The International Sports Law Journal

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2002/3

Affirmative Action in South-African Sport

International Sports Law in United States

The Ellis Park Disaster

Transfers and Agents

European Social Dialogue in Football

Sport and Development Cooperation

Congres 'Sport & Fiscus'

Actuele fiscaliteiten op sportgebied

Donderdag 24 april 2003

(De locatie is nog niet bekend)

De belangrijkste thema's die aan de orde komen:

• Loonbelasting •

Rien Vink, Senior Belastingadviseur bij Ernst & Young Belastingadviseurs in Utrecht

O.a.: Wie is (fiscaal) (beroeps)sporter? Kan de sponsor de sporter geld geven zonder consequenties voor het stipendium? Zijn de kosten van o.a. voedingssupplementen en mentale training van de sporter onbelast te vergoeden? Zijn transfersommen (on)belast? Imagerechten.

• Internationaal •

Drs. Wiebe Brink, Partner bij Ernst & Young Belastingadviseurs in Utrecht en universitair docent belastingrecht aan de Erasmus Universiteit te Rotterdam.

O.a.: Toedeling van heffingsbevoegdheden aan NL of het buitenland bij sportevenementen. Subject en object van heffing voor verdragsdoeleinden. Toepassing vrijstellings- en verrekenings-methode. Fiscale behandeling uitkeringen nabetaald salaris en pensioen. Vergelijking van het Nederlandse met andere Europese fiscale stelsels voor sporters en sportverdiensten.

• BTW •

Drs. Gerard Brand, Belastingdienst Grote Ondernemingen, Utrecht

O.a.: De (beroeps)sporter, de sportorganisatie en de BTW. Sportsponsoring in geld en natura. Zaakwaarnemers /spelers-begeleiding in het betaald voetbal. Verhuur van skyboxes, business units en business seats. Transfer van spelers. De auto van de sportorganisatie en clubkostuums.

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On 1 January 2003 the new Institute for Sport Adjudication (*Instituut Sportrechtspraak*) will become operational in the Netherlands. On this date, at least 8 sport federations will transfer their disciplinary jurisdiction from their own organisations to the Institute for Sport Adjudication, after which this number will increase to 12 during the first months of 2003.

The Ministry of Health, Welfare and Sports has decided that it is desirable that all Dutch sport federations which include a section for top athletes should transfer their doping cases to the doping section of the Institute on pain of a cut in government subsidy. This means that eventually 67 sport federations - with NOC*NSF memberships - will make use of the Institute. In addition, several sport federations which are not members of NOC*NSF have also made known that they wish to join the Institute. The ASSER International Sports Law Centre has meanwhile been invited onto the doping bodies in two instances of the Institute, which implies an entirely new function for the members of the Centre - albeit in a purely private capacity - as for the first time they will assume official sports administrative duties. The reason for addressing this invitation, which has since been accepted, to the Centre was, on the one hand, the special international sports law expertise which the Centre has accumulated over the past few years in the field of doping in sport and which has been amply evidenced by studies and other publications on the subject, and, on the other hand, the uniquely independent position of the Asser Institute with respect to the organised sports industry.

More especially as regards the future of ISLJ as the official journal of the ASSER International Sports Law Centre we may report the following. As of 2003, two kinds of subscriptions to ISLJ will be available. Apart from the existing subscription for the annual fee of € 100,- (three 32-page issues of ISLJ, to appear once in the spring and twice in the second half of the year), a combined subscription will be made available to ISLJ plus the bi-monthly SPORTS LAW BULLETIN (SLB), which gives 10-page updates focussing exclusively on sports law issues in the United Kingdom, the home of sport, for the total annual fee of € 115,-. The authors of the top UK academic book in the area, *Sports Law* (2001) 2nd ed. (*www.cavendishpublishing.co.uk*) will provide expert commentary on the crucial developments in sports law in the United Kingdom. **Readers are hereby invited to make use of the supplementary sheet in this issue in order to subscribe or continue a subscription!**

Last but not least, we extend a heartfelt welcome to Dr Steve Cornelius, Director of the Centre for Sports Law of Rand Afrikaans University in Johannesburg, South Africa, as a new member of the Advisory Board of ISLJ.

The Editors

Levelling the Playing Field: Affirmative Action in Sport in South Africa*

by **Steve Cornelius****

1. Introduction

The past four decades have seen incredible changes in South Africa, not only in Society in general, but also in South African sport, in particular. On a legal and political level, South Africa has seen the introduction of four different constitutions during this period. Social and political upheavals have inevitably left its mark on the sporting community. From a period of total segregation, sport has led the way in the abolition of discrimination. It has not only taken the lead in the elimination of discrimination, but, because of the public prominence of sport, also in demonstrating that people of different racial and ethnic backgrounds can live and work together harmoniously. Ironically, this role of sport in the transformation of the South African society, was prophesied in 1965 by the father of Apartheid, former prime minister HF Verwoerd, himself, when he stated that

"[o]nce [different races] have integrated on the sports field, then the road to other forms of social integration has also been opened. "[1]

The irony of this speech becomes apparent if one considers that it was made in defence of the segregation of sport in South Africa during the Apartheid times, by a politician who emphatically stated that a New Zealand rugby team would not be welcome in South Africa if there were any Maori players on the team. Less than two decades later, the prophetic nature of these words were realised when the establishment in sport began to open their doors to all races.

As the South African society struggles to come to grips with its past and the reforms that have taken place in recent years, sport will continue to lead the way. Whether or not they choose, sports people at all levels are roll models for society. If South African sports teams have a successful run, all South Africans seem to be cheerful, but if they suffer a few losses, their moods are dampened.

Sport represents a microcosm of society[2] and, as such, will continue to be looked at to determine whether South Africans are succeeding in the attempts at nation building, not only by people within South Africa, but also by the international community. It is with this in mind that the question of transformation in South African sport should be considered. Apartheid has left deep scars in the fabric of the South African society in general and the sports community in particular. Despite sustained efforts to deal with the legacy left by Verwoerd, there is still a deep divide between historically privileged and historically disadvantaged communities. There are still severe social and economic imbalances that will take decades to eliminate.

According to Gerwel[3], the greatest challenge to sport in South Africa today, is the management of change in a way that will eliminate crude references to race, yet promote the ideals of harmonious co-existence, working together and playing together. This challenge encapsulates the need in South African sport for affirmative action programs that will redress the imbalances that have been created as a result of decades of institutionalised racial discrimination in sport, but also in society in general. Many of the challenges with which South African sport is faced in this regard, are not directly related to discrimination within the sporting community, but reflects wrongs that have been committed in social, economic and political spheres. As a result, the transformation of sport in South Africa cannot take place in isolation, but has to follow and account for transformation of the South African society in general.

A decade after the first decisive steps towards normalisation have been taken, South Africa is still a community in transition. As a result of historical imbalances, the society in South Africa is still to a large extent composed of both first and third world elements that still reflect the divisions created by Apartheid.[4] The majority of historically disadvantaged communities still live in informal settlements where basic infrastructure is still being developed to provide the basic amenities of life. As a result, the development of sports facilities are not much of a priority so that there are still major disparities in the facilities and opportunities that are available to various communities.[5]

2. Bill of Rights

South Africa entered into a new era with the commencement of the interim Constitution[6] on 27 April 1994 and the 1996 Constitution on 4 February 1997. For the first time, a justiciable Bill of Rights was contained in the Constitution.[7] Since the commencement of the interim Constitution,[8] all spheres of society in South Africa would be affected by provisions of the Bill of Rights.

Although the Constitutional Court held that the Bill of Rights in the interim Constitution[9] did not apply in matters between individuals, section 8 (2) of the 1996 Constitution[10] provides that

> "(2) A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

As a result, the possibility now exists that a fundamental right may be enforced in private disputes between individuals.

It should be kept in mind that the Bill of Rights and the effect which it may have on sport, is primarily a matter of constitutional law, which itself forms part of the broader category of public law.[11] Public law is mainly concerned with public or general interests.[12] According to De Waal *et al*,[13] the question whether a provision of the Bill of Rights applies to private disputes, depends on the nature of the private conduct in question and the circumstances of the case. However, they warn that "a resort to context or the circumstances of a particu-

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* This article is based on a paper presented at a conference on Sport and the Law, hosted by the Faculty of Law and the Centre for Sport Law of the Rand Afrikaans University on 7 & 8 September 2000. I wish to express my appreciation to Ms Mienkie van Dyk, who assisted me with the research for this article.

** Senior Lecturer in Mercantile Law, RAU University, Johannesburg, South Africa. Director, RAU Centre for Sport Law.

1 Own translation of a speech delivered by Dr HF Verwoerd at Loskopdam in September 1965. The original text reads "As [die rasse] eers op die sportveld gemeng het, dan is die pad na ander vorme van sosiale vermenging ook oopgemaak." See also D Basson "Hoe Sportlui Politici kan Systap" *Finansies en Tegniek* 5 June 1998 at 18.

2 KL Shropshire "Merit, Ol' Boy Networks, and the Black-Bottomed Pyramid" 1996 *Hastings Law Review* 455 at 456.

3 J Gerwel "Veel Meer as Sport is op die Spel" *Insig* February 1999 at 19.

4 A Goslin "Human Resource Management as a Fundamental Aspect of a Sport Development Strategy in South African Communities" 1996 *Journal of Sport Management* 207.

5 Goslin (note 4 above) 207.

6 Constitution of the Republic of South Africa 1993.

7 DA Basson *South Africa's Interim Constitution - Text and Notes* (1994) 13.

8 Constitution of the Republic of South Africa 1993.

9 Ibid.

10 Constitution of the Republic of South Africa 1996.

11 DA Basson & HP Viljoen *South African Constitutional Law* (1988) 14; D Hutchinson, B van Heerden, DP Visser & CG Van der Merwe *Wille's Principles of South African Law* 8ed (1991) 45.

12 Basson and Viljoen (note 13 above) 15; Hutchinson *et al* (note 13 above) 45.

13 J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (1998) 32.

lar case should not be used to frustrate the clear intention of the drafters of the [1996] Constitution to extend the operation of the provisions of the Bill of Rights to private conduct. It is not permissible to argue, for example, that it is only when private persons find themselves in a position comparable to the powerful state that section 8(2) [of the 1996 Constitution] binds them to the Bill of Rights."

In spite of this, as far as the applicability of the Bill of Rights to matters between individuals is concerned, the "public" or "private" nature of the transaction should be taken into consideration. In this regard, "public" and "private" refers to the intended accessibility or inaccessibility of a transaction for members of society in general. The Bill of Rights will apply more readily and more strictly to transactions that are open to the broad public, such as banking or insurance services and retail shopping outlets, less to transactions to which public access is limited, such as the establishment of a private club, and least to private transactions, such as those between family members or friends. The same can probably be said of sport. National, provincial and local sport associations and the clubs that participate in these associations, are generally of such a public nature that they will in all likelihood be held to a higher level of constitutionality.[14] Private clubs where members may participate in sporting activities for recreational purposes will probably not be held to the same high standards in all respects. Private games between friends or family members will, most likely, hardly be influenced by the provisions of the Bill of Rights.

In the South African context, the most important fundamental right is arguably the right to equality.[15] This is evident, firstly, if one considers the history of gross discrimination on racial and other grounds and the fact that the interim[16] and 1996 Constitutions[17] were enacted mainly as a result of efforts to redress the unfair discrimination of the past.[18] It is also reflected in the 1996 Constitution,[19] in that the right to equality is typographically the first fundamental right to be mentioned in the Bill of Rights.[20] In terms of section 9 (4) of the 1996 Constitution,[21] no person may unfairly discriminate against anyone on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Unfair discrimination is generally associated with unfair inequality. Whenever people are treated differently on grounds that cannot be justified on merit, we consider that to be unfair discrimination. Section 9 (5) of the 1996 Constitution expressly states that discrimination on any of the grounds mentioned earlier, shall be unfair unless it can be established that such discrimination is fair. If one views discrimination in this way, the concept of affirmative action seems to be in direct conflict with the right to equality. No matter how one looks at affirmative action, the fact remains that people are treated differently on the basis of race, gender, sex, ethnic or social origin or colour. As such, affirmative action cannot be anything less than discrimination. Apart from being obviously discriminatory towards those 'against' whom the policies are implemented, affirmative action can also be viewed as discriminating against the very people it aims to assist. It can be argued that affirmative action is paternalistic and indicative of an attitude in terms of which historically disadvantaged individuals are indeed inferior, so that they cannot succeed without assistance.[22] Such programmes also tend to create the impression that any historically disadvantaged individual who has succeeded, did so as a result of the affirmative action program and at the expense of some other, more suitably qualified individual.[23] Furthermore, affirmative action programs, if improperly implemented, can create the impression that historically disadvantaged individuals can only achieve participation if they graduated from development programs.[24] If affirmative action programs are applied in a half-hearted and haphazard way, it can also be viewed as window-dressing or tokenism which is only aimed at appeasing the excluded masses, without any sincere attempt at inclusion.[25]

However, the fact that conduct can be labelled as discrimination, does not necessarily make it objectionable. The matter is more complex than that. Various issues have to be taken into consideration before one can adjudge whether or not discrimination in the form of affirmative action is acceptable.

3. Unfair Discrimination

It is important to keep in mind that not all discrimination is contrary to the provisions of section 9 of the 1996 Constitution.[26] That section expressly refers only to *unfair* discrimination. In all aspects of life we discriminate on a daily basis. If we support one team as our favourite, we discriminate against the others, if we select one player above another, we discriminate, if a certain sport is our favourite, we discriminate, if we select the events in which we wish to participate, we discriminate. However, in all these cases, the discrimination is not unfair, but can be justified on some rational ground or another.

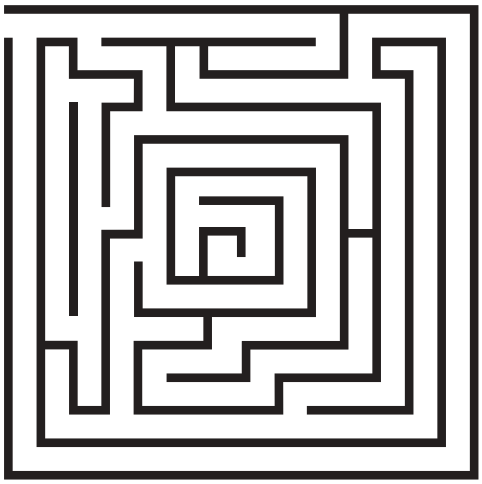
Whenever one discusses the issue of affirmative action and concludes that it amounts to discrimination, one has to question whether such discrimination is unfair, or whether there are proper grounds on which such discrimination can be justified. Admittedly, discrimination on the grounds of race, gender, sex, ethnic or social origin or colour is, in terms of section 9 (5) of the 1996 Constitution,[27] unfair, unless it can be proven to be fair. This means that, if sufficient reasons can be shown, even discrimination on one of those grounds can be permissible. If it is accepted that affirmative action is discrimination on the basis of race, gender, sex, ethnic or social origin or colour, one has to question, then, whether such discrimination can be justified on grounds that will be sufficient for the purposes of section 9 (5).

4. Constitutional Justifications

Whenever fundamental rights are at issue, it is important to keep in mind that no right is absolute. There is always some limitation or the other. Section 36 (1) of the 1996 Constitution[28] provides that fundamental rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The right to equality in section 9 of the 1996 Constitution[29] is also subject to this limitations clause. This means that discrimination which could ordinarily be described as unfair, may be acceptable if the reasons for such discrimination can be justified on grounds that are generally acceptable in an open and democratic society. Furthermore, the 1996 Constitution[30] expressly legitimises measures aimed at redressing the imbalances of the past. Section 9 (2) of the 1996 Constitution[31] provides that

> "(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

14 The Western Cape Division of the High Court has already, in the case of *Coetzee v Comitis and others* 2001 (1) SA 1254 (C) held the South African Football Association and the Professional Soccer League bound to the principles enunciated in the Bill of Rights when it found that the transfer system applied in South African football violated the fundamental rights of players.
15 GE Devenish *A Commentary on the South African Bill of Rights* (1999) 35.
16 Constitution of the Republic of South Africa 1993.
17 Constitution of the Republic of South Africa 1996.
18 *Nyamkazi v President of Bophuthatswana* 1994 (1) BCLR 92 (B) 123E *et seq*.
19 Constitution of the Republic of South Africa 1996.
20 s 9. See also Devenish (note 17 above) 37.
21 Constitution of the Republic of South Africa 1996.
22 Shropshire (note 2 above) 468.
23 Ibid 469.
24 Ibid 469.
25 K Dunn "Endgame for S Africa's White Teams" 20 January 1999 *Christian Science Monitor* 1.
26 Constitution of the Republic of South Africa 1996.
27 Ibid.
28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid.



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It is a common principle of the interpretation of statutes that any act (including the Constitution) should be read as a whole and that different parts of the same statute should be interpreted in such a way that conflict between the various sections are avoided.[32] Consequently, one should harmonise the various provisions of the Constitution[33] with each other. While section 9 (2) of the 1996 Constitution[34] clearly authorises the establishment of affirmative action programs, that subsection must always be read within the context of section 9 as a whole.

In *Wygand v Jackson Board of Education*35 in the United States, where affirmative action has been applied in various forms for many years, Judge White indicated that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees". Similarly, Judge Stevens stated in *Fullilove v Klutznick*36 that '[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification'. South Africa, with its history of severe racial prejudice, could do well to take heed of these warnings. This means that affirmative action programmes should be designed and implemented with great care to ensure that the objectives of section 9 (2) are achieved, while the right to equality is not denied in the process.

5. Unfair Equality

As I have already indicated, unfair discrimination is generally associated with unfair inequality. However, it is my submission that equal treatment may also, in certain circumstances, amount to discrimination. Consequently, in cases where it would be unfair to treat people on an equal basis, such equal treatment may, in fact, amount to unfair discrimination. In *Regents of the University of California v Bakke*37 Judge Blackmun stated that 'in order to treat some persons equally, we must treat them differently'. Similarly, Devenish[38] states

> "[e]quality in a substantive sense ... is not merely a matter of likeness; indeed, in certain circumstances it must be a matter of difference. It is just as important that those who are different should be treated as such, and those who are alike should be treated in a like manner. Furthermore, in certain circumstances, it may be essential for substantive equality to draw distinctions between individuals and groups to accommodate their specific interests and needs."

This may all seem contradictory at first, but closer scrutiny will reveal that it is actually a very accurate summation of the situation. If the Department of Home Affairs were, for instance, to require that all persons should complete applications for identity documents or passports in their own handwriting and provide only ordinary printed forms, it would be impossible for blind people to comply with this requirement. It would also be impossible for illiterate people to comply with the requirement. Although both these categories of people are treated on the exact same footing as everybody else, it is precisely this equal treatment which excludes them from participation in the activity concerned.

The concept of unfair equality has long since been recognised in sport. The vast majority of sports provide different competitions for female and male competitors. Surely equal treatment would mean that men and women should always compete in the same event against each other. However, it is glaringly obvious that women in general would be excluded from participation in most sports if they had to compete directly with their male counterparts. One only has to refer to the difference between men's and women's world and national records in sports such as athletics, swimming, cycling, weightlifting, etcetera, to appreciate the point. Even though we provide separate competitions for women and thereby treat them on a different basis from male competitors, we accept this differentiation, as equal treatment will inevitably lead to the general exclusion of female competitors from most sports. Equal treatment will then result in unfair discrimination.

Most sports also provide different competitions for various age groups. Obviously, few young people would become interested in sport if they had to compete with adults from the start. Certain sports, such as power lifting, weightlifting, wrestling and boxing, differentiate on body weight because it is recognised that a smaller person would be at an unfair disadvantage if he or she had to compete against a larger person. Some sports, such as golf and polocrosse, have taken the concept of unfair equality further by providing for a handicap system in terms of which novice participants can, at least in theory, compete on an equal footing with experts.

In all these cases, there is a willingness to accept that unequal treatment is fair and acceptable. However, it seems that when it comes to redressing the racial imbalances of the past, there is much reluctance to accept that it may be reasonable not to treat everybody on the same basis.[39] In the case of most sports, it cannot be denied that, for historical reasons, certain sectors of the South African community are effectively excluded from participation, either as a result of financial constraints, a lack of exposure to various sporting activities from an early age or the unavailability of resources. Since these communities have to a large extent been excluded from participation in most sports, a major motivating factor which incites young people towards participation in any particular sport, namely role models, is also lacking.

Furthermore, equal treatment of players and participants from historically disadvantaged communities, denies the fact that they have had to overcome incredible obstacles just to get close to a level of recognition. In this regard, the importance of the apartheid schooling system should not be underestimated.[40] Most sport people who come from historically privileged communities grew up in schools where excellent sport facilities were always available and participation in sport were both encouraged and rewarded. Schools in the townships hardly have funds to procure books for academic education, let alone sufficient equipment and facilities for sport. Children from historically disadvantaged communities have other social and socio-economic difficulties to overcome as well. The fact that some of them have achieved some measure of success, can probably only be ascribed to a miracle or to the fact that the sport concerned involves an activity that is required for day-to-day survival.[41]

6. Continued Prejudice

According to Lawrence,[42] the common historical and cultural heritage in which racism has played and still plays a major role, inevitably leads people to share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about other races. Lawrence is of the opinion that this cultural belief system makes all of us racists, although most of us are unaware of our racism. Perhaps Lawrence takes the matter a little too far, but we cannot deny that, whether we choose to do so or not, the influence which our cultural experience has on our beliefs, inevitably affects our actions. The result is what Shropshire[43] calls "ol' boy networks" in which those in positions of relative power, tend to favour

32 EA Kellaway *Principles of Legal Interpretation of Statutes, Contracts and Wills* (1995) 163.
33 Constitution of the Republic of South Africa 1996.
34 Ibid.
35 476 US 267 273.
36 448 US 448 537.
37 438 US 265 407.
38 (note 17 above) 43.
39 P Pereira "Hoe om die Ekonomie Skoon te Boul" *Finansies en Tegniek* 8 January 1999 at 10; R Hauman "SA Atletiek Byna op sy Knieë" *Insig* June 1996 at 18; Anonymous "Gross Affirmation" *Financial Mail* 12 May 1995 at 44.
40 Dunn (note 27 above) 1.
41 Ibid.
42 C Lawrence "The ID, the Ego and Equal Protection: Reckoning with Unconscious Racism" 1987 *Stanford LR* 317 322.
43 (note 2 above) 461.

people with whom they are familiar or with whom they can associate when it comes to selection or appointment. This effectively excludes historically disadvantaged communities from participation at various levels in sport. This problem is particularly acute in South Africa, where our history of strict segregation means that those in positions of relative power, have never truly become acquainted with individuals from communities that have historically been excluded from participation.[44] An editorial in the *Financial Mail*[45] summarised the position very well when it indicated that

> "[s]electors, nevertheless, are not necessarily objective people. They pick players they know. They develop inexplicable loyalties to poor performers. They are vulnerable to bootlicking by experienced players. They do not always appreciate the depth of talent from which they really can choose. And they are easily pressured into avoiding experimentation and risk.
>
> Why did rugby coach Nick Mallet field [in the Springbok team] players who were tired and patently unable to hold on to a rugby ball against England last week? How many times does Adam Bacher have to fail as an opening bat before he is removed from contention [for the national cricket team]? Merit selection is never quite what it claims to be."

People are prone to favour their own, not only on a racial basis, but on other grounds as well.[46] Whenever a Springbok (national) rugby team is selected, the coaching staff are accused of provincialism and favouritism. Supporters of the (14) provincial teams from which the Springbok team is selected, will argue that their player is far better than the selected player. Because people are prejudiced in favour of those with whom they feel some close affinity, their own subjectivity will cause them to rate their performance and abilities at a higher level. The result is that others are excluded outright or as a result of their having to perform at a higher level to obtain recognition. Unless some conscious steps are taken, these "ol' boy networks" will continue to result in the exclusion of historically disadvantaged communities and perpetuate the injustices of the past.

It is for this reason that the provisions of section 9 (2) of the 1966 Constitution[47] are very important. There is no value in a constitutional provision stating that people are all equal if the living reality does not confirm the equality.[48] It is very easy to make a formal statement that everybody is equal, but unless we recognise that those who have been (and often still are) disadvantaged by injustices of the past, are in certain cases and to some extent entitled to beneficial and advantageous treatment, we will never achieve actual equality in South Africa.[49]

While it is important that measures should be taken to "protect and advance" persons who have been historically disadvantaged by discrimination, it is equally important that they should not be over-compensated or that such measures should not deliberately be aimed at suppression of historically advantaged groups.[50] Affirmative action measures should also be implemented in such a way that it does not violate or infringe on other people's dignity.[51] If this should occur, the measures taken will no longer amount to affirmative action, which is permissible, but will amount to unfair discrimination on the grounds of race, gender, sex, ethnic or social origin or colour, which is impermissible.

It is also important that affirmative action programs should be initiated in such a way that they remain cost-effective and does not cause a squandering of human and other resources that will eventually undermine the growth and development of any sport or destroy its resources.[52] In *United States v Paradise*[53] the United States Supreme Court held that the efficacy of the affirmative action remedies, the planned duration of the remedies, the relationship between the percentage of disadvantaged individuals to be advanced and the percentage of such individuals in the relevant population, the availability of back-up plans if targets cannot be met and the effect of the remedies on innocent third parties, are all matters that should be taken into account whenever affirmative action measures are developed.

In *Public Servants' Association v Minister of Justice*[54] in South Africa, the high court held that a policy by the South African Department of Justice that no so-called "white males" would be considered for appointment to certain advertised posts, was not in compliance with the provisions in the interim Constitution[55] which authorised affirmative action. The main error in the Department of Justice's so-called 'affirmative action' program, was that it did not promote inclusion of historically disadvantaged individuals, but rather amounted to the exclusion of historically privileged individuals. If no suitable affirmative action candidates could be found, certain posts were left vacant rather than filled with individuals from historically privileged communities. Edwards[56] indicates that "[i]n essence, affirmative action means making an effort in good faith to increase the pool of applicants from which the employer hires', while outright exclusion of individuals would be unlawful." I do not believe that outright exclusion of individuals can ever be justified under the banner of affirmative action. As such, the policy adopted by the Department of Justice amounted to unfair discrimination on the grounds of race, gender, sex, ethnic or social origin or colour. Rather than eliminating the imbalances of the past, such an application of "affirmative action" will have the effect of perpetuating racial divisions in South Africa.

7. Implementing Affirmative Action

There are various ways in which affirmative action can be implemented in sport. The first way is to initiate a concerted drive to recruit individuals from historically disadvantaged communities.[57] This should involve a wider search for individuals who could benefit under affirmative action programs.[58] Sensitivity and diversity training can also contribute to a greater awareness of the need for inclusion of historically disadvantaged individuals.[59] In this way, physical and conceptual barriers which restrain historically disadvantaged individuals from participation, can be removed.[60] Selection and employment policies, which lead to underutilisation of individuals from historically disadvantaged groups, should be reviewed.[61] Special admissions programs can be utilised to ensure greater participation by historically disadvantaged individuals.[62] The most controversial form of affirmative action, is preferential selection, employment and promotion of individuals from historically disadvantaged communities.[63] This is commonly referred to as goals or quotas. Goals are flexible targets that represent an ideal level of participation by historically disadvantaged individuals. Quotas, on the other hand, are fixed preferences which require that a set number of historically disadvantaged individuals should participate.[64]

However, all these measures presuppose that there are a sufficient number of already suitably qualified and experienced individuals from historically disadvantaged communities that can simply be absorbed into any particular sport. The problem in most instances in

44 Anonymous "The Gift Politics can Give to Sport" *Financial Mail* 11 December 1998 at 14.
45 Ibid 14.
46 Ibid 14.
47 Constitution of the Republic of South Africa 1996.
48 Devenish (note 17 above) 38.
49 Ibid 39.
50 Ibid 62.
51 *Kauesa v Minister of Home Affairs* 1994 (5) BCLR 60 (NmH).
52 Devenish (note 17 above) 63.
53 480 US 149.
54 1997 3 SA 925 (T).
55 Constitution of the Republic of South Africa 1993.
56 AB Edwards "Affirmative Action: A Euphemism for Reverse Discrimination?" 1997 (2) *Codicillus* 13 16 - 17.
57 Shropshire (note 2 above) 464 - 465.
58 Edwards (note 58 above) 16.
59 Shropshire (note 2 above) 464 - 465.
60 Edwards (note 58 above) 16.
61 Shropshire (note 2 above) 464 - 465.
62 Edwards (note 58 above) 16.
63 Shropshire (note 2 above) 464 - 465.
64 Edwards (note 58 above) 16.

South Africa is that, because of historical exclusion, there simply is not enough suitably qualified or experienced individuals to make such programs successful. What is also required, is sustainable development programs to develop the skills required.[65] In this regard, it has been suggested[66] that funding for development programs should be directed at financing the education of talented individuals from historically disadvantaged communities at South Africa's great sport schools. This could make sense, as most of the country's top sports men and women have learned their skills at these schools.

However, Hendricks[67] warns that

> "[a] development program can, at best, only be marginally successful. It amounts to little more than charity. It can never be sufficiently comprehensive to involve significant numbers of people, nor can it be sustained. Accordingly, very few people will benefit from it given the breadth and depth of the disadvantage suffered by [historically disadvantaged communities]. It is not sustainable, for those who might benefit from it lack the personal, familial or communal support to facilitate participation. In any case, it can never facilitate equitable competition between [historically disadvantaged individuals] and their established counterparts. That is not to say that no [historically disadvantaged individuals] will benefit. Rather, the level of intervention required to ensure equity is phenomenal."

This criticism by Hendricks may be based on a number of questionable assumptions for which he does not provide any substantiation. However, the fact that affirmative action in South African sport is even more contentious a decade after political reforms have taken place, means that there may be some merit in his argument and that the millions of Rands[68] spent on development programs may not have produced the desired effect. Parity will only be achieved if the South African society is normalised and the imbalances of the past have been eradicated. Whether this will happen at all, is questionable. It is in this regard that Hendricks' criticism seems unfair towards sports associations who make honest attempts to create opportunities where none had existed in the past. It cannot be expected of sports associations to find magic solutions to broader socio-economic problems over which they have little, if any, control.[69]

Still, what is required, is a combination of the various measures that should be employed to ensure that the imbalances of the past are redressed at least in the context of sport. Many sports have already taken the first step of initiating development programs to develop the skills required and have spent millions of Rands in this regard.[70] To make these development programs successful, a concerted drive to recruit individuals from historically disadvantaged communities is required. Sensitivity and diversity training can also contribute to a greater awareness of the need for inclusion of historically disadvantaged individuals. In particular, this kind of diversity training should also focus on informing sport people who feel "left out" as a result of affirmative action, of the rationale behind the measures and the reason why they may sometimes be overlooked in favour of another participant who is seemingly less deserving on the merits.[71]

Selection and employment policies should be more race and gender sensitive. Although it is controversial, quotas can be a way of forcing change, provided that it is applied honestly and with sufficient care. However, quotas should be applied with great circumspection as it has various pitfalls that can be counter-productive to the process of transformation.

In the first place, experience is beginning to show that quotas can favour clubs or associations that oppose transformation, while acting to the prejudice of those who make a serious attempt to transform. Certain clubs or associations have opted for expensive development programs to ensure that they create opportunities for historically disadvantaged players and develop sufficient talent to meet quota requirements. Other clubs or associations have taken the easy way out and spent far less money on "buying" players that have been developed at great expense by others. The result is that certain clubs or associations are constantly developing players for other clubs or associations and are never in a position to meet their own quota requirements. The law of contract provides little assistance in this regard, as our courts have consistently refused to order specific compliance against players who were opting out of contracts.[72] As a result, the perception can be created that clubs or associations who are honestly attempting to make a difference through sustainable development programs, are failing or refusing to comply with affirmative action measures. On the other hand, clubs or associations that are doing virtually nothing to promote participation of individuals from historically disadvantaged communities are lauded for their window-dressing which seems to comply with required quotas.

Secondly, quotas can have the effect that players who are not ready for competition at a particular level, may be pushed to that level too soon, with the result that they are bound to get injured or discouraged if they are not able to cope with the pressures of participation at a particular level. The stigma of being labelled as a quota player places even more pressure on a player, with the result that they are expected to be infallible by everybody and are "punished" more severely for mistakes which they may have made on the playing field.[73] The result is that promising young players from historically disadvantaged communities fade away after a few appearances and are lost in the process. Furthermore, promising players from historically privileged groups may be discouraged if so-called "quota players" are constantly preferred to them. The result is that even more promising players could be lost in the process as some eventually quit out of frustration and others seek opportunities elsewhere.[74]

Thirdly, there is a real danger that players who have already achieved success at the highest levels, can suddenly be presented as so-called "quota players". This is precisely what happened to the South African national cricket player, Herschelle Gibbs. Despite the fact that Gibbs had been playing first class cricket for one of the strongest teams in South Africa since the age of seventeen,[75] had come from one of the most prestigious schools in South Africa and had already represented South Africa at the international level, he was suddenly presented as a so-called "quota player" when pressure began to mount on the United Cricket Board of South Africa to promote the inclusion of historically disadvantaged players in the national team.[76] Attaching the label of affirmative action to the inclusion of Gibbs is not only an insult to a world class player, but also to historically disadvantaged players and runs counter to the concept of affirmative action.

Consequently, one should always keep in mind that affirmative action is a sensitive matter that should be approached in a sensitive way. In the first instance, sports administrators should be sensitive to the plight of those they wish to advance in society. Every care should be taken to avoid the perception that individuals are only included for the sake of appearance. Any affirmative action policy should be an honest attempt to improve the rate of participation by historically disadvantaged individuals. The purpose of affirmative action should be

65 Shropshire (note 2 above) 464 - 465.
66 Anon (note 46 above) 14.
67 DJ Hendricks "Sport and Transformation: Observations and Projections on Developments in South Africa from an 'Eliasian' Perspective" in RC Wilcox (editor) *Sport and the Global Village* (1994) 190.
68 F Joubert "'n Resep vir Verloor" *Insig* February 1999 at 20.
69 It should be noted that Hendricks (note 69 above) 194 accepts that it cannot be expected of sports associations to rectify the inconsistencies in society.
70 Joubert (note 70 above) 20.
71 Anon (note 41 above) 45.
72 *Highlands Park Football Club v Viljoen and another* 1978 (3) SA 191 (W); *Troskie en 'n ander v Van der Walt* 1994 (3) SA 536 (O); *Coetzee v Comitis and others* 2001 (1) SA 1254 (C).
73 A Fillies "Wit Bokke is nie die Beste" *Insig* February 1999 at 21; F Heyns "So Sê die Spelers" *Insig* Februarie 1999 at 21.
74 Joubert (note 70 above) 21.
75 Heyns (note 75 above) 21.
76 Ibid 21.

to achieve some measure of distributive justice. Historically disadvantaged individuals should be afforded the opportunity to take the place which they would have secured had conditions been more fair and equal.[77] Affirmative action should not merely be a means of obtaining government or international approval.

Sports administrators should be careful to avoid the perception of paternalism or that participation in development programs is a prerequisite for historically disadvantaged individuals to achieve success in a particular sport. While certain individuals should be advanced, they should not be over-compensated,[78] as overcompensation could create the impression of paternalism or discrimination against those who are excluded from the benefits of affirmative action programs. Over-compensation can also create the impression that participation in affirmative action programs is a prerequisite for success in a given sport. This means that talented individuals must be identified and allowed to graduate from these programs at an appropriate stage. If the various kinds of program are properly applied, it could also avoid the perception that individuals from historically disadvantaged communities can only achieve success through affirmative action. This kind of argument can also be countered if the individuals who benefit from affirmative action, and quotas in particular, realise the burden of responsibility which they bear. They will be looked at by both historically privileged and disadvantaged communities to determine whether affirmative action is sincere and successful. Lastly, affirmative action policies should be aimed at inclusion of historically disadvantaged communities, but should not merely amount to the denial of participation or promotion of others.

8. Duration

By definition, affirmative action is a temporary measure which should be limited in duration.[79] The question which is often asked by historically privileged individuals is: 'How long will affirmative action (and quotas in particular) last?' There can be no simple numerical answer to that question. Affirmative action measures should be employed for as long as it takes to achieve substantive equality. If affirmative action is implemented in an honest way and conducted accordingly by all concerned, it would eventually phase itself out. If affirmative action is implemented and conducted in good faith, we should eventually arrive at a situation where so many historically disadvantaged individuals are able to compete equally on merit, that sports administrators will no longer be concerned with the problem of ensuring that sports teams are representative. When that happens, affirmative action will no longer be required and the measures that have been employed will fall into disuse.

In fact, existing affirmative action programs in South African cricket may already have produced positive results. It is claimed that a total number of six players from historically disadvantaged communities were selected to the National under 19 cricket team, purely on merit, rather than affirmative action quotas.[80] If talented players from disadvantaged communities consistently begin to emerge in such numbers, team selectors are in all likelihood no longer going to pay much attention to any quotas or targets that may have been imposed.

One thing is certain: a vital consequence of the continuing debate on affirmative action (and particularly quotas) in South African sport is that coaches and selectors have become much more sensitive to racial diversity. On the one hand, they are often actively searching for talented players from historically disadvantaged communities. On the other hand, the skills of talented players from historically disadvantaged communities are being assessed in a more positive and equitable fashion, with the result that the so-called "ol' boy networks" are losing their significance in many instances.

9. Conclusion

Affirmative action should not be seen as the punishment of the privileged few for the ills of the past - it should rather be seen as a reward for the dogged determination of the unfortunate masses who wish to succeed despite all the obstacles in their way. Section 9 of the 1996 Constitution[81] places a tremendous responsibility on South Africans of all races, genders, colours, abilities, ethnic backgrounds, etcetera. We all have a duty to promote equality, but equality can only be achieved if we provide equal opportunities for participation. Those who have been historically privileged have a duty towards our society to take definitive steps that will enable historically disadvantaged communities to participate at all levels. Those individuals who benefit from affirmative action have a duty towards society in general and their disadvantaged brethren in particular, to give it their all so that they can succeed - but what is more important than individual success, is that their communities can be uplifted and enjoy the equality which section 9 of the 1996 Constitution[82] promises.

Of course there will be failures - some people will be promoted too soon, while others may rest on their laurels and wait for the next affirmative action program to promote them. We should not allow these failures to deter us from the ultimate goal of promoting equality. Each failure should rather be an indication that we should refine the process. There have been many successes as well and we should take inspiration from those success stories. In the past, South African sports have achieved world beating results, despite the fact that only a small portion of its population, and thus also of the available talent, have been allowed to participate. Imagine the results that can be achieved if South Africa can tap from all its available talent. Despite any possible or perceived setbacks which it could cause, affirmative action can, in the long run, only benefit sport in South Africa if it is properly applied and if everybody realises their obligations to make things work.

77 Edwards (note 58 above) 20.
78 Devenish (note 17 above) 62.
79 Edwards (note 58 above) 17.
80 Joubert (note 70 above) 20.
81 Constitution of the Republic of South Africa 1996.
82 Ibid.

Comments on Applying International Sports Law in the United States

by **James A.R. Nafziger***

The law of the United States governing sport ranges from the federal Sherman[1] and Clayton[2] Acts prohibiting anti-trust activity and the Lanham[3] Act protecting trademarks to state common law rules concerning assaults and other torts on the playing field.[4] Less obvious than the normal application of such general legislation to sports, however, is the gradual emergence of a distinctive, integrated regime of law to govern sports competition and athletes. In terms of the old (and rather sterile) debate of whether "sports *and* law" or just "sports law" better describes the relationship,[5] it all depends on what we are talking about. If, for example, we are talking about issues in a strictly domestic context, we can call the semantic debate a draw; we can speak of either "sports *and* law" or just "sports law", depending on the context. If, however, we are talking about issues in the international context, there is very little international law applicable to sports that is external to it in the sense of domestic regulation such as antitrust and trademark laws. The phrase "international law and sports" is therefore inapposite. Instead, we can generally speak of an integrated (though incomplete) process of international sports law.[6]

Let me make four general points about this process and applications of it in the United States. First, rules and procedures are becoming more coherent and uniform. Consider, for example, the new regime against doping, including blood packing and ingestion of prohibited performance-enhancing agents such as steroids. The Anti-Doping Code of the International Olympic Committee (IOC) and the World Anti-Doping Agency (WADA)[7] will help overcome the confusion of disparate and often conflicting rules, standards, and internal administrative decisions among national legal systems and international sports federations (IFs). The Court of Arbitration for Sport (CAS),[8] headquartered in Lausanne, Switzerland, has already helped clarify and stabilize the governing rules. Even though its awards and other decisions are technically *lex specialis*, we are already witnessing the progressive development of a genuine *lex sportiva*.[9] Indeed, arbitral awards of the CAS, taken together, helped formulate provisions of the Anti-Doping Code such as those governing strict liability, disqualification of athletes, secondary penalties and acceptable defenses.

National laws are gradually adopting the new rules. Consequently, detection and deterrence of doping as well as procedures for resolving related disputes are becoming more uniform. In the United States the Amateur Sports Act of 1978,[10] otherwise known as the Ted Stevens Olympic and Amateur Sports Act,[11] is noteworthy. Its provisions for mandatory arbitration and voluntary mediation of sports disputes have led to decisions based on the Olympic Charter and the rules and decisions of IFs.[12] Because of the prevalence today of open competition, in which professionals and amateurs compete together, the "Amateur" Sports Act now governs professional athletes engaged in sports activity related to Olympic, Pan American and Paralympic competition.

As a second general point, the horse of international law, in this case international sports law, has been pulling the cart of domestic practice in the United States. Usually in the United States legal system, it is the other way around: domestic law shapes international practices. Sometimes the cart moves very slowly - as in professional baseball, a sport badly tainted by doping but only haltingly moving toward a program of testing and sanctions. Inevitably, though, the success of cracking down on doping in international competition - only seven failed tests among the thousands of athletes at the Salt Lake City Winter Games, for example - will overcome the reluctance of Major League Baseball and its players' unions to adopt controls.[13]

Thirdly, non-governmental organizations (NGOs) have played a pivotal role in shaping and institutionalizing sports law in the United States as elsewhere. For example, courts in the United States normally deny standing to athletes who have failed to exhaust their internal administrative remedies within sports bodies. Even when they have done so, the courts have been reluctant to allow challenges to NGO decisions based on due process (natural justice) or equal protection claims.[14] Indeed, it might be said that the central role of the IOC, the IFs, the CAS and other NGO institutions in sports is second only to the International Committee of the Red Cross, in its implementation of humanitarian law, as an NGO with substantial international legal personality.

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1 Sherman Act ‘‘1, 2, 29 Stat. 209 (1890) (current version at 15 U.S.C. ‘‘ 1, 2 (2000)).

2 Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. ‘‘ 12-27a (2000)).

3 Lanham Act, 60 Stat. 427 (1946) (current version at 15 U.S.C. ‘‘ 1051-1127 (2000)).

4 *See, e.g.*, brief summaries in Walter T. Champion, Jr., FUNDAMENTALS OF SPORTS LAW 127-42 (1990); Paul C. Weiler & Gary R. Roberts, SPORTS AND THE LAW 934-51 (2nd ed. 1998).

5 *See* Timothy Davis, *What Is Sports Law?*, 11 MARQUETTE SPORTS L. REV. 212, 212-19 (2001).

6 *See generally* James A.R. Nafziger, INTERNATIONAL SPORTS LAW (1988); James A.R. Nafziger, *International Sports Law As a Process for Resolving Disputes*, 45 INT'L & COMP. L.Q. 130 (1996).

7 *See* Klaus Vieweg & Christian Paul, *The Definition of Doping and the Proof of a Doping Offence,* 2002/1 THE INT'L SPORTS L.J. 2; Janwillem Soek & Emile Vrijman, *The Shepherd's Courage - The Olympic Movement Anti-Doping Code*, 2002/1 THE INT'L SPORTS L.J. 6.

8 *See* Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQUETTE L. REV. 515 (2001).

9 *See* McLaren, *id.*, at 516.

10 Amateur Sports Act of 1978, 92 Stat. 304 (current version at 36 U.S.C. ‘‘ 371-96 (1994)).

11 *Id.*

12 In one noteworthy pronouncement, for example, a federal appellate court characterized the Olympic Charter as 'an international agreement' whose implementation by IFs should be generally free of judicial review. Martin v. Int'l Olympic Comm., 740 F.2d 670, 677 (9th Cir. 1984).

13 *See, e.g.,* Harvey Araton, *Players' Steroid Proposal Totally Lacking in Muscle*, N.Y. TIMES, Aug. 11, 2002, ‘ 8 at 1.

14 For example, "[t]he courts have been asked on several occasions to rule on Olympic eligibility questions. Generally, the courts have left these matters to the Olympic federations and their own procedures to resolve." Ray Yasser et al., *Sports Law: Cases and Materials* 93 (2d ed. 1994). See, e.g., Behagen v. Amateur Basketball Ass'n of U.S., 884 F.2d 524 (10th Cir. 1989) ("The Act . . . makes clear that Congress intended an NGO to exercise monolithic control over its particular amateur sport, including coordinating with the appropriate international sports federation and controlling amateur eligibility for Americans that participate in that sport."), cert. denied, 110 S.Ct. 1947 (1990). See also Walton-Floyd v. USOC, 965 S.W. 35 (Tex. Civ. App. 1998). Federal courts in the United States have therefore required athletes to exhaust available administrative remedies before claiming adjudicative jurisdiction. Barnes v. Int'l Amateur Athletic Fed'n., 862 F. Supp. 1537 (S.D.W.Va. 1993). Nafziger, *Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. 161, 170 n. 34 (Supp. 2002). *See also* Michels v. United States Olympic Comm., 741 F.2d 155 (7th Cir. 1984); DeFrantz v. United States Olympic Comm., 492 F.Supp. 1181 (D.D.C. 1980); Dolan v. U.S. Equestrian Team, Inc., 608 A.2d 434 (N.J. Super. A.D. 1992).

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These are all positive developments. A final point I want to make is, however, troublesome, namely, that the resolution by United States courts and arbitral bodies of disputes related to major sports competition is excessively complicated. Several celebrated cases during the last decade have each required from ten to fourteen stages of litigation and arbitration. These include the doping case involving teenage swimmer Jessica Foschi;[15] the notorious assault case involving skater Tonya Harding;[16] the eligibility case involving Greco-Roman wrestlers Keith Sieracki and Matt Lindland;[17] and the doping case involving gold medalists runner Butch Reynolds.[18] The latter's claim against the International Amateur Athletic Federation (IAAF) became a classic example of the deficiencies of litigation when it was dismissed for lack of jurisdiction after some four years of litigation and arbitration. By contrast, several cases that raise similar eligibility issues have proceeded more efficiently and effectively in Australia,[19] Canada,[20] Switzerland,[21] and the United Kingdom.[22] We have a lot to learn from each other.

Because of its complexity, this process of international sports law must continue to rely on evolving principles of paramountcy and cooperation among a mix of governmental and non-governmental institutions. Fortunately, rules and standards to overcome the complexity of dispute resolution are becoming more uniform and clear. The IOC, IFs and the CAS are all contributing to this development.

Ultimately, the purpose of institutional cooperation and uniformity of decisions is to support principles of fairness and good sportsmanship on the playing field and in the legal channels. The welfare of athletes and quality athletic competition itself is at stake. We should therefore do all we can to simplify and better coordinate the mechanism for avoiding and resolving disputes among athletes and athletic organizations. This is the biggest challenge facing international sports law, at least as applied in the United States.

15 Foschi v. U.S. Swimming, Inc., 916 F. Supp. 232 (E.D.N.Y. 1996). For a discussion of *Foschi, see* Nafziger, *supra* note 14, at 162

16 Harding v. U.S. Figure Skating Ass'n, 851 F. Supp. 1476 (D. Or. 1994). For a discussion of *Harding, see* Nafziger, *supra* note 6, at 140.

17 *See* Nafziger, *Arbitration of Rights and Obligations in the International Sports Arena*, 35 VAL. U. L. REV. 357, 360 (2001), *reprinted in* Ian S. Blackshaw, MEDIATING SPORTS DISPUTES: NATIONAL AND INTERNATIONAL PERSPECTIVES 125-44 (2002).

18 *See* Nafziger, *supra* note 6, at 134.

19 *See* discussion of Raguz v. Sullivan, [2000] NSWCA 240, in Damian Sturzaker & Kate Godhard, *The Olympic Legal Legacy* 2 MELB. J. INT'L L. 241 (2001).

20 *See, e.g.,* McCaig v. Canadian Yachting Ass'n, Case 90-01-96624 [1996] (QB Winnipeg Centre).

21 *See* the discussion of the Swiss Equestrian case in Nafziger, *supra* note 6, at 142.

22 For a summary of English cases, *see* Nafziger, *supra* note 6, at 145.

Sports Officials and the Law

by **James T. Gray***

Over the last forty years, as the worldwide amateur and professional sports industry has grown and matured, sports officials and referees have played an increasingly essential role regarding the issue of athlete safety and protecting the integrity of sports competition. As a result of the increase of sports' public popularity, referees and officials have been the target of lawsuits for player tort liability, have formed labor unions to collectively negotiate their terms and conditions of employment with league employers, and have been the victims of spectator, athlete, coach and the media's wrath while officiating a game which has resulted in an alarming increase in the rate of verbal abuse and physical attacks on officials and referees.

1. Sports Officials Tort Liability Issues

In 1990, USA Today made the following observation: "For more than 100 years since Ernest Lawrence Thayer wrote Casey at the Bat in 1888, the worst thing you could shout at an umpire was 'Kill the ump.' Not anymore. An umpire's most feared phrase these days is 'Sue the ump!' In modern sports, if an official is negligent in the performance of his duties, and a participant is injured as a result of his action or omission, the official may be held personally liable. Whether an official breaches his duty of care owed to participants in a sports competition is an issue of ordinary care based upon the 'reasonable official standard.' The conduct of the accused sports official is usually compared to the conduct of a reasonable sports official in the same or similar circumstances."

Before liability in a negligence action may be imposed, the official's lack of ordinary care must be established as the proximate cause of the plaintiff's harm. A commonly used rule is the "but for" test. This test asks the question whether the negligence of the official contributed in some way to the plaintiff's injury. Or put another way, "but for" the official's negligence the injury would have not have occurred. While there are reported instances of alleged referee negligence, there are few reported cases. Many lawsuits involving referees are either dismissed or settled. However, from the available case law, there are several ways in which a sports official or referee can become susceptible to player tort claims.

1.1. Failure To Inspect Playing Field

In *Forkash v. City of New York*, 27 A.D. 2d 831, 277 N.Y.S. 2d 927 (1967), plaintiff was injured in an on-field collision at a city sponsored softball game. The players collided in the outfield after one player tripped over a piece of glass. Prior to the game, the plaintiff told a park supervision, who was also acting as the umpire of the softball game, that the field was not in suitable playing condition. The umpire ordered the infield, but not the outfield, swept with a large broom. At the end of the first inning, plaintiff complained that the outfield remained unfit for play. The umpire told the player that the brooms had been put away and "it was getting dark and to just get out there and play." A New York appellate court held that whether the player could recover against the city or the umpire was a jury question.

1.2. Failure To Enforce Rules

Each sport has its own set of written rules with which players are to strictly comply. It is a referee's duty to ensure that the game is played according to those rules. To avoid liability, referees must not only know the rules and their application, but also properly, strictly, and consistently enforce the rules of the particular game. For example, in *Carabba v. Anacortes School District No. 201*, 72 Wash. 2d 939, 435 P.2d 936 (1967), a wrestling referee noticed a separation between the mats during a match. He moved the mats together to close the gap and protect the contestants. While closing the mat gap, the referee's attention was diverted from the match and one of the wrestlers applied a full-Nelson hold (an illegal hold) to his opponent, resulting in permanent paralysis below the neck. The referee in this case had a duty to enforce the rules of the wrestling contest and to prevent illegal holds. The standard was one of an ordinary and prudent wrestling

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referee. The court held that the wrestling refereee liability issue should be tried.

In 2001, Orlando Brown, a former offensive lineman with the Cleveland Browns, filed a $200 million lawsuit against the National Football League, claiming his career was ended by eye injuries sustained from a penalty flag thrown by a referee during a game. Brown had alleged that the NFL failed "to properly supervise and enforce rules that flags be properly weighted and thrown in a proper fashion." According to Brown's lawyer, his client cannot play professional football again because "any kind of substantial contact to the head would cause an inalterable change in his ability to see. He would go blind."

1.3. Failure To Supervise

The seminal case relative to a failure to supervise a match which resulted in a catastrophic player injury and a referee being held liable for damages was the English case of *Smoldon v. Nolan and Whitworth* [1997] ELR 249. The lawyer for the referee argued that "people who voluntarily play contact sports should accept the risks that go with them." However, the court thought otherwise and called that argument unsustainable in a situation where a referee fails to exercise the care and skill reasonably expected in competition. This situation arose when Ben Smoldon, who was playing on a 19-and-under team at the time, broke his neck in a rugby scrum that had repeatedly collapsed. Smoldon was awarded £1.8 million in damages for his injuries but received only £1 million because it was the maximum available under the Rugby Football Union's insurance policy.

2. Sports Officials Employment Issues

Referees and officials are employed at the amateur sports level pursuant to a contract with a sports league or association. In these contracts the official acknowledges and represents that he is an independent contractor. The result is that the official is denied workers' compensation benefits in the event that he sustains an injury during a competition, the official will be responsible for any income taxes related to his services, and, in the case of the official's negligence in the performance of his duties, the plaintiff cannot recover from the party who hired the official.

Further, some officials' contracts contain "hold harmless" or "indemnification clauses." For example, the Big Ten Conference contract states that each official will "hold the Big Ten Conference[1], its commissioner, supervisor, officials and all other conference employees and all of its member institutions harmless from any and all liability for injury or damage as a result of the assignment." While these clauses have been upheld as enforceable contractual obligations, these clauses have been also struck down by courts on the basis that these agreements were contracts of adhesion or in violation of public policy.

Additional issues addressed in referee and official contracts include the following:

> What happens if the official agrees to officiate a game and fails, for whatever reason, to appear at the time, place and game contracted for?
>
> What happens if the contracted official fails to appear, but sends a substitute without receiving the prior consent of the league or association?
>
> If the contest or game is postponed or canceled for whatever reason, for example, inclement weather conditions, who has the obligation of notifying the official, how much time in advance is required, and what occurs if the official arrives at the contest without having been notified?
>
> Is an official paid if the game has begun, but canceled before the game's completion because of events beyond the official's control?
>
> What rights does an official have when an event is rescheduled?

In contrast to amateur sports officials, those who work for the NFL, NBA, NHL and MLB have formed labor unions to negotiate their terms and conditions of employment. As a result, these referees are subject to collective bargaining agreements and the contracts for game officials are standardized. Items covered under these agreements include the number of officials employed by the league, an official's remuneration, work schedule, and evaluation method adopted for use in retention, promotion and firing.

Moreover, employment related lawsuits involving referees have included age based and disability discrimination claims. For instance, in 1993, former NFL official, Ben Dreith, received $165,000 plus legal fees of $100,000, and other costs, for settling a claim he made against the league. Dreith asserted that he was fired after the 1990 season because of his age. The lawsuit claimed that the NFL was guilty of age discrimination, harassment, and intentional infliction of emotional distress on Dreith.

In Clemons v. The Big Ten Conference, 1997 U.S. Dist. Lexis 1939, 73 Fair Empl. Prac. Case (BNA) 466 (1997), Lorenzo Clemons, a former Big Ten football official, claimed that he was fired in 1994 in violation of the Americans with Disability Act ("ADA"). The court held that the conference was justified in firing Clemons because they believed that his on-field performance was adversely affected by his weight. Clemons, who weighed between 275 and 282 pounds, claimed that his firing violated the ADA because he believed that his weight problem qualified as a disability. The court held that "the Big Ten may legitimately expect that its officials maintain themselves in a physical condition such that they are able to move down the field with the football players." In addition, the court found that "except in rare circumstances, obesity is not considered a disabling impairment . . . This evidence does not demonstrate that (Clemons) was perceived as substantially limited in the major activity of working."

In July, 2002, Major League Baseball ("MLB") filed a lawsuit against one of its umpires, John Hirschbeck, and his labor union, the World Umpires Association ("WUA"). The complaint alleged that Hirschbeck told a member of his umpiring crew not to warn a pitcher for intentionally throwing at a batter despite his employer's orders to the contrary. MLB is requesting that the court grant them a declaratory judgment so that its attempt to discipline Hirschbeck is not subject to arbitration. Instead, MLB wanted Hirschbeck to attend a hearing before Sandy Alderson, MLB executive vice president of operations. On the other hand, the WUA argued that they did not attempt to arbitrate Hirschbeck's discipline. Rather, they claim that the lawsuit is really about MLB's reliance on a computerized evaluation system that is inaccurate and which the WUA and its members vehemently object to its continued use for umpire evaluation and retention.

3. Sports Officials Assaults

To be a sports official is to sometimes be subjected to witty wisecracks and sage sarcasm. In general, that type of criticism is just part of the game. However, with the growing incidence of violence at sporting contests, sports officials have been subjected to physical assaults by coaches, participants and fans. While an official consents to some

1 The Big Ten Conference is a sports conference that consists of eleven teams primarily from the Midwest universities and includes: Wisconsin, Minnesota, Iowa, Michigan, Michigan State, Indiana, Purdue, Ohio State, Northwestern, Penn State, and Illinois. The eleventh team, Penn State, was added to the Conference about five years ago, but the name "Big Ten Conference" remained. These university teams compete in sports such as American football, basketball, volleyball, wrestling, swimming, track and field, etc. Women and men compete for these teams on a very high level.

physical contact as being part of the game, he does not consent to intentional or physical acts that are outside the scope of a contest. For example, the National Association of Sports Officials ("NASO") receives two to three telephone calls each week from referees who have been shot at, spit on or physically attacked. In response to the increasingly violent environment that referees find themselves, NASO offers assault insurance to its 18,000 members, and its publication, "Referee," carries a regular feature listing the month's most egregious examples of unruly or violent behavior toward officials. According to NASO, the biggest threat to officials is not at professional, college or high schools games, but at lower sports levels, where officials must walk through a hostile crowd and return to their car alone.

As a result of this threatening behavior, presently there are 19 American states that have enacted special legislation to protect officials against assault, harassment, property damage or trespassing. In 1978, Oklahoma was the first state to pass a law that made it a serious offense to attack a sports official as well as other sports based personnel. The Oklahoma law, Okla. Stat. Ann. tit. 21, §650, states in the pertinent part as follows:

> "Every person who without justifiable or excusable cause and with intent to do bodily harm, commits any assault, battery, assault and battery upon the person of a referee, umpire, timekeeper, coach, player, participant, official, sports reporter or any person having authority in connection with any amateur or professional athletic contest is punishable by imprisonment in the county jail not exceeding one (1) year or by a fine not exceeding One Thousand Dollars ($1,000.00), or by both such fine and imprisonment."

In March, 1987, Arkansas adopted similar legislation. Ark. Stat. Ann. §5-13-209 provides that:

> "Any person, with the purpose of causing physical injury to another person, who shall strike or otherwise physically abuse an athletic contest official immediately prior to, during, or immediately following an interscholastic, intercollegiate, or any other organized amateur or professional athletic contest in which the athletic contest official is participating shall be guilty of a Class A misdemeanor."

If one is convicted of a Class A misdemeanor in Arkansas, one is exposed to a fine not exceeding $1,000.00 and a sentence not to exceed one year in jail.

Similarly, the rules of most sports leagues and associations also protect officials from player assaults or other forms of violence. For instance, Major League Baseball Rule 21(e) states that:

> In the case of any physical attack or any other violence upon an umpire by a player . . . the Commissioner shall impose upon the offender or offenders such fine, suspension, ineligibility or other penalty, as the facts may warrant in the judgment of the Commissioner.

More recently, in April, 2002, the Washington Interscholastic Athletic Association ("WIAA") is considering a new rule in response to 538 ejections from game competitions of coaches and athletes during the 2000/2001 school year. Previously, WIAA rules provided that ejections were followed with a one game suspension. However, the WIAA believes that the suspension did not provide a sufficient deterrent. The proposed rule provides that:

> "When the first participant or coach in a sport is ejected, the school that the participant or coach is representing shall be assessed a $50 fine by the [WIAA] Executive Board.
>
> A second ejection in the same sport during the same season shall result in the assessment of a $100 fine, and each ejection thereafter in that sport during that season shall result in a fine to be increased by $50 increments for each ejection without limitation."

The money derived from the fines will be used to support the WIAA's "Just Play Fair" committee and its high school sportsmanship programs.

4. Conclusion

The world of modern sports officiating has been shaped and influenced by the law. Issues ranging from player tort liability to referee contract issues and from official assaults to umpire collective bargaining agreements, all have been guided by legislation and case law. This trend will continue into the future where only the unwary or foolish sports official will ignore the law's impact on his vocation. The International Sports Law Journal

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The Ellis Park Disaster Interim Report: a Synopsis and Commentary

by **Paul Singh***

1. Background

Arch-rivals Kaizer Chiefs Football Club and Orlando Pirates Football Club were scheduled to play on Wednesday night, 11 April 2001 at the Ellis Park Stadium. Both these teams are based in Johannesburg, and have the largest number of supporters in Southern Africa. The game was a crucial Premier Soccer League (hereafter: PSL) fixture as it could have determined the league's champions for that season, and both teams were potential champions.

Ellis Park, in the east of Johannesburg is one of the country's prime stadia, with a capacity of 60,000 spectators. It is an all-seater stadium, located within walking distance of the CBD and densely populated inner city neighbourhoods. It is easily accessible by road and rail and is comparable to some of the best sports facilities in the world. However, the stadium does not have a formal parking area for spectators, except for a few parking spaces reserved for VIP's. On match days, the streets surrounding the stadium are congested with parked vehicles, and most businesses and industries in the area rent out their parking to spectators.

The stadium has an outer perimeter fence, between which and the stadium proper is a large area (municipal property) that accommo-

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dates spectators *en route* to various gates at each corner of the stadium. Ellis Park is accredited by FIFA and SAFA for soccer, and by SARFU and IRB as a suitable rugby test venue.

The match in question unfortunately turned out to be the worst soccer disaster in the country. A stampede ensued, and eventually 43 people died, leaving scores of supporters injured and traumatised.

Justice B.M. Ngoepe, the Judge President of the Transvaal Provincial Division of the High Court of South Africa, chaired the Commission of Inquiry into the disaster. He was assisted by an additional member, Advocate I.A.M. Semenya, SC. The Commission's terms of reference were to make findings and report on the facts that led to the disaster on 11 April 2001 at Ellis Park Stadium.

The interim report does not include recommendations, as it reportedly requires further research, consultations and comparative studies.

2. Processes and Procedures

In order to understand the context of the problem, the commissioners consulted with a number of experts on soccer safety and security in the UK. They read Justice Taylor's report on the *Hillsborough Stadium Disaster of 15 April 1989* and Justice Popplewell's report on *Crowd Safety and Control at Sports Grounds*. They also visited two stadia in England. Additionally, they read the report on the *Orkney Soccer Disaster of 1991*, which also occurred at a match between Kaizer Chiefs and Orlando Pirates.

Several interviews were held with the media for wider publicity of the process. The Commission invited the public to make inputs into its work. Meetings were also held with legal representatives of the role players to arrange days for the hearing of oral evidence.

The hearings began on 16 July 2001, and lasted for a period of about 10 weeks. A total of 47 witnesses testified. Further, a formal *in loco* inspection was conducted to make various observations.

At the conclusion of the evidence, the legal representatives of the various role players submitted written arguments. They were also allowed to make oral submissions. Their arguments offered constructive and objective assistance to the Commission.

3. Findings and Discussion

This article will focus firstly on events that unfolded on the day of the event and secondly on the chief factors that preceded and led to mismanagement of the event and the resultant tragedy.

3.1. Material events that occurred on the day of the match

3.1.1. Traffic congestion

The match was scheduled during midweek on a Wednesday, at a time when commuters were still returning from work through peak traffic. The roads leading to the stadium were congested with vehicle traffic by about 19h00. The lane designated for VIP entrance was blocked. Those who used vehicles experienced severe difficulties in reaching the stadium, with the result that they arrived late. The CEO of the PSL, despite using the VIP lane, took more than an hour to reach the stadium, a distance that normally takes 15 minutes.

Because of crowd pressure at the VIP gate, security personnel closed it, causing further traffic congestion. The many abandoned, randomly parked cars exacerbated the situation, making access to the stadium impossible. Traffic officers themselves were not able to drive around the stadium. This also made it impossible to use tow-trucks to remove offending vehicles and for support services vehicles to assist with rescue operations.

The Metropolitan Police accused the drivers who had illegally parked their vehicles in the way. They seemed to think that even if a large contingent of Metro Police were deployed, the situation would have been uncontrollable. There is no explanation as to why the problem was allowed to occur in the first place. Regardless of the soccer match, the Metro Police have a general duty to maintain law and order in respect of traffic. It is clear that such a duty was not met.

3.1.2. The sale of tickets

The number of spectators who turned up for the match was about 80,000. Less than 4,000 of the tickets were pre-sold, resulting in the majority of the spectators buying their tickets on the match day.

The stadium management contended that they only sold 60,000 so that the capacity of the stadium would not be exceeded. However, according to an audit, the stadium management's record was irreconcilable, as they could not account for 4,000 tickets.

3.1.3. The 'tickets sold out' announcement and crowd reaction

Announcements were made at about 19h15 that the tickets had been sold out, and that the stadium was full; spectators were urged to return home. Naturally, the announcement was not heeded. Firstly, a number of valid ticket holders were not allowed to enter the stadium, leading to chaos and confusion. They did not accept that the stadium was full, as they were in possession of their tickets. This indicates that tickets were over sold. Secondly, such a system will not work, because the spectators without tickets had already invested their time and money in undertaking the trip from all parts of the country and beyond its borders. As such, they had a fair expectation that they would be able to purchase tickets and watch the match. A mere announcement to the contrary would not only disappoint them, but also agitate spectators and encourage aggressive tendencies. Therefore, tickets to such major matches have to be pre-sold, as had been done at other events in the past.

The expectant crowd without tickets on the one side moved to another side of the stadium in an attempt to buy tickets, and the security allowed them into the inner perimeter for this purpose. Herein lies another major decisive error. The announcement was made for spectators without tickets to go home. Security should therefore not have allowed them within the inner perimeter for the purpose of buying tickets. The result was that large numbers of people moved over to the northern side where they combined with those who had rushed in over the collapsed perimeter fence and created a wave of people that security personnel were not in a position to stop. This mob pressed forward toward the stadium gates. Although Public Order Police then deployed razor wire between the collapsed perimeter fence and the stadium, it was much too late as thousands of fans had already forced their way into the stadium. A more timeous use of razor wire would certainly have helped contain the situation.

Among those that entered unauthorised, were both valid ticket holders and non-ticket holders. In all probability, they stormed their way into the stadium when they realised that they were in a helpless situation, with no chance of obtaining tickets. Such reaction should have been foreseen, especially since the fans had a reasonable expectation of tickets at the stadium on the match day. In other words, while the stampede was inexcusable, it was in a sense inevitable and foreseeable.

3.1.4. The crush

Once the control at the perimeter fence was lost between 19h15 and 20h10, the stadium was filled beyond capacity as thousands of spectators accessed the stadium without entering at the control points. The gates and roller shutter doors had been broken. With the pressure from behind at gate 4, many people were pushed over and crushed by others. At 19h55 there was total chaos as all gates had been broken down. At 20h05 there was chaos all over and the police were contacted for additional police assistance.

Evidence seems to indicate that security officers in the stadium did not react appropriately to the signs and signals given by spectators. One spectator even tried in vain to attract the attention of the security personnel by setting alight a piece of newspaper. Objects were also thrown onto the pitch for the same reason. But they were to no avail. A representative of one of the security services in the joint operation centre drew the attention of the attendant PSL representative to the incident. He merely looked at the incident and did not consider it as serious.

3.1.5. The use of teargas/similar substance

In all likelihood, either teargas or a similar gaseous irritant was dis-

charged into the crowd once they became rowdy and out of control, although conflicting accounts were rendered in this regard. The review of video footage did not conclusively show teargas canisters on the persons of the security team concerned. However, it did reveal several spectators covering their noses, albeit not in the alleged section of the stadium. The evidence suggests that the consequence of such action was a panic reaction that either caused the stampede or aggravated it.

3.1.6. Game stoppage
Evidence indicates that the game started shortly after the scheduled time of 20h00 despite all the problems within and outside the stadium. It is clear that by that time, many people had already been injured and lives were lost. Victims were lain on the field behind the northern goal posts while the match was still in progress. The obvious question is: Why had all the related circumstances been ignored and the match commenced? Also, why did it take the CEO of the PSL over 40 minutes to stop the game whereas the medical and paramedical teams were already in action?

3.1.7. The tragedy
The tragedy started well before the game commenced. The injured were taken by ambulances and helicopter to hospital. The game was abandoned with 43 people dead, and 158 injured. Post-mortem reports indicate that in each case, the cause of death was due to the crush or stampede.

4. Factors Which Preceded the Event and Led to its Mismanagement and the Tragedy

The commissioners have not singled out any one decisive factor in the interim report: according to their findings, the disaster was the result of a combination of all of them, each contributing to a lesser or greater extent.

4.1. Poor match attendance forecast
All role players, i.e., public police, private security companies, etc, had grossly underestimated possible attendance. The South African Police Services records indicate an estimate of about 50,000 spectators. The three operational meetings held by the role players revealed their estimate to be between 45,000 and 50,000.

What is inexplicable, is why any of the role players estimated anything but a capacity crowd, given the following: each team enjoys huge support; the long and proud history of rivalry between these teams; their positions on the league's log; and the fact that both teams were based in Johannesburg where the stadium is situated. Further, the stadium is the home-ground of Kaizer Chiefs; and the match was crucial in deciding the championship. In fact, these offer every indication that a large crowd would be attracted and should have been expected.

This gross underestimation of possible attendance is reported as the fundamental cause of the tragedy. There were neither plans in place to deal with a capacity crowd nor with a crowd in excess thereof. Clearly, this is directly related to the need to pre-sell tickets, what would make crowd estimation much more simple and reliable. Market research is a fundamental element of planning for effective strategies for dealing with crowds, and the PSL should engage professional assistance in this regard.

4.2. Failure to learn from the lessons of the past
The role players failed to take into consideration past experiences, or the doctrine of actual notice. Similar incidents had occurred when these two teams played against each other in the past. A stampede occurred when fans disagreed with the referee's decision and 41 people were killed and many injured when these two teams played a 'friendly' match at Orkney in 1991. On 10 October 1998, the same two teams clashed at Ellis Park Stadium. Spectator violence erupted and the police used rubber bullets to control the rioting. On 29 November 2000, these same teams clashed again at the First National Bank Stadium. It was also on a Wednesday night and spectators gate-crashed the match because of the unavailability of tickets which were sold at the stadium on the match night. Hence, it was concluded that all of the role players were remiss in not adequately addressing previous problems in their planning during the operational meetings.

4.3. Failure to clearly identify and designate areas of responsibility
In several instances there was confusion or disagreement as to specific areas of responsibility. This resulted in certain security functions not being carried out effectively or at all. There was disagreement as to whose responsibility it was to secure the outer perimeter fence against any possible intrusion by spectators. Although there were three possible role players responsible here, none of them accepted this responsibility. The result was that nobody acted pro-actively to prevent the perimeter fence from being breached.

No one was given the specific responsibility to monitor the crowd inside the stadium. Here also, while there were two possible role players, neither of them accepted this responsibility. The minutes of an operational meeting of 10 April refer to the placing of two spotters in a suite for the purpose of looking out for possible problems that may arise in the stadium. The role players could certainly not justify their ridiculous expectation that two people would effectively be able to monitor a crowd of over 60,000 spectators. It is rather ironic that several security groups were willing to 'take over the stadium', but not the basic responsibility of safety and security of the spectators.

4.4. Absence of overall command of the Joint Operation Centre
There was no specific person placed in overall command of this centre, or of the entire event, who could receive all the relevant information and take a decision. Instead, there was a collection of independent heads of security groups, all of whom denied that they had the final authority to issue commands from the centre. This was found to be a glaring and serious weakness in the security plans.

The centre was not *jointly* operated. The occupants displayed no teamwork or co-ordinated effort that was expected of them. These individuals had no authority to take any corrective action on their own if this was indeed necessary. They perceived their responsibilities as being limited to receiving and relaying messages.

There was no proper co-ordination of information in this centre. Messages were received by representatives of different companies or the police. Most senior officials were scattered around the stadium without properly communicating with each other or sharing vital information that could be used to formulate corrective strategies.

4.5. Inappropriate and untimely announcement that tickets were sold out
At 19h15 the stadium manager instructed a senior Metropolitan Police representative to announce around the stadium that tickets were sold out. This was apparently done as a strategy to discourage the many spectators who could not be accommodated in the stadium. The announcement was made without prior consultation with, or warning to, the Public Order Police, or even some of the other role players.

Previous experience of similar situations should have informed the manager that whenever a large crowd of spectators could not gain access into the stadium, they would become agitated and try to force their way in. Further, had the stadium manager consulted with all the relevant role players prior to the announcement, pre-emptive measures could have been put in place. This costly omission resulted in the loss of control over the crowd.

4.6. Failure to adhere to FIFA and SAFA guidelines
The guidelines of both FIFA and SAFA specify that a game should not commence until the situation inside and outside the stadium is under control. There is overwhelming evidence that when this match kicked-off, security personnel had already lost control of the crowd: there were thousands of spectators outside trying to gain access; many areas around the stadium were being vandalised; the gates were being ripped open; security reported total chaos outside the stadium; ticket booths had been attacked and cashiers were escorted to safety by

armed guards; and terraces, gangways and stairways were crowded with fans. The commencement of this game therefore violated the guidelines of the governing bodies. The problem here was that there was a lack of an information management system which should have formed an integral part of the overall risk management plan. Information was therefore not co-ordinated. As a result, officials inside the stadium, including the referee and senior managers of football were not aware of the scenario outside the stadium. It was not until 40 minutes into game time that the CEO of the PSL stopped the game, after the tragedy had already occurred.

4.7. Unacceptable spectator behaviour

The vast majority of South African soccer spectators are well behaved. The instances where misbehaviour and damage to property occurred, were the result of frustration when access to the stadium was denied to spectators who had gathered from afar. While it is understandable that spectators were angry and frustrated, their resultant behaviour is unacceptable. Thus, part of the blame for the tragedy could be placed on the spectators. The issue here is, have these soccer clubs and the governing body ever engaged in educational programmes that would get their supporters to appreciate that their conduct is as critical a factor as any other in maintaining safety and security at stadia?

4.8. Sale of tickets and unreserved seating

The pre-selling of tickets could not, by itself prevent such a tragedy. It much rather depends on the entire philosophy and approach to risk management. Evidence indicated that tickets were printed, issued and sold until close to the kick-off time. The sale of tickets on match day and on-site definitely contributed to the problems experienced. The fact that this decisive game was scheduled midweek and in the evening was critical. Most spectators were only able to get to the stadium after work. For these reasons, the sale of tickets on-site should have been a foreseeable risk. Unreserved seating compounded the problem. Many fans who could not find a seat stood in the gangways and on the stairways, thus leading to congestion and the lack of emergency access.

In contrast, when this same stadium hosts rugby matches, tickets are sold with reserved seating, and the aforementioned problems are prevented. The assertion that soccer spectators are mostly from the lower socio-economic groups and not particularly suited to purchasing tickets in advance is not acceptable. If they have the outlets in their localities from which to purchase tickets beforehand, and the clubs assume the responsibility for educating their own supporters as to the significance thereof, there is no conceivable reason why the presold ticket system will not work. Football governing bodies have to assume the responsibility to facilitate this process.

4.9. Corruption and dereliction of duty

There was indisputable evidence that some members of the security personnel allowed people into the stadium without tickets, in return for money. This not only leads to overcrowding, but also agitates other spectators who may/ may not have tickets and are desperate to enter, especially in the case of the latter who are still in the queue for tickets. Such corrupt practice should be stamped out immediately at match venues.

There was ample evidence that there was dereliction of duty on the part of certain security officials. At certain strategic points there were no security officers, and people entered unchecked as there was no one to demand tickets upon entry. As a result also, some spectators were able to enter the stadium with their tickets intact, and thereafter resell or hand them over to those still outside. Clearly this contributed to the overcrowding as well.

Security personnel failed in their duty to notice the trouble or disturbance in the north-eastern pavilion, where the majority of victims came from. They did not take notice of the commotion, items thrown onto the field and a newspaper set alight to attract their attention. In addition, spectators shouted at the top of their voices for help, but to no avail. If security officers were present in this area, they had clearly failed to execute their duty.

4.10. Failure to use the big screen

The use of the big screen at the stadium could have relieved pressure caused by the late arrival of spectators who became anxious to obtain tickets before the game started. However, this idea was abandoned because of cost implications to Kaizer Chiefs. Again, this is an unacceptable argument, in the light of the numerous lives lost. Certainly, Kaizer Chiefs' management should not place profits above risking the lives of their supporters. If anything, they will gain more supporters for football if they assist in providing a safe and secure environment at matches.

4.11. Inadequate public address system

The public address system was wholly inadequate to convey critical messages to spectators at the crucial times. Kaizer Chiefs were responsible to provide four additional megaphones. Instead, several hand held loudhailers were used, but these were ineffective because of the typical noise levels at soccer matches. This breakdown of communication with the crowd made its control difficult.

4.12. General remarks

4.12.1. The attitude of private security companies

The conduct of some of the private security officials was far from satisfactory. They were hostile to spectators and showed a general disregard for their dignity. There was at least one open instance of racial discrimination on their part. They also displayed contempt towards PSL security personnel. On the match day the latter security group refused to be debriefed by the Ellis Park head of security. There was palpable tension between the PSL security and other security groups. This situation is detrimental to effective crowd control measures. The PSL cannot realistically expect independent security groups to function harmoniously unless they have been trained specifically in this regard. Additionally, they have to be trained specifically in sport crowd control. Although this is an area in which there appears to be a lack of consensus, they have to be trained at least in the following broad areas: venue familiarity; use of communication skills; applicable laws and policies.

4.12.2. Complimentary tickets

The PSL issues 5000 complimentary tickets to its sponsors at the beginning of each season. Each ticket is valid for one unspecified match at any venue in the country. As there is no system regulating where and when these tickets will be used, they can negatively impact on the estimation of attendance figures at matches. There were no records to indicate how many such ticket holders attended on 11 April, but they would have certainly contributed to the overcrowding.

5. Conclusion

While the interim report has a role to play in addressing the anxiety of the public as to the cause of the tragedy, it is a concern that seventeen months later, the Commission of Inquiry has not yet made its final recommendations. Its significance cannot be over emphasised, given the serious transgressions that have surfaced in the interim report. In the meantime, the families of the 43 victims have accused the PSL of "leaving them in the lurch." The Ellis Park Relief Trust Fund managers announced a final payment of R3000, in addition to the R2500 made in December 2001, to each family, amounting to a meagre R5,500 (approximately 500 Euros) compensation. Victims' families are enraged and have promised to sue the PSL (*The Star*, Wed.28 Aug.02).

It would specifically be interesting to ascertain whether the question of joint liability will be addressed, since the Commission concluded that the disaster was the result of a combination of several factors. It would also be interesting to see whether a sports-based risk management system for South Africa will be recommended and how such a system will be implemented.

This disaster was no freak accident. It was the inevitable culmination of years of complacency, neglect, low investment and, in many ways, plain bad management. If authorities do not heed the warnings this time, there will surely be a repeat of the tragic events that could lead to the loss of even more lives.

Asser/Leuven/Tilburg Seminars on International Sports Law

"Transfers and Agents", Leuven and Tilburg, 15 and 22 May 2002

Introduction

by **Robert Siekmann***

Recently the law faculties of the Catholic Universities of Leuven (Louvain) and Tilburg have begun a close co-operation in the field of international sports law with the T.M.C. Asser Institute for International Law. This new inter-university collaboration not only focuses on Belgian and Dutch sports law, but also aims to examine the legal aspects of sport from an international and comparative law perspective. The two seminars concerning "Transfers and Players' Agents in Sport", which this contribution discusses, constituted a first joint activity.

Testing "autonomous" sports law in the narrow sense of the private law of association against the public European law of the EC/EU has become a central topic in both the theoretical study and the everyday practice of sports law. In the early days, the Walrave/Koch, Dona-Mantero and Heylens judgments had already been delivered, but since the Bosman Case everything is being tested and scrutinised, in particular as a result of the explosive increase in the level of professionalism and commercialisation of the sport of football. Apart from the judgments in non-football cases, such as Lehtonen and Deliège, there are some recent examples of matters which the Commission and the Court have yet to clarify by means of decisions or judgments in test cases: the question how to deal with state aid to professional football clubs and, in connection with this, the tenability of the licensing systems, and the problem whether the new European competitions (cf. the Atlantic or Euro League), as supported by PSV Eindhoven chairman Harry van Raaij and discussed at an Asser Institute Conference in the Feijenoord stadium in Rotterdam in November 2001, should be allowed to take place. See also in this context the speech by Anderlecht manager Michel Verschueren as far back as 28 November 1996 following the international match between the Dutch and Belgian football press in stadium "De Kuip" concerning a "Proposal to set up a championship of the Low Countries" (BeNe League). The main issue is to test existing sports structures against Community competition law. An "*Umwerting aller Werte*" is currently taking place in professional football in Europe, which is the result of the discovery that Community law is applicable to this sector.

Two other questions affected by European law were central to the seminars mentioned above: transfers and agents. These topics have been greatly clarified by the European Commission's action compelling the international football federations UEFA and FIFA to adjust their policy in accordance with European law. Essential in this is the area of tension that the law of association operates in, caught between national (labour) and European law, whereby national public law nor private sports law may go against the European rules concerning the free movement of persons or competition law. The fundamental starting point is that situations which exist in continuing ignorance of European law will inevitably be abolished. Although, in practice, this will of course not transpire without the necessary hiccups.

Transfers

A result of the Bosman Case was the abolition of the transfer system, but another transfer system swiftly took its place. Clubs began concluding long-term contracts with their players, not to gain the assurance that they would serve them out, but to ensure that the buyout payment for pre-term termination of these continuous contracts would be as high as possible. Players co-operated with the system, because they stood to receive much higher salaries when they committed themselves for the long term. Or, rather, it was the agents who claimed huge salaries on their behalf in exchange for the players' willingness to conclude long-term contracts. So, even though the old transfer system had collapsed where fixed-term contracts were concerned, clubs and players were still free to determine the duration of the agreements. In addition, the players retained the possibility to terminate the contracts as soon as another club offered to increase their earnings and also promised to be an improvement in terms of sportsmanship. This way, the players could have their cake and eat it, but they also guaranteed that the clubs stood to make a substantial amount of money in buyout sums. The clubs therefore also profited from this new, unofficial de facto transfer system. In fact, all parties involved benefited: not just the players and the clubs, but also the players' agents, who moreover gained more when players were transferred more often. Much more money than before changed hands in professional football, in short: trade was blooming, although the "player trade" as such had become a thing of the past now that the players enjoyed complete contractual freedom as compared to their previous situation. As it was no longer possible since Bosman to limit the number of EC-foreign players either, players began to enter the national markets in larger numbers. The position of the players and the agents was thus strengthened considerably and that of the clubs weakened by comparison, but this had already been a direct result of Bosman as well. Trainers had a tough time in the periods during the season when transfers were possible: you never knew which team you could continue to work with, as dissatisfied players could simply leave. Building a team over a longer period of time became virtually impossible, which did not do much to increase the level of play.

This was the reality behind the official façade of players' contracts. Everyone, i.e., all the parties directly involved, had an interest in maintaining the new post-Bosman transfer code. The risk of another Jean Marc Bosman to spoil the game was therefore minimal. The biggest advantage of the new 'unwritten law' was that on the outside it was perfectly legal where the old pre-Bosman transfer system had been legally untenable. The new system continued to develop in practice. Now, when a club wanted a player to abide by the contract no matter what, despite all the advantages outlined above, it did of course have the law completely on its side, given the adage "pacta sunt servanda": a contract is a contract and agreements must be observed in good faith. On the other hand, a club taking this line of argument would actually be violating the modern transfer code. The player would expect the club to live up to the code, because had the player not voluntarily collaborated in the conclusion of the continuous contract? And would he not have refused to do so if he had known that the club intended formally to keep him to his contract? The club went against the gentlemen's agreement whereby the player would make the club a great deal of money because he could not be tied down when another club offered much more. Meanwhile, the player would still be

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earning a lot more money under the long-term contract (in addition to the duration of the contract the height of his salary was of course also decisive for increasing the amount of the buyout payment), which formed a second condition for agreeing to its terms. On the other hand, if he had concluded a short-term contract, he would in all probability have earned less, but he would also have been free to transfer sooner and could have claimed a much higher down payment from his new club. Upon the conclusion of the contract or upon its extension the club was aware that this act could well serve a different purpose in practice than the formal purpose of the assumption of a long-term obligation by the player. Just like the old system, the new transfer code could only operate effectively if all the parties involved respected it. That is not to say that the new code was desirable. In the normal course of affairs, a player would only conclude a contract if he actually intended to serve it out on his part and if the clubs were prepared to let him serve it out on their part, bar certain special circumstances. But the new code was the result of the new balance of power between players/agents and clubs in professional football after the Bosman judgment. It was not the formal law of contract, but the informal code which actually reflected reality. The formal law of contract was only a means through which the code could operate.

It is a known fact that the European Commission gradually became more and more irritated with the fact that transfer sums were rising to ever dizzier heights. If Bosman solved the crying abuse of the "end-of-contract" situation, now there was a new abomination to contend with "during contract", which seemed to eliminate the very consequences of Bosman by the extreme duration of the new contracts. Hence, the Commission opened negotiations with FIFA and UEFA in order to have the transfer rules adjusted to call a halt to the new practice. Earlier last year, the Commission and the two international football federations concerned already managed to come to an arrangement as a follow-up to the Bosman judgment. An interesting question in this context is what the legal status of these agreements actually is. They do not involve a formal legal agreement, let there be no question about that. They seem rather to be of the nature of a "gentlemen's arrangement" in the sense that the world of football is now aware of the limits within which one is to comply with European law in any event. It is an arrangement which carries no legal obligations for the Commission or UEFA/FIFA. It rather serves as a policy guideline for the football federations on how to act. Of course, "proper" European law remains applicable at the end of the day: whosoever wants to find out what is and is not permitted or possible should apply to the European Court of Justice in Luxembourg. The Commission of course cannot interfere with hard-core European law by unilaterally making a compromise with the football scene! Those who correctly apply the new FIFA transfer rules may rest assured that they will not antagonize the Commission by acting contrary to European law. Meanwhile, the new transfer rules find themselves between the Scylla of European law and the Charybdis of national labour law. When players have increased freedom of movement on the basis of the national labour law of the Member States, which is expressly respected in the agreement between the Commission and the federations, no objections can be raised against this ("most favourable treatment"): increased freedom of movement by definition also leads to increased competition between the clubs on the market for players. As has been observed before, a second Jean Marc Bosman could stand up and, invoking national labour law, could topple the new transfer rules! In case national labour law grants less freedom (which seems unlikely though), the interpretation which the European Commission has given to the EC Treaty in this respect will of course take precedence as a minimum standard, with the in principle ever-present possibility to have this interpretation tested by the European Court.

"Bosman" was decided on the basis of the rules in the EC Treaty concerning free movement; the rules concerning competition were expressly left aside. The new FIFA rules, however, appear to reflect both areas of the law. For example, from now on clubs must be prepared to make a payment to compensate for the expenses of educating young players. This seems to be a translation of the Bosman judgment where it states that adequate and proportionate means for the protection of young footballers' education are justified in order to (together with the redistribution of TV payments, etc.) maintain a balanced competition in terms of sportsmanship. Compensating the costs of education young players, maintaining contractual stability in football (among other things by prescribing the minimum duration of contracts), the solidarity mechanism and the restricted periods during which transfers can be effected - which are all prime topics in the new FIFA rules - all seem to be geared towards promoting a balanced competition as far as sportsmanship is concerned. Apparently, the Commission was unable to come up with any objections from a competition law point of view against moving in the direction of limiting the consequences of the Bosman judgment. On the other hand, the (post-Bosman) extreme duration of contracts, which was considered as restrictive of competition, has now been eliminated by the maximum validity of contracts laid down in the new FIFA transfer rules. The new transfer rules (which are part of the law of association) reside in the area of tension between the requirements of European law and the principles of national labour law. Time alone will tell how things will turn out in practice!

Agents

On 18 April 2002, the European Commission closed the investigation into the state of affairs concerning football player's agents. The new FIFA rules for player's agents, which had come into force the year before, could bear the scrutiny of European law. The old rules had put unnecessary constraints on the market by imposing stiff requirements (high security deposits, among other things) on candidates for the designation 'FIFA agent'. Clubs were moreover officially prohibited from concluding business with other than FIFA-licensed agents, which 'on paper' barred newcomers from entering the market. Although the football federations were entitled to impose requirements as to professional skill, such requirements did have to be functional. The relaxed requirements have resulted in a run on the agent's licence. Many an individual has hopes of making a fortune to last a lifetime by doing the transfer deal of century.

N.B. The, as far as I can tell and apart from the sparsely available legal literature, only book to date to have been written by a player's agent himself on the everyday practice of his profession is "*Adrenaline! - Bedrog op de grasmat*" [Adrenalin! - Treachery on the pitch] by Andre Gieling (DeeTee Publishers, Bussum 2000, pp. 176). And the only serious article by an agent to date has appeared in The International Sports Law Journal (ISLJ), No. 5/6 (2001): "Football agents: The twilight zone of professional football" by Rob Jansen, Director of Sport Promotion Ltd. and founder/board member of the International Association of Football Agents (IAFA).

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Robert Siekmann, who 'masterminded' the Asser-Clingendael Annual Lecture, next to the Prince of Orange and Johan Cruyff respectively.

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The Prince of Orange, Johan Cruyff and Robert Siekmann at the entrance of the Clingendael Institute.

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Player's Agents in Professional Football and Employment-Finding Laws in Belgium and the Netherlands

by **Frank Hendrickx***

Introduction

If you were pursuing a career in football and looking for a club to show off your talents, where would you go? You would probably take a look around in the world of player's agents. The same is likely to be true of clubs looking for new players. It will hardly come as a surprise that player's agents play an important role in representing the interests of players or clubs in the conclusion of contracts, or in transfer negotiations or simply in looking after their interests. However, legal comments on these activities are scarce. The perspective of this contribution is to add to what little information is already available by giving an analysis of player's agents' activities in the light of employment-finding laws. It focuses on Flemish and Dutch legislation in this respect, with a view to offsetting both against the relevant provisions of international labour law.

1. Sports agents and sports managers

Terminology and meaning often cause problems when presenting an analysis. This also appears to be the case with regard to player's agents. The concept of 'player's agent' is often used where in fact the notion of 'sports agent' or 'sports manager' was intended. Most legal systems, including those of Belgium and the Netherlands, do not include the notion of 'sports agent' as a pre-defined legal concept. The use of this term commonly refers to a (natural or legal) person, who acts as an intermediary between the athlete and other parties, for example between a football player (employee or potential employee) and a club (employer or potential employer). In the latter sense, use is often made of the more limited term 'player's agent'. It is no surprise that the term 'player's agent' is often used instead of 'sports agent' in professional team sports, such as football, as the FIFA rules on player's agents demonstrate.

In legal terms, the notion of 'sports agent' is often linked with the activities of private employment agencies, i.e. agencies involved in employment-finding services (for example, finding a club for a football player). But the activities of sports agents are not confined to matching the supply of labour to the demand, or matching job seekers to job offers. Usually, sports agents develop a broad range of activities and services for the benefit of their clients, mostly athletes and sports organisations. In this respect, it may be more appropriate to use the term 'sports manager'.

In the broadest meaning of the term, a sports manager may be seen to perform one or more of the following activities:

- Contract negotiation and intermediation (employment contracts, sponsor agreements, television rights, ...);
- Management and services, most typically performed for athletes, in matters such as housing, taxes, social security, permits and licences, financial planning, legal advice, career development, health, ...;
- Organisation of sports activities and events, press conferences, publicity and sports promotion;
- Representative action in case of conflicts, mediation and arbitration.

As appears from this list of categories of activities, a sports manager may be a person involved in management and consultancy, in addition to representation and intermediation. Nevertheless, from a legal point of view, it is relevant to distinguish between the various kinds of activities that sports managers or agents perform as the capacity in which they act could influence the legal regime that is applicable to certain relationships.

Sports management activities can be legally qualified in different ways. Many contracts concluded within the framework of sports management or agency follow the normal civil law concepts. However, where sports managers or agents are involved in employment finding, i.e. are acting as an intermediary between potential employees and potential employers, specific labour law rules may come into play.

2. The law governing employment finding

As indicated above, one of the activities that sports agents may perform is the negotiation of contracts and intermediation with regard to employment. In other words, sports agents, or player's agents, assist players in finding a club, or a club in finding players. They may also play a part in the actual transfer of a player from one club to another. Put differently, in some respects sports agents may be said to act as intermediaries in the sense that they provide services in the process of uniting the demand and supply of labour. This is called employment finding (or *arbeidsbemiddeling* in Dutch), an activity which is strictly regulated by law.

A. International law

Until recently, the international labour conventions of the International Labour Organisation (ILO) provided for a prohibition of private employment intermediation. This prohibition was laid down in Convention no. 96 of 1 July 1949, which amended the former Convention no. 34 of 1933 in this respect. Fee-charging employment agencies were defined as agencies conducted with a view to profit, that is to say, any person, company, institution, agency or other organisation acting as an intermediary for the purpose of procuring employment for a worker or supplying a worker for an employer with a view to deriving either directly or indirectly any pecuniary or other material advantage from either employer or worker.

Employment finding was considered primarily a task for the government (through public employment services). It was provided that fee-charging employment agencies conducted with a view to profit were to be abolished within a limited period of time. Behind this prohibition lay the fear of abuse and the principle that 'labour is not a commodity'. As a result of this international labour convention, Belgium and the Netherlands established a government monopoly in the sphere of employment-finding services, although some exceptions were permitted. Conducting private employment-finding services was not impossible, but was subject to a very strict licensing system. Article 5(2) of Convention no. 96 provided that every fee-charging employment agency for which national law allowed an exception (to the prohibition) had to be in possession of an annual licence renewable at the discretion of the competent authority.

On 19 June 1997, the ILO adopted Convention no. 181 concerning

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Private Employment Agencies, which amended Conventions nos. 34 and 96. The new Convention starts from a different philosophy. Instead of a prohibition, the new Convention establishes a framework for the legal operation of private employment agencies. The new Convention actually uses the term 'private employment agency' which is defined as any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services: (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom; (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person which assigns their tasks and supervises the execution of these tasks; (c) other services relating to job seeking, determined by the competent authority, such as the provision of information, that do not set out to match specific offers of and applications for employment.

One of the central concepts of the Convention is laid down in Article 7, where it is provided that private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers, although exceptions are given. Another fundamental provision is Article 3 of this Convention, which imposes a duty on the States Parties to determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate national law and practice.

By shifting international attitudes regarding private employment intermediation, Convention no. 181 has obviously influenced national legislations. In Belgium, the issue of employment finding is regulated by the regions (Flanders and Wallonia). On 13 April 1999, the Flemish government ratified Convention no. 181 and issued a Decree concerning Private Employment Intermediation. This Decree was complemented by a Decision of the Flemish Government of 8 June 2000. It follows the philosophy of Convention no. 181. The Netherlands ratified Convention no. 181 on 18 September 1999 and the Dutch legislator is, at the time of writing, planning to abolish the licensing requirement.

B. Belgian law

As indicated above, of the two Belgian regions only Flanders has issued a law to facilitate - and regulate - employment intermediation, in the form of the Decree concerning Private Employment Intermediation of 13 April 1999, complemented by the Decision of the Flemish Government of 8 June 2000.

The Flemish 1999 Decree covers private employment finding. This is defined as *activities, exercised by an intermediary, aimed at assisting employees in their search of new employment or employers in their search of employees*. This definition also applies to the activities undertaken by sports agents in this field, i.e. providing assistance to athletes in finding a club, or assisting clubs in finding an athlete. It does not, however, apply to other activities in the field of sports management that are unconcerned with employment intermediation. When speaking of intermediation in this sense of the word, the notion of player's agent is often used.

The Flemish regulation of these matters is only applicable in the Flemish Region, which excludes the Walloon and Brussels Regions, where the general prohibition with regard to the operation of private employment agencies is still in force.

The Flemish 1999 Decree does not only cover assistance to employees in search of a new employer (or *vice versa*). It also concerns the intermediation between unemployed or self-employed persons in their search for a (future) employer. It may, therefore, also concern amateur players seeking to conclude their first professional contract.

According to the Flemish 1999 Decree, the exploitation of a bureau for private employment intermediation (in the language of the ILO: a private employment agency), including any publicity given to such activities, is subject to certain conditions.

a. No payment from player

Among the various legal requirements laid down in the Decree (e.g. corporate structure, credibility of management, social and fiscal obligations), it is provided that the private employment agency may under no circumstances require or receive any payment from the employee (or player).

b. Licensing system

The exploitation of a private employment agency is subject to prior authorisation by the (Flemish) Government. A formal licence must be obtained before any exploitation or publicity regarding employment-finding services is engaged in. This requirement applies in addition to any specific licences possibly required by sports federations. The governmental permit is issued by the Flemish Minister of Employment upon the recommendation of an Advisory Commission. This is a governmental body, established by law in the framework of the Social Economic Council of Flanders, in which the most representative trade unions and employers' organisations are represented. Every application for authorisation to operate a private employment agency will be examined by this Advisory Commission, which organises hearings at which the application can be presented and defended. In principle, licences are granted for an indefinite period and remain valid until revoked by the public authorities.

c. Professional experience

Persons eligible for positions in employment finding must fulfil a number of requirements concerning experience or training. This derives from the Flemish Decision of 8 June 2000 which gives effect to the 1999 Decree. For the exploitation of a private employment agency representing professional athletes, it is required that the person in charge, or at least one of his staff, should comply with at least one of the following conditions:

1° professional experience of at least 5 years in the sector of personnel management or in the sector concerned;
2° a diploma of higher education of at least 2 levels and professional experience of at least 5 years in the field of company management.

d. Payment of player's agents

The payment of sports agents is strictly regulated by the Flemish 2000 Decision. It is provided that the agent's commission, or fee, should be laid down in an agreement between the sports agency and the athlete, with a copy to be made available to the latter. The fee may be either calculated as a percentage of the total gross income of the athlete or consist of an agreed lump sum payment. However, the fee is subject to limitations. It is provided that the fee cannot exceed 7% of the (agreed) annual gross income of the athlete.

The fact that the law prohibits payment by the athlete to the sports agent and the fact of the limited agency fees has met with criticism from the sports agency sector. The fee is subject to an absolute ceiling calculated on the basis of the athlete's annual income in a given year (7% of the player's annual gross income). Successive payments are not prohibited as long as the ceiling is respected, but it is clearly not possible to stipulate a fee of 7% of each annual income. The practical effect of the legal limitation can, however, be mitigated. In the first place, the limitation only applies to *paid* athletes, who are defined as persons who participate in sporting events against payment under the authority of another person. Although this is still a large category and includes all professional athletes, it nevertheless leaves aside non-paid amateur athletes as well as athletes who are self-employed. Secondly, and perhaps more importantly, due to the fact that the Flemish Decree and Decision only concern employment finding, it must be concluded that the limitations placed upon the agent's fee do not

apply to services that are unconcerned with employment finding. Payments or fees without ceilings can therefore be negotiated for management activities or for legal or personal services which are being performed within the framework of a sports management contract. It is therefore advisable legally to separate clearly any payments for non-employment-finding services. Obviously, the athlete himself can also make such payments.

C. Dutch law

In the Netherlands, the statutory law regulating employment finding is contained in the Act concerning the Placement of Workers by Intermediaries 1998 [*Wet Allocatie Arbeidskrachten door Intermediairs*], commonly abbreviated as WAADI. It is complemented by the Employment Finding Decree [*Besluit Arbeidsbemiddeling*] of 24 June 1998.

According to the WAADI, employment finding is defined as a service provided within the framework of an occupation or an enterprise for the benefit of an employer and/or job candidate, with the aim of offering assistance in finding workers or employment for the purpose of concluding a private law employment contract or effecting an appointment as a civil servant. The Act further considers as employment finding such services as are intended to facilitate the conclusion of agreements for the performance of work which fall outside the ambit of an employment contract in the arts, entertainment or professional sports sector.

a. No payment from player

Like the Flemish 1999 Decree, the WAADI prohibits any payments by the player to the private employment agency. Provision is also made for a maximum commission or fee. This must be in conformity with the tariffs that have been communicated to the CWI (see below).

b. Licensing system

The licence is provided by the Central Organisation for Work and Income (*Centrale Organisatie voor Werk en Inkomen, CWI*) and is rarely refused. A refusal must be justified on the ground that the WAADI has been violated or that relations in the labour market or the interests of the workers concerned would otherwise be prejudiced. The Health and Safety Inspectorate of the Ministry of Social Affairs and Employment is charged with the supervision of compliance with the WAADI. In some cases licences can be revoked.

c. Player's agents in professional football

Where professional football is concerned, the FIFA Player's Agents Regulations warrant attention. Neither international law, nor the national law of Belgium and the Netherlands precludes the existence of specific rules concerning employment finding in certain professional sectors, such as for example the sports sector. The FIFA Executive Committee adopted the FIFA Player's Agents Regulations at a meeting on 10 December 2000. They became effective on 1 March 2001.

Obviously, the FIFA Regulations have to be in conformity with public law Acts and regulations, such as ILO Convention no. 181, the Flemish 1999 Decree and the Dutch WAADI. The FIFA Regulations govern the activities of player's agents who arrange player's transfers within a single national association or from one national association to another. The national associations have a duty to draw up regulations of their own concerning player's agents, based on the guidelines laid down in the FIFA Regulations. The Belgian Football Association has adopted the FIFA Regulations as an annex to its own national regulations. The Dutch Football Association adopted new Regulations concerning Player's Agents on 10 June 2002.

According to the FIFA Regulations, a player's agent is a natural person who, for a fee, regularly introduces players to clubs with a view to establishing employment relationships between them or who introduces clubs to each other with a view to concluding transfer contracts. In some respects, the rules imposed by FIFA are very similar to international or national public law rules regulating employment finding. In other respects, however, the FIFA rules are incompatible with public law legal requirements.

- The FIFA rules require that a player's agent should be in possession of a licence issued to him by the national association. This implies that, if the national law in question includes a system of licensing or certification (as is the case in both Flanders and the Netherlands), two licences will have to be obtained: a governmental licence as well as a licence from the association concerned. Experience from the Flemish Advisory Commission has shown that applicants for a governmental licence often argue that the fact that they possess a FIFA licence automatically implies their suitability for a governmental licence (e.g. as regards the professional experience requirement, see above). However, the practice of the Flemish Advisory Commission is to undertake an autonomous investigation, whereby the possession of a FIFA licence is considered to be only one element of the file.

- Players and clubs are not allowed to employ the services of non-licensed player's agents. The same applies under Dutch and Flemish law: doing business with non-certified private employment agencies is prohibited. Under the national laws in question, dealing with non-certified intermediaries can result in the imposition of a criminal sanction. Furthermore, contracts concluded by intermediaries who are not certified under national law could be considered null and void. This was the position which was, for example, adopted by the District Court of Amsterdam in the *Wilhelm/Taiwo* Case of 17 January 2001.

- Some of the FIFA rules cause problems within the framework of the Flemish 1999 Decree and the Dutch WAADI. The FIFA rules provide that only the client engaging the services of the player's agent, to the complete exclusion of all other parties, may remunerate him (Article 12(4)). However, as far as employment-finding services are concerned, both Flemish and Dutch law provide that payments cannot be requested from the employee (the player) even when the employee/player is the agent's client. This is also one of the basic principles of ILO Convention no. 181, which provides that private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers (Article 7(1)). However, the ILO Convention still leaves room for exceptions. It provides that the competent authority may authorise exceptions to the prohibition in respect of certain categories of workers, as well as specified types of services provided by private employment agencies. In theory, therefore, governments may allow exceptions to apply to the sports sector.

In any case, the new Regulations concerning Players' Agents, which were adopted by the Dutch Football Association on 10 June 2002, have been expressly adapted to eliminate the problem created by the FIFA Regulations. The Dutch Regulations provide that when a club has concluded a contract with a player following the intermediation of the player's agent as referred to in the WAADI, it falls to the club to remunerate the agent for his employment-finding services. In other words, the Dutch 2002 Regulations have been modified in accordance with the relevant provisions of Dutch law.

- Under the FIFA rules, the amount of remuneration due to a player's agent who has been engaged to act on a player's behalf is calculated on the basis of the player's *annual basic gross income* (i.e. excluding other benefits such as a car, a flat, point premiums and/or any kind of bonus or privilege) that the players' agent has negotiated for him in the employment contract (Article 12(5)). The Flemish Decision of 8 June 2000, on the other hand, provides that the remuneration of the players' agent shall consist of either a percentage of the *total gross income* of the player or of a *lump sum* payment. The FIFA rule does not run contrary to this Flemish require-

ment. But, unlike the FIFA rule, the Flemish Decision does take into account additional advantages, such as a car, housing, premiums and the like. Therefore, in order to comply with both rules (i.e. the FIFA rule and the Flemish rule), the agent's remuneration should be calculated on the basis of the player's *annual basic gross income* (excluding other benefits), but with a maximum of 7% of the player's *annual total gross income* (including other benefits).

4. Conclusion

Sports agents perform various kinds of activities, including contract negotiation and intermediation. Insofar as they assist players in finding a club, or a club in finding players, such agents, often indicated by the term player's agent, are likely to perform employment-finding services. This latter activity is strictly regulated by Flemish and Dutch national law (the Flemish 1999 Decree and the Dutch WAADI respectively), as well as by international labour standards (ILO Convention no. 181). Further standards concerning the conduct of player's agents in football can be found in the FIFA Player's Agents Regulations of 10 December 2000. These Regulations, however, must themselves also conform to national and international law. The main requirements arising from national law do not seem to pose any problems of compatibility where the rules introduced by the sports associations are concerned, especially since the shift that has taken place in international law away from the prohibition and towards the facilitation of private employment agencies. Looking at the FIFA Regulations, it would seem that the rule which is most incompatible with both Dutch and Flemish law is the prohibition of payment by the player to his agent. The national laws in question provide that the club (or another party) is to pay the agent, while under the FIFA rules this depends on the party represented by the agent. The Regulations adopted for the purpose of implementing the FIFA rules in the Belgian and Dutch football sector therefore needed to deviate slightly from these rules. The Dutch Football Association's Regulations concerning Player's Agents of 10 June 2002 expressly address the issue and provide that in case a club has concluded a contract with a player following employment finding by a player's agent as referred to in the WAADI, it is the club that should remunerate the player's agent for the employment-finding services performed by him.

It speaks for itself that national and international legislation concerning employment finding is relevant and important in the present context. But the scope of such legislation remains inherently limited. To the extent that the activities of sports agents are unconcerned with matching the supply of labour to the demand, and are rather confined to sports management alone (such as the provision of services for the purpose of housing, taxes, social security, permits and licences, financial planning, legal advice, career development, health, mediation, ...) employment-finding law does not apply at all. Still, the game often implicitly calls for intermediary functions for which labour law has to be on standby.

The International Sports Law Journal

"The Ugly Side of the Beautiful Game"

- a call for tougher action from the football authorities to safeguard the integrity of the game and its attractiveness to sponsors -

Whatever is happening to the world's favourite sport?

Once dubbed 'the beautiful game' by footballing legend, Diego Maradona, football is fast earning the sobriquet of 'the ugly game'. In fact, it is no longer a sport, but a multi-billion dollar global industry. Fair play and sportsmanship are being highjacked by insatiable commercial and financial greed.

The behaviour of footballers, their clubs, promoters, agents and fans have put football back in the dock, making the antics and machinations of 'Nasty Nick' of the UK Reality TV Programme 'Big Brother' fame look positively benign and angelic.

According to a recent football finance survey by International Accountants Deloitte & Touche (and their figures - unlike some of their 'big league' counterparts - hopefully are reliable), the age of the £100,000 per week footballer has already dawned. Such salaries undreamed of in the halcyon days of Stanley Matthews and Tom Finney, who played for and thought £20 per week was a fortune! Today's footballers are obscenely overpaid. And many of them cannot handle their wealth and lack moral fibre. Witness the likes of the English players Lee Bowyer and Jonathan Woodgate. Despite being involved in a racial attack, both have swiftly been rehabilitated into the England team by the England Coach, Sven-Goran Erickson, following their criminal prosecutions. Should they not have served a longer time on the bench? And what about the extra-marital antics of English Premier League player, Gary Flitcroft? Thanks to the English Court of Appeal, the Press was allowed to name and shame him. And rightly so! The public interest demanded it.

And what about Roy Keane? And his utterly disgraceful and deliberate assault on Alf Inge Haaland. Adding insult to injury by boasting about it in his autobiography. Rather than pardoning him, MANU's Alex Ferguson should have booted him out for gross misconduct. But then he would lose a world-class player. Double standards? The English Football Association should ban him for life for bringing the game into disrepute. And, in view of Keane's admission that he intended to get revenge and inflict harm on Haaland for an earlier unintentional tackle on him, the Crown prosecution Service should prosecute Keane for at least causing grievous bodily harm. No footballer is above the law for violent behaviour on the pitch as Eric Cantona discovered several years ago.

Footballers are role models for today's youth and have a responsibility to behave in an exemplary manner. To be nice guys like David Beckham and give something back to the community.

And then this summer saw the spectacular collapse of ITV Digital. Followed by an 'own goal' by the English Football League, who failed in the High Court to recoup the lost unrealistic TV rights fees from its parent companies, Carlton and Granada. The financial fall out for the clubs has been catastrophic: many of them having already spent the money before it was even due to be paid! The whole debacle, a case of greed, if ever there was one.

And, last summer, football's world governing body, FIFA, suffered an even greater spectacular collapse of its marketing arm, the Swiss-based Sports Marketing Group, ISL. Some commentators attributing this bankruptcy to FIFA's squeezing ever higher and, again, unrealistic financial guarantees form broadcasters for the sale of the World Cup TV rights. The ISL affair also led to claims of corruption at the highest levels of FIFA - allegations of brown envelopes to top FIFA officials and key members of the Executive Committee. Despite these 'revelations', Sepp Blatter survived an attempted 'palace coup' and was reelected President of FIFA during this year's World Cup. But one of the 'whistle blowers', Michel Zen-Ruffinen, did not and lost his job as FIFA General Secretary. This inevitably raising the question: where does the FIFA motto, 'for the good of the game', figure in all of this?

Football continues to be plagued by the so-called 'English disease' - football hooliganism. Remember the ugly scenes of English fans on the rampage in Belgium during 'Euro 2000'? And more recently, pitch invasions by over-enthusiastic and unruly Birmingham City fans? The Government's draconian football banning orders seem to have worked for the World Cup. But at the expense of the human rights of football hooligans, particularly those suspected but not convicted, including their basic rights to a fair trial and presumption of innocence until proven guilty.

Again, what about the re-emergence of racialist attacks on players, such as the savage one witnessed at PSV Eindhoven in such a prestigious event as the 'European Champions League'? The Dutch authorities are also reputedly considering introducing banning orders - similar to the British ones - to curb football hooliganism in Holland. But beware of human rights implications!

All of these things are bound to have negative and damaging effects on the sporting and also the business side of football, especially corporate sponsors, who wish to be associated with a healthy and wholesome product.

The Football Authorities - national, regional and world - should, therefore, be much tougher with clubs and players alike to safeguard the integrity of football and its goodwill and prevent it from becoming the 'ugly' rather than the 'beautiful' game.

Ian Blackshaw

The International Sports Law Journal

International Sports Lawyer and Visiting Professor at the International Centre for Sports Studies at Neuchatel University, Switzerland.

Asser/FBO Round Table Session on the Social Dialogue in European Professional Football, The Hague, 30 May 2002

A European collective agreement for players of professional clubs could offer a solution to the problems caused by national labour laws (cf., "fixed term contracts"). To this end a social dialogue would have to be set up between the partners in European football. In order to achieve this the initiative has to be taken to organize the employers, i.e., the clubs, in Europe. This is the clear-cut conclusion of the Round Table Session which the T.M.C. Asser Instituut organized in cooperation with FBO (Dutch Federation of Professional Football Organisations) and which was held on Thursday, 30 May last in The Hague. Its title: 'Promoting the interests of professional football clubs at the international level: towards a European collective agreement?'

The FBO has meanwhile begun to act on this necessary initiative. Through VVCS (Dutch Professional Players' Union), discussions have been set in motion with FIFPro as the worldwide, i.e., European employees' organization in professional football and contact has been made with France and Portugal where employers' organizations operate that are comparable to FBO. A report drawn up by Roberto Branco Martins on behalf of FBO concerning a study of the industrial relations in European professional football has furthermore been sent to the members of FBO, with copies going to all parties concerned.

Apart from a presentation of the findings of Branco Martins' research, with the conclusion that 'the ball is now on the employers' half of the pitch and a European employers' organization needs to be established with the European clubs as members, as this is the only way that football is still able to field a counterpart for FIFPro', the Conference in The Hague also saw presentations from Roger Blanpain, Professor of international and European labour law, and Frank Hendrickx, Associate Professor of European labour law, both at Louvain and Tilburg Universities. Louis Castelijns, Chairman of FBO, and Theo van Seggelen, Chairman of VVCS and Secretary-General of FIFPro, acted as commentators.

Blanpain demonstrated that it is 'perfectly possible' to achieve a binding European collective agreement, provided there are parties, with a genuine wish to reach an understanding. He based his point of view on matters like fundamental rights, the freedom of association and collective bargaining and on European law. Human beings (labour) are not merchandise, there is the freedom of employment and association, and within European law there is the freedom of movement of workers, together with a right to equal treatment.

At the basis of the possibility of European collective bargaining is, according to the Belgian Professor, the triple structure of association, negotiation and means of battle, including the threat of strikes. Conventions Nos. 87 and 98 of ILO (International Labour Organization), the 1998 ILO Declaration (containing the fundamental rights of workers) and Articles 12 and 28 of the EU Charter of Fundamental Rights of 2000 leave no room for questions on these matters, said Blanpain.

According to Hendrickx, a further possibility under European law is for social partners themselves, rather than the Commission, to take the initiative to conclude an agreement. The EC Treaty provides for this possibility, on the condition that the partners are representative for either a specific sector or industry-wide. Relevant factors here are matters such as sufficient levels of union membership and spread over the Member States. Sport, and professional football by itself, can most certainly be considered to constitute specific sectors.

Implementing a European collective agreement can be done in two ways, according to the EC Treaty. Either by means of the customs and procedures habitually used among the social partners in the Member States, or by means of their joint request for a decision from the European Council at the proposal of the European Commission. This involves an EC Directive concerning matters pursuant to Article 139 of the Treaty (the "Social Chapter") and falling within EC law.

Hendrickx went on to say that the preconditions for a social dialogue can easily be fulfilled by the sport sector, more specifically, the sector of professional football. A legal framework has long since been put in place, the institutional infrastructure is highly developed and there are no impediments to the furtherance of industrial relations. Everyday practice will determine whether there is a perceived need for a social dialogue between the partners. The European Commission is willing to support such a dialogue and even, as was included in the 1998 update of the EC Treaty, to act as a third party in order to promote binding European agreements within the sectoral dialogue. These agreements could serve to efficiently regulate the professional football sector and to prevent any threats from the domain of sport itself but, more importantly, from politics (national labour law).

As appears from the study carried out by Roberto Branco Martins over the nearly six months he spent as an FBO intern with the University of Amsterdam, binding European agreements are urgently needed at this time when without them professional football in Europe is set to face another legal revolution. After the sensation caused by the Bosman verdict the cause of the current unrest is again to be found in national labour law. As a result players, i.e., the employees, in several European countries will be able to terminate their contracts with immediate effect. This deprives the clubs, i.e., the employers, of their last remaining ground for claiming financial compensation when the player chooses to leave for another club.

According to Branco Martins' study there is only one way to avoid these consequences in a structured manner for Europe as a whole. The indicated instrument is the European Social Dialogue. 'Inherent in any dialogue is the presence of two parties. A major obstacle in European football is, however, that only the players are represented by an umbrella organisation: FIFPro. The clubs are still without a European organisation to represent their interests in industrial matters.'

It is therefore of vital importance to the continuity of top-level football that a European employers' organisation is established. As the study emphasizes, the clubs are the employers. And because the national associations are not the employers, they cannot represent the clubs in a social dialogue. And there is the fact that the players are also members of the association, which would lead to a conflict of interests.

The clubs in Europe have to join the future European employers' organisation. Membership could be direct or by means of their membership of a national organisation, such as the Dutch FBO. In any case, as both Branco Martins and Hendrickx concluded, an organisation needs to be set up and developed which is sufficiently representative for employers. This organisation must subsequently be given a European mandate to represent the clubs. Only this way can management compete with labour (FIFPro).

The International Sports Law Journal

Translated from: ***Voetbalzaken*****, Newsletter of FBO (Netherlands Federation of Professional Football Clubs), No. 10, Week 24 (2002).**

- *HVB Presentation Services* provided the audio-visual facilities at this Round Table Session.

Prince of Orange and Johan Cruyff on "Sport and Development Cooperation" at the Second Asser-Clingendael International Sport Lecture, The Hague, 3 October 2002

Introduction

The idea behind inviting Prince Willem Alexander for this year's Asser-Clingendael International Sport Lecture was that the Prince has never before held a public speech concerning this topic, even though he has been a member of the International Olympic Committee for years now and moreover occupies a seat in the IOC's Solidarity Commission, which deals with the funding of sport-and-development projects in the Third World. Johan Cruyff made an excellent second speaker in this context, as his Welfare Foundation also undertakes this type of activities in Third World countries. The Prince would thus outline the general framework from the perspective of the global sports umbrella organization IOC, while Cruyff was to provide a sketch of the activities of an NGO operating independently from organized sports, whereby it is important to realize that the name "Johan Cruyff" is an international trademark which multinationals are eager to be linked with. Cruyff's capacity to generate sponsor funding is enormous, thanks to his past achievements on the football pitch, the way in which he thinks and speaks, in short: his charisma. Prince Willem Alexander and former footballer Johan Cruyff have in common that they are dedicated to the cause of helping people in developing areas through the medium of sport.

After the welcoming address from Clingendael Director Van Staden, in which he also remarked on the presence of Guus Hiddink, coach to the South Korean football team during the last World Championship and decorated for his achievements with honorary doctorates in Physical Education from two universities in Seoul, it was my privilege to deliver the introduction to the Lecture. In this introduction I pointed in particular to the useful distinction that is made in a Dutch 1998 Government Memorandum concerning sport and development (entitled "Sport in development: teamwork scores!") between two kinds of aid in this field: *sport plus* and *plus sport* activities. The former type of aid focuses on developing activities in the realm of sport itself whereby it is hoped that these will also positively contribute to society as a whole. This could take the form of, for example, sending coaches to developing countries, as is done through Ajax Cape Town in South-Africa, which is a branch of the Amsterdam club that brought greatness to Cruyff, although the emphasis of this enterprise is quite strongly on creating a hotbed of new talent which is to supply fresh players for Ajax. The latter type of activity, "plus sport", concerns sport as an added ingredient in much wider programmes, for example in refugee camps or in the framework of projects for the emancipation of women in Third World countries. Sport here functions as an additional instrument to positively influence these matters.

In the 1998 Memorandum from the Minister for Development Cooperation, Mr Jan Pronk, and the Minister of Sport, Ms Erica Terpstra, the Government's policy aim was formulated as follows: "to promote the best use of physical education and sport in developing countries for the purpose of improving the health and welfare of people and to increase the cohesion and development of society." In the Memorandum it was said that many developing countries are convinced of the positive potential of sport to serve social purposes such as health, welfare and social development. A good sports performance earns countries worldwide recognition and it unites various groups within the country, at the national as well as the local level.

In sport and development cooperation not only national governments are involved, but also intergovernmental organizations like the United Nations and its specialized agencies UNESCO (education and culture), UNICEF (children), UNDP (development), UNEP (environment), WHO (health) and UNHCR (refugees). Mr Adolf Ogi, for example, is the Special Advisor to the UN Secretary-General on Sport for Development and Peace. Zinedine Zidane and Ronaldo are goodwill ambassadors of UNDP, Ruud Gullit works for UNESCO, etc. These interstate organizations cooperate in joint projects with the international sports federations and the International Olympic Committee. The IOC and the IF's are of course NGO's. In April last, in Rotterdam, the new IOC President Mr Jacques Rogge declared that, apart from formulating stricter rules and regulations in the fight against doping, his policy will focus on narrowing the gap that exists between developed and developing countries where the availability of sporting opportunities and facilities is concerned. Apart from through the IF's, national sports organizations also operate on their own initiative in development cooperation. In the Netherlands for example NOC*NSF, NKS (Netherlands Catholic Sport Federation), KNVB (Royal Dutch Football Association) and KNDB (draughts) may be mentioned. The NCDO (National Commission for International Cooperation and Sustainable Development) acts as a platform between the NGO's that operate in the fields of sport and development cooperation. To the first category also private organizations belong which are not part of organized sport like the Johan Cruyff Welfare Foundation and the Richard Krajicek Foundation.

Speech by Prince of Orange

In a well-balanced speech on "The Role, Tasks and Activities of the Olympic Movement in Development Cooperation" Prince Willem Alexander described sport as a "broad, social phenomenon which can play a role in development cooperation." According to the Prince, it is gratifying to note that it is increasingly being recognized that sport encompasses more than just sport. He recalled the excitement that occurred in 1993 when Minister Pronk of Development Cooperation donated funds to the African country of Zambia after an airplane with the national football team on board had crashed. People would no longer react that way now, the Prince suspects. He considered it a good thing that as of four years ago (see the Memorandum mentioned above) the Dutch government promotes cooperation between development organizations and sports federations. "Sport gives people confidence, makes them proud and inspires in them a sense of self-respect. These things are the first steps towards independence." The IOC has recognized that sport may operate as a catalyst for social development. The Prince mentioned that in the next four years the IOC plans to spend 170 million dollars towards development projects (part of the Olympic Movement's income of billions of dollars from the sale of television rights). As examples of successful initiatives he mentioned the introduction of sport in the Kakuma refugee camp in the northwest of Kenya, where 65000 people from eight different countries, belonging to various tribes, are packed together in idleness in a hot and arid place. Tension among the different groups has decreased considerably since aid organizations began offering sports activities. After four years, a quarter of the refugees practise sport. "Life is still hard there, but living conditions have improved at relatively low cost. With one or two extra people the aid organizations that were already present could start introducing sport", said the Prince. This is a clear example of a "plus sport" activity. But the football schools in the slums of Brazil or the training courses for football coaches in Burkina Faso are worth mentioning too ("training the trainers"). In addition, the Prince recounted how the IOC helps many Third World athletes by giving out grants (cf. "sport plus").

Speech by Johan Cruyff

Sport is able to change for the better the lives of people who have known nothing but misery. Sport brings people closer together, it brings hope and confidence to the unfortunate. Sport can alleviate the suffering of children and grown-ups alike throughout the world. Johan Cruyff subscribes to this message. I introduced him by citing the motto of the Welfare Foundation which he established in 1997: "If you have the opportunity to do something for another, then you must do it." And by pointing out that the Foundation bases itself on the right to "play and recreational activities" as laid down in Article 31 of the UN Convention on the Rights of the Child of 20 November 1989. The Johan Cruyff Welfare Foundation is a prominent example of a private humanitarian non-governmental organization which undertakes "plus sport" activities for disabled and neglected children in the Netherlands and developing countries. In a contribution to "The National Football Book", a Dutch publication from 2001, Ms Erica Terpstra recites a good anecdote from a visit she paid to a UN refugee camp in northern Kenia: "There was a little boy who played such beautiful football that I said to him 'You must be Cruyff?' They all know Cruyff over there. 'No', the boy answered. 'I am Mister Mandela.' A brilliant answer!" Ms Terpstra concluded, enthusiastic as always.

It further deserved to be mentioned that in April this year Cruyff was made a Knight in the Order of Orange Nassau for his services to the game of football and his contribution to society in general; in addition to the Welfare Foundation, he has founded Johan Cruyff Universities (as yet only in Spain and the Netherlands, at the Amsterdam College of Higher Education) where young top athletes can train as sports managers. In European top football, FC Bayern Munchen is the prime example of this approach, where former top players "Kaiser" Franz Beckenbauer, "Kalle" Rummenigge, Uli Hoeness and Sepp Maier for years now have been expertly holding sway and are also closely involved in developments such as the formation of the European Super League and the establishment of interest groups of European clubs such as the G-14 (which really consists of 18 top clubs at the Champions League level, including Dutch clubs Ajax Amsterdam and PSV Eindhoven) and the European Club Forum (102 sub-top clubs at the UEFA Cup level).

In his speech, which he delivered by heart at the rapid pace and in the style which wascharacteristic of him also on the football pitch ("dynamics and surprise"), Cruyff drew a parallel between the work of the Foundation and a football team which depends on team play to get a good result. The same applies to people in developing countries, according to Cruyff. "They can't do it alone". The Johan Cruyff Welfare Foundation operates in, among other places, India (Bangalore) where together with aid organization Terre des Hommes it has set up a sports institute for children (a "plus sport" activity, therefore). Cruyff: "This way, we hope to remove young people from child labour, even if only for a couple of hours a day, so they can just be kids again for a while". Sport is always a binding factor because it brings happiness. In the Netherlands, the Foundation mainly works with handicapped children. "Once you have done something for these children and you see their faces, a whole new world just opens up." Cruyff observed that a heavy purse does not need to be a precondition for successful aid initiatives. His organization, he claims, is a good example of an institution which is able to accomplish many things with only limited resources and by using great numbers of volunteer workers. The Foundation (whose Director is former Dutch hockey international Carole Thate) needs to employ only four people to support dozens of charity projects in the Netherlands and in poor countries abroad. And this will continue so long as the prevailing attitude is that giving is better than receiving. "I really don't know who said that, but whoever it was, he's right", said Cruyff in his impassioned, purely practice-orientated speech.

Conclusion

The potential power of interaction between the two phenomena of sport and development cooperation was reflected in the title of a conference that was organized two weeks ago in Amsterdam in cooperation with the Dutch Foundation for Charity & Sport. At that conference, former multiple Olympic champion speed skating Johan Olav Koss, who founded Olympic Aid, was one of the speakers. The purpose of that conference was to inform and convince athletes, sports organizations and the sports industry in general of their social responsibilities and to bring home to top-level athletes that they have a role to play in charity.

The Second Asser-Clingendael Lecture was organized for the particular purpose of promoting the wider attention and support in the Netherlands for such an extremely important topic as the potential of sport for development cooperation. The organizers of the recent Charity & Sport conference in Amsterdam had a similar aim and, in particular, focused on the contribution that individual athletes could make to charitable ventures. Apart from top sports officials, sports managers, sports lawyers and journalists, representatives of the Corps Diplomatique in The Hague were also invited to this Asser-Clingendael Lecture in their special capacity as "windows to the world at large" which in turn offer windows of opportunity where cooperation in the global issue of sport and development is concerned.

N.B. The quotations in this contribution are taken from the reports on the Asser-Clingendael Lecture in the Dutch daily papers *NRC Handelsblad*, *Trouw* and *de Volkskrant* of 4 October 2002.

Robert Siekmann

The International Sports Law Journal

- On 29 March 2001, British journalist David Winner delivered the first Asser-Clingendael International Sports Lecture at the Netherlands Institute for International Relations "Clingendael" in The Hague. Winner introduced his book "Brilliant Orange: The Neurotic Genius of Dutch Football" to an audience of sports officials, managers, sports lawyers, internationalists and journalists and presented the first copy of the Dutch edition of the book ("Het land van Oranje") to Ms Erica Terpstra, a former Dutch Minister for Sport and a present Member of the Executive Boards of the European and Netherlands Olympic Committees (EOC and NOC*NSF).
  A panorama photograph by Hans van der Meer taken from the book was displayed in the conference room, showing a "moment of tension" during Ajax v. FC Groningen, 19 November 1995 in the former Ajax Stadium in De Meer, Amsterdam; on the walls there were photographs taken from Van der Meer's photo book "Hollandse velden" (Dutch football pitches; text: Jan Mulder).

- At the second Lecture, copies of the book by Marc Broere entitled "Het Zout van Afrika - Sporthelden van een dynamisch continent" (English edition "Unlikely Heroes - The Dynamics of African Sports") were presented to His Royal Highness the Prince of Orange and Mr Johan Cruyff on behalf of the T.M.C. Asser Institute and in remembrance of this special day. Two pictures by Pieter van der Houwen taken from the book were displayed in the conference room: one showing a training session of Watanga FC in Liberia - the players depicted had been child soldiers in the civil war - and the other showing young gymnasts in South Africa after apartheid, in a celebration of their sport.

10th Annual British Association of Sport and Law Conference,

London, 9 October 2002

The 10th Annual British Association of Sport and Law Conference 2002 on 9 October at Lords Cricket Ground in London was a well attended and well organised conference. Balanced in presentation times and substantive in content, this conference offered a fresh list of speakers, a welcomed absence of mobile phones ringing, a lack of technical glitches and was at times even downright entertaining.

Session 1: Self-regulation of sports bodies: mantra or myth
Following the opening Key Note speech by The Right Honourable Richard Coborn, Minister of Sport, the first session volleyed between the practical legal considerations of self-regulation and cataloguing the more cynical realities of how inefficient self-regulation has actually been to date. Alasdair Bell of Olswang considered the Impact of European Competition law and the difficulty in balancing the regulatory aspect of sport with the fact that governing bodies in their regulatory capacity are still involved with economic issues and rights exploitation. It was clear that the Commission will scrutinise the commercial exploitation of sport, including rules regarding the transfer of players and television rights but the non-economic aspects of sport, such as Rules of the game, national clauses in national team contracts, as well as anti-doping regulations should not be caught by Competition law.

Jon Siddall, Director of the Sports Dispute Resolution Panel considered that sport has a duty to govern itself and to do so within the law. But to do this, governing bodies must display the competence to govern. Mark Gay of Denton Hall Wilde Sapte concurred in part with the problems addressed by sports journalist, Andrew Jennings but also maintained that governing bodies are in fact accountable to courts, the government, to media, as well as being self-regulating.

But it was Mr. Jennings and his colourful assortment of accusations against FIFA and the International Olympic Committee, which dominated the first session. Every lawyer in the room was undoubtedly engaged in a mental review of the elements for a defamation claim, as much as they were amused - even disturbed - by Mr. Jennings full-on confrontation of individuals for their contribution to the lack of transparency and alleged Mafia infiltration of sport at the highest level.

Session 2: 'Financing Sport - which was now?'
Although far less entertaining, the second session was an insightful one into the core issue of financing sport. Roger Mitchell, CEO of the Scottish Premier League maintained that the issue of developing new revenue streams must also include an evaluation of problems of cost-side control, including making 'smarter contracts' with players, such as performance-related pay structures and share options. Additionally, clubs must establish and stick to their core competence: its strategy for the sport, establishing a better scouting programme with fewer transfers, better planning and the development of a global network for locating new talent.

Andrew Price of DLA explained that the current needs for capital in the industry are for short-term cash generation - or 'we need cash now!'; capital to cover lumpy periods of cash-flow receipts and funding required for projects and to cover operating losses. He said it is unfortunate that during economic downturns more creative approaches to financing are shut down and companies pull back and consolidate efforts at their core adding to the lethargicness of recovery.

Producing revenue from internet-driven ideas has been the subject of concern and doubt in previous conferences, particularly after problems within the dot.com industry. However, Will Muirhead, CEO of Sportev gave an impressive on-line presentation of just how client governing bodies, such as UEFA and RFU (Rugby Football Union) are attempting to generate revenue through broadband solutions. In catering to a fan base, which thrives on reviewing every conceivable angle of each 'key play' in a game, broadband may be the on-line vehicle through which sport can harness the commercial drawing power of the internet.

Session 3: 'Crisis Management - when it all goes wrong'
Nick Bitel, CEO of the London Marathon addressed the topic of risk management of events. His experience shows that maximising the value of commercial rights requires both an increase in revenue from those rights and a reduction in the commercial risk for all parties. To this end, contracts can be used to help mitigate risks but an overall 'trouble-shooting' plan is needed for the event; to locate problems, which are likely to cause a potential loss-situation. Such a plan must include an analysis of the probability of whether a loss will occur, as well as quantify that potential loss. Thereafter both control and the monitoring of these points are required. Having been schooled during the events of 2001, which included BSE-related cancellations, weather cancellations and the devastating September 11th terrorist attack, event organisers are now required to address with all seriousness the 'worst case scenarios' and to formulate workable alternative risk management programmes. One of the most important observations during this session was made by James Davies of Long Reach International. He noted that it would be helpful, even prudent, for event organisers and insurers to be involved in the actual formulation of contract terms so that all the issues regarding termination are fully covered from the beginning.

Harsher market realities now prevail over what has been a period of 'gold rush' enthusiasm in the industry. This has created new applications in sports law, such as the impact of insolvency on rights agreements, as seen with industry giant, ISL. Richard Barratt of Norton Rose looked specifically at this issue and the intrinsic 'marriage' between insolvency law and the commercial aspects of contracts. He emphasised that insolvency does not necessarily give rise to termination of contract and that alternative 'rescue routes' might be required to salvage any remaining commercial value under a contract.

Ian Jarman of Sports Marketing and Management discussed the financing and commercial development of the Commonwealth Games. In dealing with risk management and insurance issues relating to events, the potential frustration of terms of contracts are fundamental to planning for the financial success of an event, following the idea that the greatest risk in crisis management is that one may not recognise the risk.

Session 4: 'Sports branding - new trends'
This final session featured lawyers involved in three cases involving the protection and exploitation of sports properties: RFU and Nike v. Cotton Traders and the case, Arsenal v. Matthew Reed, both mer-

chandising-trademark cases and the false endorsement case, Irvine v. Talk Sport. Simon Miles of Hammond Suddards Edge talked about the *RFU* and the *Arsenal* cases; Mark Buckley of Fladgate Fielder discussed the *Irvine* case in which he represented the plaintiff, Eddie Irvine.

The practical issue in the first two cases, according to Mr. Miles, was the attempt by clubs to protect valuable income sources when they were actually second in the marketplace as merchandisers. In the *RFU* case, the defendant had previously been an official licensee but after the contract concluded, he continued to use the logo. The problem was in the termination clause not preventing further trading by the licensee.

Mr. Miles showed the 'evolution of the Rose' - a single rose, which had undergone several changes since it was first used in 1871. Mr. Miles considered the judge=s reasoning to be unsatisfactory in considering that the Rose was a national symbol and was acting as a badge of allegiance, not a mark of origin.

In the *Arsenal* case, the defendant had been selling memorabilia for 30 years. In the late 1980=s when Arsenal 'discovered' the multi-million pound importance of merchandising it brought this action in passing off, alleging that Reed=s goods were connected to - or licensed by - Arsenal. But Arsenal failed to show evidence of confusion and Reed=s defence that the crest had not been used as a trademark as required by the Act (unuse of trademarks) led the Court to hold that the Arsenal logo was not perceived as a trade mark. Mr. Miles expects a decision by the ECJ in the next six months. In the meantime, according to Mr. Miles, what this case has managed to do is to bring confusion to practitioners and panic among sports organisations.

In the *Irvine* case, Mr. Buckley explained the history of Formula One Teams reserving the right to use the personality assets of their drivers when used in a racing context; that even now, McLaren retains all drivers= rights and the drivers are only allowed to endorse non-competitive products when wearing team colours. But this was not the situation for Eddie Irvine and under English law there is no recognised right of personality and the last endorsement case was the '*Uncle Mac*' case in 1947. In this case the Court recognised that passing-off is connected to what is happening in the marketplace and considered what has become the widespread activity of celebrity endorsements. The Court drew a distinction between merchandising and endorsements, and recognised a well-known athlete=s goodwill as an endorser. In this case the damages offered were small and an appeal is expected in January.

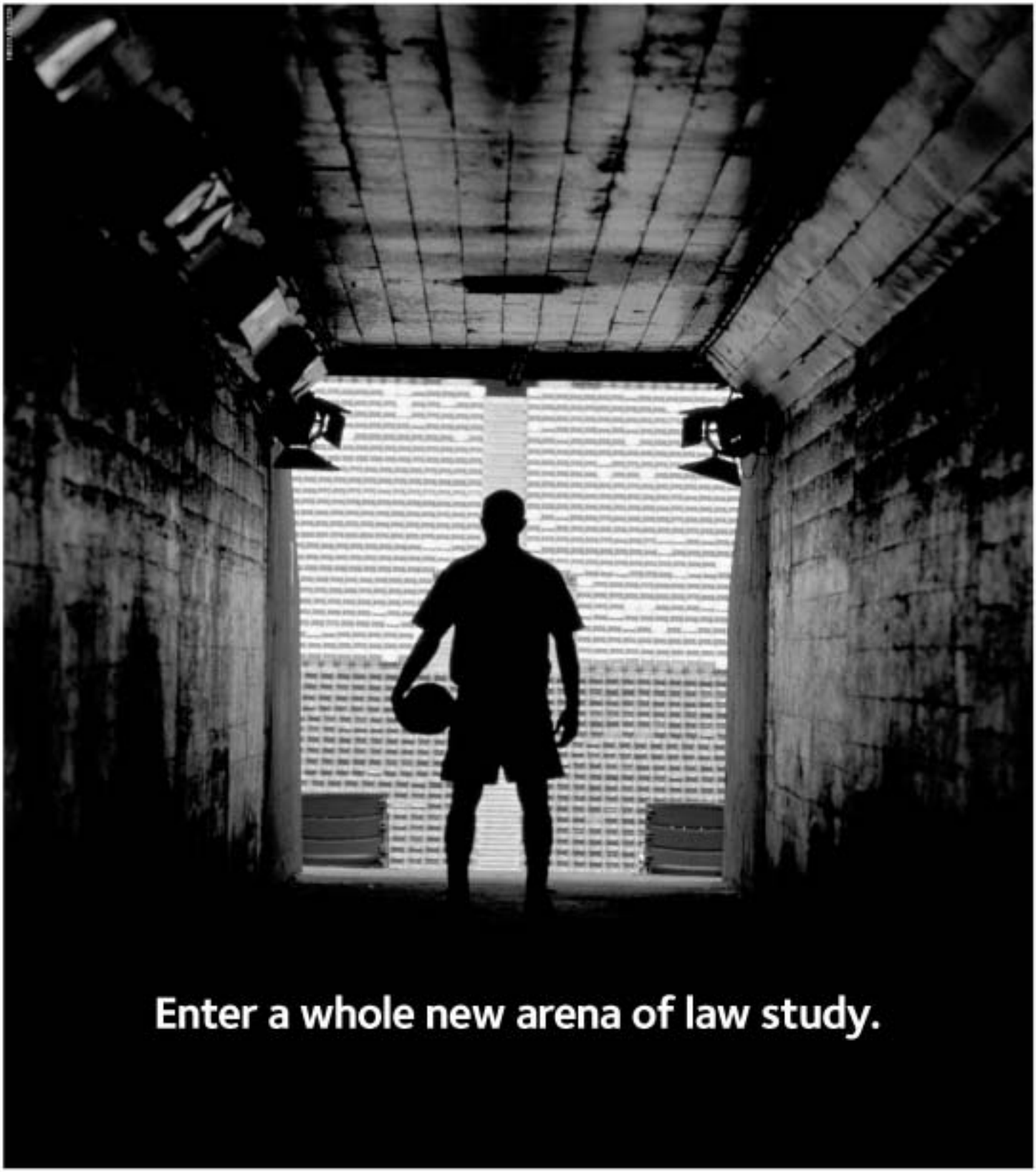
Other panelists dealing with the practical issues of personality rights and ambush marketing included Colin Graham, General Counsel for Nike, Michael Bucks from Octagon Worldwide and Jamie Jarvis of SFX. According to Mr. Jarvis, in managing the images of clients such as David Beckham, the difficulty is in knowing when to act to stop the abuse. In this regard the appeal on damages in the *Irvine* case is necessary even from a public policy standpoint as the award amounted to little more than a mere slap on the wrist. From Mr. Jarvis= position, the nominal value of the damages is unlikely to deter others from ambushing the personality value of celebrities and damaging their ability to contract for product endorsements.

The only real complaint, which is not exclusive to this conference, was the obvious omission of woman from the podium. The afternoon chairperson, Karena Vleck of Farrer & Co. was the only woman presenter and she was one of the key organisers. This is not a radical feminist battle-cry but rather a point of befuddlement, which comes from actually knowing of very qualified women lawyers who specialise in sports law at major city firms. Perhaps next year will be yet another excellent conference and one, which will reflect a practical commitment to having a respectable representation of qualified female practitioners involved who along with their male colleagues are responding to - and helping to define - legal solutions as the next decade of professional sport in Britain unfolds.

Julie King

The International Sports Law Journal

PhD Candidate, ASSER International Sports Law Centre, The Hague, The Netherlands (subject: 'The Legal Protection of Personality Rights of Sports Persons in Europe').



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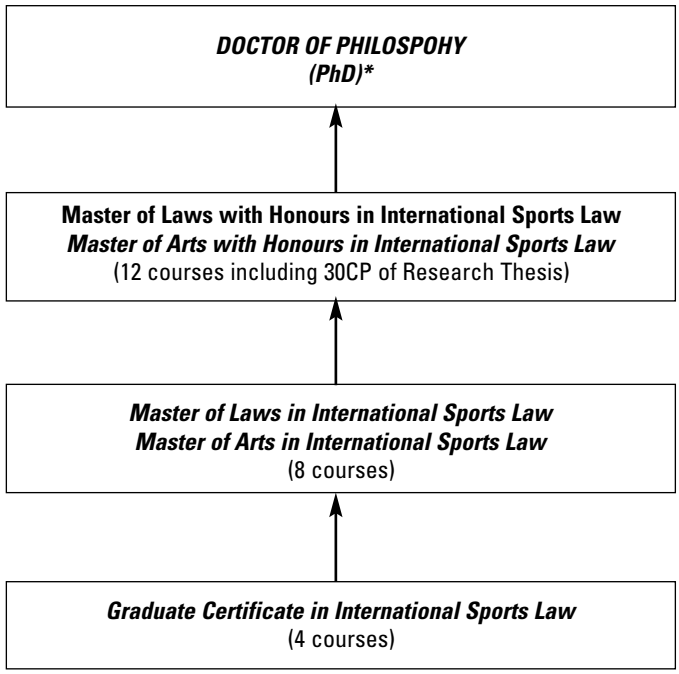

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Normally, recognition of prior learning (credit) for bachelor programs will not be awarded to students undertaking this program. However, credit for equivalent postgraduate work may be considered.

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The Masters in International Sports Law is offered on a fee-paying basis. For additional information please contact the School.

Kartellverbot und Verhaltungs-koordinationen im Sport

By Isolde Hannamann

Beiträge zum Sportrecht, Band 8 (edited by Kristian Kühl, Peter J. Tettinger, and Klaus Vieweg), Duncker & Humblot, Berlin, 2001, 546 pp., ISBN 3-428-10349-1 / ISSN 1435 - 7925, Price € 79,- / SFR 136,—

Introduction

Historically, clubs associated into voluntary non-profit organisations to guarantee fair competition and fair play amongst a certain number of teams per sport discipline. In Western European sport this so called '*associative sports movement*' remains its '*fundamental component and its essential driving force*'.[1] With the rise of spectator interest and the increase of commercialisation and professionalisation in sport, the governing body and the clubs are involved in the economic exploitation of the sport product (the game or competition). In this respect the functions of the governing bodies changed from merely regulatory and organisational bodies toward regulatory, organisational and commercial bodies. This economic development, the sports monopoly structure, as well as the required co-operation among horizontal competitors (for example, clubs) to provide the sport product, gives rise to many legal conflicts, in particular in the field of competition law.

Many questions arise: What makes the sports industry so special? Is the association of members still the most suitable organisational form? Who is the lawful owner of sporting rights, goods and services? What kinds of restraints are typical for the sports industry? May this particular industry lawfully argue that it *needs* certain restraints to survive? Do the restrictive arrangements infringe competition rules and if so, do the restraints qualify for an exemption? Are there any realistic alternatives? Etc.

Hannamann´s book is a valuable contribution to the discussion of these and many other questions. Although comparisons are made with cases in for example England or the United States the book is, in view of the published sources, theses and the few references to European primary and secondary legislation which were consulted, a foremost German study. Experts and interested parties from other countries can however learn quite a lot from Hannamann´s book.

Hannamann's study is a thorough investigation "bottom up", this means it starts with detailed information of (all kinds of) sports and its structure, its relations and membership ties and then explores the commercial side of sport and touches upon most of the legal debates. In the last part Hannamann reaches out for the future, which, because of the relatively 'early' appearance of the book, started just after publication.[2]

Content

The book of Hannamann focuses on some of the conflicts in the area between solidarity and competition law. The underlying juridical question is directed at whether the co-operation in sport is compatible with the sporting rules (German: 'Verhaltenskoordinationen') and the prohibition of restrictive agreements and related practices.

The book is divided in five very informative parts.

The *first part* contains a study of the monopolist pyramidal sports organisational structure as a logical consequence of the *Ein-Platz-Prinzip (one sports federation per sport per country)* in organised sport. Hannamann explains the complex rules and regulations in an international and national context for all kinds of sports and also goes into depth regarding the membership relations and ties between the various levels of the monopolist structure.

The *second part* shifts from the general sports structure toward the commercial side of sport. Hannamann describes the economic development of sport and lists some of the most essential economic activities like ticket sales, advertising, endorsement, broadcasting, transfer compensation etc. These activities and the elaboration in restrictive sporting rules are the main subject of legal assessment like, for example, identifying the relevant market and the permissible forms of co-operation.

In this part, Hannamann tries to solve the question of ownership. Who (co-)owns the goods, services, and, with respect to one of the most discussed areas, the broadcasting rights? This question has to be solved according to Hannamann on a case by case basis taking into account all the relevant facts, like the (characteristics of) a sport, its organisation and structure, its memberships relations, the involvement of the actors in providing the sport product etc. In the opinion of Hannamann economic arguments must not play a decisive role in the forthcoming decision. Hannamann's focus lies merely upon the organisational efforts as well as the bearing of the economic risks by the actors (governing body, clubs and athletes) concerned. This implies that Hannamann, like German courts puts great emphasize on the *Veranstalter vor Ort*, i.e., the club playing at home.

At the end of the second part Hannamann defines the different kinds of the multiple sport market.

The *third part* gives an overview of the sporting rules like, for example, the relations and co-ordinated conduct between associations, clubs, athletes, etc. Hannamann describes the apparent restrictions like the prohibition of clubs and, or athletes to take part in competitions of a rival association, restrictions on re-location of clubs, restrictions on player movement etc. In Hannamann's opinion many of the rules in commercialised and professionalised sport, like, for example, collective selling and/or restrictions at the players' market, are - due to their obligatory and /or discriminatory character etc. - not reconcilable with the purposes of sport.

The *fourth part* is a comprehensive examination of horizontal agreements in sport and competition law. It describes the scope of application, components, exceptions and exemptions of art. 81 EC Treaty and German national law. According to Hannamann most activities do fall within the ambit of art. 81; only activities like education and training, may escape antitrust liability which also is true for amateur activities. All the conditions of art. 81 EC Treaty have to be fulfilled if its prohibition is to apply.

Among the analysed issues in Hannamann's book is the "single entity theory": unilateral conduct does in general not fall within the scope of art. 81(1) or in the United States under section 1 of the Sherman Act, because two or more economically independent entities must be party to an agreement. This so called 'single entity theory' is applied in sports cases in the United States. In this respect Hannamann refers to the American case *Fraser v. Major League Soccer*[3] which resulted after the publication of Hannamann"s book in a decision favouring the *single entity theory*. The structure of Major League Soccer is characterized by common ownership and control and resembles a "single entity". So, the District Court of Massachusetts applied the single entity theory and stated that section 1 of the Sherman Act does not apply to unilateral activity, like for example the centralised contracting of player services, of Major League Soccer. In Hannamann's view however the single entity theory is in general not applicable, for it does not sufficiently takes into account the still existing competition between league members and exaggerates the requirements of mutual

1 Miège C., *Le Sport Européen, Que sais-je?,* 3083, P.U.F., Paris, 1996.

2 For example, the new transfer-system in football, as a result of a gentlemen's agreement between the football associations and the European Commission is not dealt with and neither is the Major League Soccer- decision in the United States which resulted in (again) a vivid debate about the applicability of the *single entity theory.*

3 *Fraser et. al. v. Major League Soccer,* 97 F. Supp. 2d 130 (D.C. Mass.), 19 April

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Mediating Sports Disputes:
National and International Perspectives

Ian S. Blackshaw

NEW

With a Foreword by Judge Keba Mbaye

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.

The book adopts an essentially practical approach, but also provides an explanation of the theoretical background to the subject. The book also collects together a wide-ranging set of relevant and useful texts and documentation.

Mediating Sports Disputes: National and International Perspectives is a useful tool for all those concerned with the effective and amicable resolution of sports disputes of whatever kind or nature, including sports governing bodies and administrators, marketeers, event managers, sponsors, merchandisers, hospitality providers, sports advertising agencies, broadcasters, and legal advisers.

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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cooperation. With the Major League Soccer decision in mind and with regard to the tendency to form more centrally or single operating structures in newly formed leagues, it is not inconceivable that the applicability of the single entity theory will be again amongst the issues in antitrust law to be considered.

In this part of the book Hannamann also analyses German competition law such as the German "solution" in the area of the collective selling of broadcasting rights in sport. To solve the conflicts in this area, Germany partly exempted collective bargaining from competition law. In Hannamann's opinion the exemption did not solve all conflicts in the area - not only because the exemption does not deal with other commercial rights of sport organisations like sponsoring, but, more importantly, because mostly the collective selling of broadcasting rights has to be assessed under art. 81 EC Treaty.

In the *fifth and final part* of the book Hannamann looks for solutions by way of horizontal or vertical re-distribution of income.
The ever developing world of sport, the progress of commercialisation and professionalisation, the new structures together with the many pending cases will certainly lead to more discussion in this area. Future debates however should not neglect Hannamann's study. To conclude with Hannamann's words: 'Das Thema bleibt spannend.' (The subject remains exciting.)

Marjan Olfers

The International Sports Law Journal

Research official at the ASSER International Sports Law Centre and Assistant to Prof. Heiko van Staveren at the Sports Law Chair of the Free University of Amsterdam. She is preparing a PhD on 'Competition Law and Sports - A Comparison between the United States and Europe'.

❖

Sports Personal Injury: Law and Practice

By Tim Kevan, Dominic Adamson & Stephen Cottrell

Sweet & Maxwell, London 2002, pp. 351, paperback,

ISBN 0421 778 407, price £70

Sport is now big business accounting for more than 3% of world trade and 1% of the combined GNP of the fifteen Member States of the EU. In the UK alone, we spend some £12billion annually on sports goods and equipment. In England and Wales, 19 million sports injuries occur each year costing some £500 million in treatment and absence from work. Add to this, the rise of the blame and compensation cultures, so it is not surprising that sports personal injury claims are also on the increase, some of which, as the authors note in this interesting and informative Book, have extended the legal frontiers.

Claims are not restricted to elite sports persons, but are also growing significantly at the grass roots level, not least, as recent highly publicised cases demonstrate, in schools and amateur sports clubs. Take the recent case of *Ramsey Elshafey v King's School Macclesfield* which, surprisingly, the authors do not mention.

Elshafey, a former pupil at Newcastle-under-Lyme School, suffered neck and ligament damage as a result of being lifted in the air and dropped on his head during a school rugby match against King's School, Macclesfield. At the time of this accident, he was 17 years old and preparing for his 'A' levels.

Rather than suing the pupil, who caused the injuries, Elshafey was advised by his solicitor to sue the School, which, unlike the pupil, was insured and so had the funds to meet any damages award. The High Court in Manchester found the School vicariously liable for the "*negligent tackle*" of its pupil. The Judge, it seems, did not offer much legal analysis in support of this judgement. The facts and circumstances of the case seem to have satisfied the civil law requirements of negligence as laid down by Lord Atkin in the celebrated House of Lords decision in *Donoghue v Stevenson* [1932] AC 562, at page 580. The Judge considered that the School owed a duty of care, there had been a breach of it and damage had resulted.

The School accepted this ruling and, in a subsequent 'out of court' settlement, Elshafey was awarded compensation for his injuries and consequential losses of £100,000, including loss of future playing ability.

The Elshafey case also raises the application of '*volenti non fit injuria*' and 'vicarious liability' in sports injury cases, the general principles of which the authors discuss in some depth.

As the authors do point out, there is an increasing need to take out insurance against such claims, but this, combined with the rise of 'conditional fee' arrangements in personal injury cases, is only serving to fuel the litigious fire! And, as premiums also rise, such insurance is often beyond the means of those who organise and manage sports events, particularly at the amateur level. The authors suggest that the Government may introduce a compulsory insurance scheme - a successful one by the Government of New South Wales in Australia has been running since 1978! However, in view of the British Government's ambivalent attitude to sport, particularly when it comes to dipping into Gordon Brown's deep pockets, this hope is likely to remain a rather pious one.

The authors cover in great detail the landmark Court of Appeal decision in the case of Michael Watson and the British Boxing Board of Control, who were held negligent in failing to provide adequate emergency medical facilities at his title fight with Chris Eubank, and its wider implications for sports governing bodies. And also, the earlier case of Ben Smoldon in which a referee was held liable for serious injuries sustained as a result of his negligence to prevent a collapsed scrum.

The Book also deals with the Criminal aspects of sports injuries, including the power to make compensation orders under the Powers of Criminal Courts (Sentencing) Act 2000 and the award of compensation under the Criminal Injuries Compensation Scheme.

There is also a helpful section on Practice and Procedure, including bringing a sports injury case; quantum of damages; and costs and funding.

However, being practising Barristers, the authors are somewhat dismissive - perhaps not surprisingly - about alternative dispute resolution procedures, such as those provided by the Court of Arbitration for Sport (not the Court of Arbitration *in* Sport as the authors state). They are also wrong when they say that this Court has jurisdiction in "some" sports, when, in fact, it has jurisdiction in all the Olympic sports and their various disciplines (currently standing at 28 sports and 301 events in the Summer Games), with the exception of track and field, football and boxing. Also, since its inception in 1984, the workload of the Court of Arbitration for Sport has extensively increased, contributing to the development of a '*lex sportiva*', and,

since May 1999, the Court has offered a mediation service. In fact, mediation of sports disputes, including personal injury claims, is proving to be a more effective and increasingly popular means of settling sports disputes fairly, quickly and inexpensively. There is no mention of the UK Sports Dispute Resolution Panel, established nearly three years ago, which provides a similar service in the UK to that provided by the Court of Arbitration for Sport internationally and whose activities are constantly on the increase also.

One other gripe: the effect of the Human Rights Act 1998 on sports claims generally and personal injury claims in particular is dismissed in six shortish paragraphs, when, in effect, in its two years of operation, it has made its presence felt in an increasing number of sports related cases. The real issue for sports governing bodies' liability under the Act and the European Convention on Human Rights, which it incorporates directly into British Law, is not, as the authors state, "public bodies" but the new hybrid introduced by section 6(3)(b) of the Act of "quasi-public authorities". In this context, the Jockey Club - recently branded as being institutionally corrupt by the BBC 'Panorama' programme - and the British Boxing Board of Control, previously mentioned, should particularly watch out!

On the whole, this is a workmanlike Book - not without humour either as the quotations introducing each chapter testify, including the famous one of Bill Shankley about football being much more serious than life and death - on an increasingly important and practical subject. And its publication, therefore, is to be welcomed by practitioners and sports persons and bodies alike.

Ian Blackshaw

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