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Legal Nature of Doping Law

Hazing in Sport

Match Fixing

Sport and Mediation

Court of Arbitration for Sport

World Anti-Doping Code

CONTENTS

EDITORIAL

The Asser Institute for international law and the *Law School of Griffith University, Brisbane, Australia* recently concluded a co-operation agreement in the field of international sports law. The two partner institutions will co-ordinate their activities in the following areas in order to develop and promote "international sports law" as an academic discipline: education; fundamental research; applied (contract) research; consultancy; publications; the organisation of conferences, Round Table Sessions, Annual Lectures, seminars, etc.; and library and documentation/information services. Griffith Law School, in co-operation with and with the support of the Asser International Sports Law Centre, will develop and run an LLM/MA Programme in International Sports Law. The Centre will function as the research base in the Northern Hemisphere and will provide key expert support for the LLM/MA Programme. The Asser Institute will host the annual one-week intensive workshop in Europe, which is part of the Programme. Lectures, presentations and workshops will be given by leading sports law and sports administration experts from around the world. The Programme is open to students who have a degree in law or in sport studies or who are similarly qualified, to law practitioners who wish to (further) develop expertise in the legal regulation of sports, and to persons who are involved in sports administration.

In May of this year the *Universities of Louvain (Belgium) and Tilburg (The Netherlands)* and the Asser International Sports Law Centre have begun to co-operate closely in the field of sports law. The start of this co-operation was the organization of two seminars on Transfers and Players' Agents in Sport in Louvain and Tilburg respectively. The *Academy of European Law Trier* (Germany) and the Asser Centre will also hold annual twin seminars on the same subject, in Germany and The Netherlands respectively. The series will begin in the second half of this year with seminars on State Aid and Licences in professional football. The study on the "Legal Comparison and Harmonisation of Doping Rules", which was produced within the framework of the pilot project for campaigns to combat doping in sport (European Commission (EU), Directorate General for Education and Culture) by an international research group consisting of the University of Erlangen-Nuremberg, the T.M.C. Asser Institute, the Max Planck Institute and Anglia Polytechnic University, will appear in book form as the first volume of the new Encyclopedia of Sports Law of the University of Louvain's Centre for Labour Relations.

In this issue of ISLJ, the Centre's official journal, the reader will find contributions on a broad range of both minor and major topics written by a wide variety of international authors. Special attention should be paid to Janwillem Soek's fundamental contribution on the legal nature of doping law and the articles on high school hazing in American sport and match-fixing in cricket in South Africa by Janis Doleschal and Rochelle le Roux respectively. The papers on *"Sport and Mediation"*, which were delivered by Ian Blackshaw, Matthieu Reeb and Jan Loorbach at an Asser conference in Utrecht last June, are also included in this issue.

Last but not least, we extend a heartfelt welcome to Professor Roger Blanpain and Frank Hendrickx of Louvain and Tilburg University as new members of the ISLJ Advisory and Editorial Board respectively and to Andy Gibson of Griffith University as a new member of the Editorial Board. Meanwhile, Professor Vieweg of the University of Erlangen-Nuremberg (*Forschungsstelle für deutsches und internationales Sportrecht*) has left the Advisory Board and has joined forces with the editorial team.

The Editors

The Legal Nature of Doping Law

by **Janwillem Soek***

In the disciplinary law concerning doping, use has to be made of the principles and doctrines which have reached maturity in the sanctioning systems of the states, i.e. criminal law, and which are universally recognized, in order to attain a just and fair balance between the interests of the prosecuting sport organization and the prosecuted athlete who is suspected of having used doping.

One could be critical of the omnipotence displayed by sports organisations with regard to the athletes at their whim. This omnipotence is especially apparent in the disciplinary law concerning doping. If an athlete wishes to participate in competitions he will have to put up with various compulsory measures, based on the articles of association of the organisation in question or his contract with that organisation, both of which bind him. If the analysis of his urine sample shows a positive result, he will be disqualified and disciplinary proceedings will subsequently be instituted against him. Such doping proceedings do not accord him the same rights that suspects in criminal proceedings before the state courts enjoy, but only such rights as are granted in accordance with the sport organisation's regulations. Nor is it considered self-evident in the sanctioning systems of the sports organisations that the principles which have been developed within the sanctioning systems of states - such as, for example, the principle of nulla poena sine culpa and the principles of in dubio pro reo - are applied. Due to the specific wording of the European Convention of Human Rights the athlete who is suspected of doping cannot invoke the rights of the defence, which are laid down in Article 6 of this Treaty, either.

In the following sections, it will first be argued that the objectives and organisation of the two sanctioning systems correspond to a surprising extent. Given these similarities, it is difficult to defend that the often ostentatiously relevant criminal law principles in disciplinary doping law must yield to the principles deriving from private law, with the only reason given being that the law of associations has private law roots, or, at least, that the legal relationship between the prosecuting association and the prosecuted athlete is of a private law character. However, there is the curious circumstance that the application of criminal law principles is not rejected in its entirety, which makes one wonder whether some kind of policy could be detected as regards their application or rejection. For reasons of transparency, coherence, predictability and, most of all, in order to protect the position in the doping trial of the athlete who is suspected of having used doping against the almighty sport organisation, it is advocated that the disciplinary law concerning doping be considered "organisational criminal law", in which the principles of the field of law with which it has the most in common, i.e. criminal law, must be applied. When one wishes to examine whether, and if so, in what way, the present principles have been enforced in disciplinary case law, one immediately encounters the problem that decisions from disciplinary tribunals are rarely published. In those cases, the judgments concerning doping from the Court of Arbitration for Sport should offer relief, although not all CAS decisions are published either.[1]

Doping as a social phenomenon

The simple provision in Article 8 of the Dutch Constitution, reading that: "The right of association shall be recognised" indicates the heart of the law of associations, viz. the power to establish internal regulations. This power entails that an association is able to give itself shape. The freedom to create norms for interaction is exalted in the possibility to punish the violation of such homemade rules. Therefore, the possibility to take disciplinary action against members of the association is also part of the freedom of association that is anchored in the Constitution. The origin of sanctions in sport lies in the autonomously established private norms for interaction, among which the rules of play, and in the association's authority over its members as laid down in the articles of association. Athletes and other members of the association must interact, both with each other and with the association, in accordance with the values of sportsmanship and fairness, or, at least, refrain from engaging in any act which would harm the association. Athletes who are guilty of foul play, or who have misbehaved during a competition, may be removed from the game and furthermore be excluded from participation in future competitions under the association's code of conduct applied in disciplinary proceedings. These measures have the objective of ensuring and enforcing sportsmanlike behaviour and of *disciplining* athletes where necessary. Sport-specifically speaking the protected interest contained in the rules of play is that of fair play. "The use of doping in principle has nothing to do with the contest as such. Using doping may give one player an advantage over another, but the advantage can also be gained because one player was better able to prepare for the contest, or uses better or other equipment or may simply have more money than another. The justification of the prohibition to use doping should therefore primarily be sought in the objective of promoting or retaining the social standing of the sport, rather than in the notion of fair play", claims Van Staveren.[2] The result of the momentum created by the Anti-Doping Convention has been that governments of countries which have acceded to the Convention are now bound to put pressure on the national sports organisations to include anti-doping rules in their regulations. Although some organisations had already proceeded to adopt anti-doping regulations under pressure from the international federations, many national organisations only succumbed in respond to threats that the financial support from the state would be withdrawn. The majority of national organisations conduct anti-doping campaigns because they are forced to do so from the outside. Organised sport was called on to be errand boy in the fight against an undesirable social phenomenon.[3] The services rendered were veiled in rationalisations based on equal opportunities, i.e. the notion of fair play. This had the advantage that the procedure following the doping offence could be guided through the same disciplinary channels which already existed for the prosecution of traditional activities which undermine the principle of fair play. The main difference between the punishment of, say, rough play and that of the doping offence is that the punishment of the first aims to discipline, whereas that of the second aims to exclude. Penalties lasting two years and, in some cases, even four years, for a first offence cannot be considered as aiming to restore discipline. The fight against a phenomenon which mainly occurs in sport, but is viewed as a threat to public health, should of course be fought within sport by means of disciplinary procedures, but the procedures in question should then also meet the requirements which the state prescribes should apply in corresponding criminal procedures outside sport.[4] "[...] there are areas which are traditionally self-regulatory (in the truest sense of the term) that have become sufficiently important to warrant great concern over the

* Senior researcher, ASSER Centre for International Sports Law.

1 See Karsten Hofmann: *Das Internationale Sportschiedsgericht (CAS) in Lausanne*, in: SpuRt 2002, p. 9. Cf. Stephan Netzle: *Das Internationale Sport-Schiedsgericht in Lausanne. Zusammensetzung, Zuständigkeit und Verfahren*, in: Sportgerichtsbarkeit (V. Röhricht Ed.), Stuttgart 1997, p. 15.

2 Lecture in the framework of Het Nationale Dopingdebat (The National Doping Debate), held on September 8th, 2000, in De Rode Hoed, Amsterdam.

3 Bernard Pfister and Udo Steiner, *Sportrecht von A-Z - Vereine und Verbände, Sportanlagen, Arbeitsrecht und Besteuerung, Unfallhaftung, Sponsoring, Gerichtsbarkeit,* Berlin 1995.

4 See, on the difference between disciplinary law and criminal law, and on the difference between ordinary disciplinary law and disciplinary law concerning doping, Eike Reschke, in: SpuRt 2001, p. 183.

extent to which their regulation is subject to scrutiny and required to adhere to constitutional standards. These sectors of activity, of which sport should be considered a foremost example, have, in effect, changed their nature to the extent that their activities can now be regarded as truly 'public' in practice and thus of constitutional significance", says Simon Boyes.[5]

The legal instruments

The CAS and the disciplinary bodies of the sports organisations often use a mixture of private and criminal law principles in order to decide a doping case. Decisions may, for example, contain references to the criminal law principle of legality "nulla poena sine lege scripta" or a principle such as ne bis in idem, right alongside arguments excluding the use of the in dubio pro reo principle.[6] The Swiss Tribunal Fédéral rejected the application of criminal law principles:

"As for the opinion of the CAS, whereby it is sufficient that the analyses performed reveal the presence of a banned product for there to be presumption of doping and, consequently, a reversal of the burden of proof, this relates not to public policy but to the burden of proof and the assessment of evidence, problems which cannot be resolved, in private law matters, in the light of notions proper to criminal law, such as the presumption of innocence and the principle 'in dubio pro reo', and corresponding guarantees which feature in the European Convention on Human Rights."[7]

From the following it will become clear that many arguments may be put forward which detract from such a rigid, dogmatic - (often) not legally founded - point of departure.

The cause of the confusing mix-up of principles can be found in the fact that the doping rules reside in the private law area of the law of association. Within the law of association, sports organisations are free to enact codes of conduct and rules for the enforcement of these codes.[8] From a certain point of view, the enactment by sports organisations of rules which concern the persons of whom the organisation is made up is a purely private law matter. In principle, the outlook remains the same when one involves the aspect of the hierarchy of the law of associations. Adding this detail to our considerations, i.e. the fact that the members of the organisations are subject to the organisation as a whole, has certain far-reaching consequences. The most important principle of private law, equality between the persons to whom the law applies, is put under great pressure in the disciplinary law of the organisation. "The federation in question has generally existed for decades if not generations, and has, without any outside influence, developed a more or less complex and entirely inbred procedure for resolving disputes. The accused participant, on the other hand, often faces the proceedings much as a tourist would experience a hurricane in Fiji: a frightening and isolated event in his life, and for which he is utterly unprepared", as Jan Paulsson[9] describes the situation.

In doping regulations a distinction can be made between the rules which concern the actual doping controls (the police law of doping) on the one hand and the substantive law and procedural law rules (which together constitute the normative law of doping) on the other. The rules containing provisions for the course of affairs during doping controls and doping analyses will only be dealt with below if they are needed in the argument concerning substantive and procedural doping law. The substantive law of doping indicates what type of behaviour is punishable in what type of circumstances. The procedural law of doping determines how and by whom it should be examined whether an offence has been committed and who should decide both this and the disciplinary measures to be imposed according to which standards. Normative doping law centres on the way in which athletes are supposed to behave and the action which is taken in the event that athletes fail to comply with the norms that apply to them. This phenomenon, i.e. conduct which violates the doping regulations, may be considered the main object of doping law. Doping law aims to negatively sanction objectionable behaviour with respect to doping. Doping law, unlike private law, has the fact that it is primarily a law of sanctions in common with criminal law.[10]

Just as criminal law regulates possible responses to the violation of - described - norms by those to whom they apply, doping law regulates the possible responses to the violation of the norms contained in that law by the persons to whom it applies. This is the object of both procedural and substantive law. The latter aspect of doping law determines under what circumstances certain behaviour may give rise to sanctions. The ius poenale of the sport organisation in the field of doping consists of the entirety of provisions which indicate under which conditions the organisation is entitled to punish and of the rules describing what such punishment may be.[11] Just like substantive criminal law, substantive doping law starts from the notion of the illegal act. It can be deduced from the description of the objectionable act what would be the proper way of behaving. Doping law is directed at enforcement in the event of non-compliance with the substantive doping rules (the norms), rather than at the rules of conduct deriving from other fields of law.

By way of an intermezzo, I would like to devote a few words to the relationship between the general disciplinary law of sports organisations and their disciplinary law concerning doping. In his Ph.D. thesis, Wassing[12] writes that fundamental to disciplinary law (in professional football) are "[...] the concept of 'fair play' and the flexibility formula, which means that such acts are punishable that 'harm the interests of the ... [organisation] or of the ... sport in general [...]'".[13] All behaviour that is relevant from a disciplinary law point of view can thus be included. The written and unwritten laws and attitudes of the (in the case of Wassing's Ph.D. thesis) football-playing nation are based on this.[14] What is, however, different from the general disciplinary (football) law which Wassing examined is that the disciplinary doping laws specifically target a certain type of act: the use of doping substances. General disciplinary law in sport serves two purposes. It is intended to enforce the general norms prevalent within the group which are essential for the continued existence of the organisation and it intends to enforce the norms of the sport: the rules of play.[15] After De Waard,[16] one could claim that penalising the behaviour indicated in the description of the doping offence serves to enforce the doping norm and to protect a legal interest corresponding with that norm. Doping law exclusively concerns the enforcement of one particular norm: the doping norm.[17] The violation of the substantive doping norm does not affect the organisation's structure. In other words, the norm is not part of the supporting structure of the organisation.[18] Its violation does, however, generally affect the essence of sport (the principle of equality). This is the legal interest which corresponds with the

5 Simon Boyes, in: *Sports Law*, 2nd ed. (Simon Gardiner, ed.), London/Sydney 2001, p. 198.

6 Christian Krähe: *Beweislastprobleme bei Doping im internationalen Sport - am Beispiel des Olympic Movement Anti-Doping-Codes*, in: *Doping, Sanktionen, Beweise, Ansprüche* (Jochen Fritzweiler, ed.), Vienna 2000, p. 42.

7 Extract of the judgment of March 15, 1993, delivered by the 1st Civil Division of the Swiss Tribunal Fédéral in the case G. v Fédération Equestre Internationale and Court of Arbitration for Sport (CAS). Cf. also Beloff, in: Sports Law (Beloff/Kerr/Demetriou Eds.), Oxford 1999, p.191, Rnr. 7.53.

8 Volker Röhricht: Chancen und Grenzen von Sportgerichtsverfahren nach deutschem Recht, in: Sportgerichtsbarkeit (Volker Röhricht ed.) Stuttgart, 1997, pp. 20-21.

9 Jan Paulsson, *Arbitration of International Sport Disputes*, in: Arbitration International, Vol. 9, No. 4 [1993], p. 361.

10 See G.J.M. Corstens: *Het Nederlandse strafprocesrecht*, Arnhem 1993, and M.J.C. Leijten: *Tuchtrecht getoetst*, Ph.D. thesis 1991, p. 31 and footnote 112.

11 Cf. for criminal law J. Remmelink, in: *D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse Strafrecht*, 1994, p. 1.

12 A. Wassing, *Het tuchtrecht van het publiekvoetbal*, Ph.D. thesis, 1978, p. 16.

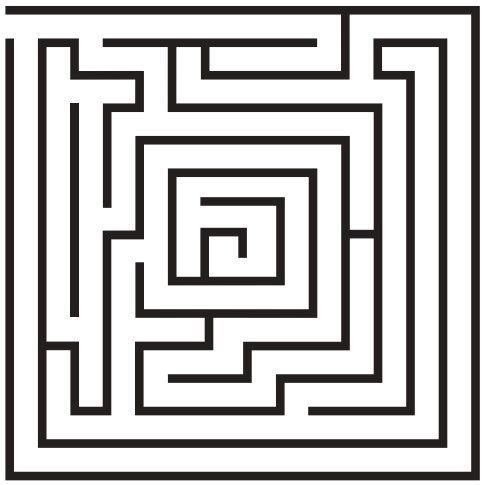
13 See also Volker Röhricht: *Chancen und Grenzen von Sportgerichtsverfahren nach deutschem Recht*, in: Sportgerichtsbarkeit (Volker Röhricht ed.) Stuttgart, 1997, p. 28.

14 Röhricht *op.cit.* p. 28.

15 See W.L. Haardt: *Samenvattend Verslag*, in: *Tuchtrecht en Fair Play*, Nederlandse Vereniging voor Procesrecht, 1984, p. 8.

16 R. De Waard: *Schuld en wederrechtelijkheid als elementen van het delict*, in: Liber Amicorum Th.W. van Veen - Opstellen aangeboden aan Th.W. van Veen ter gelegenheid van zijn vijfenzestigste verjaardag (1985), p. 382.

17 Verheugt, J.W.P.: *Inleiding in het Nederlandse recht*, 1999, p. 12.



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doping norm. Given that the doping norm does not go to the essence of the sport in question, it should be described carefully. In case of its violation, it would seem obvious that the prosecuting body cannot rely on the concept of "fair play" or make use of unwritten laws and a flexible formula such as "unsportsmanlike behaviour".[19] The sports organisation is free to determine which acts or what type of behaviour go against the interests of the organisation or of the sport in general which the organisation in question represents. As opposed to criminal law and doping law, general disciplinary law is an open system.[20]

As does criminal law, the law of doping has a special sanction at its disposal: the penalty.[21] A particular characteristic of the penalty is that it does not aim to redress injustice, but rather has the objective of taking away the illegally obtained advantages. Analogous to what Corstens[22] has written on the position and purpose of criminal procedural law, it may be claimed with respect to doping law that "with the imposition of a penalty [...] the citizen [in this case: the athlete] is being corrected and subjected to suffering which is in fact intended. The penalty does not redress the injustice which was done in practice. The penalty is *non-reparatory* by nature."[23] It entails a reprimand by means of imposing suffering which is mainly intended to result in prevention: to ensure that the perpetrator and third parties will, in future, refrain from engaging in such or similar acts. According to Corstens, this is where sanctions in private and administrative law differ from those in criminal law. Private law damages intend to bring about reparation; the primary objective of the private law of damages is to indemnify the victim for injury. Although the penalty, which is imposed at the end of doping proceedings, is in abstracto directed at the reparation of harm incurred by the legal order, it is absolutely not directed at the reparation of harm suffered by an individual. The injured party in disciplinary doping law is society, just as it is in criminal law. What both types of law have in common is their objective to enforce the law and protect the society in which this law applies. A point in case for showing that doping law should be positioned in the sphere of criminal law rather than that of private law may be found in the nature of the penalty.[24] The penalty's counterpart "which is exclusive to the domain of criminal law: the deprivation of liberty"[25] may be found to be present in the practice of imposing temporary bans from competition and, at times, even bans for an indefinite period of time, which is how the "*life long ban*" may be regarded.[26] "Even though disciplinary law penalties are to every purpose the equivalent of criminal law penalties, their legal basis is different."[27] This contention only serves to indicate that disciplinary law is not criminal law; but this does not mean to say that other principles apply with respect to disciplinary law than those applying in criminal law. What makes the basis of the two means of imposing penalties so essentially different? Corstens discovers this essence in the fact that disciplinary law serves to reprove the party involved for breaching the norms in force for and within a particular group, "whereas in criminal law one is reproved for having failed to act in accordance with a generally applicable norm". Within the confines of the sports club, of the national federation and of the international federation there are generally applicable norms for behaviour as well. This is a case of scaling down which is not coupled with a structural disruption of the essence. Structurally speaking, the size of the group makes no difference. The enlargement or reduction of a photograph does not change the photograph itself.

It has been shown that the imposition of a penalty for the violation of doping rules is a correctional response involving the infliction of suffering. It is precisely the correctional aspect which renders the execution of a custodial sentence in the law of associations "in more need of justification than the actual reparation of the injustice perpetrated, either through the payment of damages or otherwise".[28] Corstens' further contentions intrinsically apply to doping law: "A person who commits an unlawful act against another, must offer redress or compensate for the damage. This may be considered a fundamental rule of law. The infliction of suffering goes beyond that. The more solid foundation for this lies, inter alia, in the compulsory intervention of the courts and in the requirement that there must be an element of guilt present before any punishment can be imposed." In doping law, the disciplinary tribunal can only impose a penalty after a carefully described procedure has been followed. The doping procedure is the indispensable link between the offence and the penalty to be imposed by the disciplinary tribunal.

The procedural rules of doping law - the disciplinary law of doping - must contain careful descriptions of the norms according to which the doping trial must be conducted. This requirement should as far as possible allay the ever-present suspicion that persons who are subjected to the powers of punishment of monopolistic sports organisations will fall victim to arbitrariness. The application of the criminal law and criminal procedural law principles in the doping trial may reduce such suspicions to a minimum.[29] The main thing is that the athlete who has been accused of a doping offence must be protected against any excessive action on the part of the prosecuting body. Only specially designated officials of the organisation have been granted certain - circumscribed - powers during the trial.[30] [31] In the doping trial, which is by nature both inquisitorial and accusatorial, the prosecutor and the accused face each other as unequal parties. The initial stage of the trial is inquisitorial: the accused athlete is the object of examination, while the prosecutor is vested with several powers which infringe on the athlete's rights which in other circumstances are guaranteed by statutes and regulations. Although the athlete who stands accused of a doping offence is the object of scrutiny he does have some powers - sparingly granted by the doping regulations - to defend himself against the accusations made against him. In the audi alteram partem stage, the doping trial is accusatorial in nature. The possibility to defend himself that is offered to the athlete does not make him an equal in the doping trial; for example, the athlete is unable to submit a counterclaim. This inequality causes the doping trial to be best approachable from a criminal law angle, rather than from a private law angle.[32] Given that a very real inequality exists between the parties to the doping trial - as is the case in criminal proceedings - "special care must be taken in the granting and exercise of powers to or by the prosecuting body".[33]

The purpose of the penalisation of the use of doping substances and methods is to create the same general preventive effect as is intended with the penalisation of certain acts as laid down in the Criminal Code. The penalisation as such "has a certain positive effect on the compliance with the norm".[34] The rules in the doping regulations make it clear to potential offenders that the violation of these rules will result in punishment. "This will possibly deter them from committing offences. Also because of this intended effect - insofar as the objective is attained, of course - the reach of criminal procedure

18 Although this is not to say that doping regulations are lower in the hierarchy of the organisation's regulation. See, on the importance of the position of doping rules, Vieweg, *Doping und Verbandsrecht*, in: NJW 1991, p. 1514.

19 Urs Scherrer, *Strafrechtliche und strafprozessuale Grundsätze bei Verbandssanktionen*, in: *Doping, Sanktionen, Beweise, Ansprüche* (Jochen Fritzweiler, ed.), Vienna 2000, p. 125. See, however, Südwest Presse Vermischtes 22.3.2000: "Lanzaat acht Wochen gesperrt - Fürther Einspruch abgelehnt", Frankfurt/Main (dpa) and the Krabbe II case of 20-11-1993 in re Deutscher Leichtathletik Verband (DLV) v. IAAF.

20 Cf. A. Wassing: *Het tuchtrecht van het publiekvoetbal*, Ph.D. thesis, 1978, p. 137.

21 See, on the penalty in criminal law, Verheugt, J.W.P.: *Inleiding in het Nederlandse recht*, 1999, p. 9.

22 *Het Nederlandse strafprocesrecht*, Arnhem 1993, p. 2.

23 See also Apeldoorn, L.J. van, Reijntjes, J.M. Boon, P.J. Bergamin, R.J.B. : *Van Apeldoorn's Inleiding tot de studie van het Nederlands recht*, 2000, p. 289.

24 See ECHR cases Welch of 9-2-1995 (NJ 1995, 606) and Jamil of 8-6-1995 (NJ 1996, 1) on the criteria for criminal law penalties, which may be applied to doping law penalties as well.

25 Corstens [1993], *Idem*.

26 *Op.cit.* p. 120.

27 Corstens [1993], *Idem*. Cf. Reschke (SpuRt 2001, p. 183).

28 Corstens [1993], *Idem*.

29 Urs Scherrer, *op.cit.*, p. 121.

30 The German Bundesverfassungsgericht held that "Grundrechtsschutz durch Verfahren" must also be complied with in the law of association (BVerfGE 53, 30 (65).

31 On the absence of separate and independent prosecuting bodies in doping law, see Th. Summerer, *op.cit.,* p. 165, Rz. 276, and Heikki Halila, in: *Dopingrecht in Finnland*, IV, 1.

32 Urs Scherrer, *op.cit.* p. 124.

33 Corstens [1993], *Idem*.

34 Corstens [1993], *Idem*.

[in the present case: disciplinary doping law] extends further than the cases which are actually prosecuted." The course set in the doping regulations for conducting the prosecution of doping offences is virtually the same as that encountered in criminal law where the prosecution of regular offences is concerned.

The difference between the criminal law and the disciplinary law system of law enforcement often lies in the fact that "disciplinary law sanctions are of a lesser calibre"[35] than their criminal law counterparts. That is not to say that if the calibre of the penalties were the same, disciplinary law should be considered equal to criminal law. There are penalties in disciplinary law which have as much of an impact on those involved as any criminal law penalty would have. This, however, does not in itself turn disciplinary law into criminal law.[36] It does, on the other hand, provide an argument in favour of applying criminal law principles rather than private law principles in doping law.[37]

In a decision dated 8 June 1976 the European Court of Human Rights at Strasbourg (NJ 1978, 223; the Engel Case) held that when sanctions are, by reason of their severity, in principle of a criminal law nature the disciplinary trial must be considered a criminal prosecution in the sense of Article 6 ECHR. However, this qualification cannot be transposed, just like that, to doping law as the case in question concerned - statutory - military disciplinary law. Moreover, the case cited involved a disciplinary law custodial sentence. Deprivations of liberty, except for those which by their nature, duration or manner of execution are unable to result in significant prejudice, belong in the sphere of criminal law, according to the Court. Still, the Court's decision provides food for thought where doping law is concerned. It can indeed be said of a professional ban for a definite or indefinite period of time that it results in significant prejudice by its nature, duration and execution.[38] It is argued that, contrary to criminal proceedings which could be directed at anyone, disciplinary law is only exercised within certain groups. This claim which is, of course, in itself correct does not, however, offer any substantive argument for having other than criminal law principles apply in disciplinary law. It only puts the two systems of law enforcement in perspective. Persons who are members of a sport organisation are subject to doping laws in the same manner that citizens in society are subject to criminal law.[39]

De Doelder is of the opinion that disciplinary law is positioned precisely where administrative law, private law and criminal law intersect.[40] The extent to which the members joined the group of their own free will is decisive for the type of law that is predominant in the disciplinary law in question. Van Staveren[41] views disciplinary law in sport from the same angle. In his opinion, the law of obligations (both of contracts and of legal persons) has a major impact on the disciplinary law of "regular associations, among which sports clubs, and several non-major sport federations". He contrasts this with statutory disciplinary law, which is greatly impacted by criminal law. "The disciplinary law governing professional groups which have more or less voluntarily united in associations lies somewhere between the two extremes. An example would be the disciplinary law that is applicable for top athletes and professional athletes". These days, due to the increased professionalism in and the commercialisation of sport, the standards of "the extent to which" membership is voluntary (De Doelder) or "more or less" voluntary membership (Van Staveren) have become unwieldy instruments.[42] It is true that everyone is free to decide whether they wish to take up a sport or not. Once the choice in favour of a particular sport has been made, the only norms the budding athlete must take into account until he has reached a certain level are those which apply to his particular branch of sport, including the norms of the disciplinary law in question. If the athlete decides on the basis of his talent and dedication to turn his sport into his profession he will also become subject to the general disciplinary law, including that concerning doping, of the international sport federation. A professional athlete exercises his profession voluntarily, but, as he starts to earn respect and popularity both within and outside the sport as a result of wins and scores and possibly makes a fair amount of money because of this, the voluntariness of his choices will become comparable to that of any other professional to whom statutory disciplinary law applies. If he does not like the rules, the "ordinary" professional can always emigrate, but even that freedom is not available to the professional athlete because the disciplinary law of his international federation will apply no matter where in the world he practises his sport. Professional sport has put the embedment of sport within the law of association under pressure. If one can still speak of the voluntary subjection by professional athletes to the regulations of sports organisations, there is at any rate by now a complete absence of voluntary subjection to doping regulations. The voluntariness in question is a legal (dogmatic) presumption which does not correspond to reality. In reality, one could sooner speak of being forced. "Da im kommerzialisierten Sport die Sportler existentiell auf die Monopol-Organisation angewiesen sind, können sie der Bindung nicht entgehen; ihnen ist faktisch eine autonome Wahrnehmung ihrer eigenen Interessen nicht möglich; sie sind [...] auf Schutz angewiesen", says Fritzweiler.[43] ["As the athletes in commercialised sport are essentially committed to the monopolistic organization, they cannot escape this tie; it is factually impossible for them to serve their own interests; they are dependent on protection", says Fritzweiler. Transl. JS] And yet another quote claims that: "Der Profisportler muss sich regelmäßig der Sanktionsgewalt des Verbandes unterwerfen, um seinen Beruf überhaupt ausüben zu können. Von der sonst für das Privatrecht typischen Freiwilligkeit kann daher im Bereich der Sportgerichtsbarkeit kaum die Rede sein".[44] ["The professional athlete must regularly submit to the federation's power to penalize in order to at least be able to practice his profession. The element of voluntariness, which is typical for private law, is hardly present at all in the prosecution procedures in the realm of sports law". Transl. JS] Given how relative the professional athlete's voluntary subjection to the sports organisation is it could be argued that the impact of principles of criminal law should not only be substantial but should in fact be predominant. There must be no misunderstanding over the fact that disciplinary doping law is not criminal law and will never be criminal law, but in the framework of the law of associations it is a *kind* of criminal law,[45] at least, a system of imposing sanctions that should have criminal law principles and concepts applied to it.[46] As public criminal law also finds itself in an environment that is of a private law character, no arguments for proving that private law principles must have an impact on doping law can be deduced from the fact that doping law is embedded in the law of associations. "Although the punishment of doping is not a criminal punishment, it is a criminal-like punishment and will be estimated mainly according to the same principles", according to Tarasti.[47] Tarasti probably intended to say "procedure"

35 Corstens [1993], *Idem*, and J. Remmelink, in: *D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse Strafrecht*, 1994, p. 30.

36 Th. Summerer: *Internationales Sportrecht vor dem staatlichen Richter,* Ph.D. thesis 1989, p. 149.

37 G.W. Kernkamp: *Verslag van de discussies bij de overige onderwerpen*, in: *Tuchtrecht en Fair Play*, Nederlandse Vereniging voor Procesrecht, 1984, p. 328.

38 "A four year ban can be a 'functional death penalty' for an athlete", says Ken Foster, in: *The discourses of doping: law and regulation in the war against drugs*. See also A.B.Diouf's comments on the Braunskill Case (25.5.1996 - IAAF v. USA Track & Field (USATF)).

39 Th. Summerer, in: Fritzweiler/Pfister/Summerer: *Praxishandbuch Sportrecht*, München 1998, p. 162, Rz. 265.

40 H. de Doelder: *Terrein en beginselen van tuchtrecht*, diss. 1981, pp. 25-27 resp. p. 34.

41 H.T. van Staveren, Syllabus Part II, 1998-1999, Ch. V.

42 See also Margareta Baddeley: *Dopingsperren als Verbandssanktion aus nationaler und internationaler Sicht - Insbesondere am Beispiel des schweizerischen, australischen und amerikanischen Rechts*, in: *Doping - Sanktionen, Beweise, Ansprüche*, Herausgegeben von Dr. Jochen Fritzweiler, Wien 2000, p. 13.

43 Jochen Fritzweiler in: Fritzweiler/Pfister/Summerer: *Praxishandbuch Sportrecht*, München 1998, p. 12.

44 Michael Reinbart, *Sportverbandsgerichtsbarkeit und Doppelbestrafungsverbot*, in: SpuRt 2001, p. 48.

45 J. Remmelink: *Mr. D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse Strafrecht,* 1994, p. 30.

46 Summerer, *op.cit.* p. 163, Rz. 267.

47 L. Tarasti: *When can an athlete be punished for a doping offence*, World doping conference 1999.

instead of "punishment". It is a pity that he failed to provide any foundation for this claim. Going beyond criminal law, in which the Public Prosecutor has some discretion to decide whether to prosecute or not,[48] the doping law regime of the sports organisations contains the obligation on the part of the prosecuting bodies to institute disciplinary proceedings.

There is another argument for taking a criminal law approach to doping law, deriving from Article 4 in conjunction with Article 7(2)(d) of the Council of Europe's Anti-Doping Convention.[49] Article 4 provides that: "The Parties shall adopt where appropriate legislation ... to restrict the availability ... as well as the use in sport of banned doping agents and doping methods and in particular anabolic steroids". In other words, the parties to the Convention are, where appropriate, bound to include rules in their legislation concerning, inter alia, the use of doping in sport. The provision does not say what type of legislation should be involved in the view of the Convention's authors. However, clues are provided when Article 4 is combined with Article 7. Under this provision the contracting parties are, among other things, expected to urge their sports organisations to harmonise their disciplinary proceedings... "applying agreed international principles of natural justice and ensuring respect for the fundamental rights of suspected sportsmen and sportswomen; these principles will include: ... ii. the right of such person to a fair hearing and to be assisted or represented ..." This rule undeniably aims to endow doping law with criminal law characteristics. As it is apparently expected of sports organisations that they adopt disciplinary provisions with a criminal law orientation in their disciplinary regulations,[50] the conclusion is justified that the legislation referred to in Article 4 is also of this orientation. The Convention has by now entered into force for 36 countries (consisting of both members and non-members of the Council of Europe) of which 23 have adopted anti-doping rules in their criminal codes. Another 10 countries not party to the Convention have made the use of doping in sport an offence under their legislation. Regarding doping law as organisational criminal law[51] in which the principles of criminal law are especially present offers several advantages over the starting point that doping law is geared towards private law or governed by several fields of law.[52] That doping law is part of the autonomous law enacted by associations is not to say that it should fall back on the law of associations or general private law. Criminal law is also part of the private law world. All inter-human acts are in essence private law acts. This has not been an impediment for the substantiation of numerous concepts, nor for the development of principles within criminal law, which deviate from those applicable in private law.

Conclusion

The main advantage of the criminal law approach of doping law consists of the clarity and transparency it creates. Syncretisms, the intermingling of private law and criminal law concepts, which often occurs in doping judgments, are prevented by it. Concepts such as fault/guilt and intention/malice, for example, in doping proceedings must not derive from private law where they have a different function from the one they have in criminal law. The adoption of criminal law principles in doping law adds to the standing of this body of law rather more than does the arbitrary application of criminal law principles one day and private law principles the next. Why not adopt the principles of Articles 6 and 7 of the ECHR, such as in dubio pro reo, outright in doping law?[53] Why would one use the private law rules on evidence instead of the criminal law rules in a field of law dealing with punishment, as doping law does? The reversal of the burden of proof fits in beautifully with organisational criminal law, but this is completely untrue where the concept of strict liability as it has developed over the past few decades in the practice of doping law is concerned.[54] Why should concepts such as "absence of all guilt" and "lack of substantive illegality" which have been elaborated in the criminal law doctrine of legal defences not be used in doping law? Using the criminal law toolbox in doping law may render the attempts at harmonisation of this field of law more successful than the mixture of concepts from various fields of law has done so far. An additional argument in favour of the criminal law approach to doping law lies in the fact that several countries have proceeded to include the issue of doping in their (criminal law) legislation.[55] "Das nichtbeachten der [...] strafrechtlichen oder strafprozessualen Grundsätze bedeutet grundsätzlich einen Eingriff in die Persönlichkeit des Betroffenen", claims Scherrer.[56] ["Disregarding the principles of material and formal criminal law boils down to a fundamental infringement of the personality rights of the athlete involved", claims Scherrer. Transl. JS] The application of generally and internationally recognised criminal law and criminal procedural law principles and concepts to doping law does not only contribute to the careful and respectful treatment of the athlete but also renders the law more transparent and definitely more predictable for those directly concerned than does the application of a mixture of principles and concepts from other fields of law. It is not only in the nature of things that in a sanctioning system use should be made of principles and concepts which have for centuries developed and evolved in the public sanctioning system, but the application to doping law of such principles and concepts moreover contributes to the harmonisation of this body of law.

The International Sports Law Journal

48 In private law, a similar discretion is left to the interested parties. See Apeldoorn, L.J. van, Reijntjes, J.M. Boon, P.J. Bergamin, R.J.B. : *Van Apeldoorn's Inleiding tot de studie van het Nederlands recht*, 2000, p. 65.

49 Anti-Doping Convention, Strasbourg 16-11-1989, ETS no. 135.

50 See also the Gasser case (Gasser v. SLV, in: SJZ 84 (1988), p. 87).

51 Cf. Michael Reinhart, *Sportverbandsgerichtsbarkeit und Doppelbestrafungsverbot*, SpuRt 2001, p. 48.

52 See also Ken Foster, in: *The discourses of doping: law and regulation in the war against drugs*.

53 See Th. Summerer, *op.cit.,* p. 163, Rz. 268, and p. 162, Rz. 264.

54 Cf. OLG Frankfurt of 18-5-2000 (13 W 29/00, 1 O 198/00).

55 E.g. Belgium, Denmark, France, Greece, Italy, Austria, Portugal and Spain.

56 Urs Scherrer, o*p.cit.,* p. 128.

Legal Strategies to Confront High School Hazing Incidents in The United States

by **Janis K. Doleschal***

1. Introduction

Hazing, or initiation rites as they are sometimes called, have long been a tradition in the United States and abroad. In a book entitled "High School Hazing - When Rites Become Wrongs", Hank Nuwer, a noted U.S. hazing specialist, details numerous cases of hazing that have occurred on high school campuses with athletes, on college campuses in initiation rites conducted for athletes and fraternities, on professional sports teams, as well as in military academies and the armed services.

Nuwer reports that hazing is not a new phenomenon. It occurred in ancient Greece. It existed in medieval schools in Western Europe. In prestigious secondary schools in England, such as Eton, the hazing was referred to as "fagging", and the question was not whether hazing would occur, but how long it would take for a student to become "established enough" so that he could then take revenge on the next group of new students.

Because of the traditions and codes of secrecy surrounding many of these institutions and teams, the prosecution of individuals who harm or kill others during these initiation rites is extremely rare in the United States and is not even considered an issue in other parts of the world. An Alfred University, New York, study published in 2000 defines hazing as "any humiliating or dangerous activity expected of you to join a group regardless of your willingness to participate".

In this article, I will discuss four legal strategies available in the United States for those who would pursue legal action through the courts as a result of damages incurred from a hazing incident: 1) criminal prosecution pursued through existing hazing statutes in the various states, 2) criminal prosecution pursued through other criminal statutes such as battery or sexual assault statutes, 3) civil action pursued as a result of tort liability, or 4) civil action pursued in the American federal courts as a result of a violation of an individual's constitutional rights.

Because of recent publicity surrounding hazing of high school athletes over the past several years, and heightened awareness on the part of the public and school officials, seeking legal redress for damages resulting from hazing is a relatively new phenomenon. While all of these techniques have been utilized in the courts, none of them has received extensive use at this time. As a result, case law should become more highly developed as prosecution and litigation becomes more frequent.

2. Problems with Pursuing Prosecution

Legally, in the United States, a definition of hazing found in our state statutes could include all or part of the following elements: reckless or intentional endangerment of life, intimidation, humiliation, threats of social ostracism, attempts to frighten an individual into submitting to acts against the person's will, initiation rites, forcing an individual to partake of food or drink in excess, participation in acts which are intended to imply that non-compliance will subject the individual to removal or refusal of entry into a particular group or organization.

The difficulties in pursuing legal action against those responsible for hazing can be classified into three categories. The first issue, and one which continually surfaces, is the issue of secrecy on the part of individuals doing the hazing or a code of silence within a team or institution which demands that no one talks about it. In the Alfred University study quoted earlier, 40% of the respondents stated that they would not report the hazing, 36% reported that there would be no one to tell, 27% stated that adults would not know how to handle it, and 24% stated that other kids would make their life miserable if they reported the hazing.

The second issue preventing action against those responsible for hazing is an attitude of permissiveness that can lead school officials, parents and community members to condone hazing acts under the guise of maintaining team tradition or culture. When incidents finally do surface, prosecutors are unwilling to charge, juries are unwilling to convict, and parents and community members are unwilling to support actions taken by school officials.

For example, in 1981, in Toms River, New Jersey, it was discovered that the same hazing rite had gone on for eight years. Three soccer coaches were released for allowing team members to hose down, punch and kick freshman players. Parents and students distributed petitions to demand reinstatement of the coaches. Because no one was seriously injured in this incident, no one was charged with anything.

A third issue that arises frequently during hazing incidents and is difficult for prosecutors to charge is false imprisonment or kidnapping. Because those to whom the hazing occurs are reluctant to report such incidents, actions of kidnapping in the middle of the night or false imprisonment in school closets or wire cages often go unpunished.

3. State Hazing Statutes

Assuming that these three issues can be overcome, the first recourse when seeking legal action is to utilize the state hazing statute. Generally speaking, most statutes contain some or all of the following categories: 1) a definition of hazing, 2) the specific class of educational institutions to which the statute pertains, 3) a reference to whether the statute pertains only to hazing which occurs on campus, off campus, or both, 4) a statement of the range of penalties available, 5) requirements for dissemination of information regarding hazing, and 6) whether a consent defense is allowed.

The problem in utilizing state hazing statutes often lies in the wording of the statute. The definitions can be vague and ambiguous. In some cases the statute does not cover secondary institutions of learning. In other cases, the statute does not cover hazing which occurs off the school campus. If a state should allow a "consent defense", the individuals guilty of hazing could not be charged if the victim consented to the hazing. The penalties from state to state can range from a misdemeanor with a US$500 fine to a felony with imprisonment for up to five years.

Currently, only 42 of the 50 American states have hazing statutes on the books. In order for a prosecutor to successfully utilize the statute, it must not be a vaguely drafted statute, the victims must agree to issue a complaint, and the climate of the community must be such that prosecution will be favorably viewed and supported if the case goes to trial.

4. Utilizing Other State Statutes

When hazing statutes are not adequate and the hazing incident includes in it elements of sexual assault or battery, prosecutors can seek legal redress by charging under those laws. Since many cases of hazing involve some aspect of assault or battery, using those laws to prosecute is a viable option.

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The Denver Rocky Mountain News of February 27, 1998 reported that in Meeker, Colorado "the wrestling coaches allegedly used cattle prods on team members' genitals and engaged in other physical, sexual and mental abuses". Similarly in Johnson Creek, Wisconsin, as reported in The Capital Times of September 28, 1992, two wrestlers were charged with one count of sexual assault and three charges of hazing and false imprisonment after allegedly attacking a fellow wrestler, strapping his wrists and ankles with tape, and sodomizing him with a broomstick.

In Meeker, Colorado, the coaches were acquitted and kept their jobs. In Johnson Creek, Wisconsin, the jury acquitted the wrestlers. While the favorable outcome of a jury trial can never be anticipated, especially in smaller communities where the programs have been successful and the coaches and athletes are popular, the feasibility of utilizing assault and battery laws in addition to hazing laws remains a viable option.

5. Civil Litigation

In situations where either there are not any hazing statutes, the statutes are inadequate, or law enforcement officials in the jurisdiction choose not to prosecute as a result of their "prosecutorial discretion", civil litigation is another option. Typically, tort claims can be made against the students who performed the hazing and/or against schools and school officials. When a tort claim is made against the students, issues of governmental immunity do not apply. However, if civil litigation is sought against a school or its employees, complicated laws of governmental immunity that differ from state to state could prevent litigation, or could greatly limit the amount of monetary award allowable by law to the plaintiff.

In a hazing case where the plaintiff proceeds with civil litigation, one of the choices would be suing the students who performed the hazing. The claims brought forward in such as case would depend on the facts and surrounding circumstances and could include emotional distress, medical costs, loss of wages for the parents, loss of companionship depending upon the severity of the injuries, or unlawful death.

Where feasible according to the state law, a plaintiff could allege negligence and choose to proceed with tort litigation against the coach or administrator of the school. In that case, the four standards that must be met in a tort liability case to determine negligence would come into play: duty, breach, cause and harm. In most cases, the duty to supervise would be the main issue, especially in cases in which the coach is in the immediate vicinity when a hazing occurs.

For instance, in *Siesto v. Bethpage Union Free School District,* as reported in the New York Law Journal of December 30, 1999, a member of the junior varsity football team allegedly sustained injuries requiring 58 stitches during a hazing ritual that occurred in the locker room. This ritual allegedly occurred on an annual basis with the knowledge of school officials, the office of the coaching staff was located a short distance from the site of the hazing and the coaches took no actions to stop it.

The New York Supreme Court granted summary judgment to the plaintiff dismissing the affirmative defenses of comparative negligence and assumption of risk stating that athletes who voluntarily participate in extracurricular activities do not assume risk of injury from hazing rituals. In this case, the court took into consideration the duty of the coach to supervise the locker room and granted summary judgment to the plaintiff who had sustained injuries as a result of the hazing.

When deciding whether to sue a coach for negligence in a hazing case, there could be a variety of ramifications depending on the case law in that state and the climate of the community. However, the decision of whether to sue a coach should not be lightly dismissed. Indeed, it should be given careful consideration, especially in states where the hazing statutes are vague or ambiguous or infrequently used in secondary school hazing situations. If the perception of the prosecutor in the jurisdiction and the perceptions of the victim and his/her parents are greatly divergent, then it is conceivable that the only course of action available to the victim may, in fact, be civil litigation.

6. Federal Court - Violation of Constitutional Rights

When hazing statutes are non-existent or ineffective, when the prosecuting attorney decides not to charge either under the hazing statute or a criminal statute, and when the possibility of civil suit has been eliminated, another alternative that can be considered in the United States is federal litigation. In cases where this decision is made, the grounds most often used are violation of constitutional rights under Section 1983 of Title 42 of the United States Code, which states:

"Any person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

Before attempting to file a claim under 42 U.S.C. Section 1983, case law in this area states that the prima facie elements of a Section 1983 claim must be present. The problem usually does not occur with the first element, the designation of a person, since anyone sued as an individual would be considered a person.

However, circumstances under which that person is being sued must be carefully examined to determine whether that individual is acting in the capacity of a state official. If so, the person cannot be sued because it would be the same as suing the state. Therefore, the governmental immunity laws of the state in which the hazing occurred must be carefully examined to determine whether the individual who performs or is a party to the hazing event is acting in such an official capacity as to bar or bear responsibility under Section 1983.

The second element is "under color of any statute, ordinance, regulations, custom, or usage of any state". Again, the designation of precisely how that individual's actions and official capacity would be viewed under state law must meet the test of the second element.

In the third element, the actor must directly subject an individual or cause an individual a deprivation of rights. Therefore, the issue of direct causation must be examined.

In the fourth element, there must have been a deprivation of constitutional rights, privileges or immunities.

The issue of litigating hazing cases under 42 U.S.C. Section 1983 is further complicated by the necessity to determine whether a school official or school district has an affirmative duty to protect students who are victims of hazing incidents from other students or employees of the school district.

Once it is established that there is an affirmative duty, Michael Gilbert, in an article in the November 1993 University of Pennsylvania Law Review, states that "the plaintiff must then prove that the school defendants breached that duty by acting with 'deliberate indifference' toward the injurious behavior".

In other words, there are two requirements that must be met constitutionally: whether a special relationship exists between the school and the students that is strong enough under constitutional standards to require that the school and its employees have an affirmative duty to ensure the safety of the students, and whether the school employees then acted with deliberate indifference in allowing the hazing which subsequently injured the plaintiff.

A hazing case that has received considerable publicity in the United States as much for its longevity (eleven years) as for the charges (depriving a victim of a hazing of his First Amendment constitutional right to freedom of speech) is Seamons v. Snow (206 F. 3d. 1021). In 1993, Brian Seamons was a student at Sky View High School in Smithfield, Utah and a member of the football team. On October 11, 1993, he was assaulted in the locker room by a group of his teammates who restrained him, bound him to towel rack with adhesive tape, and then brought his girlfriend in and paraded her in front of him.

While Brian and his parents initially alleged numerous bases for recovery, currently, only the First Amendment claim has survived and the crux of the case revolves around whether Brian's First Amendment

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freedom of speech was violated when a coach told him that he could not return to the team unless he apologized to the team for going to the authorities. The coach subsequently threw Brian off the team when he refused to apologize.

This case has bounced back and forth between the district and circuit courts because of numerous procedural errors. To date, it has still not been fully litigated. In fact, no high school hazing case has been successfully litigated using 42 U.S.C. Section 1983. However, when parents and students are desperate and criminal and civil litigation are not feasible, the fact remains that the use of federal litigation is an option open to consideration when seeking legal redress in the United States courts.

7. Conclusion

The maze that must be negotiated in the United States when attempting to prosecute individuals who have taken part in hazing rituals is difficult. However, the primary issue is the safety of children. When that safety is being threatened, parents must seek every avenue of redress available to them. When the schools and law enforcement agencies cannot satisfy their concerns, then attorneys must avail themselves of every legal avenue possible to seek justice.

When children are subjected to hazing rituals, the long-term effects of the experience can be serious. When a child is confronted with an extremely traumatic hazing situation, Nuwer points to research that strongly indicates the long-term physical, social, emotional, and mental effects that can produce lasting harm to the child.

These are worldwide humanitarian issues. If a country does not have any laws against hazing, then laws must be passed. If a country has not viewed hazing rituals as harmful, then the victims and their parents must point to the harm. If hazing laws cannot satisfy those concerns, then the perpetrators of those rituals must be prosecuted using the full extent of the criminal laws available to pursue legal action. And if the use of criminal charges is not feasible, then victims and their parents must pursue the greatest degree of civil action available to them.

The excuses that hazing builds teamwork and character, is a part of tradition, and is only harmless fun are no longer valid. In view of increasing worldwide legislation supporting human dignity and human rights, the protection of our children must be of paramount importance. Hazing, which often threatens to needlessly harm them, must be attacked from whatever legal means are possible.

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Reflecting on Match Fixing in Cricket

The Cronjé Affair*

by **Rochelle Le Roux****

1. Introduction

The excitement generated by sport is based on the uncertainty of the result - the surprise element - and without that expectation the attraction of sport is lost. Yet several examples have recently surfaced of results being artificially contrived: Michael Schumacher winning the Austrian Grand Prix in May 2002 after his teammate was instructed to pull over to allow Schumacher to win being but one. In October 2001, five second-division soccer teams in China were involved in a match fixing scandal and, in June 2001, FIFA banned two players convicted of match fixing in Singapore. As recently as March 2002, it was discovered that the University of Michigan men's basketball booster and his family were involved in an illegal gambling operation. The extent of player involvement is now being investigated. Since 1994, there have been at least 13 official investigations into match fixing in cricket, the last and most comprehensive being the investigation by the Anti-Corruption Unit of the International Cricket Council (ICC). This led to the publication in April 2001 of a report on Corruption in International Cricket (the Condon Report). This investigation followed soon after the South African Government established a judicial Commission of Inquiry into Match Fixing in Cricket and Related Matters, headed by Judge Edwin King.[1] This commission (the King Commission) was established after the erstwhile South Africa cricket captain, the late Hansie Cronjé[2], confessed to accepting money from bookmakers. Central to most of these examples is the betting and gambling industry. This is particularly bizarre in view of the fact that it is often spread betting[3] and other betting devices that attract television audiences to games that may be otherwise uncompetitive and consequently do not warrant sponsorships.

2. The evidence

Cronjé was promised indemnity against criminal prosecution in South Africa if he told the truth before the King Commission. The King Commission eventually published three reports[4] and, in June 2001, all investigations by this commission were halted. Although Judge King refrained from indicating whether Cronjé should be indemnified, he did express some reservations about Cronjé's version in his first interim report.[5] The director of the South African Directorate of Public Prosecutions was to pronounce on Cronjé's indemnity during 2002, but had not yet done so at the time of his death.

The evidence of the King Commission revealed that Cronjé received money from bookmakers as encouragement to consider fixing matches and for providing match information. Cronjé also offered money to two team members (Gibbs and Williams) to under-perform in a one-day international (ODI) match[6] in Nagpur, India in March

* This is an adaptation of a paper presented at the 11th ANZSLA Conference, Perth, 2001.

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1 Significant reports on match fixing in cricket since 1994 include the report published pursuant to the 1998 Australian Cricket Board Player Conduct Inquiry; the report following the appointment of a commission on inquiry in terms of the Pakistani Commissions of Inquiry Act 1956 and the report following the inquiry of the Indian Central Bureau of Inquiry (CBI). These reports and the Condon Report can be accessed via http://www-uk3.cricket.org/link_to_database.

2 He died in an air crash on 1 June 2002.

3 Spread betting involves wagering on a spread of runs. The bookmaker sets the spread in advance. E.g. the spread may be set that a team will score between 230-240 runs in a particular batting innings; that a batsman may score between 30-40 runs or that a team may score between 70-80 runs during the first 15 overs of a match. Wagers may then be made to the extent that the actual score will be more or less than the spread set by the bookmaker.

4 These reports can be accessed via http://www-rsa.cricket.org/link_to_database.

5 See paragraph 47, First Interim Report of the Commission of Inquiry into Cricket March Fixing and Related Matters.

Chronology of the European Union
Following the devastation and the huge loss of life of the Second World War - the second time in a generation that Europe had been engulfed in war - six European countries made a mutual effort to find a way of preventing this from happening again. France, Germany, Belgium, Luxembourg, Netherlands and Italy decided that the best way to prevent a repeat was to work together on coal and steel production as these were the main resources required for fighting wars. They therefore created the European Coal and Steel Community (ECSC) in 1951.

ECSC
The ECSC was regarded as a success - consequently national governments decided to expand this co-operation to other areas in 1957 when 'the Six' signed the Treaty of Rome. This built on the work of the ECSC and created two more supranational bodies; the European Economic Community (EEC) and the European Atomic Energy Community (Euratom), to work alongside the ECSC.

EEC
In 1965 a treaty was signed that drew together the separate elements of the previous treaties. As the most influential body of the three was the EEC, this became the name for the group.
In 1973 the EEC expanded to include Denmark, Ireland and the UK. Britain held a referendum on its membership in 1975 in which the British public voted to stay in the EEC.
To celebrate the new members a celebration football match was played at Wembley, pitting players from "the old Six" against players from "the new Three".

Jensen of Denmark scoring for "The Three"
against "The Six" in the
E.E.C. celebration game of January 3rd. 1973

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The Three (New) 2
(Henning Jensen 49, Colin Stein 70)

The Six 0

HT: 0-0.
Att: 36,500
Ref: Norman Burtenshaw (ENG).

The Three: Pat Jennings (NIR/UK) - Peter Edwin Storey (ENG/UK), Bobby Moore (ENG/UK), Norman Hunter (ENG/UK), - Colin Bell (Eng/UK) (John Steen Olsen, DEN, 74), Johnny Giles (IRL), Bobby Charlton (ENG/UK) - Peter Lorimer (SCO/UK), Colin Stein (SCO/UK), Henning Jensen (DEN), (Alan Ball ENG/UK, 60). Manager: Alf Ramsey (ENG).

The Six: Christian Piot (BEL) (Dino Zoff, ITA, 46) - Marius Trésor (FRA) (Wim Suurbier, NED, 46), Franz Beckenbauer (FRG) (Ruud Krol, NED, 46), Horst Blankenburg (FRG), Berti Vogts (FRG) - Willem van Hanegem (NED) (Herbert Wimmer, FRG, 46), Günther Netzer (FRG), Johan Neeskens (NED) - Jürgen Grabowski (FRG), Gerd Müller (FRG), Georges Bereta (FRA). Manager: Helmut Schön (FRG).

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2000. No evidence was led to suggest that he deliberately lost a match.[7]

The United Cricket Board of South Africa (UCBSA) banned Gibbs and Williams from international cricket for six months. Unlike Gibbs and Williams, Cronjé was not given a disciplinary hearing. Based on the content of his evidence before the King Commission, along with his public declaration that he severed all ties with cricket under the jurisdiction/auspices of UCBSA, he was for banned for life from all activities of the UCBSA and its Affiliates. (At the time of his confessions, Cronjé's contract with the UCBSA was about to be renegotiated and they opted not to renew it. This decision to ban him was therefore made at a stage when no contract existed between him and the UCBSA.)

3. Reflections

It is imperative that sports administrators have knowledge of the functioning and terms of reference of the media. The UCBSA turned out to be ignorant of what was being reported in the media. On 20 December 1998, the *Sunday Times* in South Africa published an article entitled "Proud South African Cricketers hit Match-Fixers for Six". This article dealt with the offer to the South African team to lose an ODI in Mumbai in 1996 that was reportedly raised at a team meeting by Cronjé and declined by the team. The Communications Manager of the UCBSA testified that she knew about this article, but Dr Ali Bacher, the Managing Director of the UCBSA, denied any knowledge of this report before the King Commission. The article appeared in a Sunday newspaper with a circulation of nearly 500 000. Bob Woolmer, the team coach at the time, has also publicly stated that he advised Dr Ali Bacher of the 1996 approach soon after it happened. This article was published six days after the ICC announced that it would collect all possible information on corruption in cricket.[8] Of course, media reports do not constitute indisputable evidence that mischief is afoot, nor is the media necessarily the first to be aware of current events in this regard. Nevertheless, sports bodies should at least take such reports into consideration. This also corresponds with similar failures to act by other ruling bodies. In 1992, Australian cricketer Dean Jones advised his team manager that a bookmaker had approached him. No steps were taken in connection with this revelation at the time. It was only by coincidence, in 1998, that the world learned of fines levied against Mark Waugh and Shane Warne in 1995 by the Australian Cricket Board for liasing with bookmakers in the early nineties.

At the time of the Cronjé debacle, there seemed to have been some uncertainty as to who should have primary jurisdiction over gambling-related disputes. Every effort should be made to provide clear guidelines in this regard. Closely linked to the issue of primary jurisdiction, is the issue of interlocking contracts and disciplinary structures between and among the different governing bodies in sport. Disciplinary measures, definitions of misconduct and related procedures and penalties ought to be consolidated into a single code of conduct, the terms of which should be included in contracts by way of incorporation by reference. At the time of his misdemeanours, Cronjé was subject not only to the Code of Conduct of the ICC, but also to the Code of Conduct of the UCBSA, which was incorporated by reference into his contract. No clear lines established where the jurisdiction of the one Code ended and that of the other commenced. Judge King also recommended that consideration should be given to a single, international code of conduct.[9]

In addition to the harmonisation of structures, national ruling bodies should ensure that mechanisms are established to cater for the incorporation of any additions or amendments to the international body's code of conduct. Failure to do this may well hamper the ability of the ruling body to act. This is illustrated by the penalties that were imposed against Gibbs and Williams. In October 1999, the ICC drafted regulations that would effectively necessitate a life ban for anyone involved in match fixing or related conduct. These regulations only came into effect on 20 April 2000. The UCBSA had to concede that the disciplinary committee inquiring into the Gibbs and Williams matter was not bound by the ICC regulations since they were only rendered effective by the UCBSA after Gibbs and Williams committed their offences. Whether this oversight should be blamed on the ICC or the UCBSA is not clear. However, every endeavour should be made to ensure that, once a risk of this nature is identified, it is addressed in the appropriate international code of conduct. In addition, a mechanism should be established to incorporate any amendment to the international code into the national code of conduct of particular countries.[10]

In cricket, it appears that the captain's participation is almost indispensable when a result is to be contrived. Judge King commented that the "captain has a strong hand in the selection of the team; he makes the decision whether to bat or field in the event that he wins the toss. He decides on such matters as when to declare[11], the batting order, the bowling structure i.e. who bowls, from what end, when and for how long; he determines the field placing... and he obviously controls and can manipulate his own batting and bowling. It is no exaggeration to say that the participation of the captain is indispensable; it is a *sine qua non*".[12]

In other sports, it could be a player in a particular position, like the goalkeeper or the striker or the goal kicker. A good example is the German goalkeeper, Lutz Pfannestiel, who was banned for a year by FIFA in June 2001 for agreeing to influence the outcome of soccer matches.[13] Sports bodies should take steps to identify the most vulnerable player as far as match fixing is concerned and special steps should be taken to protect that person from improper influences. Monitoring player performance and career statistics may be useful in this regard. An analysis of Cronjé's career statistics, although inconclusive in itself, nevertheless shows an interesting slump in batting and bowling form when playing teams from the Subcontinent particularly *after* the first contact by a bookmaker in 1996.[14] The majority of his illicit conduct also involved teams from the Subcontinent.[15] Of course, this alone will not be sufficient to protect players and administrators may well heed the advice of Judge King that players' contact with the press and the use of cell phones should be better controlled.[16] Too often, bookmakers made contact with players under the guise of being journalists and, too often, a cell phone call seemed to be central to a fixed match.

All sports bodies should invest in educating their players or athletes about the temptations that can confront them. Cronjé alluded to this in his evidence and almost all other reports on match fixing recommend education in this regard. Clearly this requires the sports body to involve the players in educational programmes. Sight should not be lost of the fact that international athletes are often very young and have limited education when they march out onto centre stage.

6 This is a limited overs match played between two international teams and the match is usually completed in one day as opposed to "test" matches which may last up to five days and where each team is entitled to two batting innings.

7 See First Interim Report of the Commission of Inquiry into Cricket March Fixing and Related Matters, in particular paragraphs 68-69.

8 See D. Gouws, "...And nothing but the truth"?, Zebra, Cape Town 2000, 31-35.

9 Paragraphs 32-33, Second Interim Report of the Commission of Inquiry into Cricket March Fixing and Related Matters.

10 The case of the Canadian snowboarder Ross Rebaglati is also a similar example. He was stripped of his gold medal at the 1998 Winter Olympics after testing positive for marijuana. The medal was later returned to him since there was no legal agreement between the IOC and the International Ski Federation that covered the use of marijuana. The IOC's own rules provided that a sanction can only be imposed if there is an agreement between the IOC and the relevant international sport federation.

11 The captain of the batting team may, for tactical reasons, decide to stop his team's batting innings before all the batsman have been bowled out. He will then "declare" the innings closed. This does not happen in limited overs matches.

12 Paragraph 119, First Interim Report of the Commission of Inquiry into Cricket March Fixing and Related Matters.

13 See "Aussie player faces charge", Illawarra Mercury 30 August 2000. http://www.illawarramercury.com/wed/20060655.htm.

14 D. Gouws, *supra* note 8.

15 Teams from India, Pakistan, Sri Lanka and Bangladesh are collectively referred to as teams from the Subcontinent.

16 Paragraph 19, Second Interim Report of the Commission of Inquiry into Cricket Match Fixing and Related Matters. Also see the recommendations in the Condon Report.

2nd Asser / Clingendael International Sports Lecture

Thursday 3 October 2002

Venue: Institute "Clingendael"

Opening: 16.00 hours

"Sport and Development Cooperation"

Speakers

H.E. Willem Alexander, the Prince of Orange, IOC Member.

Johan Cruijff, Chairman of the Johan Cruyff Welfare Foundation.

Facilitator

Robert Siekmann, Managing Director, ASSER International Sports Law Centre.

Participation is by invitation only

"If you have the opportunity to help others, you should help others."

Johan Cruijff

Recognition should be given to the fact that a young player's sense of discernment may still be undeveloped and sports bodies should take it upon themselves to provide such life skills. The case of Herschelle Gibbs is an example in point. He made his first class debut at the age of 16 and played test cricket at the age of 22. Apart from his 6-month ban as a result of his involvement with match fixing, he has previously been reprimanded for ill discipline off the field and, after his return to test cricket following his ban, he was caught smoking marijuana while touring the West Indies. At that stage, there was still a fine and a three-match suspended sentence hanging over his head resulting from an earlier infringement. His suspended sentence was subsequently extended for a year on condition that he completed counselling in life skills. Whether or not Gibbs was fortunate to escape suspension and whether or not he needs such skills are beside the point: such skills should have been provided to him much earlier and on an ongoing basis, not at the age of 28. In this regard, a leaf can be taken from the book of the National Collegiate Athletic Association (NCAA), which has taken visible steps to disassociate itself from all forms of gambling. In conjunction with the FBI, it has produced a videotape entitled "Gambling With Your Life", which has proved to be a useful tool educating athletes of the dangers associated with gambling in general and sports gambling in particular. The NCAA actively endeavours to reach athletes at all levels of participation. In addition, it has actively countered all efforts to associate gambling with the NCAA by taking firm action against gambling websites or magazines placing gambling information or advertisement linked to the NCAA. In addition, the NCAA distributes brochures and posters to discourage gambling.[17] Suggestions by Judge King and in the Condon Report that players should sign "gambling affidavits" will not be enough to make the anti-gambling campaign visible.[18] A tangible, anti-corruption/gambling campaign is required, visible to players and fans alike. A vigorous message at grassroots level is required. It is now more than a year since the Condon Report was published and still there is no sign of such a campaign in cricket. A visit to the CricInfo.com website, for instance, will show that it still provides links to betting websites.

Cronjé contested his life ban in the High Court on constitutional grounds.[19] His legal team argued that his life ban was unconstitutional since he was not given an opportunity to state his case and that the ban constituted an unreasonable restraint of trade. They argued that the constitutional right to fair administrative action also applies to private bodies. It was also argued that both Gibbs and Williams were found guilty after the benefit of a disciplinary inquiry at which they were given the opportunity to state their respective cases. At the time of the UCBSA's imposing of the life ban, its contract with Cronjé had already terminated. The court did not accept that the ban was in effect disciplinary and punitive, but held that the UCBSA was merely relying upon its constitutional right of non-association. The court also held that banning Cronjé from the activities the UCBSA was not an unreasonable restraint of trade. He may, for instance, coach, sponsor or promote cricket in schools not affiliated to the UCBSA. Prior to this decision, it was generally expected that the court would extend the constitutional right to fair administrative action (such as the right to be heard), applicable to public bodies, to private bodies such as the UCBSA. The court unequivocally stated[20] that the UCBSA is a private body and, in the absence of a binding contractual term, it was under no legal obligation to give Cronjé an opportunity to be heard before the resolution to ban him for life was passed. The public and private law divide therefore continues to exist in respect of South African sports bodies.

Even if Cronjé was not indemnified, it is not clear in terms of which common law or statutory crime he could have been prosecuted. There simply does not seem to be a (South African) crime into which match fixing can be fitted. Perhaps sports administrators should make it their business to lobby for legislation in this regard.

What is the source of gambling among the players? Cronjé hinted that greed was a problem in his case, but the Pakistani report[21] also made reference to low pay. Judge King expressed some concern about the number of seemingly meaningless matches teams are required to play.[22] In cricket, an ODI competition[23] may often consist of a number of round-robin matches[24] followed by a final. Long after the teams for the final have been decided, non-qualifiers are still expected to continue with their round-robin fixtures. Once again, the onus is on sports administrators to see that fair pay structures and financial security are in place and to refrain from scheduling too many matches out of pure greed for the television and other revenue.

Conclusion

Rules and regulations may superficially address the gambling problem, but the truth is that the gambling spirit is very strongly embedded in certain cricket playing nations and rules will have very little or no impact on breaking this culture. The efforts of Sachin Tendulkar in going out for nought are celebrated by as many when he scores a century. This spirit will probably not be broken and ruling bodies cannot be held accountable therefor; rather, it is in terms of how they manage their players *vis-à-vis* gambling threats that sporting bodies can be judged.

17 See: http://www1.ncaa.org/membership/enforcement/gambling/index.html
18 See Appendix A, Condon Report.
19 *Cronjé v The United Cricket Board Of South Africa* 2001 (4) SA 1361 (TPD).
20 At 1376G. Also see 1380G and 1382G.
21 Paragraph 324 of the Report. See note 1.
22 Paragraphs 39 and 48, Second Interim Report of the Commission of Inquiry into Cricket March Fixing and Related Matters.
23 See note 6.
24 This is the phase of the competition where all the participating teams play against each other.

"TRANSLATING IS THINKING WITH ANOTHER PERSON'S MIND"

FREELY RENDERED FROM ARTHUR SCHOPENHAUER (1788-1860)

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12th Asser Round Table Session on International Sports Law

Utrecht, 13 June 2002

Sport and Mediation

by **Ian Blackshaw***

1. Introductory Remarks

I am very grateful to have this opportunity of presenting my new Book on "Mediating Sports Disputes: National and International Perspectives" and saying a few words on this increasingly important subject. The Book, the first of its kind in its field, is published today by the TMC Asser Press, the publishing arm of the prestigious TMC Asser Instituut in The Hague, The Netherlands. Details of the Book you will find in the "flyer" in your information packs[1].

I am particularly pleased that Dr. Rob Siekmann, the Managing Director of the Asser International Sports Law Centre, who not only organised this meeting today but also acted as an efficient "midwife" to the birth of the Book, is here today. So also is Philip van Tongeren of The TMC Asser Press. I am most grateful to them both for their enthusiasm and support. I am also grateful to a number of others, whose assistance I also acknowledge in the Book, and also to Ernst & Young for supporting this event and providing such a splendid and inspiring venue.

Lastly and by no means least, I would like to thank you all for coming today. With such a fascinating subject as "Sport and Mediation", I am sure that we will have an interesting and enjoyable meeting.

So, what is mediation and how can it be successfully used for settling sports disputes at the national and international levels?

Before answering these questions, let us put the subject of sports mediation into context.

2. Background

2.1. The Business of Sport

Sport is now big business.

It is a global industry representing more than 3% of world trade. And worth more than 1% of the GNP of the fifteen Member States of the European Union (EU), in which two million new jobs have been created directly or indirectly by the Sports Industry.

This phenomenal growth in the value of the Sports Industry is largely due to the increase in the broadcast coverage of sports events and the exponential rise in the fees paid by broadcasters for the corresponding rights. A quarter of the world's population watched the television coverage of the 1998 World Cup Final in Paris and an audience of 3.7 billion watched the opening ceremony of the Millennium Olympic Games in Sydney on 15 September, 2000. The broadcast rights to the Sydney Games were sold for a record US$1.3 billion - five times more than those for the 1984 Los Angeles' Games. Whilst, earlier in the summer of 2000, the TV rights to The Premier League in England for the next three seasons were sold by auction for a staggering £1.65 billion.

Increased television coverage has also led to a spectacular rise in the value of sports sponsorship, by national and multinational companies wishing to associate themselves and their products and services with major national and international sports events, such as the Olympic Games. An exclusive global sponsorship package of the Games now costs some US$50 million. It is not surprising, therefore, that the world-wide market for sports sponsorship grew in 1999 by 14% to US$22 billion, whilst spending in Europe alone increased by 16% to US$6.5 billion.

Increase in leisure time has also played a significant part in the meteoric rise of the Sports Industry with more people participating in and watching sport than ever before. In turn, sports men and women have become sports personalities and role models with salaries and lucrative sponsorship and endorsement deals akin to the fabulous incomes of Hollywood "stars". In fact, sport is now an integral part of the world-wide entertainment industry.

2.2. The Need for Alternative Dispute Resolution Mechanisms in Sport

With all this money and wealth circulating in sport, winning for top sports persons and clubs is now everything. So, in line with the old adage, where there is money to be fought over there are likely to be disputes, and it is not surprising, therefore, that sports litigation is on the increase.

This raises the question, given the special characteristics and structures of sport, well recognised around the world and not least by the EU Commission in Brussels in its evolving Policy on Sport, how best to resolve sports disputes. By traditional or modern means? Through the courts or other processes, such as mediation?

Fortunately, the attitude of the courts, generally speaking, is to leave sports disputes to be settled within "the family of sport".

3. The Courts and Sports Disputes

3.1. The Position in England

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, as Megarry, a former Vice Chancellor of the Chancery Division of the High Court of Justice, put it in the case of McInnes v. Onslow-Fane[2]: "far better fitted to judge than the courts".

In similar vein, Lord Denning, the famous English Judge of the twentieth century, expressed the matter in the case of Enderby Town Football Club Ltd v. Football Association Ltd[3] as follows:

".....justice can often be done in domestic tribunals better by a good layman than by a bad lawyer".

In England, there are also new rules requiring the parties to disputes to attempt to settle their disputes by mediation at an early stage in the litigation process.

However, the English Courts will intervene, where there has been a breach of the "rules of natural justice"[4] and also in cases of "restraint of trade", where livelihoods are at stake[5].

3.2. The Position in the US

In the US, sports disputes are regarded as private matters. The attitude of the Courts is well summarised by the Federal District Court in Oregon in the Tonya Harding case in 1994[6] as follows:

"The courts should rightly hesitate before intervening in discipli-

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* Member of the Court of Arbitration for Sport (CAS) and member of the Arbitration and Mediation Panels of the UK Sports Dispute Resolution Panel.

1 Ian Blackshaw, *Mediating Sports Disputes: National and International Perspectives,* TMC Asser Press, The Hague 2002.

1 [1978] 3 All ER 211.

3 [1971] 1 All ER 215.

4 Revie v. Football Association [1979] The Times, 19 December.

5 Greig v. Insole [1978] 3 All ER 449.

nary hearings held by private associations....Intervention is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in serious and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then, injunctive relief is limited to correcting the breach of the rules. The court should not intervene in the merits of the underlying dispute".

Again, on purely sporting issues, such as eligibility to compete in sports events, according to Judge Richard Prosser of the Seventh Circuit in the case of Michels v United States Olympic Committee[7]:

"..there can be few less suitable bodies than federal courts for determining the eligibility, or the procedure for determining the eligibility, of athletes....."

US Courts are willing to hear sports disputes only between Sports Bodies in accordance with Federal Law, and in due process and breach of contract cases.

3.3. The Position in Canada

In Canada, the Legal System is, in general, based on the English Common Law and the attitude of the Courts to sports disputes is well illustrated by the 1996 case of McCaig v. Canadian Yachting Ass'n & Canadian Olympic Ass'n[8].

There, the Judge refused to order the Canadian Yachting Association to hold a second regatta for selecting the "mistral class" sailing team to compete in the 1996 Olympics remarking:

"the bodies which heard the appeals were experienced and knowledgeable in the sport of sailing, and fully aware of the selection process. The appeals bodies determined that the selection criteria had been met.... [and] *as persons knowledgeable in the sport ..... I would be reluctant to substitute my opinion for those who know the sport and knew the nature of the problem*" (emphasis added).

3.4. The Position Generally in Continental Europe

In the European Civil Law Countries too, the Courts are generally amenable to the parties trying to settle their disputes by arbitration and other extra-judicial methods, and will adjourn proceedings in cases where there is an express contractual requirement to refer disputes to arbitration or mediation, to allow this process to be pursued. Only in the event of failure to reach an extra-judicial solution, and in some other very limited cases, will the Courts be prepared to entertain a suit and adjudicate on the dispute.

Also, generally speaking, the Courts will not intervene in sporting disputes, which concern the "rules of the game" of the sport concerned.

3.5. The Position in Switzerland

Under article 190(2) of the Swiss Federal Code on Private International Law of 18 December, 1987 a decision of the Court of Arbitration for Sport (CAS), which is treated as an arbitral award under Swiss Law, can only be challenged in the following circumstances:

a) if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;
b) if the arbitral tribunal erroneously held that it had or did not have jurisdiction;
c) if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;
d) if the equality of the parties or their right to be heard in an adversarial proceeding was not respected;
e) if the award is incompatible with Swiss public policy.

Also, the Swiss Federal Tribunal (the highest Court) has held, as part of a seminal ruling of 15 March, 1993 on the juridical nature of awards made by the Court of Arbitration for Sport (CAS), that any judgement, that has as its sole object the application of games rules, is "...in principle, outside a juridical control".

My distinguished colleague, Me Matthieu Reeb, Secretary general of the CAS, will have more to say on these matters and the CAS generally.

3.6. The Position in Spain

In some jurisdictions, for example, Spain, there is a legal requirement for the parties in dispute to attempt a resolution through conciliation proceedings conducted before a Judge ("acto de conciliacion") before being permitted to proceed with an ordinary legal action before the Courts. In such proceedings, the Judge explores with the parties in dispute the possibilities of their settling their dispute amicably.

3.7. The Position in Italy

There is a similar situation in Italy in relation to the handling of sports disputes.

The Italian Olympic Committee (Comitato Olimpico Nazionale Italiano - "CONI") on 28 December, 2000 approved the setting up of a special "Court" of Conciliation and Arbitration for Sport (Camera di Conciliazione e Arbitrato per lo Sport). Under article 3.5 of the Rules (Regolamento) of this Body, it is obligatory for the parties in dispute to first attempt conciliation before instituting an arbitration procedure. Conciliation is expressed to be conducted on a "without prejudice" basis (art. 5.8, ibid.).

4. What is Mediation?

4.1. The Concept of Mediation

Mediation is not a new thing. People have been mediating - that is, trying to reconcile differences between individuals and groups - for thousands of years. The Bible and other ancient texts are full of examples.

In the last twenty years or so, mediation, as a method of settling commercial disputes, has grown in popularity in the business community and has taken on certain features and characteristics.

Mediation is a voluntary, non-binding, "without prejudice" process that uses a neutral third party (mediator) to assist the parties in dispute to reach a mutually agreed settlement without having to resort to a Court. It differs from litigation and arbitration in that a binding decision is not imposed on the parties by a judge or an arbitrator. The main advantage of the mediation process is to permit the parties to work out their own solution to their dispute with the assistance of the mediator.

Mediation is a natural extension of the most common method of resolving disputes, namely, negotiation. However, negotiations either break down or cannot be commenced for a variety of reasons. Mediation gives the parties in dispute the option to start or continue negotiations in a controlled setting. If the mediation is not successful, the parties are still free to go to court or arbitration, so nothing has been lost.

As Sam Passow, head of research at the UK based Centre for Effective Dispute Resolution (CEDR), has put it[9]:

"Mediation differs from other alternative dispute resolution methods, such as arbitration, because the outcome or solution is not imposed. It has to be concluded voluntarily by the parties on either side. The mediator facilitates by evaluating the dispute and proposing solutions, but does not make a judgment as happens in an arbitration or independent expert determination. This means the parties own the outcome, it is their problem but also their solution, Therefore they are more likely to get an outcome that they can live with."

6 *Harding v United States Figure Skating Association* [1994] 851 FSupp 1476 741 F.2d 155, at p 159 (7th Circ. 1994).
7 *Michels v United States Olympic Committee* August 16, 1984 Seventh Circuit 741 F.2d 155; 1984 U.S. App. LEXIS 19507.
8 Case 90-01-96624 [1996] (QB Winnipeg Centre).
9 "Hands across the table", Kelly Parsons, in: The European Lawyer, July 2000 at p. 40.

4.2. The Advantages of Mediation

Mediation enjoys the following main advantages:

Mediation is quick - it can be arranged within days or weeks rather than months or years as in the case of litigation and can also be conducted in a very short time (a few hours or a day or two).

It is less expensive - quick settlements save management time and legal costs.

It is confidential - adverse publicity is avoided and unwanted parties, such as competitors or journalists, are not present.

It covers wider issues, interests and needs - underlying issues and hidden agendas are exposed making creative solutions possible to satisfy the needs of all the parties.

It is informal - a common sense and straightforward negotiation results.

It allows the parties to retain control - the parties make the decisions rather than control being handed over to a judge or an arbitrator.

It is entirely "without prejudice" - the parties have nothing to lose, their rights are not affected by the mediation, thus litigation can be commenced or continued if the mediation fails to produce an agreed settlement.

It enjoys a high success rate - in general, 85% or more of mediations are satisfactorily settled.

4.3. Common Concerns about Mediation

Many people regard agreeing to mediation as an admission of failure. This is not the case. As previously mentioned, negotiations break down for various reasons, and so mediation gives the parties the chance of keeping the negotiations going. The negotiations have not failed until mediation has been attempted.

Putting the dispute in the hands of a mediator does not involve any loss of control by the parties. On the contrary, the control remains with the parties, as the mediator has no authority to render any decision or force any settlement. A settlement is only reached if and when the parties consider that the settlement proposed is fair and reasonable.

Mediation does not create extra work for the parties in dispute. In fact, in the long run, mediation saves time. The parties do have to invest some time and effort in the mediation, but most cases submitted to mediation settle, saving further time. Even in the minority of cases in which mediation does not lead to a settlement, the time spent on the mediation reduces the time needed for preparing for a trial.

Neither does mediation create extra costs. Mediation reduces costs related to litigation through the early settlement of the dispute. It also, as already mentioned, reduces the trial preparation time required in those cases, which do not settle.

Many people shy away from mediation because they think that an opponent will use the mediation to gain more information about their case. In the mediation process, each party is completely in control of the information disclosed. If a party does not wish the other side to know something, they can keep it to themselves or disclose it to the mediator in confidence. However, if the information is something that might persuade the other party to accept a settlement, or is something they will find out about later on through the civil procedural legal process of "*discovery*", there is little, in those particular circumstances, to be lost by freely disclosing that information.

The parties are entirely free to choose the mediator. In fact, they must agree on his or her appointment. Organisations, such as CEDR, that offer mediation services, have a list of trained mediators with details of their qualifications and experience.

Most mediations are quick, lasting a few hours or a few days, but the mediator will continue to work with the parties as long as they wish to continue with the mediation.

It is often said that arbitration rather than replacing litigation tends to lead to litigation. On the other hand, mediation is not just an extra step in the dispute resolution process; it is usually the final step as most cases settle.

As already mentioned, nothing is lost if the mediation is not successful. Because the mediation process is conducted on a "*without prejudice*" basis, the parties are free to go to court or arbitration. It is as if the mediation did not take place. Nothing revealed in the mediation can be used by either party and neither can the mediator be required to give evidence on behalf of either party in any subsequent court or arbitration proceedings.

4.4. When is Mediation Appropriate?

Mediation is not suitable for all kinds of disputes and in all circumstances.

Mediation will never work unless the parties are genuinely willing to reach an amicable settlement of their dispute and ready to make compromises in the process.

Equally, not all types of dispute are suitable for mediation. For example, where a legal precedent or injunctive relief is sought.

However, mediation should be seriously considered by parties in dispute in the following circumstances:

When they wish to control the outcome of the dispute rather than leave the decision to a judge or arbitrator.

When they wish to preserve or restore a business relationship.

When they wish to settle if they can get acceptable terms from the other side.

When they wish to save the costs of preparing for a trial which may never take place.

When they wish to avoid or limit the risks of going to trial.

When they wish to have a quick settlement, including preferring to settle for less now than perhaps more later.

When they consider that the legal and/or technical complexities of the case are in danger of eclipsing the economic and commercial realities.

When they prefer to settle a dispute in private.

When they feel that an injection of common sense or communication is needed to reach a settlement.

When they believe that a few hours of concentrated effort is likely to produce an acceptable settlement.

4.5. When to Start a Mediation?

A dispute can be referred to mediation at any time, but certain times have been identified by experience as being opportune.

They may be summarised as follows:

When each party to a dispute has taken legal advice and before the dispute escalates. A process called a mediated Pre-Litigation Review can be helpful at this stage. The parties meet to decide whether they really wish to litigate and what information they need in order to make an informed decision

When a writ has been served. Until then the defendant may not recognise the seriousness of the dispute to warrant mediation.

When discovery has taken place and the parties have a clear idea of the situation.

When the case is ready for trial and before the parties have incurred the heavy costs of a trial.

However, it is possible to mediate at any stage of a dispute and, if the mediation proposal is refused, there is no reason why it cannot be proposed again at a later stage.

5. Mediation And Sport

5.1. Mediation by Sports Bodies

A number of Sports Bodies offer mediation as a means of settling sports disputes - or more correctly "sports-related" disputes.

These include the Court of Arbitration for Sport (CAS); the Australian National Sports Dispute Centre (NSDC); and the UK Sports Dispute Resolution Panel (SDRP).

The CAS was created in 1983; the SDRP in 2000; and the NSDC in 1996.

In the United States, under the Ted Stevens Olympic and Amateur Sports Act of 1978 - usually referred to as the "Amateur Sports Act" - National Governing Bodies (NGBs) of each sport are required to submit all disputes within the scope of this Act to binding arbitration by the American Arbitration Association (AAA).

The Act also entitles Olympic, Pan American and Paralympic athletes and other parties dissatisfied with rulings of the United States Olympic Committee (USOC) to be reviewed by the AAA.

The decisions of NGBs, under the provisions of the USOC Constitution, are subject to arbitration by the AAA.

The AAA has extensive experience of conducting Mediations and Arbitrations and has issued a comprehensive set of Arbitration and Mediation Rules.[10]

Although not in stricto sensu a mediation body, but in a number of respects close to being one, FIFA, the World Governing Body, has set up a new Arbitration Tribunal for Football (ATF) particularly for settling compensation disputes under the new International Transfer Rules[11].

En passant, it is also worth mentioning that the International Association of Athletic Federations (IAAF) offers parties in dispute so-called "Paper Only" Arbitrations, which are more flexible and designed to speed up the dispute settlement process. They are also cheaper avoiding the costs associated with a hearing. Paras. 9 & 10 of Rule 23 of the IAAF Handbook (Division II Constitution) provide as follows:

"9. Where a matter has been referred to the Arbitrators under Rule 21.3 then, in place of an oral hearing, an athlete may request that the Arbitrators reach their decision solely on the basis of written submissions. Details of the applicable procedures are to be found in the 'IAAF Arbitration Guidelines'.

10. The Arbitrators shall have the power to decide all matters of fact and law, as well as the powers specified in the IAAF Arbitration Guidelines".

5.2. General Advantages of Sports Mediation

Perhaps the main advantage of using mediation to settle sports disputes is that the process preserves and even restores personal and business relationships[12]. It is well known that the sports world is a small one - everyone seems to know somebody - and relationships - and, indeed, reputations - are, therefore, more important and worth preserving. As Bernard Foucher, President of the French Board of Mediators, has put it:

"Mediation allows legal disputes to be resolved within 'the family of sport'."[13]

As the process is not adversarial, there is no winner and, therefore, no loser. Or, at the very most, the parties share the "pain". Mediation reopens lines of communication, which have often broken down, requiring the parties to co-operate with one another in finding a solution to their problems. Mediation provides the opportunity for co-operative problem solving.

Through careful probing by the mediator, the actual underlying reasons for the particular dispute can be identified and addressed. This goes a long way towards finding an appropriate solution to the parties' problems.

Dispute settlement through the courts or arbitration is backward looking, the decision or award being reached on the basis of past facts and historical background. Mediation, on the other hand, is forward looking, having regard to the future and future possibilities. Mediation is not seeking to apportion blame or fault, but to reach a solution.

Mediation is more flexible than traditional forms of litigation and even arbitration, which has become rather technical and specialised. There are no set rules of procedure to get in the way. The approach is informal and flexible.

Mediation is swift, and this is a particular advantage to sports persons, who often have pressing event and other commitments and commercial deadlines.

This was one of the factors why a dispute in 1999 between Frank Warren, the well-known boxing promoter, and Richie Woodhall, the former WBO super middleweight world champion, was successfully resolved by mediation. The case also illustrates other reasons for opting to settle disputes by mediation.

5.3. Case Study: The Woodhall/Warren Case

In this case, in April 1999, Richie Woodhall sought to terminate his management and promotion agreements with Frank Warren, claiming that Warren was in breach of them and also that the agreements were unenforceable. Woodhall refused to fight for Warren, and also started approaches to other boxing promoters.

On the other hand, Warren refused to let Woodhall go, claiming that contracts were valid; that there was still some considerable time to run on them; and that he was not in breach of them. The parties were adamant in their respective positions.

Woodhall, therefore, started proceedings in the High Court in June, 1999. He requested an early hearing of the case to enable him to fight the defence of his world title by September, as required by the rules of the World Boxing organisation. As the agreements required that any disputes were to be referred to the British Boxing Board of Control, Warren, for his part, sought an order from the Court to that effect.

This dispute had all the makings of a full-blown legal fight in the Courts with lots of blood on the walls - and in the full glare of the media. As such, it would not only be time consuming and expensive to both parties, but also potentially damaging for their reputations. In addition, Woodhall was anxious to get back in the ring and, if he were to continue to be of any value to Warren, he needed to fight his mandatory defence to his world title within a short period of time. So, in all these circumstances, the question arose as to whether the Court was the best forum in which to resolve this bitter dispute. It was decided to refer the dispute to mediation. And the Court was prepared to adjourn the proceedings, for a short time, to enable the parties to see if they could, in fact, settle their differences by this method.

A hastily arranged mediation was set up and conducted by CEDR. Within 72 hours later, the dispute was resolved, and Woodhall signed a new deal with Warren and continued to box for him.

Unfortunately, as mediation is confidential and there is no official record or transcript of the process, it is not possible to have a "blow by blow" account of what was said, what arguments were adduced and exactly why a settlement was reached (e.g. what leverage the mediator was able to apply to reach a compromise) and what precisely were its actual terms.[14]

One thing can, however, be deduced from the brief facts and cir-

10 See AAA official website "www.adr.org".

11 See "FIFA Establishes Independent Football Arbitration Tribunal" Ian Blackshaw "International Sports Law Journal" 2002/1 at pp. 31 - 32.

12 See Blackshaw, I., "Resolving sports disputes the modern way - by mediation", (2000) 18(1) Sport and the Law Journal; Blackshaw, I., "Sporting settlements" (2001) 145 (27) SJ; Newmark, C., "Is mediation effective for resolving sports disputes?", (2000) 5/6 International Sports Law Journal 37; Slate, W., "The Growth of mediation and mediation in Sports Disputes in the US", (2000) Paper presented at the CAS Symposium on Mediation in Lausanne, Switzerland, 4 November, 2000.

13 Foucher, B., "La Conciliation Comme Mode de Règlement des Conflits Sportifs en Droit Français", (2000) Paper presented at the CAS Symposium on Mediation in Lausanne, Switzerland, 4 November, 2000.

14 or more general information, especially the views of the parties and their lawyers on the value of the mediation, see CEDR Press Release of 21 July, 1999.

cumstances of this dispute, there were some sporting and commercial deadlines to concentrate the minds of the parties and act as a spur to reaching a compromise. There was also a pressing need for the parties not to "wash their dirty linen in public"!

6. Concluding Remarks

Of course, it has not been possible to give a comprehensive or detailed account of "Sport and Mediation" in the time available, but only to give you the flavour and whet your appetite for buying my new Book and getting the full account of this fascinating and developing subject!

However, a number of conclusions can be drawn from what I have been able to say and cover in this Paper.

Mediation, as an alternative method of dispute resolution, has something valuable to offer to the world of sport in appropriate cases, including speed, confidentiality and cheapness. Many sports bodies and other organisations have recognised this and are offering - and also promoting - mediation services at the national and the international levels.

Much depends on the personal skills and experience of the mediators, but the success of mediation equally depends on the willingness of the parties to settle their disputes amicably, if at all possible.

One of the main advantages of mediation is that it is a "without prejudice" process and so little, if anything, is lost if it fails. It is very much a case of: "nothing ventured nothing gained!" For as David Richbell, former Director of Training at CEDR, has put it: "Even if a settlement agreement is not reached, nothing is lost, as the parties are better informed, issues are narrowed down and the dispute is moved significantly towards resolution as a result".

Mediation is not a universal solution for dispute settlement. It is very much, to use the sporting metaphor, a case of "horses for courses".

Neither is it cost-free. But savings in time are also saving in monetary terms and management resources.

However, although mediation of sports disputes - both nationally and internationally - is still, in many respects, in the development and evolutionary phase, the cases, in which it has been used successfully to date, clearly demonstrate its potential and usefulness as an alternative dispute resolution method.

In the author's view, it is only a matter of time, as well as education, before sports mediation in its widest sense and forms comes into its own and is more widely and regularly practised and also recognised throughout the sporting world as the effective alternative dispute resolution mechanism which it is undoubtedly proving to be.

❖

The Role and Functions of the Court of Arbitration for Sport (CAS)

by **Matthieu Reeb***

1. Introduction

Since the 1980s, sport is influencing ever larger sections of our society as a result of its commercialization, media coverage and internationalization. The astonishing speed with which professional sport and high level sport in general have developed means that athletes, sports clubs, federations, sponsors, sports event organisers and other people or bodies involved in sport become much more demanding when it comes to legal matters. The logical result of this situation is a higher number of potential sources of disputes, given the growth in the economic issues at stake.

Throughout many years the sports world has developed its own rules and regulations almost completely independently, which at present are regularly in conflict with the laws and jurisdiction of the different states. And, where there is concurrence, sometimes there are conflicts and new sources for litigations. The attitude of state courts in relation to sporting issues has gradually changed, and intervention by state judges is on the increase.

It was in this context that the CAS was created. For even if sports-legal disputes can always be settled by the ordinary courts, an international court like the CAS, which can offer specialist knowledge, low cost and rapid action, provides a means of resolving sports disputes adapted to the specific needs of the international sporting community.

The parties involved in a sports-related dispute generally have three possible ways of resolving litigation:

- to appeal to the internal authorities created by the sports federations concerned and/or
- take the dispute to the competent state courts or
- submit the litigation to arbitration or mediation.

It is important to point out that the regulations of sports federations cannot exclude an appeal of a dissatisfied member (athlete, club, etc.) to external judicial authorities, namely state courts or arbitral tribunals.

The Court of Arbitration for Sport is competent to resolve all types of disputes of a private nature related to sport. The article R27 of the Code of Sports-related Arbitration (the Code) stipulates that the CAS has jurisdiction solely to rule on disputes connected with sport. In 15 years, the CAS has never declared itself to lack jurisdiction on the grounds of a dispute's not being related to sport.

Two categories of disputes can be distinguished:

a) Disputes arising from all types of legal relations between parties and for which it has been decided to call upon CAS arbitration or mediation. For example: sponsoring contracts, contracts for the granting of television rights of a sport event, contract between an athlete and his manager, questions related to civil liability, etc.
b) Disputes arising from last instance decisions made by the tribunals of sports federations, when the statutes and regulations of these entities or a specific agreement provide for the jurisdiction of CAS. For example: disciplinary issues, in particular regarding doping, decisions regarding the qualification of athletes, etc.

2. The Institution

2.1. History of CAS

2.1.1. Origins

At the beginning of the 1980s, the regular increase in the number of international sports-related disputes and the absence of any independent authority specializing in sports-related problems and authorized to pronounce binding decisions led the top sports organizations to reflect on the situation.

In 1981, soon after his election as IOC President, H.E. Juan Antonio Samaranch had the idea of creating a sports-specific jurisdiction. The following year at the IOC Session held in Rome, IOC

* Secretary General of the Court of Arbitration for Sport (CAS).

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Arbitral and Disciplinary Rules of International Sports Organisations

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

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

This volume contains the basic documents on the 'administration of justice', i.e., the law on disputes and disciplinary action, in the international sporting world. Included are, *inter alia*, the Statutes of the Court of Arbitration for Sport, its Rules for the Resolution of Disputes during the Olympic Games and its Mediation Rules. The following categories of rules concerning the international Olympic Sports federations are reproduced in the pertinent section: (1) arbitral and disciplinary rules in the statutes, constitutions, bye-laws and general regulations; (2) special arbitral and/or disciplinary rules and regulations; (3) disciplinary rules that are embodied in the international competition regulations of the international federations; and (4) disciplinary rules in the 'laws of the game' per sport.
This publication is realised within the framework of the international sports law project of the T.M.C. Asser Institute in The Hague and with the cooperation of the International Olympic Committee. It is the third volume in the Asser Institute's series of collections of documents on international sports law and as such a follow-up publication to *Basic Documents of International Sports Organisations* (Kluwer Law International, 1998), which contains the statutes and constitutions of the international Olympic sports federations, and *Doping Rules of International Sports Organisations* (T.M.C.Asser press, 1999).
Arbitral and Disciplinary Rules of International Sports Organisations provides an invaluable source of reference for sports officials, legal practitioners and the academic world. With the increasing public interest in the legal aspects of sports, this collection of documents is a timely and welcome contribution to enhancing the accessibility of basic texts on international sports law.

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member H.E. Judge Kéba Mbaye, who was then a judge at the International Court of Justice in The Hague, chaired a working group tasked with preparing the statutes of what would quickly become the "Court of Arbitration for Sport".

The idea of creating an arbitral jurisdiction devoted to resolving disputes directly or indirectly related to sport had thus firmly been launched. Another reason for setting up such an arbitral institution was the need to create a specialized authority capable of settling international disputes and offering a flexible, quick and inexpensive procedure.

The initial outlines for the concept contained provision for the arbitration procedure to include an attempt to reach a settlement beforehand. It was also intended that the IOC should bear all the operating costs of the court. Right from the start, it was established that the jurisdiction of the CAS should in no way be imposed on athletes or federations, but remain freely available to the parties.

In 1983, the IOC officially ratified the statutes of the CAS, which came into force on 30th June 1984. The Court of Arbitration for Sport became operational as of that time, under the leadership of the President Mbaye and Secretary general, Mr Gilbert Schwaar.

2.1.2. The Beginning (1984-1994)

The CAS Statute of 1984 was accompanied by a set of procedural Regulations. Both were modified slightly in 1990. Under these rules, the CAS was composed of 60 members appointed by the IOC, the International Federations (IF), the National Olympic Committees (NOC) and the IOC President (15 members each). The IOC President had to choose those 15 members from outside the other three groups. In addition, all the operating costs of the CAS were borne by the IOC. In principle, the proceedings were free of charge, except for disputes of a financial nature, when the parties could be required to pay a share of the costs. The annual budget was approved by the CAS President alone. What is more, the CAS Statute could be modified only by the IOC Session, at the proposal of the IOC Executive Board.

The CAS Statute and Regulations provided for just one type of contentious procedure whatever the nature of the dispute. Alongside this contentious procedure there was also a consultation procedure open to any interested sports body or individual. Through this procedure, the CAS could give an opinion on a legal question concerning any activity related to sport in general. The consultation procedure still exists, but it has been modified somewhat and access to it restricted.

In 1991, the CAS published a Guide to arbitration which included several model arbitration clauses. Among these was one for inclusion in the statutes or regulations of sports federations or clubs. This clause prefigured the subsequent creation of special rules to settle disputes arising in response to a decision taken by an organ of a sports federation (appeals procedure).

The International Equestrian Federation (FEI) was the first sports body to adopt this clause. This was the starting point for several "appeals" procedures even if, in formal terms, such a procedure did not yet exist. After that, other national and international sports federations adopted this appeals arbitration clause, which meant a significant increase in the workload of the CAS.

2.1.3. The Independence

In February 1992, a horse rider named Elmar Gundel lodged an appeal for arbitration with the CAS on the basis of the arbitration clause in the FEI statutes, challenging a decision pronounced by the federation. This decision, which followed a horse doping case, disqualified the rider, and imposed a suspension and fine upon him. The award rendered by the CAS on 15th October 1992 found partly in favour of the rider (the suspension was reduced from three months to one month). Unhappy with the CAS decision, Elmar Gundel filed a public law appeal with the Swiss Federal Tribunal. The appellant primarily disputed the validity of the award, which he claimed was rendered by a court which did not meet the conditions of impartiality and independence needed to be considered as a proper arbitration court.

In its judgment of 15th March 1993 (published in the Recueil Officiel des Arrêts du Tribunal Fédéral [Official Digest of Federal Tribunal Judgments] 119 II 271), the Federal Tribunal (FT) recognized the CAS as a true court of arbitration. The supreme court noted, *inter alia*, that the CAS was not an organ of the FEI, that it did not receive instructions from this federation and retained sufficient personal 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 judgment the FT drew attention to the numerous links which existed 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 Statute; and the considerable power given to the IOC and its President to appoint the members of the CAS. In the view of the FT, such links would have been sufficient seriously to call into question the independence of the CAS in the event of the IOC's being a party to proceedings before it. The FT's message was thus perfectly clear: the CAS had to be made more independent of the IOC both organizationally and financially.

2.1.4. The Reform of 1994

This Gundel judgment led to a major reform of the Court of Arbitration for Sport. First of all, the CAS Statute and Regulations were completely revised to make them more efficient and to modify the structure of the institution, to make it definitively independent of the IOC which had sponsored it since its creation. Very soon afterwards, on 13th and 14th September 1993, the "International Conference Law and Sport" (which resulted in a publication of the same name) was held in Lausanne, to present the planned CAS reforms. The biggest change resulting from these was the creation of an "International Council of Arbitration for Sport" (ICAS) to look after the running and financing of the CAS, thereby taking the place of the IOC.

Other major changes were to create two arbitration divisions (Ordinary arbitration division and Appeals arbitration division) in order to make a clear distinction between disputes of sole instance and those arising from a decision taken by a sports body. Finally, the CAS reforms were definitively enshrined in a new "Code of Sports-related Arbitration", which came into force on 22nd November 1994.

2.1.5. The Paris Agreement

The creation of the ICAS and the new structure of the CAS were approved in Paris, on 22nd June 1994, with the signing of the "Agreement concerning the constitution of the International Council of Arbitration for Sport", known as the "Paris Agreement". This was signed by the highest authorities representing the sports world, viz. the presidents of the IOC, the Association of Summer Olympic International Federations (ASOIF), the Association of International Winter Sports Federations (AIWF) and the Association of National Olympic Committees (ANOC).

The Agreement determined the appointment of the initial members of the ICAS and the funding of the CAS.

2.1.6. The recent CAS expansion

Since the Paris Agreement was signed, the majority of the International Federations and the National Olympic Committees have included in their statutes an arbitration clause referring disputes to the CAS.

The Anti-Doping Code of the Olympic Movement, which is intended to be applied by all Olympic International Federations, institutes the Court of Arbitration for Sport as last instance tribunal for all doping-related disputes.

The International Council of Arbitration for Sport has created two decentralized offices, one in New York and one in Sydney, in order to facilitate the access to CAS in North America and Oceania. The ICAS also created ad hoc Divisions established for a limited period of time during specific sports events (Olympic Games, Commonwealth Games).

The new mediation procedure implemented by the ICAS in 1999

was created with a view to extending the services offered by CAS to resolve sports-related disputes.

2.2. Structure

2.2.1. The Code of Sports-related Arbitration and Mediation Rules
Since 22nd November 1994, the new Code of Sports-related Arbitration (hereinafter the Code) has governed the organization and arbitration procedures of the CAS. As such, the 69-article Code is divided into two parts: the Statutes of bodies working for the settlement of sports-related disputes (articles S1 to S26), and the Procedural Rules (articles R27 to R69). In 1999, mediation rules (14 articles) have been added to the Code.
The Code provides for four specific procedures:
- the ordinary arbitration procedure
- the appeals arbitration procedure
- the consultation procedure which allows certain sports entities to request advisory opinions from CAS
- the mediation procedure.

2.2.2. The International Council of Arbitration for Sport (ICAS)
The ICAS is the supreme organ of the CAS. It is a foundation under Swiss law. The main task of the ICAS is to safeguard the independence of the CAS and the rights of the parties. To this end, it looks after the administration and financing of the CAS.

The ICAS is composed of 20 members who must all be high-level jurists well-acquainted with the issues of arbitration and sports law.

Upon their appointment, the ICAS members must sign a declaration undertaking to exercise their function in a personal capacity, with total objectivity and independence. This obviously means that in no circumstances can a member play a part in proceedings before the CAS, either as an arbitrator or as counsel to a party.

The ICAS exercises several functions which are listed under article S6 of the Code. It does so either itself, or through the intermediary of its Board, made up of the ICAS President and two vice-presidents, plus the two presidents of the CAS Divisions. There are, however, certain functions which the ICAS may not delegate. Any changes to the Code of Sports-related Arbitration can be decided only by a full meeting of the ICAS and, more specifically, a majority of two-thirds of its members. In other cases, a simple majority is sufficient, provided that at least half the ICAS members are present when the decision is taken. The ICAS elects its own President, who is also the CAS President, plus its two Vice-presidents, the President of the Ordinary Arbitration Division, the President of the Appeals Arbitration Division and the deputies of these divisions. It also appoints the CAS arbitrators and approves the budget and accounts of the CAS.

2.2.3. The Court of Arbitration for Sport (CAS)
The CAS performs its functions through the intermediary of arbitrators, of whom there are no less than 150, and mediators (currently more than 50) with the aid of its court office. One of the major new features following the reform of the CAS was the creation of two divisions: an "Ordinary Arbitration Division", for sole-instance disputes submitted to the CAS, and an "Appeals Arbitration Division", for disputes resulting from final-instance decisions taken by sports organizations. Each division is headed by a president.

The role of the division presidents is to take charge of the first arbitration operations once the procedure is under way and before the panels of arbitrators are appointed. The presidents are often called upon to issue orders on requests for interim relief or for suspensive effect, and intervene in the framework of constituting the panels of arbitrators. The aforesaid panels subsequently take charge of the procedure.

The CAS arbitrators are appointed by the ICAS for a renewable term of four years. The Code stipulates that the ICAS must call upon "personalities with a legal training and who possess recognized competence with regard to sport". The appointment of arbitrators follows more-or-less the same pattern as for the ICAS members. The candidates are proposed by the IOC, the IFs and the NOCs; and the ICAS appoints 30 arbitrators from the list of candidates put forward by each of the above bodies. Thirty other arbitrators are appointed by the ICAS with a view to safeguarding the interests of the athletes, with the remaining thirty chosen from among personalities independent of the bodies responsible for proposing arbitrators.

Even though the CAS arbitrators are proposed by sports organizations, the fact remains that they must carry out their functions with total objectivity and independence. What is more, when they are appointed, they have to sign a declaration to this effect.

The arbitrators are not attached to a particular CAS division, and can sit on panels called upon to rule under the ordinary procedure as well as those ruling under the appeals procedure. CAS panels are composed either of a single arbitrator or of three. All arbitrators are bound by the duty of confidentiality and may not reveal any information connected with the parties, the dispute or the proceedings themselves.

2.2.4. The CAS Court Office
The CAS Court Office is located in Lausanne, Switzerland. It is headed by the Secretary General, assisted by a Counsel and two secretaries. The main task of the CAS Court Office is to supervise the arbitration and mediation procedures and to advise the arbitrators and the parties (procedure and case law). The CAS Court Office also performs other tasks such as: organization and preparation of ad hoc Divisions, organization of internal seminars, promotion of the institution, contact with the media, etc.

2.3. Procedures applicable before the CAS

The CAS fulfils four specific functions:

In its first role, the CAS is seized of disputes immediately and directly as an arbitration court of first and sole instance, either by virtue of an arbitration clause contained in a contract or through a submission agreement signed after the dispute has arisen. In that function, the CAS can for instance settle disputes arising out of sponsoring contracts, contracts between athletes and managers, contracts granting TV rights in connection with sports events, etc.

Secondly, the CAS, by its Appeals Arbitration Division, intervenes as a last instance court of appeal, in case a statement of appeal is lodged by any party against a decision of a sports federation, in principle a disciplinary decision. Also in that case, the jurisdiction of the CAS must be based on an arbitration agreement or arbitration clause, for example contained in the statutes or the regulations of sports federations.

On 31 December 2001, all International Olympic Federations, with the exception of FIFA, have inserted in their regulations an arbitration clause referring to CAS arbitration. In addition, several non-Olympic federations like UEFA, FIM (motorcycling), FIDE (chess) and IWSF (water ski) recognize the jurisdiction of CAS.

The working languages of the CAS are French and English. Another language can be chosen by the parties if they agree to do so and if the Panel agrees as well.

The seat of the CAS is in Lausanne, Switzerland. This seat is also the seat of every arbitration conducted in accordance with the Code of Sports-related Arbitration, even if the hearings are held elsewhere. This means that all CAS arbitrations are governed by the Swiss Federal Act on Private International Law (PIL Act), to the extent that one of the parties is domiciled or has its registered office outside Switzerland. This Act is the *lex arbitrii* and applies to issues such as arbitrability, validity of the arbitration agreement and remedies against awards.

In its third role, the CAS gives advisory opinions, which may be requested by certain sports bodies (IOC, IFs, NOCs) about any legal issues related to sport. Needless to say that an advisory opinion does not constitute a binding arbitral award.

Finally, CAS also provides for mediation services in order to offer to the parties an alternative method of settling certain kind of disputes (i.e. disciplinary matters cannot be submitted to CAS mediation). 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 their dispute.

The party wishing to institute mediation proceedings addresses a request in writing to the CAS Court Office. Then, a mediator is appointed by the parties from among the list of CAS mediators or, in the absence of any agreement, by the CAS President after consultation with the parties. The mediation procedure is conducted in the manner agreed by the parties. Failing such agreement, the mediator determines the manner in which the mediation will be conducted. The mediator promotes the settlement of the issues in dispute in any way that he believes to be appropriate. To achieve this, he will propose solutions. However, the mediator may not impose a solution of the dispute on either party. If successful, the mediation is terminated by the signing of a settlement by the parties. If the mediation fails, the parties may submit their dispute to CAS arbitration or to another arbitral or judicial authority.

2.4. Decentralization

2.4.1. The CAS decentralized offices
1996 was the year of decentralization for the CAS. The ICAS created two permanent decentralized offices, the first in Sydney in Australia, and the second in Denver, in the United States of America. These offices are attached to the CAS court office in Lausanne, and are competent to receive and notify all procedural acts. Creating them made it easier for parties residing in Oceania and North America to have access to the CAS. In the year 1999, the North America Registry moved to New York.

2.4.2. The ad hoc Divisions
Still in 1996, the ICAS created a CAS ad hoc division with the task of settling finally and within a 24-hour time-limit any disputes arising during the Olympic Games in Atlanta. This ad hoc division was composed of two co-presidents and 12 arbitrators who were in the Olympic city throughout the Games. To ensure easy access to the ad hoc division for all those taking part in the Olympic Games (athletes, officials, coaches, federations, etc.), a special procedure was created for the occasion, which was simple, flexible and free of charge.

In 1998, two new CAS ad hoc divisions were set up by the ICAS. The first was created for the Olympic Winter Games in Nagano, and the second for the Commonwealth Games in Kuala Lumpur. Both of these divisions were organized in much the same way as for Atlanta (but the number of arbitrators was reduced to six), and the applicable procedure also remained virtually identical. In 2000, the ICAS created two new ad hoc Divisions: one for the European Football Championship in Belgium and the Netherlands and one for the Olympic Games in Sydney. In 2002, a new ad hoc Division has been created on the occasion of the XIX Olympic Winter Games in Salt Lake City and another one for the XVII Commonwealth Games in Manchester.

2.5. Enforcement of CAS awards and legal remedies against them

The awards rendered by the CAS can be enforced in the countries which have signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It shall be noted that according to this Convention, enforcement could be refused if the competent authority in the country where the enforcement is sought finds that sports-related disputes are not capable of settlement by arbitration under the law of that country.

Pursuant to Swiss PIL Act, the award can only be challenged before the Swiss Federal Tribunal for limited grounds, namely, incorrect constitution of the arbitral tribunal, lack of jurisdiction, violation of the principle of equal treatment or incompatibility with public policy. If none of the parties has its domicile or business establishment in Switzerland, they may, by an express statement in the arbitration agreement, exclude all setting aside proceedings, or limit such proceedings to one or several of the above-mentioned grounds.

2.6. Advantages offered by CAS arbitration/mediation

Such advantages can be listed as follows: confidentiality, specialization of the arbitrators/mediators, flexibility and simplicity of the procedure, speed, reduced costs and international effectiveness of the arbitral award.

In terms of confidentiality, the CAS arbitration and mediation procedures are private and therefore take place without the public or the media knowing about it. The hearings are not public.

There are, however, arbitration cases where the public interest and the right to information are stronger than the obligation of confidentiality. This is the case where making an award public may have a dissuasive effect. For example, awards pronounced in connection with doping. In such cases, a Panel of the Court of Arbitration for Sport may take the decision to publish the award.

The CAS Rules are designed to avoid formalism, in order to facilitate access to the CAS. Thanks to the great flexibility of the CAS procedure, its rapidity is also guaranteed. For example, the appeals arbitration procedure provides for a 4-month time limit from the filing of the request for arbitration to issue a final award. A CAS mediation is supposed to be achieved within 3 months in principle.

One of the main objectives of the CAS was to establish a low cost procedure. For example, the appeals procedure is free of charge. It implies that the costs and fees of the arbitrators as well as the administrative costs are borne by the CAS. There is only a limited financial contribution from the parties in the other CAS procedures, on the basis of fixed rates established by CAS.

18 years after its creation, the CAS already occupies an important place within the international sports community and the world of international arbitration. The growth in its activity and the great variety of the cases registered shows that this institution answers a real need. At a time when the number of sports-related disputes is growing, the CAS must continue its evolution in order to keep on providing international sport with a dispute-resolution system which fully meets its requirements.

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Sport and Mediation in The Netherlands

by **Jan Loorbach***

Tobias Michael Carel Asser, who gave his name to today's host, the Asser Institute, lived from 1838 until 1913.

He was a law professor at the Academie Illustre in Amsterdam, the predecessor of the Amsterdam University of today.

He was also a lawyer, the fourth generation in an Asser dynasty of lawyers, that started to practice law in Amsterdam in 1783.

The Asser law firm is one of the many smaller firms that form the roots of the today's partnership of which I am a member.

That is why I am particularly privileged to be here.

1. Sport has as great history in the Netherlands. Mediation is beginning to find its place in this country amongst various means of dispute resolutions. The combination of sports and mediation has, however, no history at all, no relevant substance at this moment and, therefor, an uncertain future.

* Nauta Dutilh, Lawyers, Rotterdam and, inter alia, Chairman of the Team de Mission of NOC*NSF at the Sydney Olympics.

2. The origins of mediation in the Netherlands lie with divorce settlement. Lawyers started to specialise, even by having a specialist association within the Dutch Bar, with divorce mediation long before the general idea of mediation was introduced in other areas. Divorce mediation was certainly successful and the more general elements of its success were possibly recognised as applicable elsewhere.

Subsequently, the concept of mediation was more generally accepted as an alternative dispute resolution in the middle of the 90's of the last century. So that is less than 10 years ago.

Evidently, this fitted in the international trend, and the reasons for this increased attention for Alternative Dispute Resolution in general, were in the Netherlands not different from those elsewhere:

- congested courts,
- everlasting litigation,
- higher costs and
- a sense of discomfort with the parties about the lack of control over "your own case".

3.1 The foundation Netherlands Mediation Institute (Stichting Nederlands Mediation Instituut) came into existence in 1995 and then produced its first mediation regulations. In the same period, a few highly qualified institutes started to offer training courses for mediators which attracted a large flood of interested professionals, of whom a lot are registered with the Dutch Bar. At the same time many members have entered from very varied other professions.

Ever since, the general impression is that in the Netherlands the enthusiasm to be a mediator is substantially bigger than to be a party in a mediation procedure or to recommend, as a lawyer, to your client to accept this alternative dispute resolution.

This is even true while the Dutch government is expressly supporting the idea of mediation, to take away some of the burden which some times seem to suffocate our public system of justice.

As an example of more similar experiments I may refer to an initiative of the Rotterdam District Court. In all pending litigation, the legal counsels were asked to report whether they would be willing to have a settlement of the case tried by court-supervised mediation. From this vast operation the yield of mediations was negligible.

4.1 However, mediation seems to gain terrain in certain areas, such as labour conflicts within companies, social security disputes, and familiar areas.

"ADR Actueel" is a bi-monthly magazine, in which mediators tell the story of their cases.

4.2 I was President of the Rotterdam Bar from 1995 until 1998, and was trained as a mediator in the first year of this period. A major part of this job is settling disputes between a client and his lawyer, or between lawyers. All this has always been done in a very informal way, although I used evidently some of the techniques of my mediation training. I never ran into a situation, that mediation was the better alternative for this more informal approach on the one hand, or a possibility to avoid more formal and polarised procedures.

Later, in my ordinary law-practice, I experienced quite a few times that the negative answer on the "what's in it for me"-question blocked the way to mediation. When one party suggests mediation, he clearly sees the advantages of this method for his position, and it seems an innate Dutch reaction that the proposed mediation is for that very reason clearly disadvantageous to the other party.

However, I assisted one of two disputing parties in a substantial litigation, and in that case both parties were, from the beginning, convinced that mediation was the best way to solve the dispute. This however, was a dispute about the breaking up of the partnership of lawyers. They know the burdens and the perils of arbitration or court litigation.

4.3 The fact that mediation is not a phenomenon which is an immediate success in the Netherlands could therefore possibly be explained by the following considerations:

- When in dispute, parties do have a basic intention to solve this dispute reasonably and informally, without needing the formal format of mediation, and therefore, mediation does not add so much to the regular informal settlement traditions in the Netherlands;
- Whenever mediation is suggested by a party as a more formal means of dispute resolution, the other party will rather be suspicious and sceptical then receptive and open-minded.
- Possibly a few well publicised milestone mediations would change the climate.

5.1 In sports, a lot of legal decision making takes place within the judicial bodies within the associations.

Most of it is connected with disciplinary jurisdiction, suspending players for a few games for abusing the referee, or for a few years for abusing performance enhancing substances.

Evidently, this is a part of the sport-related traditional judicial system where mediation has no role. That seems to leave only a limited sports related amount of issues, for which mediation could be the effective alternative.

One could think of labour related issues, specifically in the field of transfers, sponsoring issues, broadcasting rights, nomination procedures to participate for a country in international events like Olympic Games or world championships.

A lot of possible disputes, related to these subjects, seem to be unnegotiable, and therefore not fit for mediation. For instance, the decision of an Olympic committee to nominate or not nominate an athlete, will be based on the strict application of rules, and such decision is fully correct or fully incorrect; a national Olympic committee will not be in the position to jeopardise the integrity of its nomination system by bargaining about its interpretation and effects. However, a lot of general subjects and some specifically sports-related subjects would be quite fit for mediation.

5.2 I interviewed most of the well-known sports lawyers in the Netherlands, and the heads of the legal departments of the football association KNVB and NOC*NSF. No-one ever was involved in sports-related mediation. We discussed how this could be explained.

The first general consideration was in line with what I have already said: in general there is not a great enthusiasm in the legal practice in the Netherlands to use the instrument of mediation. One negotiates settlement in an informal way, and sees no added value of mediation.

If a conflict has been proven to be un-settable in an informal way, it is the sports-mentality to have the game played, and to have a winner. Maybe Dutch sports does not like a draw after all.

This is only a rather superficial diagnosis.

5.3 Nevertheless, it seems that, in sports, there are often quite good arguments for mediation.

The parties in conflict are often forced into continues co-operation, notwithstanding their conflict, like a sports association and its clubs, clubs and their contracted sportsmen, an Olympic committee and the athlete that has not been nominated for the first coming Olympic Games, but will take a second chance over four years, TV-broadcasters and sports-associations or event organisers, et cetera.

Another aspect of sports disputes is media interest. Whenever public attention is undesirable, the discretion of mediation certainly would be an asset.

David and Goliath Battle over Arsenal Football Clothing

The long-running legal battle over the unauthorised sale of Arsenal branded clothing is coming to an end. Matthew Reed, a trader, has been selling scarves bearing the word "Arsenal" outside Arsenal's ground for more than thirty years, although his stall carries a notice that the merchandise is unofficial.

The English High Court in April of last year held him not guilty of "Passing Off" as no one was deceived. And considered he was using the Arsenal registered trade mark as a badge of support loyalty or affiliation rather than a badge of origin. The matter was referred to the European Court of Justice in Strasbourg for a ruling under the 1988 European Trade Mark Directive.

On 13 June this year, the Advocate General, Ruiz-Jarabo Colomer, gave his opinion to the Court.* Although not legally binding, the Court usually follows these opinions when giving its judgement.

He considers the Directive enables a trade mark owner to stop a third party using identical signs for identical goods capable of indicating their origin, provenance, quality or reputation, provided the use is commercial.

In his view, using a trade mark for supplying merchandise in the market, even if perceived as a badge of support, loyalty or affiliation, constitutes commercial use. The decisive factors are: use in the course of trade and whether persons buy the goods because they identify with the mark or its owner. Other motives are irrelevant.

Ruiz-Jarabo considers that, because professional football is now an industry, generating mega sums and thousands of jobs, football clubs are entitled to protect their intellectual property against unauthorised use.

This is in line with Trade Mark Law. Reed's use of the Arsenal name was essentially a commercial one and the distinction made by the English Court between that use and as a badge of support, loyalty or affiliation is an artificial one.

However, as no one was deceived, how does this square with the principal aim of trade mark law to protect the consumer? A point that might be taken when the case comes back to the High Court.

In any case, it seems to me that this long running battle between David and Goliath could have been settled amicably, cheaply and quickly through mediation or a combined process of mediation and arbitration (known in the jargon as "med-arb") - mediation to identify the legal issues and arbitration to settle them!

Ian Blackshaw

* Case C - 206/01, Arsenal Football Club plc v. Matthew Reed.

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The European Working Congress on Harmonisation and Future Developments in Anti-Doping Policy, Arnhem, 11-12 April 2002

This congress, which Janwillem Soek and the undersigned attended on behalf of the ASSER International Sports Law Centre, had been postponed last October due to the terrorist attacks in the United States and, because of this, could now focus substantively on the World Anti-Doping Code which WADA (the World Anti-Doping Agency) is currently developing. The Congress took place at the National Sport Centre Papendal and had been organised by NOC*NSF (Netherlands Olympic Committee * Netherlands Sports Confederation) and NeCeDo (Netherlands Centre for Doping Affairs). The Congress also mainly served to build support for such a Code among the well over a hundred sports administrators from a large number of European countries who were present. Similar meetings are apparently being organised in other parts of the world as well.

It was gratifying to find that the report by an international study group (consisting of the Nuremberg University, the Asser Institute, the Max Planck Institute and Anglia Polytechnic University) which had been completed at the end of 2001 for the benefit of the European Commission and which dealt with the *"Legal Comparison and Harmonisation of Doping Rules"* had meanwhile also become known to the WADA Anti-Doping Project Team. The rationale for this extensive study, which both concerned the doping regulations of sports organisations and national legislation on the matter, was that a thorough codification, harmonisation and progressive development of "doping law" is by definition impossible without first examining what legislation and regulations are already available and drawing up a mutual comparison of the findings. The EU study was thus intended to form a basis for harmonisation. Thereby, attention had also been paid to what could be termed the "*instrumental*" aspect, i.e. the question what type of legal instrument should be used to give shape to harmonisation. A WADA Code has now been opted for, although the reason for this choice was not expressly clarified in Arnhem. This was apparently considered to be common knowledge. It would, however, not have been overly extravagant to once more reiterate this for the assembled company. Of course, we know that WADA, which has the explicit statutory objective to harmonise or even unify doping rules, is a worldwide organisation, but then, so is the IOC, which of tradition boasts a Code (now entitled the Olympic Movement Anti-Doping Code). At the conference it became clear that WADA, as a "mixed" organisation in which both organised sports and governments / intergovernmental organisations participate, has the presumption that a new Code will eventually also be accepted by the public authorities. The 2004 Olympic Games in Athens are an important moment on the timeline that has been drawn up to persuade sports and governments to side with the Code. No discussion took place at all in Arnhem about how this should actually be brought about: are governments to adopt the Code and include it in their legislation or would a political declaration of support suffice? This also raises the question of the nature of the Code's binding power. This too was ignored in Arnhem. One thing at least ought to be clear: before any democratic government were to accept the Code, even if only in the political sense, it should be established without a doubt that the Code complies with the generally recognised principles of law which the Council of Europe's Anti-Doping Convention also expressly refers to. One could think of norms and values such as those that have been laid down in the human rights treaties of the United Nations and the Council of Europe (fair trial, due process, rights of the accused). In Arnhem, the members of the WADA Anti-Doping Code Project Team still seemed insufficiently aware of this! Is this another instance where the far too "autonomous" thinking of the sports world will be regretted later? It would be advisable for WADA to welcome a constitutional law and a human rights expert into their midst in order to ensure that the final version of the Code would be able to withstand any criticism beforehand. This finally brings us to the, in fact, preliminary question what "harmonisation" should be understood to mean in this context. What is harmonisation as the objective of "legislative techniques"? This question of principle was as such not discussed either at the conference. One could describe it as the elimination of differences or the creation of similarities between rules on the same subject matter to the degree that the effectiveness of the new rules is optimal, the legal uncertainty for those involved is minimal, and the transparency for all parties is maximal. In this context, it is therefore also important to keep sight of the relationship between government rules and sport rules, also in the sense of the question what organised sport could learn from the special legislation in a number of countries concerning doping with a view to the harmonisation of its own rules. Furthermore, from this point of view, to harmonise means more than a merely legal exercise, as it requires a trained eye for the application and enforcement of rules in the everyday reality of sport. Who are the parties involved, the stakeholders? What are their interests and how do they operate? A contribution from a field such as "sociology or psychology of sports law" would not be amiss here!

Robert Siekmann

Conclusions and recommendations

European Working Congress on Harmonisation and Future Developments in Anti-Doping Policy
11-12 April 2002, Arnhem, The Netherlands

Thursday 11 April, day 1 of the congress

For the first time, specific draft articles of the World Anti-Doping Code (World Code) were discussed in public. All congress participants were invited to react to the most recent draft text. These reactions have been used by the project team that is currently working on the World Code to compose its first draft version. The following workshops were held:

Workshop 1: Results management prior to hearing, article 9.6
Chair: Mr. Alain Garnier (member World Anti-Doping Code Project Team.
Speaker: Mr. Richard Young (member World Anti-Doping Code Project Team)

Workshop 2: Education in anti-doping policies, article 7
Chair: Mr. Svein-Erik Figved (chair World Anti-Doping Code Project Team)
Speaker: Ms. Angela Schneider (WADA Director, Education and Ethics)

Workshop 3: Roles and responsibilities of stakeholders, article 5
Chair: Mr. Casey Wade (member World Anti-Doping Code Project Team)

Speaker: Mr. Rune Andersen (member World Anti-Doping Code Project Team)

Workshop 4: Sanctions, article 9.8
Chair: Mr. Casey Wade (member World Anti-Doping Code Project Team)
Speaker: Mr. Richard Young (member World Anti-Doping Code Project Team)

The latest updated versions of the World Code can be found at the website of the World Anti-Doping Agency at http://www.wada-ama.ong. The following text is taken from this site and explains in brief the backgrounds of the World Code and addresses the process of development, acceptance and implementation of the World Code. More information can be found on the website or can be obtained from the World Anti-Doping Agency.

World Anti-Doping Code - (Main Page)
The universal World Anti-Doping Code (World Code) is intended to ensure harmonisation of anti-doping efforts across all sports and governments. A single Code that is applicable and acceptable for all stakeholders in the World anti-doping effort will help achieve this objective. The World Code is a core document that will provide a framework for anti-doping policies, rules and regulations within sport organisations and among public authorities.

WADA will continue to facilitate a broad consultative process for developing the World Code. A main objective of this process is that the World Code will be operational and put into effect by the beginning of 2004, prior to the Athens 2004 Olympic Games. The existing Olympic Movement Anti-Doping Code remains in force as the basis for current international anti-doping rules and regulations until that time.

Explanatory documents
This section contains documents giving explanatory comments to different articles in the World Anti-Doping Code and also executive summaries of the Code.

World Anti-Doping Program
The World Anti-Doping Code is the basic document in the World Anti-Doping Program. The Program is structured in three levels and includes the World Code (level 1), International Standards (level 2) and Models of Best Practice (level 3). This section presents documents that describe and explain the World Anti-Doping Program and you will also find drafts of the different International Standards as the List of Prohibited Substances and Methods, Laboratory Standards and Standards for Sample Collection.

Code process
The process of developing, accepting and implementing the World Anti-Doping Code is of vital importance with regard to the success of the World Code as the cornerstone document in the world anti-doping effort. The documents presented in this section describe the plans for the process and provide updates of the progress of the process.

Presentations
Comments and feedback from different stakeholders in the sport environment is critical in the development of the World Anti-Doping Code. An important part of this consultative process is to present and explain the content of the World Code including the reasoning for different articles and the Code process in itself. In this section you will find different Power Point presentations that will support you in your consultative process.

Contact us
Comments and proposals from different stakeholders in the sport environment are critical in the development of the World Anti-Doping Code. We will encourage you to provide us with relevant feedback and questions at any time in the process.

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Friday 12 April, day 2 of the congress

Pre-selected items that are part of the daily work of people working in the field of anti-doping were discussed during several workshops. As a result of these discussions the congress participants agreed upon the following recommendations, firmly believing that, if followed, they will be of benefit to future anti-doping policies. The recommendations are addressed to specific stakeholders.

Workshop 1: Law & Regulations
Chair: Mr. Joseph de Pencier

Appeals and the role of the Court of Arbitration for Sport (CAS)
Recommendation addressed to WADA
Article 9.9 of the World Anti-Doping Code should name the ultimate appeal body for doping cases. The Court of Arbitration for Sport should be that ultimate appeal body.

Recommendation addressed to NF's/IF's
Recourse to domestic courts should not be precluded. The use of domestic courts will be discouraged if the National and International Federations ensure that their appeal procedures include basic principles such as fairness, due process, appeal and the right to be heard and, more important, apply those principles.

Differences in anti-doping laws between nations and federations
Recommendation addressed to all stakeholders with authority to collect samples:
When sample collection is done by competent anti-doping authority that has accepted the Code, all other anti-doping authorities accepting the Code with authority over the athlete should accept the sample collector's results management, sanction and appeal provisions, subject only to the possibility of appeal to the independent appeal body (such as CAS).

Recommendation addressed to IF's and NADO's:
IF's and NADO's should co-operate to avoid multiple testing at individual events.

Recommendation addressed to WADA:
The WADA Project Team of the WADC should take notice of agreements about the issue of doping existing and/or entered into between International and National Federations on the one hand and National Authorities on the other, to develop content for the article 5 (Roles and Responsibilities) and 6 (Anti-Doping Co-operation) of the Code.

Workshop 2: Education
Chair: Ms. Pirjo Krouvila

The athlete passport
Recommendation addressed to NOC's/NADO's
The WADA-system should be compatible with all existing and planned national systems.

In every country, those with access to the system should be nominated by the national agency.

Recommendation addressed to WADA
Consideration for WADA Passport system to be available in countries

where there is no established infrastructure supporting their anti-doping program, that could include financial and technical support.

Recommendation addressed to WADA
WADA should consider ways to positively reinforce the athletes to use the passport system, and the Calendar in particular.

Nutritional supplements
Recommendation addressed to athletes committees
Athletes have the ultimate responsibility for the nutritional supplements they wish to take. It is the responsibility of the manufacturers to produce supplements that do not contain unlabelled substances.

Recommendation addressed to all stakeholders
Athletes deserve more information on ways to minimise their chances of unintentionally taking doping substances. This is the main responsibility of the sports organisations. This information should focus on a healthy diet and a "white list" of supplements.

Recommendation addressed to IOC/NOC's/IF's/NF's
Sport organisations that enter into sponsorship agreements with nutritional supplement manufacturers must require the manufacturers to guarantee the purity of their products.

Workshop 3: Future Developments & Science
Chair: Mr. Matthias Kamber

Genetic manipulation in sports
Recommendation addressed to WADA
Gene manipulation should be consistent with the definition of doping. WADA should have a position on the category of gene manipulation as a form of doping.

Recommendation addressed to all stakeholders
All stakeholders (WADA, anti-doping laboratories, governments, gene therapy societies) should join forces and exchange information including detection methods, research results and education leading to prevention of the use of this technique for doping. WADA should follow-up their initiative started March 2002.

Social behaviour research
Recommendation addressed to all stakeholders
Programs to prevent doping should be based on sound scientific results, especially from the field of behavioural and marketing research. This should include a team-oriented approach with gender specificity and involves athletes, coaches and their entourage. To adapt proven programs WADA should foster knowledge sharing among prevention experts.

Workshop 4: Controls & the list of banned substances
Chair: Ms. Michele Verroken

Principles behind the compilation of a "new" list of banned substances

Recommendation addressed to all stakeholders
The list of prohibited substances and methods should be clear in its intent, based upon performance enhancement and health hazards to justify inclusion on the list.

Recommendation addressed to all stakeholders
Stakeholders should agree one core list of named substances and methods. The implementation of the list must be continuously monitored and actively communicated. The International Sports Federations must be permitted to apply justified variations.

The International Standard for Doping Control (ISDC)
Recommendation addressed to all stakeholders with authority to collect samples
The International Standard for Doping Control provides comprehensive minimum requirements that will ensure integrity, transparency and accountability of the doping control process and in particular the athlete's sample.

Recommendation addressed to all stakeholders with authority to collect samples
The International Standard for Doping Control provides the means for the partnership of all stakeholders to ensure confidence and deliver quality doping control policies and programs, thereby achieving global harmonisation.

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Digest of CAS Awards II 1998 - 2000

Matthieu Reeb (Editor), Digest of CAS Awards II 1998 - 2000; Kluwer Law International, The Hague/London/New York 2002, Hardback, 910 pp., EUR 130.00/US$ 120.00/GBP 82.00 (Volumes I and II), ISBN 90-411-1730-X

This is the second volume in an ongoing series of CAS decisions. Volume 1 covered the period 1986-1998 and the present Volume covers the period 1998-2000.

Not only has the number of cases dealt with by the CAS covered in this second Digest increased (around 100 awards have been rendered), but so also, as the permanent President of CAS, His Honour Judge Keba Mbaye, points out in a Foreword, has the "variety of judicial issues and sports disciplines" compared to those covered in the first Digest.

This reflects, as Judge Mbaye goes on to point out: "The extraordinary and rapid evolution of the CAS over recent years [and] shows clearly that the sports world has embraced this private judicial body and the benefits it offers (speed, inexpensive or free proceedings, better knowledge of sport and the implications of sport by judges, etc.). Such recognition within the international sports community demonstrates that the CAS fulfils a need and that, even if its development is not yet complete, it has truly come of age, and reached a remarkable stage in its evolution".

Matthieu Reeb, the Secretary General of the CAS, who has put this Digest together, traces the history and explains the organisation, structure and functions of the CAS in a helpful Introduction, which sets the scene and provides a contextual basis for the Digest.

In it, he points out that the CAS has progressively grown; has opened outposts in North America and Oceania; has introduced and operated and "Ad Hoc Division" (AHD) at the Summer and Winter Games since Atlanta in 1996 and other specific sports events (in the Summer of this year, the CAS will operate an AHD at the Commonwealth Games in Manchester, England), providing a speedy (within 24 hours) and cost-free settlement of sports disputes arising during the Games and other sporting events; and, to cope with its increasing workload, has appointed more members (there are now 188 CAS judges world wide).

However, as Maitre Reeb also pints out, the CAS has not finished growing and its further development goes on: "Although almost all the Olympic International Federations and several non-Olympic federations recognise the jurisdiction of the CAS, it seems that the international sports community as a whole does not yet know enough about the role and work of the CAS to make optimum use of its services. The CAS thus needs to publish its decisions more regularly and continue its awareness-raising efforts. It appears that the CAS is known chiefly as an appeals authority for disciplinary cases. This is due notably to the fact that the CAS appeals procedures are not, as a rule, confidential. And people sometimes forget that the CAS also acts as a court of sole instance for settling sports-related contractual disputes, thanks to an arbitration procedure which is adapted to this".

The Digest covers both kinds of awards and, as far as the appeals are concerned, differentiates between doping and other disciplinary cases. Each of the awards is preceded by a helpful explanatory introduction written specially for the Digest.

The CAS also renders no-binding "Advisory Opinions". These are very useful, in practice, for determining the legal issues as a prelude to reaching amicable negotiated settlements. For example, the CAS opined on whether the "Speedo" "Long John" swim suits breached the International Swimming Association's rules. On 1 May, 2000, the CAS considered that they did not and so the suits were used for the first time at the 2000 Sydney Olympics. The Digest also contains the decisions rendered by the AHD at these Olympics. This case, as well as several others, is included in the Digest.

Since May, 1999, the CAS also offers mediation for the settlement of sports disputes, but these cases are, by their very nature, confidential and not included in the Digest. Interest in this field is also growing.

The Digest is completed with some useful Appendices, including the Code of Sports-related Arbitration and Mediation Rules (in both French and English - the working languages of the CAS), and an Index.

Since it was created in 1983, the CAS has proved to be an increasingly popular and effective permanent international body for the settlement of sports disputes "within the family of sport".

But what of the future of the CAS and its future ambitions?

Let me give the last words to Matthieu Reeb: "In the future, it is probable that... access to CAS jurisdiction....[will be facilitated still further]....for example by creating new decentralised offices or new ad hoc divisions, while maintaining the principle of not charging for appeals proceedings.

The '*Digest of CAS Awards 1986-1998*' recorded the emergence of a *lex sportiva* through the judicial decisions of the CAS. It is true that one of the interests of this court is to develop a jurisprudence that can be used as a reference by all the actors of world sport, thereby encouraging the harmonisation of the judicial rules and principles applied within the sports world. This second Digest thus represents a further building block in the construction of this edifice".

A very worthy and ambitious aim indeed and I would unreservedly commend this excellent Digest to sports lawyers and administrators all over the world!

Ian Blackshaw

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Het statuut van de sportbeoefenaar:

Toetsing van de nieuwe transferreglementeringen op hun wettelijkheid

Kritische en nauwkeurige analyse van het statuut van de sportbeoefenaar

Met overvloedige documentatie over de totstandkoming van de reglementering van de sportbonden

April 2002, 331 p.

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Roger BLANPAIN, professor KU Leuven en KU Brabant; lid van de Koninklijke Vlaamse Academie; voorzitter van de Internationale Vereniging voor Arbeidsrecht en Sociale Zekerheid.

Het boek behandelt ten gronde **het statuut van de betaalde en van de niet-betaalde sportbeoefenaar.** Hierbij worden de bestaande reglementeringen van de sportbonden op hun wettelijkheid getoetst.

In een eerste deel gaat professor Blanpain in op de **maatschappelijke en politieke krachtlijnen** van de sport. Bijzondere aandacht gaat uit naar de overeenkomst van 5 maart 2001 tussen FIFA en UEFA enerzijds en de Europese Commissie anderzijds.

De auteur stelt duidelijk aan de kaak dat hiermee de vrijheid van de sporter wordt teruggeschroefd.

Het tweede deel behandelt het statuut van de **betaalde sportbeoefenaar**, in al zijn aspecten: de juridische kwalificatie van de sportbeoefenaar als werknemer, de aard van de overeenkomst speler-club, de bekwaamheid van minderjarige spelers om een arbeidsovereenkomst te sluiten, de tewerkstelling van vreemde sportbeoefenaars, het vrij verkeer van werknemers, de arbeidsvoorwaarden, de fundamentele rechten, het tuchtrecht, de terbeschikkingstelling van spelers, het einde van de arbeidsovereenkomst, de opleidingsvergoeding, het concurrentiebeding, de geschillenregeling en het statuut van de spelersmakelaar.

Het derde deel staat stil bij het statuut van de niet-betaalde sportbeoefenaar in de Vlaamse en Franse Gemeenschap. Daarbij wordt vooral aandacht besteed aan de verhouding sportbeoefenaar-sportvereniging, de waarborgen die de speler heeft ten aanzien van zijn sportorganisatie, de vrijheidsregeling met inbegrip van de transfervergoeding, het tuchtrecht, de geschillenregeling, ...

Deze studie houdt zowel rekening met het geldende recht, internationaal, Europees, Belgisch en het Gemeenschapsrecht, met inbegrip van collectieve arbeidsovereenkomsten, als met de eigen regeling van de sportbonden. Als bijlage worden enkele belangrijke documenten weergegeven waaronder de transferregelingen van de FIFA en bepaalde stukken, die tot de besluitvorming van de Europese Commissie, leidende tot de overeenkomst van 5 maart 2001, hebben bijgedragen.

Vraag een uitgebreide inhoudstafel aan!

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Mediating Sports Disputes:
National and International Perspectives

Ian S. Blackshaw

NEW

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Mediating Sports Disputes: National and International Perspectives is the first book that deals with extra-judicial settlement of sports disputes through mediation. It reflects the growing interest in and importance of alternative dispute resolution methods for settling sports-related disputes, at the national and international levels. As sport has developed in recent years into a global business, the number of disputes has risen exponentially and the need for alternative forms of dispute resolution has grown significantly too. Mediation can be used successfully in a wide range of sports disputes, including an increasing number of commercial and financial ones. But its effectiveness depends on the willingness of the parties in dispute to compromise and reach creative and amicable solutions in their own interests and also those of sport. The growing importance of mediation in the sporting arena has been recognised and reflected by the introduction in 1999 of a Mediation Service by the Court of Arbitration for Sport (CAS) in Lausanne.

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Ian Blackshaw is a member of the Court of Arbitration for Sport (CAS) and of the Arbitration and Mediation Panels of the UK Sports Dispute Resolution Panel.

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