the manager also asks for a document to be drawn up giving him authority to act on the player's behalf but he usually does so without defining any time limit, or specifies an extremely lengthy period of time or, worse, stipulates that 50% (fifty percent) or more of the player's income is to revert to the manager.

As if this were not enough, whilst negotiating the player's deal with the team, he frequently omits to advise the player of important matters such as his participation in a future transfer, the amount of taxation that will be levied on his salary and, in many cases, the existence of a partnership with the club in the percentage of income received in the event of a transfer overseas or to a top Brazilian team. In such cases, when the player is transferred he doesn't even receive a fee for the transfer or, if he does, it will be much less than the manager is receiving or was specified in the contract.

At this point, we would highlight some real-life cases of managers not acting in the best interests of the players:

1. A deal was made for a Brazilian player to play in a Japanese team. When the player arrived at his new club he was asked if he had received the transfer fee of 1,000,000 (one million) US dollars. He informed the club that he hadn't, that his manager had given him only 500,000 (five hundred thousand) US dollars. The representatives of the Japanese team then showed him the receipt for the original amount, which his manager had signed. When questioned, the manager said that the Japanese were lying and that he didn't know what he was signing. Under the contract between manager and player, the former was entitled to 10% (ten percent) of the player's total income. Shortly afterwards, the manager bought a new house.
2. A footballer playing in Italy asked his manager to invest part of his savings in property on the Brazilian coast and to this effect he granted the manager power of attorney so that he could acquire the property on the player's behalf. At the same time, he gave the manager his bank details and PIN number. A year later, on his return to Brazil, he tried to contact his manager with a view to visiting the properties, but was unable to find him. Several days later he discovered that the manager had bought six properties over the last year, but all in his own name rather than the player's.
3. An internationally renowned Brazilian footballer currently playing in Spain had a contract with his manager whereby 70% (seventy percent) of the player's income reverted to the manager. Luckily, the player managed to legally rescind the contract and signed with a CBF agent instead.
4. As a final example we would mention a problem which frequently arises in the relationship between ingenuous players and unscrupulous managers. It is commonplace for a manager to succeed in arranging a trial for a player in a Middle-Eastern or Eastern-European country, subsequently abandoning him there with no money and no return flight ticket to Brazil, in the event that the trial is unsuccessful.

In addition to these examples, it is extremely common for managers to sign representation contracts with their players for lengthy periods, such as 4 or 5 years.

10

Year	Number of footballers transferred overseas
2006	400
2005	804
2004	857
2003	858
2002	665
Total	3.584

Source www.cbfnews.com.br - updated to 06/07/2006

11 Brazil covers a total area of 8,514,215 m2

12 Source http://www.ibge.gov.br/brasil_em_sintese/default.htm

13 Whereas a CBF Agent has been licensed by the CBF and FIFA, having passed the exam, paid for his agent's licence and taken out professional insurance, the Manager is not licensed, either because he failed the exam or because he did not have sufficient financial resources to pay the exam enrolment fee (approximately 450 US dollars), issue of the licence (approximately 2,300 US dollars) and insurance.

14 There are no exact numbers or statistics as to how many footballer's managers exist in Brazil, not to mention a list as to how many are honest or dishonest, but there is a tendency to believe that over 70% act unethically, benefiting greatly from the ingenuity and/or ignorance of players and their parents in the case of minors (under-18s).

Brazilian Legislation applicable to Footballers' Agents/Managers

In Brazil, with the exception of a single paragraph in the "Pelé Law", there is no specific legislation governing the activity of Agents or Managers. This lack of specific legislation means that under law the applicable legislation governing the relationship between player and manager/agent is the normal legislation, which in this case are the terms set out in the Civil Code ("Código Civil") and the Consumer Defence Code ("Código de Defesa do Consumidor").

A) The Pelé Law

Incredible as it may seem, this one specific law is contrary to the terms of FIFA's statutes for footballers' agents.

Article 28, paragraph seven of the Pelé Law stipulates that the maximum duration for public or private sports representation agreements and the use of professional athletes' images is one year, whereas the FIFA regulations say two years.[15]

Therefore, whenever we are approached by Agents on this matter, we suggest that they sign contracts with the players they represent for periods of one year for domestic transfers and for two years for international transfers, thereby avoiding any possible queries as to the validity of the duration of the representation period.

B) The Civil Code

The Civil Code is applicable in the present matter, since it is unquestionable that the agent/manager is representing the player by proxy.[16] The main points relating to proxies in the Civil Code are: (a) the performing of acts or the administration of interests on behalf of another; (b) the service may be free or remunerated; (c) it may be general or specific; and (d) the proxy is responsible for the acts he performs.

Briefly, according to the Civil Code, the proxy's (agent's/manager's) obligations are: (a) to be diligent in the performance of the acts entrusted to him; (b) compensate for any damage that he may cause; and (c) be accountable to the grantor.

In turn, and, again, briefly, the grantor's (player's) obligations are: (a) to comply with the obligations contracted by the proxy, as long as they lie within the limits of the terms of the power of attorney; and (b) pay the appropriate remuneration.

As may be verified, most of the real-life situations mentioned above could be resolved under civil law. However, two problems arise here, one legal, which is proving the irregularity of the acts performed and two, the players' ingenuity.

In the vast majority of cases the players either have no knowledge of their rights (only rarely does a player consult with a lawyer) or they prefer to believe in the word of their representative - "after all, he was the one who helped out right from the very start of their footballing career".

When we analyse the terms and obligations resulting from the granting of power of attorney we can clearly see why FIFA places lawyers and agents on the same footing, since the representation of his client's interests by means of power of attorney is inherent to a lawyer's professional activity.

C) The Consumer Defence Code

The applicability of the Consumer Defence Code arises from the fact that in carrying out their professional activity, the agent/manager is providing a service and therefore, under the terms of article 2[17] of the aforementioned legal diploma such a relationship must be considered as being a consumer relationship.

When the Consumer Defence Code is applied to relationships between players and managers/agents, much of the harm caused to players by unscrupulous agents/managers can be remedied, since this law protects the consumer from abusive practices by suppliers.

The main rights safeguarded by the Code are: (a) the right to be fully informed about the product or service provided; (b) the modification of contractual clauses which establish disproportionate payments or their review where subsequent facts result in their becoming an excessive burden; (c) payment of patrimonial and non-patrimonial damages; (d) protection against practices and clauses that are abusive or are imposed along with the supply of products or services; and (e) reverse onus of proof.

As may be seen, the Consumer Defence Code is a vital instrument in the player-manager/agent relationship, as it practically remedies the lack of civil legislation by placing the burden of proof back on the agent/manager and goes even further by annulling any imposed or abusive clauses in the contract signed by the player and his agent/manager.

D) Conclusion

As may be seen, the Brazilian legislation is well set out and covers all the problems that may arise from the legal relationship between the player and his agent/manager. However, very few disputes are taken before the Brazilian courts, whether as a result of ignorance on the part of the players or because of the false-friendship existing between the two.

Arbitration Chamber for the Resolution of CBF Agents' Disputes

With a view to: (a) avoiding the involvement of the Judiciary in matters relating to its members and subordinates; (b) taking into account the large number of agents; and (c) in order to avoid having to resort routinely to FIFA, the CBF, with FIFA's authorisation, instituted an Arbitration Chamber to resolve disputes involving CBF agents and which covers disagreements in situations of agents versus agents, agents versus clubs and agents versus players.

Only licensed CBF agents may take their disputes before the Arbitration Chamber. Therefore, managers, players' relatives and lawyers, even when the latter two have equivalent agent status as per article 1 of FIFA's Statutes for Players' Agents, may not seek the assistance of this tribunal in the resolution of their problems and must, instead, resolve their disputes through the normal legal system.

All cases taken before the Arbitration Chamber are dealt with impartially or in accordance with FIFA's established norms. The arbitration procedure is governed by confidentiality unless both parties agree differently.

It is not known exactly how many cases have already been settled by the Chamber, but it is certainly not less than 20 in its four years of existence.

Statement

At this point in time, and with a view to corroborating all that has been said above, we are including in the present study a statement drawn up by the author for a CBF agent who was in dispute with another CBF agent regarding the validity/legality of a player's contract.

The dispute in question was taken before the CBF's Arbitration Chamber, which found in favour of the CBF agent who requested this statement and there is no doubt that the Chamber's findings were based largely on the said statement, a copy of which follows.

For reasons of confidentiality, the names of the parties and the player involved in the dispute have been omitted.

"Dear Sir,

1. As discussed at the last meeting, we have analysed the contract in question and considered how it could be legally rescinded without the player being required to pay any compensation to his ex-agent, as well as safeguarding the interests of the former in the present case.
2. The delay in submitting the present statement was due to the time taken by FIFA to reply to a number of questions. Their informal reply was only received today.

Contractual Situation

3. In the first instance, we must point out that, legally, the contract is

15 This paragraph was not included in the original text of the law; it was added by Law 10.672 of the 15th of May 2003, which became known as the "Football Moralisation Law".

16 Articles 653 to 691 of the Brazilian Civil Code

17 "A consumer is any natural person or legal entity that acquires or uses a product or service in the capacity of end-user"

still in force and the player is still obliged to give his ex-agent a sum equivalent to 10% (ten percent) of the amount he receives in accordance with his contract of employment.

4 This means that the first step should be to notify the ex-agent (either through the notary's office or judicially) that the player does not intend to continue being represented by him, thereby putting a stop to the need to make the said payments.

5. According to the information you provided, the player has not so far undertaken any such formal act. Nevertheless, before adopting such an attitude, we must carefully consider the risks which may arise from so doing.

Rescission of Contract

6. Under Brazilian law, any contract may be terminated at any time if both parties are in mutual agreement, or rescinded by means of a compensatory payment to the injured party.
7. In both instances a document proving the termination of the contract is required; a rescission document in the case of an amicable termination or a court order in the event that the matter was settled in a court of law.
8. As we have reason to believe that the ex-agent does not intend to settle the dispute extra-judicially, we will deal directly with the legal questions.
9. In this specific case, the only risk facing the player is a compensatory payment to his ex-agent. The problem lies in determining the amount of this payment, since the contract does not expressly mention the amount, only that:

   "On pain of the payment including not only the amounts due but also all expenses, costs etc. that XXXXXX may have incurred whilst negotiating matters in the player's interest, in addition to compensation for loss and damages."

10. In the event of legal proceedings, the amount to be paid for loss and damages will be decided by the judge and in our experience it is not possible at this time to foresee what that amount might be. We would take the opportunity to point out that in view of the huge number of cases currently ongoing in the courts, these proceedings would take around five to seven years, if an agreement cannot be reached.
11. We would point out that this matter should only be taken to court if the ex-agent so wishes. We would not recommend that you propose such action as it is not in your interests bearing in mind that it is the player who is seeking to rescind the contract.

Legal Aspects which may uphold the rescission of contract without implying payment of compensation

12. Under our law, the only options for rescinding a contract without compensatory payment are:
    a) Irregularity in the contract;
    b) Culpability of the ex-agent

Irregularity in the Contract

15. As explained briefly on the phone, the contract itself contains a number of small irregularities which may be addressed under law and it is precisely on this point that we are undertaking a more detailed study.
16. Basically, there are two points which we may address; firstly, the legality of the automatic renewal of the contract and, secondly, the fact that the contract was signed by a legal entity.

a) Automatic Renewal

17. Bearing in mind that the representation contract is a contract for the provision of services, it must comply with the terms of the Consumer Defence Code, which includes a number of regulations prohibiting the inclusion of abusive clauses.
18. Having analysed the contract, we can legally uphold that this automatic renewal clause is abusive, therefore it is not valid and the contract is automatically rescinded as we are now within the renewed period. The contract, therefore, is no longer valid.
19. Such an understanding arises from the fact that there are a number of legal precedents annulling automatic renewal clauses when the express agreement of one of the parties has been omitted, as is the case in this instance.
20. We have also taken into account the fact that when the contract was signed the player was a minor (age 17) and was, therefore, represented by his parents. On the contrary, when the contract was due for renewal, he had reached majority and should, therefore, have signed the new contract himself. The old contract could not simply be extended because at the time of renewal the signees no longer had authority to act in this capacity.
21. Another important factor is that a law was published on the 15th of May 2003 determining that:

    "Public or private powers of attorney related to sports representations and the use of professional athletes' images may not be granted for periods of more than one year."

22. Thus, even taking into account the fact that the contract was signed prior to the publication of the law, we could argue that the validity of the renewal is limited to a duration of one year, in which case the contract would end on the 27th of January 2004.
23. In addition to these legal points, we would also highlight the fact that under article 12, paragraph 2 of FIFA's Agents' Regulations,

    "the contract will be limited to a two-year duration but may be renewed *if expressly requested in writing by the parties. It may not be tacitly extended.*" (our underlining)

24. Therefore, *according to FIFA regulations, the automatic renewal clause in the contract is invalid. The renewal must be expressed by signing a new contract in these terms.*

b) Contract signed by a legal entity

25. According to the terms of the FIFA regulations governing the activity of footballers' agents, *all contracts must be signed by natural persons,* although the sums to be paid as a result of such a contract may be received by legal entities, but we reiterate, the contract must obligatorily have two natural persons as parties, the agent and the player, and not the firm of one of the parties, as is the case in this instance.

Competent Jurisdiction to Settle the Dispute

27. We would point out that for the contract to be declared null and void a court of law must make such a decision. Our understanding that the contract is null and void is insufficient without a court ruling to this effect.
28. In the event that legal proceedings are required, the plaintiff should be the player and the lawsuit should be filed in his city of residence as required by the terms of the Consumer Defence Code.
29. If legal proceedings to annul the contract are not considered necessary then the correct procedure for settling the question is to go through the CBF's Arbitration Chamber.
30. We would make it clear that having queried the matter with FIFA the present dispute should be dealt with by the CBF, since there are no longer FIFA agents, only agents from the National Federations. FIFA would only become involved if the agents involved in the dispute were from different countries.
31. In addition to the facts already mentioned, it may be possible to bring to the CBF's attention the fact that the player's ex-agent is to receive a direct payment in the case of future transfer fees, which directly contravenes FIFA's regulations governing Footballers' Agents.
32. There would be no problem if the agreement had been signed by the player, but since the contract is with the club, the ex-agent is clearly in a situation where there is a conflict of interest. This is disallowed and subject to punishment by FIFA and/or the CBF, possibly even resulting in the *ex-agent's licence being revoked.*
33. With nothing further to add for the time being, we are at your disposal to provide any further clarification that may be required."

The 'Independent European Sport Review': A Critical Overview

by **Samuli Miettinen***

In 2005 the UK Presidency of the European Union initiated a review of European football with a mandate 'to produce a report, independent of the Football Authorities, but commissioned by UEFA, on how the European football authorities, EU institutions and member states can best implement the Nice declaration on European and national level[s].'[1] This illustrates two prominent features of the Review: its strong emphasis on the interests of UEFA as the collective interests of stakeholders and the focus of the report on football, rather than sport in general. The 'Terms of Reference have been drafted in consultation with UEFA and... led by UEFA....' It might seem unfair to generalise the Review as commissioned by UEFA, written by UEFA about UEFA since the sports ministers of some of the EU Member States were 'part of the governance of the report'[2] and a public consultation process was undertaken prior to publication. However, in particular consumers and the greater public whose interests the EC Treaty principles seek to safeguard did not feature prominently within the reasoning of the final document despite having been invited to take part in the consultation process. It should be recalled that although some representatives of the Commission are thanked for their interest in the Review,[3] its terms of reference were set by the institutionally distinct Presidency of the European Union rather than the Commission as the guardian of the Treaties.

Sport and Economic Activity

The UEFA-commissioned Review is founded in part on an exploration of the 'specificity of sport' thesis, according to which that sports governing body embodies features that render its otherwise controversial internal market behaviour justifiable. It will be recalled that there is a developed legal distinction between sport as economic activity and that which is not economic. Where no appreciable economic impact occurs, actions do not fall foul of internal market fundamental freedoms. Provisions that restrict trade must be proportional, that is, limited to measures that are necessary to achieve recognized non-market objectives. Competition law employs similar thresholds of economic relevance. Thus, where there is no appreciable economic impact, the specificity of sport not only makes policy sense but is already a legal reality. Rules that are not directly linked to explicit economic objectives in so far as they do not entail a direct transfer of financial benefit may nevertheless serve implicit economic purposes. Anti-doping rules are permissible not because as a feature of sport they enjoy general exemption, but because the internal market rules prohibit economic considerations within which the doping rules as 'purely sporting interest[s]' are not considered to fall.[4] The Helsinki Report recognised that on the whole, fundamental freedoms do not conflict with regulatory measures of sports associations because the sports associations' measures are objectively justifiable, non-discriminatory, necessary and proportional as required for other fundamentally non-economically driven objectives under the market freedoms.[5]

The 2000 Nice Declaration on sport, a non-legally binding Presidency Conclusion, sought to remedy the lack of a general European competence to regulate sport. Whilst necessarily recognising the primacy of Community legislation, it noted the sporting organisations' autonomy to '...organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams....'[6] The Declaration stated '...that sports federations have a central role in ensuring the essential solidarity between the various levels of sporting practice, from recreational to top-level sport...'[7] and that the social functions of sport somehow '...provide the basis for the recognition of their [exclusive] competence in organizing competitions'.[8] The declaration also implored sports governing bodies to '...continue to be the key feature of a form of organisation providing a guarantee of sporting cohesion and participatory democracy.'[9] It will be recalled that the Declaration was unable to alter the Treaty rules which before and after the declaration treated economic activity associated with sport just as any other economic activity and sports bodies as analogous to public authorities bound by the Treaty. In this respect, although demonstrating some political will[10] to recognise specific aspects of sport, it was unable to clarify, validate or deny the legal status of those sporting practices whose compatibility with the Treaty is not beyond dispute.

Unhappy with the current state of the legal regimes applicable to European football, the UK Presidency established in 2005 an initiative to review the rules applicable to European football, and in particular its governing bodies. The Terms of Reference of the then 'Independent European *Football Report*'[11] set for consideration seven broad bases for some of the current legal concerns related to sport:

1. In the context of the European model of sport, '[t]o make recommendations for how the EU institutions, member states and football authorities can improve and support the central role of the football authorities *independently to govern all aspects of the sport*...'[12]
2. 'For the football authorities to have effective arrangements to oversee the identity and integrity of the person... owning/controlling/managing clubs' in order to ensure fair competition and ostensibly to 'develop effective arrangements to prevent money laundering... and to prevent unsuitable owners... being involved in the game'[13]
3. To facilitate collusion between sports organisations in setting salary caps for players' wages,[14] fixing market shares,[15] and building links between amateur and professional sports.[16]
4. To scrutinise the role of agents and establish greater club control over players.[17]
5. To acknowledge '...the validity of European football's efforts to increase revenues...' by price-fixing through central marketing and its justification on the basis of the redistributive effects between otherwise unequal clubs[18]
6. To require the EU and Member States in addition to the football

* Edge Hill University, United Kingdom.

1 'UK Presidency Initiative on European Football - Context and Terms of Reference' p.3.
2 *Ibid.*
3 Independent European Sport Review at p. 4.
4 See for example Case C-519/04 P, *Meca-Medina* judgment of 18 July 2006, not yet reported, paragraphs 25-27 and 32.
5 Communication from the Commission on the Report from the European Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework, 10. December 1999 COM (1999) 644 and /2.
6 Nice Declaration on the specific characteristics of sport and its social functions in Europe, 2000 paragraph 7.
7 Nice Declaration paragraph 8.
8 Nice Declaration paragraph 9.
9 Nice Declaration paragraph 10.
10 Insufficient, it will be recalled, for its formal adoption into the Treaty itself.
11 Terms of Reference, p. 3. Emphasis added. Original title of the Review in the Terms of Reference at p. 3.
12 Terms of Reference, p. 3. Emphasis added.
13 Terms of Reference, p. 4.
14 'To re-examine the feasibility of salary caps' in the context of 'ways to enhance... prudential operation within budgets...'. Terms of Reference p. 4 section 3.
15 '...to help achieve an appropriate level of competitive balance'. *Ibid.*
16 'To examine way to support and encourage the education and training of young players at clubs within the local community'. *Ibid.*
17 '... effective and transparent arrangements to oversee the activities of agents in respect of their dealings with clubs and players'; 'To develop... a... system of player registration and movement at European and national levels, *recognising... stability of and respect for contracts.* Emphasis added. Terms of Reference p. 5, section 4.
18 *Ibid.*

authorities to market football by 'funding to generate opportunities for all people to participate in football...'[19]

7. Encourage EU institutions and Member States to subsidise '...*professional* football matches [by ensuring] stadia that are of sufficient quality.' And adopting 'a strong... legal framework to deal with [negative externalities associated with sport such as] hooliganism and... ticket touting.'[20]

The Review's findings: 3 categories of rules

The final report did not seriously question the assumptions underlying these terms of reference, either within the context of their proportionality to the aims they seek to achieve, the economic effects of proposed best practices, or their legality under the current Treaty system.[21] Its focus could be characterised as a list of proposed clarifications and additions to the regime that does not always engage in robust legal analysis, instead broadly justifying its propositions on the assumption that sports governing bodies' wide margins of discretion are inherently beneficial to sporting activity. In terms of substantive rules, the Review, nominally re-branded to apply to 'sport' rather than 'football', identified for closer inspection three types of common sports rules whose compatibility with Community law is not beyond dispute: rules designed to

1. Maintain the regularity and proper functioning of competitions
2. Maintain the integrity of sport and
3. Maintain the competitive balance between participants.

Regularity and Proper Functioning of Competitions

In general terms, the administration of competitions was seen to be within the discretion of sports governing bodies rather than national or supranational regulators. Field of play rules, structuring championships and calendars were all seen as 'within the sole discretion of the governing body'.[22] Despite recognising national teams' activities as economic in nature, Rules concerning the composition of national teams were declared in conformity with community law on the basis that they are 'motivated by purely sporting considerations'.[23] The home and away rule, related to the national organisation of sport in Europe, was likewise '...a pure sporting measure escaping the application of EC competition law'.[24] The very restrictive rules concerning the organisation of sporting competitions within the European sports pyramid structure, thereby precluding breakaway leagues and other innovations, were 'rules related to the participation in sporting competitions... not conflicting with Community law'.[25] The Review proposed recognising the rules on transfer deadlines as justified by reference to the competitive balance they seek to achieve during the playing season,[26] whilst other transfer restrictions as merely "...clearly in line with European legislation'.[27] Rules to encourage the attendance of spectators were declared "a good example of how to reconcile competition rules and the special characteristics of sport"[28]. Rules permitting the nationalisation of players' contracts to facilitate international sporting competitions based on nationality did not conflict with '...any provision of Community law'.[29] Rules concerning doping were, unsurprisingly, '...considered as pure sports rules and not subject to the prohibitions of Community law.'[30]

Integrity of Sport

The governance of economic units engaging in sporting-related businesses was thought to be within the proper autonomy of private, rather than public governing authorities. Rules related to the good governance of clubs and club licensing '...fall within the legitimate autonomy of the football authorities.'[31] Rules related to the ownership, control and influence of clubs were likewise matters '...falling within [the football authorities'] natural sphere of influence'.[32] Rules impacting the commercial freedom of players' agents were declared 'inherent to the proper regulation of football and therefore compatible with Community law'.[33]

Competitive Balance

One facet of the 'specificity of sport' thesis is that the value of a sporting competition is directly proportional to the level of equality between contenders. Therefore the Review advocates wholesale recognition of rules seeking to equalise the competitive inequalities between clubs as compatible with Community law. Rules requiring a proportion of home grown players and thereby reducing the influence of stakeholder investment in sporting organisations were '...seen as compatible with Community law.'[34] The rules that seek to force clubs to market their rights collectively and thereby create a monopoly in broadcasting rights vested in the sports governing authority was, perhaps rather circuitously, '...necessary for the football authorities to require clubs to commit to a central marketing model as a condition of their participation in a sporting competition'. Salary caps, a form of collusion between clubs to drive down the prices of their human resources, is with little legal analysis declared to be 'a subject that should fall within the regulatory purview of sports governing bodies'.[35] The lack of explicit legal and economic analysis does not necessarily invalidate the conclusions of the Review. This lacuna does, however, render opaque the reasoning that results in those conclusions, thus leaving the conclusions dependent on the authority other than the detail and accuracy of the analysis. A more explicit and detailed legal analysis could assist in establishing legal, rather than political justifications for the proposed 'clarifications'. In some areas further discussed below, one is left with doubts as to whether all of the relevant facets of legal tests have been addressed in coming to the conclusion of excluding sports governing bodies from the reach of otherwise applicable Community law.

Procedural Issues

The Review recognises that not all of its findings of compatibility are without controversy. In particular, UEFA's rule on home grown players and the matter of player release clauses are justified with reference to the sports governing bodies' 'sufficiently representative and democratic [nature] and [their] respect [for] appropriate governance standards' rather than its objectively measured merits.[36] The regulatory monopoly which results from the European model of sport is justified by reference to a separation of powers within UEFA[37] and the democratic representation of stakeholders within UEFA.[38] The Review does recognise that the failure of UEFA to include representation of supporters as 'key stakeholder[s] in football' should be redressed, including some form of financial redistribution in favour of supporters.[39] Whilst it advocates leaving to the discretion of the financially interested parties whether, and how to redistribute their income towards supporters, the Review does not propose specific measures or recognise that the discretion of sports governing bodies should be less than absolute.

The Review's Specific Recommendations:

The Review warns against 'a blind and insensitive application of EU law to sport,' instead reissuing the Helsinki Report's meek and legal-

19 *Ibid,* p. 5, section 6.
20 *Ibid,* p. 7, section 7.
21 Some examples are discussed below in the context of prudential supervision, salary caps, self-regulation and the sports-specific directive proposals.
22 IESRev, p. 27.
23 *Ibid* p. 28.
24 *Ibid*, p. 28 relying on the Commission decision of 3. December 1997 in *Mouscron*, paragraph 20.
25 *Ibid,* p. 30 citing *Lehtonen*, Case C-176/96.
26 *Ibid*, p. 31.
27 *Ibid,* p. 32.
28 *Ibid*, p. 33 citing Commission Press Release of 20 April 2001 Regarding Commission Decision of 19 April 2001 (Case 37,576) IP/01/583.
29 IESRev, p. 33.
30 *Ibid*, p. 37.
31 *Ibid,* p. 38.
32 *Ibid,* p. 39.
33 *Ibid,* p. 40.
34 IESRev, p. 42.
35 *Ibid*, p. 45.
36 *Ibid,* p. 48.
37 *Ibid,* p. 50 noting the analogy between the UEFA Congress as the legislative, the Executive Committee, Chief Executive and President as the executive, and the disciplinary bodies as the judicial branch of a democratic sports governance system.
38 The Professional Football Committee representing national professional leagues; The European Club Forum representing clubs but not the specific interests of G14; the Clubs Competitions Committee; Bilateral discussions between the players' union FIFPRO and UEFA; Tripartite dialogue between UEFA, Leagues and FIFPRO panel.
39 IESRev, p. 56.

ly vague call for a new approach to sports regulation that involves 'preserving the traditional values of sport, while at the same time assimilating a changing economic and legal environment'.[40] Having concluded that the substantive rules proposed above are required to preserve the traditional values of sport , the Review proposes several sporting-specific legal instruments that it foresees are necessary to protect these values and recommends a list of necessarily political interventions on the European level:[41]

1. The establishment of a European Sports Agency
2. The EU to issue guidelines to the application of Community law to sport
3. Amendment of Community law to allow and recognise as compatible with the common market certain state aids to sport
4. The EU to facilitate a European bargaining contract for each sport discipline
5. The EU to accept sports organisations as fulfilling tasks of relevant economic interest under Article 86 EC
6. The EU to adopt block exemption regulations on certain categories of agreements and concerted practices in sport
7. The EU to adopt directives regulating betting, minors, and players' agents in sport
8. EU Governments to commit to enforce the 'Independent European Sport Review'

These recommendations range from the pragmatic to the unconstitutional. On the side of the practicable, assuming that the Commission demonstrated an interest in regulating sports governing bodies[42], block exemption regulations are used in other fields with special qualities to ensure that undertakings benefit from legal certainty as to how competition rules are applicable to those specific beneficial attributes. If there are analogous rules that justify restrictive practices in sport, the Commission could conceivably attempt to recognise those attributes in such form. The very worthy proposal for a clarification of the distinction between 'sporting competition' and economic competition'[43] deserves attention in the broader context of competitive equalities that are inherent to the proper functioning of markets beyond sport. If sport has specific characteristics on the basis of market participants' interdependence, consumers' preference of hierarchical market structures and consumers' brand loyalties, it seems reasonable to expect that by analogy these conditions might be found in other segments of the internal market. However, on some levels, the Review places great faith in the democratic nature of UEFA's governance as a factor legitimating an unfettered discretion in the exercise of its regulatory powers. The balance and fairness of its governance is not entirely beyond dispute. A key concern must also be whether the Community, given its very public historical lack of sports competence, can be empowered as a general regulator of sport within its internal market or other explicit Treaty legal bases. Ultimately, the underlying debate is as to whether the legitimacy of UEFA rules is so convincing as to justify the total autonomy to the extent of exemption from judicial review which the Review seems to propose.

The Review will be welcomed by UEFA as it recommends with few reservations the widening and hardening of its territory of autonomy both against national authorities and the moderating effects of otherwise applicable Community law. Much of this is justified with reference to the emphasis on participatory, democratic elements of sports governance rather than a detailed legal or economic analysis leading to an objective conclusion in favour of the report's proposals. A number of recent developments suggest that some stakeholders still consider democracy in short supply in football. For instance, despite the objections of leagues and clubs, UEFA persisted with the home-grown player rule. Failure to secure wide agreement seems likely to result in future litigation. Furthermore, the question of mandatory player release clauses has been the subject of litigation involving the G14 group of leading clubs and the Belgian football club Charleroi, the crux of which is, as with all participatory democracies, the issue of what constitutes a fair distribution of wealth. The stakeholder committees and panels the Review relies on as exemplary features of the European model of football are not formally part of UEFA's decision making procedures, and UEFA continues to view social dialogue facilitated by the EC Treaty with suspicion. Whist these flaws are acknowledged in the Review,[44] the danger lies in pre-judging the democratic dialogue that ought to be taking place in sport by sweeping many of the most contentious issues in sport into an expanding territory of sporting autonomy. Although UEFA is invited to '...examine its own structures',[45] in this respect, the Review advocates denying European institutions any role in ensuring that it does so in a timely and democratic fashion with due regard to the balance of competing interests within European football. This raises the question of whether an external body should in any event be empowered to ensure that UEFA examines its structures and allows for sufficient representation and democratic dialogue. Since the satisfaction of this precondition is the justification for UEFA's otherwise broad autonomy proposed by the Review, its possible failure should also result in the failure of the Review's bid for this autonomy. The social model employed by European football is lauded by the Review as an illustration of an inherent institutional counterbalance to the structural exclusion of the third category of sporting rules and therefore a partial justification for the proposed exemption of sports governing bodies from judicial oversight.[46] This broadly consultative process is posited to lead to sector-specific initiatives that are considered more desirable than either the unsatisfactory extension of the sporting exception or the continuing involvement of the European Court of Justice in ad hoc legal policymaking relevant to sport. It is difficult to put forward a convincing argument against consultation with stakeholders in itself. However, if European sport requires rules other than those currently applied to it as the Review implicitly recognises, then the Review accepts that those rules should be made together with all interested parties in the spirit of participatory democracy. The distinction between the Review and the 2005 Report[47] is their stance on who should be the ultimate arbiter of those rules. In this respect, it is as difficult to argue in favour of allocating judicial function outside the European institutions as it is to accept that those courts should also make the law which they currently apply. Surely European courts should at the very least exercise a role in scrutinising the propriety of the processes even if one accepts that the rules agreed by due process are within the gift of the sports governing bodies. It is also difficult to see how any Community institution could definitively offer the level of 'legal certainly' the Review is seeking by effectively pre-empting judicial scrutiny of sports governance in novel situations. In its conclusions on the regulatory structure of European sport,[48] the Review relies on the expertise of sports governing bodies as an underlying reason as to why they should exercise a wide margin of appreciation. It is interesting that despite its advocacy of certain aspects of social dialogue, the report makes no case for the widening of amicus curiae rules in sports-related proceedings. It will be recalled that many of the adjudicatory functions are currently exercised by the Commission in the first instance, whose rules of procedure permit the examination of expert witnesses beyond the very narrow formal limits of the European Courts' procedural provisions. If such steps were routinely taken, a key argument for the exemption of sports governing bodies from judicial oversight, namely those bodies' lack of sporting expertise, would be considerably weakened.

The absence of the constitutional status of sport as a Community competence is highlighted by the developments since the Treaty of Nice. The Review explicitly recognises as its key objective to '...sup-

40 IESRev, p. 91.
41 IESRev, pp. 116-119 tables.
42 Not beyond dispute - for example, the Commission has repeatedly disowned proposals of the Review on the basis that the Commission harbours no ambitions to regulate sport in Europe.
43 IESRev, pp. 92-93
44 IESRev, p. 126
45 IESRev, p. 126
46 IESRev, pp. 52-57.
47 *Professional Sport in the Internal Market*, Report Commissioned by the Committee on the Internal Market and Consumer Protection of the European Parliament on the initiative of Mr Toine Manders (MEP) (TMC ASSER INstituut, The Hague, Netherlands, 2005).
48 IESRev, p. 47.

port and give practical effect to the principles set out in the Nice Declaration, in other words, to implement the Declaration in sport...'[49] However, as the Community exercises only those powers which are conferred to it by the Treaty establishing the European Community,[50] it is limited to legislating in fields where this competence is granted. The Member States were unable to agree either in the Nice Treaty or the subsequent Constitutional Treaty (owing to the failure to ratify the latter) that sport should be recognised as a competence independent of its hitherto subsidiary status as a facet of the internal market. There is therefore little legal authority either in the Treaty or in case law alluded to above to support the existence of a competence to recognise the 'specificity of sport' thesis to the extent to which it seems to be relied upon by the Review. The Community has the power to legislate in so far as it can cite a pre-existing legal basis, namely the Treaty regimes pertaining to free movement and competition in the context of economic activities. As persuasive as the non-binding declarations may be in support of particular Treaty reforms or interpretations, their failure to achieve Treaty status emphasises that the legislative segregation of sport from other aspects of economic internal market activity is constitutionally unsound. Due to this manifest lack of political agreement, an implicit conferral of competence in so far as a measure can not be justified by reference to education, public health, the internal market, or another recognised positive competence seems highly suspect. European sport manifesting economic aspects falls within internal market rules because it is capable of impact on the functioning of the common market within the meaning of the parameters set by Community competition law and fundamental freedoms. Where a measure falls outside of these parameters because it does not appreciably affect the internal market, the Review has omitted to demonstrate the otherwise reasonable proposal for allocating regulatory powers to the European level to the detriment of national autonomy and differentiation. In so far as the Review seeks to effect a sporting exemption from the EC Treaty regime, this is very simply beyond the capacity of any of the European institutions that derive their powers from that Treaty.

The paradox of 'specificity of sport' as a sword and a shield

The Independent European Sport Review proposes how internal market rules should be adapted to sport but does not always offer detailed, convincing reasoning beyond the general 'specificity of sport' thesis or the existence of autonomous democratic governance as to why Community markets in professional sports should be exempt from Community market regulation. The review demonstrably does not '...seek a blanket "exemption" from the rigours of EU law...',[51] but rather states as its objective the clear definition of sports regulating bodies' margins of discretion. However, the report on the one hand defends its arguments on the basis of the 'specificity of sport' thesis, and on the other, denies that sport should be exempt from regulation by proposing large-scale interventions, particularly in relation to the political interventions recommended to the EC. The intellectual foundations of some of its propositions are therefore contradictory as far as they are stated and implicit as far as other, possibly financial considerations influence the reasons as to why this is so. Ultimately, the fundamental question of principle ought to be not whether sports governing bodies should be exempt on some excusatory basis, but whether on the proper application of the internal market rules there are legitimately justiciable economic activities within the ambit of internal market regulators that originate in sport. In several respects, those 'specificity' arguments on which the Review relies are already incorporated into Community law and support the definitions which it proposes. '[I]mportant social, educational and cultural functions...'[52] are already considered as objective justifications and in some cases also offer legal bases for acts on the Community level that may be directed towards sports institutions. It should be recalled that when the ECJ has considered particular sporting rules, it has stressed that they fall within the Treaty system if their objectives are economic but not if they are 'of sporting interest only'. One of the three categories of sporting rules recognised by the Review also raises another key question of a constitutional nature. In extending the internal market rules to sports governing bodies, the European Court of Justice made an analogy to public law powers exercised by bodies that were of a public nature and therefore analogous to the 'State' in for example *Foster v. British Gas*.[53] The second category, rules related to the 'integrity of sport'[54], outlines rules that were crucial to the ratio of the Court in *Bosman*, the effects of which the Review seeks to mitigate. '[R]ules relating to good governance of clubs... [and] rules related to the ownership/control/influence of clubs...'[55] would on their face appear to be precisely the kind of rules over which the European Court of Justice intended to exercise some judicial supervision in *Bosman*. The question is not whether sports governing bodies ought to be the principal regulators in sport, but rather whether the ECJ should have the jurisdiction to revisit those decisions that are manifestly contrary to Community law. Given that Member States are individually not well placed to regulate a pan-European authority, it seems reasonable and compatible with established Treaty principles of governance to allocate the judicial oversight of European sports governing bodies to the Community, rather than domestic institutions. One also wonders whether institutions other than the Community courts are best placed to evaluate the interests of the Community, a legal requirement for many of the provisions contemplated in the Review. For example, the Review advocates the disapplication of competition rules to sporting organisations[56] on the basis that they fulfil a task of general economic interest[57] under Article 86(2) EC. As such, if in law or in fact the fulfilment of this function is obstructed by competition rules *and* trade is not affected contrary to the interests of the Community, such actions are outside the scope of competition provisions. Affording an exemption to sporting bodies could under the Treaty definition only be possible if trade was not affected 'contrary to the interests of the Community'. It is submitted that Community institutions, rather than sports governing bodies, are best equipped to adjudicate upon the merits of Community interests under Article 86(2) and other similar Treaty clauses.

Who benefits from the sporting exception?

The question of salary caps serves an illustration of the Review's reluctance to offer explicit economic analysis of the rules it seeks to justify within the context of Community competition law. The proposition that Community competition law recognises public interest rules of reason justifying otherwise prohibited anti-competitive behaviour is not beyond dispute.[58] In particular, the interests of those who are negatively impacted by such measures are rarely analysed in detail. The case for salary caps, the deregulation of which the ISR also supports,[59] illustrates that despite clear economic implications the Review is not always robustly supported with economic analysis. Whilst the Review bemoans the 'arms race' in relation to players' wages, it fails to recognise that this is a sign of healthy competition, rather than a systemic flaw, in other sectors of economic activity. The language of state price controls is a feature of command economies, not of the liberal market values that Europe seeks to promote. One wonders whether the authors of the Review intended to advocate such soccer socialism. Despite the risks of overspending by clubs, it stands to reason that market forces will preclude escalation *ad infinitum* because those spending decisions that are unsustainable will result in corrective movements without interference from a regulatory body so empowered. It would be difficult to sustain a proposition that the banking or private legal sectors could legitimately collude to restrict wages, such actions in the context of manufacturing for example having heralded the development of early US antitrust laws. Although the report mentions that wage control measures have been taken in US sports,[60] its economic model is the antithesis of the European model and there-

49 IESRev, p. 15. Emphasis in original.
50 Article 5 EC.
51 IESRev, p. 25.
52 IESRev, p. 23
53 See for example Bosman, para 10.
54 IESRev, pp. 26-27.
55 IESRev, p. 27
56 IESRev, pp. 101-103.
57 The analogy between sport and public utilities deserves more detailed consideration than is possible in the context of this article critique.
58 See for example Loozen, E., 'Professional Ethics and Restraints of Competition (2006) 31(1) ELRev 28-47.
59 IESRev, pp. 45, 73-76 and 107-108.

fore of questionable relevance. No study is attempted of the redistributive consequences of salary caps on the market. One suspects that its short-term effects would include lowering the market value of those players whose current salaries would face reduction, thereby distributing the proceeds of commercial sport from individual participants towards their current employers. In terms of equalising competition, the effectiveness of salary caps is treated as axiomatic. This is not substantiated with reference to the cited cases where they have been employed ostensibly for this purpose. Whilst salary caps will lower player incomes, no case has been made as to the subsequent economic effects of lowering the wage bills of firms involved in high-level competitions, particularly in so far as it is implied to result in some incentive or benefit that filters down to consumers which restrictive practices under Community law must provide. The Review makes no attempt to trace who the ultimate beneficiaries of such a redistributive policy would be or to justify the policy on this legally necessary level. One wonders why a collective of the organisations that wish to implement such caps should be granted the exclusive right to judge whether such an agreement is within the acceptable policy parameters of European commerce as the Review suggests in proposing the extensive margin of appreciation to sports governing bodies. This line of reasoning is analogous to the self-regulation of other interested parties such as banks and corporations and as such must be justified with concrete examples of its benefits, rather than the mere recognition that similar schemes have been implemented in dissimilar markets and legal systems. A US decision relied on by the Review is explicit to this effect: "if a regulation is adopted by an independent sanctioning organisation *with no financial stake in the outcome*, a court will have maximum assurance that the regulation is to protect fair competition within the sport."[61] The Review does not demonstrate whom the beneficiaries of the salary cap would be, lending some weight to this author's suspicion that the relevant governing bodies are not entirely disinterested parties as per the ratio of *M & H Tire v. Hoosiers*.

Whilst denying that conflicts between regulatory and commercial functions exist within UEFA, the Review cites the Commission's settlement in the *Formula 1* case[62] as an illustration of an instance where the organic separation of commercial and sporting regulatory functions could serve to eliminate these conflicts of interest.[63] In the somewhat analogous case of the financial professions that have interests in both serving clients and promoting particular products, such requirements are regulated by external bodies, for example the Financial Services Authority in the United Kingdom, precisely because the previous systems of self-regulation by the actors themselves was deemed insufficiently robust. The Review expends little effort on demonstrating how this separation would be effected in the context of UEFA or that it would be more successful than in analogous situations where a public authority is faced with conflicting interests. Indeed its reliance on its democratic accountability could be seen as an attempt to argue against a need to separate its regulatory and commercial powers. However, if the governing bodies of sport tend to exercise commercial functions but are yet exempt form particular Community rules by virtue of a broad margin of discretion as per the broader 'specificity of sport' thesis, there is a manifest conflict between the commercial interests of the body and its constituents vis-à-vis the consumers of sporting events whose interests the bodies are purported to serve. The case of central marketing of Champions League media rights cited by the report in support of multiple regulatory roles[64] turns on the proposition that the value of those rights is considerably higher, benefiting the social and educational functions of sport and therefore justifying their collective bargaining position. It should be recalled that Community competition rules cite certain 'hard-core restrictions' which cannot be justified by reference to the purportedly beneficial effects of the restriction. The practice of colluding to establish a monopoly and thus price-fixing does not appear compatible with these Treaty competition provisions. The Review recognises the need to organise sports governing bodies in accordance with established principles of democratic accountability[65] but declines to support the judicial oversight that is necessary to ensure adherence to those principles on the highest levels. Only such oversight could justify a (less than absolute) margin of appreciation that would be applicable in relation to constituent bodies and other matters within the regulatory ambit of those bodies.

Between blanket exemptions and sports-specific regulatory initiatives

If the ISR is not arguing for a '"blanket" exemption'[66] it therefore must implicitly accept judicial oversight on some level between the local and the international. If, on the other hand, it wishes to submit that rules related to the integrity[67] and ownership of clubs[68] should fall within the 'legitimate autonomy of the football authorities', it must make a convincing case towards the exemption of public authorities in sport from rules of governance applicable to all other institutions exercising public law powers. It must also demonstrate why in the small but increasing number of instances where teams are owned by public limited companies, these should be regulated by judicially untouchable sporting organisations rather than the financial regulators that govern other public companies. In the case of financial institutions, the Community has already demonstrated a long track record intervening in issues of corporate governance. As the Review recognises, Member States also employ robust measures to combat against fraud and market crimes.[69] Market manipulation, for example of the type briefly mentioned[70] would in the context of financial services be highly suspect. The Review does not fully explain why even a substantial relationship to sport should exempt a commercial activity from these rules of law when such rules are developed on the European level. One must also wonder whether its proposals to delegate to sports governing bodies powers of regulation as to the 'suitability' of individuals to sports rights ownership[71] ought ultimately to be free from judicial scrutiny from the point of view of human rights considerations including rights to due process. It also seems that the instruments proposed to combat particular manifestations of general economic questions such as the legal position of minors, the protection of betting operations and the regulation of qualifications and professional standards are generally addressed by instruments relevant to the entire internal market. Whilst proposing rules specific to sport, the Review does not put forward a convincing case as to why the market failures they propose to correct are unique to sport and therefore deserving of a specific, rather than a generalised measure of harmonisation. Some approach falling between an indiscriminate exemption based on the specificity thesis and a sports-specific but economically unsubstantiated and therefore unconstitutional regulatory regime is clearly required, but not explicitly argued by the Review.

Some of the Review's final recommendations ring truer than others. The proposal for 'clear guidance as to the type of "sports rules" that are automatically compatible with Community law'[72] is undoubtedly in the interests of legal certainty. However, some of the proposed of the legislative instruments proposed represent substantially novel developments rather than clarifications. For example, the proposal for the directive on betting[73] suggests that it should facilitate the exchange of information in order to assist in criminal investigations. However, its key aim appears to be to '...provide that betting companies should not be entitled to make use of sports event[s] without a specific licence granted by the organiser'. This raises a novel point in relation to the philosophy of intellectual property rights. If on the one hand sports organisations are able to prevent the use of public information on results, why should not by analogy other participants in the objects of quoted odds, a regular object of betting at least in the United Kingdom, have similar rights. In sum, the report

60 IESRev, p. 45.
61 M&H Tire v Hoosiers, 733 F. 2d 973, 1st Cir. 1984 at 982-3, cited in the IESRev at p. 46. Emphasis added.
62 OJ C 169 (2001), pp 5-11; Commission press release IP/01/1523 of 30 October 2001 and Commission press release IP 03/1491 of 31 October 2003. IESRev, p. 61.
63 IESRev, p. 62.
64 IESRev, p. 62.
65 IESRev, p. 64.
66 IESRev, p. 25.
67 IESRev, pp. 37-38.
68 IESRev, pp. 38-39.
69 IESRev, pp. 68-70.
70 IESRev, pp. 38-39.
71 IESRev, pp. 70-71.
72 IESRev, p. 121.
73 IESRev, p. 112

advocates the privatisation of public information that would by analogy revolutionise privacy laws by way of intellectual property.

The Review also puts forward the proposal of establishing a European tax to support grass roots funding.[74] It will be recalled that although the Community has the competence to extract external tariffs and to harmonise certain aspects of taxation with impact on the internal market, the imposition of a novel Community-level sporting tax is unlikely to meet with legal or political approval. Also, the form in which some of the 'guidance' requested by the ISR could be legally binding is not beyond dispute. If sport is regulated by European authorities acting within the Treaty framework such as the proposed European Sports Agency, it could be empowered to issue guidelines not unlike Commission comfort letters and notices in the field of competition law that, although not legally binding, are respected by enforcement and supervisory powers. Whether such a move would withstand constitutional scrutiny is a matter for more detailed study than that offered by the Review or this paper. In any case, both the delimitation proposed and any alternative solution would require adjudication from time to time as to whether particular rules fell within permitted categories. In this respect, either the proposed European Sports Agency or any other extrajudicial body would be exercising such functions analogous to public law powers under the Treaty that it ought to be open to judicial scrutiny in the event that it manifestly abuses those powers. Therefore, the proposal merely adds an intermediate tier to the pre-existing legal system at the pinnacle of which the European Court of Justice is firmly perched. In relation to legal instruments for particular reforms, some of these raise again the paradox underlying the 'specificity of sport' justification in the context of the Review. If sport is within the Treaty in so far as it satisfies other legal bases for regulation, it would constitute economic activity under internal market rules that is a necessary precondition of positive harmonisation under Articles 94 and 95 that serves to eliminate internal market failures. On the other hand, if it is a purely sporting consideration, the Treaty system could allow for cases where this justifies exemption or disapplication of rules for economic, social or other legitimate public policy reasons but not harmonising measures or positive integration based on the non-existent sporting competence. For example, positive harmonisation in the form of a hard legal instrument of a European system of player transfer regulations would require acceptance of the fact that it pertains to a generally economic activity and therefore a facet of the internal market and within all applicable internal market Treaty rules. The Report can not without selective interpretation both locate sport outside the internal market and on the other hand justify broad legal measures for the Treaty purposes of 'directly affect[ing] the establishment or functioning of the common market'[75]or the 'object [of] the establishment and functioning of the internal market'.[76] In particular, some propositions as to the legal bases of proposed measures[77] raise questions of competence. For example, there is considerable academic literature on the limits enunciated in the case law of the ECJ on the circumstances where Article 308, proposed as the basis of the European Sports Agency, might be considered an appropriate Treaty legal basis.

In conclusion, the ISR presents a great number of proposals for legislative and regulatory innovation relevant to sport. On the whole, it seems that the impact of some of its legally feasible proposals could benefit from a more robust analysis of their economic and social consequences, with particular emphasis on determining whether other fields of economic activity display similar characteristics and therefore require similarly tailored rules. Conversely, the report puts forward a number of innovations that seem incompatible with the current Treaty irrespective of the legal methods proposed within the Review. The 'specificity of sport' thesis, although initially limited to particular aspects with established precedent gradually develops into an instrument of less discriminate effects, bludgeoning rather than piercing the current legal dilemmas in European sports regulation. Nevertheless, the report catalogues well the totality of sporting-specific rules and offers a number of interesting proposals that merit further analysis to an extent difficult in the context of a remit as broad and ambitious as to 'reconcile the competing interests and priorities of sport within this [legal] framework'.[78]

74 IESRev, p. 85
75 Article 94 EC
76 Article 95 EC. See for example *Tobacco Advertising* Case C-376/98, *Swedish Match* C-210/03 and *Alliance for Natural Health* C-154 and 155/04.
77 IESRev table of measures, pp. 116-118.
78 IESRev, p. 9.

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Doping, Doctors and Athletes: The Evolving Legal Paradigm

by **John O'Leary and Rodney Wood***

In the past, legal interest in anti-doping violations has tended to concentrate on the relationship between The World Anti-Doping Agency (WADA), the governing body and the athlete. In the limited examples of an athlete bringing a successful legal action in response to a governing body sanction, the focal point of legal debate has often been a technical one, such as the effectiveness of the chain of custody or the adequacy of testing procedures. Effectively, the aim has been to seek legal redress as the result of a failure on the part of a governing body.

The Balco Enquiry and the repercussions of the ATP positive tests due to contaminated supplements[1] hint however at the potential for a shift in the traditional legal focus. In both instances, at least part of the focus was on the culpability of those providing the banned substances. Could these examples indicate a potential change in legal emphasis away from the governing body/athlete nexus toward the relationship between the athlete and the medical practitioner? Is this is so, what are likely to become the prevailing legal issues?

The object of this article is to explore the relationships that exist in the area of anti-doping and health. Its aim is to map out the tensions, obligations and responsibilities that exist between the actors and identify the possible focal points for future legal conflict

The Development of Anti-Doping Policy and the importance of good health

There is little doubt that doping has been around for as long as professional sport. However the crude use of stimulants that gave questionable benefits to our ancestors bears little relation to the sophisticated doping techniques allegedly employed by athletes today. Houlihan correctly identifies that the 1980's "watershed" in anti-doping policy was due, to a large extent, to "the recognition by govern-

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1 Charlish, P, I.S.L.R. 2005, 1(Feb),19-22.

ments and sports organisations that doping was a much more intractable and complex problem than they had at first thought".[2] One aspect of this prognosis was that sport was perceived as lagging behind the "dirty chemist" who, by the constant introduction of new drugs and techniques, could ensure that either scientific testing could not detect substances or that the banned list of substances in the rules of governing bodies were never contemporaneous.

Sport's response to what has been referred to rather emotively as "the war on doping" was the formation of the WADA. Wada's response was the development of a document aimed at tackling the perceived problem of doping in sport. The World Anti-Doping Code was launched in Copenhagen in 2003. In its preamble the code describes itself as

> "the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed upon anti-doping principles are implemented".

The Code goes on to establish to criteria that underpin the need for such a document:

- To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide and
- To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping

These criteria require further analysis. In the first criterion it appears that the athlete's fundamental rights promote health, fairness and equality. It is hard to reconcile the concepts of fairness and equality - indeed the notion of equality in sport might be seen as wholly undesirable and unfair. The idea of good health as an aspiration however, seems laudable in this context. The idea that the health of the athlete as a central tenet of the code is further reinforced by the criteria prescribed for a substance to be included on the banned list. Article 4.3.1.2 states that a substance might be included on the list of banned substances if "Medical or other scientific evidence, pharmacological effect, or experience that the Use of the substance or method represents an actual or potential health risk to the Athlete".

This promotion of health is to be achieved by the implementation of the second criteria: the detection, deterrence and prevention of doping. The word "detection" is clearly understandable and further documentation from WADA prescribes how anti-doping agencies and laboratories might achieve this objective. The notions of deterrence and prevention however are more nebulous. Are deterrence and prevention to be achieved by punishment or education? Although education does feature in the code, the majority of its provisions are aimed at establishing culpability and imposing punishment. Equally the prescriptive language used in the articles aimed at establishing an offence and punishment are not reflected in the article on education. Article 18 appears to impose little in the way of compunction on a governing body to provide education. If doping in sport is such an axiomatically terrible thing then a good programme of education should significantly reduce the number of "offenders" (and thereby protect their health).

The Athlete/Governing Body Nexus

If an effective anti-doping code is predicated on the collective confidence of the various stakeholders, then in order for the WADA code to work effectively, bearing in mind what some might consider "draconian" provisions of strict liability[3] and sanctions[4], there needs to be a belief on the part of athletes that anti-doping is objective, transparent and effective: in essence, that there is an appropriate social contract above and beyond any legal rights that the parties may claim. Little has been written on the concerns of athletes in this context: this may be as a result of the difficulty establishing a dialogue with competitors but could also represent the inherent suspicion of revealing opinions of an anti-doping system that athletes feel would be contrary to the prevailing anti-doping philosophy. One survey of elite-level fencers elicited responses such as

> "The Diane Modahl case didn't make me feel confident about the procedure. There were a lot of questions unanswered about her case: the levels of security over her sample - you can't say for certain that it was her sample. Until you can be confident that the sample you give is properly looked after and the system is foolproof, people will always be sceptical. It's not necessarily the testers' fault but there are so many hands through which samples pass. I think corruption is rife in sport. There have been cases of tampering with samples and I think swapping a negative sample for a positive one could conceivably happen".[5]

And an elite level disabled athlete has claimed

> "My greatest fears regarding adulteration of products comes from the health foods market, as I tend to use alternative health food remedies to prevent colds ... [the Drugs Helpline at the Sports Council] would not even tell me if vitamin C in an unadulterated form was a legal permissible substance. I can understand that the Governing body does not want to create a situation in which they could be found liable for any advice given on these unlicensed products. However their advice that I took such products as a simple vitamin c tablet "at my own risk" was to me taking the fear of potential legal action too far. The official's statement that these products could contain other substances not listed was correct, but to not be able to tell me if an unadulterated product was legal or not appears to me to set severe limits on the ability of the body to fulfil its function."[6]

If there is the perception that support networks, drug testing procedures, chain of evidence and rules of evidence are uncertain, athletes will only respect and have confidence in the rules and thereby the underlying philosophy of the drug-testing movement if the systems in place satisfy athletes by being not only foolproof but transparent. As Lord Hewart so rightly stated "It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[7]

The Athlete/Doctor Nexus

Athletes who perceive their governing body as unsupportive or lacking empathy with their aspirations are likely to move away from the quasi-familial nexus that they may have enjoyed or that they perceived as having existed previously with their governing body and form closer bonds of trust with family, coaches and doctors whom they see as supportive and encouraging to them as individuals. This migration of loyalty paradigm is not unique and this "metamorphic process"[8] been noted in other areas of sport where individual athletes are beginning to feel a greater affinity with actors such as agents who they identify as being more closely attuned to the aspirations of the individual athlete.

If this is so, then athletes are forced to rely upon experts and sources of information that are not directly linked to sport or their governing body. As result of the sophisticated nature of doping tech-

2 Houlihan, B, The World Anti-Doping Agency: Prospects for Success in O'Leary, J (ed), *Drugs and Doping in Sport* (2000), London: Cavendish, 128.
3 Article 2 of the WADA Code.
4 Sanctions on individuals are dealt with in Article 10.
5 McArdle D. "Say it ain't so, Mo." 7 International performers' perceptions of performance-enhancing drug use and the Diane Modahl affair. (2001) *Drugs and Doping in Sport* O'Leary J.(ed.) Cavendish, London.
6 Curtis A. "Drugs in Sport: An Athlete's View". ibid.
7 v Sussex Justices (1924) KB 259.
8 O'Leary J and Caiger A "The Regulation of Football and its Impact on Employment Contracts" p.333 in *Legal Regulation of the Employment Relation* (Collin H, Davies P and Rideout R ed.) Klewer, London.

niques, it is likely that they would need to consult a doctor. Indeed, that doctor might reasonably be the person prepared to prescribe a banned substance. Although in the first instance the advice sought might be entirely legitimate, for example, advice on substances that would not fall foul of the anti-doping provisions, ultimately the doctor's value system, which rightly prioritizes the mental, as well as physical, wellbeing of the patient, may well conflict with the prevailing anti-doping morality.

It cannot be doubted that doctors are involved in the doping of athletes. Doctors are increasingly being seen as the protagonists in doping, even attracting accusations of taking part in "medically assisted doping".[9] The statistics do not establish the degree to which this involvement in doping in sport is deliberate or happens out of ignorance however it has been reported that 61% of performance-enhancing substances supplied to amateur athletes were prescribed by doctors[10] and a survey of 400 Surrey GPs found that 12% of respondents believed that a doctor has the right to prescribe steroids for non-medical reasons.[11] Of those doctors who responded to the survey, 18% had been asked to prescribe banned drugs to athletes. If these figures are repeated nationwide or worldwide, then clearly doctors will at some time be confronted by this problem whether directly involved in sports medicine or not.

Logically, such statistics cannot surprise those involved in anti-doping. Indeed the Code specifically anticipates violations on the basis of the doctor/athlete relationship. Under Article 10.5 of the World Anti-Doping Code (the Code), an athlete will not escape sanction by claiming that the banned substance was prescribed by a doctor. As the explanatory notes state "a sanction could not be completely eliminated on the basis of No Fault or Negligence ... [as a result of] ... the administration of a prohibited substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance)". As was stated by the Court of Arbitration in Sport (CAS) in the Torri Edwards case:

> "It would put an end to any meaningful fight against doping if an athlete was able to shift his/her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself/herself did not know of that substance".[12]

If WADA is disinclined to charge governing bodies with a mandate to provide adequate and effective anti-doping education, for example, then how is an athlete to understand the nature of side effects of a particular substance? Furthermore, the current prioritizing of anti-doping of detection over education may be partially responsibly for the re-alignment of the athlete's values.

If this assessment of the changing relationships is correct then it might be possible to anticipate a change in the focus of legal attention in future away from the legal obligations and responsibilities of the athlete/governing body relationship toward the legal obligations and responsibilities of the doctor/athlete relationship. If indeed athletes are turning to doctors for advice on, and supply of, performance enhancing drugs, then a plethora of complex medico-legal issues are raised concerning the doctor patient/athlete relationship.

Consent

The two most likely scenarios upon which the law may be expected to adjudicate are firstly where the athlete was unaware that the substance prescribed by the doctor was a banned substance i.e. the athlete was banned and suffered financial loss as a result of the doctor's treatment or secondly that the athlete was unaware that the substance prescribed by the doctor would damage their health. At the heart of both of these scenarios is the validity of any consent to the use of these drugs being prescribed for or administered to the patient/athlete.

It is well established in English law that doctors owe their patients a "duty of care". This duty of care imposed on doctors towards their patients predates the famous dictum of Lord Atkin in *Donoghue v Stevenson*[13] in 1932 by at least 110 years.[14] In *Bateman*, the court held that:

> "If a doctor holds himself out as possessing special skill and knowledge, and he is consulted as possessing such skill and knowledge, by or on behalf of the patient, he owes a duty to the patient to use caution in undertaking the treatment".[15]

It is also firmly established that part of that duty is to obtain the consent of the patient to any treatment or procedure. As early as *Slater v Baker* the court held that:

> "[I]t appears from the evidence of the surgeons that it was improper to disunite the callous without consent: this is the very usage and law of surgeons: then it was ignorance and unskilfulness in that very particular, to do contrary to the rule of the profession, what no surgeon ought to have done."[16]

For any consent to be valid in law, there is also a duty on the clinician to disclose any serious risk that the treatment or procedure may pose to the patient. English law has not served patients well in this respect as evidenced by the statements of Denning LJ (as he was then) in *Hatcher v Black*[17] where the plaintiff, a singer, had been told when they asked of the risk of the procedure to remove a toxic goitre that there was none. The surgery resulted in her vocal cords being paralysed. Denning LJ noted that it was not general practice among doctors to disclose risks associated with medical treatment and therefore held that the doctor was not liable at law for the harm suffered by the plaintiff.

Although this decision may seem harsh from the perspective of the patient who may have opted to decline treatment had they known the risk that their career would be at an end, there is no doubt that in law it was correct. The decision must now be read in the light of the instructions to the jury given by McNair J. in the seminal case of *Bolam* that:

> "A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."[18]

To apply this to sportsmen and women; should an athlete seek medical attention for an illness or injury for which a banned substance is the medically indicated treatment, there will be no cause of action should that athlete subsequently be banned as the athlete has freely consented to that treatment. The physician has acted in the best interests of her patient and would have reached the standard of care required by the Bolam test. If though that same athlete has informed the doctor that they will not consent to treatment with a substance that is on the banned list, but the doctor treats with a banned substance because it is the best or only viable treatment, there will in all likelihood be liability in negligence. Even though the doctor believes that she is acting in the best interests of the patient, the wishes of a competent patient must be respected. A possible defence could be raised if it could be shown that the athlete was under such emotional pressure from external factors, such as trainers and agents, that the consent was vitiated due to undue influence.[19] Unless though the condition is life threatening, it is unlikely that such a defence would suc-

9 Laure, P., Binsinger, T. and Lecerf, T. "General Practitioners and Doping in Sport: attitudes and experience" (2003) 37 Br. J. Sports Med. 335, at 335.
10 Laure P. (1997) Doping in Sport: Doctors are providing drugs *Br. J.Sports Med.*, 31 258-259.
11 Greenaway, P. and Greenaway, M. "General Practitioner Knowledge of Prohibited Substances in Sport" (1997) 31 *Br. J. Sports Med.* 129, at 130.
12 Torri Edwards, CAS OG 04/003, c. 5.12.
13 [1932] AC 562.
14 *Pippin v Sheppard* (1822) 11 Price 400.
15 *R v Bateman* (1925) 41 TLR 557.
16 *Slater v Baker and Stapleton* (1767) 2 Wils. K.B. 860 at page 862.
17 *Hatcher v Black* [1954] CLYC 2289.
18 *Bolamv Friern and Barnet Hospital Management Committee* [1957] 2 All ER 118, at page 122.
19 *ReT* (Adult: Refusal of Treatment) [1992] 3 WLR 782.

ceed, especially if there are alternative treatments that would have been acceptable to the athlete even if not the best treatment available. Providing the patient is judged to have the capacity to refuse consent, and in law there is a presumption of capacity[20], then no matter how illogical or even repugnant the decision may appear to the clinician, they must respect the wishes of the patient.[21]

Although the paternalistic attitude of the courts and the medical professions towards patients is declining, in the area of disclosure of risk it can still be seen to be holding its own. The foremost precedent on disclosure remains *Sidaway*22, where it was held that it was not necessary to disclose the 1% risk of a catastrophic outcome to spinal surgery. Although the recent decision in *Chester v Afshar*23 seemed to shift that position as the House of Lords held that an off-the-cuff statement by the surgeon that he had not crippled anyone yet, was not an adequate response to a specific question on the risk of spinal surgery. The facts of *Sidaway* and *Chester* are alarmingly similar, with both procedures presenting a 1% risk of catastrophic outcome (the paralysis of the patient) and both patients asking specific questions about the risks of the procedure.

In *Chester*, the Court held that there was liability for the non-disclosure of even a 1% risk if asked a specific question, but the belief by some commentators that this represented a shift in the law was erroneous. *Chester* reconfirmed *Sidaway*; the cases can be distinguished on their facts. In *Sidaway*, the court chose not to believe the plaintiff's assertion that she would have significantly delayed the surgery had she known the risks, whereas in Chester, the court believed the claimant.

The central issue surrounding the disclosure of risk and the validity of consent then becomes how much information about the risks involved in a treatment or procedure is required to be disclosed by the doctor for a consent to be valid. This is governed by the "Bolam Test"[24] - what would a responsible body of medical professionals reveal to their patients?

This standard of disclosure would only apply to therapeutic treatments. There may well be considerable legal debate over the therapeutic nature of performance enhancing substances in the case of an athlete with no physical medical condition. A doctor may well be considered to be acting responsibly by treating with banned substances an athlete whose mental well being may be adversely affected by their withholding. If prescribing performance enhancing drugs are not considered therapeutic and may indeed harm the health of the athlete/patient, the standard for disclosure must be far higher. Indeed, as there is neither any statute nor case law to guide the medical practitioner, the best comparator would be medical research, where the physician is required to disclose all foreseeable risks. Although in 2006 the British Medical Association (BMA) published recommendations on education and information on doping in sport[25], no mention was made of consent as it was probably assumed that doctors would not participate in such activity. English courts have not yet had to consider this issue, yet, so it is necessary to apply the research standards on the disclosure of risk as the only appropriate comparator available.

The Medicines for Human Use (Clinical Trials) Regulations 2004 Schedule 1 Part 2 states in section 1 that:

> "Clinical trials shall be conducted in accordance with the ethical principles that have their origin in the Declaration of Helsinki, and that are consistent with good clinical practice and the requirements of these Regulations."

Section 9 continues:

> "Subject to the other provisions of this Schedule relating to consent, freely given informed consent shall be obtained from every subject prior to clinical trial participation."[26]

It is necessary to determine not only that consent is given voluntarily and that the subject be fully informed of the risks, but also that "external factors had not exerted so much pressure on her that she felt she had no other option but to agree to take part".[27] Although referring to subjects taking part in clinical trials, the relevance to athletes subject to the pressures to win and the financial rewards, it seems unlikely that any consent to the taking of performance enhancing drugs be truly given voluntarily.

As stated in the Regulations, they do conform to the Helsinki Declaration which states in Article 1(9) that:

> "In any research on human beings each subject must be adequately informed of the aims, methods, anticipated benefits and potential hazards of the study and the discomfort that it might entail ... The physician should then obtain the subjects freely given consent preferably in writing."

These same requirements are repeated in the European Union Clinical Trials Directive which defines informed consent in Article 2(j) as being a decision which is "taken freely after being duly informed of its nature, possible risks and benefits of the procedure". Possibly the clearest statement on the need for fully informed consent from participants in non-therapeutic clinical trials came in the Canadian case of *Halushka v University of Saskatchewan* where Hall J. stated that[28]:

> "The subject of medical experimentation is entitled to a full and frank disclosure of all the facts, probabilities and opinions which a reasonable man might be expected to consider before giving his consent."

This is where the analogy arises to the issue of doping in sport. Although the conducting of non-therapeutic clinical trials would generally be seen as being for the public good and doping more likely to be regarded as contra bonos mores, neither activity is undertaken to either maintain or improve the health of the subject, though this may well be a positive side effect. As the prescribing of performance enhancing drugs is not a therapeutic treatment and, like some clinical trials, may well cause harm to the subject, an interesting legal scenario would arise if fully informed consent of the athlete were not acquired before proceeding with any "treatment". Should an athlete request performance enhancing drugs from their doctor when there is no medical indication that they are required, and the physician follows the wishes of their patient but fully informs them of any associated risks, then clearly no action would lie on behalf of the athlete should they in fact succumb to those risks. If on the other hand, the athlete is not fully informed of the risks associated with any performance-enhancing drug, then it could be argued that any consent given by the athlete is vitiated. Under either scenario, any action brought by the athlete for losses resulting from any ban should they be caught would be unlikely to succeed.

Criminal Conspiracy

This in itself though does raise a dilemma for the doctor as they if they have the written records of the freely given consent as a defence against any civil liability, they are also collecting evidence that they have committed a criminal act. Although the athlete in using performance-enhancing drugs may not have committed a criminal offence, by consenting to a doctor prescribing or administering those drugs may well be involved in a criminal conspiracy for the purposes of section 1, Criminal Law Act 1977 (as amended). So that in providing evidence in defence to a civil action by the athlete, the clinician will also be providing evidence of their guilt to a criminal offence and also opened their patient to criminal charges.

This discussion though could be argued to be moot because even

20 *Re C* (Adult: Refusal of Medical Treatment) [1994] 1 WLR 290.
21 *St.* George's NHS Trust v S [1997] FLR 426, per Judge LJ.
22 *Sidaway v Board of Governors of the Bethlem Royal Hospital & the Maudsley Hospital* [1985] AC 871.
23 *Chester v Afshar* [2004] 3 WLR 927 HL.
24 Above.
25 BMA "Drugs in Sport: the Pressure to Perform" ttp://www.bma.org.uk/ap.nsf/Content/Drugs+in+sport.
26 Emphasis added.
27 Jackson, E. "Medical Law: Text, Cases and Materials" (2006) Oxford University Press, at page 485.
28 *Halushka v University of Saskatchewan* [1965] 53 DLR (2d) 436 at page 873.

though a doctor were to adequately inform an athlete/patient of the risks of a performance enhancing drug, the validity of the consent in criminal law would at best be questionable as *R v Brown*[29] clearly demonstrated that it was not possible to consent to a criminal act that may result in serious harm. It can be seen that in this instance as in others within the doctor patient relationship, there is a divergence between the civil law and criminal law because in civil law the maxim is "*volenti non fit injuria*" - to a willing person no wrong is done. It could also be argued that a further defence for the physician would be that the athlete should not be awarded a remedy because they would be basing their claim on an act that is itself unlawful (the criminal conspiracy); "*ex turpi causa non oritur actio*" - an action does not arise from a base cause. This of course assumes a relationship of equals as between the athlete and doctor. It could though be argued that between doctor and patient the relationship is never one between equals as it is the doctor with all the expert knowledge and therefore power.

Professional Misconduct

Additionally, there is always the residual possibility that an athlete may draw the attention of the General Medical Council (GMC) to the fact that their doctor has prescribed performance-enhancing drugs where there is no clinical indication that they are required. This would lay the doctor open to disciplinary action by the GMC for serious professional misconduct even though the athlete actively sought such treatment and may therefore have no legal redress.

Obviously, doctors should always act in the best interests of their patient, though it may be possible to argue in this scenario that the clinician is so acting. It might be reasonable for the doctor to argue that with the pressures on the athlete to succeed being so intense, and that their only chance of "winning" is to use performance enhancing substances, the doctor may be acting reasonably in prescribing these substances for the patient's mental wellbeing. To prevent psychiatric harm, a doctor may well feel justified in undertaking such an unlawful act. It is though unlikely that such a defence would succeed as there is a better alternative course of action: therapy.

Confidentiality

A doctor approached by an athlete seeking access to performance enhancing drugs is also faced with another problem. Medical practitioners owe their patients a duty to maintain the confidences revealed during any consultation.[30] As Lord Keith stated:

> "The law has long recognised that an obligation of confidence can arise out of particular relationships. Examples are the relationship of doctor and patient, priest and penitent, solicitor and client, bank and customer."[31]

That duty has been demonstrated not to be absolute. In W v Egdell[32] where revealing the results of a psychiatric test to the prison service was held to be an overriding public interest. The revealing of medical information that has the nature of an overriding public interest must only be revealed to the appropriate authority.[33] Two questions need to be answered for the clinician at this point, is the fact that an athlete is using, or considering using, performance enhancing drugs an issue in which there is an overriding public interest and secondly, if it is, to whom should information on drug use be revealed? As this is not a criminal matter at this point and there is no public safety issue, the only reason to reveal such information is that there is a public morality issue and as morality is by and large a relative question, it is unlikely that this issue would be an issue of overriding public interest as opposed to the prurient interest of the public, which is definitely not the same thing. If though it transpires that there is an overriding public interest, there may be little point in revealing the information to the police as the use of most performance enhancing drugs is not necessarily a criminal offence. That leaves only the relevant regulatory body for that athlete's sport.

Conclusion

As the protection of the health of athletes is one of the three criteria used to establish the suitability of a substance on the "banned list" it is reasonable to assume that the health of athletes is one of the central tenets of the anti-doping movement. The Code however does not attempt to impose education policies on governing bodies with anywhere near the same zeal as it advocates detection and punishment.[34] It is arguable that all good regulatory frameworks must strike an appropriate balance between "carrot" and "stick" otherwise they run the risk of being ineffective. It would be ironic if the WADA Code, with its emphasis on detection and punishments, is effectively pushing athletes away from the anti-doping values of their governing body and thereby counterproductive in protecting the health of athletes.

It is not the intention of this article to vilify doctors or their values nor to question the integrity of the anti-doping movement. It is accepted that most doctors observe the highest of professional standards. It is just that those standards might not always align themselves exactly with those of the governing bodies of sport.

The principle conclusion of this article is that is that the likely consequence of this philosophical re-alignment is that the legal focus will shift from the athlete/governing body relationship to the athlete/physician relationship which necessitates a re-evaluation of the crucial legal issues.

It is not the purpose of this article to provide a detailed legal commentary on these crucial doctor/athlete issues. However in identifying consent, disclosure, criminal conspiracy and issues of medical ethics and explaining the logic of this underlying shift in the migration of loyalty paradigm it identifies a change of legal emphasis in anti-doping matters. The legal and ethical consequences of the doctor/athlete relationship in the context of anti-doping is largely uncharted waters. There is an urgent need for WADA and medical governing bodies to investigate further the nature of and tensions that exist in this important relationship.

29 *R v Brown* [1993] 2 WLR 556.
30 Stephens v Avery [1988] 2 WLR 1280.
31 *A-G v Guardian Newspapers* (No. 2) [1990] AC 109 HL.
32 *W v Egdell* [1990] 1 All ER 835.
33 *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513.
34 Article 18.2 of the WADA Code merely states that "each Anti-Doping Organization should plan, implement and monitor information and education programs. The programs should provide Participants with updated and accurate information on [inter alia] ... health consequences of doping". (italics added).

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ASSER International Sports Law Centre

Conferences, Round Table Sessions, etc.

- The abolition of the transfer system in professional football (The Hague 1996);
- The television rights of professional football and European competition law and policy (The Hague 1996);
- The sports boycott of Nigeria: sports, politics and human rights (The Hague 1998);
- The international regulation of doping in sport: towards harmonisation? (The Hague 1999);
- The Americanisation of sports law - the American and European sports models compared (Utrecht 2000);
- Sport and the law in the People?s Repuhlic of China (The Hague 2000);
- The taxation of international sports income (Utrecht 2001);
- The future of professional football leagues in Europe: competitive balance and fair competition? (Rotterdam 2001);
- Sport and pensions (Utrecht 2002); ***(continued on page 117)***

Golf: Validity and Enforceability of Exemption Clauses in South African Law

by **Steve Cornelius***

1. Introduction

Exemption clauses that exclude civil liability for damage, loss, injury and even death, have, in various forms, become standard features of contracts in South Africa.[1] It is particularly in the case of standard form adhesionary contracts, where the terms of the contract are determined by one party and not subject to negotiation, where exemption clauses are utilised to a substantial degree to protect the party in the stronger bargaining position. However, the significance of exemption clauses are often overestimated and, while the party in the stronger bargaining position is under the impression that they are not exposed to civil claims, they are in reality often in for an unpleasant surprise. This was exactly what transpired in the case of *Johannesburg Country Club v Stott and another*.[2]

2. Facts

The respondent and her husband (the deceased) were both members of the appellant Johannesburg Country Club. The deceased had gone and played a roud of golf on the appellant's course on 4 March 2004. While the deceased was still playing, a thunder storm with resultant rain developed over the golf course. A siren warning of the threat of lightning was sounded and the deceased took cover from the storm under a shelter on the course. The shelter was struck by lightning and the deceased suffered severe injuries to which he eventually succumbed three weeks later.[3]

As a result, the respondent instituted a claim in the amount of 5,9 million Rand for loss of maintenance against the appellant. The appellant raised the special plea that the respondent and the deceased had, at all relevant times, both been members of the appellant club and, as such, were both contractually bound to the constitution and rules of the club.[4] The rules contained a clause in terms of which the club

"shall in no circumstances whatsoever be liable for any loss of or damage to the property of any member or guests brought onto the premises of the Club whether occasioned by theft or otherwise, nor shall the Club be held responsible or in any way liable for personal injury or harm however caused to members or their children or their guests on the Club premises and/or grounds".[5]

The respondent opposed the special plea and denied that the above-mentioned clause could protect the appellant *in casu*. The court *a quo* considered the special plea and dismissed it.[6] As a result, the appellant took the matter on appeal to the Supreme Court of Appeal.

3. Judgment

From the outset, justice Harms emphasised the presumption that the parties to a contract intend that their legal relationship will be governed by (Roman-Dutch) common law, unless the contrary is indicated clearly and unambiguously. If a party wishes to be exempted from common law liability, that party must ensure that the nature and extent of the exemption is clearly set out in the contract. As a result, exemption clauses are always viewed with suspicion and interpreted restrictively to limit their scope.[7]

As a result, the question before the court was whether the exemption clause in the club's rules clearly and unambiguously exempted the club from liability. This case was made more complicated by the fact that the respondent herself was also a member of the club and therefore bound by the rules of the club.[8]

Although a claim for damages against the club may be contrary to the spirit of a social club, the legal question remains whether the parties had actually agreed contractually to exclude the liability of the club. Appeal Judge Harms analysed the exemption clause and found that it was constituted of two distinct parts. The first part purported to exempt the club from liability for damage to property and, as such, was not of any significance for this particular case. The first part was partially void as it purported to exempt the club from liability against losses by third parties sustained on the premises. Guests are not parties to the contract (as constituted by the rules) and, based on the principle of privity of contract, not bound to the terms thereof. Furthermore, the rules did not provide that members indemnified the club against claims which their guests may have against the club.

The special defence relied on the interpretation which the court would assign to the second part of the exemption clause. Judge Harms indicated that this second part was also void to the extent that it purported to exempt the club from liability towards guests of members who suffer injury on the premises or children of members if members suffer injuries that may impact on the rights of their children.[9] The judge interpreted the clause further and concluded that it only provides for exemption against liability for "personal injury or harm" and not against claims of dependents. He further indicates that the adjective "personal" not only qualifies the noun "injury", but also qualifies the noun "harm". Consequently, the argument raised on behalf of the club that loss of maintenance could be described as "harm", cannot be sustained. In any event, the ordinary meaning of the expression "personal harm" generally does not include loss of maintenance, neither does it cover funeral expenses. And due to the drastic nature thereof, a clause can only exempt a party from civil liability for negligence in the death of another, if at all possible, where the parties have expressly agreed to such exemption. In this case, the clause did not provide for such exemption and the appeal is dismissed.[10]

Judge of Appeal Harms concluded his opinion with a few passing remarks relating to the lawfulness of contractual clauses which exempt parties against civil liability for negligently causing the death of another, especially in view of the significance which common law and the Constitution[11] attaches to the right to life. In particular, he questions such exemptions in the event of criminal negligence, but leaves the question unanswered.[12]

On this latter issue, Judge of Appeal Marais joins in the debate and delivers a brief minority judgment in which he first agrees with Judge Harms that the appeal should be dismissed. However, he doubts whether exemption from liability for negligence in causing the death of another is necessarily against public policy of constitutional principles. In this regard, he distinguishes between the civil and criminal consequences of negligence. While a party may generally exemption itself against civil liability for negligence, it cannot in the same exempt itself against criminal liability for such negligence. However, Judge marais expressly states that these are not his final views on the matter and, in the end, also leaves the question unanswered.[13]

4. Negligent Cause of Death

This case will probably be cited repeatedly in future as authority, not for what was held in the judgment, but rather for the one question

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1 *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA).
2 2004 5 SA 511 (SCA).
3 515F - H.
4 515H - I.
5 516B - C.
6 516A.
7 516D - F.
8 516I - 517A.
9 Such as the right to maintenance.
10 517F - 518G.
11 Constitution of the Republic of South Africa 1996.
12 518H - 519B.
13 519D - I.

that was left unanswered. It is indeed true that the common law and the Constitution places a very high value on the right to life and this will inevitably affect the validity of a clause which exempts a party against liability for negligently causing the death of another. In my view, Judge Marais correctly distinguishes between civil and criminal liability for negligently causing the death of another. The mere fact that conduct could result in criminal liability is not in itself conclusive in determining whether or not civl liable should or should not be exemptible. Possible criminal liability is merely one of the factors which should be considered in determining whether or not an exemption is contrary to public policy.

There seems to be another distinction which the majority of the bench do not seem to make in this case. They seem to discus an exemption against liability for negligently causing the death of another as if it would be an inevitable consequence of entering into such a contract. This is clearly not the in line with reality. The death of a party is in the overwhelming majority of cases only a remote possibility which will in all likelihood never occur. The emphasis here should therefore not be on the death of a party, but on the civil liability which may arise in the highly unlikely event that the risk of death is realised. Clauses which exempt liability for negligently causing the death of another party is not directed at the demise of that party, but rather at protection of the other party if a party should indeed, in the course of executing the contract, be killed. As such, the right to life in the Constitution should not in itself be grounds to deny the validity of such an exemption clause. At most, it can be one factor which should be considered to determine whether or not such a clause is contrary to public policy.

5. Enforceability

This case emphasises how important it is to ensure that a contract is properly drafted. It also confirms the role of the rules and presumptions in the drafting and interpretation of contractual terms. Written contracts are, after all, drafted to be interpreted at a later stage. Failure to take note of the rules and presumptions of interpretation during the drafting of a contract, could lead to unwanted and unexpected consequences, as the club had to learn in this particular case.

In the case of exemption clauses, it is in particular the presumption that the parties do not wish to deviate from existing legal principles more than expressly stated, which could prove troublesome.[14] If it is patently clear that the parties intended to exclude some common law liability, a court will give effect to the clear intention of the parties. But this presumption has the effect that exemption clauses will always be viewed with suspicion and interpreted restrictively.[15] As a result, it is of the utmost importance that the drafter of an exemption clause must select his or her words with the utmost care. It should also be kept in mind that one can never provide for all possible eventualities.

This case also stresses how important it is to be aware of the limitation to which contractual terms are subject. It has almost become standard practise for parties to insert extensive exemption clauses in their contracts in an endeavour to exempt themselves from liability. This practise, however, often losses sight of the principle of privity of contract in terms of which only the parties to a contract are bound by its terms; third parties are not subject to those terms unless they consent to be so bound.[16] As a result, it is legally not possible for a party to exempt itself against all possible claims and all possible claimants, irrespective of how thoroughly an exemption clause may be drafted.

It is especially from the latter perspective that clauses which purport to exempt a party from liability for negligently causing the death of another, is nonsensical. By their very nature, civil claims for negligently causing the death of another will always be instituted by third parties - after all, the deceased cannot do so!

6. Conclusion

It is obvious that no exemption clause can ever be interpreted in terms broad enough to exempt a party from all possible claims and all possible claimants. Exemption clauses have, due to their contractual status insurmountable limitations. Consequently, it is vital that parties who wish to protect themselves against civil claims, should pursue alternatives, such as insurance, to redress the limitations of exemption clauses. This may well prove to be expensive, but it is certainly less costly when compared to a R6 million civil claim with its resultant legal costs.

14 *Marsay v Dilley* 1992 3 SA 944 (A); *First National Bank of SA Ltd v Rosenblum and another* 2001 4 SA 189 (SCA).

15 *Fey and Whiteford v Serfontein* 1993 2 SA 605 (A).

16 Christie *The Law of Contract in South Africa* 4 ed (2001) 298 et seq.

Dr Emanuel Macedo de Medeiros, General Manager of the Association of European Professional Football Leagues (EPFL) (right) and Dr Robert Siekmann, Director of the ASSER International Sports Law Centre (left), at the Sixth Asser/Clingendael International Sports Lecture on The European Union and Sport: Law and Policy*, in The Hague on 6 June 2006.*

Study into the Possible Participation of EPFL and G-14 in a Social Dialogue in the European Professional Football Sector

by **Robert Siekmann***

Chapter 1: Introduction

The purpose of this study is to investigate whether EPFL and G-14, as European employers' organizations may participate in a possible Social Dialogue with FIFPro under the EC Treaty in the professional football sector. An additional question to be answered is which themes might be relevant to be put on the agenda of a European Social Dialogue in particular from the perspective of G-14.

One precondition is of course that the objects, the mandate (and the tasks) of EPFL and G-14 must (implicitly or explicitly) allow them to deal with "industrial relations" including a Social Dialogue. We will examine whether this is the case on the basis of the Statutes of both organizations, as presumably the status of employers' (interest) organization is a conditio sine qua non for admittance to a Social Dialogue. This point will be dealt with in *Chapter 2.* In this context, it is also important with regard to EPFL whether "industrial relations" and Social Dialogue are part of the objectives of the national Leagues (EPFL now has 15 members). The national Leagues can only have mandated EPFL to deal with these aspects at European level if they themselves are expressly or otherwise empowered under their Statutes to do so. In view of the question concerning the (in)dependence of EPFL and G-14 in relation to UEFA and FIFA as well as of the Leagues in relation to the FAs (see below in *Chapter 3*) the objectives of UEFA and FIFA must also be taken into account.

The social partner organizations must be able to function freely, without outside intervention. This may be considered as an implicit condition for meaningful participation in a Social Dialogue in a free, democratic community of States and in its individual Member States. In the football world the clubs are affiliated to their national FA which is represented in the international federations UEFA and FIFA. This is termed a "pyramid model" with FIFA at the top, UEFA at the European regional intermediate level and the FAs at the bottom. Football is administered according to this model. The model consists of levels of administration which transcend the clubs. The question therefore is whether EPFL and G-14 as clubs' organizations for the purposes of a Social Dialogue can operate sufficiently independently from the governing bodies. This point will be investigated in detail in *Chapter 3*. With regard to EPFL not only the relationship to the Leagues/members which must have commissioned EPFL to deal with "industrial relations" including a Social Dialogue is important, but also the way the Leagues are affiliated to the FAs at the national level.

Apart from that, employers' and employees' organizations and EPFL and G-14 alike have to fulfil certain (explicit) criteria which have been developed by the European Commission. This aspect shall be dealt with in *Chapter 4*. In this context, the question may be asked which lessons can be learned from previous practice regarding the application of the criteria in other industrial sectors, for it may be presumed that the (manner of) application of the criteria in principle also determines their precise meaning and importance. What is the "case law", what useful precedent exists? (*Chapter 5*).

There is another EU perspective which is even broader than that of the criteria and which deserves to be examined here. What does it mean for the possibility of participation of EPFL and G-14 in a Social Dialogue that "the specific characteristics of sport" should be taken into account in the European context (Treaty of Nice)? This question will be dealt with in *Chapter 6.*

In *Chapter 7* the question of which themes might be particularly relevant for G-14 in a Social Dialogue is examined.

Finally, *Chapter 8* contains a summary of the conclusions of this study into the possible participation of EPFL and G-14 in a Social Dialogue in the European professional football sector.

Chapter 2: Mandate, tasks and purposes

EPFL

The relevant objectives of the Association of European Union Premier Professional Leagues, the predecessor of the current EPFL (Association of European Professional Football Leagues), were as follows: to participate in and appoint representatives to UEFA's Professional Football Committee and to work with UEFA for the good of professional association football in Europe; and to foster friendly relations between the Association and the players' unions operating within the territory of member Leagues (Art. 2 of the Accord of the Association).

The tasks and purposes of the current EPFL are formulated as follows. Each member has agreed with the other members to form a non-profit association to create and/or increase cooperation amongst themselves in order to develop their own activities and to act jointly whilst promoting professional football in accordance with the respective statutes and regulations of the UEFA and FIFA (Preamble of the Constitution of the Association of European Professional Football Leagues). The Association will have the following two objectives: a) To fulfil and comply with the Memorandum of Understanding signed between the Leagues and UEFA on 6 June 2005 and 1 July 2005 (respectively) and approved by FIFA in Marrakech on 10 September 2005. The Leagues and the EPFL have the duty to notify to FIFA and UEFA any activity which may have an impact on the Memorandum of Understanding. b) To administer all rights and duties arising from the abovementioned Memorandum of Understanding. In this respect, the Association will inter alia have the following purposes: to be the voice of professional football Leagues in Europe on all matters of common interest; to achieve full recognition by FIFA and UEFA; to participate in and appoint representatives to the UEFA Professional Football Committee and/or such other UEFA committees as may from time to time be agreed; to foster friendly relations between the Association and organizations representing players operating within the territory of member and associate member Leagues; to consider Social Dialogue issues at a European level and where appropriate act as a social partner (Art. 1.3 of the EPFL Constitution).

Article 3 of the Memorandum of Understanding between UEFA and EPFL dealing with Objectives of Cooperation inter alia states that to protect and promote the common values and concerns (see Art. 2) the parties agree as follows: to create and develop, in conjunction with player representatives, a tripartite European football dialogue between the EPFL, UEFA and player representatives, so as to ensure that the specificity of football is always included when discussing labour-related matters and, if appropriate, to reach agreements in this forum in accordance with the tripartite agreement dated 27 January 2004 whilst also recognizing UEFA's presence as a third party in any social dialogue in Europe in order that UEFA fulfils the roles of, inter alia: guardian of sporting rules and values; representative of those territories where clubs and players are not represented by the EPFL/player representatives involved in such a dialogue; and guarantor of the essential solidarity between the various levels of football practice, from recreational to top-level football.

As to the objectives of UEFA and FIFA, the first objective of UEFA

* Director, ASSER International Sports Law Centre, The Hague, The Netherlands. The author thanks Roberto Branco Martins, research fellow of the ASSER International Sports Law Centre, for contributing Chapter 5 of the report and the Centre's trainees Patrizio Salvadori (University of Amsterdam) and Stefan Couwenberg (University of Rotterdam) for their assistance in collecting the basic documents of the national Football Associations and Leagues.

is to deal with all questions relating to European football (Art. 2 of the UEFA Statutes). Among the objectives of FIFA are to improve the game of football constantly and promote it globally and to control every type of Association Football (Art. 2 of the FIFA Statutes).

The following conclusion may be drawn from this. As "the voice of the Leagues" EPFL seemingly wishes to manifest itself as the better alternative for G-14, "the voice of the clubs". EPFL desires to be the representative in all matters of common interest of which a European Social Dialogue is clearly one. EPFL is thus duly authorized by its members, the national Leagues, to participate in a European Social Dialogue, irrespective of whether this is an EU Dialogue or an informal non-EU Dialogue. The first objective of EPFL is to fulfil and comply with the Memorandum of Understanding with UEFA, according to which EPFL shall recognize "UEFA's presence in any social dialogue in Europe".

Austria

The purpose of the Austrian League (*Österreichische Fusball-Bundesliga*) is to promote Austrian elite football, to deal with all questions concerning elite football, to promote the sportive and economic interests of the clubs in particular, and to regulate the working conditions of the clubs' employees, in particular also by concluding collective bargaining agreements (Art. 1 of the League Statutes).

The purpose of the Austrian Football Association (FA) is to promote, supervise and regulate association football in Austria, to represent association football at home and abroad and to maintain relations with FIFA and UEFA, while observing the Statutes, Regulations and decisions of FIFA and UEFA (Art. 2 of the FA Statutes).

We may therefore conclude that the Austrian League is expressly authorized to participate in "industrial relations", including the conclusion of collective labour agreements.

Belgium

The purpose of the Belgian League (*Ligue Professionelle de Football/Liga Beroepsvoetbal*) is the promotion and development of professional football in Belgium (Art. 3 of the League Statutes). From Article 3 it also follows that the League represents the clubs as employers of the professional football players in Belgium, both nationally and internationally. The Belgian FA has attributed to the League the full and sole competence to represent professional football in Belgium (Art. 39 of the League Statutes; see also *Chapter 3* below under "Belgium").

The purpose of the Belgian FA is to handle the administrative and sportive organization of association football (Art. I/3 of the FA Statutes).

The Belgian League is thus expressly an employers' organization and as such is mandated to participate in "industrial relations".

Denmark

The objectives of the Association of Danish League Clubs (*Divisionforeningen*) are to promote football through the Danish Football League and to arrange permanent cooperation between the members for the benefit of the members and Danish football (Art. 2 of the League Statutes). Art. 18 of the League Statutes deals with cooperation with the players' union.

The aim of the Danish Football Association is to promote and develop Danish football both nationally and internationally (Art. 2 of the FA Statutes).

The Danish League is expressly authorized to participate in "industrial relations".

England

The objectives of the English League (Football Association Premier League Limited) amongst others are to organize and manage under the jurisdiction of the Football Association a League of association football clubs ("the Premier League"), and generally to adhere to and comply with the applicable rules and regulations of the Football Association (Art. 3 of the League Memorandum of Association).

One objective of the English FA is to promote the game of Association Football in every way in which the Association shall think proper (Art. 3 of the FA Memorandum of Association).

According to the Chaidron Report[1], the English FA is the overall regulatory authority of the game, whereas the Premier and Football Leagues handle employment issues for the clubs.

The conclusion therefore is that no provision has been made concerning "industrial relations" in the English League Statutes, or in the Memorandum, or in the Articles of Association.

Finland

The objectives of the Finnish League (*Jalkapalloliiga RY*/Football League Association) are to organize annually the top national football League, in which every member club is represented by one team, and to establish solid cooperation among the member clubs and act as an impartial common body between the member clubs. The Association's main objective is to actively raise the level of Finnish football (Art. 2 of the League Statutes).

The purpose of the Finnish FA as the national governing body in football is to direct, manage and guide the development of football in Finland (Art. 2 of the FA Statutes). The Association shall realize its purpose by acting as the governing body directing, representing and managing football activities in Finland and abroad thereby following the rules, instructions and regulations of the international federations to which the FA is affiliated (Art. 3(1) of the FA Statutes).

The conclusion is that the Finnish League Statutes do not refer to "industrial relations".

France

The object of the French League (*Ligue de Football Professionnel*) is to guarantee the practise and administration of professional football in accordance with the Statutes and Regulations of the FA and with the provisions of the agreement concluded between the FA and the League.

The League is authorized to take all decisions regarding the organization and development of professional football. More specifically, the League is authorized to organize, administer and regulate professional football including the first and second League divisions (Articles 5 and 6 of the League Statutes).

The objectives of the French FA among others are to organize, develop and supervise the training in and practise of football in France, to develop and maintain relations with the League and to maintain all necessary relations with the other member FAs of FIFA (Art. 1 of the FA Statutes).

The Preamble of the Statutes of the French Employers' Union of Professional Football Clubs (*Union Patronale des Clubs Professionnels de Football (UCPF)*) states that the Union is a professional trade union (*syndicat*) in accordance with the provisions of the Labour Act. The purpose of the UCPF is to protect the general and specific interests of the football clubs in Leagues 1 and 2 and in the (National) Third Division, especially in relation to the different authorities in charge of professional football, namely the FA and the League (Art. 4 of the UCPF Statutes).

In order to realize this purpose, the UCPF may notably take every action to protect professional footballers' interests against all *syndicats* representing the management of professional clubs and may accede to and/or cooperate with any employers' organization, either national or international (Art. 5 of the UCPF Statutes).

According to the Chaidron Report, the UCPF protects and promotes the interests of professional clubs (also as employers) vis-à-vis the various bodies that control professional football. The sole mission of the UCPF is to represent professional clubs, particularly in the field of Social Dialogue.

The French League Statutes make no provision for "industrial relations". In France, UCPF is the professional football employers' organ-

1 Study on the Representativeness of the Social Partner Organisations in the Professional Football Players Sector (EU-25 - Bulgaria, Romania and Turkey), Research Project conducted on behalf of the Employment and Social Affair DG of the European Commission, Université Catholique de Louvain, Institut des Sciences du Travail, February 2006.

ization and as such is expressly authorized to participate in "industrial relations".

Germany
The purpose and task of the German League (*Ligaverband*) is to administer and operate the competitions of the first and second *Bundesliga* which are delegated by the FA to the League (Preamble and Art. 4 of the League Statutes). Another purpose and task is to promote the sportive and economic interests of all its members together towards governing bodies and other third parties (Art. 4 of the League Statutes). For the performance of its tasks and the implementation of its purposes the League has established the *Deutsche Fussball Liga GmbH* (DFL) (Art. 4 of the League Statutes).

The main task of the German FA is to be responsible for the practise of association football. The FA has full responsibility for the unity of German football (Preamble of the DFB Statutes). The purposes and tasks of the FA are in particular to promote association football and its development, to represent German football at home and abroad and to organize the first and second *Bundesliga* (Art. 4 of the FA Statutes).

The conclusion is that the German League Statutes do not contain any provisions that explicitly refer to "industrial relations". However, "industrial relations", both nationally and internationally, could be considered to come within the scope of the provision stating that the League promotes the sportive and economic interests of all its members together (by authorizing EPFL on the European level).

Greece
The Greek FA's aims are to organize, propagate, administer, supervise and generally promote association football on Greek territory, to organize championships on a national level and assign organizational duties to the Greek Association of Professional Football Clubs (Art.2 of the FA Statutes).

NB: The Greek League in its present form (Hellenic Football League) is to be dissolved shortly and replaced by a completely new Super League.

Conclusion: not applicable.

Ireland
The objectives for which the Irish League (*Eircom League*) has been established are amongst others to be a governing body for all member clubs and to represent and further the interests of the League, member clubs and the game of association football, to organize an annual League competition for member clubs, to regulate the activities of the League, to cooperate with or assist the FA in any way which the League shall think proper and to enter into or adopt any agreement with such bodies, and to cooperate with FIFA and UEFA (Art. 4 of the League Statutes).

The main objectives of the Irish FA are to promote, foster and develop the game of Association Football. In furtherance exclusively of the foregoing main objective, the FA shall among others have the following subsidiary objectives: to cooperate with FIFA and UEFA in all matters relating to the game of football or the rules and regulations affecting the same (Art. 3 of the FA Memorandum of Association).

No reference is thus made to "industrial relations" in the Irish League Statutes.

Italy
Art. 1 of the Italian League Statutes amongst other things provides that the League (*Lega Nazionale Professionisti/Lega Calcio*) represents the clubs in the conclusion of employment contracts and the drafting of standard contracts and in their relations with third parties.

The Leagues also represents the associated clubs in the conclusion of employment contracts and the drafting of the relevant standard contract (Art. 7 of the FA Statutes).

The Italian FA is a recognized private association with legal status. Its objective is to promote and regulate the game of football and related aspects (Art. 1 of the FA Statutes).

The conclusion is therefore that the Italian League does deal with employment issues.

Portugal
The main purposes of the Portuguese League (*Liga Portuguesa de Futebol Profissional*) are among others to exercise its authority as an autonomous FA body in accordance with the Sports Act; to promote and protect the common interests of its members and to manage matters inherent to the organization and the practise of professional football and its competitions; and to organize and regulate competitions of a professional nature which take place under the auspices of the FA (Art. 5 of the League Statutes). In order to pursue the common interests and to fulfil its social objective, the League also acts in among others the following capacities: as a representative of all members together towards all entities with which they have a common interest, to act in pursuit and defence of these interests, especially towards the Professional Footballers' Union, the National Association of Football Coaches, and other professional associations that include persons employed by the clubs, and to be the authority to negotiate and conclude agreements and contracts that are binding on the member clubs, i.e. collective labour agreements (Art. 6 of the League Statutes).

The main objective of the Portuguese FA is to promote, organize, regulate and monitor the training and practice of association football (Art. 2 of the FA Statutes).

According to the Chaidron Report, the League was originally only an employers' organization, but when the applicable Law came into force it additionally acquired the role of autonomous body of the FA and assumed responsibility for the organization and management of professional competitions.

The Portuguese League Statutes therefore do refer to "industrial relations".

Scotland
The objectives for which the Scottish Premier League Limited has been established are amongst others to organize and manage and commercially exploit, under the jurisdiction of the Scottish FA, a League of association football clubs; to cooperate with the FA in all matters relating to the operations of the League and to cooperate where appropriate with the FIFA and UEFA, and to take such steps as are necessary to observe and comply with the FA's articles of association (Art. 3 of the League Memorandum of Association).

The Scottish FA's objectives are inter alia to promote, foster, and develop the game of Association football (Art. 3 of the FA Memorandum of Association).

No mention is made of "industrial relations" in the Scottish League Statutes, or in the Memorandum, or in the Articles of Association.

Spain
The objective of the Spanish League (*Liga Nacional de Futbol Profesional*) is inter alia to organize and promote official nationwide professional football competitions (Art. 2 of the League Statutes). The League shall further act as it deems necessary to pursue its corporate purpose. Pursuant to the Sports Act and its enabling regulations, the task and responsibility of the League is to organize official nationwide professional football competitions, in coordination with the FA and in accordance with the criteria established by the Higher Council for Sports to guarantee compliance with national and international commitments. This coordination shall be implemented by means of agreements between the parties, the contents of which shall, to all intents and purposes, form part of the corporate purpose of the League. Agreements or arrangements entered into with the Higher Council for Sports and the Association of Spanish Footballers shall also form part of the corporate purpose of the League (Art. 3 of the League Statutes).

The Spanish FA is responsible for the governance, administration, management, organization and regulation of association football (Art. 4 of the FA Statutes).

The conclusion is that the Spanish League is an employers' organization.

Sweden
The Swedish Football Association has as its objective the promotion

and administration of the sport of football in Sweden (Art. 1 of the FA Statutes).

According to the Chaidron Report, the League (*Foreningen Svensk Elitfotboll*) is charged with administering professional clubs, organizing the professional clubs' League championship, and representing its members in a range of settings, including collective bargaining.

The Swedish League is therefore an employers' organization.

The Netherlands

The main purpose of the Dutch League (*Eredivisie NV*) is to promote the quality of football in the Netherlands, amongst other things by participating in and administering the *Eredivisie CV* (Art. 3 of the League Statutes).

The purpose of the Netherlands Federation of Professional Football Clubs (FBO) is to promote the interests of professional football clubs in the Netherlands. The FBO tries to achieve this purpose by inter alia representing the clubs' interests in the field of labour relations and by concluding collective labour agreements with employees who are employed by its members. As such the FBO represents its members as parties to these agreements on the employer side (Art. 2 of the FBO Statutes).

The main purpose of the Dutch FA is to promote and support the promotion of association football (Art. 4 of the FA Statutes).

There are no provisions in the Dutch League Statutes concerning "industrial relations". In the Netherlands, FBO is the professional football employers' organization that is explicitly authorized to participate in "industrial relations". The ECV is a member of EPFL.

G-14

Every G-14 founding member is a principal European professional football club. With the other members these have agreed to form a European Economic Interest Grouping (EEIG)

subject to Council Regulation (EEC) No. 2137/85 of 25 July 1985 so as to initiate or increase mutual cooperation for the purpose of developing own activities and to act jointly in the promotion of professional football (Preamble of the G-14 Foundation Agreement).

The G-14 amongst others has the following objectives: to promote the cooperation, amicable relations and unity between the member clubs; to promote and improve the professional football competition in all its aspects and safeguard the general interests of the member clubs; to promote the interests of the member clubs and to consider the collective affairs that are important for these clubs; to promote cooperation and relations between G-14 on the one hand and the FIFA, the UEFA, and other sports institutions or professional football clubs on the other; to negotiate the format, administration and operation of the club competitions with the FIFA, the UEFA and other sports institutions (Art. I.3. of the G-14 Foundation Agreement).

According to the Preamble of Council Regulation No. 2137/85, a harmonious development of economic activities and a continuous and balanced expansion throughout the Community depend on the establishment and smooth functioning of a common market offering conditions analogous to those of a national market. To bring about this single market and to increase its unity, a legal framework which facilitates the adaptation of their activities to the common conditions of the Community should be created for natural persons, companies, firms and other legal bodies in particular. To that end it is necessary that those natural persons, companies, firms and other legal bodies should be able to cooperate effectively across frontiers. Cooperation of this nature can encounter legal, fiscal or psychological difficulties. The creation of an appropriate Community legal instrument in the form of a European Economic Interest Grouping would contribute to the achievement of the abovementioned objectives and therefore proves necessary. Article 3 of the Regulation provides that the purpose of a grouping shall be to facilitate or develop the economic activities of its members and to improve or increase the results of those activities.

Of the 10 Principles of G-14, no. 9 states that Social Dialogue is critical: issues between players as employees and clubs as employers must be discussed and resolved within the context of the European Social Dialogue.

The conclusion therefore is that the G-14 is a European Economic Interest Grouping for the promotion of professional football. In its Statutes no reference is made to "industrial relations".

In respect of Social Dialogue, G-14 due to its nature is first interested in *international* football issues and secondly in the *harmonization* of specific national issues from an international perspective.

Summary concerning the question of mandate

According to its Statutes, the EPFL is explicitly authorized by its members, the national Leagues, to participate in a European Social Dialogue. At the national level, some Leagues in their Statutes are expressly described as employers' organizations, while others are expressly authorized to participate in "industrial relations". Under the Austrian, French and Dutch League Statutes, the conclusion of collective labour agreements is referred to as an instrument of Social Dialogue. In addition to the Leagues in France and the Netherland, there are separate employers' organizations for the purpose of "industrial relations". In all cases where no reference is made to a League either as an employers' organization or as having the power to participate in "industrial relations", this does not mean that the League is barred from acting as such, which can also be manifest in practice. The broad, all-encompassing official purposes of the respective national FAs do not contradict this conclusion either. Of course, the same is true for the purposes of UEFA and FIFA in their capacity of "umbrella" organizations to the FAs and - through them - the Leagues, and besides that in their direct relations with EPFL. It may not be concluded that the national Leagues have illegally empowered EPFL to participate in "industrial relations"/Social Dialogue.

In the G-14 Statutes no reference is made to "industrial relations".

Chapter 3: (In)dependence

EPFL

As to the EPFL's predecessor, in a Memorandum of Understanding (1998) concluded between certain of the founding member Leagues on the one hand and UEFA on the other the parties recorded the essential terms of their cooperation and involvement relating to European professional football. As part of this cooperation and involvement UEFA agreed to establish a permanent Professional Football Committee (Preamble of the Association Accord). The Association's representatives on the Committee shall reflect a balance between the major Leagues (England, France, Germany, Italy and Spain) and the remaining Leagues (Art. 5(3) of the Association Accord).

According to the Preamble and Paragraphs 1-2 and 6-8 of the Memorandum of Understanding, it complies with the wish of UEFA, as the parent body of European football, to take care of the specific matters of concern to the Leagues and professional football and, within the framework of the UEFA Statutes, to devote time and attention to these needs. It complies with the common wish of the Leagues and UEFA to enter into a Memorandum of Understanding, for the purpose of establishing future cooperation. The essential terms of this cooperation and involvement are inter alia recorded as follows: UEFA, within the framework of its Statutes, shall support the Leagues in their specific issues and problems related to professional football. UEFA agrees to establish a permanent Professional Football Committee. The aim and duty of this Committee shall inter alia be friendly cooperation between the Leagues and UEFA within the framework of the UEFA Statutes. The discussions shall be conducted with the guarantee of full transparency to the UEFA Member Associations. All activities shall be undertaken in a democratic manner, and in a spirit of mutual trust. Its aim shall further be to promote and safeguard the interests of Professional Football Leagues within Europe with regard to their specific problems and to advise UEFA's Executive Committee on problems relating to Professional Football. Amongst the competences of the Committee are entering into talks with players' unions and contacting the European Union bodies after consultation with UEFA.

In September 2005 the FIFA Executive Committee ratified the Memorandum agreed between the European Professional Football League (EPFL) and UEFA, as well as the constitutional terms of the

EPFL as an association under Swiss law in accordance with the provisions negotiated with UEFA, which are as follows.

Each of the member Leagues is one of Europe's principal premier professional football Leagues and is duly authorized and mandated by the relevant competent bodies to enter into this Constitution (Preamble of the Constitution of the Association of European Professional Football Leagues). Associate membership of the Association shall be open to all major non-premier professional football Leagues. The individual members and associate members shall have the following obligations: to fully comply with the Statutes, Regulations and Decisions of FIFA, UEFA and EPFL as well as the Memorandum of Understanding and ensure that these are also respected by its own members and affiliates, where necessary (Arts. 2.3, 3.2 and 3.4 of the EPFL Constitution).

According to the Preamble of the Memorandum of Understanding between UEFA and EPFL all members of EPFL must be officially recognized by their respective UEFA member association and represent their member clubs as well as being entrusted with certain tasks, obligations and/or powers as delegated by the FA in question and/or national legislation such as, but not necessarily limited to, the organization of the top division national championship and the commercialization of rights. All members of EPFL recognize their subordination to their respective FAs, fully respecting them and implementing their Statutes, Regulations and Decisions where applicable. All members of EPFL shall also respect the Statutes, Regulations and Decisions of FIFA and UEFA where applicable.

According to Art. 1 of the Statutes of UEFA, "League" is defined as a combination of clubs within the territory of a member association and which is subordinate to and under the authority of that member association. Under the FIFA Statutes the League is considered an organization that is subordinate to an association. Article 18 of the FIFA Statutes provides that Leagues or any other groups of clubs affiliated to a member of FIFA shall be subordinate to and recognized by that member. The member's statutes shall define the scope of authority and the rights and duties of these groups. The statutes and regulations of these groups shall be approved by the member. Every member shall ensure that its affiliated clubs can take all decisions on any matters regarding membership independently of any external body. This obligation applies regardless of an affiliated club's corporate structure.

The EPFL in its original form was restricted to *EU* Premier Leagues, while now it is expressly described as a *European* organization. Of course, "European" might simply refer to "EU" and it is true that the former 12 and present 15 members of EPFL all originate in ("old") EU Member States. However, this change of name could also be interpreted as better reflecting EPFL's close ties with UEFA as a pan-European organization, and as a loosening of its ties with the EU.

Obviously, through the Memorandum of Understanding with UEFA and under its Constitution, EPFL and its members (the national Leagues) and the members of the FAs (the clubs) are closely linked to UEFA and FIFA, and not only as far as EPFL's objectives are concerned. The close tie between EPFL and UEFA also becomes apparent through EPFL's permanent membership of UEFA's Professional Football Committee. According to the UEFA and FIFA Statutes, recognized Leagues are subordinate to the respective FAs.

The conclusion is that EPFL is mandated to participate in a European Social Dialogue.

However, generally speaking it cannot operate independently from football's national and international governing bodies. It has even officially recognized "UEFA's presence as a third party in any Social Dialogue in Europe".

Austria

The Austrian League is a member of the Austrian FA (Art. 1 of the League Statutes and Art. 4 of the FA Statutes).

Membership of the League obliges the clubs to recognize the Statutes and decisions of the League, of the FA, of UEFA and of FIFA (Art. 4 of the League Statutes).

The FA is a member of FIFA and UEFA. This membership obliges the FA and the League to recognize the FIFA and UEFA Statutes (Art. 2 of the FA Statutes). The members of the FA are obliged to observe the Statutes and Decisions of the FA (Art. 7 of the FA Statutes).

According to the Chaidron Report the League was set up as a voluntary, legally independent organization of the professional clubs and at the same time as a member of the FA.

Decisions on professional football are delegated to the League. This means that the organization of the First and the Second Division falls within the purview of the League, which is an affiliate of the FA. The *Bundesliga* represents the employers' side of professional

football. There is no Social Dialogue in Austria.

The Austrian League is therefore a member of both the Austrian FA and of EPFL.

Belgium

The Belgian League counts as its members the professional clubs playing in the First Division of the national championship. The League's members have authorized it to represent them as the association of clubs/employers of professional football players in Belgium, both within the framework of national and international bodies (Art. 3 of the League Statutes). Art. 39

states that by approving these Statutes, the Belgian FA confers upon the League the capacity of sole representative of professional football in Belgium to the exclusion of any other association.

As a member of FIFA the Belgian FA is recognized by all foreign FAs as the only association representing association football in Belgium (Art. I/4 of the FA Statutes).

The Belgian League is thus closely linked to the Belgian FA and is a member of EPFL.

Denmark

The League (Association of Danish League Clubs) is a member of the Danish Football Association. As a member of the FA, the Association and its members are at all times subject to the applicable statutes and regulations that apply to the FA (Arts. 1 and 3 of the League Statutes).

According to the Chaidron Report, the Association is a mixed association. Apart from being a special interest organization of the clubs, the Association is also an employers' organization, and this means that, in this particular role, the social partner is the players' union instead of the FA. As a member of the FA, the Association is obliged to comply with the rules of the FA, UEFA and FIFA. As an employers' organization however the Association is obliged to follow another set of rules when it comes to negotiating employment and working conditions for Danish players, namely the rules on collective bargaining in Denmark.

The Danish League is a member of the Danish FA and of EPFL.

England

The English League (The FA Premier League Limited) shall adhere to and comply with the FA Rules (Art. 78 of the League Statutes).

The English League is a member of EPFL.

Finland

In the Finnish League Statutes no provision is made regarding the institutional relationship between the League and the Football Association.

Art. 28 of the Finnish FA Statutes provides that a group formed by FA member clubs may only take part in football activities with the permission of and subordinate to the FA. The rules and regulations of such a group must be submitted to the FA for approval.

According to the Chaidron Report, as a member of FIFA, the FA has responsibility for all activities connected with football in Finland. Indeed, League One and all other Leagues or competitions are managed by the FA. However, for the top League (*Veikkausliiga* (League One)) there is one exception in that its management is partly delegated to an independent association.

The League represents professional clubs playing in the *Veikkausliiga*.

All professional clubs are members of the FA. The League is not a member of the FA. The League is fully recognized by the FA. It is an independent organization, not a subdivision of the FA.

Social Dialogue does not take place in Finnish football.

The Finnish League is thus not a member of the Finnish FA, but, as "a group formed by FA member clubs", it is subordinate to the FA. The League is a member of EPFL.

France

Professional football as defined by the French FA in its Statutes and Regulations and according to its Decisions is delegated to the League on the conditions indicated in the Agreement between the FA and the League. The League has administrative, financial and sportive autonomy in accordance with the Statutes and Regulations of the FA. The League organises, administers and regulates the First and Second Division (Arts. 1 and 2 of the Agreement between the FA and the League). The League consists of clubs that participate in the First and Second Division, established in conformity with the Law (Art. 7 of the League Statutes).

According to the Chaidron Report, at European level the League has not given EPFL a mandate in legal terms in negotiations at European level. The League is only a member of EPFL, but does believe that the EPFL could emerge as a legitimate actor in a European Social Dialogue.

It can be concluded that according to the Agreement with the French FA, the French League has autonomy in organizing the First and Second Divisions. The League is a member of EPFL.

Germany

The German League is the organization representing the clubs playing in the first and second *Bundesliga* (Preamble and Art. 1 of the League Statutes). The League is a member of the German FA. On the basis of this membership the League must function in accordance with the Statutes and Regulations of the FA and with the basic agreement with the FA. These documents are directly binding upon the League and its members (Art. 3 of the League Statutes).

The FA is a member of FIFA and UEFA. Based on its FIFA membership, the FA must comply with FIFA and UEFA provisions, which implies that these are also binding upon the League and its members. The League may also become a member of other organizations, provided that this does not affect the rights of FIFA, UEFA and FA (Art. 3 of the League Statutes and Art. 3 of the FA Statutes).

The *Deutsche Fussball Liga GmbH* (DFL) is in charge of the operational affairs of the League (*Ligaverband*). Within the scope of the FA Statutes, the basic agreement between the FA and the League and the Statutes of the League, the DFL is authorized to take all and any action serving the purpose of the DFL (Preamble and Art. 2 of the DFL Statutes).

According to the Chaidron Report, the *Ligaverband* was founded to give professional clubs greater autonomy (independence) within the FA. The *Ligaverband*/DFL is not an employers' organization and therefore does not take part in collective bargaining. There is no official Social Dialogue in German football.

The German League is a member of the German FA. It is explicitly allowed to become a member of other organizations. The League is a member of EPFL.

Greece

According to its Statutes the Greek League is a member of the Greek FA. The League accepts unreservedly the Statutes, Regulations and Decisions of the FA. The position of the League in relation to the FA is also dealt with in the Sports Act.

The FA is the sole and exclusively competent highest authority representing Greek football. It is a member of FIFA and UEFA. Amongst other things, the FA is obliged to accept FIFA's and UEFA's statutes, regulations, directives and decisions, and to ensure that these are also accepted by all parties involved in Greek football (Art. 1 of the FA Statutes).

According to the Chaidron Report, the FA has delegated to the League the right to organize the professional football championships. The League is responsible for the organization of the professional competitions, i.e. Divisions 1, 2 and 3.

There is no Social Dialogue (formal or informal) in Greek football.

At European level, the League as a member of EPFL has delegated to EPFL its power of negotiation (in the field of employment).

The Greek League is a member of EPFL.

Ireland

The amalgamation of member clubs shall be known as the FAI National League and shall trade as the *Eircom League* (Art. 1 of the League Statutes).

According to the Chaidron Report, the *Eircom League* is not a legal entity in itself, even though the FA and the League are two independent organizations. The League recognizes that they are subservient to the FA as the FA is the national association. There are no specific formal structures, such as joint committees, devoted to Social Dialogue in football.

The Irish League is a member of EPFL.

Italy

The Italian League is a private association of all clubs affiliated to the Italian FA that take part in the A and B Series championships. As an association of clubs affiliated to the FA, the League also performs the functions assigned to it by the FA Statutes and Regulations. For the realization of its objectives it enjoys organizational and administrative autonomy and, acting as a representative for the associated clubs, performs all the related duties and powers arising, save for those which, in accordance with the law, FA Statutes or Regulations, fall to the FA (Art. 1 of the League Statutes).

The FA carries out its functions in accordance with the resolutions and guidelines of FIFA, UEFA, the IOC and CONI (Art. 2 of the FA Statutes).

The Italian League has organizational autonomy in relation to the Italian FA. It is a member of EPFL.

Portugal

The Portuguese League is an association under private law which is governed by its Statutes, by the Regulations that are issued in accordance with the Statutes and by applicable law (Art. 1 of the League Statutes). In the pursuit of its purposes, the League, in its capacity of an autonomous organ of the Portuguese FA, has exclusive authority in among others the following fields: the organization and regulation of competitions of a professional nature and, by means of a Protocol with the FA, the definition of the applicable regime with regard to sportive, financial and property relations between the League and the FA. In order to pursue the common interests and to fulfil its social objective, the League as we have seen above also acts in among others the following capacities: as a representative of all members together towards all entities with which they have a common interest, to act in pursuit and defence of these interests, especially towards the Professional Footballers' Union, the National Association of Football Coaches, and other professional associations that include persons employed by the clubs, and to be the authority to negotiate and conclude agreements and contracts that are binding on the member clubs, i.e. collective labour agreements (Art. 6 of the League Statutes).

The Portuguese FA is governed by its Statutes and by the rules to which it is bound through its affiliation to FIFA and UEFA (Art. 1 of the FA Statutes). With regard to competitions of a professional nature, the League is responsible for exercising the FA's authority where organization and management are concerned. The applicable regime with regard to sportive, financial and property relations between the League and the FA is defined by means of a protocol between the League and the FA (Arts. 53 and 54 of the FA Statutes).

According to the Chaidron Report, under the law and the FA Statutes, the organization, regulation, management and administration of professional football in Portugal comes exclusively under the authority of the Portuguese Professional Football League. The League is a member of the FA. A protocol between the FA and the League establishes the criteria and regulations for interaction between the two organizations. The League is a legal person distinct from the FA. Under the law the FA has public powers for self-regulation by delega-

tion from the State. The FA has no way of intervening in the autonomy of the League to regulate professional football competitions, as this is how the arrangements are set out in the law. There is Social Dialogue in the football sector, with the League representing the employers. At European level the League has delegated to EPFL its power of negotiation as an employer for the European Social Dialogue.

The Portuguese League is a member of the Portuguese FA. The relationship of (functional autonomy) between the League and the FA is also secured by public law. The League is a member of EPFL.

Scotland

According to Art. 97 of the Scottish League Statutes, nothing in these Articles shall relieve any member of the League from its obligations as a full member club of the FA to comply with the applicable articles of association of the FA. Each member shall procure that the League observes and complies with all relevant articles of association of the FA applicable to it.

Art. 5 of the Scottish FA Statutes provides that all members shall be subject to and shall comply with the Articles of Association and with any regulations or decisions promulgated by the FA or by FIFA or UEFA.

The Scottish League is a member of EPFL.

Spain

The Spanish League is a sports association under private law which, in accordance with the Sports Act, has as its exclusive and compulsory members all clubs participating in official nationwide professional football competitions, and is legally entrusted with organizing these competitions, in cooperation with the Spanish FA. The League has its own legal status and full capacity to act in pursuit of its aims, and is independent from the FA, of which it forms part, with regard to its own internal organization and operation (Art. 1 of the League Statutes).

The Spanish FA is a private association, albeit of public utility, which is governed by the Sports Act.

The FA is affiliated to FIFA and UEFA, whose Statutes it accepts and undertakes to observe.

The FA is amongst others composed of the League (Arts. 1 and 2 of the FA Statutes). The League is a private sports association composed exclusively and compulsorily of First and Second Division clubs, insofar as they participate in official professional competitions at national level. It has distinct legal personality and with regard to its internal organization and functioning enjoys autonomy towards the FA, of which it forms part. The League shall organize its own competitions in coordination with the FA (Art. 16 of the FA Statutes).

According to the Chaidron Report, the clubs delegate the negotiation of collective agreements with players' representatives to the League.

The conclusion is that the Spanish League is affiliated to the Spanish FA, but autonomous in its operations. It is a member of EPFL.

Sweden

The Swedish Leagues are administered by the Swedish Football Association (Ch. 10, Art. 1 of the League Statutes).

According to the Chaidron Report the Leagues (*Allsvenskan, Superettan* and the First Division) enjoy administrative, financial and sportive autonomy in accordance with the statutes and regulations of the FA. The Leagues are affiliated to the FA. They are in charge of organizing League championship matches and, under FA control, supervise the professional clubs. In Sweden, the FA is not separate from the Leagues and hence no specific regulations exist concerning the relationship between the two or regulations on the purpose of the Leagues. There is a Social Dialogue in Swedish football. At European level the League has delegated its competence (i.e. its power to negotiate) in the field of employment relations to the EPFL.

The Swedish League is part of the Swedish FA and a member of EPFL.

The Netherlands

The Dutch League is an organ of the professional football section of the FA (Art. 2 of the FA Professional Football Regulations).

FBO is a member of the Dutch national general cross-industry employers' organization *VNO-NCW*.

According to the Chaidron Report, FBO is an independent organization.

Every three years there is a formal Social Dialogue in the sense that a collective labour agreement is negotiated and concluded with FBO.

The Dutch League is an organ of the Dutch FA. The League is also a member of EPFL. A representative of FBO is a member of the League delegation to EPFL (Art. 2.6.1 of the EPFL Constitution: A member League may also authorize any other person as it sees fit to act as the representative of the member League).

G-14

The conclusion must be that there is no formal relationship between G-14 and UEFA or FIFA other than that the members of G-14 are on the one hand also members of their national FAs and, on the other hand, of the national Leagues and in that capacity are indirectly associated with UEFA, FIFA on the one hand and EPFL on the other. In this respect and within the framework of the "pyramid model", G-14 may under private association law be considered through its member clubs to be a part of and subordinate to the FAs, the Leagues, UEFA, FIFA and EPFL. However, within the framework of its official purposes G-14 and its members are fully independent from a legal perspective, as (European) public law prevails over private (association) law and G-14 has formally been established as a European Economic Interest Grouping.

Summary on (In)dependence

The EPFL is directly and very closely linked to UEFA and FIFA. It cannot operate independently in a European Social Dialogue. At the national level, the same is true for the EPFL member Leagues in their relationship with the respective national FAs, as most Leagues are separate legal entities. Leagues are generally either members of the FA, are subordinate to the FA, or are affiliated with the FA. Where Leagues have organizational and administrative autonomy towards the FA, this autonomy is functional for the purpose of fulfilling the tasks that are assigned to them by the FAs. Of some EPFL member Leagues (i.e. in France, Greece, Italy, Portugal and Spain) their position and authority (status) and relationship with the FA is even regulated and secured under public law (Sports Act).

In terms of (in)dependence, compared with EPFL G-14 is at the other end of the spectrum.

The G-14 is an independent organization which is multinational (transnational) in that it - as opposed to EPFL - does not represent a national level at the international level. In that respect, it does not correspond to the pyramid model, as it lies outside and beyond the boundaries of this model.

Chapter 4: EU admissibility criteria

At sectoral level, the Social Dialogue underwent an important development in 1998, when the Commission decided on the establishment of sectoral Dialogue committees promoting the Dialogue between the social partners in the sectors at European level (COM (1998) 322 final of 20 May 1998, Communication from the Commission "Adapting and promoting the Social Dialogue at Community level"). The document laid down precise provisions concerning the establishment, representativeness and operation of new sectoral committees, intended as central bodies for consultation, joint initiatives and negotiation. The sectoral Social Dialogue committees are established with due regard for the autonomy of the social partners. The social partner organizations must apply jointly to the European Commission in order to take part in a Social Dialogue at European level. The European organizations representing employers and workers must, when submitting this application, meet a number of criteria (Article 1 of the Commission Decision of 20 May 1998 (98/500/EC) on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partner at European level, OJ L 225, 12.8.1998, p. 27), i.e. they must:

- be cross-industry, or relate to specific sectors or categories and be organized at European level;
- consist of organizations which are themselves an integral and recognized part of Member States' social partner structures and with the capacity to negotiate agreements, and which are representative of all Member States, as far as possible;
- have adequate structures to ensure the effective participation in the consultation process.

For the purpose of setting up sectoral Dialogue committees, the European Commission asks organizations representing employers and workers wishing to establish such a committee to complete a questionnaire and attach it to their joint request. Apart from the EU criteria and other possible considerations regarding admissibility to a Social Dialogue, this would mean that EPFL and G-14 would be dependent on the willingness of FIFPro and vice versa for participation in a Social Dialogue. The tripartite agreement of 27 January 2004 between UEFA, EPFL and FIFPro implies mutual recognition.

EPFL and G-14 are both organizations relating to the specific sector of professional football

and they are organized at European level. The member Leagues of EPFL belong to Europe's

principal premier professional football Leagues. G-14 is an Economic Interest Grouping under EU law. For these reasons, they can both be considered to fulfil the first requirement.

As to the second criterion, the following is to be observed. EPFL consists of organizations which in many, but not all cases are an integral and recognized part of the Member States' social partner structures. Among the purposes of most national Leagues is to participate as an employers' organization in industrial relations; in some cases the capacity to negotiate collective labour agreements is even explicitly mentioned and in most cases there is an official Social Dialogue in the national professional football sector in which social partners recognize each other officially. Some 80% of the national Leagues belonging to the EPFL are recognized as representatives of the clubs in the clubs' capacity of employers of the players. In 11 EPFL countries collective labour agreements exist. In the Netherlands the independent employers' organization FBO, representatives of which are recognized as official representatives of the League within the EPFL framework, is a member of the national general cross-industry employers' organization. As to the subcriterion of representativeness in all Member States, the EPFL is represented in 14 of the "old" EU Member States (in Luxembourg there is no professional football sector and Scotland is represented individually). The new EU member countries are invited to join the EPFL with full membership status, but separate professional football League organizations do not yet exist in most "new" EU Member States. In October 2004 the EPFL represented 458 professional clubs. On the whole, the EPFL represented 100% of the top Division clubs of the 15 Members of the EU belonging to the EPFL, 67% of the Second Division clubs of these Members, 61% of the top Division clubs of the 25 countries of the enlarged European Union, 33% of the top Division clubs of the 52 UEFA countries, 52% of the top and Second Division clubs of the 31 European countries where a professional football League currently exists, 93% of the European club competition winners, and 95% of the European top Division championships turnover. It may therefore be concluded that under the present circumstances the EPFL is "as far as possible" represented in the current 25 EU Member States.

G-14 has 18 elite clubs from the "Big Five" professional football countries (England, France, Germany, Italy and Spain) plus top clubs from Portugal and the Netherlands as its members. G-14 members are regular participants in the final rounds of the European Champions League and were frequent winners of European club competitions. In financial terms it presently covers 35% of the turnover in the EU professional football market. It is obvious that G-14 does not consist of organizations which are part of national social partner structures. Whether G-14 can be considered as being "representative of all Member States, as far as possible", also depends on the interpretation of the nature (configuration) of the professional football market in Europe. In this interpretation and context, the fact that G-14 as such is not linked to national social partner structures (with the capacity to negotiate agreements) could be said to be irrelevant.

The pyramid structure in football is traditionally made up of national associations, which represent the clubs at the regional and global (universal), international level. As a consequence, there are national professional football markets (national championships) and at the regional level there is a European market which in the past consisted of several Cup competitions, namely a competition for national champions (I), one for national cup winners (II) and one for runners-up (III). These were pure knock-out competitions. In the champions and cup winners Cups - the oldest and most prestigious competitions - each UEFA member was represented by one club. The introduction of the Champions League was the result of the changing economic and financial circumstances in European professional football. The risk of being eliminated in the early stages of the European Cups was no longer acceptable for the principal clubs. Therefore a competition model element was added by introducing group stages, which guaranteed a considerably larger number of matches to the elite clubs. The permanent coefficient ranking for UEFA members was introduced on the basis of the previous results of the clubs per country in Europe. This resulted in the arrangement that three or four clubs from the "Big Five" football countries can directly qualify for the final rounds of the Champions League, whereas a few single positions are attributed to a B category of countries and the clubs of all other UEFA countries have to qualify through preliminary rounds. The other two European Cups were combined into one, i.e. the UEFA Cup, which was still a knock-out tournament (to which a preliminary group stage was added in 2002). Besides the national football markets, two international markets - the Champions League and the UEFA Cup - can nowadays be distinguished at the European level. This situation is reflected by the existence of the G-14 as a European Economic Interest Grouping representing elite clubs the majority of which regularly, if not continuously, participate in the Champions League (in total they have won 41 Championship League Cups and former European Champion Clubs' Cups out of 51; the G-14 represents the clubs with the most significant "on the pitch" records in European club competitions), as well as by the existence of the European Club Forum that is for the main part made up of regular UEFA Cup participants (also including the G-14 members). The European Club Forum is composed of 102 members, plus clubs with sporting merit, representing a corresponding number of European top-division clubs. The number of clubs per country is established on the basis of the ranking position of the member associations. In principle the clubs are selected according to their individual coefficient ranking. No lower-Division clubs are admitted. As a mark of recognition of their sporting merit, those clubs which have won at least five UEFA club competition trophies are granted a regular seat in the Forum. The Forum was set up in 2002 as the body to reinforce dialogue between UEFA and Europe's major clubs. The European Club Forum has the status of an UEFA Expert Panel. The Forum is also represented in the UEFA Club Competitions Committee. Generally speaking, whereas the European elite clubs could be qualified as "multinationals", the clubs at the UEFA Cup level and below could be described as "small and medium-sized enterprises" (SME).

In this context it should be observed that in Spain the so-called G-12 - a grouping of now seventeen major clubs of the League - as an economic interest grouping in fact fulfils a function at the national level which is similar to that of G-14 at the European level.

We may conclude that the second criterion (member organizations should be part of Member States' social partner structures and be representative of all Member States, as far as possible) is to be considered irrelevant in the context of the Champions League if this League, in terms of Social Dialogue, is regarded as a "subsector" of the (European) professional football sector at the European level which in fact it is. It is actually difficult to imagine how an organization that seeks to protect the interests of a certain category of clubs like G-14 in the context of Social Dialogue could be organized differently, that is in accordance with the above-mentioned closely interconnected (the sec-

ond depending on the first) subcriteria. A number of 15 out of 18 G-14 clubs represent the "Big Five" Leagues: England: 3, France: 3, Germany: 3, Italy: 3, Spain: 3. Regular or even continuous Champions League participants are well represented in G-14 so that reasonably G-14 may be considered as a legitimate social partner (on the employers' side) in a Social Dialogue.

As to the question whether the European organizations have the capacity to negotiate agreements, it should be observed that the EPFL may be considered to have adequate structures to ensure the effective participation in a European Social Dialogue in the professional football sector. One of the official tasks and purposes of the EPFL is to consider Social Dialogue issues at a European level and where appropriate act as a social partner.

G-14 is not (yet) explicitly empowered under its Statutes to fulfil a similar function.

Chapter 5: Representation in the context of present Social Dialogue Committees

Before embarking on an analysis of the facts in other relevant sectors, a general observation concerning the "representativeness test" should be made. It would have been helpful to this research if information on the methods employed by the European Commission in determining the representativeness of social partner organizations were publicly available. However, the only information currently available is the text of the criteria, with no information having been published concerning the procedure and points of view related to the granting of EU social partner status.

The composition of Social Dialogue Committees in other industrial sectors may bring some clarity with regard to the exact meaning of the criteria defined by the European Commission in the abovementioned Decision of 20 May 1998. Which precedents are relevant for the establishment of a Social Dialogue Committee in professional football? At this moment there are 32 Social Dialogue Committees in operation. In order to give a comprehensive overview the sectors most relevant for the football industry will be analyzed.

The most common structure for a Social Dialogue Committee should ideally be the "two-partner" model: there are two industrial organizations which have recognized each other as the other party in a Social Dialogue. Examples of sectors where this is the case are Telecommunications (UNI-Europa on the workers' side and EUROFEDOP on the employers' side); Commerce (UNI-Europa on the workers' side and EuroCommerce on the employers' side) and Agriculture (EFFAT on the workers' side and GEOPA/COPA on the employers' side).

However, the vast majority of Social Dialogue Committees have several (more than one) representative organizations acting on the two sides of the industry. We will take a closer look at the representatives on the side of the employers in the sectors of Civil Aviation, Temporary Work, and Audiovisual and Chemical Industries.

In the Civil Aviation sector the employers are represented by the Association of European Airlines (AEA), the European Regions Airline Association (ERA), the International Air Carrier Association (IACA) and the Civil Air Navigation Services Organisation (CANSO). These organizations represent the majority of employers in the Civil Aviation sector at large. A relevant aspect is the increasing role of low-cost carriers and independent ground handlers. Due to the expansion of the budget flights market these companies face a greater need for the representation of their interests in the Civil Aviation sector. The representative organizations of these undertakings may request to be recognized as social partners in the near future.

The Temporary Work sector has only one representative on the employers' side, but the method of representation is of interest for this research. The employers are gathered in the European Organization of the International Confederation of Private Employment Agencies (CIETT). CIETT represents the national federations in the 25 EU Member States, Norway, Romania and Switzerland. Besides having the national federations (groupings of undertakings) as a member, the CIETT has six corporate members, namely the largest employment agencies in Europe: Adecco, Kelly Services, Manpower, Randstad, Vedior and USG. The interests of these large undertakings are different from the interests of the smaller private employment agencies.

A factor in relation to the representativeness issue in the Temporary Work sector is that the six corporate members are juxtaposed to the national federations that are members of the CIETT. Thus, the individual corporate members have decided that their interests on the EU "umbrella" level are not ideally represented by the CIETT as a whole and that individual membership safeguards the position of these large undertakings in a better way on the European level. Their membership of a general representative organization, which is a social partner on the national level, thus does not imply membership of the overall international organization due to a difference in interests on the EU level. The national federations and undertakings are both direct members of the CIETT.

In the Audiovisual sector the employers are represented by multiple organizations: the European Union of Broadcasters (EBU), the European Coordination of Independent Producers (CEPI), the Association of Commercial Television (ACT), the Association of European Radios (AER) and the International Federation of Film Producers Association (FIAPF).

We would like to illustrate the positions of the EBU and the ACT. The EBU is the largest professional association of national broadcasters in the world. The Union has 74 active members in 54 countries of Europe, North Africa and the Middle East. The EBU negotiates broadcasting rights for major sports events and operates Eurovision and Euroradio. EBU represents the interests of their members vis-à-vis the EU institutions and in the Social Dialogue.

The ACT represents the interests of commercial broadcasters at the EU institutions. The ACT's 25 member companies are active in twenty-one European countries and encompass several business models, from free-to-air television broadcasters to multimedia groups and digital TV platform operators. Cumulatively, these companies offer many hundreds of television channels and are the leading source of information and entertainment to millions of European citizens.

Although there is an overall organization for national broadcasters, the interests of commercial broadcasters are of a different character to such an extent that they considered the creation of a separate representative social partner organization necessary. For this reason the 25 members established the ACT.

The Chemical Industry provides another point of view in relation to representation issues. In the Chemical Industry the employers are represented vis-à-vis the workers by means of the European Chemical Employers' Group (ECEG). In this sector another actor also participates in the Social Dialogue, namely the European Chemical Industry Council (CEFIC). The CEFIC has federation members which are national federations of chemical industry undertakings and individual corporate members (cf. the corporate membership of the private employment agencies in the CIETT). The CEFIC does not have a formal social partner structure, but having been recognized by the social partners the CEFIC plays an important role in the Social Dialogue on the EU level.

This last aspect is clearly illustrated in the joint declaration of the social partners in the Chemical Industry at the time of the establishment of a formal Social Dialogue:

"The Social Partner Dialogue between ECEG and EMCEF (workers) will not be limited to social affairs subjects, but will - whenever appropriate together with the European Chemical Industry Council (CEFIC) and with close involvement of other relevant institutions and associations of the industry - focus as well on business issues, general economic conditions, environmental and other questions. Such a broader approach, which takes into account all conditions and frameworks under which the companies of the sector operate in Europe can bring a real added value to these companies, their employees and the European economy as a whole."

Since its establishment and the incorporation of CEFIC the Social Dialogue Committee has been quite active. CEFIC is a co-party to various joint declarations and has been incorporated in the Biannual Working Programme of the Social Dialogue Committee.

It has become clear that, although not having a formal social partner structure, the CEFIC forms an integral part of the Social Dialogue Committee due to its nature and due to the variety of issues that may form the content of a Social Dialogue on the EU level.

The accumulation of the abovementioned facts leads to the following assumptions in relation to the possible participation of the G-14 in a Professional Football Social Dialogue Committee.

- Whenever the industry changes and new interests come to the surface new organizations can be allowed to take part in the Social Dialogue (cf. the low-budget carriers in the Civil Aviation Industry).
- It appears that the European Commission takes a rather flexible approach to the application of the criteria for representativeness of social partner organizations. This is illustrated by the allowed individual membership of the six major employment agencies in the Temporary Work sector. In fact, the six major agencies have "double representation" in the Social Dialogue on EU level, as for example Vedior is not only a member of and represented by the *Algemene Bond Uitzendondernemingen* (ABU), but on EU level is also an individual member of the CIETT. This fact does not stand in the way of the simultaneous membership of ABU and Vedior of CIETT.
- As long as the relevant interests are apparent and the EU geographical area is more or less covered, organizations taking part in a Social Dialogue can consist of a limited number of undertakings. The ACT in the Audiovisual sector has a relatively small number of members, but their interests require specific representation on the EU level, especially when taking into account the existence of other "giant" organizations in the same sector such as EBU.
- There are various methods of participation in the Social Dialogue. The ACT for example is a direct member of the Social Dialogue Committee in the Audiovisual sector, while the CEFIC in the Chemical Industry is included by the social partners now that some issues cannot be discussed without the participation of the CEFIC as a stakeholder.

As regards the position of G-14 in the professional football sector, the European Commission should take a flexible approach in allowing G-14 to play a role in the Social Dialogue. An argument against participation by G-14 could be that this would lead to "double representation", now that the G-14 members are also direct members of the respective national Leagues and, as such, indirect members of EPFL. However, this situation is comparable to that of the CIETT which can therefore serve as a precedent.

From the situation in the other sectors it emerges that a very important aspect is the existence of relevant interests. These interests would legitimize the creation of special representation.

The relevance of "non-social" issues could also be an (additional) legitimization for participation in a Social Dialogue. This situation is illustrated by the circumstances in the Audiovisual and the Chemical Industry, corresponding with what has been outlined above concerning the existence of "multinationals" and SMEs in the professional football industries (see *Chapter 4*), i.e. that different interests require different representation. G-14's interests are different from those of an SME group of undertakings (cf. also the Agenda of topics listed in *Chapter 7*).

It has also become clear that different forms of membership exist, namely either direct membership (cf. ACT) or membership through inclusion (cf. CEFIC). The actual form of membership needs to be decided upon by the European Commission, after a formal request by the social partners.

An important aspect, which is of key importance to recognition as a social partner, is the recognition of the (specific) nature of the organization by other social partners. In professional football, G-14 should be formally recognized by the other pertinent organizations FIFPRO and EPFL.

This is supported by the fact that for example in November 2005 the President of FIFPRO after a meeting with G-14 declared: *"We have had a constructive conversation today with G-14 members on a number of common issues. It now makes sense to put in place a detailed framework for further discussions and to agree on a process for taking our conversation forward. We think this should be done under the umbrella of the European Social Dialogue."*

Thus, in this (informal) statement the existence of common interests is stressed as well as the position of G-14 as a "logical" partner in future social negotiations.

Chapter 6: Specificity of sport

In addition to the EU admissibility criteria discussed in *Chapters 4 and 5*, another aspect which might support the positioning of G-14 as a Social Dialogue partner should be dealt with here. This aspect concerns the general acceptability or recognition of G-14 as an official partner in European football which logically also affects G-14's possible participation in the Social Dialogue. In his article "Is the Pyramid Compatible with EC Law?" (*The International Sports Law Journal* (ISLJ) 2005/3-4 pp. 3 et seq.), Stephen Weatherill, who is Jacques Delors Professor of EC Law at Oxford University, United Kingdom, points out that the Declaration which is attached to the Treaty of Nice as Annex IV on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, includes a consideration on the *role of sports federations*: "The European Council stresses its support for the independence of sports organizations and their right to organize themselves through appropriate associative structures. It recognizes that, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organizations to organize and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the way which they think best reflects their objectives. It notes that sports federations have a central role in ensuring the essential solidarity between the various levels of sporting practice, from recreational to top-level sport ... While taking account of developments in the world of sport, federations must continue to be the key feature of a form of organization providing a guarantee of sporting cohesion and participatory democracy."

As the European Court of Justice has made clear in *Deliège* and *Lehtonen* this material may be aptly cited in the exploration of the nature and scope of the relevant EC rules (in casu quo, concerning the FIFA mandatory player release system for national team matches), as Weatherill observes. This Declaration (and the previous Declaration of Sport attached to the Treaty of Amsterdam) asserts the *conditional* recognition of the virtues of governing bodies, and the regulatory discretion which they are allowed. In particular, sports federations are expected to operate "on the basis of a democratic and transparent method of operation" and they "must continue to be the key feature of a form of organization providing a guarantee of sporting cohesion and participatory democracy". Insistence on the virtues of participation chimes in with the broader agenda mapped out by the Commission in its 2001 White Paper on European Governance. It is perfectly possible to take these broad recommendations of good, transparent and participatory governance and to deploy them in a concrete legal setting. In that vein, Weatherill would argue that the absence of such necessary levels of participation is a powerful reason for arguing that practices imposed on football clubs fall within the sphere of application of EC law, for it is not necessary for the federations to maintain such an exclusion of input from directly affected interests. The European Commission's 1999 Helsinki Report on Sport similarly expresses the view that "... the basic freedoms guaranteed by the Treaty do not generally conflict with the regulatory measures of sports organizations, provided that these measures are objectively justified, non-discriminatory, necessary and proportional", Weatherill continues.

Moreover, were the Treaty establishing a Constitution for Europe, signed in October 2004, to enter into force (which is admittedly currently improbable) Article III- 282(1)g would provide that "Union action shall be aimed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions and

cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen." This lends yet more weight to the argument that the absence of such "cooperation between bodies responsible for sports" would warrant the conclusion that a process of rule making which excludes the (directly affected) clubs is inconsistent with EC law.

The arguments advanced by Weatherill would seem to apply equally to the positioning of a key stakeholder like G-14 with regard to its envisaged participation in a Social Dialogue, not in the least because the FIFA mandatory player release system could very well be part of the agenda for discussions with FIFPro, as especially elite (and other) players' interests (see also the match calendar issue) are involved (see *Chapter 7*).

Finally, in this context and more directly, one might argue that an organization like G-14 is now a factual and integral part of European professional football and is therefore in its own right an aspect of "the specific characteristics of sport of which account should be taken in implementing common policies" (cf. the Nice Declaration), such as promoting Social Dialogue in the European professional football sector. The same of course applies to EPFL.

Chapter 7: Agenda of topics

The themes to be discussed in a Social Dialogue depend on the nature of the employers' and employees' organizations involved in the Social Dialogue. Some general themes would concern all organizations on both sides, but others would obviously be more specific to certain organizations only. EPFL, for example, is a generally representative organization whose territorial scope is restricted to Europe. G-14, on the other hand, is an organization which represents the interests of elite clubs in Europe, but is aiming to expand to include elite clubs in South America. This would put G-14 on a level with the international players' union FIFPro, which again is a general organization similar to EPFL. G-14's immediate partner at European or even global level should by nature be an organization representing the interests of elite players in Europe or worldwide. However such an organization does not (yet) exist. A comparable organization is ProProf in the Netherlands. This organization was established some years ago as an alternative for the general players' union VVCS to represent the specific interests of elite players. Elite players prefer to invest the capital they have earned rather than put it (partially) into a general players' pension fund. They therefore need to be advised differently from the average professional football player in the Netherlands. The Executive Board of ProProf consists of representatives of agents of leading Dutch players. In the Netherlands, there is thus an independent national Social Dialogue of a general nature between FBO (besides the two League organizations (ECV and CED for the Second Division) and the FA) and VVCS in which ProProf is also involved. Things will be organized differently in the future, however, with FBO/ECV as a member of EPFL on one side and VVCS, as a member of FIFPro, and ProProf on the other. A Social Dialogue with EPFL and G-14 on one side and FIFPro on the other at the European level would be just the opposite. In both situations, special interests (see ProProf and G-14) would be represented in a general framework. In the Netherlands a recent initiative by several leading players' agents (cf. the previous ProProf initiative) has been to establish a national players' agents organization, named ProAgent (see also below under "Players' agents"). ProAgent is aiming for the creation of a European organization in the near future which would (also) be entitled to represent the players' interests at European level, in addition to FIFPro.

Returning more specifically to the themes which could be discussed in a Social Dialogue, G-14 would obviously join sides with EPFL where their views on general themes coincide. Naturally, the opposite might occur with regard to other issues. It might also be the case that G-14 and FIFPro have similar interests with regard to UEFA and/or FIFA (e.g. the related themes of player release and international match calendars).

The formal framework of the European Social Dialogue is laid down in Articles 136 et seq. of the EC Treaty. In principle, agreements between social partners may address any topic. The social partners are therefore not bound to deal only with social subjects. The topics mentioned in the EC Treaty include:

- Working conditions
- Information and consultation of the employees
- Integration of those excluded from the labour market
- Equality of men and women with regard to labour market opportunities and treatment at work
- Social security and protection of the employees
- Protection of employees on terminating the employment contract
- Representation and collective defence of the collective interests of the employees and employers, including employee participation
- Employment conditions for subjects of third countries who are legally resident in a Community territory
- Financial contributions for enhancing employment and creating jobs.

Below, I will give a list (in alphabetical order) of (topical) themes which could be of specific interest to G-14. In each case the background of the theme is described (why is it an issue?) and it is explained why the theme would be suitable for inclusion in a Social Dialogue. The appropriate heading(s) in the EC Treaty (see above) is/are also given, i.e.: the "home-grown" rule (freedom of movement/freedom of employment), the player release system (working conditions), image rights (protection of employees after terminating the employment contract), salary capping (control of player wages), pension funds (social security and the protection of employees), investment (player) funds (freedom of movement/freedom of employment), non-EU nationals/work permits (freedom of movement), the international match calendar (working conditions), artificial turf (working conditions), the pyramid structure (European Sports Model), and players' agents. The last two issues are of a general and fundamental nature touching on the very structure of professional football in Europe (i.e. representation and collective protection of the collective interests of employees and employers by means of a Social Dialogue), but some interests can also be said to be specific to G-14. The following issues could also be considered suitable for inclusion in a Social Dialogue, although they are not currently specific to G-14 as such: transfer rules, TV rights, player unemployment, change of nationality/naturalizations (representative teams), licensing, state aid, the Service Directive, doping, football hooliganism, corporate social responsibility (CSR), good governance in sport, multiple ownership of clubs, etc.

Of course, when social partners meet in a Social Dialogue, it would be useful if all issues of concern to the European professional football sector were discussed, even if they are not "social" as such. The opportunity of all parties involved meeting should be used to maximum advantage. In particular, in a Social Dialogue all developments occurring in "Brussels" and affecting professional football should be considered.

Artificial turf

Introduction

In September 2005, FIFPro approached G-14 to form a united front against artificial turf. FIFPro is opposed to the introduction of artificial turf in professional football. Out of the 18 G-14 members, 17 (not including Ajax Amsterdam) turned out to be fierce opponents of this new development. A FIFPro/G-14 coalition on this issue will face the FAs and UEFA/FIFA in opposition. The main question is whether artificial turf is detrimental to the quality of play and whether players will be more vulnerable to injuries as a result. In both respects, clubs and players have common interests. However, we should remember that the quality of artificial turf continues to improve. Of course, there is no argument against the view that real football should only be played on natural grass.

Suitable for Social Dialogue

The quality of play is in the interest of both clubs and players, as is the reduction of injury risks. Here there is clearly a common interest to be protected against football's governing bodies. Although this may

not seem to be a theme which is of specific interest to G-14, the history of the issue shows that it could become one, given FIFPro's request to G-14 to create a united front to oppose artificial turf.

"Home-grown" players rule

Introduction

UEFA will impose specific quotas on clubs for the inclusion of locally trained players between the age of 15 and 21 in Champions League and UEFA Cup matches. The rationale behind these quotas is that they would enhance the training and development of young talent. From next season, at least four "home-grown" players must be included in teams for European club games - at least two trained by a club's own academy and a further two trained by other clubs within the same association. By the 2008/2009 season, the minimum number of "home-grown" players required should have been increased to eight.

Suitable for Social Dialogue

The new rule would seem to restrict the freedom of movement of young players as it implies "indirect" or "hidden" discrimination. Such discrimination would be based on different criteria than nationality, i.e. training in the club and/or national association, but would indirectly result in the discrimination of foreigners. Most of the "home-grown" players would be nationals and not foreigners, making it more difficult for foreign players to move to a country where they had not been trained and educated. The "home-grown" players rule could potentially restrict cross-border labour mobility. This raises the question of the compatibility of the "home-grown" players rule with European Law (Article 39 of the EC Treaty: freedom of movement for workers). An issue like this which concerns the freedom of movement/employment of players from the perspectives of both employers' and employees' organizations could be included in the Social Dialogue. The rule concerns European level (Champions League, UEFA Cup) football and would appear to directly affect G-14 interests. It is clear that the "home-grown players" rule is in the interest of the national FAs. The underlying idea is that the national teams would be strengthened if enough youngsters were given the opportunity to play in the premier League of their own country. This explains why UEFA introduced this rule, which is particularly important for the "Big Five" in Europe. For a country like the Netherlands, the rule is less applicable to the national team as the best players play abroad in the premier Leagues of the "Big Five". On the other hand, this rule is not directly in the interest of the (elite) clubs, as they need the best home-grown and foreign players. There is therefore a conflict of interest between clubs and associations in this respect. G-14 and FIFPro would seem to be united against UEFA/FIFA and FAs on this issue because the absolute freedom of movement/employment of any player, local or foreign, is also in the interest of FIFPro.

Image rights

Introduction

Given the huge media interest in football, the advent of new technology and the "Hollywood" status of players, the financial exploitation of image rights has become increasingly important in professional football. Players entering into a fixed-term employment contract with a club already have to sign a separate contract regarding their image rights. This contract gives the club the right to profit from the player's image rights. Image rights contracts apply to a longer period than the employment contract. When the player reaches the end of his employment contract, the former club can request that the new club buys out the image rights contract. Naturally the new club is keen to exploit the player's image.

Suitable for Social Dialogue

Due to the tendency to financially exploit the image of elite players it is likely to be in the interest of G-14 clubs that the "transfer" of image rights from one club to the other is regulated in general terms in the Social Dialogue. Players would need the same legal certainty.

International match calendar

Introduction

The interests of clubs, in particular elite clubs and national football associations as well as UEFA and FIFA, are increasingly contradictory as far as the international match calendar is concerned. The main reason is the rising number of international matches. In Europe, after the fall of the Soviet Union, UEFA acquired many more member countries. The qualification groups for the European Championship and World Cup subsequently became larger. The Confederations Cup (national teams) is a new FIFA tournament and the World Cup for club teams became a tournament instead of a single match between the champions of Europe and South Africa in Tokyo as before. On the other hand, the winner of the UEFA Champions League currently has to play thirteen matches up to and including the final. The (elite) clubs needed more guaranteed matches to secure their income. Although the second groups round of the Champions League was abolished some years ago, a one group round was recently introduced in the UEFA Cup competition. More matches mean more TV and sponsoring income for FAs as well as for FIFA and UEFA, particularly during the final rounds of the European National Teams Cup and the World Cup. The number of finalists has also considerably increased, meaning more matches. Too many national team matches prevent (elite) clubs from playing enough international friendly games and tournaments abroad, which would usually be held during the closed season. However every two years, the summer calendar is full of national team football. Furthermore, the FIFA match calendar now includes international friendly and practice matches throughout the year. Then there is another problem for European (elite) clubs. The final round of the Africa Cup takes place during the League season in Europe and, according to the FIFA rules, clubs are obliged to allow their foreign players to play for their country (including preparation). Generally speaking, every national team match means that the clubs' international players (nationals and foreigners) are not at the disposal of the club during their preparation. As a result, the elite clubs are often unable to implement a regular training programme at the club. On the other hand, playing for the national team greatly increases the quality and value of a player.

The result of playing too many matches is the potential mental and physical overburdening of the players. This naturally affects the quality of play.

Suitable for Social Dialogue

Such stress is not in the interest of the clubs or the players. There is common ground here for G-14 and FIFPro to propose solutions. Moreover, the clubs' financial and commercial interests are directly at stake. Sometimes their players return injured from international matches. The players are their working capital in which they have invested large sums of money under (the operation of) the current transfer rules. They cannot play enough friendly games and tournaments and they therefore merchandize their teams internationally. The match calendar issue brings up the broader issue regarding the validity and conditions of the compulsory FIFA player release system as it now stands. From the point of view of labour (industrial) relations, an overly heavy match calendar resulting in the overburdening of players must be modified in accordance with the international rights of employees. These state that the number of working hours per day, etc. must not be disproportionate and that the tasks assigned must be physically and mentally acceptable (labour/rest balance). It is therefore in the interest of clubs and players that the players are protected against overburdening.

The current challenge facing G-14 with regard to the player release system seems to be securing the modification of the match calendar. Objectively, there are various options to achieve this: the introduction of two or more levels of competition for UEFA and FIFA qualifying matches (preliminary rounds or even an A and B group, etc. with promotion and relegation), fewer dates reserved for friendly matches on the national team calendar, the abolition of the Confederations Cup and World Cup for teams in their present form, fewer matches during the final rounds of the European Cup and World Cup, and reduc-

tion of the number of teams and therefore matches in national Premier League competitions. As the players are "in the ownership" of the clubs, it seems logical that the clubs' commercial interests would prevail. After all, which came first: the club or the nation?

Investment (player) funds

Introduction

The current trend for clubs to use investment funds to maximize the budget for the acquisition of players is in principle a threat to the freedom of movement of players as well as the freedom of employment of players. The extra budget is created by attracting external investors and involving them in the acquisition of players. The external investors receive a return on investment which is created when a player moves from one club to another. The external investors obtain the federative rights to the player. This means that they receive their money back, including a profit, when the player is registered for his new club at the national FA. The highest return on investment for the investors is naturally obtained when a player is transferred at the moment that he is worth the most.

Suitable for Social Dialogue

In order to avoid infringing Article 39 of the EC Treaty with regard to the free movement of workers, it must be guaranteed that the external investors gathered in the fund do not have a decisive vote in the movement of the player. An infringement of the free movement of workers can easily occur through clauses in a contract or by means of actual practice. The free movement of players must be safeguarded and the authority of the investors' funds over the players controlled by the clubs. Investment funds are financially the most attractive in relation to young elite players, and young and other elite players usually play for elite clubs. There is therefore a clear common interest between G-14 and FIFPro here.

Non-EU nationals

Introduction

Germany recently abolished the rule whereby only a limited number of non-EU players were allowed to play in professional football. The 36 clubs in the first and second *Bundesliga* are now allowed to have an unlimited number of non-EU nationals under contract. This was decided by the German professional League (DFL). This amendment implies that elite clubs like Bayern Munich, Schalke 04 and Werder Bremen, which have the financial means to invest in the transfer of foreign players from Africa and South-America, can now strengthen their position on the players' market from an international/European perspective. On the other hand, under the new UEFA "home-grown" players rule, the clubs will be obliged to include at least four such youngsters in their squad. In addition the German FA (DFB) requires a restriction in the number of players per team. This would give local players more chance to play.

Suitable for Social Dialogue

The German example shows that the unrestricted admission of non-EU players is in the interest of the elite clubs. However, if FAs apply different national rules in this respect,

they will jeopardize the international/European competitive status quo. And that is currently the case.

Moreover, besides having different sporting rules, national legislation also differs from country to country regarding work permits. Therefore from the perspective of G-14, EU harmonization with the highest degree of openness towards non-EU nationals could be the solution to the problem. However, it is possible that, on behalf of its EU member players' unions, FIFPro would not support unrestrictedness as it would prefer to protect the labour market for EU nationals first and foremost. It is in the interest of the FAs and thus UEFA/FIFA to oppose openness, as openness would weaken the quality of national representative teams, especially in the EU's major footballing nations. FAs (and national governments!) could strengthen the national team by getting better foreign players naturalized under accelerated public nationality law procedures. However this way of operating is increasingly being opposed by restricting the availability of a new "sport nationality" to foreigners under the sporting rules of the IFs and national sports-governing bodies.

Pension funds

Introduction

A so-called bridging pension may allow the player to deposit a percentage of his salary into a fund during his active career. This arrangement enables the professional football player to save money for later on in life, after his professional career. At the end of his career he financially bridges the years up to his pension by means of payments from the fund. These payments will then fall under a favourable tax rate. The CFK (*Contractspelersfonds KNVB*) is just such a fund in the Netherlands. However a European fund would have to guarantee that fund deposits are made by the player's own choice and not by obligation (indirectly) imposed on him by the FA.

Suitable for Social Dialogue

The specific interest of G-14 is not to oppose the introduction of a European fund if the issue were tabled by FIFPro for example, but to create guarantees during negotiations that participation in the fund is voluntary for the players. A pension fund is not always the best solution for elite players, a case which was illustrated by the founding of ProProf in the Netherlands as a reaction to CFK. The issue of pension funds is a good example of the monitoring role which could be exercised by G-14 by being a partner in the Social Dialogue regarding new developments in European professional football.

Players' agents

Introduction

Players' agents, FIFA and others not working for the official national players' unions, have a permanent commercial interest in concluding as many "transfers" of players as possible because of the commission they receive from each transfer. This often results in unrest within players' groups and clubs, also beyond the official transfer periods. During transfer windows, there is currently a continuing "circulation" of players per professional footballing nation, in Europe and the world at large. Proportionally, too much money that is "in the game" goes to agents to the detriment of clubs and players alike.

Suitable for Social Dialogue

In the Netherlands, an initiative was recently introduced to try and organize the agents. This initiative involved the FBO (the clubs' organization for both Leagues which is still independent from the Premier League organization ECV, but which appears set to become integrated into ECV and First Division (cf. Championship in UK) CED), ECV, CED and the FA. The Dutch FA is enthusiastic about this initiative. One could imagine the establishment of a European or even a global players' agents' organization which could participate in regular tripartite dialogue with employers' and employees' organizations. Certain issues could be settled in the Social Dialogue, but would require the consent of the agents if the settlement were to work in practice, for example "salary capping". The agents would then have to operate within the financial boundaries determined in the Social Dialogue. In the Social Dialogue, FIFPro could support the mutual salary capping agreement approved by the G-14 members. Besides the above considerations, which are still largely academic due to the lack of a working international players' agents representative organization (the IAFA (International Association of Football Agents) is a dead body), the position of players' agents with regard to their important financial involvement in European professional football could and should be considered as an agenda item for the Social Dialogue. The quality and effectiveness of the FIFA Player Agents rules is one of the specific issues to be studied in this context.

Player release system

Introduction

Under the FIFA rules, clubs are obliged to allow their players to play for the national team.

This is naturally an honour for the player, but he still might not voluntarily accept such an invitation. It could be argued that by playing for the national team, the value of players increases, which is undoubtedly a positive thing for the club. The value of players who participate in the European Championship and the World Cup increases even more. However, the pertinent FIFA rule which is confirmed at national level in the FA Statutes of each country dates back to "amateur" times. The clubs have to pay insurance for their players even when they are preparing and playing in the national team squad. If players return to their clubs injured from international matches, the club's strength is weakened in its home competition and European matches due to the absence of such key players. The clubs receive no compensation from their FA, UEFA or FIFA for having fulfilled the mandatory player release rule for international matches. The extra international matches for the national team imply an added physical and mental burden for the players concerned. Moreover, from the point of view of fair competition law, it is quite unique that firms are required to put their employees on loan to another firm for a certain period of time which then makes money out of the activities of those employees during those periods! In particular, the presence of elite players from elite clubs in the final rounds of European (and other regional) and World Cup championships allows the FAs, UEFA and FIFA to earn vast sums from broadcasting rights, sponsorships, gates, etc. The money spent by TV companies on international matches and the sponsoring they obtain may not be re-invested in the clubs' game!

Suitable for Social Dialogue

This player release issue is an international/European issue which is initially relevant to elite clubs like the G-14 members. This is illustrated by the club cases G-14 is supporting/directly involved in versus FIFA. However, whatever the court decides, whether it be favourable or a compromise, due to the threat of overburdening players it is also in the interest of FIFPro that the player release rule is amended for the benefit of the clubs. The rule should be amended in the direction of evenhandedness between football-governing bodies and the clubs. This issue is the perfect illustration of the fact that the clubs, elite or otherwise, should be able to independently negotiate with UEFA and FIFA on the basis of having been officially recognized by those bodies as partners.

Pyramid structure

Introduction

The current prevailing pyramid structure (European Sports Model) dates from "amateur" times, as the protection of the vital interests of the clubs, particularly the professional elite clubs, is not an integral part of the system. The reason for this state of affairs is that the clubs are indirectly represented by the FAs in UEFA and FIFA. In a purely formal sense, the clubs are considered to have tacitly agreed to all UEFA and FIFA decisions which affect them. In a way, UEFA and FIFA operate as the "government of the State of Football". According to the "one club, one vote" and "one association, one vote" democratic principle of decision making, a small minority of clubs like G-14, although they financially represent 35% of the professional football market in Europe, has to accept the decisions taken by the greater majority of clubs and FAs. In a regular industry in a democratic society, commercial firms are independent of each other and do not depend on the public authorities either. In professional football in Europe, the opposite is the case. The least that could be done to alter this would be to introduce official participatory democracy for the clubs in the decisions of FAs, UEFA and FIFA in all questions which directly or indirectly affect them.

Suitable for Social Dialogue

G-14 needs to participate with FIFPro in the Social Dialogue to protect its vital interests in relation to players' interests. A second step is for the present structure of professional football in Europe to be placed on the Social Dialogue agenda from a much broader perspective. A workable option might be to let UEFA and FIFA govern amateur football, the "grass roots" of the game, as well as representative football. The same would naturally apply to the national FAs. Professional club football (the Leagues) would acquire an independent position, although remaining contractually linked for certain practical purposes and (impartial) services (national teams, referees, disciplinary law, etc.) to the present governing bodies.

Salary capping

Introduction

Players' salaries constitute the clubs' greatest expenditure. Increasing competition keeps pushing up salaries. Increases are sometimes so excessive that clubs spend more on salaries than they receive in revenues. The imminent problems are obvious: salaries rise, revenues drop, clubs go bankrupt or (in the smaller Leagues) there will be an even greater exodus of top players. A salary cap is in place for a number of sports in the United States, where it is also part of a collective labour agreement. A salary cap comes in two forms: hard or soft. A hard cap links the salary to a percentage which the employer may maximally spend on salaries. A soft cap also links the money to a percentage which the employer may maximally spend on salaries, but in this case the percentage is linked to the revenues which the club generates in a given season. With a soft cap the salary limit can be subject to deviation under some circumstances. A soft cap is more relevant to football. In practice a salary cap creates financial stability in the sector. It must be noted that a salary cap can only be introduced successfully if this is done across the entire EU - in other words if it is transnational. The use of salary caps in professional football has been suggested as a solution to the problem of clubs spending unsustainable levels of player wages in order to compete at the highest level. Salary caps are by definition restrictive. Depending on the form they take they restrict the amount clubs can spend on wages, thus restricting the supply and demand for players. Capping is therefore likely to be considered an issue for EU competition law. Careful consideration should be given to the overall context in which the decision to employ a salary cap was taken. An environment of economic crisis in professional football would make salary caps more likely to survive legal challenge. In this environment, salary caps may be justified on the grounds that they maintain the economic viability of teams competing in the League and that they preserve the competitive balance between clubs. Some commentators have argued that the softer the cap the harder the law should intervene. If the objective of the cap is to safeguard competitive balance, then a hard cap should be preferred as this imposes a flat ceiling on the spending of all clubs. A soft cap, which links spending to revenue, disproportionately affects the ability of small clubs to improve their position. This places them at a competitive disadvantage and at risk of closure. Competition law, which is designed to promote competition, could not sanction a system which curtails competition to this level. The fact that a hard cap is more restrictive and less appealing to the larger undertakings and high earners is not relevant under this analysis. As long as players have the right of free movement to seek alternative employment, a hard cap should not amount to a breach of competition law. To achieve maximum legal certainty in this field, the international players' union (FIFPro) must give its consent to such a move although high-earning players are less likely to consent to a hard cap. Consent could be provided through a collective labour agreement with the employers (clubs).

Suitable for Social Dialogue

In the light of the above, capping does not seem to be suitable for discussion in the Social Dialogue with FIFPro in general. The general introduction of capping in European professional football is not in the interest of G-14. If EPFL introduced it into the Social Dialogue with G-14 and FIFPro or if FIFPro itself wished to place it on the agenda, G-14 should use its monitoring role in the Social Dialogue and block discussion at least as far as G-14 clubs are concerned. Besides, a cap would considerably restrict the room for manoeuvre of players' agents to increase salaries and thus their own commission. And, very specifically, the members of G-14 themselves have internally agreed on a "hard" cap by way of a gentlemen's agreement: a max-

imum of 70% of the budget should go to player salaries. An alternative for capping is licensing for the purpose of maintaining the economic viability of clubs (cf. the newly introduced UEFA licensing system). Of course, salary capping could be part of a licensing system.

Chapter 8: Summary, conclusions and recommendations

1. It is recommended that the G-14 explicitly incorporate participation in a European Social Dialogue in its Statutes as one of the official purposes (cf. EPFL).
2. If we compare the role of FAs as the central governing bodies in the pyramid structure (European Sports Model) with that of the government of a country in a democratic society, it is difficult to imagine how a conflict of interests could be avoided between governing bodies and (statutorily, contractually and/or factually non-independent) social partner organizations representing the clubs as employers in a Social Dialogue. A similar conclusion would in principle apply to the issue of (in)dependence at the European level.
   EPFL is "very" representative, but not independent. Functional, factual independence with regard to "industrial relations"/Social Dialogue at the European level in relation to UEFA and FIFA and also of their members in relation to the national FAs should be explicitly incorporated in the EPFL Statutes at the least. Apart from that, the recognition of UEFA's presence as a third party in *any* Social Dialogue in Europe - even if it is neutral to both social partners' interests - has to be deleted from the Memorandum of Understanding between UEFA and EPFL to which explicit reference is made in the EPFL Constitution, since a Social Dialogue in EU terms never has a tripartite character.
3. G-14 is an organization (EEIG) officially recognized under EU law, possessing - under the present circumstances of the pyramid model in professional football - a maximum degree of independence of its members in relation to UEFA, FIFA and the FAs. However, other than is the case for the first criterion (representativeness in as many EU Member States as possible), the G-14 does not fulfil the second EU criterion, since its members/clubs as such are not part of the national social partner structures. However, it could be argued that this is not relevant if the Champions League is considered as a "subsector" of the European professional football sector (see also under 6). If this view is taken G-14 would be a legitimate social partner on the employers' side in a Social Dialogue.
4. There are a number of precedents in other sectors of industry as to participation of specific organizations as (additional) partners in the pertinent Social Dialogue Committees (cf. the direct representation by (groupings of) individual undertakings/companies in the Temporary Work and Audiovisual Sectors; the incorporation of a "non-social" representative organization in the Chemical Sector) that would allow for the argument that G-14 could be admitted to a Social Dialogue in the professional football sector, on the condition of course that partner organizations would recognize G-14's involvement.
5. Because of the requirement of participatory democracy in sports federations (governing bodies) under European law, it may very well be argued that G-14 in order to be able to protect its interests should be entitled to participate in a Social Dialogue. Moreover, notwithstanding the fact that it is not officially recognized by the football-governing bodies, the very existence of G-14 has become a aspect of the "specific characteristics of sport" of which account should also be taken in promoting Social Dialogue in the professional football sector.
6. The phenomenon of organized competition is a conditio sine qua non for sport and as such it is a "specific characteristic of sport" by which professional football (again) differs from the average industrial sector. The Champions League could be qualified as a "subsector" of the European professional football sector. The specificity of the Champions League as a separate competition - with its own financial-economic characteristics - could be used as yet another argument for not automatically applying the EU admissibility criteria for the purposes of a Social Dialogue in this case.
7. The following themes have been identified as being of special interest for G-14 in a Social Dialogue: artificial turf, the "home-grown" players rule, image rights, the international match calendar, investment (player) funds, non-EU nationals, the pension fund, players' agents, the player release system, the pyramid structure, and salary capping.

Informal Social Dialogue

Finally and apart from the above, it is suggested that the European Commission could take steps to introduce an informal Social Dialogue which would continue until all aspects concerning participation have been clarified. This has in fact been done before in other sectors and could prove perfect for paving the way for a comprehensive Social Dialogue and negotiation result (Edith Franssen, *Legal Aspects of the European Social Dialogue*, Antwerp-Oxford-New York 2002, p. 57, paragraph 3.2.7.). All parties in the European football sector would have to be represented in the temporary Committee and given the opportunity to express their views and ideas and receive feedback from the European Commission and Social Dialogue experts. The participants in Committee meetings should all be parties who are stakeholders in football, i.e. UEFA, FIFPro, the Sport Unit of the European Commission's Directorate-General for Education and Culture, the Directorate-General for Employment and Social Affairs, the Directorate-General for Competition, the G-14, the EPFL including other Leagues and an organization representing national initiatives like the G-12 (Spain) and G-5 (Belgium).

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Contract research

- The Balance between the Game and the Money (on sport, media and competition law), with KPMG and CMS Derks Star Busmann, commissioned by the Netherlands Ministry of Health, Welfare and Sport (2000);
- Aren?t We All Positive? — A (socio)-economic analysis of doping in elite sport (with KPMG and Lamsma, Veldstra & Lobé), commissioned by the European Commission, Brussels (2001);
- Legal Comparison and the Harmonisation of Doping Rules (with University of Erlangen, Max Planck Institute, Freiburg i.B., Germany, and Anglia Polytechnic University, Chelmsford, United Kingdom), commissioned by the European Commision (2001);
- Promoting the Social Dialogue in European Professional Football - Reports on the "old" and "new" EU Member States (with EFFC), commissioned by the European Commission (2004);
- Football Hooliganism with an EU Dimension: Towards an International Legal Framework, commissioned by the European Commission (2004);
- Professional Sport in the Internal Market, commissioned by the European Parliament (with Edge Hill University, United Kingdom. and Sport 2B, The Netherlands), Committee on the Internal Market and Consumer Protection (2005);
- Sport in National Sports Acts and Constitutions: Definition, Ratio and Purposes, commissioned by the Netherlands Ministry for Health, Welfare and Sport (2005);
- Study into the Possible Participation of EPFL and G-14 in a Social Dialogue in the European Professional Football Sector (2006).

The Right to Information and of Short Reporting/Short Extracts with regard to Sports*

by **Robert Siekmann****

I. Introduction

In this contribution I will first deal with the case NOS (the Dutch joint national public broadcaster) v. Talpa (a new commercial broadcaster) regarding the possible existence of an enforceable "preferential right" of the NOS with regard to the short reporting (summaries) of matches of the Dutch Premier League on the basis of Article 71t of the Media Act (Mediawet).

Secondly, I will deal with and comment on the proposed Article 3b of the Television without Frontiers Directive in the light of the NOS v. Talpa case. What conclusions may be drawn from comparing the proposal with the case, what lessons may be learned?

II. NOS v. Talpa case

In an open tender procedure, in December 2004 Talpa, regarding acquisition of exclusive sports rights as the pre-eminent method for rapid acquisition of a viable market share, had acquired from the Dutch Premier League (ENV) the right to broadcast on television extracts of all Premier League matches and play-offs in the seasons 2005/2006 up to and including 2007/2008. Apart from that, a second right regarding the same package (however, with a maximum of 5 minutes per game), on the condition of postponed (deferred) transmission had been purchased by another commercial broadcaster (RTL). This tender was a total break with tradition. In the past, dating back to the fifties, the rights regarding extracts always were sold privately to the NOS. Next to this arrangement, in recent years the rights to live broadcasting of matches in the Premier League were purchased by Canal+. However, the Dutch national competition authority had raised objections to this state of affairs. This time next to NOS and Talpa there was even a third competitor, that is Versatel who acquired the live broadcasting rights.

In pursuance of the results of the tender procedure, the NOS had requested Talpa to open negotiations regarding the acquisition by the NOS of a sub-licence for the broadcasting rights that had been acquired by Talpa. The latter refused the request to negotiate, also because under their contract with the Dutch Premier League they were not allowed to concede any sub-licence.

1. Article 71 t of the Dutch Media Act

In its Decision of 14 June 2005 in the NOS v. Talpa case which was upheld in appeal (Decision of 2 February 2006), the national Broadcasting Authority (Commissariaat voor de Media, CvdM) starts by saying that, next to the text of the Law, for the interpretation of Article 71 t of the Media Act the views expressed in the parliamentary papers and pertinent academic literature are essential. Article 71 t Dutch Media Act states:

"A commercial broadcasting organization is not allowed to broadcast or cause to be broadcast a programme item as referred to in Article 51d, second paragraph, insofar as this concerns a part of a television programme which can only be distributed in the Netherlands after acquisition of the rights pertaining to it, if:

a. the commercial broadcasting organization has not informed the Foundation (read: NOS; RS) on time that it wishes to acquire the rights referred to in the opening words to the exclusion of the organizations which have obtained broadcasting time for nationwide broadcasting; and
b. the Foundation has notified the commercial broadcasting organization within a reasonable time after the information referred to under a. that it or another organization which has obtained broadcasting time for nationwide broadcasting wishes to include the programme item in question in its programme."

The Authority then points out that Article 71 t of the Media Act consists of the following elements. The Article addresses commercial broadcasters who wish to acquire the rights regarding programme items inter alia covering topical sports reporting, in any case including the competition and cup matches and international events (these are items which need to be broadcast with high frequency and regularity, have a service character, or can be produced more efficiently when produced jointly by public broadcasters). The commercial broadcaster is not allowed to broadcast such programme items if two conditions are fulfilled. The first condition is that the commercial broadcaster has not notified timely the NOS of its wish to acquire these rights with the exclusion of public broadcasters. Secondly, the NOS has to notify the commercial broadcaster within reasonable time after the commercial broadcaster's notification that they themselves or another national public broadcaster wish to incorporate this item in their programme. These conditions if read together result in the absurdity that the NOS has to react within reasonable time to a notification that was never made or was not made timely. So, the only logical application of these conditions implies that this provision must be understood in such a way that the conditions for the ban on transmission are fulfilled if (a) the commercial broadcaster has not made their notification timely or (b) the NOS has informed the commercial broadcaster about its wish to incorporate the item in their programme.

2. Background

a) National: preparation for Art. 71t

As to the parliamentary papers in the years 1989/1992, that is the drafting history of Article 71 t of the Media Act, the Broadcasting Authority is of the opinion that the question whether the ratio of securing the programme task of the NOS followed naturally from guaranteeing access (the right) to information of the general public that is necessary in the interest of a democratic society, or whether these two starting-points have to be understood as independent purposes at the background, is not fully crystallized. The Authority concludes from the parliamentary debate in the Second Chamber of Parliament that the free access of the public to certain information during the drafting of Article 71 t of the Media Act is the first priority. During the discussion of the Bill in the First Chamber of Parliament, Government was more explicit about the background of the "preferential right". It was explicitly indicated that the "preferential right" is not intended to protect the NOS as a public broadcaster. The purpose was to guarantee that important information is accessible for the Dutch public in general.

With regard to the intention of the Dutch FA (KNVB) to establish in cooperation with a number of commercial partners a special ("pay per view") sports channel (Sport 7) which would have the exclusive right to exploit the television rights, in particular, to matches of the Dutch Premier League, second division, FA Cup etc., the Government in February 1996 explained the purpose of the "preferential right" more explicitly: this would comprise not only the access of the Dutch public to important information, but also the securing of the programme task of the public broadcaster.

Sport 7 had the right to sell its exclusive rights as sub-licences to third parties in the Netherlands and abroad. At the time Sport 7 con-

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cluded an agreement with the NOS for the sub-licensing of football matches. The Broadcasting Authority was of the opinion that the parties concerned by this agreement had implemented Article 71 t of the Media Act adequately.

b) Supranational: Art. 3a TwFD

Then, in June 1997 the new Article 3a of the European Community's Television without Frontiers Directive came into force. It reads as follows:

"1.Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of three months from the notification, the Commission shall verify that such measures are compatible with Community law and communicate them to the other Member States. It shall seek the opinion of the Committee established pursuant to Article 23a. It shall forthwith publish the measures taken in the Official Journal of the European Communities and at least once a year the consolidated list of the measures taken by Member States.

3. Member States shall ensure, by appropriate means, within the framework of their legislation that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters following the date of publication of this Directive in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with the preceding paragraphs via whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1."

So, shortly speaking, according to the newly inserted Article 3a of the Television without Frontiers Directive every Member State had the freedom to compose a list of events which are of major importance for society[1] and which therefore have to be broadcast on free-to-air television. The anxiety is plainly that broadcasters to whom a fee must be paid by viewers to secure access to transmissions will acquire exclusive rights to major events with the consequence that the general population will be deprived of the opportunity to view such events for free.[2]

This new regime was incorporated in June 2000 in the Media Act.

Article 72 of the Media Act:

"1.A list shall be drawn up by order in council of events which if they are broadcast as part of a television programme shall in any case be broadcast on free television. It may thereby be determined which of these events shall also be considered events as referred to in Article 3bis of the European Directive.

2. An event may be placed on the list referred to under paragraph 1 if at least two of the following requirements are fulfilled:
a. the event is of general interest to Dutch society;
b. the event has special cultural meaning;
c. the event was already broadcast on free television in the past and could count on high ratings;
d. it is a major international sports event in which the national team participates.

3. Further rules shall be established by order in council for the implementation of the obligation referred to in paragraph 1. These shall in any event include rules determining whether the events included in the list if they are broadcast as part of a television programme shall in any event be broadcast on free television by means of whole or partial live coverage or whole or partial deferred coverage."

Article 73 of the Media Act:

"1. An organization which has obtained broadcasting time or a commercial broadcasting organization shall exercise acquired broadcasting rights pertaining to events included in the list referred to in Article 72, paragraph 1, in accordance with the rules established pursuant to Article 72.

2. An organization which has obtained broadcasting time or a commercial broadcasting organization shall exercise broadcasting rights acquired after 30 July 1997 in accordance with the rules which have been established by other Member States of the European Union in accordance with Article 3bis, first paragraph, of the European Directive."

At the time, the legislator stated that he fully supported the purpose of Article 3a, that is to guarantee the access of every citizen to the topical news reporting of events of a general interest for a reasonable price. Listed sports events ("large international sports events in which the Dutch national team participates") had to fulfil at least one of the following additional conditions:

- being of general interest for Dutch society;
- having special cultural importance;
- the event was broadcast in the past already on free-to-air television, having a large viewership.

NB: Since it was revised by the Protocol of 1 October 1998, the Council of Europe Convention on Transfrontier Television also now contains, in Article 9a, provisions on public access to events of major importance. Both the content and terminology of Article 9a are deliberately adapted to Article 3a of the Television without Frontiers Directive. One difference is that lists have to be submitted to the Standing Committee established under the Convention. According to the guidelines issued by this Standing Committee for the implementation of Article 9a, the level of importance of an event depends on four criteria:

- the event itself or its outcome has a special general resonance in society, not just for those who ordinarily follow the sport or activity concerned;
- the event has cultural importance;
- it involves national team or representatives;
- and the event has traditionally commended large audiences on free television.

At least two of these conditions must be met for an event to be deemed as being of major importance.

c) Development of the conflictual case

In November 2004 the Parliamentary Undersecretary for Education, Culture and Sciences (including broadcasting issues) pointed out that the NOS should have the opportunity to broadcast "reasonable" extracts. It was a question of negotiation what the meaning of "reasonable" would be in this context. In December the Minister of Education, Culture and Sciences supported this view in Parliament. At the time the Broadcasting Authority stated that, according to its

1 Recital 21 of Directive 97/36/EC reads: They should be "outstanding events which are of interest to the general public in the European Union or in a given Member State or in an important component part of a given Member State"; Recital 18 refers non-exhaustively to the "Olympic games, the football World Cup and European football championship".

2 According to recital 22 of the Television without Frontiers Directive "free television" for these purposes means "broadcasting on a channel, either public or commercial, of programmes which are accessible to the public without payment in addition to the modes of funding that are widely prevailing in each Member State (such as licence fee and/or the basic tier subscription fee to a cable network)".

opinion "reasonable" extracts are broadcast on the usual days and times which are reasonable for the public.

According to the Broadcasting Authority's opinion, in view of its drafting history Article 71 t of the Media Act guarantees that programmes which report on events of a national interest are accessible to the Dutch public. This explains the exceptional provision of a transmission ban in the Media Act. At the time it was already possible to get official permission for commercial broadcasting if 48% of all households were reached (60% of the 80% of the households that were connected with the cable networks). Moreover, it should be considered that the listed events regime was not yet in force at the time. An arrangement which secures the access of the Dutch public to important information by incorporating a transmission ban in the Act was in conformity with the original purpose of the legislator.

Although it may be concluded from the parliamentary papers (see, in particular the Government's point of view in the context of the Sport 7 initiative) that the public task of the NOS has been stressed more emphatically in the course of time in relation to the ratio of Article 71 t of the Media Act, this cannot be derived explicitly from the text of the article and its drafting history. Apart from that, the relationship between Article 71 t and Articles 72 and 73 of the Media Act was not explained any further by the legislator, when the listed events regime was introduced.

As to the request of the NOS, the Broadcasting Authority finally concluded that, in view of the content and purpose of Article 71 t of the Media Act and the system of the Act the question whether Article 71 t contains a right of the NOS to a sub-licence which may be enforced by the Broadcasting Authority, was to be answered in the negative. The Authority has no legal means to force the parties concerned to start negotiations and to come to terms on a sub-licence to be granted by Talpa and/or the Premier League to the NOS. The Authority considered in this context inter alia that Talpa's transmissions would fulfil in any case the original ratio of Article 71 t, that is to guarantee the access of the Dutch public to important information through free-to-air television. Extracts of the Dutch Premier League matches would be presented to the Dutch public even via two free-to-air channels, Talpa and RTL. Moreover, both commercial broadcasters cover an almost 100% viewership by cable, satellite and digital television.

3. Draft Article 3b of the Television without Frontiers Directive

In the course of the revision of the Television without Frontiers Directive and the modernization of provisions that protect the "right to information", the European Commission issued in 2003 two discussion papers under the heading "Access to events of major importance for society". The Commission invited comments on Article 3a of the Directive, a provision that allows Member States to draw up a so-called list of important events that may not be shown exclusively on pay-TV. It was also suggested to model a European right to short reporting on Article 9 of the European Convention on Transfrontier Television (Council of Europe, 1989):

"Each Party shall examine and, where necessary, take legal measures such as introducing the right to short reporting on events of high interest for the public to avoid the right of the public to information being undermined due to the exercise by a broadcaster within its jurisdiction of exclusive rights for the transmission or retransmission (...) of such an event."

In contrast to its role in relation to lists of major events, the Council of Europe's Convention on Transfrontier Television has led the way as far as short reporting rights are concerned. The Convention does not impose a binding obligation for Member States to introduce the right to short reporting, but invites them to examine such measures. The current wording of Article 9 dates back to the 1998 Protocol. The original version of 1989 mentions only a very vague duty to examine measures to prevent exclusive broadcasts. The current version, in contrast, explicitly refers to the right of short reporting. In 1991, the Committee of Ministers of the Council of Europe adopted a recommendation putting in more concrete terms the comparatively vague provisions of Article 9 as it stood at the time. This Recommendation is not a legally binding instrument. The Recommendation begins by discussing the need to weigh up the rights of a broadcasting organization which has acquired broadcasting rights - the so-called "primary broadcaster" - and the right of the public to information, the protection of which means limiting the rights of the broadcaster. It recommends that any "secondary broadcaster" should be allowed to broadcast short reports on major events, either by recording the signal of the primary broadcaster (however, the primary broadcaster's transmission does not necessarily have to be recorded, particularly since in some circumstances this renders it impossible to complete the short report in time and can result in a loss of quality: usually access to the "clean feed" signal is possible at the rear of the primary broadcaster's outside broadcast unit) or by obtaining direct access to the event in order to produce a short report. Where a major event is composed of several self-contained elements, each self-contained event should be deemed to be a major event. If an event takes place over several days, secondary broadcasters should be allowed to broadcast at least one short report per day. In general, the authorized duration of a short report should depend on the time needed to communicate the information content of the event. The Recommendation also contains provisions on the use of short reports. They should be used exclusively by the secondary broadcaster and only in regularly scheduled news bulletins. In the case of organised events, short reports should not be broadcast before the primary broadcaster has had the opportunity to carry out the main broadcast. Also, where the short report has been made from the signal of the primary broadcaster, it should mention the name of the primary broadcaster as the source of the material. In principle, a short report should not be reused and all original programme material used by the secondary broadcaster should be destroyed after production of the short report. Finally, the primary broadcaster should not be allowed to charge a fee for the short report. In any event, the secondary broadcaster should not have to contribute towards the cost of broadcasting rights. Nevertheless, the organizer of a major event should be able to charge for any additional costs incurred if the secondary broadcaster is granted access to the event site.

This part of the revision was driven by the wish to modernize the European rules on private exclusionary legal or electronic control over viewers' access to broadcast television coverage of "important events" or news reports, and to bring European broadcasting law in line with Article 10 of the European Convention on Human Rights (Freedom of Expression).

The results from the consultation were summarized in the Commission's communication on the future of the European audiovisual regulatory policy. Here, the Commission concluded that "the issue of right to access to newsworthy events needs further attention." As a consequence, in December 2004, focus group three, a group of experts from academia, industry, regulatory authorities, and other stakeholders, was invited to debate on possible revisions of the Directive to realize what the European Commission then called the "right to information". Based on the work of focus group three, the European Commission launched a second discussion paper with the same title in the summer of 2005. Again, comments were invited, also in preparation for a major audiovisual conference, "Between culture and commerce", that was held in September 2005 in Liverpool and where conclusions of the consultation of the relevant topic were presented.

The recommendations of the focus group for a modernization of the European rules on access to audiovisual content:

Focus group three on the right to information/short reporting embraced two approaches to the problem of exclusionary control over access to broadcasting content and the "public's right to access to information". First, there was a strong majority for maintaining the list-of-important-events concept in its unchanged form. Ideas suggesting the European Commission make the list concept mandatory for all Member States, demand more involvement in the process of drafting the lists, or harmonize the interpretation of certain conditions ("substantial part of the public") were rejected. Second, it was concluded, though not unanimously, that the list-of-important-events concept was not enough to protect the public's access to infor-

mation and that a right to short reporting should be introduced in addition. (The right to information and to short extracts has been differently approached by stakeholders: on the one hand some stakeholders claimed that there is no need to have a harmonization of different regulatory frameworks at European level and on the other hand public broadcasters considered that the current negotiating conditions do not facilitate the access to short extracts and a provision in the Directive would be helpful in that respect.) Yet unclear are the conditions of, for example, whether to include news/press agencies (non-linear intermediaries), and the limitations to such a right. These two suggestions were brought forward during the consultations and will be taken into account in the final phase of the process of modernizing the European rules on audiovisual content.[3]

The right to short reporting does not guarantee coverage of the full event in free-to-air television but only the possibility to report about the event by those broadcasters that have not acquired the exclusive rights for full coverage. Conceptually, the right to short reporting in Article 9 of the European Convention on Transfrontier Television comes the closest to an access right for broadcasters. This is certainly true where it provides a right of access to an event's site. As far as the right to recording a signal for the purpose of using it in a short report is concerned, it resembles an exception to exclusive rights in the public interest similar to Article 5 (3)c of the Copyright Directive. Unlike Article 3a of the Television without Frontiers Directive, the right to short reporting does not impose any restrictions on the exclusivity of the transmission - the event can still be broadcast on an exclusive basis. But, similar to an exception in copyright law, it does oblige the entity that carries out the exclusive transmission to allow certain uses, namely the making of short reports. In other words, the right to short reporting makes the exercise of exclusive transmission rights subject to certain limitations.

An implementation of the right to short reporting in the revised Television without Frontiers Directive should be considered seriously. Having said that, focus group three did not consider a very practical, major problem with the right to short reporting and access of the public to information, at least where it is invoked against pay-TV operators. The right to record a signal for the purpose of making a short report would not be effective if the primary broadcaster is not obliged to provide the signal in unencrypted form. The secondary broadcaster would first have to gain access to the unencrypted signal or the event itself before being able to make a short report. Article 9 of the European Convention on Transfrontier Television, however, does not include a corresponding obligation for the primary broadcaster. In practice, this could lead to lengthy negotiations and the risk that the interest of the public to be informed about a particular event becomes obsolete with the passage of time.

4. Current Regulations at Member State Level

The right of short reporting may be granted in the form of a right for third parties to access the signal of the transmitting broadcaster, or as a right of access to the event venue, where secondary broadcasters can film their own reports. Depending on which system is used, these rights are claimed from different parties: in the first case, the transmitting broadcaster and, in the second, the event organiser.[4]

The right of access to other broadcasters' signals throws up the question of the obligation to mention the source. Such an obligation would not be considered harmful to the right of short reporting, since it would not adversely affect the function of short reports, i.e. to inform the public. The broadcaster transmitting the report would automatically be expected to mention the source, and the intrusion on the primary broadcaster's rights would be lessened if its name were mentioned.

Although the Council of Europe Recommendation favours the right to produce short reports free of charge, a fee is usually payable.

The 90-second upper limit is usually applicable. However, if this rule is liberally interpreted, the news-type character of such reporting can be lost if a large number of short reports are broadcast. For example, if 90 seconds is devoted to each of 10 matches played in a 20-club football league on a single day, along with comments between matches, studio interviews and league tables, the news programme concerned in fact becomes a sports programme.

III. Proposal (of 13 December 2005) for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

1. Text

[...]

Recitals 27 and 28:

"Entertainment rights in events of public interest may be acquired by broadcasters on an exclusive basis; however, it is essential to promote pluralism through the diversity of news production and programming across the European Union, as well as to respect the principles recognized by Article 11 of the Charter of Fundamental Rights of the European Union[5];

Therefore, with regard to the fundamental freedom to receive information[6] and the need to ensure that the interests of viewers in the European Union are full and properly protected, it is necessary to establish that those exercising exclusive rights concerning an event of public interest grant a right to other broadcasters and intermediaries to use short extracts for the purposes of general news programming on fair, reasonable and non-discriminatory terms, and that such terms are communicated in a timely manner before the event of public interest takes place to enable others sufficient time to exercise such a right; as a general rule, these short extracts shall not exceed 90 seconds."

[...]

The proposed Article 3b reads as follows:

"1. Member States shall ensure that broadcasters and intermediaries established in other Member States are not deprived of access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted by a broadcaster under their jurisdiction for the purposes of short news reports.

2. Short news reports should be chosen freely by the broadcasters or intermediaries from the transmitting broadcaster's signal with at least identification of its source."

2. Comments

If we compare the decision in the NOS v. Talpa case regarding the meaning of Article 71 t of the Media Act (at the national level) with draft Article 3b of the Television without Frontiers Directive and the pertinent Recitals text (at the international, European level), it may be observed:

1) that in Article 71 t a distinction is made between the national public broadcasters (NOS and others) and commercial broadcasters, whereas this is not the case in the context of Article 3b;
2) that Article 3b has as its second ratio "pluralism" (diversity of news programming) which mutatis mutandis could be compared with securing the programme task of the NOS in Article 71 t;
3) that in connection with Article 71 t explicit reference is made to "topical sports reporting, including in any case the competition and cup matches and international events", whereas Article 3b only

3 See proceedings, at p. 15 et seq., available at: http://ec.europa.eu/comm/avpolicy/docs/reg/modernisation/liverpool_2005/uk-conference-report-en.pdf

4 See also Max Schoenthal, Major Events and Reporting Rights, IRIS plus, April 2006.

5 Recital 18 of the Television without Frontiers Directive refers to a "right to information" and to ensuring "wide access by the public to television coverage" of events of major importance to society. Article 10 of the European Convention for the Protection of Human Rights provides that the right to freedom of expression shall include the right to "receive and impart information without interference by public authorities and regardless of frontiers". See also Natali Helberger, The "Right to Information" and Digital Broadcasting: About Monsters, Invisible Men and the Future of European Broadcasting Regulation, Entertainment Law Review, 2006-2, pp. 70-80.

6 This formulation is now also to be found in Article 11 of the EU Charter of Fundamental Rights, which is to be interpreted to conform with the Convention.

concerns short extracts which as a general rule shall not exceed 90 seconds;

4) that, as a consequence of the different types of reporting the procedures in both cases differ fundamentally. Article 71 t contains a notification system (by the commercial to the public broadcaster) even before the pertinent exploitation rights have been acquired, whereas Article 3b allows the freely taking-over of the primary broadcaster's signal with at least identification of its source, that is after the applicable (general) terms having been communicated by the primary broadcaster to other broadcasters beforehand;
5) so, Article 71 t concerns regular programme items (cf., RTL's second right to short extracts to a maximum of 5 minutes per Dutch Premier League game), whereas Article 3b concerns the ad-hoc taking-over of information (very short extracts, that is "highlights" of a maximum duration of 90 seconds). If we would translate Article 3b further to the Dutch situation: on the basis of this provision the NOS could reproduce in its, general or specific, sports news reporting only the goals scored in a match (for example, the classic game Ajax Amsterdam v. Feyenoord Rotterdam of which Talpa would (have) show(n) a summary).

3. Conclusion

It is recommended that an EU short reporting regime would also be generally applicable in the purely national context (cf., the listed/protected events regime). There should be enshrined a right to short reporting in the new Directive, at the national as well as transnational levels.

❖

The Professional Athlete - Employee or Entrepreneur?*

by **Ian Blackshaw****

Introductory Remarks

Since the reestablishment of the Olympic Games of the modern era by Baron Pierre de Coubertin in 1896, sport has become highly competitive and business orientated. Amateurism has given way to professionalism. In fact, sport is now worth more than 3% of world trade and 2% of the combined GNP of the 25 Member States of the European Union. With so much to play for, it is not surprising that the Olympic Motto '*it's not the winning that counts but the taking part*' has largely - and many would say sadly - gone by the board. Indeed, it is the winning that now counts and, in many cases, at any price (witness the continuing problem of doping, especially in new forms, for example, blood and gene doping). We no longer talk of amateur athletes but of elite athletes, by which we mean athletes that earn their livings through the practise of their sports. The funding of sports and sports persons through the public and private sectors nowadays is also big business. The race is on for gaining more medals. The question - and a tricky one at that - quite naturally arises: are athletes employees or entrepreneurs? And the answer to this question has significant financial and fiscal implications, as well, of course, as sporting ones.

In this Paper, I have interpreted my brief quite broadly and I shall look at the situation and certain legal issues and cases in the United Kingdom and also under EU Law; and then try to draw some general conclusions on the legal status of athletes. Not surprisingly, because it is the world's favourite game and the most lucrative sport in global commercial/financial terms, worth billions of dollars (and still counting!), association football, footballers and football clubs figure prominently in the text.

The first and logical question that needs to be posed and answered is: who is an employee under English Law?

Legal Definition of Employee under English Law

Under the Employment Rights Act of 1996, an employee is defined as a person who has entered into or works under a contract of employment.[1] Thus, there is no statutory definition of who is an employee and, therefore, one has to turn to case law (in other words, the Common Law) to answer this important question.

Traditionally, the Common Law applied the so-called 'control test' to determine whether a person was an employee or not. Under this test, a person was an employee if told what to do and how to do it by someone else, with little or any choice in the matter.

In the application of this test, claims that certain sports persons were not employees by reason of the particular skills they possessed which their 'employers' were not able to control were quickly dismissed. Thus, the then Master of the Rolls, Lord Cozens-Hardy, dealt with such arguments in the case of *Walker v Crystal Palace Football Club*[2] in the following terms:

"*It has been argued before us ... that there is a certain difference between an ordinary workman and a man who contracts to exhibit and employ his skill where the employer would have no right to dictate to him in the exercise of that skill; e.g. the club in this case would have no right to dic-*

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1 Section 230.

tate to him how he should play football. I am unable to follow that. He is bound according to the express terms of his contract to obey all general directions of the club, and I think in any particular game in which he was engaged he would also be bound to obey the particular instructions of the captain or whoever it might be who was the delegate of the authority of the club for the purpose of giving those instructions. In my judgment it cannot be that a man is taken out of the operation of the Act simply because in doing a particular kind of work which he is employed to do, and in doing which he obeys general instructions, he also exercises his own judgment uncontrolled by anybody."[3]

By the same token, cricketers are also considered to be employees. Under Clause 5(a) of the Standard Contract for Professional Cricketers, cricketers are required to "*.... obey all the lawful and reasonable directions of the captain or deputy captain*."

For the needs of modern sport, the control test has become inadequate for determining whether a sports person is or is not an employee. And so this test has been replaced by a test of whether an individual is working 'on his or her own account'. This will depend upon all the circumstances of the particular case. For example, does the individual concerned bear any of the risks of loss?[4]

The method by which tax is paid is a relevant but not necessarily a decisive factor. Generally speaking, club managers will be considered employees even if treated as self-employed persons for tax purposes.[5] But in the case of *Sports Club plc v Inspector of Taxes*6, Arsenal Football Club succeeded in having payments made to off-shore companies in respect of the Club's commercial exploitation of the image rights of their players, David Platt and Dennis Bergkamp, classified, for tax purposes, as capital sums and, therefore, non-taxable as income. In other words, for the purposes of licensing their image rights, the players were not considered to be employees but entrepreneurs - in other words, 'independent contractors'. This case is not only interesting from a fiscal/employment point of view, but also from a jurisprudential point of view, in that, for tax purposes, image rights are considered to be capital assets even though image rights *per se* are not recognised as a separate species of property under the general law in the United Kingdom[7].

However, in the case of *Singh v The Football Association Ltd, The Football League Ltd & Others*,[8] an Employment Tribunal had to decide whether referees are employees of The Football League and/or The Football Association and thus able, for example, to claim unfair dismissal. The Tribunal accorded no particular importance to the fact that referees are normally taxed as self-employed persons. And similarly emphasised that there was no single test for determining the issue. Rather, the Tribunal had:

"*To stand back and consider all aspects of the relationship between the parties with no single factor being decisive or determinative but seeking to give appropriate weight to all relevant factors*."

The Tribunal attached little importance to the requirement on referees to wear particular dress or on referees' lack of entitlement to claim sick pay or holidays. In other words, under English law, each case must be decided on its own particular and circumstances.

An important consideration, however, in determining whether a person is an employee or not is the existence or absence of 'mutuality of obligations'. Thus, in the case of *Carmichael v National Power*9 the House of Lords, the highest Court in the land, decided that guides 'employed' by National Power were not employees because there was no obligation to offer the guides any work and equally there was no obligation on their part to accept any work that they were offered.

Again, the question of whether a person is or is not an employee is a matter of substance and not of form. Just because someone is described in the contract as 'self employed' it does not necessarily follow that such person is not an employee. This will depend on all the other terms of the contract as well as the particular circumstances of the case. Thus, a bar manager, who was described as 'self employed' was, in fact, held by the Court to be an employee because the other terms of his contract showed that he could not be considered to be 'his own boss'.[10]

Professional boxers, snooker and tennis players are not considered in law to be employees, because, even though they may be under the guidance or control of an agent or manager, as well as being subject to the rules of their particular sport, they negotiate their own entries into competitions and the payments they receive for rendering their services. They are effectively and essentially working for themselves and on their own account.

The Position under EU Law

Under EU Law, footballers have been held to be workers and, as such entitled to the benefits of the freedom of movement of workers' provisions of the EC Treaty and also to its anti- competition rules.

In the famous - or, depending on your point of view, infamous - *Bosman* case[11], the European Court of Justice effectively held that a football player was an employee. As such, under the provisions of Article 39 of the EC Treaty (formerly Article 48 of the Rome Treaty at the time of the ruling), EC nationals have the right to work and reside in any Member State on equal terms with the nationals of that State. This Article is directly applicable and thus enforceable by national courts and tribunals. The Article also takes precedence over any conflicting national laws, under the well-established principle of the supremacy of EU law[12]. As was pointed out in the Opinion of Advocate General Lenz:

"*.....the transfer rules directly restrict access to the employment market in other member States.....under the applicable rules a player can transfer abroad only if the new club (or the player himself) is in a position to pay the transfer fee demanded. If that is not the case, the player cannot move abroad. That is a direct restriction on access to the employment market.*"

The principle established in *Bosman* was applied in the case of the Slovak professional handball player Mario Kolpak.[13] In that case, the question before the European Court of Justice was whether a Slovak national could take advantage of the freedom of movement of workers' rules incorporated in an Association Agreement between the Slovak Republic and the European Union to oppose restrictions placed by the German Handball Federation on players who are nationals of non-member countries that do not belong to the European Economic Area. The Court replied in the affirmative, stating in paragraph 58 of its Judgement:

"*It follows that the answer to the question submitted for preliminary ruling must be that the first indent of Article 38(1) of the Association Agreement with Slovakia 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 EEA Agreement.*"[14]

As demonstrated by *Kolpak* and as pointed out by Dr. Richard Parrish:

"*The impact of the* [Bosman] *ruling has been profound..... Furthermore, the ruling has confirmed sports linkage to the operation of the Single*

2 [1910] 1 KB 87 CA.
3 At p. 92.
4 See *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2QB 497 QBD.
5 See *Massey v Crown Life Insurance Co* [1978] ICR 509 CA and *Young and Woods Ltd v West* [1980] IRLR 201 CA.
6 [2000] STC (SCD) 443.
7 See further on this subject in Blackshaw, Ian S., and Siekmann, Robert C.R., '*Sports Image Rights in Europe*', 2005, The Hague: Asser Press. Co-branding in sport also raises employment law issues where an individual sports athlete has his/her own sponsor and this is in direct conflict with the sponsor of the team of which he/she is a membet. See clause 4 of the new English FA Premier League Standard Player Contract.
8 (2001) ET Case No. 5203593/99.
9 [1998] 1CR 1167.
10 *Withers v Flackwell Heath Football Supporters Club* [1981] IRLR 307.
11 *Union Royale Belge de Soceities de Football ASBL v Bosman*, Case C-415/93, [1995] ECR I-4921.
12 See *Costa v ENEL*, Case 6/64, [1964] ECR 585.
13 Case C-438/00, *Deutscher Handballbund EV v Maros Kolpak* (8 May 2003).
14 Ibid.

European Market whenever practiced as an economic activity. Football is therefore not the only sport to be affected by the ruling."[15]

Thus, generally speaking, employed professional athletes, who are engaged in other sports, are regarded as workers for the purposes of EU law. But, as always, their actual legal status will depend upon all the circumstances of each individual case.

English Common Law Doctrine of 'Restraint of Trade'

But back to football; can clubs and, indeed, for that matter, national and international football governing bodies, treat their players just as they like - as if they were slaves or chattels? Can, they, for example, hold them to long-term employment contracts if the players no longer wish to be bound by them, wishing instead to exercise their freedom of movement rights as EU nationals and move from one country to another and from one employment to another. What is their legal status in such cases? Can they claim that such restrictions are, under English Common Law, unreasonable 'restraints of trade' and, therefore, void on the grounds of 'public policy', in that they prevent them from earning their livelihoods in a manner that suits their purposes.

This very issue was raised in the case of Nicolas Anelka, who, in the Summer of 1999, announced that he no longer wanted to honour his contract to play for Arsenal FC, which had another four years to run, but wanted to move from the UK to Italy and play for Lazio. The problem for Anelka was that Arsenal were not prepared to release him from his contract. This situation generated much legal debate, initiated by Jean-Louis Dupont, the Belgian lawyer who advised Jean-Marc Bosman. He argued that to prevent a player from terminating his employment contract, as the transfer system does, is as much a restraint on the player's freedom of movement as where a player is prevented from moving to another club on the expiration of his contract. It followed that Anelka should have the right to break his contract provided that he was prepared to pay compensation to Arsenal subject to the normal contractual rules for assessing damages to be paid for breach of contract. Estimations of the financial compensation that Arsenal might be entitled to claim from Anelka varied between £5million to around £22million, being the transfer fee that Arsenal required for the player. In the event, much to the disappointment of the sports lawyers, the matter was resolved without litigation by Arsenal accepting a transfer bid for the player from Real Madrid.

However, the Anelka situation does raise the question of whether the 'received wisdom' that the ruling in *Bosman* that Article 39 of the EC Treaty only applies to out of contract' players is correct. Or does it extend to cases where the contract is prematurely broken by the player? There are at least two 'schools of thought' on this legal conundrum! For example, Andrew Caiger and John O'Leary have come up with an intriguing argument to support the contention that *Bosman* also applies to players denied a mid-contract transfer. Caiger and O'Leary argue[16]that any player who unilaterally breaks his contract should be considered to be out of contract. Thus, in line with Bosman the employing club has no option other than to release his registration. The club's only legal remedy is to seek damages for breach of contract. They also argue that to permit professional footballers to act in this way is simply to allow them to act as any other employee under any other contract of employment is able to do.

On the other hand, Roger Welsh, of Portsmouth University, UK, whilst conceding that these arguments are "*cogent*", makes the point that

"*The general tenor of the* [Bosman] *ruling was that an 'out of contract' player is a player whose contract has run its course and thus expired.*"[17]

In line with the normal rules of interpretation of legal texts - at least according to English law - that is, giving the words 'out of contract player' their normal and natural meaning, the author of this Paper is inclined to agree with the Welsh view of this matter rather than the Caiger and O'Leary one. In any case, paragraph 246 of the Opinion of Advocate-General Lenz in *Bosman* would appear to be explicit on this point.

Be that as it may and, in any case, in the view of the author of this Paper, the better legal argument in such situations as the Anelka one is probably to claim 'restraint of trade'. For example, one can compare a young promising footballer with, for example, a young unknown musician in the case of *Schroeder Music Publishing Co Ltd v Macaulay*[18], whom the Court released from his contract which was perceived as unduly restrictive as it tied the individual concerned to the company for five years, with an option for the company to extend this to ten years, in return for which the company was required to give very little. In deciding such cases, as Lord Diplock pointed out in *Macaulay*:

"*.....the question to be answered as respects a contract in restraint of trade ....is was the bargain fair? The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promissory under the contract. For the purpose of this test all the provisions of the contract must be taken into consideration.*"

The 'restraint of trade' doctrine can also apply to more experienced individuals, including sports persons, as the case of *Clifford Davis Management v WEA Records and CBS Records Ltd* shows[19]. In that case, the band, 'Fleetwood Mac' was able to invoke this reasoning to be released from a recording contract which tied the band to a record company for five years, which also contained a provision for the company to extend the contract for a further five years. Although the band had not at the time of the case attained the 'mega star status' they were to go on to achieve, they were already an established band with significant 'chart' successes. However, the Court placed much importance on the fact that the band had not received independent advice before signing the contract in issue. Thus, by analogy, the same principle could be applied to professional football - and, indeed, other sports - where 'long' contracts are used to tie players to clubs and other employers.

It should be added that in England there is a long tradition that the Courts do not generally intervene in sports disputes. They tend to leave matters to be settled by the sports bodies themselves, regarding them as being, in the words of Lord Megarry: "*far better fitted to judge than the courts.*"[20] However, generally speaking, the Courts will intervene in cases of 'restraint of trade', where livelihoods are at stake as in the famous Kerry Packer World Series Cricket case of *Greig v Insole*.[21]

That case involved a legal challenge to the rules of the International Cricket Council (ICC) and the Test and County Cricket Board (TCCB) in England. The ICC controlled the playing of international matches and the TCCB administered and controlled the playing of first class cricket in the UK. In May 1977, World Series Cricket (WSC), a company managed by the Australian entrepreneur Kerry Packer, announced that it had secretly signed up 34 of the world's top cricketers to play in a series of 'test matches' in Australia. In July 1977, the ICC altered its rules so that players taking part or making themselves available to play in a match previously disapproved of by the ICC, after 1 October 1977, would be disqualified from taking art in test cricket without the express consent of the ICC. At the same time, the ICC issued a resolution specifically disapproving of any match organized by WSC. The ICC also recommended that national governing bodies take similar action in respect of their domestic game. The TCCB then resolved to alter its rules so that any player who was subject to the test match and would also be disqualified from taking

15 Parrish, R, 'Reconciling conflicting approaches to sport in the EU', in Caiger, A and Gardiner, S (eds), *Professional Sport in the EU: Regulation and Re-regulation* (2000) The Hague: Asser Press, pp 28-29.

16 See Caiger, A and O'Leary, J, 'The end of the affair: the '*Anelka Doctrine*'- the problem of contract stability in English professional football', in Caiger, A and Gardiner, S (eds), *Professional Sport in the EU: Regulation and Re-regulation* (2000) The Hague: Asser Press, pp 197-216.

17 See Gardiner, Simon, James, Mark, O'Leary, John, Welsh, Roger, Blackshaw, Ian, Boyes, Simon and Caiger, Andrew, '*Sports Law*', Cavendish Publishing, London, Third Edition 2006, at p. 512.

18 [1974] 3 All ER.

19 [1975] 1 All ER 237.

20 *McInnes v Onslow-Fane* [1978] 1 WLR 1520, at p. 1535.

part in first class cricket. Three cricketers, Tony Greig, Jon Snow and Mike Procter, all of whom had contracted with WSC to take part in the 'unofficial' test, issued a writ seeking against the TCCB and ICC, a declaration that the change of rules by the ICC and those proposed by the TCCB were *ultra vires* and in unlawful restraint of trade. The Court held that the imposition of a retrospective ban was a serious and unjust step. It would be to deprive a professional cricketer of the opportunity to be employed in an important part of his professional field. The justifications advanced by the ICC for the suspension of the players from test match cricket were judged to be highly speculative. And, therefore, the ICC failed to justify its rule change. Thus, the new ICC rules were held by the Court to be *ultra vires* and void as being in unreasonable restraint of trade.

Although a useful remedy in appropriate cases of employment disputes, the English Common Law 'restraint of trade' doctrine is problematic, in practice, in that it is impossible to discern general principles of application from the decided cases: on the contrary, each case is decided on its own particular facts and merits. Some you win; some you lose. But that is, I suppose, the lottery of litigation!

The Oulmers Case

A word or two now about the pending case of Abdelmajid Oulmers, which, according to Stephen Weatherill, Jacques Delors Professor of European Law at Oxford University, is likely to transform international football in general and the legal status of players in particular.

Oulmers is a young Moroccan who plays for the Belgian Football Club Charleroi. In November 2004, he was released by his Club for an international friendly match. Unfortunately, he returned badly injured. As a result, for many months afterwards, he was unavailable for selection and the team's fortunes declined. On 5 September, 2005, the Club initiated a legal action against FIFA, football's world governing body, claiming compensation. The Club claims that the rules requiring football clubs to release players for international matches infringe EU Law. The G-14 group of leading European football clubs has intervened in the legal proceedings in support of Charleroi's action against FIFA. The Club is represented by Jean-Louis Dupont, who also represented Bosman.

Under FIFA rules, clubs are obliged to release players for so-called 'international duty' and insure against the risk of injury. Any entitlement to financial compensation is expressly excluded. In other words, if the player returns injured, the club must bear the loss.

Professor Weatherill has described this state of affairs as "*extraordinary*" and has pertinently asked:

"*What other industry requires an employer to surrender a valuable asset and to receive no compensation if it is damaged?*"[22]

At the heart of this case is whether FIFA is in breach of Article 82 of the EC Treaty. In other words, is FIFA, by making rules requiring the obligatory and uncompensated release of players employed by clubs for participation in international competitions organized by FIFA, abusing its dominant position? Certainly, FIFA, like other sports governing bodies, dictates how football is run and can exclude those who decline to play by its rules and is, therefore, in a dominant position within the meaning of Article 82.

According to Weatherill - and the author of this Paper would entirely agree with him - FIFA has gone beyond its role of fixing rules for the good of the game and argues that:

"*The onerous and unilateral nature of the current system condemns it as abusive*."

A further pertinent point in this case is that the clubs are currently excluded from the process of fixing the rules and this, *prima facie*, is also unlawful.

It would seem that Charleroi and the G-14 have a good case against FIFA, but the outcome of any litigation is always uncertain, not least because of the possibility of the parties reaching an amicable - out of court - settlement of their dispute. But, if like *Bosman*, *Oulmers* goes all the way to a final judgement, it will significantly shift the balance of power in the game. Needless to say, FIFA is defending the case.

As Weatherill concludes:

"*If Charleroi and the G-14 win this case, the voice of the clubs will become much louder. Governing authorities will not be forced to abandon their right to shape matters such as the off-side rule but their exclusive grip on decision-making that directly affects the commercial interests of the clubs will be loosened*."

And adds:

"*The lesson of Bosman is that the game can cope - but only if it responds imaginatively*."

Interesting times ahead indeed! But, in any event, this case illustrates once again the need for footballers not to be treated as modern-day slaves but to have a legal status consonant with their rights as human beings and the dignity and moral integrity of the person.

The Meca-Medina Case

A brief mention should also be made of the case of *David Meca-Medina and Igor Majcen v Commission of the European Communities*.[23]

This case deals with athletes - swimmers - who are self-employed and Articles 43 & 49 of the EC Treaty extends the rights of freedom of movement of 'workers' (guaranteed by Article 39) to include the free movement of individuals, who are self-employed, and wish to establish themselves in another Member Sates, or to provide services there.

This was an appeal brought by two professional long-distance swimmers, who had tested positive for nandrolone and banned from competition, against a decision of the Commission (Case COMP/38158 - Meca-Medina and Majcen/IOC) rejecting their claim for a declaration that certain rules adopted by the International Olympic Committee (IOC) and implemented by the Federation Internationale de Natation (FINA) - the World Governing Body of Swimming - were incompatible with the Community Competition Rules and the Freedom to Provide Services in the European Union (Articles 81, 82 & 49 of the EC Treaty).

The appellants claimed that the anti-doping rules in question have economic repercussions for elite athletes, in that they prevent them from providing their services and earning their livelihoods as professional sports persons within the EU, and should be struck down. However, that fact did not, in the view of the Court, prevent the rules from being purely sporting ones - designed to maintain fair play and protect athletes' health. The economic claim was, the Court said, "*..at odds with the Court's case-law*." Indeed, in the earlier English case of *Edwards v BAF and IAAF* [1998] 2 CMLR 363, the Judge held that a rule prohibiting athletes from taking drugs was a rule of a purely sporting nature and did not cease to be so simply because it had economic consequences.

Another intriguing legal argument put forward by the appellants was that the anti-doping rules had been imposed not only for "*altruistic and health considerations*" but also to protect the economic interests of the IOC in having 'clean' Games, not tainted by scandals linked to doping which tend to devalue them. This, as already noted, being a matter of particular concern to the multi national companies who sponsor the Games. Surely this was an economic issue that should be taken into account and bring EU law into play?

However, this argument did not cut any ice either with the Court:

"*The fact that the IOC might possibly have had in mind when adopting the anti-doping legislation at issue the concern, legitimate according to the applicants themselves, of safeguarding the economic potential of the*

21 [1978] 3 All ER 449.

22 Article by Stephen Weatherill in the 'Financial Times' newspaper of 12 September, 2005.

23 Case T-313/02, Judgement 30 September 2004.

Olympic Games is not sufficient to alter the purely sporting nature of the legislation."

In other words, doping is a sporting not an economic issue.

Incidentally, this case was also brought by the pioneering Belgian Lawyer, Jean-Louis Dupont. And it should also be noted that this case is currently being appealed to the Full Chamber of the European Court of Justice.[24]

FIFA Status of Players Regulations

A brief word on the FIFA Status of Players Regulations now follows.

These Regulations shed little, if any, light on who is an employee. In Article 2, they differentiate solely between a professional and an amateur as follows:

"*Article 2 Status of Players: Amateur and Professional Players*

1. *Players participating in Organised Football are either Amateurs or Professionals.*
2. *A Professional is a player who has a written contract with a club and is paid more than the expenses he effectively incurs in return for his footballing activity. All other players are considered as Amateurs*."

However, it is interesting and possibly instructive to note the ambit of these Regulations as set out in Article 1, which provides as follows:

"*Article 1 Scope*

1. *These Regulations establish global and binding rules concerning the status of players, their eligibility to participate in Organised Football, and their transfer between clubs belonging to different Associations.*
2. *The transfer of players between clubs belonging to the same Association is governed by specific regulations issued by the Association concerned in accordance with Art. 1 par. 3 below, which must be approved by FIFA. Such regulations shall foresee rules for the settlement of disputes between clubs and players, in accordance with the principles stipulated in these Regulations. Such regulations should also foresee a system to reward the clubs investing in the training and education of young players.*
3. *a) The following provisions are binding at national level and have to be included, without modification, in the Association's regulations:*
   Art. 2 - 8, 10, 11 and 18
   b) Each Association shall include in its regulations appropriate means to protect contractual stability, paying due respect to mandatory national law and collective bargaining agreements. In particular, the following principles should be considered:
   - Art. 13: The principle that contracts must be respected;
   - Art. 14: The principle that contracts may be terminated by either party without consequences in case of just cause;
   - Art. 15: The principle that contracts may be terminated by Professionals for sporting just cause;
   - Art. 16: The principle that contracts cannot be terminated during the course of the Season;
   - Art. 17 par. 1 and 2: The principle that in case of termination of contract without just cause, compensation shall be payable and that such compensation may be stipulated in the contract;
   - Art. 17 par. 3-5: The principle that in case of termination of contract without just cause, sporting sanctions shall be taken against the party in breach.
4. *These Regulations also govern the release of players for Association teams and players' eligibility to play for such teams in accordance with the provisions of annexes 1 and 2 respectively. These provisions are binding for all Associations and clubs*."

In particular, as will be seen, emphasis is placed in the FIFA Regulations on 'contractual stability' and what this means is spelled out in them. A footballer subject to these Regulations does not enjoy the normal 'freedom of contract' that most other employees enjoy but is subject to a number of obligatory restrictions. Therefore, when drafting employment contracts between clubs and players, the mandatory provisions of these Regulations must be incorporated and respected.

Infringements by clubs and players of these Regulations will be the subject of disciplinary proceedings, and sanctions of a sporting nature and other kinds will be imposed on the offenders.

Conclusions

The subject of this Paper is a vast and complex one; and, indeed, would form a worthy and challenging topic for a most interesting PH D Thesis. In the time available, it has only been possible to scratch the surface of this fascinating side of Sports Law and discuss a few general principles and identify some problem areas and potential legal and practical issues to be aware of at the UK and European Union levels.

Despite the changes in the ten years following the landmark ruling by the European Court of Justice in *Bosman*, football continues to be in something of a state of flux; and also, it may be said, in an ongoing evolutionary phase, especially regarding the rights and duties of players and clubs and the nature of their relationships. There are still a number of 'grey areas' concerning the legal status of athletes which require clarification. So, further legal changes in the corresponding rules and practices can be expected in the foreseeable future, brought about, no doubt, by further bold legal challenges of one kind or another, rather than merely accepting the *status quo*.

Governing bodies, like FIFA, can no longer impose their will on their sports and sports persons with impunity, justifying what they are doing as being 'for the good of the game'. Relationships and dynamics in sport generally are constantly changing and its stakeholders are becoming more militant!

One thing, however, is certain and clear: in the increasingly sophisticated world of elite sport, where there is much to be played for and lost, both in sporting and financial terms, professional advice is needed more than ever before, especially on the negotiation and drafting of meaningful and legally enforceable contracts. Not to invest in and take such advice is not only false economy, but also sheer sporting and commercial folly.

More grist, one might say, to the lawyers' mill!

The International Sports Law Journal

24 For further comment on and discussion of this case, see Blackshaw, Ian, '*Doping is a sporting, not an economic matter*', The International Sports Law Journal, 2005/3-4, pp 51-52.

ASSER International Sports Law Centre

Main publications

- Basic Documents of International Sports Organisations: Statutes and Constitutions, Siekmann/Soek eds,Kluwer Law International, 1998;
- Doping Rules of International Sports Organisations, Siekmann/Soek/Bellani eds, T.M.C. Asser Press, 1999;
- Arbitral and Disciplinary Rules of International Sports Organisations, Siekmann/Soek eds, T.M.C. Asser Press, 2001;
- Professional Sport in Europe: Regulation and Re-regulation, Caiger/Gardiner eds, T.M.C. Asser Press, 2001;
- Ian Blackshaw, Mediating Sports Disputes — National and International Perspectives, T.M.C. Asser Press, 2002;
- The European Union and Sport— Legal and Policy Documents, T.M.C. Asser Press, 2005;
- Sports Image Rights in Europe, Blackshaw/Siekmann eds, T.M.C. Asser Press, 2005;
- The Court of Arbitration for Sport 1984-2004, Blackshaw/ Siekmann/Soek eds, T.M.C. Asser Press, 2006.
- The Strict Liability Principle and the Human Rights of Athletes in Doping Cases, by Janwillem Soek, T.M.C. Asser Press 2006.

Bans on Discrimination and Duties to Differentiate in the German Law of Sports Organizations

by **Klaus Vieweg***

I. Introduction

Differentiation in sports is widespread: according to sex, age, and weight. We distinguish between ladies' and men's football; youth and adult championships; feather- and heavyweight boxing. The reasons for differentiating are not far to seek: differentiation is intended to ensure fairness and an equality of arms in competition. *Discrimination* on the grounds of race or religion, on the other hand, is off limits - in Germany largely in response to the legacy of Nazism and because of the tax and other privileges enjoyed by institutions that benefit the public at large. However, upon reflection, several cases come to mind that belong in the "discrimination" rubric:

- the case of Casey Martin, a permanently disabled man, who wanted to use a golf cart in an American tournament against the tournament regulations;
- the case of Bill May, who, as the only male member of the American synchronized swimming team, was denied the right to participate in the World Championships and the Olympics;[1]
- the case of a twelve-year-old English girl, who wanted to play on a boys' football team and had to resort to the courts to be allowed to do so;[2]
- the furious excitement among the supporters of the traditionally Protestant Glasgow Rangers football club on account of the preponderance of Catholic players in the Rangers squad, in particular as there already is a Catholic football club in Glasgow (Celtic);[3]
- the case of the German gymnast Yvonne Pioch, which sparked off energetic discussions of the minimum age for gymnastics (16 years) introduced by the German Gymnastics Federation (*Deutscher Turnerbund*). The age requirement prevented the fifteen-year-old five-time German champion from qualifying for international competitions for which the International Gymnastics Federation had set a lower minimum age;[4]
- the introduction of a maximum age of 70 for members of the UEFA executive committee,[5] for functionaries of the German Football Federation (*Deutscher Fußball-Bund - DFB*),[6] and for IOC members;[7] or the fact that former German boxer Henry Maske, planning a return to the ring at the age 42, would not qualify for a first-time licence by the German Boxing Federation (*Bund Deutscher Berufsboxer - BDB*), which imposes an age limit of 38.[8]
- the fight over admission to membership between the German Sports Federation (*Deutscher Sportbund - DSB*) und *RKB Solidarität*, a cycling association;[9]
- the refusal, in 1991, of Marylebone Cricket Club, composed of 17.500 male members, to grant membership status to the (female) captain of the English national cricket team;[10]
- the pressure on the world's best snowboarders, who had formed a federation of their own, to return to their national ski federations in order to participate in the Olympics, because only the International Ski Federation, but not the International Snowboard Federation, was recognized by the IOC;[11]
- professional discrimination as in *Bosman*.[12]

Losing - even on account of a wrong decision that results from a misapplication of the rules - is part and parcel of sports. This essay is not about these nonconforming decisions.[13] Rather, it focuses on discriminatory decisions that are in accordance with the rules.

II. Issues Addressed

In terms of the law applicable to clubs and associations, two areas are of particular interest: for one thing, there is the classic right to admission to membership issue or, looked at from the organization's point of view, the question of the duty to admit, with its follow-on problems (III.); secondly, the modalities of participation merit attention (IV.). The article does not consider problems posed by discrimination for employment law and the European law issues raised by *Bosman*, which are discussed in detail elsewhere.[14] The differential treatment of women and men, whether in terms of prize moneys or media exposure,[15] is yet another area that lies beyond the scope of the present article. The article concludes with an examination of whether and the conditions under which a duty to differentiate exists in the German law of sports organizations (V.).

III. Admission and Exclusion

1. Case Law

The issue of a sports association's right to admission to the relevant umbrella organization has come before the courts on several occasions in the history of the Federal Republic of Germany. The "*RKB Solidarität*" case may serve as an example.

a) Rad- und Kraftfahrerbund Solidarität

With 350.000 members to its name, *RKB Solidarität* had been the world's biggest cycling association until its dissolution during the time of the Third Reich. When it was re-founded in April of 1949, the association found itself at odds with the movement towards greater integration and unification in sports. In an application of the single-place

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1 On the Martin and May cases, cf. *S. Zinger*, Diskriminierungsverbot und Sportautonomie (2003), pp. 193 et seq. and her Gleichbehandlung im Sport - unter besonderer Berücksichtigung US-amerikanischer Rechtsprechung, in K. Vieweg, ed., Spektrum des Sportrechts (2003), p. 1 (at pp. 3 et seq.).

2 *Guardian* 15 June 1978, *Daily Mail* 16 June 1978: 15.

3 Cf. "Katholiken bekennen sich zu Protestantenclub," *Frankfurter Allgemeine Zeitung* 5 November 1998: 42. It is worth pointing out, however, that Celtic had already narrowed the denominational gap by employing Protestant players.

4 *Frankfurter Allgemeine Zeitung* 31 July 1995: 23; 9 August 1995: 25; 28 August 1995: 26.

5 Art. 36 (2) UEFA Rules of 24 September 1997 (in their version of 23 April 2004); the age requirement will only have an impact on the 2006-2008 and later terms, since it only applies to elections and re-elections.

6 § 9 Nr. 9 of the DFB regulations in their version of 30 September 2000, last modified 28 April 2005. An age limit (of currently 47 years) also applies to referees in professional football. Cf. "Schmusekurs hat nichts bewirkt," *Mindener Tageblatt* 18 March 2005: 34.

7 Rule 16.3.3 of the Olympic Charter in its version of 1 September 2004; according to bye-law 2.7.1 to rule 16.3.3, the maximum age for members, who were admitted prior to 11 December 1999, is 80 years. According to the same bye-law, there is no maximum age for members elected before 1966.

8 *Frankfurter Allgemeine Zeitung* 18 July 2006: 29.

9 BGHZ 63, 282 = BGH NJW (Neue Juristische Wochenschrift) 1975, 771.

10 Cf. "Der Geist des Weiblichen auf den Zinnen des Palastes," *Frankfurter Allgemeine Zeitung* 10 March 1998: 13. Not all clubs are this set in their ways, however. Thus, the Royal and Ancient Club (R & A) of St. Andrew's in Scotland, which organizes the Open Golf Championships, recently considered opening the event up to professional women golfers, thereby breaking with 145 years of male exclusivism. Cf. *Frankfurter Allgemeine Zeitung* 17 February 2005: 34.

11 Cf. "Zwangsehe der rivalisierenden Snowboard-Verbände für Olympia," *Frankfurter Allgemeine Zeitung* 11 November 1997: 38.

12 ECJ, 15 December 1995, C-415/93 = NJW 1996, 505 = Sp*u*Rt (Sport und Recht), 59.

principle (*Ein-Platz-Prinzip*) enshrined in its regulations, the German Sports Federation (*Deutscher Sportbund - DSB*) turned down all requests for admission preferred by RKB Solidarität between 1954 and 1960. The single place for cycling had been held by the German Cycling Federation (*Bund Deutscher Radfahrer - BDR*) ever since the DSB was set up in 1950. When yet another request for admission in April of 1968 was again turned down by the DSB, RKB Solidarität took legal action.

In its holding of 2 December 1974,[16] the Federal Supreme Court of Germany, referenced § 826 BGB (*Bürgerliches Gesetzbuch* - Civil Code) and elements of § 20 (6) GWB (*Gesetz gegen Wettbewerbsbeschränkungen* - Act against Restraints of Competition), which regulates admission to commercial and professional organizations, in its discussion of a duty to admit to membership where restrictions on admission contained in an organization's regulations are void or only partially applicable. Proceeding from these legal norms, the court developed the formula that a refusal to admit that conforms to the regulations must not unjustifiably discriminate against the applicant vis-à-vis existing members. An application of this formula calls for *a balancing of the interests* involved. On the one hand, there are the legitimate interests of the applicant in becoming a member and the importance of the rights and benefits membership status entails _ rights and benefits of which the refused applicant is, by implication, deprived; on the other hand, account has to be taken of the interest the monopoly organization has in imposing and maintaining restrictions on admission. In each case, the question becomes whether it would be unduly burdensome for the applicant to be required to meet the monopoly organization's conditions of admission. At the same time, the monopoly organization might be expected to try and achieve its ends by means of another, less stringent set of rules, thereby paving the applicant's way to the benefits of membership.

This case highlights the difficulties posed at the time by the duty to admit. The flexibility allowed for by the balancing approach inevitably entails a diminution in legal certainty because of the potential for divergent views. It would take another three years for RKB Solidarität to be admitted to the DSB as an "association with special responsibilities."[17]

b) Evaluation

In their essentials, the positions are the same.[18] Both legal scholars and the courts accept that the appropriate venue for disputes over admission are the civil courts and that the decision is ultimately based on a balancing of interests _ a balancing also mandated by the German Constitution. In the process _ and in a way anticipating membership _ the conditions of admission are subjected to a content review. The fact that different justifications and legal bases are advanced for the duty to admit may be mentioned in passing. The different explanatory models - whether the organization binds itself by its regulations,[19] whether §§ 826, 249 (1) BGB,[20] § 1004 BGB[21] or the rule expressed in § 20 (6) GWB, § 826 BGB[22] are applicable, whether there should be an analogy to § 20 (6) GWB and §§ 33 GWB, 823 (2), 1004 BGB,[23] or whether the duty to admit to membership is simply an implication of the duty to accord equal treatment[24] - do not lead to a difference in result.

Irrespective of the fact that its dogmatic roots lie in private law, the balancing process is ultimately determined by the indirectly horizontal effect, the *mittelbare Drittwirkung*, of the basic rights involved. Where basic rights collide, the conflict is to be resolved by looking for a viable solution that will give maximum effect to each (*praktische Konkordanz*).[25] On the one hand, the umbrella organization may advance Article 9 (1) GG (*Grundgesetz* _ Basic Law), which protects its fundamental right to freedom of association and its autonomy over its internal organization. This autonomy includes the right to opt for the single-place principle which, among other things, serves as a legitimate means to achieve a measure of uniformity. On the other hand, the applicant club or association may rely on its autonomy, which is also protected by Article 9 (1) GG. In this context, the benefits of membership - whether pecuniary or non-pecuniary - of which the applicant club or association would be deprived are especially important. These benefits are determined by looking at the applicant's objective. If the benefits can be secured short of admission - for instance, by entering into an informal agreement with the rival organization - this alternative will usually be preferred. In other words, because a duty to confer membership status constitutes such a severe restriction on an organization's autonomy, a decision in favour of the applicant club or association will only be taken if the monopoly position of the umbrella organization means that the applicant's objective can either not be achieved at all without admission or can only be achieved with great difficulty. However, even in such a case, the individual, constitutionally protected interests have to be ascertained and carefully balanced against each other.[26]

2. Exclusion

The counterpart of admission is exclusion. From the applicant's point of view, the effects of non-admission and exclusion are identical. If membership is a prerequisite for participation or other benefits (e.g. gym times may be conditioned on membership in the district or city sports organization), exclusion will entail the loss of the chance to participate.

The classification of an exclusion from a club or association is contentious. Considered a type of penalty until the mid-1980s,[27] most legal scholars now categorize it as a notice of termination for cause on the part of the organization against one of its members.[28]

The practical relevance of this classificatory skirmish has diminished on account of the density of judicial control of the penalty or notice exclusion.[29] At least as far as monopoly organizations are concerned, the scope of review extends similarly far. The margin of appreciation normally accorded in the interests of the organization's specific values and objectives is restricted by the courts, if membership is particularly important to the excluded party.[30] In the final analysis, this, too, calls for a balancing of the interests involved.[31]

13 For these, see *K. Vieweg*, Fairness und Sportregeln - Zur Problematik sog. Tatsachenentscheidungen im Sport, in Festschrift für V. Röhricht (2005), p. 1255 (at pp. 1265 et seq.).

14 These issues are dealt with in *K. Vieweg/A. Röthel*, Verbandsautonomie und Grundfreiheiten, ZHR (Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht) 166 (2002), pp. 7 et seq.; cf also *R. Streinz*, Die Rechtsprechung des EuGH nach dem Bosman-Urteil, in: P. J. Tettinger, ed., Sport im Schnittfeld zwischen europäischem Gemeinschaftsrecht und nationalem Recht (2001), pp. 27 et seq.

15 For a consideration of the discrimination of feminine sport activities by the media, see *T. J. van Rensburg*, Merely Giving the People What They Want or Differentiation Based on Sex?, ISLJ 2004, 68 et seq.

16 BGHZ 63, 282 = BGH NJW 1975, 771; cf. also BGH NJW 1999, 1326 (at p. 1327).

17 § 5 Nr. 1 lit. c) of the DSB regulations in their version of 28 November 1998, last modified 4 December 2004.

18 For the same argument, cf. also *K. Vieweg*, Teilnahmerechte und -pflichten der Vereine und Verbände, in: E. Deutsch, ed., Teilnahme am Sport als Rechtsproblem (1993), p. 23 (at p. 28).

19 *B. Grunewald*, AcP (Archiv für die civilistische Praxis) 182 (1982) 181 (at p. 184).

20 *D. Medicus*, Allgemeiner Teil des BGB, 8th ed. (2002), para. 1114; *W. Kilian*, AcP 180 (1980), 47, 82.

21 *K. Schmidt*, DRiZ (Deutsche Richterzeitung) 1977, 97 (at 98).

22 DEB-Schiedsgericht, Teilschiedsspruch of 6 November 1996, S 440/96, Sp*u*Rt 1997, 162 (at p. 164).

23 *F. v. Look*, comment on BGHZ 101, 193, in: WuW (Wirtschaft und Wettbewerb) II L. § 38 BGB 1.88.

24 *O. Werner*, Die Aufnahmepflicht privatrechtlicher Vereine und Verbände, unpublished post-doctoral dissertation (Göttingen, 1982), pp. 606 et seq.; *W. Baecker*, Grenzen der Vereinsautonomie im deutschen Sportverbandswesen (1985), pp. 74 et seq.

25 On this, cf. *K. Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, rpt. of the 20th ed. (1999), para. 317.

26 In this context, reference should be made to the current version (4 December 2004) of the DSB guidelines on admission, which were first laid down in 1981.

27 Münch-Komm-*Reuter*, 4th ed. (2001), § 25, para. 42, with further references; Staudinger-*Coing*, 11th ed. (1957), § 25, para. 10; Palandt-*Heinrichs*, 45th ed. (1986), § 25, para. 4g.

28 *W. Flume*, in: Festschrift für E. Bötticher (1969), p. 122; *W. Hadding*, in: Festschrift für R. Fischer (1979), p. 194; Soerger/*Hadding*, 13th ed. (2000), § 39, para. 10; *B. Grunewald*, Der Ausschluss aus Gesellschaft und Verein (1987), pp. 39 et seq.; *F. v. Look*, Vereinsstrafen als Vertragsstrafen (1990), pp. 131 et seq.

29 K. Vieweg, WM (Zeitschrift für Wirtschafts- und Bankrecht) 1991, 211.

30 BGHZ 102, 265 (276) = BGH NJW 1988, 552 (at p. 555).

31 For details, see *K. Vieweg* (supra fn. 29), pp. 230 et seq., with further references.

IV. Modalities of Participation - How to Participate

Once an organization has cleared the first hurdle of "whether" it may participate, a second hurdle looms: how to participate - that is, its modalities.[32] On the one hand, discrimination may result from the fact that the participating club or sportsman cannot influence the rules which the organizing entity lays down unilaterally. Frequently, the actual power structure is important in this regard. Possible bones of contention range from advertising, over the proper number of foreigners and bans on certain materials or equipment, to modes of qualification and the distribution of television and advertising rights. On the other hand, the potential for conflict is fed by a process of increasing commercialization and professionalization, which throws up new challenges and renders traditional rules obsolete. There are three *problems specific to sports law*:

- Firstly, the admissibility of legal protection by the state courts is questionable. In this regard it is sufficient to point out, however, that a complete elimination of legal proceedings by means of an organization's regulations and/or by contractual agreement is not possible. At a minimum, the courts remain competent to review an arbitral award pursuant to §§ 1040 et seq. ZPO (*Zivilprozessordnung* - Code of Civil Procedure).
- Secondly, there is the review of the *content* of an organization's rules and regulations by the state courts.
- Finally, decisions have to be taken by the organization or its members even in the absence of specific rules. This involves the danger that the other party may not agree with a decision that is taken after the event.

Ever since the Federal Supreme Court's decision of 24 October 1988,[33] the judicial review of the *content of an organization's regulations* pursuant to § 242 BGB has been the central point of controversy as regards the relationship between the organization's autonomy, on the one hand, and the competence of the state courts, on the other.[34] The courts' competence to review certainly extends to those organizations that occupy a leading position, economically or socially.[35] Even this limitation should be dispensed with, for the following reasons:[36] reviewing the content of an organization's regulations optimizes the indirectly horizontal effect (*mittelbare Drittwirkung*) of constitutionally guaranteed rights and takes account of the interests of the organization, those of its majority and minority members, and even those of its indirect members, where applicable. It is not only those interests that directly relate to the specific aspect of the relationship between the organization and its member that is under discussion in the case at hand that have to be taken account of in the balancing process. Rather, interests that result from the pursuit of a common objective and hence from the fact that an organization and its members (who are the parties typically affected by its rules) are linked by a complex corporate relationship have to be considered as well. Insofar as the rules of international sports organizations have been adopted by German ones, they, too, are subject to a content review pursuant to § 242 BGB.

A *lack of rules* may lead to discrimination. There are two questions: are the federal or state organizations required to draw up rules and regulations that are sufficiently detailed and non-discriminatory, both as regards their application by the relevant organs and as regards long-range decisions by direct and indirect members? And: is there a duty on organizations to arrive at non-discriminatory decisions even if their rules and regulations do not explicitly support such decisions? The basis of both the duty to regulate and the duty to decide is the reciprocal[37] duty of support owed by an organization and its members under § 242 BGB.[38] This duty implies a mutual duty to inform. The organization's general and abstract rules have to be detailed enough to constitute a reliable source of information on which the organization's members may base not only their present behaviour, but also their longer-term decisions. Additionally, the organization is under a duty to monitor developments and, if necessary, to adjust its rules. Finally, the duty of support implies a duty to decide in an individual case. Content-wise, the decision must conform to the requirements of § 242 BGB. In particular, it must not discriminate without a proper and objective justification.

V. Duties to Differentiate

The problems posed by the differing treatment of sportspeople may also be looked at from the opposite angle. The question becomes whether situations exist in which the discriminating club or association may not only deviate from a certain, generally applicable ban on discrimination by way of exception, but *must accord unequal treatment* to different sportspeople on account of a *duty to differentiate*. As mentioned in the introduction, we conventionally distinguish between male and female,[39] adult and youth,[40] and heavy- and featherweight championships. In motor sports, we classify according to cubic capacity; in cross-country skiing and wrestling we distinguish different styles. Finally, there are classifications according to performance quality (leagues) and according to whether the sportsperson concerned is an amateur or a professional. The question is whether there are case constellations, in which an organization is legally obligated to offer even more differentiated sports competitions than hitherto.

Possible claimants include organization members eager for a change as well as those affected by potential alterations and therefore anxious to avoid them. There are various reasons why such demands may be made. They might derive from a wish to ensure equality of opportunity (see 1.). For instance, an older sportsman might complain about the inclusion of five age-groups in a single competition - common in old-age gymnastics, for instance - on the grounds that he will typically not stand a chance against opponents up to five years younger than himself. The same applies to weight as a criterion of differentiation. Finally, a boxer or fencer may ask not to have to compete against a left-handed person because, physically and psychologically, he has prepared for the "normal case" scenario of having to take on a right-handed opponent. On the other hand, the wish to preserve a particular sport's distinctive character[41] may become a claimant's key motive (see 2.). For example, a figure skating couple - in what would, admittedly, constitute quite a spectacular case - might wish to prevent the organization from granting the right to participate in the same competition to a same-sex couple. Other reasons might motivate the wish for differentiation. Thus, the same-sex couple might refuse to compete with "normal", i.e. mixed-sex couples and ask for a special competition of its own. Whether the organization can be forced to a certain way of proceeding is tantamount to asking whether there are duties to differentiate in sports.

1. Duties to Differentiate to Ensure Equality of Opportunity

Duties to differentiate are not unknown to law. Thus, Art. 3 (1) GG not only formulates the legislator's duty to treat substantially similar things alike, but also its corresponding duty to treat differently things that are dissimilar in character.[42] In the German law of (sports) organizations, the same *duty to accord equal treatment* applies.[43] This duty is a consequence of the organization's duty of loyalty towards its members.[44] The duty to accord equal treatment extends to those sportsmen and -women that have contractually agreed to be bound by its

32 Cf. *K. Vieweg* (supra fn. 18), p. 42.

33 BGHZ 105, 306 = NJW 1989, 1724 et seq.

34 For details, cf. *K. Vieweg*, Zur Inhaltskontrolle von Verbandsnormen, in: Festschrift für R. Lukes (1987), pp. 809 et seq.

35 For this limitation, see BGH NJW 1999, 1326 (at 1327).

36 For details, cf. *K. Vieweg* (supra fn. 29), pp. 229 et seq. (esp. at pp. 234 et seq.).

37 BGHZ 110, 323 (at p. 330) = BGH NJW 1990, 2877 (at p. 2879).

38 For a more detailed discussion of this aspect cf. *K. Vieweg* (supra fn. 29), pp. 244 et seq.

39 For a consideration of gender discrimination in sports and its implications, see *S. Cornelius*, Affirmation of (In)Equality?, ISLJ 2004, 72 et seq and *G. Autran Dourado Dutra Nicacio*, Brazilian Sports and Women Discrimination, paper presented to the 11th I.A.S.L. Congress, Johannesburgh 2005. For the related issue of discrimination of transsexual athletes, see her paper "The Participation in Sports Competition of Athletes who have had Surgery for Sex Change," presented to the same conference.

40 Cf. *K. Bill*, The Prevalence and Nature of Age Discrimination Practices in UK Sport and Recreation Organisations, in: D.P. Panagiotopoulos, ed., Sports Law - Implementation and the Olympic Games (2005), pp. 242 et seq.

rules.[45] Therefore, an umbrella organization must ensure that the rules and regulations of member clubs, which apply to individual members in their turn, conform to the duty to accord substantially equal treatment.[46] It follows from its character as a duty to accord equal treatment that this duty, like the duty formulated in Art. 3 (1) GG, may imply a duty to differentiate, since differentiation, too, is ultimately a matter of equality of treatment.[47]

Finally, the *duty to ensure fairness in competition* may be of particular legal relevance in sports. Although _ on account of the many different meanings associated with the word "fair" _ this duty is inherently imprecise, it lays down both a guideline for conduct and a procedural requirement.[48] While, as a guideline for conduct, it demands observance of the rules of the game,[49] as a procedural requirement, it is designed to yield terms of participation and competition that ensure equality of opportunity[50] - a basic requirement of just (because based on performances of comparable quality) results. If the purpose of the fairness duty, however, is to ensure that the rules of competition accord equality of opportunity, then the duty can only be addressed to the institution that lays down those rules, i.e. to the umbrella organization.

Usually, the organization's rules and regulations bind it to the fairness duty.[51] In the absence of a specific provision, § 242 BGB may be relied upon.[52] However, the sportsman, as the person subject to the rules, will only have a claim to the creation of fair rules - i.e. rules that ensure equality of opportunity - and to the observance of the duty to differentiate, if he has a right to rule observance that corresponds to the norm-setting organization's duty. Such a right might derive from the sportsperson's (indirect) membership in the umbrella organization and, possibly, from a contractual relationship.[53]

A (sports) organization's duty to differentiate requires - if we posit an indirectly horizontal effect of constitutional rights - a failure to differentiate, without justification, between substantially dissimilar things. Hence, the first prerequisite of a right to differentiation (as far as the law of sports organizations is concerned) is the organization's actual or prospective *non-differentiation between things that are substantially dissimilar* in character. Such non-differentiation might consist in the lumping together of sportspeople with differing objective performance abilities in a single competition. The inequality must result from the fact that the performances of the individual sets of sportspeople, which would have to be compared, are in fact incomparable in account of differing physical, technical, or stylistic starting conditions. If, in a sport where physical development is important, age groups, whose physical development is very different, are indiscriminately lumped together (for instance, sportspeople from 10-14 and sportspeople from 50-70), this will constitute a case of non-differentiation between things that are substantially dissimilar in character.[54]

It has to be examined next whether the non-differentiation is *unjustified*. Cases decided by the Federal German Constitutional Court (*Bundesverfassungsgericht*),[55] on differentiation in public law, may be looked to for guidance in sports organization cases. According to the Federal German Constitutional Court, differentiation is permissible, if both the objective and the criterion of differentiation are constitutional and if the relationship between the objective and the criterion is acceptable and proportionate.[56] For the reverse case - i.e. equal treatment of dissimilar fact constellations - this balancing approach, also known as the "new formula" (*Neue Formel*),[57] means that it is permissible to treat two cases alike if both the objective of and the criterion for according equal treatment are constitutional and if the relationship between the objective and the criterion is acceptable and proportionate.

Non-differentiation between substantially dissimilar things is uncommon in practice,[58] with the result that such constellations have only rarely come before the Constitutional Court.[59] Consequently, as yet, there is no "new formula" for non-differentiation cases.[60] However, it seems safe to say that non-differentiation will, at a minimum, be impermissible if an observer, with the interests of justice at heart, would consider the existing disparities so important in the context at hand, that the legislature - or, in our case, the norm-setting organization - would have to take them into account in formulating its rules.[61] In the final analysis, this requires a *balancing of interests* already familiar from the consideration of the various bans on discrimination - a balancing of the interests of the organization, on the one hand, and those of the sportsperson, as an (indirect) member or someone bound by independent contractual agreement, on the other. If a sportsperson is of the opinion that a rule set by the organization adversely affects his or her equality of opportunity, one has to ask oneself whether the balance struck between the objectives motivating the rule and the sportsperson's interest in equality of opportunity is an acceptable one.

Non-differentiation may be *justified*, for instance, where, because of a shortage of competitors, collecting together several age groups in a single event opens up the possibility of having a competition in the first place. When addressing the question of justification, alternative solutions may be taken into account. Thus, several age groups might be included in a single competition, yet the performance evaluation might still be responsive to the difference in age. For instance, in a long or high jump competition, the distance jumped or height cleared by older competitors could be related to a complex points system that reflects the fact that a competitor's average performance potential depends on his age.

The aspect just considered leads on to the further question of whether the organization retains any *margin of appreciation* (*Beurteilungsspielraum*). This might be assumed given the possibility of a content review pursuant to § 242 BGB and the hesitancy of the state courts in interfering with organization-specific[62] value judgments. An organization, therefore, is to be accorded a margin of appreciation, by analogy with the discretion enjoyed by the legislature.[63] This margin is limited by the provisions of § 242 BGB.

2. Other Duties to Differentiate

Differentiation may not only be prompted by the wish to ensure equality of opportunity, but also by other considerations. These considerations include, in particular, the wish to preserve the distinctive character of a sport. Thus, in the case of the same-sex figure-skating couple considered above, conservative members of the organization might take the view that skating as a couple, by its very nature, calls for a mixed-sex pairing. In such a case, the chances of ending the competition as the best couple might be even, so that there is no discrimination within the meaning of Art. 3 (1) GG, the organization-

42 Jarass/Pieroth-*Jarass*, Grundgesetz, 6th ed. (2002), Art. 3, para. 5; Sachs-*Osterloh*, Grundgesetz, 3rd ed. (2004), Art. 3, para. 83; Schmidt-Bleibtreu/Klein-*Kannengießer*, Kommentar zum Grundgesetz, 10th ed. (2004), Art. 3, para. 14; for a different opinion, see Maunz/Dürig-*Maunz*, Grundgesetz (version of March 2006), Art. 3, para. 321.

43 For details, see *B. Reichert*, Handbuch des Vereins- und Verbandsrechts, 10th ed. (2005), paras. 771 et seq.

44 *B. Reichert* (supra fn. 43), para. 771.

45 *B. Reichert* (supra fn. 43), para. 772.

46 *B. Reichert* (supra fn. 43), para. 772.

47 Cf. Maunz/Dürig-*Maunz* (supra fn. 42), Art. 3, para. 321.

48 *K. Vieweg* (supra fn. 13), p. 1270.

49 *K. Vieweg* (supra fn. 13), p. 1270.

50 *K. Vieweg* (supra fn. 13), p. 1268.

51 *K. Vieweg* (supra fn. 13), p. 1271.

52 *K. Vieweg* (supra fn. 13), p. 1271.

53 On the various ways of becoming bound, cf. BGHZ 128, 93 (at pp. 96 et seq., 103 et seq.) (equestrian federation); cf also *K. Vieweg*, SpuRt 1995, 97.

54 The same applies where weight is critical. To ensure equality of opportunity, the FIS recently amended its ski jumping rules, relating the length of the skis an athlete may use to his body mass index: to be allowed to use their optimum length, athletes must have a BMI of at least 20,0 dressed (or 18,5 naked). The effect of the new rules has been to make ultra-lean ski jumpers fill out a bit. Cf. "Besser essen: Die neue Gewichtsregel beim Skispringen zeigt Wirkung," *Süddeutsche Zeitung* 22 October 2004: 36; "Skispringer lassen jetzt als schwere Jungs die Muskeln spielen," *Frankfurter Allgemeine Zeitung* 2 August 2004: 22

55 BVerfGE 55, 72 (at p. 88); 68, 287 (at p. 301); 82, 60 (at p. 87).

56 Cf. Von Münch/Kunig-*Gubelt*, Grundgesetzkommentar, vol. 1, 5th ed. (2000), Art. 3, para. 14.

57 Cf. Sachs-*Osterloh* (supra fn. 42), Art. 3, para. 17.

58 *Bleckmann*, Staatsrecht II - Die Grundrechte, 4th ed. (1996), § 24, para. 129; *Sachs*, Staatsrecht II, Grundrechte, 2nd ed. (2003), p. 225, para. 41.

59 BVerfGE 4, 31 (at p. 42).

60 *Sachs* (supra fn. 58), p. 226, para. 46.

61 Schmidt-Bleibtreu/Klein-*Kannengießer* (supra fn. 42), Art. 3, para. 18.

62 *K. Vieweg* (supra fn. 29), pp. 235 et seq.

specific duty of equal treatment, or the duty to ensure fairness in competition. Since it is, in the first instance, up to the organization to determine a sport's distinctive character, the individual sportsperson's right of action is doubtful. A right of action _ in the form of a claim by the sportsperson against the organization to promote the sport which is the declared object of promotion under the organization's rules and regulations _ might exist, however, if the sport in question could be said to have an objective character, independent of the organization's ideas about it, and if the organization wanted to act in a manner inconsistent with it. In such a case, the introduction of a new, character-changing element would require a change in the organization's objective by an assembly of its members. Until the assembly has returned its decision, the individual member might have a right of action purely to protect the character of the sport. If the change imported by the new element does not rise to the level of a change in character, the organization is free to introduce it - at least as against its members - provided it does not infringe on the basic right to equality of opportunity.

A further factor motivating differentiation might be the wish to acknowledge or include special-status groups. If, to return to the same-sex figure-skating couple considered above, the couple, for reasons of "gay pride," for instance, does not want to compete alongside mixed-sex pairings, but wants an independent competition of its own, we are no longer in the realm of (formal) equality of treatment, but in that of substantive equality.[64] The difference to the affirmative measures, which may be required pursuant to Art. 3 (2) 2 GG, consists in the fact that the substantive equality in question is to be implemented not through equal, but through unequal treatment. It is questionable, however, whether a *private* organization can be under an obligation to promote the substantive equality of special-status groups. This could only be the case if the requirements of §§ 826 BGB, 20 (6) GWB were met. The balancing process would have to take account, on the one hand, of the difficulties faced by the special-status group as a result of the organization's taking up (or taking away) infrastructure (gyms, courts) and of its claiming the single place offered by the DSB. On the other hand, due consideration would have to be given to the question of whether the character of the sport in question would change if the special-status group were included, of whether the organization, in acknowledging the "new rubric," might incur the risk of elimination of another Olympic discipline, and whether the special-status group has been invited to participate in the traditional event. In the last-mentioned case, in particular, the group's claim to a competition of its own will usually be excluded.

VI. Conclusion

1. Differentiation in sports is widespread: according to sex, age, and weight. Differentiation ensures fairness and equality in competition. Discrimination, on the other hand, is off limits. The dividing line between permissible differentiation and impermissible discrimination is not always easy to draw. Hence, bans on discrimination and duties to differentiate in the German law of sports organizations are an important topic.
2. The monopoly structure which characterizes the law of sports organizations is supported by the single-place principle. According to this principle, only one member/sport/state/region may be accepted as a member. Whether this can be justified or amounts to unjustifiable discrimination was decided by the Federal Supreme Court in its famous *RKB-Solidarität* case. According to this decision, a refusal to confer membership status that conforms to the organization's rules and regulations may not lead to unjustifiable discrimination against the applicant vis-à-vis existing members. Whether this test is satisfied, falls to be determined by balancing the interests involved.
3. An exclusion from a monopoly organization - the reverse side of the right to admission problem - is judged by comparable criteria.
4. The modalities of participation in a sports competition, laid down in an organization's regulations, may be discriminatory. If this is the case is decided by the national courts according to the fundamental principle of good faith (§ 242 BGB). At present, the courts' review is limited to organizations wielding considerable economic or social power. The review calls for a demarcation of the interests involved. The problem of an absence or shortage of rules, which leads to unjustifiable discrimination, may be solved in a similar manner.
5. Organization-specific duties to differentiate have their legal basis in the duty to accord equal treatment and in the fairness duty. A right to differentiation on the part of the sportsperson affected presupposes that things that are substantially different in character are treated alike. Organizations should be accorded an appropriate margin of appreciation as regards organization- and sport-specific value judgements.

63 Von Münch/Kunig-*Gubelt* (supra fn. 56), Art. 3, para. 23; Schmidt-Bleibtreu/Klein-*Kannengießer* (supra fn. 42), Art. 3, para. 18.

64 On this distinction, see *L. Fastrich*, RdA (Recht der Arbeit) 2000, 65 (at pp. 68 et seq.).

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Sports Administration and Good Governance: Theory and Practice in South Africa*

by **Brian Brooks****

Abstract

This paper is a follow up to papers delivered at the past two IASL Congresses. The first of those earlier papers examined the role of ethics as a regulator of sport. The second discussed the relationship between sport and recreation and the laws protecting the environment. This paper builds on those earlier themes and looks at the need for sports administrators to conform to good corporate governance practices. While examples will be drawn from many parts of the world most attention will be given to South Africa. In the past SA has been seen as a useful case study for investigation into racism and political change. Today SA has characteristics of both developed and developing countries and it provides opportunities for studies in corporate governance particularly in the context of professional sport.

This paper begins by asking why good corporate governance is important in society and narrows that down to an examination of why good governance in sport is important. There is a definition of good corporate governance and a distinction made between ownership and one hand and governance and management on the other. The old and the new models of corporate management are compared. The point is made that sports bodies are different from commercial trading companies while at the same time sharing characteristics of trading corpo-

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rations. They share the pursuit of profit in the age of professional sport but at the same time, and unlike trading corporations, sporting bodies are deeply embedded in the life of the society and call forth deep emotional attachments. This duality is illustrated by an examination of the governance and administration of cricket, rugby and soccer. These three sports illustrate the problem arising from the fact that what was once a game is now a livelihood. Given this the question is then asked: are the accepted principles of good corporate governance and administration applicable to sports bodies? The answer is yes but the conclusion, based on the evidence, is that the old model of corporate governance in South African sport is being broken down only very slowly.

Preamble

"Greater transparency and accountability in both the public and private sectors, considered essential elements of good governance, are needed to ensure equality and equity in the access to, and participation in, economic, political and social activity in all countries."
"Corporate Governance," in Asia: Lessons From The Financial Crisis (UNDP, Malaysia, 2002)

"The man accused of master-minding German soccer's match-fixing scandal testified yesterday that he paid players to throw games and told the court of his frustration over his failure to rig a game in Turkey."
The Star 21st October 2005 at page 23.

"major company collapses in recent years, such as Enron and HIH, have led to questions about the quality of corporate governance of business enterprises."
Council Brief, October 2005 at page 3.

"Soccer s era as the country s biggest sport has finally dawned, eclipsing rugby not only in terms of the number of spectators and audiences but as a destination for sponsors' millions."
Sunday Times Business Times 13 June 2004 page 1.

"Sport is too much a game to be a business and too much a business to be a game."
Journal of Business Ethics, Vol.20. 1999, at page 52.

"Millions pumped into SA rugby despite elections."
The Star 17th February 2006.

Introduction

In the South Africa context Basson and Loubser have observed: "For the management and administration of a sports body as an association or society and for sporting events to take place, there is a need for tasks to be carried out by certain people other than the referees, coaches, players and spectators: the administrators. They are the ones who have to see to it that the aims of the sporting body are attained and that events take place, whether these be competition, recreation or other forms of entertainment." They cite in their support Rice[1] and go on to add: "The commercialization of sport has led to an increased need for professional sports administrators. Despite the fact that sport or types of sport have become professionalized, many sports are still being run by amateurs who are expected to manage sports professionally. In South Africa, particularly, the situation still prevails that, in spite of the huge popularity of sport in this country and its very wide scope, there are actually only a small number of professional administrators, i.e. people who are paid for their work and who are employed exclusively to work in the interests of sport. This situation is likely to change rapidly."[2] It is significant that this is the sole passage in a very bulky loose-leaf service in which the need for professional administrators is mentioned, and that mention is a mere two brief paragraphs. Equally significant is the absence of expressions such "good corporate governance" (or even "good management"), "financial reporting and accountability", "good practice", "the fiduciary obligations of Directors" and possibly the most significant omission, no reference to "business ethics." The foregoing expressions are common currency in any discussion of modern corporate governance and administration.[3]

Why is good corporate governance important?

Widespread interest in trying to ensure good corporate governance in business can be traced back to at least the corporate excesses of the 1980's as exemplified in the film Wall Street where the central character, Gordon Geko, extolled the virtues of the slogan "greed is good."[4] That slogan seems to have been embraced by some in the business world and a series of scandals form the background to investigations and reports into corporate governance in the 1990s.[5] Those investigations and reports have been seized on by business publications which carry regular features exposing incompetence.[6] In addition to, and often building on, these reports and Codes many countries have enacted legislation which, amongst other things,

is intended to snare corrupt business practices.[7] In 1991 a leading journal in Australia carried a lengthy item the opening paragraph of which read: "Directors of public companies are yet again about to have their legal obligations and duties increased as the authorities try to make up for the failure of regulators to prevent the corporate crashes and rorts of the 1980s."[8] In the USA, as a direct response to the collapse of companies such as Enron, Congress enacted the 2002 Sabanes-Oxley Act. In 2005 the Business Roundtable, an association of the CEOs of the leading USA companies and a body which has long sought to exert influence over corporate governance, published its "Principles of Corporate Governance." The 1990's in South Africa saw the release of the King Report On Corporate Governance and this was followed by a second King Report in 2004. In the United Kingdom the Hampel Committee on Corporate

Governance issued its report in 1998 and this was translated into the Combined Code on Corporate Governance. That 1998 Code was replaced in 2003 with a new Combined Code on Corporate Governance. "The United Nations Development Programme (UNDP) initiative on corporate governance was launched in 2000 in wake of the worst economic and financial crisis to hit nations in Northeast and Southeast Asia."[9] In New Zealand the Securities Commission released its report on Corporate Governance Principles for New Zealand in 2004 and the Law Society summarized the contents of the report under a headline which read "The final word on corporate governance?"[10]

1 J. Rice *Start of Play* (London, Prion Books Ltd.. 1998) al page 227ff.
2 J.A.A. Basson and M.M. Loubser (eds), Sport and The Law in South Africa. (LexisNexis. Service Issue 4, Part 1, Sport and Society, Chapter 1-11.
3 Jim Nafziger will forgive me if I also point out that in his seminal text there is but one implied reference to the need for good governance in sports organizations. That is found under the heading Organizational Corruption in Nafziger, International Sports Law (Transnational Publishers Inc., New York, second ed., 2004) at pages 30-34. In a more recent publication there is attention at various points to the need for professional governance and administration of sports: Toomey (ed.) Keeping The Score: Essays in Law and Sport (The Centre for Commercial and Corporate Law. Unisersity of Canterbury, 2005): R. Cloete (ed), Introduction to Sports Law in South Africa (LexisNexis Butterworths, Durban, 2005) chapter 4.
4 Twenty years later the slogan surfaced again and seems to have been readopted on Wall Street. See Cover Story "Wall Street 2005: Is Greed Still Good?" Fortune Vol. 151,No. 10 European Edition, June 13, 2005 in which the theme of the article beginning at page 28 is that "it feels like the 1980's all over again."
5 Worldcom and Enron in the USA. Parmalat in Italy, the financial crisis in Asia in April 1997 and, more recently the Linter tcxtile group collapse in Australia are the inost notorious. For one detailed analysis of one of these scandals see Loren Fox, Enron: the Rise and Fall (Wilby, Hoboken, New Jersey, 2003). For a careful analysis of the Asian crisis see Corporate Governance in Asia: Lessons From The Financial Crisis (UNDP, Kuala Lumpur, 2002).
6 In Australia, for example, a leading weekly journal, The Bulletin, carries an extensive business section. That section is zealous in exposing corporate corruption as illustrated in the issues of November 15 and 22, 2005.
7 For example The Prevention of Corruption Acts of Singapore. Tanzania and in South Africa.
8 "Another turn of the screw for directors of companies," Financial Review, Thursday December 5, 1991 page 50. (a "rort" is a colloquial expression to describe corrupt behaviour)
9 Corporate Governance in Asia: Lessons From The Financial Crisis (UNDP, Kuala Lumpur, Malaysia, 2002), Preface, page 3.

There are other examples of investigations into and reports on corporate governance and it is significant that all of them share a common agreement that the elements of good corporate governance are accountability, transparency and openness.[11] Furthermore, and as a necessary byproduct of openness and accountability, there is growing awareness of the need to step away from the concept of the "Imperial CEO" who ruled and personified his company.[12] Not only is there agreement amongst a wide range of countries as to the broad elements of good governance but there is agreement also as to the principles of good corporate governance. The agreed principles may be summarized under nine headings: ethical standards; Board composition and performance; Board committees; accountability, reporting and disclosure; remuneration; risk management; auditing and financial information; shareholder relations; stakeholder interests. These principles, in many countries expressed in Codes, are expected to be observed by companies listed on the various stock exchanges. While the Codes are not mandatory, a common approach is to expect companies to have a statement in the annual report that the Code has been complied with or to provide an explanation as to why the company has not complied. In the United Kingdom this "comply or explain" policy has been in operation for over a decade "and the flexibility it offers has been widely welcomed both by company boards and by investors. It is for shareholders and others to evaluate the company s statement."[13]

Underlying the specific principles of good corporate governance is a philosophy captured in this passage: ".... effective corporate governance systems are crucial for the stability of market-oriented economies. Greater transparency and accountability in both the public and private sectors, considered essential elements of good governance, are needed to ensure equality and equity in the access to, and participation in, economic, political and social activity in all countries.[14]

Why is good governance in sport important?

Five points can be made.

First, the comments by Basson and Loubser make the obvious point that good governance and good administration is essential for the successful conduct of any sporting organization and any sporting event. Whether it be a footrace, a swimming race, a bicycle race, a game of field hockey, an international swimming tournament, a national soccer final or the Olympic Games, effective administration and organization is essential. The absence of efficient organization carries with it possible harm to participants and legal consequences for the organizers.[15]

Second, inadequate governance and administration is harmful in other ways. Basson and Loubser emphasise that the age of professional sport demands professional administration. What Basson and Loubser do not emphasise is that professional sport connotes money. The amounts are staggering as revealed, for instance, in the announcement by FIFA of sponsorship deals for the World Cup.[16] Even before this announcement it was reported that , in South Africa, "booming sponsorships take soccer into number one spot, eclipsing rugby" with sponsorships of over R300 million in 2003.[17] Sports bodies are money- spinning businesses for all the shareholders and "shareholders" includes amongst others, participants[18], agents[19], advertisers, sponsors[20], broadcasters.[21] manufacturers of sportswear[22]; the management of the various sporting organizations, spectators and politicians. Each "shareholder" has an interest in the responsible and accountable management of these vast sums.[23]

Third, when there is demonstrated incompetence in the conduct of the affairs of sports bodies then an immediate consequence is damage to the image of the sport. The scandals surrounding the Salt Lake City Winter Olympics, match-fixing and doping scandals in soccer[24], cricket, weightlifting[25], athletics, horseracing and even pigeon-racing[26] as well as the ever-present questions about the conduct of professional boxing bring the sport into disrepute with often long-term consequences.

Fourth one long-term consequence is that both participants and spectators will turn away from the sport and, if that happens, sponsors will also turn away.[27] As will be discussed below there has been a decade of scandals swirling around the affairs of the South African Rugby Union (Sarfu). One leading columnist described the scandals as "boardroom tomfoolery" and alleged that "South African rugby is in wretched health". The columnist went further and asserted that the "tomfoolery" had drawn attention away from "the domestic playing front where standards *and interest* are abominable." To underline the declining interest in Rugby in South Africa, which he linked directly to the "tomfoolery" of the Board, the columnist quoted a former Springbok coach who claims that "no fewer than 300 South Africans are playing rugby overseas" which he interprets as "an alarming statistic."[28]

10 Law Talk Issue 622, 12 April 2004 at page 12 (Law Talk is the official monthly publication of the New Zealand Law Society).

11 Corporate Governance in Asia, op cit examines reports on corporate governance in Indonesia, South Korea, Malaysia, The Philippines, Singapore and Thailand.

12 The USA Business Roundtable "Principles of Corporate Governance" is an example as is the Australian model which separates the role of Chairman and CEO: Bosch, "Corporate governance reform in the USA." Corporate Directors Association of Australia Board Report No. 1011. December 2005 at page 5.

13 The United Kingdom Combined Code on Corporate Governance, July 2003. Preamble, Para.5.

14 Op cit note 5 Foreword page 1.

15 For example the collapse of the stand at Ellis Park in Jonannesburg on April 11th 1991 causing 43 deaths. Many years earlier a stand collapsed in Hillborough in England. Prosecutions followed. In New Zealand recently there have been two deaths in unconnected road cycling races. In the first the organizer was charged with criminal nuisance and convicted. That conviction was overturned on appeal. In the second the police decided not to prosecute.

16 Visa is to sign a sponsorship deal for a sum as high as 22 million pounds for the World Cup from 2007 onwards as FIFA's new financial services partner. Mastercard has been the financial services partner since 1990. Other to have signed with FIFA include Coca-Cola, Hyundai, Adidas and Sony: The Star 6 April 2006 at page 27

17 "The bountiful game." Sunday Times Business Times 13 June 2004 at page 1.

18 "The world's most celebrated and controversial spin bowler, Shane Warne, has heen offered at least R10 million to play provincial cricket in South Africa for the next two years." Front page story in Saturday Star (Johannesburg) April 8th 2006.

19 In April 2006 the agent of a prominent English soccer star, Ashley Cole, was charged with breaching Football Association and FIFA rules for "illicit talks" on a possible move to another club. The player had earlier been fined 75 thousand pounds (about R800000) for attending the talks: Saturday Star Sports, April 8, 2006 at page 23. The agent of another English star, Wayne Rooney, has also been charged with breaching the FIFA Players' Agents Code of Conduct while the "Row over Cole's Chelsea meeting rumbles on". Sunday Times, April 9th, 2006 at page 30.

20 "DB breweries is poised to take legal action against the NZRU this week in the face of a major row over what beer fans can buy at All Black test matches." NZ Sunday Star Times 26 September 2004. That is a mild contretemps compared to the following headline: "Sex shop deal stumped" which covered a report that "An English cricket club has had to pull out from a sponsorship deal with a sex shop after it was threatened with expulsion by its local league." The Star Sport, 12 April 2006 at page 27.

21 "PSL wants to make big bucks from TV" Sunday Times 16 April 2006 at page 27, which reported that broadcasting rights were worth millions of rands but that "negotiations between the PSL and the SABC are just one aspect of an increasingly complicated and fraught relationship between sporting bodies and TV stations in South Africa."

22 "Fair play for all World Cup workers is new rallying cry" Star Business Report, Friday 21 May 2004 at page 2.

23 An illustration of this is found in the role of Ali Baeher, former CEO of South African Cricket and now an influential member of the Board of Saru. He is the sponsor's appointee. For an example of his role see The Star 30 January 2006.

24 In recent years proven instances of match-fixing and bribery in soccer have been reported in Vietnam, China, The Czech Republic, Germany, and ,most blatant of all, in Nigeria where the acting Secretary-General of the Nigerian Soccer Federation in April 2006 said that football referees in Nigeria can take bribes from clubs provided this does not influence their decisions on the pitch: http://soccernt.espn.go.com/news/story?id=363449&cc=3888 (last accessed loth April 2006).

25 The International Weightlifting Federation suspended India from international competition for an unspecified period following several Indian lifters testing positive during the 2006 Melbourne Commonwealth Games. The Indian Federation imposed life bans on two of the lifters: The Star Monday 10th April 2006.

26 The Sun (UK) 9th September 2004.

27 See the clear indications of sponsors concerns at the inquiry into the affairs of Saru and its President (The Star, 30 January, 2006 at page 6) and the evidence of continued support when it was clear that the president would not win relection. ("Bumbling Brian snubbed" Saturday Star Sport 18 February 2006 at page 34).

28 Rodney Hartman "Some SA Super l4s look like Under- 14s." The Star 6 April 2006 at page 26 (emphasis addcd).

Fifth, maladministration in sports, in particular in the iconic sports of any nation, will likely call forth a political response. This may range from criticisms from the Minister of Sport[29], to criticisms from the Head of State[30], to calls for government intervention[31] to reports that the government will appoint a representative to a new body to run the affairs of soccer[32] to an announcement that government is willing to contribute to the salary of a top foreign soccer coach to ensure that South Africa does well when it hosts the soccer World Cup in 2010.[33] The political dimension to sport is noticeable in many countries but FIFA does not accept this and has threatened to ban Kenya because government demanded accountability from the officials who administer soccer in that country.[34] This despite a former secretary of the Kenyan Football Federation noting that "one thing should be clear. Unlike associations in developed countries, African football associations rely a lot on government support. It is difficult to divorce the running of the game from the government which finances the national team and provides the infrastructure."[35]

Political influence in sport is very noticeable in South Africa. Indeed, political influence is unavoidable given the Constitution within which the Bill of Rights enshrines the right of all citizens to equality and equity in access to and participation in the economic, political and social life of South Africa. Expression to this is given in, for example, the Mission Statement of the South African Football Association (Safa) which commits Safa to "engaging in pro-active dialogue with the government to generate a partnership in recognition of football as a national asset."[36] In similar terms the Constitution of United Cricket Board of South Africa (UCB) sees the role of the UCB as being "to strive to become representative of the South African Society"[37] and further, "to implement the recommendations of the Vision created by its shareholders,"[38]

Models of corporate governance

The traditional model is one in which the shareholders elect the board of the company and the board selects the management. In this model the board had a chairman and the management was headed by a chief executive office, the CEO. This model maintained a critical distinction between the owners of capital (the shareholders) and the managers of the business (the directors). The operation of the corporation was broken down into two functions: governance and administration. By the former is meant the policy-making function, commonly performed by a Board of Directors. By the latter is meant the day- to-day running of the affairs of the business performed by managers.[39] That simple dichotomy conceals some serious issues. To begin with the description "manager" is ambiguous.[40] One use describes the manager of the business side. The other describes the manager of the team. What this discloses is the two sides to sports bodies: the business side and the community based recreational side. In modern professional sport it is very difficult to keep the playing and administrative sides separate because they are each an aspect of the business activities of the sport. Many problems arise when the administration arm interferences with the playing arm. This is especially true when the chairman and the CEO are the same person as was commonly the case when sport was non-professional and was managed by volunteers. In that model the concept of the board appointing the management was a fiction. The board did not select the management: management selected the board. Furthermore , the fusion of the chairman and the CEO resulted in what has been called the "Imperial CEO", a person who ruled the corporation and personified the company.[41]

Keeping governance and management separate in law and in fact is very difficult in the era of the "Imperial CEO." Rugby and soccer in South Africa have long been an illustrations of how difficult it is to keep governance and management separate. There have been many allegations that successive Rugby bosses have been dictators and bullies.[42] The "most powerful individual in South African soccer by far" is nicknamed "The bon Duke".[43] A succession of national soccer coaches have complained of constant interference from the national administration with one recent coach describing how he "received calls from within the administration to tell him which players to pick."[44]

That the two arms of modem sport must be treated separately has been recognized in South African soccer where there has been a recent announcement that the national team Bafana Bafana, will become a separate entity. In the words of the president of the South African Football Association (Safa) when announcing a radieal restructuring. "We needed to move Bafana Bafana away from the general administration of Safa. People always blame Safa when the team underperforms but now there will be accountability."[45] Bafana Bafana will now have a "top international coach with the freedom to groom the national team without interference."[46] The new structure to run Bafana Bafana will be a commercial entity wholly owned by Safa. Safa will concentrate on amateur soccer development.[47]

The status of sports bodies

The foregoing comments raise several issues. The first is the status of those bodies whieh govern and administer sport. Are they constituted in the same manner as trading companies and, if so, does that mean that the guidelines and practices applicable to trading corporations also apply to sporting bodies? The answer is in two parts. The first relates to the "two souls" of sports bodies such as soccer clubs. "Football clubs are indeed a complex mixture of top-level money-spinning business activity and a long standing recreational activity deeply rooted in almost even social and geographic context."[48] Any sports fan will understand the dilemma which is neatly captured in the observation that "sport is too much a game to be a business and too much a business to be a game."[49] Witness, for example, the uproar which accompanied the announcement that the English club Manchester United had been sold to an American millionaire, Michael Glazier.[50] "Football Clubs are at the heart of their communities", said the UK Minister for Sport, adding that "In Government we need to harness the power of football, [and] help in our work on the

29 The Sports Minister in South Africa said that "the government was concerned by the team s decline and wanted answers" to "what went wrong" during Bafana Bafana s dismal performance at the African Nations Cup: The Star 10 February 2006. In a similar vein the New Zealand Minister of Sport "as openly critical of that country's failure to win more medals at the Melbourne Commonwealth Games: NZ Herald 28 March 2006.

30 President Mbeki of South Africa commented on his country's dismal failure in the Africa Cup of Nations in his 2006 State of the Nation address to Parliament, a matter which drew the attention of both columnists and cartoonists. See, for example, the editorial page of The Star 3 February 2006 which has President Mbeki reading his State of the Nation address and saying "But first, let us address the issue that concerns the nation most the state of our football."

31 Following the poor showing of the South African team. Bafana Bafana, in the African Cup the South African Broadcasting Corporation devoted an entire morning to debating the topic " Should government intervene in sports administration?" SABC Tuesday 7 February 2006.

32 Mail and Guardian 10-16 March 2006 at page 48.

33 Mail and Guardian 7-12 April 2006 in Sport Section page 48.

34 Mail and Guardian 3-9 February 2006 at page 6.

35 Ibid.

36 From the official website of SAFA: http://www.safagoal.net/mission.asp.

37 Article 7.11.

38 Article 7.12.

39 At another and ambiguous level are those who are described as "organizers" of events. That such functions can result in legal actions is demonstrated by two unrelated incidents in New Zealand as described supra at footnote 15.

40 "The Ethical issues Confronting Managers in the Sport Industry" Journal of Business Ethics,Vol 20, 1999, 51-66.

41 "Corporate governance reform in the USA." CDA Board Report, No. 1011, December 2005 at page 5.

42 The president of Saru had been accused of being a bully. He replied. "Luyt: I was no bully". Letter to editor, Sunday Times 5 June 2005. In early 2004 an Afrikaans language carried a headline describing the then president of Saru as "'n diktator".

43 Mail and Guardian 3-9February 2006 at page 6.

44 "Baxter paints gloomy Bafana picture: Former South African coach's tale of intrigue reads like a best-selling novel with bugged telephones being part of the deal." Sunday Times 5 February 2006 at page 30.

45 Sunday Times March 12, 2006 front page article.

46 Ibid.

47 The new structure was approved by the national executive of Safa at a meeting on Friday 7th April 2006: Frontpage report, Sunday Times April 9th 2006.

48 Domenico Di Pietro, "The Dual Nature of Football Clubs and the Need for Special legistation", The International Sports Law Journal, 2003/2 page 24.

49 Journal of Business Ethics Vol. 20, 1999 at page 52.

social inclusion agenda."[51] The sale of Manchester United proved that "football clubs look like any other business company nowadays and are often incorporated as commercial companies and sometimes even floated on the stock exchange - but, unlike business companies, retain a strong link with the community."[52] In South Africa for decades sports were run through unincorporated entities such as voluntary associations and were administered by amateur, part-time volunteers. With the emergence of professional sports it became necessary to create business entities, commonly companies. This move highlights the tension identified earlier between sport as a community-based social recreation and sport as a highly lucrative business requiring business management and raises the question whether sports bodies are complying with regulations which prescribe good corporate governance. In South Africa those issues can be best explored through the three national sports of cricket, rugby and soccer. Each is deeply embedded in the national consciousness, so much so that successive Presidents have closely identified themselves with the success of the teams[53] and have publicly criticized teams when they lose?[54] Intense public debate is engendered when teams fail to perform up to often over-inflated expectations.[55] What this shows us is that sport is part of the economic, political and social life of a society. This is reflected in the comments of the UK Sports Minister noted earlier and is echoed in the expressed objectives of sporting bodies in South Africa such as that of the United Cricket Board which aims "to strive to become representative of the South African Society,"[56] and in the Mission Statement of the South African Football Association which commits Safa to "engaging in pro-active dialogue with the government to generate a partnership in recognition of football as a national asset."[57]

The iconic sports of South Africa

Introduction

Cricket, rugby and soccer in South Africa have been subject to investigations stemming from allegations of corruption, mismanagement and fraud. In the case of cricket the most dramatic illustration of deep-seated problems was the scandal surrounding the late Hansie Cronje. At the outset Cronje denied allegations of match-fixing as captain but then admitted the truth. The scandal was not confined to South Africa and it enmeshed players in Australia, India and Pakistan,[58] There was an official enquiry, a report, and firm action by the International Cricket Council (ICC) which established a new ICC Code of Conduct (Corruption) Commission. South African soccer administration was exposed as corrupt in 2004 with one frontpage headline declaring "Match-fixing scandal rocks SA soccer"[59] with subsequent revelations that clubs were accustomed to bribing referees and players[60], a scandal to which police investigators gave the file name "Operation Dribble."[61] Allegations of poor corporate governance practices and corporate misconduct in South African Rugby Union have been aired for over a decade and are dealt with below.

Cricket

There have been other problems with cricket in South Africa other than the match-fixing scandal. In 2004, for example, there were reports alleging that the rules of the United Cricket Board of South Africa (UCB) had been breached by its then Chief Executive . It was reported that the Chief Executive was a shareholder in a technology company which was awarded a valuable contract by the UCB. The core of the allegation was that the contract was never put out to tender and this was contrary to the constitution of the UCB.[62] The UCB is described in Article 5 of the UCB Constitution as being "a voluntary association having a corporate identity separate from that of its affiliates and is entitled to own property ... and to sue and be sued in its own name, and notwithstanding any change in the composition of its membership from time to time shall have perpetual succession." There is no doubt that the UCB is a legal entity on the same footing as an incorporated trading company. Pursuant to Article 12 the UCB "shall be conducted on a non- profit basis" and is "prohibited from carrying on any business undertaking or trading activity", except when that undertaking or activity is integral and directly related to the "sole object" of the UCB. That "sole object" must be a reference to Article 7.1 which expresses the aims and objectives of the UCB as being "to promote, advance, administer, co-ordinate and generally encourage the game of cricket in South Africa." While the UCB is conducted on a non-profit basis Article 11.1.6 of the Constitution empowers the UCB to "incorporate its professional activities into a separate entity for the carrying on of professional cricket and all commercial activities relating to" all national cricket teams, brand building and protection, merchandising, sponsors and official suppliers relating to professional cricket, media rights and marketing of professional cricket and the conduct of tours, tournaments and competitions relating to professional cricket. That separate entity, the professional arm of the UCB, is Cricket South Africa (Pty) Ltd. While purportedly separate, that body is effectively controlled by the UCB. For example, the highest authority in the UCB is the General Council. While the General Council has the particular function of managing the non-commercial activities of the UCB those non-commercial activities are listed in Article 13.1.3 as including "the appointment of the Board of Directors of Cricket South Africa (Pty) Ltd, the professional arm of the Board." Moreover amongst those who serve *ex officio* on the Board of the professional entity are the President, the Vice President, the Treasurer and the Chief Executive Officer of the UCB. Finally, the non-commercial UCB is a shareholder in, and has monitoring powers over, the activities of, Cricket South Africa (Pty) Ltd.[63]

The role of the UCB is to "govern,"[64] to "strive to become representative of the South African Society"[65] and to "implement the recommendations of the Vision created by its shareholders."[66] This is a succinct expression of the broad governance role of a sporting body. The affairs of the UCB "shall be administered by the Management Committee, subject to the general control of the General Council."[67]

50 Angry fans built barricades, threw boules and bricks and had to be baton-charged by police. Fans were reported in The Daily Mirror as saying that "MU fans are disgusted and repulsed by the Glazers. The Glazers are enemies of the MU supporters. "That was in February 2005. By mid-year it had become clear to the fans that the Glazers were passionate about keeping MU successful. Even the UK Sports Minister, Richard Cahorn, was supportive of the Glazers. See generally the release by the Communications Department, MUFC 29 June 2005.

51 Ibid

52 Op.cit. note 16.

53 As most memorably President Mandela at the conclusion of the Rugby World Cup won by the host team, South Africa. The President wore the jersey carrying the number of the winning captain.

54 Mbeki commenting on Bafana Bafana 's dismal failure in the African Cup during his State of the Nation address, a matter which drew the attention of cartoonists. That this is not a response exclusive to South Africa is demonstrated by the New Zealand Minister for Sport who was highly critical of his country's failure to win more medals in the Melbourne Commonwealth Games. See NZ Herald 28 March 2006.

55 Not only did the President comment unfavourably on the Bafana Bafana failure but the South African Broadcasting Corporation devoted an entire morning to debating the topic "Should government intervene in sports administration?" SABC, Tuesday 7th, February 2006.

56 UCB Constitution Article 7.11.

57 Supra.

58 Tim Castle, "Corruption In International Cricket", in Toomey (ed) Keeping the Score: Essays in Law and Sport (The Centre for Commercial and Corporate Law, University of Canterbury, Christchurch, New Zealand, 2005) 145-155.

59 Sunday Times, 13 June 2004.

60 For three months in 2004 there was constant media reports on the scandal with an early frontpage report asserting that "Arrests expected as club officials and players are also probed over match-fixing": The Star 14 June 2004. Referees revealed how they rigged games: Sunday Times 20 June 2004 at page 5. Notwithstanding these revelations, arrests and confessions by August 2004 the Premier Soccer League CEO was able to assure the public that the alleged corruption in the game, and the ongoing police investigations, would in no way delay the start of the local soccer season. Furthermore. he made it clear in a written statement that "the league is aware of the allegations against clubs and officials, but has no evidence in its possession that would enable it to proceed with internal prosecutions In terms of rules against any parties at this stage." The Star Sport Section 3 August 2004 at page 18.

61 The press seized on this as for example the headline "Operation Dribble Scores Again" in the body of which item it was reported that "The number of people held for match-fixing, bribery and corruption in soccer has risen to 21, after two more club bosses and a senior Premier Soccer League referee handed themselves over to police." The Star, 29 June 2004 on front page.

62 The Star Thursday 22 July 2004.

63 Article 13.2.

64 Article 7.2.

65 Article 7.11.

66 Article 7.12.

The day-to-day affairs of the UCB are conducted by a Chief Executive Officer who also sits on the General Council, the Management Committee and all other committees (except selection committees) in an *ex offico* capacity.[68]

Soccer

Soccer offers further evidence of the fact that sport is deeply rooted in the community conscience. As noted earlier the governing body of Safa is committed to engaging in pro-active dialogue with the government to generate a partnership in recognition of football as a national asset.[69] Safa is also committed to "contributing to Africa's ascendancy in world football through the hosting of major events in Africa, while aspiring and striving to become a leading football nation."[70] The aim of hosting major events was achieved when South Africa was awarded the rights to host the Soccer World Cup in 2010. The aspiration to become a leading football nation suffered a serious setback when the national team, Bafana Bafana, failed to qualify for the 2006 World Cup in Germany and made a dismal showing in the African Nations Cup in Egypt in the same year.[71] These dismal showings generated widespread reactions. Newspapers carried banner headlines with such proclamations as "The Bafana Disaster: nightmare likely to continue"[72] and "Bye-Bye Bafana!"[73] and "Bafana go from riches to rags."[74] There were nostalgic recollections along the lines of "When Bafana were Africa's soccer kings."[75] In addition to the contributions of former coaches and contemporary commentators both politicians[76] and the general public[77] voiced their belief that the "national asset" was not well administered. A leading national weekly claimed that "Safa is peopled by some babes in the wood - inexperienced and unsuitable to host or compete well in the 2010 World Cup."[78] Notwithstanding that there had been thirteen coaches in twelve years, there were demands that this current unsuccessful coach also be removed.[79] This was done.

Attention was then turned to the administrative side with such headlines as "Problems with Bafana start at the top"[80] and one former Bafana coach describing "a crumbling infrastructure and chaotic governing body."[81] There was a demand that the governance and management structure of Safa be overhauled: "Soccer circus must come to an end."[82] There was no shortage of free advice: "How to fix Bafana an idiots guide to Safa's mess" read one headline[83] and letters to the editor contained thoughtful suggestions.[84] In early February it was announced that the Sports Minister would meet Safa "in a bid to sort out Bafana mess."[85]

It light of all this attention to its sporting and administrative shortcomings it comes as no surprise to learn that Safa underwent a restructuring. One leading newspaper displayed a frontpage headline reading "Radical plan to fix Bafana" and reported that "South Africa's soccer bosses have agreed on a radical plan to build a more powerful Bafana Bafana ahead of the 2010 World Cup."[86] Another leading weekly journal announced in its headline that "Local soccer's setup is being turned on its head to change Bafana Bafana into a winning team." In the item it was reported that "a revolutionary restructuring of football is being touted" with the suggestions that a government representative and a "well-respected businessman" were to be appointed to a new governing body for South African football. [87] This is a clear demonstration of a football club having to balance its two souls: the deep-rooted social and community activity of predominantly amateur players and the dictates of a professional business.

Rugby

The third major sport in South Africa, Rugby Union, is also deeply rooted in the national psyche and attracts as much emotional reaction as does soccer. A major newspaper in April 2006 began an article critical of Rugby administration with the enjoinder to "Listen up. The signs are neon-bright: Super 14 standards are shambolic, the State of the smaller provincial unions is pitiful. Club rugby is on its knees. transformation has become a dog's breakfast, and too many players are draining the system."[88] The article went on to assert that "change is one of the things SA rugby doesn't handle particularly well, especially with so many Flat Earthers running the game." That comment comes after the Rugby Union had undergone substantial change and it is therefore necessary to put the criticisms into context.

The story begins with the then Minister of Sport recommending to then President Mandela in 1997 that there be a commission of inquiry into the affairs of the South African Rugby Union (Saru). There is a dispute as to who approached the Minister [89] to initiate the inquiry into allegations of corporate mismanagement against the then President of Saru, Mr Louis Luyt. A legal challenge to the inquiry was successful. This did not end the matter. There is a trail of court cases, commissioned Reports, official enquiries and legal opinions as well as endless media scrutiny and public reaction which shows no sign of abating.

The storm focused on Mr Luyt's successor as President, Mr Brian Van Rooyen[90], In August 2005, following a further inquiry a report was delivered to the Saru Board. That report, 338 pages long, found a range of poor corporate governance practices in Saru, listed a number of allegations of corporate misconduct, accused Mr Van Royen and other members of the President's Council of not acting in the "best interests of the union" and found that Mr Van Rooyen had "used his position and privileges for personal gain." An advocate, Jannie Lubbe, was asked to evaluate the contents of the report and he also took additional evidence received from, amongst others, the Department of Sport and Recreation. In December 2005 Advocate Lubbe handed his report to Saru CEO. Johan Prinsloo, and the chairperson of the Saru disciplinary committee, Judge Lex Mpati. In response to this report, and its finding that a *prima facie* case existed, the Saru President's Council Disciplinary Committee appointed Judge Edwin King in December 2005 to investigate the alleged mismanagement. Judge King was experienced in these matters as he had led the investigation

67 Article 14.2.

68 Article 15.

69 In April it was reported that business and government might contribute to the payment of the salary of a top international coach for the national soccer team (Bafana Bafana) with a senior official of Safa quoted as saying that "the government wanted to have a big say in the rebuilding of Bafana Bafana to ensure that the 2010 World Cup is a success." Mail and Guardian 7-12 April 2006, Sport Section page 48.

70 Mission Statement of SAFA accessed on the official website http://www.safagoa1.net/mission.asp.

71 In three qualifying games Bafana Bafana failed to win a match or score a goal and was bundled out in the first round. This was against a history of successes including winning the African Nations Cup in 1996, being runners-up in 1998 and qualifying for the World Cup finals in France in 1998.

72 Soccer Life 4-5 February 2006 at page 6.

73 The Star Sport Section 27 January 2006 at page 25.

74 Sunday Times Sport Sunday 29 January 2006 at page 22.

75 Sunday Times 29 January 2006 at page 13.

76 "During his annual State of the nation address last week President Thabo Mbeki echoed South African's disappointment at Bafana's loss, saying their performance in Egypt "did nothing to advertise our strengths as a winning nation." The Star 10 Februarv 2006.

77 "(Boo)fana are greeted by a hostile public." The Star Sport 2 February 2006 page 24 reporting the team being subject to a chorus of boos on its return from the Africa Cup of Nations and, later at a "much-heated post-booing press conference." The Mail and Guardian reported "the "venom of the derisory boos and jeers that greeted the national football team on their return from the African Nations Cup" and President Mbeki's "indignation with their dismal performances in Egypt." See issue 3-9 February 2006 at page 6.

78 Mail and Guardian 3-9 February 2006 at page 6.

79 See articles in Mail and Guardian 27 Jan-2 Feb 2006 at page 44, Soccer Life 4-5 February 2006 at page 6 and Mail and Guardian 17-23 February 2006 at page 44.

80 50 Soccer Life 28-29 January 2006 at page 9.

81 Stuart Baxter quoted in Sunday Times 5 February 2006 at page 30.

82 The Star 3 February 2006.

83 The Sunday Independent 5 February 2006 at page 22.

84 See for example, "SA soccer needs to have a rethink," Letters section of The Star 6 February 2006 at page 12 and "Now is the time for cool heads to fix soccer": Letters section of The Star 10 February 2006 at page 13.

85 The Star, 10 February 2006.

86 Sunday Times 12 March 2006.

87 Mail and Guardian 10 to 16 March 2006, Sport Section, page 48.

88 "How I'd shake up SA rugby," Sunday Times, 2 April 2006 at page 28.

89 See letter from former President of Saru, Louis Luyt published in Sunday Times, 5 June 2005. Mr Luyt asserts a "dossier" was compiled by Mr Van Rooyens and that this formed the basis for the inquiry.

90 It is important to emphasise that at the time of writing no criminal charges have been brought against Mr Van Rooyen and no internal disciplinary proceedings brought by Saru.

into cricket match-fixing in 2000 but he did not last long enough to have the same impact on the affairs of Saru. One month after his appointment Judge King withdrew from the enquiry pleading that the "matter has taken too long to come to fruition." According to one media report while Judge King did meet with Saru no terms of reference were clarified and Judge King had lost patience with the delays,[91]

The announcement by Judge King was made days before the inquiry was to begin and with the Annual General Meeting of Saru barely a month ahead. The announcement generated harsh, indeed cynical, media reaction. The Star carried a headline reading "Slippery Brian to get away with it" and the view was expressed that the judge's resignation meant that the inquiry would be put on ice and may perhaps never take place.[92] That story was to be the first of a month-long media attack on the conduct of the affairs of Saru and its President. On the Saturday following Judge King's resignation a Saru official announced that a provincial union president would "look into the inquiry into Van Rooyen" but the official immediately qualified the announcement by saying that he would have to discuss the matter with the Sports Minister. He did say "we hope to complete the inquiry before the AGM." That announcement came from the President s Council less than a month before the AGM and buried in that announcement was the news that Mr Van Rooyen would be opposed by a provincial president, Oregan Hoskins. The challenger was described as "favourite to succeed Van Rooyen."[93] Nonetheless we were told that the sitting "Rugby boss remains defiant as new challenger campaigns to unseat him"[94] and in response to the appointment of a former judge, Joos Hefer, to head the investigation Mr Van Rooyen hired leading lawyers.[95] This may have been premature as the same official who had been asked to look into the matter repeated that he had met with the office of the Sports Minister, that "there were some concerns from the ministry's side" and that he was not willing to speculate on the time the investigation might take nor when the investigation would commence.[96]

The status of the inquiry became one bargaining chip in the increasingly bitter infighting for the presidency of Saru. There was a report that Mr Van Rooyen was negotiating a deal whereby he would resign provided the investigation was stopped[97], a claim which Van Rooyen denied[98] the next day. Perhaps because of the confusion surrounding the status of the legal inquiry the media turned its attention to the run- up to the election at the AGM in late February 2006 but the implications of the pending inquiry was ever- present. In early in February, The Star newspaper was quoting the challenger as promising "good corporate governance and a union built on honesty and integrity should he be elected Saru president."[99] The next day the same newspaper was counting the votes and finding the challenger ahead by 29 votes to 15.[100] Allegations of dirty tactics by the incumbent were reported and denied[101] and evidence of other battles within Sarfu surfaced, in particular struggles by smaller franchises to remain in the Super 14.[102] It is a fair summary of the next few weeks media coverage to say that the coverage was more favourable to the challenger[103] than the incumbent with the press assuming that the challenger would win.[104] There were claims of dirty tricks[105] and claims of support for the incumbent by such persons as the Springbok coach.[106] Five days before the vote a headline could be interpreted as assuming the outcome when it invited the public to read about the "Rock-strewn path of Van Rooyen era"[107] and next day asked "is Brian buying votes to swing election?" On Thursday 23 February the SABC FM "After Eight Debate" was entirely given to the imminent elections in Saru and the next day a newspaper headline declared "End near for Van as Hoskins secures backing of big unions."[108] Two days later the Sunday Times carried an analysis of the election under the headline: "Brian meets his Waterloo" and although the ballot had been secret and Saru refused to disclose the vote the newspaper asserted that "Hoskins wins easily" and that Van Rooyen's defeat was "humiliating: 27 votes to 17."[109]

The election did not end the ructions within South African rugby. In his first media statement the new president declared himself "shocked and stunned" to learn that his predecessor had offered a provincial union a Test Match and many million rands in return for that union switching its votes to him and added that this "made it even more important that the investigation into claims of corporate mismanagement against the former president went ahead."[110] The former president was reported at the same time as welcoming the investigation in order to clear his name.[111] While the two protagonists maintained their eagerness to get into the legal ring there were hints that the inquiry, pending for more than one year, would not continue. The president of the provincial union which van Rooyen was alleged to have attempted to bribe, declined to comment further other that to say: "I don t think we need to get into that. The election is over and I'm tired of rugby politics for now."[112] It was also suggested that the investigation would cost millions and that, with van Rooyen out of rugby administration, to continue with the inquiry would serve no purpose".[113] One columnist wondered "who'll carry the costs and whether it is now even necessary to continue."[114] Despite this the new president "was adamant that the investigation should go ahead, adding that he was also seeking a forensic audit of the national governing body" because "we need to start with a clean slate on these matters."[115] The adamantine position of the new president softened in less than two weeks. On a television programme the president was asked if the action against Van Rooyen would continue. The president replied that he is not directly involved, that it is a legal process and that we would just have to wait and see.[116] That, for now, is the end of that story but the recriminations within Saru continue and one of them, in the words of the president is "a legal condundrum I've inherited from the past administration, but SA Rugby will do everything possible to keep the matter out of the courts."[117]

91 ABC Online 17 January 2006.
92 The Star 18 January 2006.
93 "The strife of Brian takes another turn", Saturday Star Sports 21 January 2006.
94 Headline in The Star 23 January 2006 at page 3.
95 "Van Rooyen faces 11 charges, hires crack defence," The Star 26 January 2006 at page 27.
96 Ibid.
97 "Bacher brokers Van deal". The Star, 30 January 2006 (Ali Bacher is a Saru board member appointed by the sponsors and former cricket CEO and he agreed that Van Rooyen had asked him to "facilitate his exit from South African rugby.").
98 "Van Rooyen denies deal, admits meeting but is ready to fight on", The Star 31 January 2006.
99 The Star 1 February 2006 at page 20.
100 The Star Sport 2 February 2006 at page 24.
101 The Star Sport 3 February 2006 at page 24 and again on 21 February 2006 at page 18 (Is Brian buying votes to swing election?").
102 Ibid
103 In one report close to the election a photograph of Van Rooyen was captioned: "Rhino Cowboy: Brian van Rooyen has a swaggering style all his own." Sunday Times 19 February 2006 at page 24. On the Monday following the election The Star carried a large photograph of the new Saru president with the caption reading: "No arrogance in this man: Regan Hoskins ousted controversial Brian van Rooyen to become the new Saru president. He faces huge challenges in his bid to clean up the game." The Star 27 February 2006 at page 8.
104 "Regan must set himself to clean up Brian's big mess." Saturday Star 4 February 2006 at page 28: "It looks all over for Van Rooyen, Star 6 February 2006 at page 8; "Bumbling Brian snubbed," Saturday Sport 18 February 2006 at page 34, a reference to the fact that Van Rooyen was not invited to a multi-million rand sponsor-ship renewal announcement. Whether the sponsor or Saru had declined to invite the president of Saru was unclear.
105 The allegations included claims that the then president of Saru offered inducements to small unions in return for their votes. Inducements took the form of offering the union a Test match as well as millions in rands. Sunday Times 26 February 2006 at page 26.
106 Frontpage of Sunday Times 12 February 2006.
107 The Star 20 February 2006 at page 8.
108 The Star 24 February 2006.
109 Sunday Times 26 February 2006 at page 26.
110 'Test for votes claim rocks rugby", The Star 27 February 2006 at page 5.
111 Ibid at page 12.
112 Ibid at page 5.
113 Ibid.
114 "Tough calls await Regan," The Star 27 February 2006 at page 8. A few days later the same newspaper published a letter welcoming the change in the administration of rugby in South Africa. The editor appended a photograph of the new president with a caption declaring that he "has to repair the damage done during the Van Rooyen era." The Star 3 March 2006.
115 The Star 27 February 2006 at page 5.
116 That Sport Show, ETV, Sunday 12 March 2006 at 3.30 pm.
117 "Hoskins inherited shambles: Spears mess sticking in Saru's guts", the headline to an item which reported on a continuing problem within Saru over which franchises should or should not be admitted into the new Super 14 competition. The Star Sport 12 April 2006 at page 27.

The comment that this was a legacy from the past raises directly the question of whether a mere change in the elected officials can achieve desired changes on and off the field. At least one respected commentator remains unconvinced and claims that "professional rugby's worst attribute in this country right now is the enthusiasm for scapegoatery" and clearly sees no improvement as a result of the recent elections in Saru.[118]

Conclusion

Sports are games engaged in for recreation and pleasure by millions. The games are organized by community volunteers and are participated in by amateurs. Increasingly, however, for many what was once a game has now become a livelihood. Vast amounts of money are involved. Governments take a close interest in major sports and in the conduct of major sporting events. The governance and management of sports, both on an off the playing field, is a matter of public interest. For many years the governance and administration of sport were tightly fused, most commonly characterized in the concept of the "Imperial CEO" who personified the organization and who always got his way. In response to a number of stimuli the three major South African sports of cricket, rugby and soccer have begun a process of restructuring their corporate governance.

Good corporate governance exists when there is accountability, transparency and openness. It exists where there is no "Imperial CEO". The "Imperial CEO" is the old model of corporate governance. The recent South African experiences in the three major sports shows that the old model is only slowly being eroded and that the transition to good corporate governance in professional sport is difficult. Whether the current changes eliminate "boardroom tomfoolery" and also achieve results on the playing field remains to be seen.

118 "The curse of scapegoatery and fat, greedy men who don't care." Saturday Star 15 April 2006 at page 23. The author of the item is editor of Rugby World South Africa.

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Fair Play on and off The Field of Play: Settling Sports Disputes Through the Court of Arbitration for Sport*

by **Ian Blackshaw**

Introductory Remarks

Sport is now a global business worth more than 3% of world trade. In the enlarged European Union, now comprising 25 Member States, it accounts for 2% of their combined Gross National Product. It is hardly surprising, therefore, that sports disputes are on the increase - where there is money to be made and lost, litigation is never far away. And, like other industries, the settlement of sports disputes by alternative dispute resolution (ADR) processes is also on the ascendancy, including mediation[1]. In other words, without resort to the Courts.

This is not only for the same reasons recognised in other industries, namely, that litigation is slow, expensive, arcane and unpredictable; but there are also special reasons peculiar to the sporting world. Sports persons and bodies prefer not 'to wash their dirty sports linen in public' but settle their disputes 'within the family of sport'. In other words, in private and amongst others who understand what makes sport special and tick. In addition, the dynamics of sport require quick and informal settlement procedures. For example, a dispute may arise in relation to the commercialisation of a major sports event, like the Olympic Games or the FIFA World Cup, and the parties in dispute cannot afford to wait months - or even years - to settle their disputes through the Courts, by which time the event will be long over and forgotten and the sporting or business opportunity lost! Again, the dispute may be subject to other sporting deadlines as in the Woodhall/Warren boxing case, which was settled by mediation in 72 hours![2] Traditional arbitration now also suffers from the same ills as litigation, having become procedurally complex, costly and lengthy, especially those conducted by the ICC.[3]

However, due to the foresight of the former President of the International Olympic Committee (IOC), Juan Antonio Samaranch, a special body for settling all kinds of sports-related disputes, called the Court of Arbitration for Sport (CAS)[4], was set up with the intention of making the CAS 'the supreme court of world sport'. That was in 1983. A year later, the CAS opened its doors for business and so this year celebrates its twenty-first birthday. During this time, the CAS has lived up to the expectations of its founders and is proving to be a popular[5], fair, effective, relatively inexpensive, confidential and quick forum for the settlement of sports disputes[6].

Before looking at the possibilities of using the CAS for the settlement of sports disputes at first instance or on appeal, a potted history and some remarks on the nature and the organisation of the CAS, as well as the dispute resolution services it offers, would not be inappropriate.

Brief History of the CAS

Origins

At the beginning of the 1980s, an increasing number of international sports disputes and the lack of any independent body to deal with them in a flexible, quick, inexpensive and binding manner prompted a number of international sports federations to look a this situation and see what could be done. Soon after assuming the Presidency of the International Olympic Committee (IOC) in 1981, Juan Antonio Samaranch had the idea of creating a sports court that would become the supreme court of world sport. The following year at an IOC Meeting in Rome, Judge Keba Mbaye, from Senegal, an IOC mem-

* Paper presented at the Second Asser/Sinzheimer Annual International Sports Law Lecture on "The Court of Arbitration for Sport and Lex Sportiva", Amsterdam, 9 May 2006.

1 See '*Mediating Sports Disputes - National and International Perspectives*' by Ian S. Blackshaw 2002 TMC Asser Press The Hague, The Netherlands (ISBN 90-6704-146-7). See also Chapter 6: 'Alternative Dispute Mechanisms in Sport' by Ian Blackshaw at pp. 229-268 in '*Sports Law*' by Simon Gardiner, Mark James, John O'Leary, Roger Welch, Ian Blackshaw, Simon Boyes and Andrew Caiger, Third Edition 2006 Cavendish Publishing London, UK (ISBN 13: 978-1-859-41894-9)

2 See p. 182 of '*Mediating Sports Disputes - National and International Perspectives*' by Ian S. Blackshaw 2002 TMC Asser Press The Hague, The Netherlands (ISBN 90-6704-146-7).

3 International Chamber of Commerce, which is based in Paris.

4 The CAS is also known by its French acronym 'TAS' (Tribunal Arbitral du Sport').

5 According to Matthieu Reeb, CAS Secretary General, writing in the 'CAS NewsLetter' of March 2005, "*more and more people are taking their disputes to the Court of Arbitration for Sport without a second thought. It is true that the number of cases was expected to rise, especially since FIFA decided to allow appeals to the CAS in 2002. However, rather than a linear increase, the number of cases registered by the CAS has exploded (271 in 2004 compared to 109 in 2003).*" The increase in the number of cases being referred to the CAS continued in 2005.

6 In 2005, there were 271 CAS cases registered.

ber and at the time a Judge at the International Court of Justice in The Hague, was asked to chair a working party with the aim of preparing the Statutes of a sports dispute resolution body that, in time, would become known as the 'Court of Arbitration for Sport'.

In 1983, the IOC officially ratified the Statutes of the CAS, which came into force on 30 June, 1984. On the same date, the CAS became operational under Judge Mbaye as its President, a position he has occupied with distinction ever since.

The First Ten Years

The 1984 CAS Statutes were supplemented by a set of Procedural Regulations. Both were slightly modified in 1990. Under these Regulations, the CAS was composed of 60 members appointed by the IOC, the International Federations (IFs), the National Olympic Committees (NOCs) and the IOC President - 15 members each. The IOC President had to choose members outside the other three groups. All the operating costs of the CAS were borne by the IOC. In general, the proceedings were free of charge, except for financial disputes, in which the parties could be required to pay a share of the costs. The CAS Statutes could be modified only by the IOC meeting in General Session, on the proposal of the IOC Executive Board.

The CAS Statutes and Regulations provided for only one kind of contentious procedure, irrespective of the nature of the dispute. In addition, there was also a 'consultation procedure' open to sports bodies or individuals. Through this procedure, which still exists, the CAS could give a legal opinion on any sports-related issue.

In 1991, the CAS published a 'Guide to Arbitration', which included several model arbitration clauses, including one for incorporation in the statutes or regulations of international sports federations. This clause foresaw the creation of special rules to settle disputes arising out of a decision taken by a sports federation (the 'Appeals Procedure'). The first such body to adopt this clause was the International Equestrian Federation (FEI).

The next significant development was in February 1992, when a horse rider, named Elmar Gundel, lodged an appeal for arbitration by the CAS, based on an arbitration clause in the FEI statutes, in which he challenged a decision rendered by the FEI. This decision, which followed a horse doping case, disqualified the rider, suspending and also fining him. The award rendered by CAS on 15 October, 1992 found partly in favour of the rider (the suspension was reduced from three months to one month). Dissatisfied with the CAS ruling, Gundel filed an appeal with the Swiss Federal Tribunal (Swiss Supreme Court). He disputed the validity of the award, on the grounds that it was rendered by a tribunal that did not meet the conditions of impartiality and independence need to be considered as a proper arbitration court. In its judgement of 15 March, 1993, the Tribunal recognised the CAS as a true court of arbitration. And noted, *inter alia*, that the CAS was not an organ of the FEI; that it did not receive instructions from this Federation; and that it retained sufficient autonomy with regard to it, in that it placed at the disposal of the CAS only three arbitrators out of the maximum of 60 members of which the CAS was composed. However, in its judgement, the Tribunal drew attention to numerous links between the CAS and the IOC: the fact that the CAS was financed almost exclusively by the IOC; the fact that the IOC was competent to modify the CAS Statutes; and the considerable power given to the IOC and its President to appoint CAS members. In the Tribunal's view, such links would be sufficiently serious to call into question the independence of the CAS if the IOC were a party to proceedings before it. As Matthieu Reeb, Secretary General of the CAS, has remarked: "*The Federal Tribunal's message was thus perfectly clear: the CAS had to be made more independent of the IOC both organizationally and financially.*"[7] So this decision led to some major reforms of the CAS in 1994.

The 1994 Reforms

Firstly, the CAS Statutes and Regulations were completely revised to make them more efficient and to modify the structure of the institution to make it more independent of the IOC, which had sponsored it since its creation. The most important change resulting from these changes was the creation of an 'International Council of Arbitration for Sport' (ICAS) to deal with the running and financing of the CAS, thereby taking the place of the IOC (see below).

Another major change was the creation of two Arbitration Divisions of the CAS (the 'Ordinary Division' and the 'Appeals Division') in order to make a clear distinction between disputes of sole instance and those arising from a decision rendered by a sports body. And the CAS reforms were enshrined in a new Code of Sports-related Arbitration, which came into force on 22 November, 1994.

All these reforms were approved in Paris on 22 June, 1994 with the signing of the 'Agreement concerning the Constitution of the International Council of Arbitration for Sport' - known as the 'Paris Agreement'.

Later Developments

The ICAS was responsible for the creation of the decentralised offices of the CAS (referred to below) and also the 'Ad Hoc' Divisions (also referred to below); as well as the introduction of a 'Mediation Procedure' (see below).

More recently, the CAS has moved to new headquarters at the Chateau de Bethusy in Lausanne. This not only provides the CAS with the possibility to expand its personnel and facilities to cope with its ever increasing workload, but also represents a further - physical - separation and independence from the IOC.

The International Council of Arbitration for Sport (ICAS)

The ICAS is the supreme organ of the CAS. Its main function is to safeguard the independence of the CAS and the rights of the parties appearing before it.[8] Thus, it is responsible for the administration and financing of the CAS. The ICAS has 20 members, who, on appointment, must sign a declaration in which they undertake to exercise their functions in a personal capacity, with total objectivity and independence. The members comprise 5 sports persons; 5 independent persons, who are outside the Olympic Movement and sport generally; 5 persons from the IOC; 5 persons from the Association of Summer Olympics International Sports Federations (ASOIF) and the Association of Winter Olympics International Sports Federations (AIWF); and 5 persons from the Association of National Olympic Committees (ANOC). ICAS members are appointed for four-year renewable terms. ICAS, like CAS itself, is a Swiss Foundation based in Lausanne, Switzerland. The ICAS appoints the CAS arbitrators and mediators and approves the budget and the accounts of the CAS.[9]

The funding of CAS is shared between the constituents of CAS as follows:

- 4/12 by the IOC;
- 3/12 by the ASOIF;
- 1/12 by the AIWF; and
- 4/12 by the ANOC.

The Organisation of CAS

The CAS, also known by its French acronym TAS (*Tribunal Arbitral du Sport*) - the official languages are French and English - is based in Lausanne, Switzerland, and has two permanent branches in Sydney, Australia, and New York, USA, facilitating access to CAS for parties residing in Oceania and North America.[10] Because CAS is based in Switzerland, with its seat in Lausanne, the CAS is generally governed by Swiss Law[11]. It has its legal seat in Lausanne for all purposes, even when it hears cases outside Switzerland.[12] The CAS Court Office, headed by the Secretary General and assisted by several Counsel and secretaries, supervises the arbitration and mediation procedures and acts as a Registry; it also organises the '*Ad Hoc*' Divisions (see below) and deals with other administrative matters.

7 See note 7 below.

8 For a complete list of the functions of ICAS, see Article S6 of the Code of Sports-related Arbitration.

9 See generally on the ICAS Articles S4 - S11, ibid.

10 See generally M. Reeb, 'The Role and Functions of the Court of Arbitration for Sport (CAS)', The International Sports Law Journal 2 (2002), 21, 23-25.

11 For more information, log onto the CAS official website at 'www.tas-cas.org'.

During the Olympic Games, the CAS operates an '*Ad Hoc*' Division (AHD), which was first set up on September 28, 1995, for the Centennial Atlanta Summer Games of the Modern Era in 1996, resolving disputes relating to the Games within 24 hours and free of charge.[13] For example, the AHD established for the Athens Summer Olympics in 2004 handled ten cases on a variety of sporting issues in a variety of sports, including selection and doping matters.[14] The AHD was again in session for the 2006 Winter Games in Turin in Italy, dealing with eligibility and doping cases. The AHD decides cases "*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*." All athletes participating in the Summer and Winter Olympic Games have to submit their disputes to the CAS AHD. The actual submission forms part of the Athlete's Entry Form to participate in the Olympics. The standard Arbitration Clause for the Athens Olympic Games 2004 ran as follows:

> *"I agree that any dispute, controversy or claim arising out of, in connection with, or on the occasion of, the Olympic Games, not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, ATHOC and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport (CAS) for final and binding arbitration in accordance with the "Arbitration Rules for the XXVIII Olympiad in Athens", which form part of the Code of Sports-related Arbitration.*
>
> *The CAS shall rule on its jurisdiction and has the exclusive power to order provisional and conservatory measures. The decisions of the CAS shall be final and binding. I shall not institute any claim, arbitration or litigation, or seek any other form of relief, in any other court of tribunal.*
>
> *The NOC confirms that all the relevant rules have been brought to the notice of the athlete/coach/trainer/official, and it has been authorised by the National Sports Federation concerned to sign this entry form on its behalf."*

The CAS now has a minimum of 150 arbitrators from 37 countries, who are specialists in arbitration and sports law[15]. They are appointed for 4-year renewable terms and must sign a 'letter of independence' confirming that they will act impartially. In establishing the list of CAS arbitrators, the ICAS must, in principle, respect the following distribution of candidates:

- 1/5 of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or outside;
- 1/5 of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside;
- 1/5 of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside;
- 1/5 of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes;
- 1/5 of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.[16]

The CAS also has a permanent President, Judge Keba Mbaye of Senegal, who is a former member of the International Court of Justice at The Hague. He is also President of ICAS.

CAS arbitrators, who sit on panels composed of one or three members, are not generally obliged to follow earlier decisions (*stare decisis*), but they usually do so in the interests of legal certainty.[17] Thus, a useful body of sports law (*lex sportiva*) is steadily being built up[18]. The extent to which this is happening continues to be the subject of academic debate.[19]

CAS Procedures

Ordinary Arbitration Proceedings

The procedure to be followed in CAS Arbitration cases is set out in the Code of Sports-related Arbitration, the latest edition of which dates from January 2004. Copies of the Code can be obtained from the CAS Court Office in Lausanne, Switzerland[20]. And the applicable law for determining the dispute is Swiss law, unless the parties agree on another law. The parties may authorise the CAS to decide the dispute '*ex aequo et bono*'[21].

To commence ordinary arbitration proceedings before CAS, it is necessary to file a written request, which must contain the following information:

- the name and address of the Respondent;
- a brief statement of the facts and legal argument, including a statement of the issue to be submitted to the CAS for determination;
- the Claimant's request for relief;
- a copy of the contract containing the arbitration agreement or of any document providing for arbitration in accordance with these procedural rules;
- any relevant information about the number and choice of the arbitrator(s), in particular if the arbitration agreement provides for three arbitrators, the name and address of the arbitrator chosen by the Claimant from the CAS list of names.[22]

Upon filing the request, the Claimant must pay the Court Office fee.[23]

If any of these requirements are not met, the CAS Court Office will grant a once only short deadline to comply, failing which the request for arbitration shall be "deemed withdrawn".[24]

The arbitration procedures generally fall into two different phases: a written procedure with exchange of written submissions; and an oral procedure, in which the parties present their cases and witnesses[25] in a hearing, which is usually held *in camera* at the CAS headquarters in Lausanne, Switzerland.[26] It should be added, however, that, pursuant to the provisions of Article R57 of the CAS Code of Sports-related Arbitration, the case may be decided without holding a hearing, but on the submission of documents alone, if the Panel of Arbitrators, after consulting the parties, "*deems itself sufficiently informed*" to proceed without holding a hearing. But this may raise questions of 'due process', especially the right of a party to be heard ('*audi alteram partem*'), and may perhaps expose the CAS Award to a legal challenge in the Swiss Federal Tribunal (see later).

12 For the legal and practical significance of this, see the Judgement of the New South Wales Court of Appeal of 1 September, 2000 in the case of *Angela Raguz v Rebecca Sullivan* [2000] NSWCA 240. In that case, a legal challenge against a CAS arbitral award was dismissed on the ground of lack of jurisdiction because the Court upheld the choice of Lausanne, Switzerland as the seat (i.e. place) of arbitration under the CAS Code of Sports-related Arbitration.

13 See Ian Blackshaw, 'A sporting decision in just 24 hours', 'The Times', 23 July, 2002.

14 See Booklet 'CAS Awards - Salt Lake City & Athens 2004' published by ICAS in 2004.

15 At the time of writing, there are around 300 CAS arbitrators, of which the author is one.

16 Article S14 of the Code of Sports-related Arbitration.

17 See Case of UCI v J. 7 NCB, CAS 97/176 Award of 28 August, 1998, 14.

18 From time to time, the CAS publishes Digests of Cases, but respecting, as appropriate, the confidentiality of the parties. The latest Digest of CAS Awards Volume III covers the period the period 2001 - 2003 and was published in 2004 by Kluwer Law International, The Hague, The Netherlands (ISBN 90-411-2259-1). Previous Volumes I and II covered the periods 1986-1998 and 1998-2000 respectively and were published by Editions Staempfli SA Berne and Kluwer Law International/Editions Staempfli respectively.

19 See K. Foster, 'Is There a Global Sports Law?, *Entertainment Law* 2/1 (2003), 1-18. Foster argues that the CAS as an institutional forum is not yet "globally comprehensive". And see also James A.R. Nafziger, 'International Sports Law', Second Edition, 2004, Transnational Publishers, Inc., Ardsley, New York, 48-61. Prof Nafziger characterises the CAS *lex sportiva* as "still incipient".

20 Chateau de Bethusy, Av. De Beaumont 2, CH-1012 Lausanne. Tel: + 41 21 613 50 00. Fax: + 41 21 613 50 01.

21 Article R45 of the Code of Sports-related Arbitration.

22 Article R38, ibid.

23 Ibid.

24 Ibid.

25 On the question of the rules on examination of witnesses and experts in CAS hearings, see comments of Stephan Netzle in Blackshaw, I, Siekmann, R.C.R. & Soek, J (Eds.), 'The Court of Arbitration for Sport 1984-2004', (2006) The Hague, The Netherlands, TMC Asser Press (ISBN 978-90-6704-204-8) at pp. 210-215.

26 Under Article R28 of the Code of Sports-related Arbitration, after consultation with all parties, the hearing may be held elsewhere.

If the Claimant fails to submit its statement of claim as required under the procedural rules, the request for arbitration shall be "*deemed withdrawn*".[27] Likewise, if the Respondent fails to submit its response in accordance with the procedural rules, the Panel may proceed with the case and deliver an award.[28] And, finally, if any of the parties is duly summoned and fails to appear at the hearing, the Panel may nevertheless proceed with the hearing.[29] Again, this may raise questions of 'due process'.

Appeal Proceedings

In appeal cases, it is interesting to note that, also pursuant to the provisions of Article R57 of the Code, "*The Panel shall have full power to review the facts and the law*." And "*it may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*." In other words, the case is dealt with '*de novo*'. And, whilst on the subject of appeals, to commence the process the Appellant must file with CAS a Statement of Appeal, which must contain the following information:

- the name and full address of the Respondent;
- a copy of the decision appealed against;
- the Appellant's request for relief;
- the appointment of the arbitrator chosen by the Appellant from the CAS list, unless the parties have agreed to a Panel composed of a sole arbitrator;
- if applicable, an application to stay the execution of the decision appealed against, together with reasons;
- a copy of the provisions of the statutes or regulations or the specific agreement providing for appeal to the CAS.[30]

Upon filing the Statement of Appeal, the Claimant must pay the Court Office fee.[31]

If any of these requirements are not met, the CAS Court Office will grant a once only short deadline to comply, failing which the Appeal shall be "*deemed withdrawn*".[32]

There is a time limit for bringing an Appeal to CAS established in Article R49 of the CAS Code of Sports-related Arbitration, which provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late."*

If the Appellant fails to submit its Appeal Brief as required under the procedural rules, the appeal shall be "*deemed withdrawn*".[33] If the Respondent fails to file an Answer as required under the procedural rules, the Panel may nevertheless proceed with the case and deliver an award.[34] If any of the parties are summoned but fails to appear, the Panel may nevertheless proceed with the hearing.[35] Again, this may raise questions of 'due process'.

Provisional or Conservatory Measures

In appropriate cases, it is possible for the parties to apply to the CAS for so-called '*provisional or conservatory measures*' under the procedural rules.[36] Such measures, if granted, may be made conditional on the provision of security.

Article R37 of the CAS Code of Sports-related Arbitration empowers the CAS to offer the parties in dispute certain protective measures within a very short timeframe.

This Article 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*." [37]

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 Paper in its own right.[38] Suffice to say that, in practice, the measures carry a high degree of moral authority and, therefore, National and

27 Article R44.5, ibid.
28 Ibid.
29 Ibid.
30 Article R48, ibid.
31 Ibid.
32 Ibid.
33 Article R51 of the Code of Sports-related Arbitration.
34 Article R55, ibid.
35 Article R57, ibid.
36 Under Article R37 of the Code of Sports-related Arbitration.
37 CAS JO-SLC 02/004, COA v ISU, CAS Digest III, pp. 592 & 593.
38 See Antonio Rigozzi on 'Who Rules - The CAS or the Courts?' in Blackshaw, I, Siekmann, R.C.R. & Soek, J (Eds.), 'The Court of Arbitration for Sport 1984-2004', (2006) The Hague, The Netherlands, TMC Asser Press (ISBN 978-90-6704-204-8) at pp. 217-224.

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 it 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.

Expedited Proceedings

Likewise, the CAS Panel may, with the consent of the parties, agree to expedite the proceedings, in respect of which it shall issue appropriate directions.[39] This, in practice, is a useful measure in sporting disputes, where athletes or teams/clubs are often subject to sporting deadlines and other time pressures. For example, a sports person or a team, who has been denied eligibility to compete in a particular sporting event, which is soon to take place, need to have their dispute settled very quickly, if the possibility of competing is to remain open and not lost through any delay.

Again, article 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.

CAS Mediation

The CAS also offers a mediation service,[40] which was introduced on 18 May, 1999[41]. And, as Ousmane Kane, Senior Counsel to the CAS and responsible for mediation has remarked:

> "*The International Council of Arbitration for Sport took the initiative to introduce mediation alongside arbitration. As the mediation rules encourage and protect fair play and the spirit of understanding, they are made to measure for sport.*"[42]

Article 1, para 1 of the CAS Mediation Rules (Rules) defines mediation in the following terms:

> "*CAS Mediation is a non-binding and informal procedure, based on a mediation agreement in which each party undertakes to attempt in good faith to negotiate with the other party, and with the assistance of a CAS mediator, with a view to settling a sports-related dispute".*

Article 2 of the Rules defines a 'mediation agreement' as follows:

> "*A mediation agreement is one whereby the parties agree to submit to mediation a sports-related dispute which has arisen or which may arise between them.*
>
> *A mediation agreement may take the form of a mediation clause inserted in a contract or that of a separate agreement.*"

In other words, an express or an '*ad hoc*' mediation reference clause (see later).

Although mediation is expressly excluded (in para 2 of article 1 of the Rules) for disciplinary and doping cases, for obvious reasons, mediation is very appropriate for settling the commercial/financial issues and consequences (for example, loss of lucrative sponsorship and endorsement contracts), which often follow from a doping case, particularly where the sports person concerned was wrongly accused of being a drugs cheat. For example, Dianne Modahl would probably have been better advised to try to settle her claims for compensation against the British Athletic Federation through mediation rather than through the courts[43].

If the parties in dispute prefer to settle their differences by mediation - and many do because of the special characteristics and dynamics of sport[44] - the CAS model mediation clause is as follows:

> "*Any dispute, any controversy or claim arising under, out of or relating to this contract and any subsequent of or in relation to this contract, including, but not limited to, its formation, validity, binding effect, interpretation, breach or termination, as well as non-contractual claims shall be submitted to mediation in accordance with the CAS Mediation Rules.*"

If mediation proves to be unsuccessful, although mediation providers usually claim a success rate of 85%, the CAS recommends the following additional clause to be inserted in a contract to cover the above contingency:

> "*If, and to the extent that, any such dispute has not been settled within 90 days of the commencement of the mediation, or if, before the expiration of the said period, either party fails to participate or continue to participate in the mediation, the dispute shall, upon the filing of a Request for Arbitration by either party, be referred to and finally settled by CAS arbitration pursuant to the Code of Sports-related Arbitration. When the circumstances so require, the mediator may, at his own discretion or at the request of a party, seek an extension of the time limit from the CAS President.*"

Thus, the CAS offers disputing parties the possibility of a 'Med-Arb' dispute resolution process: mediation to identify the issues; and arbitration to settle them.

Whilst on the subject of mediation, it may be noted, *en passant*, that in a recent landmark ruling in the English Courts in the case of *Cable & Wireless PLC v IBM United Kingdom* [2002] 2 All ER (Comm) 1041, Mr Justice Colman held that an agreement to refer disputes to mediation is contractually binding. In this case, IBM called on Cable and Wireless to mediate a dispute that had arisen under a contract in which the parties had agreed to mediate future disputes. Cable and Wireless refused to do so, claiming that the reference to mediation in the contract was legally unenforceable because it lacked certainty and was like an unenforceable agreement to negotiate. The judge rejected this argument, holding that the agreement to try to resolve a dispute, with identification of the procedure to be used, was sufficient to give certainty and, therefore, legal effect to the clause. It may be added that, in England too, parties, who, under Court rules, refuse to try to

39 Under Article R44.4, ibid.

40 See Booklet 'Mediation Guide' published by and available from CAS.

41 There are currently some 65 CAS mediators, of which the author is one.

42 On the value of mediation generally for settling sports disputes, see '*Mediating Sports Disputes - National and International Perspectives*' by Ian S. Blackshaw 2002 TMC Asser Press The Hague, The Netherlands (ISBN 90-6704-146-7); and on CAS mediation, see Blackshaw, Ian, 'Settling sports disputes by CAS mediation', CAS Newsletter No. 3 - November 2005, at pp. 4-7.

43 *Modahl v British Athletic Federation* [2001] All ER (D) 181 (Oct). See also 'Modahl Loses Appeal For Compensation', I Blackshaw, November/December, 2001 issue of the 'Sports Law Bulletin', Vol. 4 No. 6 at pp. 1,3 & 4.

44 See the case of Richie Woodhall and Frank Warren involving a time-critical dispute under certain management and promotion agreements entered into between them, which was settled within 72 hours by mediation, discussed at page 182 in '*Mediating Sports Disputes - National and International Perspectives*' by Ian S. Blackshaw 2002 TMC Asser Press The Hague, The Netherlands (ISBN 90-6704-146-7).

settle their disputes by mediation at an early stage in the litigation process, may run the risk of being denied their legal costs if ultimately successful, contrary to the normal rule that 'costs follow the event'.[45]

Because of its popularity in the sporting world, many International and National Sports Federations now include specific provisions for mediation of appropriate sports disputes in their Statutes and Constitutions. As to the legal validity of a so-called CAS arbitration or mediation 'clause by reference' in such Statutes and Constitutions, see the decision of the Swiss Federal Tribunal of 31 October 1996 in the case of *N. v Federation Equestre Internationale*.[46] In that case, the Court held that by agreeing to abide by the rules of the Federation, which included a provision to refer all disputes exclusively to the CAS, the sports person concerned was bound to submit the dispute to the CAS, even though he had not expressly agreed to CAS arbitration or mediation. So-called 'sports association law' applied in such a case.

Procedural Aspects of CAS Mediations

Under Article 3 of the Rules, except where the parties agree otherwise, the version of the Rules in force at the time the written request for mediation (required under Article 4 of the Rules) is filed at the CAS Court Office shall apply.

Article 4 provides that the written request shall contain:

"*the identity of the parties and their representatives (name, address, telephone and fax numbers), a copy of the mediation agreement and a brief description of the dispute*."

Upon filing the mediation request, the administrative fee stipulated in Article 14 of the Rules (see later) must be paid; and the day on which this request is received by the CAS Court Office shall be considered as the date on which the mediation proceedings commenced.

Pursuant to Article 6 of the Rules, the CAS President chooses the mediator from the list of CAS mediators drawn up in accordance with the provisions of Article 5. The mediator appointed must be and remain independent of the parties (ibid.). The parties may be represented or assisted at their meetings with the mediator (Article 7). The representative must have full authority to settle the dispute alone, without consulting the party whom he is representing (ibid.).

Under Article 8 of the Rules, the procedure to be followed in the mediation shall either be agreed by the parties themselves or determined by the mediator. This is a slight deviation from the general principle that the mediator is the one who controls the procedural aspects of the mediation. But the parties are required to "*cooperate in good faith with the mediator and ... guarantee him the freedom to perform his mandate to advance the mediation as expeditiously as possible*."

The role of the mediator is laid down in Article 9 of the Rules, which recognises the basic concept of mediation, namely, that the mediator acts as a facilitator and may act in any manner "*...he believes to be appropriate*" but may not impose any solution of the dispute on either of the parties.

Article 10 of the Rules provides for the confidentiality of the mediation process subject to the normal exception of making any disclosure as required by the law. And further provides that:

"*No record of any kind shall be made of the meetings... [and] [a]ll the written documents shall be returned to the party providing these upon termination of the mediation, and no copy therefore shall be retained*."

Article 10 also makes provision for the mediation to be conducted on a '*without prejudice*' basis, expressed in the following terms:

"*The parties shall not rely on, or introduce as evidence in any arbitral or judicial proceedings:*

1. *expressed or suggestions made by a party with respect to a possible settlement of the dispute;*
2. *made by a party in the course of the mediation proceedings;*
3. *, notes or other information obtained during the mediation proceedings;*
4. *made or views expressed by the mediator;*
5. *fact that a party had or had not indicated willingness to accept a proposal."*

Article 11 of the Rules deals with the questions of when and how the mediation may be terminated and provides as follows:

"*Either party or the mediator may terminate the mediation at any time*

The mediation shall be terminated:

1. *by the signing of a settlement by the parties;*
2. *by a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or*
3. *by a written declaration of a party or the parties to the effect that the mediation proceedings are terminated.*"

Article 12 of the Rules requires that any settlement of the mediation must be in writing and signed by the mediator and the parties. And further provides that:

"*Each party shall receive a copy thereof. In the event of any breach, a party may rely on such copy before an arbitral or judicial authority. A copy of the settlement is submitted for inclusion in the records of the CAS Court Office*."

Article 13 of the Rules deals with the question of failure to settle and includes the following important provision - absolutely fundamental to the process of mediation:

"*In the event of failure to resolve a dispute by mediation, the mediator shall not accept an appointment as an arbitrator in any arbitral proceedings concerning the parties involved in the same dispute*."

CAS Mediation Costs

Article 14 of the Rules deals with the equally important subject of the costs of CAS mediations. Until the CAS administrative fee is paid by each party, the mediation proceedings cannot be started; and the CAS Court Office may require the parties to deposit an equal amount as an advance towards the CAS mediation costs. The parties are required to pay their own mediation costs and, unless otherwise agreed, share equally the other final costs, which include the CAS fee, the mediator's fees, calculated on the basis of the CAS fees scale, a contribution towards the costs of the CAS, and the costs of witnesses, experts and interpreters.

CAS Mediations to Date

To date, there have been a number of mediations conducted by CAS in relation to administrative sporting disputes involving Sports Federations and the exercise of their regulatory functions. Details are sketchy because of the confidentiality requirements.

There have also been a number of commercial disputes settled by CAS Mediation. These cases have included disputes with a sports management agency over the commercialisation of a cyclist's image rights and some financial disputes between athletes and their advertising agencies in relation to substantial commission payments.

As the CAS mediation service becomes more widely known, it is expected that more sports disputes, including commercial and financial ones, will be referred to CAS for settlement under the Mediation Rules, thus proving the suitability of mediation for resolving sports disputes quickly, confidentially and relatively in expensively.

More on the usefulness of settling sports business disputes by mediation later.

CAS 'Advisory Opinions'

The CAS also offers 'Advisory Opinions' (known as 'Consultation Proceedings') on potential disputes, similar to the concept of 'expert determination' in the business world, which has become a popular form of ADR for settling commercial and financial disputes. However, there is one important difference; CAS 'Advisory Opinions' are not legally binding. However, this does detract from their useful-

45 See *Susan Dunnett v Railtrack PLC* [2002] EWCA Civ 302.

46 Nagel/FEI, CAS-Digest I, p.585.

ness, because, in practice, they are a quick and relatively inexpensive way of clarifying legal issues and thus, hopefully, avoiding lengthy and expensive litigation.

Such Opinions may be requested by the IOC, the International Sports Federations, National Olympic Committees, and certain other sports bodies, including the World Anti-Doping Agency on "*any legal issue with respect to the practice of sport or any activity related to sport.*"[47] When a request for such an Opinion is filed, the CAS President shall "*review whether it may be the subject of an opinion. In the affirmative, he shall proceed with the formation of a Panel of one or three arbitrators from the CAS list and designate the President. He shall formulate, at his own discretion, the questions submitted to the Panel and forward these questions to the Panel.*"[48]

The Opinion may be published with the consent of the party who requested it.[49] We will look at a couple of actual Case examples of CAS Advisory Opinions later.

It may be noted, *en passant*, that a party may apply to the CAS for the interpretation of an award issued in an ordinary or appeals arbitration, "*whenever the operative part of the award is unclear, incomplete, ambiguous or whenever its components are self-contradictory or contrary to the reasons, or whenever the award contains clerical mistakes or a miscalculation of figures.*"[50] The Panel must rule on the request for interpretation within one month.[51]

CAS Ad Hoc Division

Since the Centennial Games in Atlanta in 1996 - dubbed the 'Coca-Cola Games' - the CAS has operated a so-called Ad Hoc Division (AHD) to adjudicate on disputes arising during the Summer and Winter Games. The CAS AHD was again in session during this year's Winter Games in Turin.

The AHD operates under a special set of rules - Arbitration Rules for the Olympic Games - and its remit is to settle such cases within 24 hours[52] - it needs to act quickly because of sporting deadlines, especially in eligibility and selection disputes - and does so free of charge.[53] All athletes competing in the Games must agree in their entry forms to submit their disputes 'exclusively' to the jurisdiction of the CAS. The wording of this 'undertaking' is as follows:

> "*I shall not constitute any claim, arbitration or litigation, or seek any other form of relief in any other court or tribunal.*"

The legal validity of such a clause - designed to 'oust the jurisdiction of the courts'- may be doubtful under various jurisdictions.[54]

Under the Special AHD Rules, the arbitrators selected to serve on the AHD Panels must decide cases in accordance with the principles of the Olympic Charter, the applicable sports regulations, general principles of law and the rules of law which they deem appropriate.[55] This gives them a wide scope to act fairly and provide just outcomes in the cases referred to them. The parties may be represented or assisted by persons of their choice, including lawyers.[56]

The cases range from eligibility and selection issues to, sadly, doping issues. And there are an increasing number also of cases challenging the decisions of referees and judges. For example, at the last Winter Olympics in 2002 in Salt Lake City, one of the cases dealt with was the so-called 'skategate' scandal concerning the impartiality of the judges in one of the skating events. In that case, the CAS AHD imposed an order on the judges concerned not to leave the Olympic village before it had investigated the circumstances in which the disputed medal had been awarded, which illustrates the wide powers the members of the AHD have at their disposal.[57]

The CAS publishes a Digest of the cases dealt with by the AHD at each of the Games shortly afterwards, and these make interesting and informative reading.

The CAS also provides AHD proceedings at the Commonwealth Games and the Euro Football Championships.

One final but important legal and practical point. In AHD proceedings, the 'seat' of the CAS remains in Lausanne, Switzerland, where it is based. The case of Angela Raguz[58] well illustrates this point. In that case, the CAS AHD was asked just before the 2000 Sydney Summer Olympics to adjudicate in a selection dispute involving two Australian 'judokas'. The unsuccessful one, Angela Raguz, challenged the CAS award in the New South Wales Court of Appeal. The Court held that the CAS agreement for arbitration form signed by the parties was not a 'domestic arbitration agreement' within the Commercial Arbitration Act 1984, but a foreign one, and, therefore, outside the jurisdiction of the Australian Courts. Although the physical place of arbitration was Sydney, Australia, the legal place of arbitration, as expressly stipulated in the agreement, was Lausanne, Switzerland - the 'seat' of the CAS. The CAS award could only, therefore, be challenged in a Swiss Court under Swiss Law - in limited circumstances as explained later.

Sports Disputes

Generally

Parties involved in sports disputes have three possible ways of resolving them. They can appeal to the internal authorities of their sports federations - both national and international; they can take their disputes to the ordinary competent courts; or submit disputes to private arbitration or mediation. It is important to point out that the regulations of sports federations cannot exclude an appeal of a dissatisfied member to external judicial authorities. Such provisions designed to oust the jurisdiction of the courts are void.[59] However, they can provide in their regulations for parties involved in disputes to first exhaust all the internal remedies and appeal procedures before resorting to the courts.[60]

The CAS is dedicated to hearing and settling any disputes directly or indirectly relating to sport.[61]

'On-Field of Play' Disputes

However, it is well established in previous decisions that the CAS will not generally review so-called 'on-field of play' sporting decisions made on the playing field by judges, referees, umpires and other officials, who are responsible for applying the rules of a particular game. For example, in *Mendy v International Amateur Boxing Association*, the Ad Hoc Division, sitting at the Atlanta Summer Games in 1996, dismissed the French boxer's appeal against disqualification for punching his opponent below the belt in violation of the rules.[62] In that case, the AHD held that "*...the referee's decision, confirmed by the AIBA, is a purely technical one pertaining to the rules which are the responsibility of the federation concerned.*" And added that the boxer had not provided any evidence that the competent sports authorities, in evaluating a technical rule specific to the sport concerned, had committed an error of law, a wrong or a malicious act against him.

Again, and more recently, the appeal during the Athens Summer Games in 2004 against the decision of the Appeal Committee of the International Equestrian Federation setting aside the Ground Jury ruling that a time penalty be imposed on the German equestrian athlete Bettina Hoy for failing to complete a jumping event within the

47 Article R60 of the Code of Sports-related Arbitration.
48 Article R61, ibid.
49 Article R62, ibid.
50 Article R63, ibid.
51 Ibid.
52 Article 18 of the Rules.
53 Article 22, ibid. However, the parties are required to pay their own costs of legal representation, experts, witnesses and interpreters (ibid.).
54 See pp. 114-115 of '*Mediating Sports Disputes - National and International Perspectives*' by Ian S. Blackshaw 2002 TMC Asser Press The Hague, The Netherlands (ISBN 90-6704-146-7); and also the leading English case of *Scott v Avery* [1856] 5 HL Cas 811.
55 Article 17 of the Rules.
56 Article 8, ibid.
57 As to the range of these powers to grant preliminary relief including stays of execution of sports bodies' rulings, see Article 14, ibid.
58 *Angela Raguz v Rebecca Sullivan & Ors*, 2000 NSECA 240; CAS Digest II, p.783 - CAS Awards Sydney 2000, p.185.
59 See *Baker v Jones* [1954 2 All ER 553.
60 See *Scott v Avery* [1856] HL Cas 811.
61 Article R27 of the Code of Sports-related Arbitration provides (in part) as follows: "Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport."

required time limit was upheld. The Ad Hoc Division held, *inter alia*, that it was "... *not necessary to deal with the merits or demerits of the Ground Jury's ruling, which was clearly a "on-field of play" decision made within its competence during the course of an event falling under its exclusive control.*"[63]

But in cases in which such rules have been applied in bad faith, the CAS will exceptionally intervene in the interests of justice.[64] In doing so, there must be evidence, which generally must be direct evidence, of bad faith. This places a "high hurdle" that must be cleared by anyone seeking to review a field of play decision: if the hurdle were to be lower, the flood-gates would be opened and any dissatisfied participant in a sporting event would be able to challenge such on field decisions.[65]

Sporting and Commercial Disputes

Sports disputes that the CAS hears may include purely sporting issues, such as selection and eligibility matters, as well as disciplinary matters, including doping;[66] and also commercial issues, which are on the increase in view of the mega sums now at stake in the promotion and marketing of professional sport and sports events, such as disputes over corporate sponsorship, merchandising and agency contracts. A sports person, body or a commercial company, such as a sports marketing company, may bring cases to CAS. The parties must agree to do so in writing. Cases can be referred to the CAS on an '*ad hoc*' basis at the time a particular dispute arises. But many sports bodies and sports marketing companies are now including an express CAS arbitration clause in their contracts.

The standard CAS clause for a sports body is as follows:

"Any decision made by....[insert the name of the disciplinary tribunal or similar court of the sports federation, association or sports body which constitutes the highest internal tribunal] may be submitted exclusively by way of appeal to the Court of Arbitration for Sport in Lausanne, Switzerland, which will resolve the dispute definitively in accordance with the Code of Sports-related Arbitration. The time limit for appeal is twenty-one days after the reception of the decision concerning the appeal."

The standard CAS clause for a commercial dispute is as follows:

"*Any dispute arising from or related to the present contract will be submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland, and resolved definitively in accordance with the Code of Sports-related Arbitration*."

The parties may - and it is advisable to do so - include in this reference clause additional provisions regarding the number of CAS arbitrators (from one to three) and the language in which the CAS proceedings will be conducted (for example, English).

Sports-related Commercial Disputes: Some Examples

The CAS has dealt with a number of sports-related commercial disputes and mention will now be made of a few of them, which will give the reader a flavour of the range of sports-related commercial and financial disputes that may be referred to the CAS.

The CAS was brought in to deal with a dispute concerning the UEFA, the European Governing Body of Football, restrictions on common ownership of football clubs competing in their European competitions. The CAS held that these restrictions were not anti-competitive, as alleged by the English national Investment Company, which owned several clubs and wanted to acquire others, but could be justified on sporting grounds - the so-called 'sporting exception'[67]. These restrictions actually encouraged competition in a sporting sense. Incidentally, subsequently the EU Competition Commission agreed with this ruling in line with the legal distinction EU Law makes between the 'rules of the game' and commercial restrictions.

In another case, the CAS was called upon to determine the legal nature of and interpret certain marketing contracts, including a sponsorship contract, entered into between a Sports Federation and a French Company. *Inter alia*, the CAS held that where a contract's provisions concerning the payment of commission are unambiguous, there is no need to re-interpret them[68].

Again, the CAS dealt with another sporting issue with significant commercial implications. Just before the 2000 Sydney Summer Games, the Australian Olympic Committee asked the CAS for an 'Advisory Opinion' on whether the introduction of of so-called 'full body' swimming costumes was lawful. Speedo and other sports apparel manufacturers had invested substantial sums of money in them. But did they give competitors, who wore them, an unfair advantage over those who did not and had the rules, allowing them, been properly passed by FINA, the World Governing Body of Swimming? The CAS, after a full review of the legal and sporting issues, held that they had been correctly introduced.[69]

More recently, in 2003, the author of this Chapter was asked to give an 'Advisory Opinion', requested by the Canadian Olympic Committee, on whether controversial new scoring rules in Badminton introduced by the International Badminton Federation - introduced for marketing/commercial reasons with the intention of making the sport more telegenic and interesting for sponsors - discriminated against women players, who were subject to different playing rules. As there was no sporting reason for this difference, it was held that the new rules could be considered discriminatory.[70]

A number of commercial disputes have also been settled by CAS Mediation. These cases have included disputes with a sports management agency over the commercialisation of a cyclist's image rights and financial disputes between athletes and their advertising agencies in relation to substantial commission payments.

It should be added that, since FIFA joined the CAS in 2002, there have been many disputes referred to the CAS concerning the interpretation and application of the FIFA International Football Transfer Rules, especially the payment of compensation for the education and training costs of young players and disputes regarding the level of transfer fees payable in particular cases. Many of these cases have involved well-known Football Clubs and players.[71]

Cost of CAS Proceedings

Challenges to decisions of international sports federations are dealt with by the Appeals Division of CAS. Where such disputes relates to

62 See CAS Arbitration Ad Hoc Division (O.G. Atlanta 1996) 006, M./Association Internationale de Boxe Amateur (AIBA), Award of 1 August, 1996.

63 See CAS Ad Hoc Division (OG Athens) 2004/007, Comite National Olympic et Sportif Francais (CNOSF), British Olympic Association (BOA), United States Olympic Committee (USOC)/Federation Equestre Internationale (FEI) and National Olympic Committee for Germany (NOCG), Award of 21 August, 2004.

64 See CAS 2001/A/354, Irish Hockey Association (IHA)/Lithuanian Hockey Federation (LHF) and International Hockey Federation (FIH) and CAS 2001/A/355, Lithuanian Hockey Federation (LHF)/International Hockey Federation (FIH), Award of 15 April, 2002.

65 See CAS Ad Hoc Division (OWG Salt Lake City 2002) 007, Korean Olympic Committee (KOC)/International Skating Union (ISU), Award of 23 February, 2002.

66 Under Article 13 of the World Anti-Doping Code of 2003, final appeals against doping decisions go exclusively to the CAS.

67 See *AEK PAE and SK Slavia Praha v UEFA*, CAS Case No. 98/2000, award dated August 20, 1999; Digest of CAS Awards Vol II 1998-2000 (2002, Kluwer) at page 36.

68 See *X.Sarl and Federation Y*, CAS Case No. 319/2001, Award dated October 17, 2001; Digest of CAS Awards Vol III 2001-2003 (2004, Kluwer) at page 10.

69 See Advisory Opinion CAS 2000/C/267, Australian Olympic Committee (AOC), 1 May 2000 rendered by Prof Richard H. McLaren (Canada) on the so-called 'Long John' swimsuits and their compliance with the FINA (International Amateur Swimming Federation) rules. For a critique of this Advisory Opinion, see the article by Janwillem Soek entitled, '*You don't win silver, you miss the gold*', The International Sports Law Journal, September 2000 (ISLJ 2002/2), at pp. 15-18, quoted *in extensu* in Ian S. Blackshaw, '*Mediating Sports Disputes: National and International Perspectives*', 2002: The Hague, the TMC Asser Press.

70 See Advisory Opinion CAS 2003/C/445, Canadian Olympic Committee, 24 April, 2003 rendered by Prof Ian S. Blackshaw (United Kingdom) on the legality of the new scoring rules introduced by the International Badminton Federation on 23 May, 2002.

71 For example, the dispute between Fulham Football Club and Olympic Lyonnais concerning the transfer of Steve Marlet: see Arbitration CAS 2003/O/486, Award of 15 September, 2003.

disciplinary matters, including doping cases, apart from the payment of the Court fee of Sw Frs 500, the proceedings are free of charge. However, in one case in which the parties settled their dispute prior to the hearing before CAS, but only informed CAS on the day of the actual hearing, resulting in the unnecessary attendance at CAS of the members of the CAS Panel, the CAS ordered the parties to pay the CAS costs.[72] In all other appeal cases, for example, an appeal relating to a football transfer dispute, costs are fixed in the same way as disputes dealt with in the Ordinary Division (see below).

Commercial disputes referred to the CAS are deal with under the Ordinary Jurisdiction. Apart from the payment of a Court fee of Sw Frs 500, the CAS fixes the costs in accordance with a sliding scale based on the amount in dispute and before the case may proceed the parties are required to pay an advance of fees to the CAS Office[73].

The CAS can award costs to the successful party in a CAS case or determine the proportion in which the parties are to share them; as a general rule, the prevailing party is granted a contribution towards its legal fees and other expenses, including the costs of witnesses and interpreters[74].

Lex Sportiva

During its 21 years of operations, the CAS has dealt with a substantial number of cases covering a wide range of sports related legal issues. Although CAS arbitrators are not generally obliged to follow earlier decisions and obey the sacred Common Law principle of '*stare decisis*' (binding legal precedent),[75] in the interests of comity and legal certainty, they usually do so. As a result of this practice, a very useful body of sports law is steadily being built up.[76]

The extent to which the CAS is contributing to a discrete body of sports law ('*lex sportiva*') is a complex and controversial subject and divides academics and practitioners alike. For example, Ken Foster argues that the CAS, as an institutional forum, is not yet:

"*...globally comprehensive...[but] has improved by becoming more independent of the International Olympic Committee and thus satisfying Teubner's criterion of externalisation.*"[77]

And, according to Jim Nafziger, the CAS '*lex sportiva*' although "*still incipient*", the general principles and rules derived from CAS Awards are becoming clearer on such issues as:

"*...the jurisdiction and review powers of the CAS; eligibility of athletes; and the scope of strict liability in doping cases..... A truly effective body of jurisprudence generated by CAS awards, however, will require more development before the emerging lex sportiva can become a truly effective regime of authority.*"[78]

As mentioned above, one area of sports law in which the CAS is developing a particular body of jurisprudence is, sadly, in doping cases. The legal challenges and limitations facing CAS in developing a consistent approach to such cases is well covered by Frank Oschutz in his study entitled 'Doping Cases before the CAS and the World Anti-Doping Code'.[79] According to Oschutz:

"*The Court of Arbitration for Sport offers a unique opportunity of international decision making in the world of sport.....The awards rendered by the various arbitrators prove that the CAS can provide effective protection for the rights of the accused athlete and is likewise able to ensure that the fight against doping will be upheld unremittingly..... the CAS has developed a quite impressive body of decisions which deal with all kinds of challenges.*"[80]

However, one of the difficulties faced by the CAS in developing a '*lex sportiva*' stems from the fact that, generally speaking, CAS proceedings and decisions are a matter of private law and confidential to the parties. CAS by its nature is a private arbitral body. And therein lies the paradox - the need, on the one hand, of the sporting community 'not to wash its dirty sports linen in public' and, on the other hand, the need of a wider public to know how cases are being decided, particularly for future guidance and reference. Article R43 of the CAS Code of Sports-related Arbitration provides as follows:

"*Proceedings under these procedural rules are confidential. The parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings.*"

However, the last sentence of this Article provides the following exceptions to the general rule of confidentiality:

"Awards shall not be made public unless the award itself so provides or all parties agree."

But, in practice, more CAS Awards are being published,[81] especially on the CAS official website.[82] And, indeed, as the work of the CAS continues to expand and becomes more widely known and discussed, especially in press reports and articles, the need for such publicity also increases. In fact, a 'public interest' argument comes into play and needs to be satisfied in appropriate cases.[83] But, in this context, what interests the public is not necessarily the same as what is in the public interest![84]

The Legal Status of CAS Awards

Awards made by the CAS, like other international arbitral awards, are legally enforceable generally in accordance with the rules of International Private Law, and also specifically under the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June, 1958. The CAS is also recognised under the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations.

So, the CAS decisions are legally effective and can be enforced internationally. This is particularly important in the case of disputes involving intellectual property rights, especially trademarks, which are generally of a territorial nature.

Legal Challenges to CAS Awards

The CAS awards can be legally challenged in the Swiss Federal Court, also based in Lausanne, by a dissatisfied party, but only in very limited circumstances, under the provisions of article 190(2) of the Swiss Federal Code on Private International Law of December 18, 1987. This article reads (in translation) as follows:

72 See CAS 2000/A/264.G, Federazione Italiana Sport Equestri, Order of 23 October, 2000.

73 Article R64 of the Code of Sports-related Arbitration. See also Appendix II - Schedule of Arbitration Costs.

74 Article R64.5 ibid., which provides (in full) as follows: "*The arbitral award shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.*"

75 See *UCI v J.* 7NCB, CAS 97/176 Award of 28 August 1998, 14.

76 See further on this, Nafziger, J, 'Arbitration of Rights and Obligations in the International Sports Arena', (2001) 35(2) Valparaiso University Law Review 57; Nafziger, James A.R., 'International Sports Law', Second Edition (2004), Ardsley, NY, Transnational Publishers, Inc. (ISBN 1-57105-137-6) at pp. 48-61; and Blackshaw, I, Siekmann, R.C.R. & Soek, J (Eds.), 'The Court of Arbitration for Sport 1984-2004', (2006) The Hague, The Netherlands, TMC Asser Press (ISBN 978-90-6704-204-8), at pp. 409-454.

77 Foster, K, 'Is there a Global Sports Law?' (2003) 2 (2) Entertainment and Sports Law Journal , 1. Teubner's criterion of externalisation applied to CAS is represented by an 'external arbitrator' who is able to make decisions amounting to 'official and organised' law.

78 Nafziger, J, 'The Court of Arbitration for Sport: the emerging lex sportiva' in Blackshaw, Siekmann & Soek, op cit, at pp. 409-419.

79 See pp. 246-265 in Blackshaw,Siekmann & Soek, op cit.

80 Ibid. at p. 264.

81 The Secretary General of CAS, Matthieu Reeb, has edited and published three Digests of several CAS cases covering the periods 1986-1998; 1998-200; and 2001-2003.

82 'www.tas-cas.org'.

83 See, for example, the Decision in the Gaia Bassani Case (CAS 2003/O/468), where the writer was the Sole Arbitrator and, because of the particular circumstances of the case and the need for a wider audience to know about the case, directed that the Decision be published.

84 On this point, see the discussion in the English case of *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417.

ANZSLA

The Australian and New Zealand Sports Law Association

ANZSLA was formed in 1990 under the leadership of Hayden Opie, the first President and a board of mainly young Melbourne based lawyers interested in the law pertaining to sport.

A very successful Conference was held at Melbourne University in 1991, and that proved to be the forerunner of Annual Conferences that have been held in the capital cities of 5 of the Australian States, in a regional centre and on both the North and South Island of New Zealand. Those conferences are the highlight of the ANZSLA year.

Shortly after the first Melbourne conference a journal entitled ?The ANZSLA Newsletter? was published, on what was initially to be a quarterly basis. The Newsletter was unique to the legal and sports administration community.

ANZSLA was readily accepted by sporting organisations, government and the legal community as the body to provide advice and assistance, and since then it has conducted inquiries for major sports federations and government.

At a time when the only avenue of resolving sports disputes externally was the courts, and with the formation of the International Court of Arbitration for Sport in Lausanne, ANZ SLA took a lead and set up its own dispute resolution service. That evolved, in partnership with the Australian Sports Commission, Confederation of Australian Sport & The Australian Olympic Committee into the National Sports Disputes Centre in Australia, at about the time that CAS created an Oceania Registry in Sydney. A similar scheme has been set up in New Zealand.

In 1999 the "Commentator" became the official publication of ANZSLA, the organisation employed professional staff, and in late 2000 the Commentator was published electronically.

The organization is currently preparing for its 16th Annual Conference in Auckland.

A website was created and access to the business and publications of ANZSLA is now obtained through that site www.anzsla.com.au.

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"*[The Award] can be attacked only:*

1. *if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;*
2. *if the arbitral tribunal erroneously held that it had or did not have jurisdiction;*
3. *if the arbitral tribunal ruled on matters beyond the claims submitted to it or failed to rule on one of the claims;*
4. *if the equality of the parties or their right to be heard in an adversarial proceeding was not respected;*
5. *if the award is incompatible with Swiss public policy."*

In practice, perhaps ground (d) is the most important one, and the CAS bends over backwards in each case to ensure that the parties are properly heard and receive a fair hearing.

In practice, there have been few legal challenges to CAS awards and none have been successful to date (see above). In the latest challenge in 2003 concerning the independence of the CAS in view of its association with and partial funding by the IOC, the Swiss Federal Court held that the CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration, even where the IOC - as in that case - was a party in its proceedings[85].

In that case, two Russian cross-country skiers, Larissa Lazutina and Olga Danilova unsuccessfully questioned the independence of CAS in the Swiss Federal Tribunal (TFS) in 2003. These skiers were disqualified by the IOC after the 2002 Winter Olympic Games in Salt Lake City for doping offences. The International Ski Federation (FIS) suspended both of them for two years. Their appeal to CAS, calling for the IOC and FIS decisions to be overruled was dismissed. Their legal challenge to the TFS on the grounds that CAS, because it is a creature of and receives some funding from the IOC, is not a truly independent body, was also dismissed. The TFS held that CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration, even where the IOC - as in the Russian skiers' case - is a party to its proceedings. On the question of the partial financing of the CAS by the IOC, the Court concluded as follows:

"To conclude our discussion of the financing of the CAS, it should be added that there is not necessarily any relationship of cause and effect between the way a judicial body is financed and its level of independence. This is illustrated, for example, by the fact that State courts in countries governed by the rule of law are often required to rule on disputes involving the State itself, without their judges' independence being questioned on the ground that they are financially linked to the State. Similarly, the CAS arbitrators should be presumed capable of treating the IOC on an equal footing with any other party, regardless of the fact that it partly finances the Court of which they are members and which pays their fees." [86]

However, the TFS made the following observation/recommendation to make the list of arbitrators more transparent for the benefit of the parties selecting them:

"It would be preferable, if the published list were to indicate, alongside the name of each arbitrator, which of the five categories mentioned in Article S14 they belonged to (arbitrators chosen from those proposed by the IOC, the Ifs and the NOCs; arbitrators chosen to safeguard the interests of the athletes; arbitrators chosen from among persons independent of the three aforementioned bodies) and, for those in two of these categories, by which IF or NOC they were proposed(. The parties would then be able to appoint their arbitrator with full knowledge of the facts. For example, it would prevent a party in dispute with the IOC, in the belief that he was choosing an arbitrator completely unconnected to the latter, from actually appointing a person who was proposed by that organisation but who is not an IOC member (see Art. S14 of the Code, which advocates this practice)." [87]

The TFS ruling of May 27, 2003 puts, I think, the question of the impartiality and independence of the CAS beyond any further doubt both now and in the future.

Concluding Remarks

As the global sports industry continues to expand and sports-related disputes continue to rise, and ADR continues to find favour in the sporting and business communities, the services offered by the Court of Arbitration for Sport, as outlined in this Paper, will continue to appeal to parties who wish to settle their disputes, fairly, quickly, effectively, confidentially and relatively inexpensively. The Court has distinguished itself and fulfilled the hopes and expectations of it founders, as well as withstanding a number of legal challenges to its independence and impartiality, during its first twenty-one years of operations.

As to the future, CAS would appear to have a bright and expanding one, by all accounts, and not least based on the following ringing endorsement by the Swiss Federal Tribunal given in the Russian cross-country skiers' case discussed above:

"The CAS is growing rapidly and continuing to develop. An important new step in its development was recently taken at the World Conference on Doping in Sport, held in Copenhagen at the beginning of March 2003. This Conference adopted the World Anti-Doping Code as the basis for the worldwide fight against doping in sport. Many States, including China Russia and the United States of America, have adopted the Copenhagen Declaration on Anti-Doping in Sport. Under the terms of Art. 13.2.1 of the new Code, the CAS is the appeals body for all doping-related disputes related to international sports events or international-level athletes. This is a tangible sign that States and all parties concerned by the fight against doping have confidence in the CAS. It is hard to imagine that they would have felt able to endorse the judicial powers of the CAS so resoundingly if they had thought it was controlled by the IOC. This new mark of recognition from the international community shows that the CAS is meeting a real need. There appears to be no viable alternative to this institution, which can resolve sports-related disputes quickly and inexpensively. Having gradually built up the trust of the sporting world, this institution which is now widely recognised, remains one of the principal mainstays of organised sport." [88]

CAS, as previously mentioned, was the brainchild of former IOC President, Juan Antonio Samaranch, whose aim was to set up a Supreme Court for World Sport. He seems to have succeeded, as CAS has become just that! With, in the words of the ICAS/CAS President, Judge Keba Mbaye, "*a stature that inspires confidence and respect*" to match.

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85 See Judgement of 27 May, 2003 of the First Civil Division of the Swiss Federal Tribunal in the case of *A. & B. v International Olympic Committee and International Ski Federation* (4P.267/2002; 4P.268/2002; 4P.269/2002; and 4P.270/2002).

86 Ibid. at para.3.3.3.1.

87 Ibid. at para. 3.3.3.2.

88 Ibid. at para. 3.3.3.3.

ASSER International Sports Law Centre

Conferences, Round Table Sessions, etc. ***(Continued from page 66)***

- The promotion of professional football clubs? interests at the international level: towards a European collective bargaining agreement? (The Hague 2002);
- Sport and mediation (Utrecht and London 2002);
- Sport information and new media: legal aspects (The Hague 2002);
- Sport, liability and insurance (Utrecht 2002);
- State aid to professional football clubs in a European law perspective (The Hague 2002);
- Transformation in South African sport (The Hague 2003);
- Licensing systems in Dutch and European professional football (The Hague 2003);
- The Kolpak case and the international migration of non-EU professional football players (The Hague 2003);***(continued on page 130)***

European Law: two Swimmers Drown the "Sporting Exception"

On 18 July 2006, the Court of Justice of the European Communities (ECJ) rendered a leading judgement clarifying the relationship between European and national law in relation to international sports federations. As this judgement was rendered in a dispute concerning the sport of long-distance swimming, a sport less popular with the media, it has not attracted widespread media attention.

The dispute concerned the legality of the International Olympic Committee's (IOC) rules on doping control. Two swimmers, David Meca-Medina and Igor Majcen, represented by attorney at law Jean-Louis Dupont, who had previously represented Mr Bosman, alleged that such rules violated the Community rules on competition.

Applying the case law of the ECJ of the seventies (judgements Walrave and Donna), the IOC (followed by the European Commission) held that the rules on doping control were "purely sporting rules" as they pursued an entirely non-economic purpose (equity of sports competitions, health of the athletes) and that, therefore, such rules were not subject to Community law.

According to the IOC and the European Commission, these rules consisting of a purely sporting character, were not subject to Community law, even if they restrained the economic freedom of certain professional or semi-professional athletes. As a consequence, it was not for the ECJ to assess whether or not such rules (and the sanctions resulting therefrom) were disproportionate with regard to the objectives pursued.

In its landmark judgement, the ECJ reversed the position of the IOC and the European Commission (like it did with the judgement rendered by the Court of First Instance, which concurred with their position).

The ECJ considered that even anti-doping rules (which could well be considered to be the most emblematic "purely sporting rules") are subject to Community law and that it must be shown on a case by case basis that the restrictions they cause are inherent and proportionate with regard to the sporting objectives pursued. This is revolutionary for the relationship between sport and Community law.

Thus, these rules, even if they pursue an objective of a purely sporting interest, are subject to European law and, therefore, to European competition law, the moment they affect the transnational economic activities of third parties (e.g. of the athletes or clubs).

In other words, by its judgement Meca-Majcen, the ECJ rejected the international federations' pretences to avoid Community law. One will recall that the federations used to present such pretences under the title "sporting exception", "specificity of sport" or "purely sporting rules".

It is of course a very important change which will finally force the sports federations to demonstrate self-restraint and moderation both as regards the adoption of their regulations and as regards the implementation of such rules.

This will in particular, be the case for the fight against doping, but will also come to apply to other issues.

In order to illustrate this, we may look at certain applications of this judgement to the number 1 sport, i.e. football.

A major dispute currently opposes the clubs of the European football elite, unified in the G-14, to FIFA and UEFA. The clubs take the view that it is excessive for the international federations to "recruit" their employees, the players, in accordance with an international calendar unilaterally imposed on the clubs, without insuring them and without compensating their employers, so that they can organise events such as the EURO or the World Cup, which generate billions of Euros in revenue for the sports federations.

In this matter, the Commercial Court of Charleroi recently referred a preliminary question to the ECJ, requesting a preliminary ruling. A judgement should be rendered within the year.

On the basis of the judgement Meca-Majcen, it should henceforth be established that the FIFA and UEFA regulations governing the release of players and the fixing of the international calendar fall within the application of EC Treaty rules and that it is basically for the federations to prove to the ECJ that their rules (as they are currently in force) are absolutely necessary and proportionate with regard to the sporting objectives they pursue. In fact, FIFA's and UEFA's main thesis in the Charleroi case, which consisted of maintaining that their rules are of a purely sporting interest and, therefore, not subject to the EC Treaty, has been radically "placed offside" by the judgement Meca-Majcen, which now accepts nothing but the debate on the proportionality of the contested rules within the scope of the European treaties.

Further, the Meca-Majcen judgement will doubtlessly affect the currently pending proceedings initiated by the Italian sports authorities against certain football clubs.

It is in fact henceforth established that the rules applied by such sports authorities and the sanctions resulting therefrom, are subject to European competition law and must mandatorially be proportionate with regard to the sports objectives they pursue (fight against fraud in sport).

In this new legal context, the sports authorities would be well advised to ask themselves the right questions and find the right answers thereto.

Is the proof furnished sufficient to conclude that serious violations have been committed? Do the investigations led allow for the conclusion that only the clubs pursued committed violations? Are the clubs as such responsible (owners, members of the board of directors) or have their employees (directors, managers) taken personal decisions?

If so, is it justified to severely sanction the undertakings, the clubs, because some of their employees have violated rules, while other rules provide for the sanctioning of these individuals?

In the affirmative, would it not be excessive to relegate these clubs to the second league, knowing that such a sanction could be tantamount to a bankruptcy or at least to a damage amounting to hundreds of millions of Euros?

Failing to demonstrate moderation (and continuing the "judicial show" instead), these sports authorities risk the fact that one day their decision will be reversed by the ordinary courts on the basis of the Meca-Majcen judgement and that they might be ordered to compensate the clubs for the economic and sporting damage caused. In this respect, we recall that European competition law has a direct effect, i.e. it can be directly invoked by individuals and undertakings before the national courts, which have the duty to ensure that such law is complied with the way it is interpreted by the ECJ in its judgement Meca-Majcen, in particular by awarding to the aggrieved parties adequate damages.

Meca and Majcen are worthy successors of Bosman. From a case-law perspective one could say that the sons have excelled the father.

*Juan de Dios Crespo**

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Update - The Meca-Medina Case

Introductory

An appeal to the full court of the European Court of Justice (ECJ) against the judgement of the Court of First Instance of the ECJ in the case of *David Meca-Medina and Igor Majcen v Commission of the European Communities* (Case T-313/02; Judgement 30 September 2004), which held that doping was a sporting not an economic issue, has been partially upheld in a judgement of the ECJ handed down on 18 July, 2006.

The facts of the case and the previous judgement of the ECJ Court of First Instance were reviewed by the author in ISLJ 2005/3-4 at pages 51 -52.

The appellants had sought to have the judgement of the ECJ Court of First Instance set aside, arguing, *inter alia*, that the Court had erred in law when it held that the anti-doping rules at issue did not fall within the scope of Articles 49, 81 and 82 of the EC Treaty. On this ground alone, the appellants were successful, but failed to have the original decision of the Commission of 1 August 2002 set aside. But this aspect is generally considered to be of less importance than the general principle recognised by and explained in the words of the ECJ itself as follows.

Appeal Judgement

The relevant parts of the latest judgement are to be found in paragraphs 22 - 34 as follows:

"22 It is to be remembered that, having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 4; Case 13/76 *Donà* [1976] ECR 1333, paragraph 12; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 73; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 41; and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 32).

23 Thus, where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of semi-professional or professional sportsmen (see, to this effect, *Walrave and Koch*, paragraph 5, *Donà*, paragraph 12, and *Bosman*, paragraph 73), it falls, more specifically, within the scope of Article 39 EC et seq. or Article 49 EC et seq.

24 These Community provisions on freedom of movement for persons and freedom to provide services not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner (*Deliège*, paragraph 47, and *Lehtonen and Castors Braine*, paragraph 35).

25 The Court has, however, held that the prohibitions enacted by those provisions of the Treaty do not affect rules concerning questions which are of purely sporting interest and, as such, have nothing to do with economic activity (see, to this effect, *Walrave and Koch*, paragraph 8).

26 With regard to the difficulty of severing the economic aspects from the sporting aspects of a sport, the Court has held (in *Donà*, paragraphs 14 and 15) that the provisions of Community law concerning freedom of movement for persons and freedom to provide services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events. It has stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty (*Bosman*, paragraph 76, and *Deliège*, paragraph 43).

27 In light of all of these considerations, it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down.

28 If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition.

29 Thus, where engagement in the sporting activity must be assessed in the light of the Treaty provisions relating to freedom of movement for workers or freedom to provide services, it will be necessary to determine whether the rules which govern that activity satisfy the requirements of Articles 39 EC and 49 EC, that is to say do not constitute restrictions prohibited by those articles (*Deliège*, paragraph 60).

30 Likewise, where engagement in the activity must be assessed in the light of the Treaty provisions relating to competition, it will be necessary to determine, given the specific requirements of Articles 81 EC and 82 EC, whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States.

31 Therefore, even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity (*Walrave and Koch* and *Donà*), that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those articles.

32 However, in paragraph 42 of the contested judgment, the Court of First Instance held that the fact that purely sporting rules may have nothing to do with economic activity, with the result that they do not fall within the scope of Articles 39 EC and 49 EC, means, also, that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC.

33 In holding that rules could thus be excluded straightaway from the scope of those articles solely on the ground that they were regarded as purely sporting with regard to the application of Articles 39 EC and 49 EC, without any need to determine first whether the rules fulfilled the specific requirements of Articles 81 EC and 82 EC, as set out in paragraph 30 of the present judgment, the Court of First Instance made an error of law.

34 Accordingly, the appellants are justified in asserting that, in paragraph 68 of the contested judgment, the Court of First Instance erred in dismissing their application on the ground that the anti-doping rules at issue were subject to neither Article 49 EC nor competition law. The contested judgment must therefore be set aside, and there is no need to examine either the remaining parts of the first plea or the other pleas put forward by the appellants."

Commentary

As pointed out by the Court, it is difficult, in practice, to separate the sporting and economic aspects of a particular sport - witness, the football transfer rules, which have a sporting purpose as well as economic effects. And it does not automatically follow that because certain rules, such as doping rules, have a sporting purpose, consideration cannot be given to their economic consequences, especially in the case of professional and semi-professional sports persons.

In other words, just because certain rules are imposed to achieve sporting objectives, there is no *per se* rule of law that those rules are automatically outside the scope of EU Law in general and EU Competition Law in particular. Each case must be considered and decided on its own particular circumstances and merits, that is, a 'rule of reason' approach applies in deciding whether the sporting rules concerned are compatible with EU Law and whether the sports persons affected by them fall within or outside the protection of the Law.

According to Jean-Louis Dupont, of *Bosman* and other leading sports cases fame, "(t)his judgement is the landmark case that finally gives the sports world a sound and rational tool regarding any adop-

tion and implementation of regulations: the Wouters criteria (*Wouters and others,* (2002) ECR I-1577; eds) now apply to sport federations. This provides a consistent conceptual basis for the Charleroi referral (*Oulmers v FIFA,* Case C-000/06; the so-called G-14 case, referred to the ECJ by Tribunal de Commerce de Charleroi in May 200&; eds)."

From this last comment, it looks as though the G-14 are going to triumph and it is understood that FIFA already have in place certain insurance arrangements in place to cover players called up for 'international duty' who are injured.

And as Stephen Weatherill, Jacques Delors Professor of EC Law at Oxford University, has remarked in connection with the pending *Oulmers* litigation: "..... one could certainly not exclude the possibility that Article 82 could play a role in the review of sporting practices..... This is particularly pertinent in circumstances where a sports federation which enjoys monopoly power in making the rules that govern the sport makes decisions with direct commercial implications" (for the background, see S. Weatherill, 'Is the Pyramid Compatible with EC Law?' ISLJ 2005/3-4 3).

So, we will await the ruling of the ECJ in the G-14/FIFA case and its aftermath with great interest.

Lance Armstrong Innocent of Doping - According to an Independent Investigation

According to a 130-page Report issued on 31 May, 2006 by an independent investigative team, appointed by the International Cycling Union (UCI) on 9 November, 2005, led by Dutch sports doping legal expert, Emile Vrijman, of the Sports Law Firm, Scholten, based in The Hague, exonerated the seven-times 'Tour de France' American cyclist, Lance Armstrong, from claims made in an article entitled '*Armstrong's lie*' published on 23 August, 2005 in the French sports newspaper '*L'Equipe*' that six urine samples of Armstrong taken on the 1999 Tour (the first time he won the event) after retesting by the French National Anti Doping Laboratory ('Laboratoire National de Depistage du Dopage' - LNDD) in 2004 came back positive for the banned red blood cell-booster 'recombinant *EPO*' (r-*EPO*). Incidentally, six other riders were alleged to have tested positive for r-*EPO* at the same time. The other members of the investigative team were the senior partner of Scholten, Paul Scholten, a sports lawyer with 30 years' practice in the field, and Dutch scientist, Dr Adriaan van der Venn, an experienced and respected expert witness in many doping cases before the Court of Arbitration for Sport and other national and international tribunals. A high-powered team indeed!

On publication of the Report, Armstrong, who has repeatedly denied using any banned substances, told the media that "the report confirms my innocence", adding that the case amounted to a "witch-hunt" that was aimed to "discredit" him. One is, however, tempted to reasonably ask how someone can win cleanly a major cycling event not once but seven times, when the sport itself is well-known to suffer from serious doping problems.

UCI, cycling's governing body, said that it would make a full statement when it had studied the Report. And Dick Pound, the chairman of the World Anti Doping Agency (WADA), was initially dismissive of the Report and its findings and called for further inquiries to be made. Although, WADA has said that it will respond, in due course, once it has fully reviewed the Report.

Vrijman, who headed the Dutch Anti Doping Agency for ten years, said that the Report "exonerates Lance Armstrong completely with respect to alleged use of doping in the 1999 Tour de France."

The Report criticised the handling of the case by LNDD and WADA. In particular, the LNDD had analysed the samples only as part of a research programme for the detection of *EPO*, thus there was no way of confirming the tests. And, therefore, the procedure followed, might be sufficient for research purposes, but certainly not to support a valid doping finding - in the words of Vrijman, "no way". Furthermore, whilst samples may be used in research programmes, all information connecting them with a particular individual must be removed, which was not done in the present case. The procedure followed, therefore, raises "fundamental issues". The Armstrong case also raises the legal issue of the meaning of article 17 of the 2003 WADA Code, which imposes a 'limitation period' of 8 years for 'prosecuting' doping cases. Does this mean that sports governing bodies have the right to engage in 'retrospective testing' - that is, to retest frozen urine and/or blood samples obtained up to 8 years ago. According to the authors of the Report, the better view, which I would entirely endorse, is that article 17 allows an action to be commenced against an athlete or other person for a violation of an anti doping rule within a period of 8 years from the date of the violation and only where so-called 'non-analytical positives' are concerned. The article does not provide for the retesting of urine samples within a period of 8 years from the date they were provided. Furthermore, the testing procedures require samples to be tested promptly and not within a period of 8 years (para. 1.9).

The Report concludes that "the LNDD, and WADA, to an undefined extent in cooperation with the French Ministry, have behaved in ways that are completely inconsistent with the rules and regulations of international anti-doping control testing and, in certain instances, even in violation of applicable legislation" (para. 1.25).

The Report is indeed hard hitting, pretty thorough and workmanlike, to the extent that the members of the team have been given access to relevant information and documentation, including administrative documents, by the LNDD; under French Law, there is no general right of discovery. Thus, the Report needs to be seen - in some respects - as an interim finding, as several of the issues addressed in it require further investigation; in particular, the leaking of confidential information to '*L'Equipe*'. And, according to the authors of the Report, there is need for "a tribunal with authority... to be convened, to provide a fair hearing to the individuals and organizations involved in the misconduct discussed..." in the Report. However, based on the findings to date, the Report is very clear in recommending that the UCI should refrain from taking any disciplinary action against any of the riders affected by the research testing by the LNDD, and those riders should be informed accordingly (para. 5.37).

Sports lawyers, administrators and other stakeholders await, with great interest, the considered responses from WADA and the UCI and the next thrilling instalment(s) of this continuing saga! We certainly have not heard the last of this affair - yet.

When is a Logo Not a Logo? - Advertising at the Olympics

All forms of advertising at the Summer and Winter Olympic Games are strictly controlled by the International Olympic Committee (IOC). Indeed, the marketing of the Games is a sensitive issue. And what would Baron Pierre de Coubertin, the founder of the Olympics of the modern era, make of the modern commercialisation of sport and sports events? To be fair, in its pursuit of the high ideals of Olympism, as defined in the Olympic Charter of 11 September, 2000, the IOC is constantly seeking to strike a proper balance between safeguarding the sporting integrity of the Games and promoting the commercial side, without which, as a matter of fact, the modern Games would not be possible.

Under paragraph 2 of Rule 61 of the Charter, the IOC Executive

Board "*alone has the competence to determine the principles and conditions under which any form of publicity may be authorized*." Unlike other major international sporting events, such as the FIFA World Cup, no form of advertising is allowed in the Olympic stadia or other competition areas (paragraph 1).

Again, under the Bye-Law to Rule 61, there are strict controls on any form of publicity or propaganda - commercial or otherwise - that may appear on athletes or other participants, their clothing or equipment during the Games. The only exception to this rule is that the "*identification*" (as defined in paragraph 8) of the manufacturer of the article or equipment concerned may appear only once and shall not be "*marked conspicuously for advertising purposes*" (paragraph 1). As regards what is or what is not conspicuous, for these purposes, quantitative limits have been laid down in this Bye-Law. For example, on clothing, which includes T-shirts and shorts, any manufacturer's identification exceeding 12 sq cm shall be deemed to be conspicuous (paragraph 1.4). On shoes, "*the normal distinctive design pattern of the manufacturer*" is permitted, as well as the manufacturer's name and/or logo up to a maximum of 6 sq cm "*either as part of the normal distinctive design pattern or independent of the normal distinctive design pattern*" (paragraph 1.5). Paragraph 8 of the Bye-Law defines the word "*identification*" as follows: "*the normal display of the name, designation, trademark, logo or other distinctive sign of the manufacturer*" of the item concerned.

In 2005, the IOC ruled that Adidas, the sports goods manufacturer, could not incorporate its well-known trademarked 'three-stripe' design into an Olympic kit, following complaints made by rival manufacturers. However, Adidas was allowed to introduce a new design for the Turin 2006 Winter Olympic Games, which was not trademarked and, therefore, regarded by the IOC to be a 'design feature' rather than a logo. The World Federation of the Sporting Goods Industry (WFSGI) received several complaints from other sports goods manufacturers about this new design, particularly in view of remarks made in the Adidas Press Release introducing it. This Release stated: "*By using a row of '3s' in a playful and creative way, the originator of this collection will nevertheless be clearly Adidas*." That sounds to me to describe perfectly a trademark, which, according to the universally accepted definition, is a badge or symbol of origin of goods or services of one company, which distinguish them from those of another company.

The WFSGI argues that, by giving its approval, the IOC is opening itself up to the possibility of other manufacturers incorporating their brand identity into Olympic kits. And, further argues that, once a design is used over and over again, it becomes a conspicuous design, which is not allowed under the IOC advertising rules.

This all sounds rather confusing and inevitably raises the questions: '*what is a logo*?' And '*when is a logo not a logo*?' A logo is defined in the *Oxford Dictionary of Current English* as: "*a non-heraldic badge or symbol of an organisation*." That answers the first question. As to the second question, the answer seems to be: "*when the IOC says so*."

This is entirely unsatisfactory, and, not surprisingly, the WFSGI has asked the IOC to set up a so-called '*homologation*' committee to approve Olympic kits 18 months before the date of any Olympic Games and to remove the confusion on what sports goods manufacturers can and cannot do under the Rules. In other words, clear guidelines are needed.

That seems eminently sensible to me. And, apparently, not, I would add, before time!

Another First for The Court of Arbitration for Sport

By all accounts, apart from the typical efficient German organisation, the 2006 World Cup was, generally speaking, a rather lack lustre affair, so as far as the football was concerned. Although the tournament did come to an end with something of bang - the infamous head butt of Zidane against the Italian Materazzi!

However, the 2006 World Cup also scored another first. At the request of FIFA, the world governing body of football, the Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, created a new Ad Hoc Division to settle disputes arising during the tournament.

FIFA became a member of the CAS in 2002, and, as such, the CAS is a final 'court of appeal' for football disputes after the parties have exhausted all available internal remedies within the 'football family'. In other words, according to the rules of the National Associations and FIFA itself. Since becoming a member, the CAS has handled many football-related disputes, including - not surprisingly - many high profile international football transfer disputes involving millions of dollars in transfer fees.

Since the Centennial Games in Atlanta, USA, in 1996, the CAS has operated a so-called Ad Hoc Division at the Summer and Winter Olympic Games. And also operated a similar Division during the European Football Championships in 2000 and 2004.

The arrangements for the World Cup, however, were based on the Euro 2000 and Euro 2004 models. Unlike, the CAS Ad Hoc Division operating at the Olympics, the members of the Division were not based in Germany. But were on 'standby' and available to fly out to Germany at very short notice when a case was referred. Again, another difference between the World Cup and the Olympic arrangements was that disputes would not be settled within 24 hours, but within 48 hours. As always, to be effective, the CAS needed to act quickly because of sporting deadlines. One point of similarity, however, was that there was to be no charge by CAS charge for its services - of course, parties in dispute were responsible for paying any lawyers, who represented them, as well as the costs of any translators needed for the proceedings. And, again, the procedures were kept simple and flexible to facilitate a quick turn around of any cases.

The President of the World Cup Ad Hoc Division was Judge Jean-Jacques Leu of Switzerland and, on a case being referred, he was required to appoint a three-member Panel to deal with it. The members were to be selected from a list drawn up by the CAS office in Lausanne of CAS Arbitrators based in Europe, who had indicated their availability to serve on the Ad Hoc Division during the tournament. Another point of difference was that the CAS office was not present in Germany, but remained in Lausane, Switzerland, during the tournament.

In all cases, the members of the Panel had to be entirely independent of the parties in dispute and confirm this in writing.

For all CAS proceedings, arbitrators are not generally obliged to follow earlier decisions (*stare decisis*), but they usually do so in the interests of legal certainty - and, indeed, so-called 'comity'. Thus, a useful body of sports law (*lex sportiva*) is being steadily built up.

In fact, no actual cases were referred to the CAS Ad Hoc Division during the World Cup. However, the aftermath of the Zidane/Materazzi affair may result later on in an application to the CAS being made under its normal proceedings. In any event, what can be said with certainty is that, in accordance with previous decisions, the CAS will not, as a general rule, intervene in 'on-field-of-play sporting decisions' made by referees and other match officials, who are solely responsible for applying the 'laws of the game'. However, exceptionally the CAS will, in the interests of justice, intervene in those cases where sporting rules have been applied in bad faith. But, in such cases, the CAS will require a high standard of proof. Otherwise, the flood gates would be opened to any participant in a sporting event dissatisfied with an 'on-field' decision appealing to the CAS. This would make the running and completion of sporting competitions impracticable - if not chaotic!

CAS awards, including any that might have been made by its Ad Hoc Division at the World Cup, like other international arbitral awards, are legally enforceable generally in accordance with the rules of International Private Law, and also specifically under the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June, 1958.

However, CAS awards can be legally challenged in the Swiss Federal Court, also based in Lausanne, by a dissatisfied party, but only in very limited circumstances, under the provisions of article 190(2) of the Swiss Federal Code on Private International Law of December 18, 1987. This article reads (in translation) as follows:

"*[The Award] can be attacked only:*
1. *if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;*
2. *if the arbitral tribunal erroneously held that it had or did not have jurisdiction;*
3. *if the arbitral tribunal ruled on matters beyond the claims submitted to it or failed to rule on one of the claims;*
4. *if the equality of the parties or their right to be heard in an adversarial proceeding was not respected;*
5. *if the award is incompatible with Swiss public policy*."

In practice, perhaps ground (d), the 'due process' one, is the most important. And, in fact, the CAS bends over backwards in every case to ensure that the parties are properly heard and receive a fair hearing.

In practice, there have been few legal challenges to CAS awards and none of them has been successful to date. The latest challenge, in fact, arose out of the 2002 Winter Games. And concerned the independence of the CAS in view of its association with and partial funding by the IOC. The Swiss Federal Court held on May 27, 2003 that the CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration, even where the IOC - as in that case - was a party to its proceedings. This verification by Switzerland's highest Civil Court is not only reassuring to CAS itself, but also to all those who refer to the CAS as a final resort for the settlement of their sporting disputes.

English Premier League 'Bungs' Inquiry: Will it Prove to be a 'Whitewash'?

The English Language is a treasure trove of colourful words and expressions. And one such expression, that has passed into common parlance in the last fifteen years or so, is the 'bung'. This denotes a bribe - or, to use more euphemistic language, a secret payment to facilitate or sweeten a particular transaction. In fact, 'bungs' have become common currency in doing business in sport in general and football in particular. Indeed, 'bungs' in football have come to be regarded in some quarters as - to use a golfing metaphor - 'par for the course'. In other words, part of the culture and tradition of football. 'Everybody does it, so it must be alright', seems to be the justification for this practice, which, in other quarters, is regarded as, if not illegal, then, certainly, unethical.

The controversial subject of 'bungs' has recently resurfaced as a result of remarks made by the England Head Coach, Sven-Goran Erikkson, to undercover reporters of and published in the British Sunday newspaper, the '*News of the World*'. Erikkson is alleged to have said that three unnamed English Premier League clubs have been involved in 'bungs'. In addition to these statements, Luton Town manager, Mike Newall, and Queen's Park Rangers manager, Ian Holloway, have also recently said that they have been offered inducements for player transfers.

The frenzy whipped up by the Press following these 'revelations' has put the English Premier League - the world's most financially successful football league - under considerable pressure to investigate these claims. So, in view of all the speculation, the chief executive of the League, Richard Scudamore, recently announced that the League will carry out its own Inquiry, saying that "*Due to their frequent and persistent nature, allegations of wrongdoing, real or perceived, must be addressed*." And adding: "*One of our problems is that it's almost accepted as a given that these things go on*." What a terrible admission to make!

The Inquiry is backed by all 20 clubs that play in the League. And, it has recently been announced, that the former London Metropolitan Police Chief, Lord Stephens, will lead it. He is also currently heading a special inquiry into the circumstances surrounding the untimely death of Princess Diana in a Paris car crash several years ago. And in this inquiry he is proving to be very thorough and independent and determined to get to the truth. So, Stephens is an interesting choice to lead the 'Bungs' Inquiry.

As mentioned, he is known to be a tough guy, but, the question must be asked, what, in fact, will come of this Inquiry. A number of sports commentators, like myself, are rather sceptical about the outcome. Even though the chief spokesman for the English Premier League, Dan Johnson, is reported to have said: "*there will be scope to take the findings and recommendations further....*" But adding, however, the caveat, which speaks volumes: "*if we think it is required*."

It is not the first time that the matter of 'bungs' has been investigated in England. Indeed, the English Football Association (FA) appointed an inquiry team consisting of the former English Premier League chief executive, Rick Parry, Judge Robert Reid, QC, and ex-player Steve Coppell, which reported in September 1997, following allegations of illegal payments being made in connection with the transfer of Teddy Sheringham form Tottenham Hotspur to Nottingham Forest. This inquiry took three years, examined 60 witnesses, produced tens of thousands of pages of evidence, and cost over £1 million, but few individuals were the subject of any subsequent action or proceedings by the FA.

Will the present Inquiry, which will also take time and cost a lot of money, be any more successful? Or will it prove to be purely a cosmetic and public relations' exercise? One of the main problems facing the Inquiry is to get those in the know to come forward as witnesses and put themselves and their future careers in football on the line! Will it, once again, expose lack of financial probity in the English game, but make no real difference? In other words, will the conclusion be, as Scudamore admitted, that 'bungs' are part of football culture and will continue to be so? If that, in fact, proves to be the outcome of the present Inquiry, it will be high time for FIFA itself to act 'for the good of the game'.

A daunting task indeed for Lord Stephens and his Inquiry team. And it will be very interesting, therefore, to see how he fares and what he makes of it all. So, as they say, 'watch this space'!

Online Horse Betting Ban Upheld in France: French Nationalism Wins?

As one of the founding members of the European Common Market, France is a past master at crying foul when another Member State breaks the rules, but, when it suits its purposes to do so, justifies its own breaches of the rules on the grounds of national interest.

A recent important case in point is the decision handed down earlier this year by the Paris Court of Appeal, upholding a ruling made last year by the Paris High Court, banning the Malta-based online horse betting operator, *Zeturf*, from offering its betting services to punters in France. This decision is not, in fact, unique, following similar bans imposed on foreign operators offering their betting services

in Germany, The Netherlands and Italy. In all these cases, the restrictions have been imposed in order to protect the interests of their own state betting operators in the countries concerned.

But, how, you might well ask, are such restrictions compatible with the operation of an open and single market? What about the freedom to provide services, one of the four fundamental freedoms of the European Union, guaranteed under the provisions of Article 49 of the EC Treaty?

Article 49 basically provides as follows:

> "..... *restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended* ....."

In my opinion, such restrictions are incompatible and inconsistent with this basic freedom and, therefore, *Zeturf* was wrongly and improperly decided. And so, in the interests of justice, the decision needs to be reversed.

For a start, the decision in *Zeturf* fails to take account of the European Court of Justice (ECJ) judgement in *Gambelli* (Case C-243/01, [2003] ECR I-13031), which found that a European gambling operator can, under certain conditions, offer its services to punters in another Member State.

Also, the Paris Appeal Court only dealt with the legal issues raised by *Gambelli*, according to Thibault Verbiest, the lawyer of *Zeturf*, "*very superficially*". The Court admitted that the French horse betting monopoly granted to PMU was contrary to Article 49, but justified it on the grounds that the restriction was necessary to protect public order ('*ordre public*'). Such justifications may be valid under EU law, but, as exceptions to the norm, they must be founded on critical factual assessments and the existence of a consistent gaming policy. Such a policy must be evaluated as a whole and not just in relation to a particular sector of gambling, such as betting on the horses. This was not apparently the case in *Zeturf*. Indeed, rather than France having an independent administrative body in charge of authorising gaming and controlling the activities of authorised gaming operators, PMU was, in fact, subject to only to the control of the French Interior Minister! Hardly an impartial arbiter! Furthermore, the Paris Court of Appeal did not take the opportunity, as the Italian Judge did in *Gambelli*, of referring the matter to the ECJ for a preliminary ruling.

Thus, according to Verbiest, there is only one conclusion to be drawn from all this, namely:

> "*The truth is the French judges acted through a reflex of national protectionism*."

So, what is new about that, one may ask?
The case of *Zeturf* may be appealed to the French Supreme Court ('*Cour de Cassation*'). As a revising chamber, its main role is to review the law and the facts of the case to ensure that French law, which includes EU law, has been correctly interpreted and applied. Surely, any injustices will be put right there? Or will they?

But the chances are, however, that the matter will have to be finally resolved by the ECJ. If so, a case once again, of more money in the pockets of the lawyers. Proving that justice does not come cheap, particularly in France!

WIPO Arbitration and Mediation Centre Goes from Strength to Strength

Introductory

The Arbitration and Mediation Center of the World Intellectual Property Organization is a specialized agency of the UN, based in Geneva, Switzerland. The Center provides arbitration and mediation for settling a wide range of commercial and IP disputes, including an ever increasing number of sporting ones.

According to Dr Francis Gurry, the Deputy Director of WIPO:

> "The WIPO Arbitration and Mediation Center has experienced a substantial growth in cases from 2004 to 2005, in particular, mediations and domain name cases. This trend is expected to continue in 2006."

So, what does the Center offer particularly to the sporting world that generally prefers to settle its disputes 'within the family of sport'?[1] In other words, extra judicially, informally, quickly and in private.

The WIPO Center

The Center offers a cost- and time-effective alternative to litigation, especially when the litigation needs to be conducted in foreign or even multiple jurisdictions. This is particularly relevant to sports disputes, many of which are of an international dimension transcending national boundaries, as sport is now a global business.

The WIPO Center provides interested parties with an efficient set of rules governing arbitration and mediation; a selection of model clauses; as well as a list of qualified intellectual property experts, who can be appointed to resolve these disputes. Information on all these matters can be found on the WIPO Center's comprehensive website at "www.arbiter.wipo.int".

Of particular interest to the sporting world, the Center also administers disputes under the Uniform Domain Name Dispute Resolution Policy (UDRP). The WIPO-initiated UDRP provides holders of trademark rights with an administrative mechanism for the efficient and relatively quick and inexpensive resolution of disputes arising out of the 'bad faith' registration and use by third parties of domain names corresponding to those trademark rights. Such abusive registration of domain names is known as "cybersquatting".[2]

The Center is active in many different industry sectors, including sport, having handled many cases involving famous sporting figures[3], clubs[4], events and their organizing committees[5] and franchises[6], as well as manufacturers of sports equipment and other bodies associated with the sporting world[7]. The Center's legal index of cases is available online at "www.arbiter.wipo.int/domains/search/index.html";

1 See further on this subject, Blackshaw, Ian S. 'Mediating Sports Disputes - National and International Perspectives', TMC Asser Press, The Hague, The Netherlands.

2 See further on this subject, Simon Gardiner, Mark James, John O'Leary, Roger Welch, Ian Blackshaw, Simon Boyes and Andrew Caiger, 'Sports Law' Third Edition, 2006, Cavendish Publishing, London, UK, at pp 263-265.

3 Serena Williams and Venus Williams v. Eileen White Byrne and Allgolfconsultancy, WIPO Case No. D2000-1673, venusandserenawilliams.com
Terrell Eldorado Owens v. Aran Smith d/b/a Sportsphenoms.com and/or Sportsphenoms, WIPO Case No. D2003-0463, terrellowens.com
Mr. Mika Häkkinen v. "For SALE", WIPO Case No. D2001-1306, mika-hakkinen.net

4 FC Bayern München e.V v. Miguel Garcia, WIPO Case No. D2000-1773, fcbayern.com

5 Comitato per l'Organizzazione dei XX Giochi Olimpici Invernali -Torino 2006 v. gate24, WIPO Case No. D2003-0411, torino2006.net
National Collegiate Athletic Association and March Madness Athletic Association, L.L.C. v. Mark Halpern and Front & Center Entertainment, WIPO Case No. D2000-0700, final-four.org, march-madness.org

6 NFL Properties, Inc. et al. v. Rusty Rahe, WIPO Case No. D2000-0128, greenbaypackers.com philadelphiaeagles.com
NBA Properties, Inc. v. Ituralde-Kasmir, Inc., WIPO Case No. D2000-1620, washingtonwizards.com.

and this index also lists the sports-related cases dealt with by the Center over the past five years. And these are many and make very interesting reading indeed!

The UDRP dispute resolution procedure costs as little as US$1500; and is also relatively speedy, normally taking no more than two months to complete. Again, this is very relevant in the sporting world where sporting (for example, football 'transfer windows') - and also commercial deadlines (for example, preemptive options) - are often tight and need to be respected.

In many cybersquatting cases, parties come from different jurisdictions. Whilst this would complicate court proceedings, under the UDRP procedure, the location of the parties is actually irrelevant.

If the independent Panel appointed by the WIPO Center finds that the Complainant has proved that the domain name at issue has been unlawfully registered and used, the Panel will issue an order to transfer the domain name concerned to the Complainant. No damages or costs are awarded under the UDRP procedure. Following the ruling, the Respondent has 10 days in which to file court proceedings challenging the decision, in an appropriate jurisdiction. Unless the Respondent files such a challenge (which happens rarely in practice), the Registrar of the domain name concerned will then transfer the name to the Complainant in compliance with the decision.

Some Vital Statistics

From December 1999, when the WIPO-administered UDRP proceedings began, through December 2005, the Center has managed more than 8,300 UDRP cases in 12 different languages involving parties from 126 different countries. The Center has dealt with cases involving 70 of the 100 largest global brands, and several large brands that play a major role in the sports sponsorship market. Of the cases that have been resolved, 83% have resulted in the transfer of the domain name to the trademark holder. The WIPO Center also provides services in resolving disputes concerning an increasing number of country code top-level domain names (46 at the time of writing), such as names ending in .au (Australia), .nl (Netherlands) and .mx (Mexico).

In 2005, the workload of the Center represented some 4 cases per calendar day. The 8,000th case having been filed on October 4, 2005. Examples of such cases, covering a wide range of industries, including the sports and entertainment sectors, follow:

Sports: Adidas, Ronaldinho, Houston Rockets, Michelin, FA Premier League, Commonwealth Games, Frank Rijkaard, Converse Basketball, Lacoste, Adidas and Juventus.
Electronics: Samsung, Hitachi, Telefunken
Culture and Entertainment: Gehry, Vargas Llosa, Saint Exupery, Hirst, Glastonbury Festival, Larry King, Monte Carlo Casino, Morgan Freeman, Playboy, Abbey Road Studios, Lido Paris, Universal Studios, Robert Downey Jr.
Fashion: Chanel, Armani, Ralph Lauren, Donna Karan, Harrods, Vogue
Telecommunications: Sony-Ericsson, Deutsche Telekom, Nokia, Maori TV, TV Azteca
Food: Trump, Coca-Cola, Nestlé, Starbucks
Banks: La Caixia, JP Morgan, Banco de Bogota, Credit Suisse
Drug Companies: Pfizer, Sanofi-Aventis
NGOs and Institutions: Greenpeace, Harvard University, Livestrong Foundation, Give2Asia
Internet and IT: Google, Network Solutions, Yahoo, Dell, Microsoft, Kazaa
Transport: Porsche, Air France, Hyundai, Eurochannel, Ferrari, Lamborghini
Hotels: Accor, Le Meridien, Ibis, Hyatt

Among the decisions in the sports sector that have attracted media attention and coverage has been the decision in the livestrong-bracelets.net case (WIPO D2005-0888 http://arbiter.wipo.int/domains/decisions/html/2005/d2005-0888.html). The Complainant was the Lance Armstrong Foundation, a not for profit corporation established in 1997 by the Tour de France cyclist and cancer survivor, Lance Armstrong, to support health research, advocacy, and education. The registrant of the domain name was an individual from California, who did not respond to the complaint. Ordering the transfer of the domain name, the three-member Panel found "opportunistic and abusive conduct of a kind that the Policy was designed to correct". In other words, the unlawful exploitation of someone else's fame and celebrity status.

Other Developments

In March of 2005, a new and useful resource, the WIPO Decision Overview, was introduced by the Center, which supplements the detailed WIPO Legal Index of WIPO Panel Decisions, with a view to:
- facilitating the decision-making process and enhancing consistency;
- assisting parties considering filing complaints or responses; and
- informing all interested parties on the application of UDRP criteria.

The WIPO Center also organizes practical workshops and seminars on a variety of subjects, including the resolution of IP and domain name disputes. This year, there will be several such meetings in Geneva and elsewhere around the world, all designed to make the services of the Center better known and more user friendly. These will also be of interest to sports bodies, sports marketing companies and sportspersons themselves and their legal advisers.

Further Information

For more information on these workshops and seminars, as well as the Center's arbitration and mediation services generally, visit the Center's web site at "www.arbiter.wipo.int". The site provides information in six different languages, including a guide to the UDRP and other domain name dispute resolution policies; a model complaint and response; and general information about filing a UDRP Complaint.

The web site also provides a listing of all WIPO UDRP decisions (full-text); a searchable legal keyword index of those decisions; and a WIPO Overview of WIPO Panel Views on Selected UDRP Questions (referred to above). Finally, the web site also includes extensive information about the WIPO Center's arbitration and mediation services, including model clauses and other useful materials and information.

Conclusion

As pointed out above by the Deputy Director of WIPO, the workload of the Center has been steadily increasing and, in my opinion, the number of sports-related disputes is likely to increase too in the foreseeable future, reflecting the growing importance economically of the sporting sector, which is now an industry in its own right accounting for more than 3% of world trade, and its particular need to settle disputes outside the courts.

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7 NIKE Inc. v Granger and Associates, WIPO Case No. D2000-0108, nike-town.com
Adidas-Salomon AG v. Domain Locations, WIPO Case No. D2003-0489, www-adidas.com
HBP, Inc. v. Front and Center Tickets, Inc., WIPO Case No. D2002-0802, daytona500tickets.net
Fiji Rugby Union v. Webmasters Limited, WIPO Case No. D2003-0643, fijirugby.com

No 'Right of Publicity' in the Names and Statistics of Major League Baseball Players

A US District Court for the Eastern District of Missouri ruled on 8 August, 2006 that there is no 'property right' - known in the US as a '*right of publicity*' and known elsewhere generally as an '*image right*' - in the names and statistics of Major League Basketball (MLB) players.

Dismissing a claim by the MLB, the Court held that there is no legal right to control the name and likeness of the compiled profiles of individual players, and, therefore, the commercial use of them by 'fantasy league' operators was quite lawful. In other words, such operators did not need a licence from the MLB; they were free to exploit the players' names and statistics for commercial purposes.

The Court went further and also held that, even if the players did have a 'right of publicity', the right of freedom of expression, guaranteed by the First Amendment to the US Constitution, takes precedence over any such right. In fact, as Prof John Wolohan as pointed in '*Sports Image Rights in Europe*' (Blackshaw & Siekmann, Eds., 2005 TMC Asser Press, The Hague, The Netherlands), the First Amendment looks beyond written and spoken works as mediums of expression and, therefore, grants visual expression the same legal status as the written word.

The Court further held that the players' names and statistics, as used in the case by the St Louis based CBC Distribution and Marketing, which operates CDM Fantasy Sports, are not protected either by copyright under the US Federal Copyright Act of 1976.

Although the US Supreme Court held in the case of *Zacchini v Scripps-Howard Broadcasting Co.*, 433 US 562 [1977], that a news broadcast of Hugo Zacchini' entire 15-second 'human cannonball' act, in which he was shot from a cannon into a net 200 feet away, was protected under Copyright Law, historically, the US Courts generally apply a broad reading of the news media exemption, because they do not consider that it is their role to determine which matters may or may not interest the general public.

In any event, each sports image rights case will be decided on its own particular facts and circumstances, and the MLB ruling - although only at District Court level - well illustrates the point that there is no automatic legal '*right of publicity*' in the States, the home of sports marketing and the commercialisation of sports 'stars' and events.

Winning the War on Doping

Introductory

President George W. Bush declared 'war on terrorism' after 9/11 and President Jacques Rogge of the IOC declared 'war on doping' on taking office. Both 'wars' are ongoing and, in a number of respects, controversial.

Regarding the 'war on doping', which like its counterpart the 'war on terrorism is never far from the headlines, some commentators argue that, instead of banning the use of performance enhancing drugs in sport, athletes should be free to choose whether to take them or not. This would remove some of the alleged hypocrisy and inconsistency surrounding doping in sport on the part of a number of sports governing bodies. But this is missing the point of doping control - it is there to safeguard the health of the athletes and the integrity of sport itself. Doping and sport, like oil and water, do not mix!

Doping Control and the Ohuruogu Case

In enforcing doping control, there has also been much discussion on the application of the principle of strict liability, whereby an athlete is solely responsible for any banned substance found in his/her body. Accordingly, it is not necessary to show intent, fault, negligence or knowing use of the banned substance concerned on the athlete's part in order to establish a doping offence.

And also the rule of the British Olympic Association (BOA), and a number of other National Olympic Committees, which automatically excludes an athlete, who has committed a doping offence and received a ban, from competing in future Olympic Games - the dream of all elite athletes.

Both of these issues have come to the fore in the case of the British athlete, Christine Ohuruogu, the Commonwealth 400m champion, who has just received a twelve-month ban for missing not one but three out-of-competition doping tests and also faces a lifetime Olympic ban from the BOA. She is appealing against the latter ban and, as that is, therefore, *sub judice*, I shall refrain from commenting specifically on this aspect of the case. However, in general terms, lifetime bans of 'elite' athletes - that is, those who earn their livings from their sports - from competing may, according to the particular circumstances, constitute unlawful 'restraints of trade' and be void and unenforceable. And, although generally speaking English Courts are reluctant to intervene in sports disputes, they will generally do so where livelihoods are at stake, in order to determine whether the restraint was reasonable or not (see *Gasser v. Stinson*, High Court, 15 June 1988, unreported). But these are not easy cases to decide. In *Gasser*, the claimant was not, in fact, successful, the English High Court holding that the ban was reasonable in the circumstances.

Under the IAAF rules, and, indeed, under the anti-doping rules of other international sports bodies, and also in line with the WADA Anti-Doping Code of 2003 (see Article 2.4), failure to attend a doping test, without justification, is tantamount to failing such a test and is punishable accordingly - in the present case, a mandatory ban of twelve months.

Ohuruogu is reported to have been devastated by the ban and her coach, Lloyd Cowan, has said he is "disgusted" at the suspension, adding that it was "very harsh". Be that as it may, and although her failures to show up for the doping tests concerned have been put down to "forgetfulness" and the independent disciplinary committee, which found Ohuruogu guilty, has issued a statement saying that she "had no intention of infringing the anti-doping rules", the rules are the rules and must be obeyed, if the 'war' on doping in sport is to be won. Her forgetfulness on more than one occasion hardly shows a sense of responsibility or respect for doping control.

The strict liability rule has been defended on several occasions. Without it, it is generally argued, it would be virtually impossible to convict and punish drugs cheats. In other words, any anti-doping programme would be rendered nugatory. In perhaps one of the most celebrated and widely reported cases, namely, that of the sixteen year old Romanian artistic gymnast, Andreea Raducan, who, having won a gold medal, tested positive for a banned substance, which was attributable to two Nurofen tablets prescribed by her team Doctor for headache and congestion and taken by her, the Ad Hoc Division (AHD) of the Court of Arbitration for Sport (CAS) sitting during the 2000 Sydney Olympics (CAS AHD OG 2000/11) upheld the commission of the doping offence and the resulting ban, stating:

"*The Panel is aware of the impact its decision will have on a fine, young, elite athlete. It finds, in balancing the interests of Miss Raducan with the commitment of the Olympic Movement to drug-free sport, the Anti-Doping Code must be enforced without compromise*."

This decision was very much in line with previous CAS decisions in doping cases, not least the ruling in C v. FINA (CAS 95/141) in which the strict liability rule in doping cases was defended in the following terms:

"*... the system of strict liability of the athlete must prevail when sporting fairness is at stake. This means that , once a banned substance is discovered in the urine or blood of an athlete, he must automatically be disqualified from the competition in question, without any possibility for him to rebut this presumption of guilt (irrebutable presumption). It would indeed be shocking to include in a ranking an athlete who had not competed using the same means as his opponents, for whatever reasons*."

In other words, the use of any banned substance distorts the result of the sporting event/competition concerned and, thus, the intention of the athlete regarding the presence of such substance is not relevant. It further follows from this that the fact that the banned substance was not taken to obtain a competitive advantage (as argued in the Raducan case) is also irrelevant - for a doping offence to have been committed requires only the presence of the banned substance in the athlete's body.

Conclusion

Should one feel sorry for Ohuruogu, who has said about the ban and its sporting consequences that "I really didn't expect my hopes and dreams to end this way"? I think not, because elite athletes know the rules on doping - in particular, the need to be available and to attend out-of-competition doping tests whenever required to do so - and also the serious consequences that follow from breaking them. Only in this way, in my view, can the 'war on doping' be won and the integrity of sport and the fairness of sporting competition maintained and safeguarded.

Ian Blackshaw

The Strict Liability Principle and the Human Rights of Athletes in Doping Cases

By Janwillem Soek

TMC Asser Press, The Hague 2006, hardback pp. 455 + XX, ISBN 13: 978-90-6704-226-0, Price GBP 70.00 / USD 120.00

The central issue in this study, the basis of a PH D thesis by Dr Janwillem Soek, a Senior Researcher at the International Sports Law Centre of the prestigious TMC Asser Instituut in The Hague, The Netherlands, is whether the strict liability principle, whereby any athlete who tests positive for a banned substance is solely responsible for what is found in their body, is compatible with the European Convention on Human Rights and, in particular, article 6, which guarantees the right to a fair trial and enshrines the basic presumption of innocence until proved guilty. However, a strict liability principle involves a basic presumption of guilt. And the question, therefore, arises, which the study tackles with exemplary diligence, as to what extent, given such a principle, an athlete is able to mount an effective legal defence against a doping finding by a sports body.

The fight against doping in sport has been led by the International Olympic Committee (IOC), which considers that doping is unfair to other 'clean' competitors; is against medical and sports ethics; and harmful to the mental and physical health of athletes. Some other International Sports Federations, such as the International Ski Federation, go further and consider that doping is contrary to the rules of sport: indeed undermines the very integrity of sport.

Without such a regime, the IOC and other sports bodies, argue that what the World Anti Doping Agency, which in its World Anti Doping Code has harmonised the anti doping rules, has described as a 'war on doping' would be difficult if not impossible to win! But the application of such a strict liability principle can - and often does - lead to unfairness. Take, for example, the case of the sixteen year old Romanian gymnast, Andreea Raducan, who tested positive for a banned substance after being prescribed by her team doctor and taking a Nurofen tablet in his presence to stem a cold before competing and gaining a gold medal at the 2000 Sydney Summer Olympics. Despite lack of fault on her part, she was stripped of her medal by the IOC and this ruling was upheld on her appeal to the Ad Hoc Division of the Court of Arbitration for Sport (CAS) sitting during the Games. In dismissing the appeal, the CAS remarked as follows: "*The Panel is aware of the impact its decision will have on a fine, young, elite athlete. It finds, in balancing the interests of Miss Raducan with the commitment of the Olympic Movement to drug-free sport, the Anti-Doping Code must be enforced without compromise.*"

Of course, nowadays, under the World Anti Doping Code, to a limited extent at least, there are provisions for taking into account so-called 'exceptional circumstances', which may result in a reprimand rather than a suspension from competition.

Under this Code, the CAS is now the final 'Court of Appeal' in doping cases, and Dr Soek includes in his study an extensive review of CAS rulings, observing that its developing '*lex sportiva*' can only be consummated if the '*stare decisis*' ('judicial precendent') principle and the obligation to publish its decisions are incorporated in the CAS procedural rules.

Not only is this study important from a sports law point of view, but also from a practical point of view, in that doping bans not only prevent athletes from practising their sport, but also has economic consequences for them - the loss of lucrative sponsorship and endorsement deals.

As mentioned, the main question raised by this excellent and comprehensive study is whether the strict liability rule infringes an athlete's human rights. Put another way round, whether rules of a higher order enshrined in the European Convention on Human Rights take precedence over current doping procedural rules, which Dr Soek also extensively examines in his study. If the answer to that question is in the affirmative, the further question must be answered as to whether the doping rules are '*contra legem*'. The author seems to think that they are, and concludes that doping violations are quasi-criminal proceedings and that, as such, athletes, the subject of doping proceedings, should be entitled to the same rights as suspects and accused persons in criminal proceedings. In other words, the fundamental right to the presumption of innocence and the right to defend themselves. As well as respect for the principle of "no punishment without guilt". In other words, without the criminal element of '*mens rea*'.

But sports bodies and administrators, who, together with their legal advisers, should not be without a copy of this study, take a different point of view. So the debate is wide open and will continue. Whatever, the final outcome, sport and justice must be the winners.

Ian Blackshaw

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Foul!

By Andrew Jennings

Harper Sport (Harper Collins), London 2006, hardback, pp. 386 + XI, ISBN-13 978-0-00-720811-1, Price £18.99

Sub-titled, 'The Secret World of FIFA: Bribes Vote Rigging and Ticket Scandals, the investigative sports journalist, Andrew Jennings, who lifted the lid on the IOC in 'The Lords of the Rings', which is ranked among *Sports Illustrated's* Top 100 Sports Books of All Time and also earned him a five-day jail sentence in Lausanne, Switzerland, now exposes "the dark side of the beautiful game" in this his latest book.

In this Book, the result of four years of research in the Americas, Africa, Asia and Europe, Jennings deals with the hitherto secret world of FIFA and, in particular, reveals many aspects of how FIFA is organised and run, and the personalities involved over the years, including the close relationship between FIFA and Horst Dassler of ADIDAS, the founder and his right hand man, Jean-Marie Weber, the subsequent President of the now bankrupt sports marketing company ISL, formerly FIFA's exclusive marketing agent for the World Cup and other FIFA events; as well as the rise of Sepp Blatter from a humble marketing assistant on joining the organisation in 1975 to FIFA Secretary General in 1981 and then President in 1998.

It is certainly is a fascinating Book, full of high drama, sports politics, both internal and external, colourful - and, indeed larger than life - characters, well drawn by the author, and also high finance, that will make uncomfortable reading for FIFA; and Blatter's attempt to ban it was unsuccessful. A District Court in Zurich in March 2006 turned down his application for a world-wide injunction. However, the Court did grant Blatter leave to appeal the decision. So, the next thrilling instalment in this particular saga is awaited with interest.

To put the story in context, the Book includes in an Appendix very helpful Chapter Notes, which include many sources/evidence for the allegations Jennings makes in the Book; a so-called 'Timeline' chronicling important dates and events regarding the history of FIFA,

which celebrated its centenary in 2004; and a 'Cast List' or a short 'who's who' of the persons who appear in the Book.

As an investigative journalist, Jennings tries to discover the truth about how the world's most popular - and lucrative - sport is run. This has certain echoes - probably co-incidental - in the recently published Independent European Union Report on Football by Jose Luis Arnaut, which, amongst other things, calls for openness and transparency on the part of the football authorities, including UEFA and FIFA. This is not, it is submitted, in a world that espouses 'freedom of information' unreasonable. Surely the fans, whose money and enthusiasm keep the 'beautiful game' going around the world, have a right to know what goes on in their name 'for the good of the game'. After all, they are part of the 'football family'!

Whether the Book is fact or fiction - according to Blatter, Jennings writes fiction - or perhaps a mixture of the two - 'faction' - your reviewer refrains to make any judgements whatsoever on this or the allegations made in the Book. But what he can say - without fear of contradiction - is that the Book is an extremely good read from beginning to end; so why not get a copy and judge for yourself!

Ian Blackshaw

European Sports Law: a Comparative Analysis of the European and American Models of Sport

By Lars Halgreen

Forlaget Thomson, Copenhagen 2004

Sports Law and Policy in the European Union

By Richard Parrish

Manchester University Press, 2003

The European Union and Sport: Legal and Policy Documents

By Robert Siekmann and Janwillem Soek (editors)

T.M.C. Asser Press, The Hague 2005

It is easy to assert that sport is unlike other industries, but it is harder to pin down exactly what that may entail. It does not mean, for example, that price-fixing should be treated any less leniently when it involves replica football kits than when it involves cement or vitamins. Sport is not *wholly* unlike other industries. But it possesses features that are abnormal. The economics of professional leagues are based on the interdependence of participants. The maintenance of rivals is a necessary element of the whole endeavour. Uncertainty of result is essential to sustain spectator interest. But it not simply in its economics that sport is special. It has social and cultural functions which transcend those to which ordinary industries would lay claim. All this poses challenges for the lawmaker. How to provide room for sport to express its distinctive economic and socio-cultural concerns while not allowing it the wholesale immunity from legal control which would overstate its separation from the norm? And at EU level the problem is all the more acute. How to shape a policy sensitive to sport's peculiarities while also taking account of the limited competence conferred by the Treaty on the relevant European institutions (most prominently the Court and the Commission) to consider all relevant aspects, most of all the cultural dimension? So at European level, more than at national level, the complaint of those subjected to public intervention may be *either* that the special demands of sport have been misperceived *or* that the system locks out consideration of features that should be part of the assessment. Or both.

All the three books under review carry these background rhythms. Halgreen's special contribution is to draw comparisons and contrasts between European and North American practice, Parrish builds his narrative around the notion of 'separate territories', according to which there is 'a territory for sporting autonomy and a territory for legal intervention' (p.3), while Siekmann and Soek's handsomely presented volume collects together the 'EU Sport Acquis' (p.x) of the Court, Council, Commission and European Parliament.

Halgreen shows how the notions of vertical and horizontal solidarity are developed in very different manners in Europe and in North America. At the risk of superficiality (on the part of your reviewer, not the author), one may identify Europe as more deeply committed to vertical solidarity than North America - promotion and relegation, sharing wealth all the way down to the grass roots, and so on - while North America displays a deeper commitment to horizontal solidarity within professional leagues - the 'draft pick', franchise relocation, and so on. This model can be used - *inter alia* - to track how things might change over time. Halgreen provides a detailed comparative account of the legal treatment of a set of practices that are central to the sports industry: among them, broadcasting rights and competition (anti-trust) law, ownership restrictions, labour relations including player mobility, the regulation of agents, and intellectual property rights.

Sports law in its modern form has a longer pedigree in the United States than in Europe. Some practices to which European actors still cling were long ago suppressed on the other side of the Atlantic. Case C-415/93 *URBSFA* v *Bosman* was our European 'bombshell' (Halgreen, p.47), pitching us on to a 'legal roller-coaster' (Halgreen, p.379). On paper the decision merely confirmed European Court decisions of the 1970s that sport falls within the scope of the EC Treaty in so far as it constitutes an economic activity. (All the relevant decisions are collected in Siekmann and Soek). To this extent, there

was no shock - except for the 'eminent [unnamed] sport and the law lawyer' cited by Parrish who asked 'what the bloody hell has the Common Market got to do with sport?' (p.1): eminence can evidently be achieved without intellectual curiosity. In practice, however, the *Bosman* ruling demonstrated for the first time that EC law could be employed to force radical and immediate change in the structure of the game. Things have never been the same again, as what Parrish aptly labels the commercialisation, juridification and politicisation of sport has intensified and, as he emphasises especially at pp.101, 106, enforcement of the rules of the EC Treaty became a real prospect.

A central question asks just what is the scope of the autonomy that is and should be allowed under the law to governing bodies to set the rules that underpin their sport. It is what the European Court in *Bosman* described as 'the difficulty of severing the economic aspects from the sporting aspects' of (*in casu*) football. It is difficult because it is probably impossible. Football teams consist of only 11 players - but that sporting rule has economic implications, because were teams to comprise more players, there would be more jobs. It is very difficult to imagine any 'sporting rule' which does not also have a commercial repercussion. Halgreen spends time in the introductory Chapters of his book setting the scene for analysis of the key question, and returns to it in his Conclusions. He observes that '... the line between economic and sporting reasons forms the crux of sports law' and wonders whether one should accordingly abandon the quest to find a *purely* sporting rule (which escapes legal control) and instead think in terms of a rule possessing a *predominant* sporting reason (p.396). As he convincingly observes two pages later the 'European Model of Sport' could be defended by separating the regulatory branch of the sports federation from its commercial interests - though the arguments of both the past and the future centre on where to locate the line of that separation. Parrish also addresses these issues, providing a helpful survey of rules necessary for 'organising the game' (pp.132-138), including those concerning the single structure model of sport, precluding multiple club ownership and club relocation; and rules governing the supply of labour (pp.138-149), covering most of all the transfer system. He accepts that the divide between the notion of the rule that is inherent to the organisation of the game and the rule that is commercially based is hard to fix, generating a likelihood of a case-by-case approach (p.152), and 'problematic' (p.217), but he shows that this does not in any sense undermine the value of a 'separate territories' approach. It just reminds us that knowing that there is a divide between the territory of sporting autonomy and the territory of legal intervention is a well-positioned starting-point in the investigation, not an answer in itself.

There is plenty of intriguing material in these books which allows reflection on just how special sport really is - that is, just what should be tolerated in sport that would not be practised in a 'normal' industry. I would not agree with Halgreen's view that collective selling of broadcasting rights is inherent in the way sport is run (pp.114-115), and nor does the European Commission, if it adheres to the approach it took in its *Champions League* decision. But the point may be revisited, for the possibility of breaking open collective deals is likely to become increasingly attractive to some richer clubs who stand to make more from individual sale of rights to their own matches than from sharing in the collectively-created pool. Whether the collective deals are lawful under competition law will likely become an important element in the commercial manoeuvring. I would be more sceptical of the idea that salary capping can escape legal control than Parrish (p.156), at least in the absence of a deeper participation in agreeing arrangements by players or their representatives than currently occurs in sports organisation in Europe. But my comments in this paragraph are really mere detail. The general point is that the authors have done a great service to scholarship by offering such rich material as the basis for reflection on just how special sport really is.

A key theme for Parrish is the risk that the EC's focus on economic integration may imperil social and educational concerns within sport. This issue is set out clearly at the beginning of Chapter 6, though it is visible elsewhere. He then shows how the 'socio-cultural coalition' (p.161) has endeavoured to prise open the EU's institutional environment in order to secure deeper recognition of its anxieties. This is an intriguing tale which conveys the breadth of the virtues claimed for sporting activity.

At p.166 it is stated that *Bosman*, labelled a 'setback', 'confirmed the predominance of the EU's market-based definition of sport at the expense of the social definition'; at p.174 an 'insensitivity' in the EU approach to sporting issues is mentioned. I think I would not fully share Parrish's assessment of the *Bosman* ruling. It was, as he convincingly explains, a landmark in the sense that it demonstrated the live possibility of using EC law in an effective manner to force change in professional sport. Parrish goes further. It 'struck at the heart of the socio-cultural coalition's belief system' (p.204). In so far as that belief system was simply that sport is entitled to autonomy from the law, then I agree. But the book's claim seems to be stronger. It is contended that the Court in *Bosman* neglected some deeper socio-cultural dimension in sport. As Parrish observes (pp.195, 204, 217) the 'socio-cultural coalition' is one of convenience, lacking consensus on policy strategy, but I am still left unsure what really is the core of the perceived damage wrought by *Bosman* to sport's socio-cultural territory. The Court set aside a transfer system that was mediaeval in its treatment of footballer employees; and, strongly prompted by Advocate General Lenz, it refused to accept that the origin of players plays any necessary role in the structure of club football, a view which I have never seen challenged with any intellectual rigour. I would argue that in *Bosman* the Court swept away anachronistic practices that the 'football industry' had no serious basis to defend, either on economic or socio-cultural grounds. In this vein, at p.214 Parrish writes that the analogy between sport and culture was rejected by the Court in *Bosman*. I do not think this is correct. The Court refused to accept that the practices at stake *in the case itself* had anything to do with 'culture'. In my opinion it was subsequently more accommodating to sports peculiarities in *Deliege* and *Lehtonen* not because it had changed its mind about the worth of socio-cultural concerns in EC trade law but rather because the material presented in those cases was, unlike that in *Bosman*, shown to be relevant to preserving sport's necessary peculiar features. So I would fully endorse Parrish's instruction to sport to abandon the feeble 'we know best' claim (p.219) - but I would depict *Bosman* as a perfect example of such feebleness, rather than as an instance of - in short - commercially-driven legal reasoning overwhelming embedded socio-cultural values.

I am not in any sense taking issue with the core of the thesis advanced with care and skill by Parrish - that there is a territory in which sport sets the rules, and the law is kept at bay, and that a range of interested actors participate in shaping the geography of that territory. My reservation about the use of the 'separate territories' pattern is that it may be used in a way that tends to conceal the misshapen and contested nature of the socio-cultural territory occupied by sport. The 'separate territories' approach is a valuable framework for analysis, but it is, for my taste, appropriate to have a healthy scepticism about just what falls into sport's socio-cultural territory. (I should make plain that nothing in Parrish directly contradicts that view, for his primary concern is to show the analytical salience of the 'separate territories' framework in understanding how EU sports law and policy has evolved rather than to criticise the location of the divide between the territories - I am here indulging the reviewer's privilege of drifting away from the mainstream of the agenda set by the author). There are features of sport that render it distinct from normal industries in *economic* terms - most prominently, the interdependence of clubs in a professional league and the associated need to preserve uncertainty of result, which the Court explicitly recognised in *Bosman* (and at p.100 Parrish observes that the Court in *Bosman* did not treat sport as any other industry). But what is really *culturally* different about sport? Perhaps that it is a means to achieve good health - but this would apply to participation in recreational sport and has nothing to do with spectator interest in professional sport. Perhaps that it is a device for promoting a People's Europe, as Parrish suggests at p.203 - but I am not sure what this means. Perhaps that it is a means to promote notions of fair play and tolerance - but your reviewer would need a lot of persuading that has any connection with

top-level football. Opportunistic politicians curry favour by playing along with an inflated view of sport's entitlement to autonomy - at pp.190-191 Parrish provides a quote of which I confess I had been unaware, referring to a 'need to safeguard sport, notably, soccer, from the perverseness that has emerged from the (Bosman) ruling', attributed to the Portuguese Minister for Sport - but intellectual substance is rarely present. *What* perverseness, exactly? That working-class young men are getting paid more than expensively-educated middle-aged politicians? Sports federations too are very eager to assert the cultural value of their activities as a shield against legal intervention, and the 'separate territories' approach provides an intellectual basis for understanding what this may mean, but, again, the substance of their claims is rarely carefully articulated. My feeling is that much of the cultural worth of sport has little, if anything, to do with its modern top-level professional version. 'Sport' is not sensibly thought of as a homogenous phenomenon. Amateur and recreational sport is not business. Professional sport is. And *Bosman* fits coherently into this logic, in my opinion.

It is not just sports federations that play fast and loose with definitions of sport that make airily unsubstantiated claims about its cultural importance. The biter may be bit. Both Halgreen and Parrish discuss the 'protected events' legislation found in some EU Member States and, at EC level, sourced in the 'Television without Frontiers' Directive (89/552, amended by 97/36, extracted in Siekmann and Soek at pp.73-86). This permits Member States to select events of particular importance that, for the purposes of broadcasting, will be protected in a manner that is not entirely clear (for an exasperated attempt to make sense of the rules, see the decision of the House of Lords in *R* v *Independent Television Commission, ex parte TV Danmark 1 Ltd* [2001] 1 WLR 1604). It is *not* a regime that guarantees public viewing access to major sporting events on television, as Parrish claims at p.15: it is, as he acknowledges at p.209, a permissive regime, of which most Member States have chosen not to make use. (Halgreen is also too strong in his description of the rules at p.134). Quite why such a system should exist is not explained in any convincing fashion in these books. Nor can it be. Your bewildered reviewer is unable to fill the gap. To suggest that citizens have a right to watch England play football or cricket is to invite deserved ridicule, yet that seems to what is at stake here. The best one can do in making sense of this system is to conclude that politicians win votes by adopting such rules, and that holders of the relevant rights in the sports sector have not (yet) devised adequate political and/or legal methods to combat such intervention, but to portray the 'protected events' legislation as a manifestation of the socio-cultural dimension of sport increases your reviewer's suspicion that, at least in professional sport, this means nothing more than that sport is popular.

In a way that is the point. Sport *is* popular and plenty of actors have an incentive to shove it up their agenda. For the political scientist in particular, the story of the EU's interventions in sport is - in short - one of 'task expansion', or (to select a label hinting at a greater degree of suspicion about the process) 'creeping competence'. Chapter 2 of Parrish provides a helpful connection between sport and the general literature on the shaping of the modern state of European integration. The EC has no explicit *legislative* competence in the field of sport, which an inspection of Article 5(1) EC might lead one to conclude therefore places it off-limits. But sport as an economic activity has been treated as subject to the basic principles of EC law, including most conspicuously the Treaty provisions concerning free movement of labour and competition policy. And so the EC institutions, in particular the Court and Commission, have been drawn (and not necessarily unwillingly) by a rich mix of public and private actors into the task of shaping a policy of sorts against the unwelcoming Treaty background. On occasion one gets the hint that the absence of general EC competence under the Treaty generates a reluctance to disturb sporting arrangements. For example rules prohibiting multiple ownership of clubs were left untouched by the Commission in *ENIC/ UEFA* (2002, Siekmann and Soek pp.576-587) despite vigorous arguments that the rules were disproportionately restrictive means to secure confidence in the absence of match-rigging. But by contrast *FIA (Formula One)* (2001, Siekmann and Soek pp.458-468) and most of all *Bosman* itself stand for a vigorous engagement with sporting practices and an uncompromising unwillingness to tolerate the sporting *status quo*. EC law makes a *conditional* grant of autonomy to governing bodies, and the role of its institutions in shaping the content of those conditions forms the heart of Parrish's exploration of the extent to which ambitions to develop a policy on sport is undermined by the tensions between the regulatory and commercial implications of decisions taken by sports federations and the (even wider) concern of policy-makers to reflect and promote the much broader (if ill-defined) socio-cultural context within which sport is viewed in Europe. Parrish's 'separate territories' presents a model on which Halgreen draws, and Chapter 3 of Parrish explores - in short - who wants what and how this plays out against the background of coalition-building inspired by the distinctive readings of sport as economic and sport as socio-cultural in its impact.

Task expansion can be propelled by material that might seem to the lawyer to be rather woolly. Halgreen shows how the 'feeble and vague' Amsterdam Declaration (p.58) has generated a political dynamic to think seriously about the shaping and even promotion and defence of a 'European Model of Sport'. The gulf between the Treaty's barrenness and the ambitions of the Commission's Helsinki Report (in particular) is proof of the reality of task expansion. Parrish handles the impact of the Amsterdam Declaration skilfully (e.g. pp.15-16, 19, 104, 176, 196) and makes a convincing case that one should not underestimate the force of soft law. At p.213 he makes the nice point that use of soft law to trumpet sport's special virtues may satisfy both those dedicated primarily to market solutions and sceptical about sport's socio-cultural claims (because soft law is not binding) and those eager for recognition of sport's special socio-cultural features (because soft law is, after all, better than nothing and the best that can be extracted from the EU as currently structured). Parrish's more broadly theoretical Chapter 2 has embedded within it the important perception that policy evolution is driven by a much broader pattern of sources than binding rules alone (e.g. p.59). This is then vigorously demonstrated by his treatment of the environment within which the Court operates (Ch.4) and examination of the Commission's contribution through the application of the competition rules (Ch. 5). Equally, to inject the sober lawyer's anxiety, the constitutional fragility of the Commission's claim to be able to extract a defensible European model from the Treaty is good reason for scepticism about how much can be done in law should the economically powerful actors in European sport decide to opt more aggressively for an American model. There is here a fascinating point (and Halgreen makes it at p.394) that sports federations, having long lamented the incursion of EC law, may come to see it as a friend in so far as it may provide some shelter from the ruthless ambitions to restructure the game held by some of the more powerful clubs.

Three very worthwhile books, which I enjoyed reading and will certainly use again and often.

Stephen Weatherill

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ASSER International Sports Law Centre

Conferences, Round Table Sessions, etc. *(Continued from page 117)*

- Legal aspects of the TV rights issue in Europe and Israel: ownership and competition law (The Hague 2003);
- Corruption in sport (The Hague 2003);
- The position of women in sport (The Hague 2004);
- Holland-Belgium: The option clause in professional football (Antwerpen 2004); ***(continued on page 144)***

Publication of CAS Awards
(per March 2006)

The International Council of Arbitration (ICAS) has given its consent to the publication of summaries of major and non-confidential Court of Arbitration for Sport (CAS) awards in specialised journals like The International Sports Law Journal (ISLJ), while CAS will keep on publishing its awards in its official Digest. (eds)

CAS 2004/A/572 Arsenal Football Club / RCD Espanyol de Barcelona SAD, award of 23 September 2004
Panel: President: Dr Stephan Netzle (Switzerland), President; Mr Raj Parker (United Kingdom); Mr Juan Vives Rodriguez de Hinojosa (Spain)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by Arsenal Football Club plc (the Appellant) against the decision of the FIFA's Player's Status Committee of 9 March 2004 dismissing the Appellant's claim on the grounds that RCD Espanyol de Barcelona SAD (the Respondent) was not to be held accountable for the cancellation of the Contract with the Appellant.

On 2 July 2002 the Appellant and the Respondent agreed terms for the transfer of the registration of a player from the Appellant to the Respondent for a transfer fee of GBP 500,000 to be paid until 31 August 2003 and further payments dependent on the matches played up to the maximum of another GBP 500,000, i.e. payments up to GBP 1,000,000.

The Contract, directed to the Respondent's General Manager, was accompanied by a separate message in which the Respondent's General Manager was asked to submit the Contract to the club's President for signature and further informing the Respondent that the Player would be required to sign a waiver to waive his right to the balance of a signing-on fee of GBP 80,000 payable to him by the Appellant under his previous employment contract with the Appellant.

On 9 August 2002, the Respondent wrote a letter to the Appellant explaining its reasons to "*accept and affirm the [Appellants] intentions to reconsider and not to respect the said agreements*]", the reasons stated therein being:
- the constant default of performance by the Appellant,
- the constantly expressed intention not to respect the Contract by the Appellant, and, eventually
- the impossibility in obtaining the Certificate.

In the same letter, the Respondent further informed the Appellant that it had cancelled all guarantees of payment.

On the merits, the Appellant bases its appeal on the grounds that the Decision ignored the oral agreement made by telephone on 14 July 2002 between the Appellant and the Respondent. According to this agreement, each of the parties would have had to contribute GBP 16,000 to the Player in respect of his signing-on fee. The Appellant therefore had rightfully withheld the Certificate as long as the Respondent refused to fulfil its obligations deriving from this agreement. As a consequence, the Respondent was not entitled to cancel the Contract as it did by withdrawing from the transaction on 31 July 2002. As the performance of the Contract would have entitled the Appellant to receive GBP 1,000,000 from the Respondent, the Appellant claims payment of this sum as damages.

The Respondent requests in its answer of 21 April 2004 that the appeal be dismissed and the Decision adopted on 19 February 2004 by the Player's Status Committee be confirmed. On the merits, the Respondent argues that there was no oral agreement between the parties as to any contribution of the Respondent to the Player's signing-on fee. The Respondent argues that the Appellant acted unreasonably by (i) initially arguing that the Contract was conditioned to a waiver of the Player of his signing-on fee and withholding the Certificate until such waiver was signed and (ii) by later arguing that an oral agreement as to a contribution of the Respondent to the signing-on fee had been agreed upon as well as by the ongoing refusal of the Appellant to deliver the Certificate. As a consequence, the Respondent concludes that this behaviour of the Appellant's and the non-fulfilment of the Appellant's contractual obligation to deliver the Certificate rightfully entitled the Respondent to eventually cancel the Contract.

In its written decision the Panel considered that:
- It cannot be established that the signing of the waiver of signing-on fee by the Player was a condition to the Contract, especially as the formal contract was aimed to "*reflect what* [the Parties had] *agreed*" the day before and did not itself mention such a condition in its terms. The Panel therefore holds that the Contract was not conditioned to the signing of the waiver by the Player.
- The Appellant has failed to prove that the alleged tripartite agreement over the signing-on fee was collateral to or modified the Contract. The Appellant has also failed to show that the tripartite agreement was agreed between the Appellant, the Respondent and the Player. The Panel therefore holds that no such tripartite agreement modifying the contract was validly concluded.
- The Panel holds that the Respondent was entitled to withdraw from the Contract as the conditions of Art. 102, 107 and 108 of the Swiss Code of Obligations (CO) were satisfied. (i) The Appellant was in default in a bilateral contract (Art.102 CO) as he unjustifiably retained the Certificate necessary for the completion of the transfer. This unjustified refusal to deliver the Certificate constituted an essential violation of his contractual obligations. (ii) The Respondent repeatedly asked for performance, receiving constantly the same response by the Appellant. The Respondent was therefore entitled to assume that the behaviour of the Appellant indicated that the setting of a time limit would be in vain (BGE 116 II 436, 440 Swiss Federal Court). As the Respondent was not in breach of contract, no compensation is due to the Appellant.

CAS 2004/A/620 Xerez Club Deportivo SAD / HNK Hajduk Split Club, award of 9 December 2004
Panel: Mr Raj Parker (England), President; Mr José J. Pinto (Spain); Mr Michele Bernasconi (Switzerland)

On 16 July 2002, Xerez Club Deportivo S.A.D. (Xerez) and HNK Hajduk Split Club (Hajduk) signed a transfer agreement (the Agreement) concerning the transfer of Mr Igor Musa (the Player). The Player was to be loaned from Hajduk to Xerez for the seasons 2002/3, 2003/4 and 2004/5. Three instalments of EUR 100,000 each were to be paid by Xerez to Hajduk under three promissory notes with the due dates of 15 September 2002, 20 December 2002 and 10 June 2003 respectively.

On 13 January 2003, Hajduk (acting through the Croatian Football Federation) complained to FIFA claiming non-payment by Xerez of the sums set out in the Agreement.

A decision by the FIFA Players' Status Committee (the FIFA Committee) was issued on 5 May 2004. It held that the documentation submitted by Xerez was not sufficient evidence to prove the discharge of its financial obligation under the Agreement.

Therefore, Xerez had to either prove the payment (e.g. by bank receipts, SWIFT, or receipts signed by Hajduk) or pay EUR 300,000 to Hajduk.

On 14 May 2004, Xerez appealed to the Court of Arbitration for Sport (CAS) to annul the decision of the FIFA Committee and to hold that Xerez had duly paid the three instalments as set out in the Agreement to Hajduk in cash. Once these cash payments had been

made, the promissory notes were invalidated and returned to Xerez. As Xerez had the invalidated promissory notes in their possession (evidenced by a notary's certification), this was irrefutable proof of payment under them.

Hajduk has chosen not to file any submissions in this matter despite having been issued with several reminders from CAS.

In its written decision the Panel considered that:

- According to Swiss Federal law, to obtain payment of a promissory note the holder of the note must present the original of it to the person carrying the obligation to pay (cf. art. 1028 of the Swiss Code of Obligations, "CO"). The person who pays a promissory note has the right to request the note to be returned to him/her, with a confirmation of receipt of payment on it (cf. art. 1029 CO). If a promissory note is paid and the paying party has not requested the return of it, that party may have to pay a second time to a third party who, in good faith, may have bought the promissory note and relied on the fact that no confirmation of payment was written on the note itself (cf. Meyer-Hayoz/von der Crone, "Wertpapierrecht", § 10 N 24; Stephan Netzle, Basler Kommentar, art. 1029 N 2).
- Based on all evidence produced by the parties, the Panel is of the view that in the absence of any other evidence, the fact that Xerez has the promissory notes back in its possession is sufficient proof of payment under them. As a result, Xerez has proved its compliance with its obligations to make payments under the promissory notes as set out in the Agreement and the decision of the FIFA Committee must be overturned.

CAS 2003/A/648 Belarus Football Federation (ABFF)/ Fédération Internationale de Football Association (FIFA), Award of 26 January 2005

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Lars Halgreen (Denmark); Mr Stuart McInnes (England)

This is an Appeal by "Association Belarus Football Federation" (hereinafter "ABFF" or "Appellant") against Fédération Internationale de Football Association (hereinafter "FIFA") moving the Court of Arbitration for Sport (CAS) to set aside a decision of FIFA dated 10 June 2004 which lifted a sanction imposed by the Appellant on Mr Nikolay Kashevsky (hereinafter the "Player").

Mr Nikolay Kashevsky (hereinafter the "Player") was subject to a player contract with FC Skvich, a Belarus fotball club for a period from 2 May 2002 until 31 December 2003.

The Player was loaned by FC Skvich to FC Metallurg, Ukraine, for a period from 30 July 2003 until 30 November 2003.

Upon the expiration of the loan agreement the Player did not return to FC Skvich and instead signed a contract with FC Krivoi, Ukraine where he started to play on 2 January 2004.

On 26 January 2004, the Disciplinary Commission of the "Association Belarus Football Federation" (hereinafter "ABFF" or "Appellant") suspended the Player for breach of his contract with FC Skvich for a period of four months beginning 15 April 2004 until 15 August 2004 (the "Belarus Sanction").

The Player filed an appeal against the Belarus Sanction with the Football Arbitration Body of the Appellant which appeal was rejected on 10 February 2004 (the "Belarus Appeal Decision").

On 17 March 2004, the Player filed an appeal against the Belarus Appeal Decision with the FIFA Dispute Resolution Chamber which, on 10 June 2004, upheld the Appeal and set aside the Belarus Sanction (the "FIFA Decision").

The FIFA Decision is the subject matter of these proceedings which were commenced by the Appellant by filing a statement of appeal received by CAS on 28 June 2004.

The FIFA Decision argues that in violation of Article 44 of the FIFA Regulations for the Status and Transfer of Players (the "Transfer Regulations") both the Belarus Sanction and the Belarus Appeal Decision were taken by bodies which "*were not composed by equal representation of players and clubs*" and " *that therefore it [the FIFA Dispute Resolution Chamber] was entitled to intervene in this matter*".

As to the sanction imposed on the Player the FIFA Decision is of the view that it was not proportionate to the extent of the breach of contract committed by the Player because during December 2003, the only month remaining under the Player's Player Contract with FC Skvich after the end of the loan arrangement, no official games were played in Belarus. As a consequence, in the FIFA Decision's opinion, no "serious problem" was caused to FC Skvich. Therefore, the FIFA Decision lifted the Player's sanction.

The Appellant argues that the FIFA rule directing FIFA member federations to establish a dispute resolution system and to provide that in that system there shall be equal representation of players and clubs in the decision-making bodies (Article 42 of the Transfer Regulations), is not mandatory for FIFA member federations according to the Preamble to the Transfer Regulations.

With respect to the sanction the Appellant submits that it is perfectly in line with the applicable regulations.

In the Respondent's view the equal representation of players and clubs in the federations' dispute resolution mechanism is a general principle mandated by the Transfer Regulations which, in turn, were drafted on the basis of an agreement between the EU-Commission and FIFA/UEFA dated 5 March 2001. Since, in the Respondent's view, this principle is not abided by in the Belarus regulations, FIFA has a

"... statutory obligation to supervise and intervene if deemed necessary when infringements or abuses may occur..." (emphasis added)

With respect to the sanction, the Respondent reiterates that it is disproportionate to the breach committed by the Player.

The Respondent thus requests that the Appeal be dismissed.

In its written decision the Panel considered that:

- A right "to intervene" may very well follow from the applicable regulations and, in fact, from Association Belarus Football Federation's (ABFF) membership in FIFA if ABFF fails to abide by regulations promulgated in a democratic process within FIFA. However, absent an express provision to the contrary, this "intervention" is limited to reprimanding or sanctioning ABFF as a member of FIFA, but does not include the right to interfere with the ABFF's internal disciplinary proceedings. Article 6.6 of the ABFF Statutes stipulates that the decisions of the Appeals Commission are final and there is no FIFA rule which would authorise FIFA to interfere with this principle, even if it violates FIFA directions to its member federation.
- As a consequence of the Panel's decision above the Panel does not have to express a view on whether or not the ABFF sanction is proportionate or not. This is a matter for the ABFF to decide. Equally, it is not for this Panel to decide whether the ABFF rules have been approved by whatever external body, be it FIFA, UEFA or ABFF authorities.

CAS 2004/A/647 NK Maribor Branik /Sekerspor Club, award of 27 January 2005

Panel: President: Mr Quentin Byrne-Sutton (Switzerland), President; Mr Goetz Eilers (Germany); Mr Lars Hilliger (Denmark)

The Court of Arbitration for Sport (CAS) has decided to upheld the appeal filed by NK Maribor Branik ("the Appellant"), a Slovenian football club and to annull the decision of 22 June 2004 issued by the FIFA Body of Appeal in connection with the compensation claimed by Sekerspor Club ("the Respondent"), a Turkish football club following the transfer of the player to his former club, the Appellant.

In the summer of 1997 Marko Simeunovic, a Slovenian football player (goalkeeper) was under contract and registered with the Appellant, when he was transferred to the Respondent. The employment contract (hereinafter "the Contract") Marko Simeunovic signed with the Respondent on 1 August 1997 contained a clause referred to in the submissions as art. 3, which provided:

"As from 30.05. 1999 the player has obligations towards the Club and must not leave the Club without the Club's approval. If by 30.05.1999 the

player is sold to another club or he changes the club he is entitled to 30% and Sekerspor Club to 70% of the potential amount. If the player returns to his parent club he shall be without a compensation (no compensation shall be paid).” (Official translation from Slovenian to English, made in Maribor on 15 May 2000).

The Contract indicated that the Respondent had paid the Appellant a sum of DEM 300,000 for the transfer. In July 1999, the Respondent wrote to the Turkish Football Association requesting it to take the necessary steps to obtain payment of DEM 300,000 from the Appellant for the transfer of Marko Simeunovic to the Appellant. NK Maribor Branik indicated it considered no compensation was due and that it would never have re-engaged Marko Simeunovic had it believed any compensation was to be paid.

On 22 August 2001, the dispute was submitted to the FIFA Bureau of the Players’ Status Committee for a formal decision which decided that the claim by Sekerspor Club was rejected because *“the Art. 3 should be interpreted as meaning that only in case the players are re-transferred to their original club (NK Maribor Teatanic), no transfer compensation will be due by the Slovenian to the Turkish club”.*

[the decision mentions two contracts because it also related to another player not involved in this arbitration] *that were signed between the players and the Turkish club, the Art. 3 should be interpreted as meaning that only in case the players are re-transferred to their original club (NK Maribor Teatanic), no transfer compensation will be due by the Slovenian to the Turkish club. It follows that the claim for transfer compensation from the Turkish club regarding the transfer of the player Simeunovic, must be rejected.”*

8. On 14 September 2001, the Turkish Football Association lodged an appeal with FIFA on behalf of Sekerspor Club against the foregoing decision. On 21 May 2004, the FIFA Executive Committee, convening as a Body of Appeal decided to partially accept the appeal and to modify the decision of the FIFA Players’ Status Committee of 22 August 2001: “The Respondent, NK Maribor Teatanic, must pay compensation for training and/or development, of the player Simeunovic to the Appellant, Sekerspor. The Appellant’s claim regarding the amount of compensation payment, i.e. DEM 300,000, is not considered, as the Body of Appeal did not allow itself as competent to decide in this issue.”

On 1 July 2004, the Appellant filed a statement of appeal before the CAS. On the merits, the Appellant submits in particular that: The last sentence of article 3 of the Contract, whereby “*If the player returns to his parent club he shall be without compensation (no compensation shall be paid)*”, is clear and speaks for itself by stating that any transfer back to his original club will be free of charge. It must be deemed a valid waiver under the meaning of article 15.2 of the FIFA Regulations.

The Respondent argues in particular that:

“J. the meaning of art. 3 of the contract concluded between them and the player concerned on 25 December 1997 is very obvious: in case the player returns to the Respondent, his former club, he shall not be entitled to have any share from his “Licence Fee”. According to the Appellant the “he” in the former sentence is clearly related to the player. “The aim of this provision was to promote the success of the player beforehand by giving him 30% of the transfer fee in case the player is sold to another club with a high transfer fee. If he returns to his former club, he shall be entitled with no compensation payment. As it is, the word “it” refers to the Appellant, and the word “he” refers to the player. If it was meant that the Appellant would not be entitled with a compensation fee, the sentence (he shall be without a compensation) would not have been written.”...

The Respondent also argues that *“Said Article determines the premium to be paid to the player personally and does not mention transfer compensation to be paid to the club.”*

In its written decision the Panel considered that:

- In connection with the player’s re-engagement by Appellant in 1999 whether any transfer fee is due depends on the existence of a contract between the parties relating to such fee. In this case, there is no evidence that the matter of a transfer was negotiated between the football clubs in question or that any price was articulated in any form. More specifically, the Respondent has submitted no evidence of any offer made by the Appellant to pay a transfer fee to buy back the player in 1999 and the Respondent has not even alleged that any transfer price was ever discussed, let alone agreed. For the above reasons, the Panel considers the existence of a transfer agreement between clubs is not established. Consequently, the Panel finds the Appellant owes no contractual transfer fee to Respondent .
- Given the broad meaning of the term “compensation” when used without qualification and given the fact that Sekerspor Club drafted the Contract, the Panel considers thus that the player could and should reasonably have understood in good faith that the words “*no compensation shall be paid*” meant Sekerspor Club had agreed to waive all form of compensation. Consequently, whatever the Respondent’s real intent was when including such wording, the last sentence in article 3 must be deemed a valid waiver under the meaning of article 15.2 of the FIFA Regulations. For the above reasons, the Panel considers the decision under appeal misapplied the FIFA Regulations and that, in application of article 15.2 of the FIFA Regulations, the Appellant cannot be deemed liable to pay the Respondent any compensation for training and/or development of the player Marko Simeunovic.

CAS 2004/A/635 RCD Espanyol de Barcelona SAD / Club Atlético Velez Sarsfield, award of 27 January 2005

Panel: Professor Massimo Coccia (Italy), President; Mr José Juan Pintó Sala (Spain); Mr Hugo Mario Pasos (Argentina)

The Court of Arbitration for Sport (CAS) has decided to set aside the appealed decision issued on 21 May 2004 by the Executive Committee of FIFA and to condemn RCD Espanyol de Barcelona (hereinafter “Espanyol” or “Appellant”) to pay to Club Atletico Velez (hereinafter “Velez” or “Respondent”) an amount of USD 300,000 as compensation for breach of contract.

The player Martín Andrés Posse (hereinafter Mr Posse or the “Player”) until the season 1997/98 he performed as a professional footballer with Velez which is a professional football club incorporated under the laws of Argentina.

During the season 1997/98, the Respondent and the Player signed two coordinated contracts, on 5 and 18 March 1998, according to which they agreed on a three-year employment relationship expiring on 30 June 2000.

On 4 August 1998, the Respondent and Espanyol, a Spanish professional football club, with the participation of the Player, signed a contract (hereinafter the “Contract”). Pursuant to the Contract, the Respondent agreed to sell and the Appellant agreed to purchase 50% of the rights over the Player’s professional services for the price of USD 4,500,000, and to share in equal parts any benefits deriving from the sale of those rights to third parties. Moreover, the parties agreed that as long as Mr Posse played for Espanyol either club could propose to the other one to purchase or sell the remaining 50% of the rights.

The Player gave his express consent to such deal.

Besides the Contract, the parties and the Player filled out and signed an Argentinan Football Association (AFA) form, according to which - in compliance with the fourth clause of the Contract - the Player was going to be transferred “*on loan*” from Velez to Espanyol until the end of the season 1998/99 without any further charge in addition to the already agreed USD 4,500,000, and that - in compliance with the sixth clause of the Contract - Espanyol had the right to obtain the renewal of the loan for the following season 1999/2000 by paying to Velez USD 500,000. Accordingly, AFA issued an International Transfer Certificate, allowing for FIFA purposes the transfer of the Player “*on loan*” from Argentina to Spain for the 1998/99 season.

1.1 One year later, in August 1999, Espanyol paid to Velez the agreed sum of USD 500,000 and obtained the renewal of the loan for the new football season;

1.2 On 2 July 2000, Espanyol proposed to Velez to borrow again the Player until 30 June 2001 for the amount of USD 250,000, sending a draft transfer agreement on loan, to be signed for acceptance by Velez. However, this draft transfer agreement was never signed and thus never entered into force.

On 23 October 2002, Velez filed a petition claiming compensation for the transfer of the Player before the Players' Status Committee of FIFA (the "P.S. Committee").

On 31 October 2002, the P.S. Committee issued a formal decision on the matter (the "P.S. Committee Decision"), rejecting the claim and refusing to adopt any decision as the sale of 50% of the rights over the Player, in accordance with the established P.S. Committee's jurisprudence, was "*against the spirit and terms*" of the FIFA Regulations for the Status and Transfer of Players, insofar as only 100% of the rights should be transferred and as both clubs had infringed the FIFA Regulations.

A few months later, Velez requested once more FIFA to adjudge its claim for compensation.

In the Second S.J. Decision dated 13 October 2004:

«*... given that the Argentine club had ensured an employment with the player Posse until 2002/2003, the stated club must be compensated for the missed benefit of having the player at its disposal. Therefore, and bearing in mind that the Spanish club had stated its agreement to pay a loan fee for the services of the player of USD 250,000 for one season, the Single Judge concluded that R.C.D. Espanyol shall pay an amount of USD 750,000 for the loan of the player to Atlético Velez Sarsfield until the end of the 2002/2003 season.*

1.3On 24 November 2003, the Executive Committee of FIFA, received, through the Spanish Football Federation, Espanyol's appeal against the Second S.J. Decision. The Executive Committee considered that Espanyol had not complied with the twenty-day time limit prescribed by art. 24.1 of the FIFA Regulations for the Status and Transfers of Players of October 1997 (hereinafter the "1997 FIFA Regulations"), the Executive Committee dismissed the case.

Espanyol appealed the Executive Committee's Decision before the CAS.

In its written decision, the CAS has considered that:

- The Appellant, at the moment of the appeal against the Second Single Judge Decision, was unfairly put by the ambiguous FIFA provisions in a state of procedural uncertainty, which should have induced the Executive Committee to adopt a more prudent stance. The Panel deems that a plausible construal which would avoid any regulatory inconsistency could be the following: any *substantive* aspects of contracts entered into before 1 September 2001 are governed by the 1997 Regulations, whereas any *procedural* aspects (such as the settlement of disputes) are governed by the 2001 Regulations. This reading of the above FIFA provisions would be in full compliance with the *tempus regit actum* principle according to which - as a general rule - the substantive aspects of a contract keep being governed by the law in force at the time when the contract was signed, while any claim should be brought and any dispute should be settled in accordance with the rules in force at the time of the claim. In these circumstances, the Panel has no hesitation in deciding that the Executive Committee's Decision, in rejecting the Appellant's claim on the above mentioned formal grounds, was in breach of the fundamental principle of procedural fairness, which on many occasions the CAS has recognized and protected (see e.g. Watt/ACF, CAS 96/153, in *Digest of CAS Awards*, I, 341; AEK Athens-Slavia Prague/UEFA, CAS 98/200, in *Digest of CAS Awards*, II, 66).
- FIFA rules require that a player be registered to play for only one club at any given time. This requirement does not prevent two clubs from apportioning between them the economic rights related to a player, as long as the player is under an employment contract with either team and expressly consents to such apportionment. The FIFA provision is quite meaningful in that it clearly distinguishes between the registration issue (and the related transfer certificate), which is a sporting administrative matter necessary to ascertain which club is entitled to actually field the player, and the "*separate written contract between the two clubs and the player concerned*", which is the private instrument dealing with the economic rights to the player's performances. In a loan situation, the title to the economic rights and the title to register and field the player are plainly split between two clubs. Logically, contract rights which can be loaned can also be partially assigned. In the Panel's view, as long as FIFA rules do not issue an express prohibition, clubs are allowed to treat those economic rights as assets and commercialize them in ways allowed by States' legal systems.
- In the Panel's view, by virtue of the Contract the two clubs have set up a sort of joint venture, insofar as they have arranged to jointly own and hold title to the economic rights to the performances of the Player. As a result of their reciprocal commitments, neither club was in a position to lawfully hire the Player or trade him to a third club without the other club's consent, in addition to the requisite Player's consent. The Panel finds, and so holds, that the Appelant breached the Contract insofar as it employed the Player without obtaining the Respondent's consent. As a result, Espanyol must compensate Velez.

CAS 2004/A/643 Superstar Rangers FC / Sport Lisboa e Benfica - Futebol SAD, award of 1 February 2005

Panel: Prof. Ulrich Haas (Germany), President; Mr Om Lalla (Trinidad & Tobago); Mr Olivier Carrard (Switzerland)

In April 2000, the Appellant Superstar Rangers Football Club Ltd (hereafter "Superstar Rangers" or "the Appellant") and The Respondent Sport Lisboa e Benfica - Futebol SAD (hereafter "Sport Lisboa e Benfica" or "the Respondent") signed an agreement for the transfer of the federative rights of the Italian football player Alejandro Enrique Cichero (hereafter "the Player") from the Appellant to the Respondent. The agreement (hereafter "the First Contract").

In July 2000 both parties (with the consent of the Player) concluded another contract (hereafter "the Second Contract") that reads inter alia as follows:

"... Considering the definitive transference of the services of the player, by the first party on April 2000.

...

3) The parties state not to be reciprocally debtors or creditors of any sum, either by the contract now resolved, or by the present resolution.

4)

a) The parties establish, however, that the second party will be able to choose, until April 15, 2001, for the definitive transference of the player by the first party to the second party, by paying the amount of USD 1,500.000,00 ... .

b) Such amount will be paid within 30 days after the statement made on the above item.

c) The non execution of the mentioned payment will destroy the effects of the statement.

...

On 15 November 2000, following the request of Sport Lisboa e Benfica and the Portuguese Football Federation, an International Registration Transfer Certificate (hereafter IRTC) was issued by Trinidad and Tobago Football Federation (TTFF) and forwarded to the Portuguese Football Federation. The certificate contained - inter alia - a notice in conformity with art. 9 § 2 FIFA Regulations for the Status and Transfer of Players-1997 (hereafter "FIFA Regulations-1997") that reads as follows:

" Important

Any special agreements which have been concluded in accordance with the provisions of the FIFA Regulations governing the status and transfer of players must be attached to this international transfer certificate. The validity of this certificate may not be restricted to a certain period and any clauses to this effect appended to the certificate will be declared null and void."

On 5 December 2000 the Player signed a fixed term employment contract with the Respondent (having a fixed term from 1 November

2000 until 30 June 2001), which was registered the same day with the Portuguese Football Federation. During the entire term of the contract the Player did not play for the main team of Sport Lisboa e Benfica, in fact not even as a substitute. Shortly before expiry of the contract, namely on 26 June 2001, the Venezuelan Football Federation applied to the Portuguese Football Federation for an IRTC for the Player. The latter was issued by the Portuguese Football Federation by letter of 29 June 2001. The Player then moved to Venezuela without a transfer fee.

In a letter dated 2 and 11 January 2001 the Appellant asked the Respondent to inform the Appellant of how and when the Respondent would be able to pay the sum of USD 1,500,000.00 agreed on in the Second Contract. The Respondent refused to give any such information or to make any such payment.

On 22 March 2001 the Appellant referred the case to the FIFA Players' Status Committee and requested it inter alia, *"to take all adequate and legal measures in order to compel the Respondent to fulfil its contractual obligation and namely to pay the amount of USD 1,500,000.00."* In its decision dated 14 May 2002 the FIFA Players' Status Committee rejected the Appellant's request. The decision was communicated by letter dated 21 May 2002 to TTFF and the Portuguese Football Federation. TTFF informed the Appellant of FIFA's decision by letter dated 23 May 2002.

By letter dated 19 June 2002 FIFA advised the Portuguese Football Federation that Superstar Rangers had submitted an appeal and by letter dated 23 August 2002 FIFA notified Superstar Rangers of Sport Benfica e Lisboa's response.

On 21 May 2004 the FIFA Executive Committee convening as a Body of Appeal decided that, *"the appeal lodged by the Appellant ... is not to be considered owing to non-fulfilment of formal requirements."*

By letter dated 8 June 2004 the Appellant lodged an appeal against the decision of the FIFA Executive Committee with CAS.

In its written decision the Panel considered that:

- The Second Contract is describing an option right in favour of the Respondent. Whether or not the agreement or the obligation relating to the payment of a transfer fee comes into being or not is therefore solely at the discretion of the option holder, who in this case is the Respondent.
- The issuance of the International Registration Transfer Certificate (IRTC) does not constitute an implied exercise of the option right by the Respondent and therefore does not imply the payment of a high transfer fee by the Respondent. Several arguments indicate that the Respondent did not want to exercise the option right: (i) the employment contract concluded between it and the Player was entered into in connection with and directly around the time when the IRTC was issued and provides for a term until 30 June 2001. Such a short term obviously conflicts with the high transfer fee stipulated in the Second Contract. (ii) The Respondent did not play the Player in a single official game on the main team not even as a substitute and (iii) after the Agreement had expired, the Respondent let the Player move from Portugal to Venezuela without any transfer fee.
- Strictly speaking the issuance of the IRTC is a purely administrative process between two national federations. If the issuance of the IRTC does not even involve a declaration of intent by the Respondent towards the Appellant, the latter cannot claim that it relied on any such declaration and that such reliance merits protection.

CAS 2004/A/573 Club Sportif Sedan Ardennes/Sharjah & Sports Club, award of 21 February 2005

Panel: Mr Olivier Carrard, President (Switzerland); Mr François Klein (France); Mr Michèle Bernasconi (Switzerland)

Mr Modeste M'Bami ("the player") is a footballer of Cameroonian nationality. He began his career at the J.S. Yaounde club, before moving to Dynamo Club of Douala ("Dynamo").

In September 1998, an employment contract valid for three years was signed between the Sharjah Sports Club ("Sharjah") in the United Arab Emirates and the player.

In January 1999, the Cameroon Football Association asked Sharjah to allow the player to join the Cameroon team preparing for the African Youth Championship.

By July 1999, the United Arab Emirates Football Association had not heard any news of the player for several months. In October 1999, it requested the intervention of FIFA. The player then returned to Sharjah.

In December 1999, the player again left Sharjah, this time to join French club Sedan.

The player failed to disclose all relevant information to Sedan, claiming that his last club was Dynamo and withholding the fact that he was under contract to Sharjah for another two years.

In March 2000, a trainee player contract was signed between Sedan and the player for one season.

Having signed the contract with Sedan, the player represented Cameroon at the Olympic Games in Sydney in September 2000.

The United Arab Emirates Football Association responded by pointing out that the player was still under contract with Sharjah.

The trainee player contract with Sedan was replaced with a professional player contract for a period of four years, starting on 9 November 2000.

The United Arab Emirates Football Association contacted FIFA again on Sharjah's behalf. The club demanded that its economic rights be protected, claiming that the player had no right to offer his services to Sedan, since he was under contract with Sharjah until the end of 2001.

The player accepted that he had indeed played in trial matches for Sharjah, but denied having signed a contract with the club.

The Players' Status Committee ruled that the federative rights to the player concerned belonged to Sharjah, who were therefore entitled to training compensation from Sedan pursuant to Article 14.1 of the Regulations for the Status and Transfer of Players (1997 edition).

On 17 March 2004, Sedan submitted a statement of appeal to the CAS against the decision of the FIFA Committee of 19 March 2004.

In its award, the Panel considered that:

- According to Art. 14.1 of the FIFA Regulations for the Status and Transfer of Players in force at the time of the events, "*if a non-amateur player concludes a contract with a new club, his former club shall be entitled to compensation for his training and/or development*". Therefore, since the player had signed a contract with Sedan even though he was still under contract with Sharjah, the latter club owned the federative rights to the player and compensation was due under Art. 14.1 of the aforementioned Regulations.
- The Panel considered that the reference period used to fix the amount of compensation was wrong and did not take into account the actual training period completed by the player at Sharjah. The player was only physically present at the club from the end of September 1998 until mid-December 1999, i.e. for a total of five months. Sharjah could only therefore have trained the player for that limited period of time. It was therefore appropriate to reduce the compensation of USD 450,000 for 17 months of training to USD 132,353 by applying a simple rule of three, since this sum represented the compensation owed by Sedan to Sharjah for the five months of training received by the player.

CAS 2004/A/594 Hapoel Beer-Sheva / Real Racing Club de Santander S.A.D., award of 1 March 2005

Panel: Mr Michael Beloff (U. K.), President; Ms Deanna Reiss (USA); Mr Stuart C. McInnes (U.K.)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by Hapoel Beer-Sheva F.C. (the Appellant), a football club registered with the Football Association in Israel, against the decision issued on 24 March 2004 by the FIFA Dispute Resolution Chamber (DRC) concerning the quantum of compensation due from Real Racing Club de Santander S.A.D. (the Respondent), a football

club registered with the Spanish Football Association, to the Appellant for the training and education of Yossi Benayoun .

In July 1997 the Appellant and the Player entered into a contract of five-year span effective from 1 July 1997 until 30 June 2002 ("the Hapoel Contract"). At the completion of the 1997-1998 season the Appellant's team was relegated to the Israeli second league. At the request of the Player, who was concerned with his own professional advancement, the Appellant and Maccabi Haifa, another Israeli club then in the Israeli first league, signed two agreements ("the Loan Agreements") for the lending of the Player from the former to the latter for the 1998-1999 and 1999-2000 seasons and then for the 2000-2001 and 2001-2002 seasons at a fee of USD 220,000 per season. During the loan period the Player remained registered with the Appellant.

On the 24 June 2002, the Respondent informed the Appellant that the Santander Contract had been signed between the Respondent and the Player with effect from 1 July 2002.

Due to the Player's perceived misconduct in negotiating with the Respondent while the Hapoel Contract remained in force, the Appellant filed a claim to the Arbitration Institution of the Football Association in Israel. The Arbitrator determined the Player had breached the Hapoel Contract and stated that the Appellant should apply to FIFA to determine any compensation due. On a date before 24 May 2004 the Appellant made accordingly a claim for EUR 570,000 from the Respondent.

Taking into consideration FIFA circular letter n. 826 dated 31 October 2003, the FIFA Dispute Resolution Chamber decided that the Respondent must pay the amount of EUR 90,000 to the Appellant.

On 12 April 2004, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS).

The Appellant's submission, in essence, may be summarised as follows:

* That pursuant to article 5 of the Regulations of Status and Transfer of the Players (hereinafter "the Regulations") the Appellant is entitled to receive compensation for the training and education costs of the player for a period 9 years.
* That the Appellant is entitled to receive training compensation for 9 years, as follows:
  * For the ages 12-15 3x € 10,000 = € 30,000
  * For the ages 16-21 6x € 90,000 = € 540,000
  * Total Compensation payable = € 570,000

The Respondent's submission, in essence, may be summarised as follows:

* That the Appellant was the club at which the Player received his training and education and that any compensation payable was confined to the Appellant and no other club.
* That the Player was trained for only 5 seasons. That he had completed his training by the 1997-1998 season when he was assigned for a fee to Maccabi Haifa at the age of 17 years and that the computation of training and educations costs should be as follows:
  * 1992-1993 12 years old = € 10,000
  * 1993-1994 13 years old = € 10,000
  * 1994-1995 14 years old = € 10,000
  * 1995-1996 15 years old = € 10,000
  * 1996-1997 16 years old = € 30,000
  * Total compensation for training and education payable = € 70,000
* That the award of compensation made by the DRC was incorrectly calculated and that of the payment made by the Respondent to the Appellant € 20,000 was repayable to Respondent.

In its written decision, the Panel decided:

- The quantum of compensation as a general rule must reflect the costs which are necessary to train the player (art. 5(4)(b) of the Application Regulations and art. 16 of the Regulations) Circular 826 p.3.
- The Player is to be deemed to have completed his training at the end of the 1996-1997 season. The Player was loaned from the Appellant to Maccabi Haifa during the 1998-1999, 1999-2000, 2000-2001, and 2001-2002 seasons, at a fee of USD 220,000 per season. The Appellant is not entitled to any compensation for this loan period since they did not train him during this time. Consequently, for the training compensation of the player (who was born 5 May 1980) for the years 12 through 15, the Appellant is entitled to 3 years x € 10,000 (Europe Category 4) = € 30,000.
- Furthermore the training compensation for the years in which the player was aged 15-17 the Appellant is entitled to be compensated by reference to the training costs of the country in which the Respondent is located multiplied by the amount corresponding the Category of the Appellant club (*i.e.* Europe Category 3) 2 x € 30,000 = € 60,000 (art. 7 para 1, para.3 of the Application Regulations and Circular Letter no.826).
- Based on the foregoing, the Panel concludes that the training compensation to be awarded to the Appellant shall thus amount to EUR 90,000.

CAS 2004/A/686 Reggina Calcio/Platense FC, award of 3 March 2005

Panel: Mr José J. Pintó Sala (Spain), President; Ms Margarita Echeverria Bermúdez (Costa Rica); Mr Luc J. Argand (Switzerland)

1.4 The Court of Arbitration for Sport has decided to dismiss the appeal filed by Reggina Calcio challenging the FIFA Dispute Resolution Chamber decision issued on 22 July 2004 which condemn the Italian club pay to Platense FC USD 100,000 as contribution related to the solidarity mechanism.

1.5 The player Julio Cesar de Leon was born on 13 September 1979. It is undisputed that Julio Cesar de Leon was registered with Platense Football Club S.A. de C.V., the Respondent, during five sporting seasons, from 1996/1997 until 2000/2001. The Respondent is a football club with its registered office in Puerto Cortés, Honduras.

1.6 It is also undisputed that Julio Cesar de Leon was under contract as a non-amateur player with Club Deportivo Maldonado, in Uruguay, when he was transferred to Reggina Calcio S.p.A, the Appellant in August 2002 for a transfer fee of USD 4,000,000. The Appellant is a football club with its registered office in Reggio Calabria, Italy.

1.7 The Appellant paid the total amount of USD 4,000,000 to Club Deportivo Maldonado.

1.8 In 2004, the FIFA Dispute Resolution Chamber was requested to order the Appellant to pay to the Respondent an amount of USD 100,000 as a solidarity contribution, pursuant to art. 25 of the FIFA Regulations for the Transfer and Status of Players (hereinafter referred to as "the FIFA Regulations").

On 22 July 2004, the FIFA Dispute Resolution Chamber issued a decision stating as follows on relevant part:

"According to Article 25 of the revised FIFA Regulations for the Status and Transfer of Players and Article 10 of the Regulations governing the Application of the afore-mentioned regulations, a proportion of 5% of any compensation paid by the new club of a player to his previous club has to be distributed to the clubs involved in the training and education of the player concerned, if he moves to the new club during the course of a contract.

This distribution will be made in proportion to the number of the years the player has been registered with the clubs involved in his training and education between the ages of 12 and 23, whereas the club where the player concerned was registered from his age of 17 to 21 shall receive 10% of the proportion per season.

In the present case, the Dispute Resolution Chamber noticed that the player Julio Cesar de Leon, moved from Deportivo Maldonado to FC Reggina in August 2002, during the course of his contract with

Deportivo Maldonado. The Dispute Resolution Chamber furthermore noticed that the amount of the transfer fee to be paid by FC Reggina to Deportivo Maldonado Sports was USD 4,000,000. And finally, the Dispute Resolution Chamber noted that the player concerned was registered for Platense FC during five sporting seasons, between the age of 17 and 21.

In the light of this, the Dispute Resolution Chamber first decided that the amount to be distributed from FC Reggina to the clubs involved in the training and education of the player Julio Cesar de Leon in relation to the solidarity mechanism is 5% of USD 4,000,000, i.e. USD 200,000.

Continuing, the Dispute Resolution Chamber stated that Platense FC, as being the club with which the player concerned was registered for five sporting seasons between the age of 17 and 21, is entitled to 10% of USD 200,000 for each season the player was registered for it, which is USD 100,000.

In view of the above, the Dispute Resolution Chamber concluded that the Italian club FC Reggina shall pay to the Honduran club Platense FC USD 100,000 as contribution related to the solidarity mechanism."

On 13 August 2004, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (hereinafter "CAS"). It challenged the above-mentioned Decision.

In essence, the Appellant submitted that it paid to Club Deportivo Maldonado the entire transfer amount agreed upon and considered that the latter club was therefore bound to comply with the obligation of distributing the solidarity contribution.

The Respondent put forward that the FIFA Regulations as well as the Regulations governing the Application of the FIFA Regulations (hereinafter the "Application Regulations") clearly indicate that the new club of the transferred player is the only debtor of the solidarity contribution. There is no room for another interpretation.

In its written decision the Panel considered that:

1.9Based on art. 11 of the Application Regulations as well as on the FIFA Circular Letter No. 769, it is undisputable that the Appellant is responsible for the payment to the Respondent of the solidarity contribution of USD 100,000 :*"The new club shall pay the amount due as a solidarity contribution to the training clubs. It is the responsibility of the new club to calculate the amount of the solidarity contribution and the way in which it shall be distributed in accordance with the player's career history."* Furthermore, the position of the Appellant is in contradiction with the FIFA Circular Letter No. 769 (page 15), which confirms that "*it is the responsibility of the new club to calculate the amount of the contribution and to effect the necessary payments". S*uch a Circular Letter reflects the understanding of the FIFA and the general practice of the federations and associations belonging thereto.

CAS 2004/A/708/709/713 Philippe Mexès & A.S. Roma/ S.A.O.S A.J. Auxerre & Fédération Internationale de Football Association (FIFA), award of 11 March 2005

Panel: Mr Jean Philippe Rochat (Switzerland), President; Mr François Klein (France); Mr Jean-Pierre Morand (Switzerland)

Mr Philippe Mexès is a French professional footballer. After playing for AJ Auxerre during the 1997-1998 season, Mr Mexès signed his first trainee player contract ("contrat Espoir") with the club in 1998.

On 20 June 2000, Mr Mexès signed a professional player contract with AJ Auxerre, valid until the end of the 2004-2005 season.

On 15 December 2002, AJ Auxerre, represented by its President and the player, signed a protocol under which, in particular, the contract was extended for one additional season, i.e. until the end of the 2005-2006 season, the player's salary conditions were improved and the club agreed to pay the player a transfer bonus if he moved to another club, depending on his number of years' service at the club.

The following day, i.e. on 16 December 2002, a second document, which was called a "contract", was agreed, setting out the terms of payment of the transfer bonus provided for in Article 4 of the protocol.

A few days later, AJ Auxerre informed Mr Mexès and his agent, Mr Jouanneaux, that the club was refusing to include these agreements in the ad hoc form of the Professional Football League ("LFP"), a formality that was indispensable to their being authorised.

Mr Mexès responded by instigating proceedings with the LFP's judicial organs in order to ensure the new agreements signed by the parties were authorised. On 16 July 2003, the National Joint Appeals Commission ordered AJ Auxerre to include the two aforementioned agreements in the official ad hoc form so that they could be authorised. Finally, they formed the subject of an amendment to the professional contract that was signed by the parties on 3 August 2003 and were authorised by the LFP on 12 August 2003.

Mr Mexès asked AJ Auxerre to let him know the transfer fee it would demand if the employment contract between them were to be terminated amicably. AJ Auxerre reminded the player that the contract expired on 30 June 2006 and required him to meet his contractual obligations.

AS Roma submitted an offer to AJ Auxerre for the transfer of Mr Mexès.

The two clubs' representatives, Mr Hamel and Mr Baldini, then met in order to negotiate the transfer fee. However, they were unable to reach an agreement.

Since AJ Auxerre had failed to respond to the player and to agree a fee for his transfer, Mr Mexès informed the club that he intended to ask the responsible authorities to rule on the consequences of him breaking his employment contract. To this end, he applied on the same day to the Dispute Resolution Chamber of the FIFA Players' Status Committee ("the Chamber").

On 12 June 2004, Mr Mexès signed a professional player contract with AS Roma for four seasons, i.e. until 30 June 2008.

Despite formal demands issued on 21 June and 1 July 2004, the player did not attend any more training sessions with AJ Auxerre. The club therefore in turn asked the Chamber to rule on the dispute.

The Chamber considered that Mr Mexès had unilaterally breached his employment contract with AJ Auxerre without just cause during the stability period defined in Article 23.1 (a) of the 2001 Regulations and suspended the player.

On 3 September 2004, Mr Mexès and AS Roma each submitted to the CAS a statement of appeal against the Chamber's decision of 31 August 2004.

In its award, the Panel considered that:

- In order to determine whether or not the extension of the term of a professional player contract triggered a new stability period for the player concerned, it was necessary to examine each individual case, taking into account all the circumstances, in accordance with the method used by the European Commission in application of the case-law developed by the Court of Justice of the European Communities. Hence, the legitimate objective of team stability could justify a new stability period linked to the extension of a player's contract, provided the means used were proportionate to the goal pursued.
- In the current case, neither the circumstances that had led to the signature of the agreements nor the precise objectives of the extension of the term of the player's contract enabled the Panel to make a clear and legitimate assessment of the start of a new stability period. The Panel had to find the *ratio legis* of the rules governing the relationship between the parties. It considered that, in this particular case, reference should be made to FIFA's interpretation of its own 2001 Regulations: in the new version, the extension of the term of a professional player contract automatically triggered a new stability period for the player concerned. The Panel therefore considered that, in this case, the signature of an agreement extending the term of a contract triggered a new stability period for the player.
- The Panel considered that the new stability period should take effect from the moment when the new agreement came into force. The Panel stressed that FIFA should clarify how the stability period should apply when an extension came into effect mid-season.

- The respondent club had no interest in the length of the sanction imposed against a player who was no longer part if its squad. It was not therefore in a position to submit pleadings concerning the length of the sanction. In the absence of a valid argument that the sanction should be increased, the Panel, which was bound by the conclusions according to the principle of *ne ultra petita*, could not take a decision that extended beyond that of the Chamber.

CAS 2004/A/701 Sport Club Internacional /Galatasaray Spor Kulübü Dernegi, award of 17 March 2005
Panel: Professor Massimo Coccia (Italy), President; Mr Michele Bernasconi (Switzerland); Ms Margarita Echeverria Bermúdez (Costa Rica)

The Court of Arbitration for Sport (CAS) has decided to uphold in part the appeal filed by Sport Club Internacional (hereinafter "Internacional" or the "Appellant") a Brazilian football club and to reverse partially the decision of the Single Judge of the FIFA Player's Status Committee. Thus the CAS has decided to entitle the Appellant to keep the compensation already received from Galatasaray Spor Kulübü Derne_i (hereinafter "Galatasaray" or the "Respondent") that is USD 100,000 and to receive in addition USD 400,000 from the Respondent as a result of the breach of a Co-ownership Agreement.

On 1 July 2002, by signing a "Professional Football Player Contract" (hereinafter the "Employment Contract"), Galatasaray, a Turkish football club, hired the Brazilian football player Fabio Pinto (hereinafter the "Player" or "Mr Pinto") for a period of five years. Mr Pinto was not a free agent, as the economic rights to his performances were held, with his consent, by Sport Internacional, a Brazilian football club, (50%) and by a third party (50%). Accordingly, Galatasaray acquired 50% of the rights from such third party, and dealt with Internacional in respect of the outstanding portion of the rights.

On 2 July 2002, Galatasaray, Internacional, the Player and his agent Mr Franck Logbi Henouda signed an agreement entitled "*Convençao de Co-Propiedade*" (hereinafter the "Co-ownership Agreement").

The Co-ownership Agreement provided that Galatasaray was authorized to hire the Player for five football seasons, until 31 May 2007. The parties agreed also that Galatasaray had the option, until 15 December 2002, to purchase 40% of the rights over the Player for the price of USD 1,000,000; after such date, the price would have been of USD 3,500,000. If the said purchase option was not exercised, Galatasaray had to pay a yearly fee of USD 100,000 to Internacional for the loan of 50% of the rights over the Player. In any event, Galatasaray had the option to buy for itself or for a third club 100% of those rights at a minimum price of eight million USD.

Galatasaray did not avail itself of the option to pay one million USD and purchase 40% of the economic rights over the Player by 15 December 2002. Subsequently, Galatasaray never offered to purchase all or part of the portion of economic rights held by Internacional.

With a letter dated 21 October 2003, the Player communicated to Galatasaray its decision to terminate the Employment Contract due to personal and professional reasons. The day after, on 22 October 2003, the Player and Galatasaray signed a Termination Agreement. Moreover, Galatasaray agreed "*to pay to the Player the balance amounting to 600,000 USD*" in six monthly instalments.

On 7 November 2003, Internacional filed through the Brazilian Federation a complaint before the Players' Status Committee of FIFA claiming the breach of the Co-ownership Agreement and requesting Galatasaray the payment of USD 3,500,000. On 20 May 2004, Galatasaray filed through the Brazilian Federation a response brief stating that the Co-ownership Agreement had not been breached because the Player had unilaterally terminated the Employment Contract. On 20 August 2004, the Single Judge of the FIFA Players' Status Committee communicated its decision, whereby:

«*I. The claim of the Claimant, Sport Club Internacional, is partially accepted. The Respondent, Galatasaray S.K., has to pay the amount of USD 100,000 to the Claimant;*

II. Any further claims lodged by the Claimant are rejected [...]».

In compliance with the above decision of the FIFA Single Judge, on 16 September 2004 Galatasaray paid to Internacional USD 100,000.

On 30 August 2004, Internacional lodged an appeal with the Court of Arbitration for Sport ("CAS") against the said decision of the Single Judge of the FIFA Players' Status Committee (hereinafter the "Appealed Decision").

Internacional alleges that Galatasaray clearly breached the Co-ownership Agreement. The Appellant submits that the termination of the Employment Contract was not unilateral but agreed by the parties, as demonstrated by the Termination Agreement and by the payment of 600,000 USD made by Galatasaray to the Player. Thus, the Player was released without the consent of Internacional which lost its 50% of the rights over the Player.

Galatasaray submits that the existence and enforceability of the Employment Contract is an essential precondition for the existence and enforceability of the Co-ownership Agreement. On this grounds, the Respondent argues that the termination of the Employment Contract caused the Co-ownership Agreement to lose its effects.

In its written decision, the Panel has decided that:

- Even assuming that the Player terminated unilaterally the Employment Contract, by signing the Termination Agreement and by not contesting the Player's attempt to leave the club, the Respondent did accept such termination, thus rendering it bilateral anyways. In particular, in order to prove its bona fide effort to protect the rights of the Appellant, the Respondent could and should have resorted to the FIFA rules for the "maintenance of contractual stability", which provide for possible compensation or disciplinary sanctions (art. 21 et seq. of the Status and Transfer Regulations). Quite the opposite, the Respondent adopted immediately an acquiescent attitude towards the Player's unilateral termination, even agreeing to perform some payments in his favour.
- The Co-ownership Agreement established a sort of joint venture between the two clubs, whereby they arranged to jointly hold title to the economic rights to the performances of the Player. As a result of their reciprocal commitments, both clubs had a duty of transparency and cooperation towards each other; in particular, neither club was in a position to lawfully hire or release the Player, or trade him to a third club, without the other club's consent. In the Panel's view the Respondent, by allowing the Player to become a free agent without the Appellant's consent, breached the Co-ownership Agreement. As a result, the Panel finds, and so holds, that the Respondent must pay some compensation to the Appellant.

CAS 2004/A/706 Reggina Calcio / Club Olimpia, Award of 14 April 2005
Panel: Prof. Ulrich Haas (Germany), President; Mr Luc Argand (Switzerland); Mr Ricardo De Buen Rodriguez (Mexico)

The Court of Arbitration for Sport (CAS) has decided to dismiss the appeal filed by Regina Calcio against the decision issued by the FIFA Dispute Resolution Chamber on 22 July 2004 regarding the solidarity contribution due to the Respondent, Club Olpimpia.

The Paraguayan football player Carlos Humberto Paredes Monges (hereafter "the Player"), born on 16 July 1976, was registered with CLUB OLIMPIA (hereinafter "Olimpia" or "the Respondent"), a Paraguayan football club, for eight sporting seasons, from 19 March 1992 to 6 June 2000. After that date he was registered with the Portuguese club Futebol Clube Do Porto - Futebol SAD (hereafter "FC Porto").

On 16 July 2002 REGGINA CALCIO S.P.A. (hereafter "Reggina Calcio" or "the Appellant"), an Italian football club, and FC Porto signed an agreement for the transfer of the federative rights of the Player from the Portuguese club to the Appellant. According to the "the Transfer Contract" Reggina Clacio will pay to FC Porto the amount of Euro 4.800.000.

By letter dated 12 February 2004 the Respondent informed FIFA

that, with regard to the transfer of the Player, no payments according to FIFA's "solidarity mechanism" had been effected to it so far.

The relevant FIFA rules concerning the "solidarity mechanism" are to be found in Article 25 Chapter IX of the Regulations for the Status and Transfer of Players, which in turn is supplemented by Article 10 ofthe Regulations Governing the Application of the Regulations for the Status and Transfer of Players (hereinafter "Application Regulations").

By letter dated 8 March 2004 FIFA advised the Italian Football Federation of the Respondent's letter dated 12 February 2004 and requested the Italian Federation to inform the Appellant to start distributing the proportion of 5 % as provided in Art. 25 of the Regulations for the Status and Transfer of Players by 22 March 2004 at the latest. As the letter remained unanswered FIFA sent a reminder on 29 March 2004 in which a new deadline of 12 April 2004 was fixed. By letter dated 21 April 2004 the Appellant informed FIFA that the transfer payments had been fully effected to FC Porto and that, therefore, it was up to the Portuguese club to carry out the "solidarity payments" to the Respondent. By letter dated 12 May 2004 FIFA requested the Portuguese Football Federation to inform its affiliated club FC Porto to start distributing the "solidarity dues" by no later than 31 May 2004. After expiry of the deadline FIFA informed the various clubs involved via their respective federations by letter dated 7 June 2004 that the file would be submitted to the FIFA Dispute Resolution Chamber for a formal decision.

In its decision dated 22 July 2004 the FIFA Dispute Resolution Chamber decided, inter alia, that,

> *" ... [the Appellant] has to pay the amount of EUR 192.000 to the ... [Respondent] ..."* and that *"on the aforementioned amount, a default interest payment of 5% p.a. as from 16 August 2002 until the day of the payment must be applied."* Furthermore, the Dispute Resolution Chamber decided that, *"the amount due to the ...* [Respondent] *has to be paid by ...* [the Appellant] *within 30 days as from the date of notification of this decision."* Finally, *"the Chamber maintained that the ... [Appellant] may turn to FIFA upon paying the amount owed to the ... [Respondent], should it encounter any difficulties in recovering the sum paid as solidarity contribution from FC Porto."*

By letter dated 30 July 2004 the Appellant lodged an appeal against the decision of the FIFA Dispute Resolution Chamber with CAS.

In its statement of appeal dated 30 July 2004 the Appellant is challenging *"the decision of the Dispute Resolution Chamber taken in Zurich on 22 July 2004"*. In particular the Appellant requests the Panel to *"cancel"* the decision and to declare that the Appellant *"must give nothing"* to the Respondent.

In support of its claim, the Appellant contends, *inter alia*: that according to the rules in force at the time of the signing of the transfer contract it was up to FC Porto to fulfil the "solidarity obligations" towards the Respondent.

The Respondent requests, *"the rejection of the appeal ... against the decision of the Dispute Resolution Chamber"* and the *"affirmance of the judgement ordering ...* [the Appellant] *to pay to the ...* [Respondent] *the amount of EURO 192,000 plus interest"*.

In its written decision, the Court of Arbitration for Sport has decided:

- FIFA's Regulations must be interpreted in accordance with their objective meaning. Who it is who owes the "solidarity contribution" derives from the reference in Art. 25(2) of the Regulations for the Status and Transfer of Players to Art. 11(1) of the Application Regulations. According thereto it is quite clear that it is the "new club", and therefore the Appellant, who owes the "solidarity contribution". The Panel's opinion, which is in line with the past established case law of the CAS (CAS 2004/A/686), namely that the Appellant is the debtor who owes the "solidarity contribution", is ultimately confirmed by the FIFA Circular Letter No. 769 (page 15 *et seq.*). The latter confirms that, *"it is the responsibility of the new club to calculate the amount of the contribution and to effect the necessary payments"*. Said Circular Letter reflects the understanding of the FIFA and the general practice of the federations and associations belonging to FIFA (CAS 2003/O/527; CAS 2004/A/560). Thus, the Panel also considers this Circular Letter to be relevant for the interpretation of FIFA's Regulations (on this note see CAS 2004/A/686).
- Payment by the Appellant can only have the effect of a discharge if payment is made to the "correct creditor". However, if the Appellant pays the wrong creditor - as in the present case - it does so at its own risk with the consequence that the Respondent is not prevented from still taking action against the Respondent for the "solidarity contribution".
- The Appellant's alternative application to have the solidarity contribution reduced must also be dismissed. The FIFA Dispute Resolution Chamber calculated the amount of the solidarity contribution correctly pursuant to Art. 10 of the Application Regulations.

CAS 2004/A/605 Pamesa Valencia / Euroleaugue Basketball, award of 12 May 2005

Panel: François Carrard (Switzerland), President; José Juan Pintó (Spain); Peter Leaver (Great-Britain)

The Court of Arbitration for Sports has decided to dismiss the appeal filed by Pamesa Valencia Basket Club SAD on 23 April 2004 against the decision issued on 14 April 2004 by the Appeals Judge of the Euroleague and to confirm such decision.

Pamesa Valencia Basketclub SAD (hereafter "Appellant") is a spanish basketball club. It is a member of the Spanish basketball league which in turn is a member of the Euroleague.

Within the fourth round of the Euroleague competition, which gathered the best 16 qualified European basketball teams, a game between the Appellant and Maccabi was scheduled to be played on 25 March 2004 in Tel Aviv, Israel.

On 22 March 2004, a special operation implemented by Israeli services resulted into the death of Sheik Yassin in Gaza, Palestine. Sheik Yassin was a leader of the Palestinian Hamas movement. As a consequence of his death, Israel feared terrorist attacks on its territory.

In view of the situation described above, the Appellant requested from the Respondent, by letters of 24 and 25 March 2004, the postponement or change of venue of the game scheduled on 25 March 2004 against Maccabi in Tel Aviv.

On 24 March 2004, the CEO of the Respondent replied to the Appellant that Euroleague decided neither to change the date of the game, nor its venue. The Respondent further notified to the Appellant that the latter should play the game as instructed, it being clear that if it were not the case, a disciplinary procedure would be undertaken in accordance with the Bye-laws of the Respondent.

On 25 March 2004, the Appellant confirmed to the Respondent that it was maintaining its decision not to travel to Tel Aviv to play the game on 25 March 2004.

On 31 March 2004, after considering the arguments which had been submitted by the Appellant, the Euroleague Disciplinary Judge issued the decision 25/2003-2004 in which, applying article 35 of the Euroleague Regulations as well as article 34a and 37 of the Euroleague Disciplinary Regulations, the said disciplinary Judge held that the Appellant had not given a *"suitable justification"* for its failure to appear at the game.

On 7 April 2004, the Appellant appealed from the decision rendered by the Disciplinary Judge of the Euroleague on 31 March 2004.

On 14 April 2004, the Appeals' Judge of Euroleague issued his decision (hereafter "the Decision"), whereby the appeal filed by the Appellant was dismissed and the decision of the disciplinary Judge of Euroleague confirmed.

On 23 April 2004, the Appellant lodged with the Court of Arbitration for Sport (CAS) an appeal against the Decision.

In its written decision, the CAS has decided:

- On the basis of article 6.2.1. of the Protocol of Constitution of

Euroleague, the Appellant had a contractual duty to appear at the game, unless excused by the Regulations. The existence of such an excuse has to be proved by the Appellant. The Panel considers that the situation in Israel does not constitute a "suitable justification" for the non-appearance of the Appellant. The situation in Israel which is far from being "normal" has not prevented the Euroleague competition from taking place in safe and undisturbed environments for the competition. The situation is considered to have been carefully evaluated by Euroleague, when it decided that the game at hand be played in Tel Aviv and took into account the security measures offered to prevent any risk and/or accident. There was no existence of a specific and individual threat to the life of the members of the Appellant's team. As to the fact that Euroleague had convened an extraordinary meeting to discuss the venue of the Final Tour, the Panel is of the opinion that such extraordinary meeting does not constitute a "suitable justification" on which the Appellant could rely. Thus, the Panel reaffirms a principle already developed by CAS in re CAS 2002/A/388, Ulker v/Euroleague.

- The first consequence of the lack of "suitable justification" is that the game is to be considered as lost by the Appellant by the result of twenty to zero (20-0). This results clearly from article 35 litt. d of the Euroleague Disciplinary Regulations, which, in accordance with article 34 of the same Regulations, is applicable to an infringement consisting of a failure to appear at the game without justification.
- The Appellant is declared responsible *"for compensation of all the expenses associated with refereeing and other costs that the organization of the games might have caused that are duly justified before the Euroleague"* art. 35 of the Euroleague Regulations). The Panel considers that the amount of the compensation due by the Appellant as a consequence of its failure to appear without "suitable justification" should be limited to the possible expenses associated with refereeing the game which was scheduled on 25 March 2004.

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Case Digest*

February 2005

New Zeeland: Liability of Sports Event Organisers - Andersen v. R. [2004] NZCA 238
In 2002, Astrid Andersen, a cycle race organiser, was convicted of criminal nuisance and fined $10,000 after a cyclist Vanessa Caldwell died during Le Race near Christchurch. Mrs Caldwell, who was pregnant, had been travelling on the wrong side of the road as she thought it was closed to all traffic, but she was hit by a car and died.

Andersen's conviction was quashed by the Court of Appeal, who rejected the Crown's argument that she was to blame for the death because she did not make clear that the road was open to traffic. Miss Andersen's conviction led to various other events being cancelled as organisers feared they would be held responsible for any accidents. The successful appeal should alleviate such concerns.

United Kingdom: Unlawful Selling of Replica Football Shirts - JJB Sports Plc and Allsports Limited v. Office Of Fair Trading, Competition Appeal Tribunal, [2004] CAT 17
In August 2003, the OFT found that a number of undertakings including JJB Sports, Manchester United and Umbro Ltd. had colluded in price fixing of replica football kits during 2000 and 2001, contrary to Chapter 1 prohibition imposed by Section 2 of the Competition Act 1998.

Dismissing the appeal, the CAT held that an 'agreement' under s.2 could be made out by an expression of the parties' joint intention to conduct themselves on the market in a particular way, and that the concept centres around the existence of a concurrence of wills. It could also be manifested by one party's tacit acceptance of another party's wish to achieve an anti-competitive goal. A tribunal will require convincing evidence of infringement, given the serious nature of the allegations and the very substantial penalties at stake, but the criminal standard of proof is not required in order for the OFT to make out an infringement.

Europe: EU Intervention into Sport - Meca-Medina & another v. Commission of the European Communities, European Court of First Instance, Case T-313/02
The applicants were international long-distance swimmers who tested positive for the anabolic substance nandrolone. FINA, the international swimming federation, banned them for four years. On appeal to the CAS, two-year bans were substituted due to evidence that the drug was produced endogenously within the body.

On a separate action to the EU Commission, it was argued that the strict liability test in the anti-doping rules and the fixing of a specific amount of drugs that would lead to a ban was a concerted practice between the IOC and its accredited laboratories, and was anti-competitive and contrary to provisions guaranteeing free movement of services under Articles 19, 81 and 82 EC.

The ECJ dismissed the application. It held that the anti-doping regulations of the IOC that were adopted by international sports federations are not subject to EU law. Anti-doping rules concern purely sporting considerations and have nothing to do with economic activities.

March 2005

United Kingdom: Tax and Sportsmen - Agassi v. S. Robinson (HMIT) (2004) Times, November 27, 2004
Andre Agassi, ordinarily resident and domiciled outside the UK, appealed against an earlier decision that he could be assessed to income tax under the Income and Corporation Taxes Act 1988 s.556 in respect of payments to a company controlled by himself with no UK presence in connection with his activities as a sportsman in the UK. His company entered endorsement contracts with two manufacturers of sports clothing and equipment, neither of which had been resident nor had a tax presence in the UK. Agassi, in the UK only to play in tournaments such as Wimbledon, and the company received payments from the manufacturers that derived at least in part from his activities in playing in those tournaments. Held that the Act did not apply to companies with no tax presence in the UK with the result that such an international sportsman could not be assessed to income tax.

United Kingdom: Criminal liability for participatory violence - R. v. Barnes (2004) Times, January 10, 2005
Barnes appealed against his conviction for unlawfully and maliciously inflicting grievous bodily harm, contrary to the Offences against the Person Act 1861 s.20. The victim had sustained a serious leg injury as a result of a tackle by the defendant during a football match. The tackle occurred after the victim had kicked the ball into the opposi-

* With permission taken from SportBusiness International, Febuary/October 2005.

tion's net. While accepting that the tackle was hard, the defendant maintained that it was a fair challenge and that the injury caused was accidental.

Allowing Appeal it was held that the criminal prosecution of those who had inflicted injury on another in the course of a sporting event was reserved for those situations where the conduct was sufficiently grave to be properly categorised as criminal. The fact that the play had been within the rules and practice of the game and had not gone beyond it would be a firm indication that what had occurred was not criminal.

United States: Pippen v. Rosenman, (Cook County, Illinois 2005)
Former Chicago Bulls basketball player, Scottie Pippen, filed a legal malpractice lawsuit in January 2005 against his former law firm along with the lawyer who advised him while at that firm. Pippen claims that his lawyer recommended Robert Lunn, a firm client, as his financial adviser. Lunn, allegedly, lost approximately $ 20 million of Pippen's money in unsuccessful investments.

The case highlights the continuing problem of young, rich and unsophisticated athletes losing their fortunes in unrealised investment opportunities. It also reflects the duties of competency, due diligence and fiduciary obedience that each agent owes to his client athletes. In response, lawsuits and malpractice premiums have increased and, regulatory schemes, such as state athlete agent registration laws, have proliferated. Further, it has required athlete representatives must engage in risk management where an athlete's informed consent is required to be proven by virtue of an extensive paper trail.

April 2005

Australia: Sports Governance - Minardi Racing v. FIA, Supreme Court of Victoria
On the eve of the Australian Grand Prix, Paul Stoddart and his Minardi Racing team were successful in obtaining an injunction ordering that two cars be allowed to run in Saturday's practice sessions, notwithstanding that they did not comply with the regulations for the 2005 FIA Formula One World Championship.

The granting of the injunction had the effect of overruling the decisions of the race officials and compelling the governing body to allow cars to participate in breach of the international regulations. However, before a second hearing took place, Minardi announced that it had withdrawn the proceedings and presented cars that complied with the 2005 regulations.

The implications of this decision on future FIA-organised events held in Australia will be considered by the World Motor Sport Council.

The Netherlands: EU and Gambling Provision - De Lotto v. Ladbrokes, Supreme Court

For several years UK-based gambling companies have attempted to challenge provisions in the Netherlands that only allow the Dutch company De Lotto to offer related services. This decision by the Dutch Supreme Court means that Britain's biggest bookmaker, Ladbrokes, has been barred from offering internet betting services to punters in the Netherlands.

The ruling follows a lawsuit from De Lotto after Ladbrokes placed adverts in several Dutch newspapers during the World Cup three years ago. Ladbrokes does not hold a permit to offer bets in the Netherlands and has no shops in the country. However, recent rulings from the European Court of Justice (ECJ) could force member states to open up their controls on betting. In 2003, the ECJ ruled that an agent acting for Stanley Leisure was within his rights to take bets in Italy.

United States: Sports Coach contracts - Neuheisel v. University of Washington et al., King County, Washington Superior Court

The issues surrounding the firing of former University of Washington football coach, Rick Neuheisel, involve truth, honesty and fairness. In this case, Neuheisel has admitted that he lied to the media about his interest in the San Francisco 49ers' head coach position. However, he has claimed that National Collegiate Athletic Association investigators did not provide him or his employer with advance notice of any impending interview of potential ethical conduct violations, such as gambling. Neuheisel is accused of violating the NCAA's anti-gambling rules.

On the other hand, the University of Washington had pointed out that Neuheisel's dishonesty was a violation of his contract irrespective of how the NCAA chose to investigate him. Washington maintains that their decision to fire Neuheisel was due to his public acts of dishonesty relative to the 49ers job opportunity, and that he lied in his first interview with NCAA investigators. The jury is expected to reach a decision in late March.

May 2005

Australia: Civil Liability - McCracken v. Melbourne Storm and Ors [2005] NSWSC 107
Of interest to administrators of contact sports, Hulme J has held that that the Civil Liability Act 2003 (NSW), which restricted a plaintiff's right to a commmon law action in negligence, did not apply because the intention of the defendant players was to cause injury to the painliff, making the defendant players and club (vicariously) liable under the common law rules of negligence.

Hulme relied, at least in part, on the defendants_ guilty pleas at a voluntary sporting association's disciplinary hearing. This assisted him in finding that the player's actions were intentional and amounted to a breach of their duty towards the plaintiff. The idea of encouraging players to plead guilty to certain rule breaches and receiving a discount on penalty has proved to be increasingly attractive. However, this decision may force players and clubs to review whether they should enter guilty pleas.

Australia: Olympic Games - Zhu v. The treasurer of the State Of New South Wales [2004] HCA (17 November 2004)
TOC Management Services Pty Ltd (TOC) had been authorised by the Sydney Organising Committee for the Olympic Games (SOCOG), a statutory body, in relation to the promotion of products and services relating to the Sydney Olympics. In March 1999 the plaintiff was appointed by TOC under an Agency Agreement to self international memberships in a product known as the Olympic Club to the Mainland Chinese as part of an accommodation and travel package for the Games. SOCOG took over TOC_s business when it appeared that it was about to become insolvent and terminated the plaintif's agency. The plaintiff successfully sued TOC and also SOCOG for interference with contractual relations.

The plaintiff's only failure was that he did not obtain consent in writing in addition to his oral agreement from the Chinese Olympic Committee to use Olympic images and indicia in China, as required under the Olympic Charter.

United Kingdom: Regulation of Sports betting - Financial Services Authority v Top Bet Placement Services High Court, 21 October 2004
Top Bet Placement Services ran a scheme involving the use of unsolicited mailshots sent to the public by 147, taking the form of an invitation from well-known snooker players to participate in a scheme to make money on horse race betting by using information not widely

available to the public. The scheme was described as 'investing in horse racing_. The FSA attempted to define a way in which the scheme could operate without being a collective investment scheme as defined in s.235 of the Financial Services and Markets Act 2000. Held the scheme was a collective investment scheme under the Act and although betting is already a heavily regulated activity, certain actions can fall under the auspices of the FSA.

June 2005

United Kingdom: Compensation on Dismissal- Manchester City Football Club Plc v. Joe Royle [2005] CA, Times, March 14
Under his contract Royle (R) received a higher annual salary if Manchester City (M) played in the Premier League rather than the First Division of the Football League. The contract had provided that R should be paid one year of the higher salary if the contract were prematurely terminated by M whilst it was 'in the Premier League', or six months of the lower salary if it were terminated whilst M were in the First Division. R was dismissed two days after the final match of a season following which M ware relegated.

It was held the parties had intended to compensate R, if prematurely dismissed, for the loss of the earnings he would have received but for the premature dismissal. As M would be in the First Division in the following season R was only entitled to compensation based on the lower salary.

United States: Title IX - Jackson v. Birmingham Board of Education, 125 S. Ct. 1497 [2005]
A girls basketball coach had his coaching duties terminated because he had complained about sex discrimination in the high school's athletic programme. Title IX prohibits sex discrimination by recipients of federal education funding. The United States Supreme Court determined whether the plaintiff's private right of action, implied by Title IX, included claims of retaliation. The Court in ruling in favour of the plaintiff held that 'retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Coaches, who are typically more mature than the athletes they coach and, who also possess the 'institutional history' of their sport programmes, can serve as effective Title IX advocates, and. If necessary, litigants.

Australia: Update - Sport Income Subject to Tax - Commissioner of Taxation v. Stone [2005] HCA 21
The Australian High Court (highest appeal court), in a decision that has the potential to affect athletes in all non-professional sports, has unanimously held that an athlete's prize money, appearance fees, grants and sponsorships constituted taxable income even though the athlete did not intend to profit from their sport. In effect, by accepting sponsorship, in this case $12.50O, Stone was deemed to have turned her sport into a business and therefore everything that she received as an athlete became taxable, including prize money. However, the Court suggested that if sponsorship was trivial it could be ignored but it failed to say what 'trivial' was.

July 2005

United States: Sexual Harassment - Prince v. Cablevision Systems Corporation, et al. 04 Civ. 8151 (S.D.N.Y. 2005)
The former captain of the NHL's New York Rangers cheerleading team filed a lawsuit against her employer alleging sexual harassment. a hostile work environment and state law assault and battery claims. The plaintiff contended that her job as a cheerleader led her to be propositioned by one of defendants' employees in a sexualised work environment. Afterwards, the employer conducted an investigation and later terminated the plaintiff's employment with their team.

Alter reviewing the merits of this case in response to the defendant's Motion to Dismiss, the Court held that a single incident of alleged sexual harassment was not sufficient to establish a claim for a sexually hostile work environment against the defendant.

The Court said this single incident was not objectively severe or pervasive enough to qualify as 'hostile_ under federal and state law.

United Kingdom: Football Managers_ Duties -Fulham FC v. Tigana (2004), High Court
Jean Tigana was the manager of Fulham between summer 2000 and the end of June 2003.

Fulham sued Tigana in respect of alleged breaches of duties under his employment contract and as a director of the club.

The alleged breaches related to a number of transfer dealings. The club alleged that Tigana conducted negotiations without any regard for the interests of Fulham and agreed fees and wages that were too high.

It was held, finding against Fulham, that the allegations of breach were not established based on the facts. There is discussion on the duties of a manager involved in transfer negotiations.

United Kingdom: Insurance and Injuries - Blackburn Rovers FC v. Avon Insurance & others (2005) Court of Appeal, EWCA Civ 423
D issued a policy to the respondent, Blackburn Rovers FC, insuring it against the risk of illness or injury to its players disabling them from continuing to play. The policy excluded disablement resulting from permanent total disablement attributable to arthritic or other degenerative conditions. B made a claim over a player said to have suffered a back injury in the course of a practice game. D declined to meet the claim on grounds that the player suffered from a degenerative condition within the exclusion. The trial judge held that the reference to arthritic or other degenerative conditions was to conditions which were sufficiently serious to amount to an illness and not those that were simply a result of ageing. The insurance company won on appeal.

August 2005

United States: Image Rights - Neal v. Electronic Arts, Inc., U.S. Dist. LEXIS 12324 (W.D. Mich. 2005).
Steve Neal, an African American football player, alleged that Defendant used his photograph in the biographical portion of the defendant's video games when attempting to refer to a white football player of the same name. The plaintiff claimed that defendant's mistaken reference resulted in invasion of privacy by appropriation and invasion of privacy by false light.

Invasion of privacy by false light is established when the false light in which the other was placed would be highly offensive to a reasonable person and the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. In ruling against the plaintiff the Court held that plaintiff's argument that the use of his picture in place of a Caucasian player is highly offensive to a reasonable person is simply contrary to the well established history of the judiciary not to condone theories of recovery which promote racial prejudice or effectuate discriminatory conduct.

Australia: Negligence - Action Paintball v. Clarke [2005] NSWCA 170.
Clarke had successfully brought an action against the organizers of a

paintball game in negligence and for breach of a consumer protection provision of the Trade Practices Act 1974 (Cth), s 74(1) relating to fitness for purpose. Clarke had argued that the protective goggles and the playing area were not fit for their purpose and could be directly linked to his injury.
The New South Wales Court of Appeal overturned the decision of the District Court. They held that Clarke had not established that Action Paintball had breached its duty of care. Where the risks are apparent and the need to exercise care is appreciated by the participants, wet conditions do not necessarily call for a game to be abandoned. The appellant was not acting unreasonably in allowing the game to proceed and therefore was not in breach of his duty, nor were they in breach of the duty of fitness for purpose.

September 2005

United Kingdom: Disciplinary breach and right to work - Bradley v. Jockey Club Times, July 14, 2005.
Bradley had been a successful steeplechase jockey until 1999. In 2001 a jockey friend of B's was tried for conspiracy to import cocaine and B was called to give evidence about payments of money and presents made to the jockey from a professional gambling organisation. In cross-examination B confirmed that he had also received money and presents in return for sensitive information about horses, which the stables would not have wished to be divulged. An inquiry was held by the disciplinary body, which held that B had breached several of the Rules of Racing. B contended that the sanction imposed was disproportionate as the disqualification order excessively interfered with his right to work.

Dismissing appeal it was held that professional and trade disciplinary bodies were better placed to oversee breaches of rules of trade to which they related. Where an individual took up a profession that critically depended on the observation of rules, and then broke those rules, it could not be contended that he had a vested right to work within that profession.

United Kingdom: Database Rights - British Horseracing Board Ltd v. William Hill Organization Ltd (2005)
The BHB maintained a database that contained comprehensive information on horseracing and race meetings. William Hill had published those lists on the internet so that bets could be placed online. B had submitted that W's publication of the information infringed its database right since B had made substantial investment in obtaining, verification or presentation of the contents of its database and W had extracted and reutilised a substantial part of those contents

Allowing William Hill's appeal, in so far as BHB's database consisted of the officially identified names of riders and runners it was not within the sui generis of Art.7(1) of the Council Directive 96/9 Art.7. The resources used in creating the lists had therefore not been used in obtaining or verifying the contents of the database but in creating the content. The lists were therefore not a database that was protected under Art.7(1).

Republic of Ireland: Equality Authority v. Portmarnock Golf Club 11 June 2005, The Irish Times
An action under the Equal Status Act 2000 against Portmarnock Golf Club alleged that its policy of excluding female members was found not to be discriminatory. Rule 3 of the Club stated: 'The Club shall consist of members and associate members ... who shall be gentlemen properly elected and who shall conform with the rules of amateur status'. In February 2004 at an earlier hearing, Judge Collins had suspended the drink license on the basis that the policy was discriminatory. The High Court allowed the Club's appeal finding that the policy fell into the exception that a club may be considered not to be discriminating if its principal person is to 'cater only for the needs of persons of a particular gender'.

Australia: Drug Ban - Mark French v.Australian Sports Commission & Cycling Australia, CAS 2004/A/651
Cyclist Mark French was successful in his appeal against a two year ban imposed under the Cycling Australia Anti-Doping Policy at a CAS hearing in mid-July. The CAS Panel noted that the more serious the offence, the higher the standard of proof required. There was insufficient evidence to prove knowing use of the banned substance, eGH by French. The lack of security in regards to the chain of custody and the methodolgy of the DNA testing, together with direct testimony, did not make an overwhelming case that French used eGH. For a trafficking offence, some knowledge or intent must be shown and the Panel was satisfied that French did not know the he had eGH.

October 2005

United Kingdom: Employment Contracts - Leeds Rugby Ltd v. (1) Iestyn Harris (2) Bradford Bulls, [2005] EWHC 1591 (QB)
Leeds sought damages for breach of contract and inducing a breach of contract respectively against the defendant rugby player, Harris and Bradford. Harris was contracted to play Rugby League football for Leeds who saw him as a very important asset and a key player. During the term of the contract Harris decided to switch from playing Rugby League to Rugby Union and to play for Wales and Welsh club Cardiff. Leeds wanted provision to be made requiring Harris to return to play for Leeds if he left Wales and four interlocking tripartite agreements were signed including a release contract giving effect to the transfer and reserving to Leeds certain options. At the end of the three year period Harris entered into a player's contract with Bradford.

Held clauses contained in a release agreement between a rugby football club and a player, when considered together with other interlocking agreements, were not void for uncertainty, for lack of consideration or as being in restraint of trade.

United States: Sports Employment Contracts Miami Dolphins Ltd. v. Errick L. "Ricky" Williams, 356 F. Supp. 2d 1301 (S.D. Fla. 2005)
NFL running back Ricky Williams informed his team, the Dolphins, that he would no longer play football. In response, the Dolphins filed a grievance under the collective bargaining agreement in place between the football player's union and the owner's association. An NFL arbitrator ruled in favour of the Dolphins, holding that the grievance was based upon several clauses in the contract between the Dolphins and Williams regarding required player performance and the return of any salary and bonuses for his failure to render football services to the team as promised.

On appeal, Williams argued that his contract default provisions "intended to punish him for failing to perform under the contract in violation of state law." The Court upheld the arbitrator's finding that "whether or not the default provision constituted a penalty, what was bargained here was a comprehensive incentive and default mechanism."

United Kingdom: Players Agents - Jacques Lichtenstein v. Clube Atletico Mineiro [2005] EWHC 1300 (QB)
Lichtenstein, a football players' agent, sought 10% commission pursuant to an agreement on monies received by the defendant Brazilian football club in respect of the transfer of a football player from Atletico Mineiro to a football club in the United Kingdom. L was licensed under the Licensed Players' Agents Regulations made by FIFA. L had a business relationship with a "football consultant", who prepared the agreement in the name of Lichtenstein as the consultant was not registered with FIFA as a players' agent.

A football players' agent was not entitled to commission on the transfer amount received by a football club under an agreement in respect of the transfer of a football player, because what he did to interest another club in the player, was not the effective cause of the transfer agreement reached between the clubs.

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Conferences, Round Table Sessions, etc. *(Continued from page 130)*

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- Sports legislation and Football Act: The Netherlands, England and Europe (The Hague 2004);
- European Sports Law – A comparative analysis of the European and American models of sport (The Hague 2004)
- Good governance and integrity in sport (The Hague 2005);
- Lex Sportiva by Prof. Jim Nafziger, Willamette University, United States of America;
- Players' Contracts in Professional Football: EU Law and the Challenge for Bulgaria (Sofia 2005);
- Topics in European Sports Law (Madrid 2005);
- "Ten Years of Bosman: May the Law Save Football? (Leuven, 2005);
- European Influences on Professional Sports Administration (Rotterdam 2006);
- Nationality and Sport: Public Law v. Sports Law - in pursuance of the Kalou Case (The Hague 2006);
- The Court of Arbitration for Sport and Lex Sportiva (Amsterdam 2006).

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- Brazil: Football, Culture and National Identity, by Luiz Roberto Martins Castro, President of the Brazilian National Sports Law Institute, Sao Paulo and Alex Bellos (2004);
- Sport for Development and Peace in the UN Perspective / the Netherlands-Surinam case, by Mr Adolf Ogi, United Nations, Geneva, Humberto Tan, Will van Rhee and Diederik Samwel (2004);
- Religion and Sport, by Father Kevin Lixey, Vatican, Bert Konterman, Sports Witnesses, and Mohammed Allach, MaroquiStars (2005);
- The European Union and Sport: Law and Policy – Developments and Prospects, by Prof. Stephen Weatherill, University of Oxford, United Kingdom, Mee Jean-Louis Dupont, Elegis Law Firm, Liège, Belgium, Dr Emanuel Macedo de Medeiros, general manager of EPFL, Theo van Seggelen, secretary-general of FIFPro, and Toine Manders, member of the European Parliament.

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