Congres Sport & Recht
Juridische actualiteiten en knelpunten op sportgebied

Dinsdag 16 december 2003 • Meeting Plaza Olympisch Stadion, Amsterdam

- Mondiale doping regelgeving: achtergrond, inhoud en praktische consequenties van de World Anti Doping Code
- Recente uitspraken schadeaansprakelijkheid Spel en Sport (HR); deelnemers onderling; aansprakelijkheid trainers / coaches; letselschade door paarden
- Overheidssteun aan betaald voetbal; Nationale en Europese invalshoek
- Verenigingsrechtelijke ontwikkelingen in de sport; bestuurlijk invulling van de tuchtrechtspraak; de positie van afdelingsverenigingen bij sportbonden en het duaal stelsel; mediation bij verenigingsrechtelijke conflicten
- Sportrecht bezien vanuit de rechterlijke macht

KLUWER CONGRES
Sprekers
Mr. Fred Kollen
Mr. Steven Teitler
Mr. Cor Hellingman
Mr. Mark J.M. Bootekees
Prof. mr. Heiko T. van Staveren
Mr. Hessel Schepen

Kosten
€ 575,- p.p. (excl. BTW)

Kluwer bundel
Sport & Recht 2003
Deze nieuwe uitgave ontvangt u bij deelname en is bij de prijs inbegrepen.

Antwoordkaart verzenden per fax of in open envelop zonder postzegel aan:
Kluwer Opleidingen,
Antwoordnummer 424,
7400 VB Deventer

Handtekening:
Traditionally, the football industry has a pyramidal structure. At the top, at the worldwide level, FIFA may be found as the regulatory body; in Europe, UEFA is the regional organisation of national football associations. In addition to national organisations, a number of countries nowadays also have professional football league organisations. FIFPro is the worldwide organisation representing national players’ unions in professional football. However, as yet no worldwide employers’ organization of clubs has been established. The establishment of the European Federation of Professional Football Clubs (EFFC) is the beginning of the organisation of management at the European level. EFFC was incorporated as an association under Dutch law in September 2002, on the basis of an initiative taken by the Netherlands Organisation of Professional Football Clubs (FBO) which is seated in Rotterdam.

In June of this year, a subsidy was granted by the European Commission to EFFC under budget heading B 3–4000 for promoting the social dialogue in European professional football. By way of the organisation of a series of regional seminars the football sector at large (associations, clubs, leagues, trade unions, etc.) will be made aware of and informed about the social dialogue and its framework for collective bargaining. The possibilities that European Law offers to organisations of clubs and players to regulate the issues that are their joint responsibility as representatives of employers and employees will be discussed. The seminars will be followed by private workshops of EFFC and employers’ representatives per country, in particular concerning identifying relevant issues and determining common principles on which future negotiations with labour within the framework of the social dialogue could be based. The project is intended to inform about and thereby promote the concept of the social dialogue and of collective bargaining at the sectoral level of the professional football industry in Europe. Its aim is to contribute to facilitating the start of consultations between management and labour at Community level and the intended subsequent establishment of relevant contractual relations, by the exchange of information and experience on a European basis, in particular regarding employment contracts and collective bargaining agreements. It is expected that the project will help pave the way for a social dialogue in the European football industry by creating awareness amongst the organisations concerned of the possibilities the social dialogue offers for establishing effective industrial relations and, in particular, by creating common ground amongst management for the purpose of future negotiations with labour.

In this context, the ASSER International Sports Law Centre proudly announces that EFFC has assigned to it the organization of a series of regional seminars, to take place between October 2003 and May 2004 when the final session of the series is planned in Brussels. The other seminars will be held in London, Stockholm, Munich, Madrid and Rome.

The Editors
The WADA World Anti-Doping Code: The Road to Harmonisation

Janwillem Seek

1. Introduction

The World Conference on Doping in Sport, which took place in Lausanne in December 2000, led to the establishment of the World Anti-Doping Agency (WADA) in 2003. The WADA, among other things, was responsible for approving the World Anti-Doping Code (WADC). The WADA was established in November 1999. The reason for establishing a World Anti-Doping Agency was the assumption that the fight against doping could be fought more effectively when the Olympic Movement (including the athletes) and public authorities would cooperate. This Cooperation process had involved all categories of stakeholders in various meetings of the IICGADS. One of the most important tasks were supposed to play in the WADA was subsequently clarified during the meetings of the Executive Committee and the Foundation Board of the World Conference on Doping in Sport, during which the World Anti-Doping Code (WADC) was started immediately after the Conference Resolution. A Conference Resolution would also be drawn up on that day, based on the interventions and their content. With the Resolution ‘the World Conference accept[ed] the World Anti-Doping Code [...] as the basis for the fight against doping in sport throughout the world’. The governments agreed to a joint meeting in Copenhagen in order to discuss intergovernmental aspects and to arrive at a Government Declaration which was to supplement the Conference Resolution. ‘There should be no place at the Olympic Games for IFs or NOCs that refuse to implement the Code. Likewise, no organisation of the Olympic Games should be awarded to a country whose government had neglected or refused to implement the Code,’ IOC chairman Rogge warned in his opening address, and he further urged all IFs and NOCs ‘to apply the same philosophy’. Core elements of the WADC are:

1. The broadened scope of the concept of doping. According to the new concept doping is not only understood to be the act of doping itself, but also attempted doping and the possession of or trafficking in doping products and methods.

The expertise of several key drafting experts could be drawn on. Over 120 comments were the result of this exploration. The second draft of the Code was published on 10 October 2002. Again, meetings were held with practically all the parties mentioned above who had been involved previously. This round of consultations yielded another 200 comments. The third draft dates from 20 February 2003 and was circulated in the final quarter of that month. The second World Conference on Doping in Sport took place in Copenhagen from 3 to 5 May. The purpose of this conference [...] was to review, discuss and agree upon the Code content and its use as the basis for the fight against doping in sport. The approach had been to highlight the importance of the athletes, and its basis was the integrity of sports. Taking part in the Conference were representatives of the IOC and of its 80 members, 60 NOCs, 70 IFs, 30 NADOs and 20 athletes, all in all around 2000 persons. The first day was set aside for the discussion of the content of the third draft of the Code. The WADA Foundation Board would adopt the Code on the third day of the Conference. A Conference Resolution would also be drawn up on that day, based on the interventions and their content. With the Resolution ‘the World Conference accept(ed) the World Anti-Doping Code [...] as the basis for the fight against doping in sport throughout the world’. The governments present at the Conference declared among other things that they would ‘support a timely process leading to a convention or other obligation concerning, among other things, the Code, to be implemented through instruments appropriate to the constitutional and administrative contexts of each government on or before the XX Olympic Winter Games in Turin in 2006’. The governments agreed to a joint meeting in Copenhagen in order to discuss intergovernmental aspects and to arrive at a Government Declaration which was to supplement the Conference Resolution.

The WADA is also called on to promote harmonised rules, disciplinary procedures, sanctions and other means of combating doping in sport, and to contribute to the unification thereof taking into account the rights of athletes, all in all around 2000 persons. The first day was set aside for the discussion of the content of the third draft of the Code. The WADA Foundation Board would adopt the Code on the third day of the Conference. A Conference Resolution would also be drawn up on that day, based on the interventions and their content. With the Resolution ‘the World Conference accept[ed] the World Anti-Doping Code [...] as the basis for the fight against doping in sport throughout the world’. The governments present at the Conference declared among other things that they would ‘support a timely process leading to a convention or other obligation concerning, among other things, the Code, to be implemented through instruments appropriate to the constitutional and administrative contexts of each government on or before the XX Olympic Winter Games in Turin in 2006’. The governments agreed to a joint meeting in Copenhagen in order to discuss intergovernmental aspects and to arrive at a Government Declaration which was to supplement the Conference Resolution. “There should be no place at the Olympic Games for IFs or NOCs that refuse to implement the Code. Likewise, no organisation of the Olympic Games should be awarded to a country whose government had neglected or refused to implement the Code,” IOC chairman Rogge warned in his opening address, and he further urged all IFs and NOCs “to apply the same philosophy.”

Core elements of the WADC are:

1. The broadened scope of the concept of doping. According to the new concept doping is not only understood to be the act of doping itself, but also attempted doping and the possession of or trafficking in doping products and methods.

Available on the WADA website.
2. Strict liability as the starting point. The athlete is strictly liable for the presence of any prohibited substance in his or her body. Although the WADC includes some exceptions to this rule, every participant in the Olympic Games and world championships is tested for doping and, if found positive, automatically disqualified.

3. A penalty of two years' exclusion following a first doping offence. In exceptional circumstances, however, this penalty can be reduced or lifted. Repeat offences result in life-long exclusion.

4. At least once a year, the WADA publishes a list of banned substances and methods. The current list, which has been in force as of January 2003, also features the prohibition of gene doping.

5. The WADA may appeal doping judgments from sports organizations to the CAS.

Below, several aspects of the WADC will be discussed and where necessary compared to the rules in previous Codes.

2. Description of the doping offence (violation of the anti-doping rule)

2.1. The definition of doping

Article 1 Definition of Doping

Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2 through Article 2.8 of the Code.

The descriptions of the doping offence used in the codes preceding the WADC were similar in structure to the description of an offence under criminal law. A certain act or situation was considered undesirable and a penalty was assigned to it. The drafters of the WADC decided to abandon this approach. Doping is no longer considered a specified condemnable human act or the result of such an act, but rather a violation of the rules describing that act or result. The concept of doping has been completely detached, abstracted and instrumentalized. Doping is no longer viewed as an act knowingly performed by an athlete, but rather as an act performed by an athlete in a legal dimension: doping is the violation of an anti-doping rule. As such violations of the anti-doping rule also comprise situations which are not directly considered doping offences in the classical sense of the word, it is understandable that the term doping has to be defined in two stages, although this is not very elegant, nor very clear. The substantive norm, i.e. the norm that should be complied with and on the basis of which an act or a situation can be tested and punished, has been pushed into the background. Subsequent to the framework rule it is indicated when there can be said to have been a violation of the anti-doping regulations. The substantive norm which was taken as the starting point in the WADC says that no underlying substantive norms may be violated. These rules essentially indicate what the drafters of the Code considered doping to be.

2.2. Description of the doping offence

Article 2 Anti-doping Rule Violations

The following constitute anti-doping rule violations:

2.2.1. The presence of a prohibited substance or its metabolites or markers in an athlete's bodily Specimen

2.2.1.1. It is each athlete's personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their bodily specimens. According to this Article, an athlete is considered to have violated an anti-doping rule if in his or her body is present a prohibited substance or one of its metabolites or markers. An athlete shall be held liable for the present in his or her body of any prohibited substance or one of its metabolites or markers. In these circumstances, the presence of a prohibited substance or one of its metabolites or markers in bodily specimens is not the product of an act of the athlete, but rather of the presence of such substance or metabolite or marker in his or her body resulting from an act of another person or persons. The athlete is considered to have committed an anti-doping rule violation if he or she possesses the prohibited substance or one of its metabolites or markers in his or her body. The athlete is considered to have violated an anti-doping rule if he or she possesses the prohibited substance or one of its metabolites or markers in his or her body.

2.2.1.2. Excepting those substances for which a quantitative reporting threshold is specifically identified in the pro-

hibited list, all substances or methods not listed in the prohibited list are prohibited. The presence of any quantity of a prohibited substance or its metabolites or markers in an athlete's sample shall constitute an anti-doping rule violation.

2.2.1.3. As an exception to the general rule of Article 2.2.1, the pro-

hibited list may establish special criteria for the evaluation of prohibited substances that can be produced endogenously.

2.2.1.4. Use or attempted use of a prohibited substance or a prohibited method.

2.2.1.5. The success or failure of the use of a prohibited substance or method is not material. It is sufficient that the prohibited substance or prohibited method was used or attempted to be used for an anti-doping rule violation to be committed.

2.2.1.6. Refusing, or failing without compelling justification, to submit to sample collection after notification as authorized in applicable anti-doping rules or otherwise evading sample collection.

2.2.1.7. Violation of applicable requirements regarding athlete availability for out-of-competition testing including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules.

2.2.1.8. Tampering, or attempting to tamper, with any part of Doping Control.

2.2.1.9. Possession of prohibited substances and methods.

2.2.1.9.1. Possession by an athlete at any time or place of a substance that is prohibited in out-of-competition testing or a prohibited method unless the athlete establishes that the possession is pursuant to a therapeutic use exemption granted in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.

2.2.1.9.2. Possession of a substance that is prohibited in out-of-

competition testing or a prohibited method by athlete support personnel in connection with an athlete, competition or training, unless the athlete support personnel establishes that the possession is pursuant to a therapeutic use exemption granted to an athlete in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.

2.2.1.9.3. Trafficking in any prohibited substance or prohibited method.

2.2.1.9.4. Administration or attempted administration of a prohibited substance or prohibited method to any athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation.

The Code Project Team [...] had tried to come up with a list of anti-doping rule violations that was both comprehensive and loophole-free. In Articles 2(1) - (3), 2(5) and 2(7) - (8) some rules have been laid down which may also be found in the IOC codes and in the anti-doping regulations of the majority of IFs. A new feature of the list, which describes acts and circumstances which are indicative of a violation of an anti-doping rule, is that in principle, doping is also understood to include the failure to provide the required information concerning an athlete’s whereabouts. The drafters of the WADC considered unannounced out-of-competition doping checks to be at the heart of effective doping control. It is their opinion that without accurate information concerning the athlete’s location doping control would become inefficient and in many cases even impossible. The drafters felt that this was such an important part of the entire out-of-
competition programming test that it had to be brought inside the scope of the term doping. The anti-doping rules require that the athlete is absolutely responsible for the presence of a prohibited substance in the body. The Code does not provide that the athlete bears the burden of proof. It is important to note that Articles 6(1) and 16(5)(a) only penalize possession when the substance is found during out-of-competition testing.

The line set out in the Olympic Movement Anti-Doping Code, i.e. the starting point that the athlete is absolutely responsible for the presence of a prohibited substance in the body, is continued in the WADC. For purposes of anti-doping violations involving the presence of a prohibited substance (or its metabolites or markers), the code adopts the rule of strict liability which is found in the OMADC [Olympic Movement Anti-Doping Code, §3] and the vast majority of existing anti-doping rules. Under the strict liability principle, an anti-doping rule violation occurs whenever a prohibited substance is found in an athlete’s bodily specimen. The violation occurs whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault. The Code Project Team did not hesitate to follow the approach of the OMADC and did not bow to the criticism which was the result of this rather harsh position. It would have been possible to opt for a reversal of the burden of proof whereby the athlete who tested positive would have been found guilty prima facie, but would also have been given the opportunity to defend himself/herself against the charge. But the WADC system does not allow for any debate concerning the question of guilt either. It can only be debated in the doping procedure where the proportionality of the severity of the penalty is concerned as related to the severity of the offence. However, even then such debate is pointless, because the Code has a system of fixed penalties.

Athletes are bound by the rules of play applying in their sport. In the comment to Article 4, the drafters are of the opinion that in the same manner, athletes and athletic support personnel should be bound by anti-doping rules based on Article 2 of the Code by virtue of their agreements for membership, accreditation, or participation in sports organizations or sports events subject to the Code. Here a connection is made which cannot be entirely justified. The anti-doping rule is not a rule of play. During a game a participant may be sent off for a violation of the rules of play without the need to discuss whether blame can be attributed. We will not find any difficulties concerning human rights on chessboards, but we will find them before the disciplinary court which has to try a doping offense. The sporting world prefers to consider the offender of a doping offense and tackle it accordingly. However, there are not many sporting offences for which first-time offenders may be banned for two years and repeat offenders for life. Where an offence can result in penalties such as these it is necessary to protect the athlete with more rights than would be warranted by violations of the rules of play which are not punished as severely.

An appropriate passage in the drafters of the Code nevertheless believe that the fight against doping was big enough to provide enough work for everybody. The WADC proposes that out-of-competition doping tests are held by international and national organizations. Such tests can be initiated and supervised by the WADA, the IOC or the IPC in the context of the games organized by them, by the athlete’s IF, by the athlete’s NADO or by the NADO of the country where the athlete resides. The tests are to be coordinated by the WADA so as to attain maximum efficiency as regards the joint efforts and so as to avoid the unnecessary repetition of tests. Although most governments are unable to be parties to or to be bound by non-governmental instruments like the WADC, the drafters of the Code believe that it is the responsibility of the sporting world and national governments to fight doping side by side. For the sake of this joint battle governments should at least make it possible for the WADA to organize out-of-competition testing.

What are athletes tested for out-of-competition? The WADC has a single list of prohibited substances for use both in and out of competition. Among the substances which are prohibited at all times are masking agents and substances which have a long-term boosting effect after use during training, like anabolic steroids. An athlete’s out-of-competition use of a prohibited substance that is not prohibited out of competition would not constitute an anti-doping rule violation, says the comment to Article 1(1) of the WADC.

Athletes have to keep themselves available for out-of-competition testing. If an athlete fails to do this and informs the competent authorities of his/her location, he/she will be guilty of a doping offence under Article 2.4 of the WADC. Over the years, doping hunters have come to the conclusion that unannounced out-of-competition testing is a battle which the sporting world and national governments have to coordinate and coordinate, because the fight against doping was big enough to provide enough work for everybody.
petition testing is an effective tool for detecting doping. ‘Without accurate athlete location information such testing is inefficient and sometimes impossible’, says the comment to this Article. The athlete’s IF and NADO have to formulate applicable requirements […] in order to allow some flexibility based upon varying circumstances encountered in different sports and countries.1 Athletes who have been included in an out-of-competition testing pool by their IF or NADO have to provide detailed information concerning their location. The IFs and NADOs must pass this information on to the WADC. The WADC will then inform either NADOs who are competent with respect to the athlete pursuant to Article 15 of the WADC. The information must be kept confidential and may only be used in the planning, coordination and application of the test and has to be destroyed after it has ceased to be relevant for these purposes.2 The NADOs who administer the tests must first consult with their IFs or other organizations. Every NADO has to establish a ‘Registered Testing Pool’ for the country for which it is competent,3 including both international-level athletes and national-level athletes. Every IF, in consultation with every NADO has to plan and apply out-of-competition tests based on its Registered Testing Pool.4 The WADA is merely a coordinating body where out-of-competition testing is concerned. The actual testing is left to national and international anti-doping organizations. WADA was in the position to include principles in the WADC for the protection of the rights of the organizations the organizations would have to guaran-

tee in unannounced tests.5

4. Procedure after testing positive

Every anti-doping organization which organizes doping controls has to adopt rules for the pre-hearing administration with respect to suspected violations of the anti-doping rules.6 To this end, several rules have been established in the WADC. The organization must in the first place examine whether the use of the prohibited substance found in the A sample was not in fact approved (therapeutic use exemption) and whether the International Standards for Testing have been applied strictly so as not to undermine the validity of the positive doping result. When these matters have been found to be in order, the organization will promptly notify the athlete of its findings. He will be informed, among other things, of the fact that he can request an analysis of the B sample and that he or his representative can apply to be present at the analysis. The athlete may request that he be be sent copies of the A and B sample laboratory documentation package. The package must include the information required by the International Standard for laboratory analysis. The anti-doping organization is in charge of organizing the follow-up investigation. The results of this investigation must be passed on promptly to the athlete. The organization must also inform the athlete whether it persists in its opinion that a doping rule has been violated. If so, it must indicate which rule has been violated and in what way.

5. Provisional suspension

A Signatory7 may adopt rules, applicable to any event for which it is responsible, permitting provisional suspensions to be imposed after the investigation referred to above but prior to a final hearing. Pursuant to Article 10, the athlete will then be disqualified with all the resulting consequences, including the loss of medals, rankings and prizes, ‘unless fairness requires otherwise’. The WADC has made this type of suspension conditional upon certain factors. The athlete must be heard in a provisional hearing. This hearing is to take place either before the provisional suspension is imposed or very shortly thereafter. It does not follow clearly from the WADC whether the rights of the defence (Article 8) which apply to the final hearing also apply to the provisional hearing. If the investigation referred to in Article 2(9) has not been concluded in time, the WADC assumed that the analysis of the B sample would only rarely result in a different finding than the analysis of the A sample. Still, at the end of Article 7.3 if they have inserted a provision ‘just in case’. In circum-

stances where the athlete […] has been removed from a competition and the subsequent B sample analysis does not confirm the A sample finding, if, without otherwise affecting the results of the analysis of the A sample. The WADC had to take part in the competition. It is hard to imagine a sit-

uation in individual sports where the competition would not be affected. In the likely event that the rehabilitated athlete can no longer take part in the competition, no financial compensation or satisfac-

tion of any kind is offered.

6. Sanctions

6.1. Sport sanctions

The WADC provides for sport sanctions and disciplinary sanctions. The sport sanctions consist of ‘[...] disqualification of all of the ath-

lete’s individual results obtained in that event with all consequences, including forfeiture of all medals, points and prizes’.8 Two particular sets of circumstances can trigger automatic disqualification. Under Article 9 this may happen when the violation of the doping rule takes place ‘[...] in connection with an in-competition test’, and under Article 10.1 when the violation takes place ‘[...] during or in connec-

tion with an event [...] upon the decision of the ruling body of the event’. Article 9 is a separate article, while Article 10.1 is part of an Article concerning ‘Sanctions on individuals’. The reason remains unclear why Article 10.1 has not been inserted into a separate article or has not been joined to Article 9. The only difference between the situations described is whether the game in question is an individual game or part of a series. Article 10.1.1 provides that if the athlete ‘[...] bears no fault or negligence for the violation, the athlete’s individual results in the other competitions shall not be disquali-
fied unless the athlete’s results in competitions other than the competition in which the anti-doping rule violation occurred were likely to have been affected by the athlete’s anti-doping rule violation.9 Strangely enough, it seems that an exception is made here to the strict liability rule.

6.1.1. Disciplinary sanctions for individuals

The WADC includes sanctions directed against individual athletes (Article 10), against teams (Article 11) and against sports organizations (Article 12). The WADC sanctions for a violation of the rules in Articles 2.1 - 2.3 and 2.5 - 2.6 - except when the specified substances referred to in Article 10.3 are found in a sample - are two years’ exclu-
sion for a first offence10 and life-long exclusion for a second offence.11

The pool of top level athletes estab-

lished separately by such International Federation and National Anti-Doping Organizations who are subject to both in-competition and out-of-competition test-

ing as part of that International Federation or Organization’s test distri-

bution plan’. Appendix I - Definitions - of the WADC.

Art. 4 WADC.12. ‘The pool of top level athletes estab-

lished separately by such International Federation and National Anti-Doping Organizations who are subject to both in-competition and out-of-competition testing as part of that International Federation or Organization’s test distribution plan’. Appendix I - Definitions - of the WADC.

normen Athleten deklarieren?’ Pound replied: ‘Relevante Sport- und Mehrkraftwettbewerber haben sie die Unbedenklichkeit der Verstöße in Gutachten bezeichnet.’21. Art. 10.2 WADC.

12 Art. 4 WADC. Art. 15 WADC once more reiterates that: ‘Private information regarding an athlete shall be maintained by each National Anti-Doping Organization who are subject to both in-competition and out-of-competition testing as part of that International Federation or Organization’s test distribution plan’. Appendix I - Definitions - of the WADC.

13 Art. 15 WADC.

14 Signatory: Those entities signing the Code and agreeing to comply with the Code, including the International Olympic Committee, International Federations, International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, National Anti-Doping Organizations, and WADA. Appendix I - Definitions - of WADC.


normen Athleten deklarieren?’ Pound replied: ‘Relevante Sport- und Mehrkraftwettbewerber haben sie die Unbedenklichkeit der Verstöße in Gutachten bezeichnet.’21. Art. 10.2 WADC.
During the 1999 World Conference on Doping it was agreed to introduce flexible sanctions with a minimum of two years following a first offence. The idea of imposing a certain minimum at least has been abandoned in the WADC. The reason could be that various disciplinary tribunals have the discretionary power to respond differently to equal cases, which causes a lack of uniformity. The comment to Article 2.10.2 provides that violations of the anti-doping rules are: First violation: at a minimum, a warning; second violation: lifetime ineligibility. Third violation: lifetime ineligibility. A violation of the whereabouts rule is at a minimum 3 months and at a maximum 3 years (Art. 2.10.3) and a violation of an administration violation is at a minimum four years up to lifetime ineligibility (Art. 2.10.5). As mentioned in Art. 2.7.1, the sanctions for test-positives can be tailored for specific ‘specified substances’ as: First violation: at a minimum, a warning and reprimand, and at a period of ineligibility from future events, and at a maximum, one (1) year ineligibility. Second violation: two (2) years ineligibility. Third violation: lifetime ineligibility. Third violation: lifetime ineligibility. A violation of the whereabouts rule is at a minimum 3 months and at a maximum 3 years (Art. 2.10.3) and a violation of an administration violation at a minimum four years up to lifetime ineligibility (Art. 2.10.5).

30 World Conference on Doping in Sport, plenary session, Summary Notes, p. 13
31 Event: A series of individual competitions conducted together under one ruling body (e.g., the Olympic Games, FINA World Championships, or Pan American Games). WADC, Appendix I, Definitions. 32 Target testing is defined as: ‘selection of athletes for testing where specific athletes or groups of athletes are selected on a non-random basis for testing at a specified time’, under Appendix I - Definitions - WADC.

33 [...] it appears to be a laudable policy objective not to repair an accidental violation to an individual by creating an unintentional sanction to the whole body of other competitors. This is what would happen if the performance-enhancing substances were tolerated when absorbed inadvertently, according to the CAS in Quigley v. UIT. Cited by the drafters of the OMADC, as it did not merely apply in connection with the sanction for a first offence. According to this provision it would in theory be possible to commute the sentence of exclusion for life to a much milder penalty. 34 Unter den rund 10000000 Radsportler wenden sich auch für Doping-Ersttäter'. Frankfurter Allgemeine Zeitung, 4 March 2001, no. 3, p. 37. 35 Weltcup Finalen Sollte Deutsche Bahn Kosten für Doping-Fälle ausräumen. Welt- und Europameisterschaften, 100 km Verfolgung, 2000. Universität Paderborn."
The second version saw the clause return in a much-edited version. It had been supplemented to cover cases where an athlete’s low age and lack of experience would be relevant in deciding the culpability of his actions.

1.2.3.3 Exceptional circumstances. The periods of ineligibility provided above may be lessened or eliminated in proportion to the exceptional circumstances of a particular case, but only if the athlete can clearly establish that the anti-doping rule violation was not the result of his or her fault or negligence. The athlete’s age and competitive experience may be considered in determining whether the anti-doping rule violation was the result of the athlete’s fault or negligence.

Why include an exceptional circumstances clause in the WADC? This provision, which had already been laid down in the OMADC, provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the athlete was admittedly at fault. Perhaps partly as a result of pressure from the FIFA and the UCI, the exceptional circumstances clause was expanded considerably.

Where the first version still spoke of a proportional reduction of the period of exclusion, the second mentioned reduction and elimination, and the third now exclusively mentions elimination in cases where there has been no fault or negligence. It must be noted however that the clause may currently only be invoked in case of the violation of the anti-doping rules referred to in Articles 2.1, and 2.2.

10.1 Elimination or reduction of period of ineligibility based on exceptional circumstances.

10.1.1 No fault or negligence

An athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1, or Article 5.1, or Article 2.2, or as a result of a prohibited method under Article 10.1, or of a prohibited substance or prohibited method under Article 2.1, or of use of a prohibited substance or prohibited method under Article 2.2, that he or she bears no fault or negligence for the violation, the otherwise applicable period of ineligibility shall be eliminated.

A rule which has been laid down in the final version of the WADC and which was not found in earlier versions is Article 10.1.2. The Code Project Team considered it appropriate to include another exceptional circumstances clause for cases where there is no significant fault or negligence. This clause may also be invoked by athletes who are suspected of having violated the anti-doping rules laid down in Articles 2.1 and 2.2.

10.1.2 No significant fault or negligence

This Article 10.1.2 applies only to anti-doping rule violations involving Article 2.1, or Article 2.2, or Article 5.1 or Article 2.8. If an athlete establishes in an individual case involving such violations that he or she bears no significant fault or negligence, then the period of ineligibility may be reduced, but the reduced period of ineligibility may not be less than one-half of the minimum period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this section may be no less than 8 years.

An additional requirement which had already been part of all the earlier versions of the WADC is that ‘... the athlete must also be able to demonstrate how the prohibited substance entered his or her system’. One could argue that it is hardly proportionally justified for the penalty for a second violation to be eliminated when no fault or negligence is at stake, but is upheld for a minimum of eight years if there is no significant fault or negligence.

The Dutch delegation to the World Conference on Doping in Copenhagen criticized the limited role in the doping procedure of the question of the culpability of the athlete in doping violations. Van Kleij remarked that: ‘Where exceptional circumstances were concerned, the proposed system for taking into account exceptional circumstances seemed to be limited in order to allow the limit of the anti-doping policy. An athlete should not be restricted in proving exceptional circumstances when accused of an anti-doping rule violation. The Code should address explicitly that exceptional circumstances would be taken into consideration for each and every anti-doping rule violation. This would promote the credibility of the anti-doping policy by providing greater fairness’. This is a laudable point of view, but the drafters of the WADC had already opted for a system in which culpability could no longer be discussed for the purpose of determining whether a doping violation had taken place. This system, which had already been laid down in the OMADC, was adopted by the world when it was adopted in the WADC.

As the OMADC clause did not provide for exceptional circumstances, the IFs were free to either apply clauses of their own. The WADC ... stated that an athlete needed to exercise the utmost caution. What if an athlete could not meet the test of absolutely no fault? How could proportionality be dealt with? If the athlete could not prove absolutely no fault, then the athlete would have the burden to prove no significant fault or negligence, following which the two years could be reduced to a floor of one year. The opinion of the independent experts was that there had to be a rule that addressed proportionality, and this rule (Article 10.5) satisfied the requirement’, said Richard Young.

Questions still remain however concerning the particular circumstances which according to the drafters of the WADC had to be considered exceptional. These had to be adequately described, as ‘there is plenty of devil in the detail’. The comment to the WADC mentions the following concerning the definition of the clause’s scope:

‘Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases. To illustrate the operation of Article 10.5, an example where no fault or negligence would result in the total elimination of a sanction is where an athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of no fault or negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1)) and...”
have been warned against the possibility of supplement contamina-
tion; (b) the administration of a prohibited substance by the ath-
lete's personal physician or trainer without disclosure to the ath-
lete (Athletes are responsible for their choice of medical personnel
and for advising medical personnel that they cannot be given any
prohibited substance); and (c) sabotage of the athlete's food
or drink, whether within the athlete's circle of associates (Athletes
are responsible for what they ingest and for
the conduct of those persons to whom they entrust access to their
food and drink), coaches, or others within the athlete's circle
of associates (Athletes are responsible for what they ingest and for
the conduct of those persons to whom they entrust access to their
food and drink).

The 'roles and responsibilities of athletes [are] to be knowledgeable of
national circumstances. These Articles provide among other things that
national-level athletes. Article
may be appealed exclusively (without recourse to the courts) to the
Under Article
Despite this explanation, a very real chance remains that the discipli-
nation under Art.
the Code Project
\[\ldots\] as a result, different sporting bodies
determination. Given Articles 22.1 and 22.3, it will not be easy to demonstrate excep-
tional circumstances. These Articles provide among other things that
the 'roles and responsibilities of athletes [are] to be knowledgeable of
and with all applicable anti-doping policies and rules adopted
Background. This has been modified to allow individ-
92. Comments to Art. 10.2, WADC (final version).
93. The comments to Art. 10.2, WADC, which was
violations under Articles 21.1 and 21.2 [...].
because fault or negligence is already
required to establish an anti-doping rule violation under other anti-doping rules'.
This is not a means for consolation in order to
the anti-doping rule violation shall not be
considered a violation for the limited purpose of determining the period of
indiscretionality for multiple violations under
World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 23.
... as a result, different sporting bodies
had set their own, different, criteria. Two
examples from two federations could be cited. The FINA rule was based on lack of
fault. Since adoption of the rule, there
had been fourteen mandoline cases, ten
of which had imposed a four-year sanc-
tion, and four of which had applied the
exceptional circumstances rule to some
extent, but only one of these had applied
the penalty of less than two years (in this
case, one year). FINA had a right excep-
tional circumstances rule. The UCI had
a very different exceptional circumstances
rules, which was much broader, and
afforded for consideration of the impact
on the athlete, and the impact on the
in this community. The UCI had
had four cases since January 2001,
when the two-year rule had been adopt-
ed. Of these, the cases had been sanctioned two years, and the
other three cases had received six months'. Commented Richard Young.
World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 13.
Richard Young, World Conference on
Doping in Sport, plenary sessions, Summary Notes, p. 14.
This has been modified to allow individ-
ual sports bodies to reduce the ban in
"exceptional circumstances". Professor Jim
Dowden, the head of FINA's medical com-
mittee, said football had no major dis-
agreements with the code. He said: 'We
can live with the general estimation of a
two-year ban for a first offence but we
want the right to increase the ban as
well as reduce them - maybe to three or
maybe four years.' BBC Sport, Tough
new sanctions for drug cheat. (3 March 2003).
42 A Signatory that is responsible for adopt-
ing rules for initiating, implementing or enforcing any part of the Doping Control
process. This includes, for example, the
International Olympic Committee, the
International Paralympics Committee, other Major Event Organizations that
conduct testing at their events, WADA,
International Federations, and National
Anti-Doping Organizations.
Signatories: Those entities signing the
Code and agreeing to comply with the
Code, including the International
Olympic Committee, International
Federations, International Paralympic
Committees, National Olympic
Committees, National Paralympics
Committees, Major Event Organizations,
National Anti-Doping Organizations, and
WADA, Appendix D, Definitions, WADC,

31. Comments to Art. 10.2, WADC (final version).
32. The reference to Article 10.2.1 makes it clear that
the Code Project Team were quite aware of this: 'These
examples are quite helpful in making plain the WADC
any discussion of culpability is ruled out
because fault or negligence is already
required to establish an anti-doping rule violation under other anti-doping rules'.
This is not a means for consolation in order to
the anti-doping rule violation shall not be
considered a violation for the limited purpose of determining the period of
indiscretionality for multiple violations under
World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 23.
... as a result, different sporting bodies
had set their own, different, criteria. Two
examples from two federations could be cited. The FINA rule was based on lack of
fault. Since adoption of the rule, there
had been fourteen mandoline cases, ten
of which had imposed a four-year sanc-
tion, and four of which had applied the
exceptional circumstances rule to some
extent, but only one of these had applied
the penalty of less than two years (in this
case, one year). FINA had a right excep-
tional circumstances rule. The UCI had
a very different exceptional circumstances
rules, which was much broader, and
afforded for consideration of the impact
on the athlete, and the impact on the
in this community. The UCI had
had four cases since January 2001,
when the two-year rule had been adopt-
ed. Of these, the cases had been sanctioned two years, and the
other three cases had received six months'. Commented Richard Young.
World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 13.
Richard Young, World Conference on
Doping in Sport, plenary sessions, Summary Notes, p. 14.
This has been modified to allow individ-
ual sports bodies to reduce the ban in
"exceptional circumstances". Professor Jim
Dowden, the head of FINA's medical com-
mittee, said football had no major dis-
agreements with the code. He said: 'We
can live with the general estimation of a
two-year ban for a first offence but we
want the right to increase the ban as
well as reduce them - maybe to three or
maybe four years.' BBC Sport, Tough
new sanctions for drug cheat. (3 March 2003).
42 A Signatory that is responsible for adopt-
ing rules for initiating, implementing or enforcing any part of the Doping Control
process. This includes, for example, the
International Olympic Committee, the
International Paralympics Committee, other Major Event Organizations that
conduct testing at their events, WADA,
International Federations, and National
Anti-Doping Organizations.
Signatories: Those entities signing the
Code and agreeing to comply with the
Code, including the International
Olympic Committee, International
Federations, International Paralympic
Committees, National Olympic
Committees, National Paralympics
Committees, Major Event Organizations,
National Anti-Doping Organizations, and
WADA, Appendix D, Definitions, WADC,
8. Proof of doping

Article 3 WADC contains both substantive and procedural rules of evidence. Especially the procedural law rules call the positioning of this Article amongst the articles regulating substantive law matters into question. Article 1 regulates the burdens and standards of proof.

As was the case in the previous anti-doping codes, the WADC puts the onus of proving the doping offence on the prosecuting organization. It is subsequently indicated how the offence has to be proven.

The standard of proof is that the prosecuting organization will have proven the offence if the evidence is 'to the comfortable satisfaction of the balance of probabilities'. The severity of the offence is a co-deciding factor. 'This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt'. In cases where according to the WADC the burden of proof is on the accused, the standard of proof shall be by a balance of probability. Unfortunately the Code Project Team did not incorporate the principle of 'in dubio pro reo', i.e. the benefit of doubt, which itself is an emanation of one of the most important legal presumptions, the presumption of innocence, deeply enshrined in the general principles of law and justice. This principle has the effect that in criminal and similar proceedings, the two parties do not bear equal burden of proof, while the accusing party must prove the alleged facts with certainty, it is sufficient for the accused to establish reasons for doubt. In their comment the drafters of the Code defended their standard of proof by stating that it '[...] is comparable to the standard which is applied in most countries to cases involving professional misconduct. It has also been widely applied by courts and tribunals in doping cases.'

The position which laboratories were granted under the OMADC and rightly be criticized from a law of evidence perspective. Has the almost unassailable position of the laboratories been weakened under the WADC? According to Article 2 of Chapter III of the OMADC:

'Accredited laboratories are presumed to have conducted testing and custodial procedures in accordance with prevailing and acceptable standards of scientific practice.'

9. Appeals

Pursuant to Chapter III of the OMADC every participant could appeal a decision from an IF, NOC or other organization to the CAS provided that the decision had been made on the basis of the OMADC. Article 13 of the WADC has restricted the possibilities for appeal. According to Article 13.2 appeal lies against a decision:

- that an anti-doping rule violation was committed;
- imposing consequences for an anti-doping rule violation;
- that an anti-doping rule violation was committed;
- that an anti-doping organization lacks jurisdiction to rule on an alleged anti-doping rule violation or its consequences; and
- to impose a provisional suspension as a result of a provisional hearing or in violation of Article 7.5.

Articles 13.1.2 and 13.2.2 distinguishes between appeals involving international-level athletes and those involving national-level athletes. Cases involving international-level athletes arising from competition in an international event or cases involving international-level athletes in general may be appealed exclusively to the CAS. National-level athletes can only appeal to an independent and impartial disciplinary body established under the rules of the NADO. Only the WADA, the relevant IF and, in cases where the national anti-doping organization has so entitled them, the athletes can appeal a decision from a national disciplinary body to the CAS. This possibility is not found in the highly relevant text of the WADC.

It would still be true to say that, in other words, in addition to the exclusive status awarded to (now) WADA-accredited laboratories, this position furthermore gives rise - for no apparent reason - to the presumption that, in case of a doping trial, the laboratory concerned functioned in accordance with its applicable guidelines and Good Laboratory Practice (GLP).

Under the OMADC, however, it was possible for the athlete accused of having committed a doping offence to adduce evidence to the contrary:

'This presumption can be rebutted by convincing evidence to the contrary, but the accredited laboratory shall have no onus in the first no anti-doping rule violation was committed.'

The WADC in Articles 3.2.1 and 3.2.2 improves the position of the athlete, who is suspected of having used doping, as against the laboratory. The provisions read as follows:

'The athlete may rebut this presumption by establishing that a departure from the International Standard occurred. If the athlete rebuts the preceding presumption by showing that a departure from the International Standard occurred, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.'

[] If the athlete establishes that departures from the International Standard occurred during testing then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the adverse analytical finding or the factual basis for the anti-doping rule violation.'
timely informed of the asserted anti-doping rule violation, the right to respond to the asserted anti-doping rule violation and resulting consequences, the right of each party to present evidence, including the right to call and question witnesses and the person’s right to an interpreter at the hearing not apply? The comment to this Article is silent on this point. It does however mention that ‘an Anti-Doping Organization may elect to comply with this Article by giving its national-level athletes the right to appeal directly to CAS’. Here too one may wonder why this has not been laid down in the ‘WADC’

Article 13.3 further elaborates which individuals and organizations may appeal. For both possibilities of appeal these are: the athlete or other person involved in the case, the other party, the relevant IF and the WADA. Decisions involving international-level athletes may also be appealed by an anti-doping organization other than the relevant IF when the penalty has been imposed on the basis of a rule of that other organization. The IOC or the IPC may further also appeal such decisions where they ‘may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games’.

Pursuant to Article 13.1, the decisions appealed from remain in effect, unless the appellate body orders otherwise. The final part of this Article reads as follows: ‘before an appeal is commenced, any post-decision review provided in the Anti-Doping Organization’s rules must be exhausted’ [...]. What is the meaning of this rule? Article 13.3.1 does not say that all possibilities of appeal as provided by the IF must be exhausted before a decision can be appealed to the CAS. Does the provision of Article 13.1 mean to prescribe that these possibilities of appeal actually have to be exhausted first? In a national context it would make sense that one can only appeal to the national disciplinary tribunal in the second instance from a final decision delivered in the first instance.

10. National anti-doping organization

One of the problems faced by the IOC Medical Code (MC) and the OMADIC was the elusiveness of the members of the athlete’s supporting staff. These persons where not contractually bound to the sports organization and therefore remained out of its reach. In this respect the WADC has made a radical change now that it defines the term ‘participant’ as ‘Any athlete or athlete support personnel’[3] and ‘athlete support personnel’ as ‘Any coach, trainer, manager, agent, team staff, official, medical or para-medical personnel working with or treating Athletes participating in or preparing for sports competition. ’By their participation in sport, [...] athlete support personnel should be bound by anti-doping rules based on Article 2 of the Code by virtue of their agreements for membership, accreditation, or participation in sports organizations or sports events subject to the Code. Each signatory, however, shall take the necessary steps to ensure that all [...] athlete support personnel within its authority are bound by the relevant Anti-Doping Organization’s anti-doping rules’. Article 2.3 WADC describes its function and responsibilities[4]:

‘To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to this Code and which are applicable to them or the athletes whom they support. To cooperate with the Anti-Doping Testing Program.

21.2.3) ‘To use their influence on athlete values and behaviour to foster anti-doping attitudes.’

Athlete support personnel may also commit doping offences under the WADC. Article 2.6.2 WADC provides that:

‘Possession of a substance that is prohibited in out-of-competition testing or a prohibited method by athlete support personnel in connection with an athlete, competition or training [...]’.

The penalties awaiting members of the athlete’s entourage when they commit doping offences are not to be taken lightly. Article 10.4.2 WADC to this end provides that:

For violations of Articles 2.7 (Traffickling) or 2.8 (administration of prohibited substances and methods which would normally speaking) ‘Ineligibility imposed shall be a minimum of four (4) years up to lifetime ineligibility. An anti-doping rule violation involving a minor shall be considered a particularly serious violation, and, if committed by Athlete Support Personnel for violations [...] shall result in lifetime ineligibility for such Athlete Support Personnel.

11. The role of the ADOs and NADOs

Pursuant to Appendix 1, Definitions, of the WADC the term ‘Anti-Doping Organization’ (ADO) is defined as: ‘a Signatory that is responsible for

• adopting rules for initiating,
• implementing or enforcing any part of the doping control process.

As examples of such organizations are mentioned the IOC, the IPC, other major event organizers that conduct testing at their events, WADA, IFs and National Anti-Doping Organizations (NADOs). NADOs are the national bodies that

• adopt and implement anti-doping rules,
• direct the collection of samples,
• the management of test results, and
• the conduct of hearings, all at the national level.

Failing the designation of such a body the NOC will carry out the tasks mentioned in the country in question. The text of the WADC may be the source of some confusion because the same body is sometimes referred to by different names or one name is used to refer to different bodies. At the beginning of this section, for example, it was noted that an ADO is a signatory and Article 7.5 provides that ‘[...] a Signatory may adopt rules [...] permitting provisional suspensions to be imposed [...]’. The ‘national anti-doping organization’ comes under the term ‘anti-doping organization’, yet neither body is given the exact same tasks. Does the term ‘anti-doping organization’ in the text of the WADC always imply the ‘national anti-doping organization’, besides the IF and the WADA itself? Another cause of possible confusion is the fact that under one provision of the WADC the NADO is given certain tasks in connection with athletes under its jurisdiction who are not international-level athletes and under another provision is given tasks concerning both international-level athletes and national-level athletes as ‘the pool of top level athletes established separately by each National Paralympic Committee or their equivalent. An athlete support personnel in the pool of top level athletes may have a relationship with an athlete under their jurisdiction, but this does not mean that the NOC has the right to appeal the decision even if the athlete under jurisdiction is not international-level athlete. The NOC may only appeal decisions resulting from testing or a prohibited method by athlete support personnel in connection with such an athlete. The NOC may only appeal decisions resulting from testing or a prohibited method by athlete support personnel in connection with such an athlete.

The NADO is not a party to the dispute and it may not intervene in the dispute. As a rule of thumb, the NADO may only appeal decisions resulting from testing or a prohibited method by athlete support personnel in connection with such an athlete, competition or training [...]’.
International Federation and National Anti-Doping Organization

who are subject to both in-competition and out-of-competition testing

as part of their International Federations’ or Organization’s test distribution plan. Every IF has to establish a registered testing pool for international-level athletes in its own branch of sports. Every NADO has to establish a national registered testing pool for its national athletes. Every ADO has to establish a registered testing pool for in and out-of-competition testing in their individual registered testing pools.

Every ADO charged with results management has to establish a procedure for the pre-hearing administration of possible violations of the anti-doping rules, with due regard for certain principles laid down in the WADC. It needs to be examined whether a therapeutic use exemption was granted and whether a clear deviation from the International Standards for Testing or Laboratory Analysis exists, which could render the results of the analysis invalid. When a possible violation has been found the athlete must be informed promptly. It must be pointed out to him/her that among other things he/she may request the analysis of the B sample. The ADO has to carry out a follow-up investigation, the result of which has to be reported promptly to the athlete. The ADO is able to exclude the athlete provisionally until a final decision has been made. Under Article 3.1.1 the athlete has the right to appeal this decision. The ADO may also decide to dispense with earlier elements of the procedure and start with the final hearing under the expedited procedure based on Article 8. Every ADO responsible for result management has to make arrangements for a hearing. The hearing should take place upon certain conditions (see section 11.4.7). The ADO plays an important role in the proof of anti-doping rule violations. Article 3.1.1 lays down the presumption that the WADA- accredited laboratories carry out sample analyses and custodial practices in accordance with the International Standard for Laboratory Analysis. The athlete concerned can attempt to rebut this presumption by showing that the laboratory did not act in accordance with the International Standard. If the athlete successfully challenges the presumption, the burden of proof is on the ADO to demonstrate that the proven deviation from the Standard was not the cause of the Adverse Analytical Finding nor the factual basis of a violation of an anti-doping rule. Article 3.2.2 provides that deviations from the International Standard for Testing which do not result in an adverse analytical finding or otherwise show a violation of an anti-doping rule do not invalidate the outcome of the analysis.

12. Summary

The description of the doping offence has been laid down somewhat oddly in the WADC. No longer is the starting point the undesirable human act which is punished; instead it is the violation of anti-doping rules. These rules describe the outcome of a human act. The way in which these matters are regulated by the WADC is neither elegant, nor transparent. The WADC provisions not only concern the anti-doping rules. These rules describe the outcome of a human act. The system providing for strict liability after a sample has tested positive in a laboratory may lead to the punishment of innocent people. I argue in favour of the simple reversal of the burden of proof whereby the athlete is presumed guilty but is at least given the opportunity to prove his/her innocence. The possibility included in the WADC for an athlete who has been found guilty to claim exceptional circumstances may offer an escape for athletes who are free of blame. The basis for relying on such circumstances is very narrow and the plea does not alter the fact that the athlete is guilty of the offense; its effect is felt only in the determination of the penalty. In out-of-competition testing the WADA has a coordinating function. The division of tasks between the respective anti-doping organizations has been regulated in the WADC in such a manner (in contrast to previous regulations) that a battle of competences between the organizations involved is all but impossible. This benefits the athletes. It is to be deplored that the Code does not include guidelines for the procedure and carry out in and out-of-competition testing in their individual registered testing pools.

The WADC reserves an important coordinating task for the Anti-Doping Organizations (ADOs) and the National Anti-Doping Organizations (NADOs). It is not easy to understand the wording of the WADC. One may easily get confused when reading that the NADO comes under the term ADO, yet it has a different function. NADOs and ADOs are both signatories, but a signatory is not always a NADO or ADO. Does the term ‘anti-doping organization’ as used in the WADC always include the NADO, in addition to the IF and the WADA itself? Every IF and every NADO has to prepare and carry out both in and out-of-competition testing within its registered testing pool. Every ADO charged with results management has to establish a procedure for the pre-hearing administration of possible violations of the anti-doping rules. Another cause of possible confusion is the fact that under one provision of the WADC the NADO is given certain tasks in connection with athletes under its jurisdiction who are not ‘international-level athletes’ and under another provision is given tasks concerning both ‘international-level athletes’ and ‘national-level athletes’ included in its registered testing pool. IFs have to establish registered testing pools for the international-level athletes in their branches of sports, while NADOs have to establish national registered testing pools for the national-level athletes.
The European Non-EU player and the Kolpak Case

by Frank Hendrickx

1. Introduction

Some commentators argue that France won the World Cup Football in 1998 and the Euro 2000 tournament due to the experience acquired by French players in foreign (non-French) football competitions.1 It is a well-known fact that the Bosman ruling of the European Court of Justice has made the free transfer of players possible. The claim that this judgment has improved the situation of French players was made by the lawyer of Lilia Malaja, a Polish basketball player in the French basketball competition. She forced a decision in a case named after her before the French Conseil d’État. Following this judgment, the limitation that had been placed on the number of Polish players per club had to be abolished. This decision received much attention in the sporting world, but its effect remained limited to the scope of jurisdiction of the French administrative courts. Meanwhile, however, the European Court of Justice had been dealing with a similar case, the Kolpak Case. In this case, a Slovak handball goalkeeper named Kolpak predictably caused the abolition of a rule limiting the number of licensed Slovak players per club in the German handball competition. Both decisions were made possible by means of the application of the Association Agreements concluded by the European Union and its Member States with third countries.

The cases mentioned above, which will be discussed in further detail below, did not come out of the blue. They built on existing developments within national and European case law. Two main developments are worth mentioning.

1. In the first place, both cases concerned athletes who were nationals of a “third country” (i.e. a non-EU and a non-EEA country) attempting to rely on the principles set out in the Bosman Case. The issue under review concerned the existence of nationality clauses in professional sports.

2. Secondly, the recent sports cases must be considered in the light of the case law as it has developed with regard to the European Association Agreements between the EU and third countries. In particular, the European Union has concluded ‘Europe Agreements’ with countries in Central and Eastern Europe. These agreements have the objective of bringing about close cooperation with these countries and they enable these countries to participate, albeit partially, in the European Community’s legal regime. Similar Association Agreements have been concluded with many other countries.3 The Association Agreements among other things contain provisions with regard to the rights of employees who are nationals of the third country concerned. These employees are not eligible for the full regime of free movement, but, for those who are lawfully employed on the territory of an EU Member State, the principle of non-discrimination on the basis of nationality applies with regard to working conditions, remuneration and dismissal. Third-country nationals therefore receive a significant level of protection under EU law and have already been successful in directly relying on EU antidiscrimination provisions included in Association Agreements before the Court of Justice.4 Consequently, in the context of these findings, the crucial question arises as to whether sports federations or associations may limit the number of players originating from third countries with which the EU has concluded an Association Agreement as members of clubs participating in their competition.5 Precisely this question was raised in both the Malaja and the Kolpak Case.

2. The Malaja case

Lilia Malaja is a Polish basketball player. She concluded an agreement with basketball club Racing Club de Strasbourg to play in the French women’s competition for the season 1998-1999. The French Basketball Association’s sporting rules, however, provide that for every game a club may select no more than ten players, observing a maximum of two players from outside the European Economic Area. As the club’s selection already numbered one Croatian and one Bulgarian player, Malaja was excluded from playing under the rule mentioned above. Both the club and the player subsequently attempted to solve this problem. The president of the club filed a request with the Association in order to obtain a decision that, for the application of the sporting rules, Malaja could be considered a national of the European Economic Area, among other things on the basis of the Association Agreement concluded between the European Union and Poland in conjunction with the principles of Bosnia. The Association, however, found this solution to be unacceptable. Racing Club de Strasbourg and Malaja then instigated proceedings against the Association before the Administrative Tribunal of Strasbourg. However, on 27 January 1999, the Tribunal rejected their arguments. Malaja still could not play as a result of the nationality clause in the Handball Association’s sporting rules.

Malaja subsequently appealed to the Administrative Court of Appeal, which reached a decision on 3 February 2000.6 Malaja’s arguments were based on Article 37(2) of the Association Agreement concluded on 16 December 1996 between the European Community and its Member States on the one hand and Poland on the other. This Article provides that, subject to the conditions and modalities applicable in each Member State, workers of Polish nationality legally employed in the territory of a Member State, shall be free from any discrimination based on nationality as compared to its own nationals, as regards working conditions, remuneration or dismissal.

---

1 Professor of European Labour and Sports Law, Université de Liège (Belgium) and Tilburg (The Netherlands).  
2 In the current judgment, it is questioned whether the Malaja case is a case of “in blatant opposition to the European Community”, that is, a case in which the Malaja case would be a “tactical” case, to refer to the Kolpak Case.  
3 Iceland, Liechtenstein and Norway, the EEA agreement was adopted on the basis of negotiations between the Member States of the European Union and the EFTA countries and at the time represented around 37% of total external trade of the European Community. Nowadays, the three EFTA countries of the EEA agreement account for about 5% of the EU’s external trade, of EEA. Resolution of the Consultative Committee of 16 June 2001 (SEC(2001) 871 final), O.J. 20 March 2001, C 79/01.  
4 Such as Hungary, Poland, Czech Republic, Slovakia, Romania, Bulgaria, Estonia, Latvia, Lithuania and Slovenia.  
9 CLOQ 95/111, CLOQ 93/218, CLOQ 91/235 and CLOQ 88/39.
The Court of Appeal held that a professional athlete's opportunity to participate in a particular team forms part of the remuneration and working conditions which, according to Article 37 of the Association Agreement, must apply without discrimination to Polish employees who are legally employed in France.\(^9\) The Court went on to point out that Article 37 of the Association Agreement is sufficiently clear so that a preliminary ruling from the European Court of Justice concerning the interpretation of Article 37 did not need to be sought. Moreover, the Court indicated that the legislative competence of the Bundesverfassungsgericht for matters relating to contracts to fill the post of goalkeeper in the German handball team was excluded. Mr Kolpak, who applied for a player's licence not bearing the specific reference to non-member country nationality, brought an action before the Landgericht (Regional Court) of Dortmund (Germany) challenging the DHBB\(^1\) decision. He argued that the Slovak Republic is one of the non-member countries of which nationals are entitled to participate without restriction in competitions under the same conditions as German and Community nationals.

The Regional Court allowed Mr Kolpak's claim and ordered the DHBB to issue Mr Kolpak with a player's licence not marked with an 'A' on the ground that, under Rule 15 of the sporting rules, Mr Kolpak was not treated in the same way as a player who was a national of a non-member country. The DHBB then appealed to the Oberlandesgericht of Hamm. This Court concluded that the facts amounted to an infringement of the prohibition of discrimination resulting from the combined provisions of the EC Treaty and the Association Agreement with Slovakia.

The Regional Court held that Mr Kolpak was a professional athlete and his opportunity to participate in a particular team was part of the remuneration and working conditions which, according to Article 48 of the Association Agreement, must apply without discrimination to Polish employees who are legally employed in France. Mr Kolpak, who applied for a player's licence not bearing the specific reference to non-member country nationality, brought an action before the Landgericht (Regional Court) of Dortmund (Germany) challenging the DHBB\(^1\) decision. He argued that the Slovak Republic is one of the non-member countries of which nationals are entitled to participate without restriction in competitions under the same conditions as German and Community nationals. The Regional Court allowed Mr Kolpak's claim and ordered the DHBB to issue Mr Kolpak with a player's licence not marked with an 'A' on the ground that, under Rule 15 of the sporting rules, Mr Kolpak was not treated in the same way as a player who was a national of a non-member country. The DHBB then appealed to the Oberlandesgericht of Hamm. This Court concluded that the facts amounted to an infringement of the prohibition of discrimination resulting from the combined provisions of the EC Treaty and the Association Agreement with Slovakia.

3. The Kolpak case

The Kolpak Case before the European Court of Justice involved a dispute between the German Handball Federation (Deutscher Handballbund - 'DHB') and Matej Kolpak, the Slovak goalkeeper of a German handball team. It concerned the issue of the professional player's licence.

The conflict centred round 'Rule 15' of the sporting rules (Spielordnung) of the German Handball Federation, which provided, at the time of the dispute, that clubs can only select two players from third countries, i.e. citizens from outside the European Economic Area, amounted to direct discrimination based on nationality and which is capable of affecting Polish employees in their working conditions is prohibited. On this ground, the Conseil d'Etat was of the opinion that the sporting rules of the French Basketball Association, which limits the number of players from outside the European Economic Area, amounted to direct discrimination with regard to those players.

3.1. History

In March 1997, Mr Kolpak was given a fixed-term employment contract to fill the post of goalkeeper in the German handball team TSV Osterwegen eV Handball, a club playing in the German Second Division. Mr Kolpak received a monthly salary. He was a German resident with a valid residence permit. The DHB, which organises league and cup matches at federal level, issued a player's licence to Mr Kolpak, in accordance with Rule 15 of the Spielordnung which was marked with the letter 'A' on the ground of his Slovak nationality.

Mr Kolpak, who applied for a player's licence not bearing the specific reference to non-member country nationality, brought an action before the Landgericht (Regional Court) of Dortmund (Germany) challenging the DHBB\(^1\) decision. He argued that the Slovak Republic is one of the non-member countries of which nationals are entitled to participate without restriction in competitions under the same conditions as German and Community nationals. The Regional Court allowed Mr Kolpak's claim and ordered the DHBB to issue Mr Kolpak with a player's licence not marked with an 'A' on the ground that, under Rule 15 of the sporting rules, Mr Kolpak was not treated in the same way as a player who was a national of a non-member country. The DHBB then appealed to the Oberlandesgericht of Hamm. This Court concluded that the facts amounted to an infringement of the prohibition of discrimination resulting from the combined provisions of the EC Treaty and the Association Agreement with Slovakia.

The Regional Court held that a professional athlete's opportunity to participate in a particular team forms part of the remuneration and working conditions which, according to Article 37 of the Association Agreement, must apply without discrimination to Polish employees who are legally employed in France. Mr Kolpak, who applied for a player's licence not bearing the specific reference to non-member country nationality, brought an action before the Landgericht (Regional Court) of Dortmund (Germany) challenging the DHBB\(^1\) decision. He argued that the Slovak Republic is one of the non-member countries of which nationals are entitled to participate without restriction in competitions under the same conditions as German and Community nationals. The Regional Court allowed Mr Kolpak's claim and ordered the DHBB to issue Mr Kolpak with a player's licence not marked with an 'A' on the ground that, under Rule 15 of the sporting rules, Mr Kolpak was not treated in the same way as a player who was a national of a non-member country. The DHBB then appealed to the Oberlandesgericht of Hamm. This Court concluded that the facts amounted to an infringement of the prohibition of discrimination resulting from the combined provisions of the EC Treaty and the Association Agreement with Slovakia.

The conflict centred round 'Rule 15' of the sporting rules (Spielordnung) of the German Handball Federation, which provided, at the time of the dispute, that clubs can only select two players from third countries, i.e. citizens from outside the European Economic Area, amounted to direct discrimination based on nationality and which is capable of affecting Polish employees in their working conditions is prohibited. On this ground, the Conseil d'Etat was of the opinion that the sporting rules of the French Basketball Association, which limits the number of players from outside the European Economic Area, amounted to direct discrimination with regard to those players.

3.1. History

In March 1997, Mr Kolpak was given a fixed-term employment contract to fill the post of goalkeeper in the German handball team TSV Osterwegen eV Handball, a club playing in the German Second Division. Mr Kolpak received a monthly salary. He was a German resident with a valid residence permit. The DHB, which organises league and cup matches at federal level, issued a player's licence to Mr Kolpak, in accordance with Rule 15 of the Spielordnung which was marked with the letter 'A' on the ground of his Slovak nationality.

Mr Kolpak, who applied for a player's licence not bearing the specific reference to non-member country nationality, brought an action before the Landgericht (Regional Court) of Dortmund (Germany) challenging the DHBB\(^1\) decision. He argued that the Slovak Republic is one of the non-member countries of which nationals are entitled to participate without restriction in competitions under the same conditions as German and Community nationals. The Regional Court allowed Mr Kolpak's claim and ordered the DHBB to issue Mr Kolpak with a player's licence not marked with an 'A' on the ground that, under Rule 15 of the sporting rules, Mr Kolpak was not treated in the same way as a player who was a national of a non-member country. The DHBB then appealed to the Oberlandesgericht of Hamm. This Court concluded that the facts amounted to an infringement of the prohibition of discrimination resulting from the combined provisions of the EC Treaty and the Association Agreement with Slovakia.

The Regional Court held that a professional athlete's opportunity to participate in a particular team forms part of the remuneration and working conditions which, according to Article 37 of the Association Agreement, must apply without discrimination to Polish employees who are legally employed in France. Mr Kolpak, who applied for a player's licence not bearing the specific reference to non-member country nationality, brought an action before the Landgericht (Regional Court) of Dortmund (Germany) challenging the DHBB\(^1\) decision. He argued that the Slovak Republic is one of the non-member countries of which nationals are entitled to participate without restriction in competitions under the same conditions as German and Community nationals. The Regional Court allowed Mr Kolpak's claim and ordered the DHBB to issue Mr Kolpak with a player's licence not marked with an 'A' on the ground that, under Rule 15 of the sporting rules, Mr Kolpak was not treated in the same way as a player who was a national of a non-member country. The DHBB then appealed to the Oberlandesgericht of Hamm. This Court concluded that the facts amounted to an infringement of the prohibition of discrimination resulting from the combined provisions of the EC Treaty and the Association Agreement with Slovakia.
ic economic development and prosperity in the Slovak Republic and in the Republic of Poland respectively, in order to facilitate those countries’ accession to the Communities, there appeared to be nothing to prevent Article 38 of the Agreement with Slovakia from having direct effect.

Secondly, the Court examined whether Article 38 of the Agreement with Slovakia applied to rules laid down by sporting associations. The Court recalled its decision in *Bosman* in which it was decided that the non-discrimination principle of Article 39 of the EC Treaty is applicable where a rule such as the one laid down by a sporting association which determines the conditions under which professional sportsmen can engage in gainful employment. The Court further pointed out that where the conditions for the application of Article 38 of the Agreement were fulfilled. The prohibition of discrimination on grounds of nationality, set out in Article 38 of the Association Agreement with Slovakia, applies only to workers of Slovak nationality who are already lawfully employed in the territory of a Member State and are thus attached to clubs which have achieved certain sporting results in their respective countries, without any particular significance being attached to the nationalities of their players (*Bosman*, paragraphs 131 and 132).

### 5.4. Conclusion of the Court

The Court concluded that Article 38 of the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, signed in Luxembourg on 4 October 1991, had to be construed as precluding the application to a professional sportsman of Slovak nationality who is lawfully employed by a club established in a Member State, of a rule drawn up by a sports federation in that State under which clubs are authorised to field players from other regions, towns or localities in such matches, the Court reasoned. Moreover, in international competitions participation is limited to clubs which have achieved certain sporting results in their respective countries, without any particular significance being attached to the nationalities of their players. In that context, the Court pointed out that a football club’s links with the Member State in which it is established cannot be regarded as any more inherent in its sporting activity than are its links with its locality, town or region. Even though national championships are played between clubs from different regions, towns or localities, there is no rule restricting the right of clubs to field players from other regions, towns or localities in such matches, the Court reasoned.

### 4. Final comment

The question of nationality clauses which was already dealt with in *Bosman* has now been broadened to extend to these ‘third countries’. This was made possible by the fact that the prohibition of discrimination on the ground of nationality is also laid down in numerous Association Agreements, such as the Europe Agreements, which have been concluded with the ‘third countries’. According to these Agreements, which are often worded alike, discrimination against workers who are third-country nationals in respect of working conditions, remuneration or dismissal is prohibited when these workers are lawfully employed in the territory of a Member State. The case law which has now, with regard to sporting rules, been created by the Kolpak Case could easily extend to many other associated countries, such as Hungary, Poland, the Czech Republic, Romania, Bulgaria, Estonia, Latvia, Lithuania, Slovenia or
even others bound by equal or similar provisions.

The decision in Kelpak does not come as a big surprise. The judgment follows a logic which has built up in the evolution of the recent case law of the European Court with regard to Association Agreements. Some will regret the Kelpak judgment, referring to the possible harm it might cause to national youth by reducing training opportunities and to the promotion of national teams. However, for Central and Eastern European countries the judgments merely offer a taste of things to come after the aqaus communautaire becomes applicable to the enlarged EU. Not only does it remain to be seen what the full effect of the non-discrimination clause is going to be, it is also for the future to show what the expanded free movement principle à la

Force Majeure: Terror and Politics in Sport

by Nick White

1. Introduction

The issue of force majeure in sports contracts has recently become of increased significance, particularly in the wake of the cataclysmic events of 11 September 2001. In this article, I examine a range of political and terrorist-related events and circumstances that have disrupted or threatened to disrupt sporting fixtures in recent times. The purpose of this contribution is to analyse the concept of force majeure in the light of those events and circumstances. As well as helping to clarify the circumstances in which it may be possible to claim force majeure, this analysis will highlight points to be taken into account when drafting a force majeure clause.

2. The force majeure clause

The standard force majeure clause operates by specifying that a party or parties to an agreement:

i. shall not be in breach or be liable for any delay in performance or non-performance of any of its contractual obligations;
ii. where such delay or non-performance is caused by any reason or act beyond the (reasonable) control of the party/parties.1

The reasoning behind including the force majeure clause in contracts is clear enough. A party should not be liable for failing to fulfil any or all of its contractual obligations where such failure is due to factors beyond its control. Most contracts will specify examples of possible events of force majeure: fires, floods, storms, landslides, lightning, earthquakes, acts of government or state, war, civil commotion, insurrections, riots etc. In fact, the term ‘force majeure’ does not have a strict legal meaning under English law so it is always necessary to include a definition and always advisable to include a non-exhaustive list of relevant examples.

3. Sports contracts

Before getting stuck into the pit and narrow, it will be helpful to briefly survey some of the different types of contracts that relate to sport. One class of contracts governs the relationships between sports governing bodies (including regional, national and international) and the teams or individuals that take part in the relevant sport. Furthermore, where the sport is a team sport you will also have contracts between the individual team/squad members and the team or club itself. Another class of contracts comprises sponsor/agreements with teams, individual players and governing bodies. On top of that, broadcasters and other rights purchasers/licensors may also be involved, contracting with teams and governing bodies. As we delve into the issue of force majeure it will help to be aware of which of these types of contracts may be affected.

4. Terrorism and the public interest

Interestingly, despite the huge amount of press coverage and public concern that terrorism attracts, one seldom finds it specifically referred to in a force majeure clause. There are a number of reasons for this. Firstly, while there have been significant and tragic terrorist attacks on sporting events - some of which we will touch on shortly - those attacks have never been sustained or frequent enough to compel those involved in contract negotiation to make specific provision for them in force majeure clauses. Coupled with that fact is the tendency among contract draftsmen to include in their contracts ‘boilerplate’ clauses, such as the force majeure clause, with little or no reworking. This tendency means that many such clauses are used time and time again without regard to the specific set of circumstances in which the contract is made. Finally, ‘terrorism’ is a term which is notoriously difficult to define and, of course, lawyers have been trained to keep such terms out of contracts as far as possible.

In spite of these reasons, it is perhaps surprising that terrorism is not more frequently referred to in force majeure clauses, particularly those that appear in sports contracts. This point may require a little explanation. One of the features of such events, and of sports teams and sporting individuals, is that they tend to attract public interest. This may be obvious but is worth explicitly stating because it is this feature that makes such events particularly attractive to those, such as sponsors, who wish to exploit that public interest. However, there are other groups beside sponsors who are drawn to sport by the public interest factor.

Terrorists have certainly taken advantage of the high profile that some sporting events can provide. At the Olympic Games in Munich in 1972, Palestinian terrorists stormed the Israeli Olympic Village, killing two Israeli athletes and taking nine more hostage. The subsequent standoff led to a gun battle during which all the hostages, together with five of the terrorists, were killed. It was of course no accident that the Olympic Games were chosen by the terrorists. They wanted to create the biggest possible shockwave and exploited the public interest in the Games in order to do it. Similar motivations lay behind the bomb threats made by the IRA in relation to the 1977 Grand National at Aintree. Coded warnings were received less than an hour before the race was due to start, causing it to be postponed

1 Solicitor, Couchman Harrington, Associate, London, United Kingdom.

2 Although force majeure and frustration are often mentioned in the same breath, they are distinct doctrines. In general, a frustrating event makes a contract impossible to perform and leads to its termination. A force majeure event, on the other hand, can frustrate a contract but it may equally only delay the parties’ ability to fulfil their contractual obligations. There is a further distinction: whereas frustration is a common law doctrine, force majeure has no strict legal meaning. Force majeure must therefore be provided for contractually.

3 In fact, the key reason that there is no United Nations convention on terrorism is that the UN Member States cannot agree on a definition.
to the Monday. Despite the fact that, on that occasion, there was no actual bomb, the terrorists caused considerable disruption and achieved their aim of publicising their cause.

5. Politics

The sporting boycott of South Africa in protest at apartheid in the 1970’s and 1980’s provides a key example of the political impact that sport can have. By the dawn of the 1980’s the country had become a sporting pariah and the sporting boycott was instrumental in bringing an end to the apartheid regime. Later on, we will look at another important example of the interrelationship of politics and sport in the form of the tour that England and Zimbabwe had in South Africa in 1998.

There are, of course, more recent instances of politics impacting on sport. The horror over whether England should play their World Cup matches in Harare and Zimbabwe was heightened by the fact that the tour was swiftly abandoned. Was the abandonment of the tour due to force majeure? My inclination is that it probably was although the position is very far from clear cut. One of the factors in favour of concluding that the Karachi bomb should be viewed as a force majeure event is its immediacy; i.e. the fact that it occurred during the tour as opposed to before it. Another factor is that Westeners appeared to have been the target of the attack; 11 of those killed were French.

Moving onto another example, consider the Ryder Cup matches scheduled for 2001 that were postponed for a year due to the events of September 11th of that year. Was the rescheduling due to force majeure? According to the official Ryder Cup statement the 2001 matches were ‘postponed out of necessity following the enormity of the tragedy in the United States’.

Of course, there have been numerous other instances of security concerns impacting on sporting events. On February 24, a game which passed without major incident) may damage England’s chances of claiming force majeure remains to be seen. My own view is that it is of little relevance because, unlike the arguments in the New Zealand / Pakistan series, the organisation’s social status is not at stake.

In the end, however, the decision was taken by USOC. As Carter was to comment at the 1996 Games in Atlanta: ‘It should be remembered that in the United States and other free countries, the national Olympic committees were independent of government control [...]’.
8. Contract considerations and insurance

In the drafting of a contract relating to a sporting event, especially where that event is high profile or high value, it will always be worth considering the contents of the force majeure clause carefully. It may be worth including a specific reference to acts of terrorism or other events in relation to which there is a particular concern. The bottom line, however, is that the purpose of a force majeure clause is to cover those acts which the parties are not expecting to happen. If the occurrence of a force majeure event is anything more than a distant possibility, it will often be worth considering insurance cover.

In the aftermath of September 11th this can sometimes prove impossible or prohibitively expensive. By way of example, Australian swimmers who wanted to compete in the World Cup and US Open in November 2001 were asked to sign disclaimers protecting Australian Swimming Incorporated (ASI) from being sued in the event of injury or death to the swimmers due to terrorist attacks or acts of war. ASI was forced to take this step because they were unable to secure insurance. Similar problems have been haunting the Olympics in its search for insurance cover in the event of cancellation. As International Olympics Committee President Jacques Rogge recently commented: ‘The international political situation and the danger of terrorism means the insurance market is reticent against taking this kind of risk.’

While terrorism and the unstable state of world politics is perhaps as much of a risk to sport as the risk of wrapping ourselves and our sportsmen and women in cotton wool. Australian swimming coach Otto Sonnenfetter summed it up well enough: ‘We can only hope everything goes okay. What do you do? Do you sit home, twiddle your thumbs and say I’m not going anywhere?’

Sports Torts and the Development of Negligence in England

by Mark James∗

1. Introduction

The use of the law of negligence as a means of securing compensation for injuries caused during participation in sports continues to develop and evolve.1 The origins of the jurisprudence of this particular field of Sports Law are relatively recent, beginning with the Court of Appeal decision in Condon v Race where the Master of the Rolls observed that:

It is said that there is no authority as to what is the standard of care, which governs the conduct of players in competitive sports (...) whose rules and general background contemplate that there will be physical contact between the players, but that appears to be the case. This is somewhat surprising, but appears to be correct.2

After a very brief review of the law, Lord Donaldson held that the test applicable where sports injuries were concerned would require that the claimant establish that the defendant had been negligent in all the circumstances. His Lordship did not consider it necessary to define further the test for negligence in football matches as the case itself observed that:

The prevailing circumstances are all such properly attendant upon the conduct of players in competitive sports (...) whose rules and general background contemplate that there will be physical contact between the players, but that appears to be the case. This is somewhat surprising, but appears to be correct.3

Condon, the law has developed considerably, particularly in its definition of the relevant circumstances and playing culture of a sport and in the range of defendants against whom an action can be pursued. Two cases in particular, Caldwell v Magazine and Fitzgerald4 and Vowles v Evans and the Welsh Rugby Union Limited5 have provided some of the extra guidance on liability that was lacking in Lord Donaldson’s original statement.

2. The relevant circumstances, playing culture and sports negligence

Following the decision in Condon, there was a great deal of uncertainty about the precise definition of the standard of care required of sports participants. Some considered that the, ‘negligence in all the circumstances’ test was too easily satisfied by sports participants and that liability should only be imposed where a higher degree of negligence, usually referred to as reckless disregard, was reached.6 Others thought that negligence in all the circumstances was the correct test as any move towards reckless disregard would blur the distinction between negligently caused injuries and reckless criminal assaults.7 The trial courts sidestepped the issue by claiming that the applicable test was negligence in all the circumstances but giving judgment in such terms as that the defendant had acted with a ‘reckless and wanton disregard for the health and welfare’8 of the claimant.9

Most of the issues that had concerned both the court and academic writers on this subject were addressed by the decisions of the High Court and the Court of Appeal in Caldwell v Magazine and Fitzgerald10. The case involved serious injuries caused to a professional jockey who had been uninsured because of the interference of another horse with his own mount.11 In dismissing Caldwell’s appeal, the Court of Appeal upheld the judgment of Judge Holland in the High Court and approved the following statement of the law.

1 Each contestant in a lawful sporting contest (and in particular a race) owes a duty of care to each and all other contestants.
2 That duty is to exercise in the course of the contest all care that is objectively reasonable in the prevailing circumstances for the avoidance of the infliction of injury to such fellow contestants.
3 The prevailing circumstances are all such properly attendant upon the contest and include the game’s object, the demands inevitably reasonably to be expected of a contestant. Thus in the particular case of a horse race the prevailing circumstances will include the contestant’s obligation to ride a horse over a given course competently with the remaining contestants for the best possible placing, if not for a win. Such must further include the Rules of Racing and

Notes

1 School of Law, Manchester Metropolitan University, United Kingdom.
3 Ibid p 498
4 [2001] EWCA Civ 1056
5 Condon v Basit [1986] WLR 866, per Donaldson MR.
6 See for example Dade J in Elliott v Saunders (1992) unreported decision of the High Court.
7 Caldwell v Magazine and Fitzgerald [1993] 168 Sports Law 705 and 709
8 See for example Dade J in Elliott v Saunders (1992) unreported decision of the High Court.
the standards, skills and judgement of a professional jockey, all as expected by fellow contestants. 4 Given the nature of the circumstances outlined above, the threshold for liability is in practice inevitably high - proof of no more than an error of judgement or momentary lapse of skill and care will not be enough in itself to establish a breach of duty when subject to the circumstances. An error of judgment or miscalculation will not be sufficient to determine whether or not the injury-causing challenge itself was negligent in the circumstances as they were known and accepted to be by the players of that game. Further, commonly occurring acts of foul play would not automatically lead to a finding of negligence but must also be taken into consideration. By this process, the sport as a whole, or the game where the actual injury occurred, can be examined to determine whether or not the injury-causing challenge itself was negligent in the circumstances as they were known and accepted to be by the players of that game. Further, commonly occurring acts of foul play would not automatically lead to a finding of negligence but would instead be considered as relevant circumstances when determining whether liability should follow.

The case does leave open the possibility that a variable standard of care is applicable to the different levels at which sport is played. In Caldwell, the Master of the Rolls held that a different standard of care would be expected of a player in the elite national leagues than one playing in a local league game. This proposition was doubted in Elliott v Saunders as being without basis in law. However, by requiring of Maguire and Fitzgerald that they exercise the skills and judgement of professional jockeys it is possible that the existence of a variable standard has been confirmed by the Court of Appeal. Caldwell has clarified the law in this area by requiring that future courts pay specific attention to the way that sports and games are played and in particular to the playing culture of such sports and games. In identifying the circumstances that are relevant to a claim of sports negligence, participants should be better able to understand in advance what actions are likely to attract liability and which are likely to be considered to be an inherent part of the way that the sport is played.

3. Referees and liability for sports injuries

One of the biggest developments in the scope of claims for sports injuries came in the 1997 case of Smoldon v Whitewall. Smoldon had moved to a front row position from playing flanker because of an injury to the original hooker. He successfully sued the referee of the under-15's rugby union match in which he was playing for the negligent non-application of the safety rules relating to scrumming. The referee’s negligence eventually led to a scrum collapsing, breaking Smoldon’s neck and leaving him paralysed from the neck down. It was found by the court that the disproportionately high incidence of collapsed scrums was because the referee had failed to do more than incidents inherent in the nature of the sport.

In practice, it may be difficult to prove a breach of duty unless there is a specific accounting to reckless disregard for a fellow contestant’s safety.6

The case establishes a number of significant points. It confirms conclusively that the applicable test to sports tort is negligence in all the circumstances. It acknowledges that proving this may be difficult and that liability may on occasion be established only where the defendant has shown a reckless disregard for the claimant’s safety. However, this is to be of evident importance only, not a rule of substantive law. This is a matter more of common sense than of legal substance. The high degree of interpersonal contact, or risk of such contact, that can and does arise from participation in sport will require a high degree of proof to show that the injury-causing contact was above and beyond that which is expected as an integral or inherent part of the game. Thus, a court will take more convincing that a tackle in a rugby match was unconnected to the playing of the game than it will that any contact in a tennis match was a necessary part of the game. An error of judgment or miscalculation will not be sufficient for a finding of negligence.7

Most importantly, however, the case finally discusses in some detail the circumstances that must be taken into account when attempting to ascertain whether the particular act of the defendant was negligent. A court must look beyond simply the rules and object of the game to its playing culture. The playing culture of a sport looks at the way that it is acknowledged and accepted as being played by those who play it. Lord Judge Tuckey held that the demands inevitably made upon participants, the sport’s inherent dangers, conventions, customs and the standards, skills and judgment reasonably to be expected of the participants to ascertain whether the particular act of the defendant was negligent. Thus, by requiring of Maguire and Fitzgerald that they exercise the skills and judgement reasonably to be expected of the participants to determine whether or not the injury-causing challenge itself was negligent in the circumstances as they were known and accepted to be by the players of that game. Further, commonly occurring acts of foul play would not automatically lead to a finding of negligence but would instead be considered as relevant circumstances when determining whether liability should follow. This proposition was doubted in Elliott v Saunders as being without basis in law. However, by requiring of Maguire and Fitzgerald that they exercise the skills and judgement of professional jockeys it is possible that the existence of a variable standard has been confirmed by the Court of Appeal. Caldwell has clarified the law in this area by requiring that future courts pay specific attention to the way that sports and games are played and in particular to the playing culture of such sports and games. In identifying the circumstances that are relevant to a claim of sports negligence, participants should be better able to understand in advance what actions are likely to attract liability and which are likely to be considered to be an inherent part of the way that the sport is played.

4 Given the nature of the circumstances outlined above, the threshold for liability is in practice inevitably high - proof of no more than an error of judgement or momentary lapse of skill and care will not be enough in itself to establish a breach of duty when subject to the circumstances. An error of judgment or miscalculation will not be sufficient to determine whether or not the injury-causing challenge itself was negligent in the circumstances as they were known and accepted to be by the players of that game. Further, commonly occurring acts of foul play would not automatically lead to a finding of negligence but would instead be considered as relevant circumstances when determining whether liability should follow. This proposition was doubted in Elliott v Saunders as being without basis in law. However, by requiring of Maguire and Fitzgerald that they exercise the skills and judgement of professional jockeys it is possible that the existence of a variable standard has been confirmed by the Court of Appeal. Caldwell has clarified the law in this area by requiring that future courts pay specific attention to the way that sports and games are played and in particular to the playing culture of such sports and games. In identifying the circumstances that are relevant to a claim of sports negligence, participants should be better able to understand in advance what actions are likely to attract liability and which are likely to be considered to be an inherent part of the way that the sport is played.

5 In practice, it may be difficult to prove a breach of duty unless there is a specific accounting to reckless disregard for a fellow contestant’s safety.6

The case establishes a number of significant points. It confirms conclusively that the applicable test to sports tort is negligence in all the circumstances. It acknowledges that proving this may be difficult and that liability may on occasion be established only where the defendant has shown a reckless disregard for the claimant’s safety. However, this is to be of evident importance only, not a rule of substantive law. This is a matter more of common sense than of legal substance. The high degree of interpersonal contact, or risk of such contact, that can and does arise from participation in sport will require a high degree of proof to show that the injury-causing contact was above and beyond that which is expected as an integral or inherent part of the game. Thus, a court will take more convincing that a tackle in a rugby match was unconnected to the playing of the game than it will that any contact in a tennis match was a necessary part of the game. An error of judgment or miscalculation will not be sufficient for a finding of negligence.7

Most importantly, however, the case finally discusses in some detail the circumstances that must be taken into account when attempting to ascertain whether the particular act of the defendant was negligent. A court must look beyond simply the rules and object of the game to its playing culture. The playing culture of a sport looks at the way that it is acknowledged and accepted as being played by those who play it. Lord Judge Tuckey held that the demands inevitably made upon participants, the sport’s inherent dangers, conventions, customs and the standards, skills and judgment reasonably to be expected of the participants to ascertain whether the particular act of the defendant was negligent. Thus, by requiring of Maguire and Fitzgerald that they exercise the skills and judgement reasonably to be expected of the participants to determine whether or not the injury-causing challenge itself was negligent in the circumstances as they were known and accepted to be by the players of that game. Further, commonly occurring acts of foul play would not automatically lead to a finding of negligence but would instead be considered as relevant circumstances when determining whether liability should follow. This proposition was doubted in Elliott v Saunders as being without basis in law. However, by requiring of Maguire and Fitzgerald that they exercise the skills and judgement of professional jockeys it is possible that the existence of a variable standard has been confirmed by the Court of Appeal. Caldwell has clarified the law in this area by requiring that future courts pay specific attention to the way that sports and games are played and in particular to the playing culture of such sports and games. In identifying the circumstances that are relevant to a claim of sports negligence, participants should be better able to understand in advance what actions are likely to attract liability and which are likely to be considered to be an inherent part of the way that the sport is played.

The case does leave open the possibility that a variable standard of care is applicable to the different levels at which sport is played. In Caldwell, the Master of the Rolls held that a different standard of care would be expected of a player in the elite national leagues than one playing in a local league game. This proposition was doubted in Elliott v Saunders as being without basis in law. However, by requiring of Maguire and Fitzgerald that they exercise the skills and judgement of professional jockeys it is possible that the existence of a variable standard has been confirmed by the Court of Appeal. Caldwell has clarified the law in this area by requiring that future courts pay specific attention to the way that sports and games are played and in particular to the playing culture of such sports and games. In identifying the circumstances that are relevant to a claim of sports negligence, participants should be better able to understand in advance what actions are likely to attract liability and which are likely to be considered to be an inherent part of the way that the sport is played.

1 Given the nature of the circumstances outlined above, the threshold for liability is in practice inevitably high - proof of no more than an error of judgement or momentary lapse of skill and care will not be enough in itself to establish a breach of duty when subject to the circumstances. An error of judgment or miscalculation will not be sufficient to determine whether or not the injury-causing challenge itself was negligent in the circumstances as they were known and accepted to be by the players of that game. Further, commonly occurring acts of foul play would not automatically lead to a finding of negligence but would instead be considered as relevant circumstances when determining whether liability should follow.

2 Most importantly, however, the case finally discusses in some detail the circumstances that must be taken into account when attempting to ascertain whether the particular act of the defendant was negligent. A court must look beyond simply the rules and object of the game to its playing culture. The playing culture of a sport looks at the way that it is acknowledged and accepted as being played by those who play it. Lord Judge Tuckey held that the demands inevitably made upon participants, the sport’s inherent dangers, conventions, customs and the standards, skills and judgment reasonably to be expected of the participants to ascertain whether the particular act of the defendant was negligent. Thus, by requiring of Maguire and Fitzgerald that they exercise the skills and judgement reasonably to be expected of the participants to determine whether or not the injury-causing challenge itself was negligent in the circumstances as they were known and accepted to be by the players of that game. Further, commonly occurring acts of foul play would not automatically lead to a finding of negligence but would instead be considered as relevant circumstances when determining whether liability should follow.

3 The case does leave open the possibility that a variable standard of care is applicable to the different levels at which sport is played. In Caldwell, the Master of the Rolls held that a different standard of care would be expected of a player in the elite national leagues than one playing in a local league game. This proposition was doubted in Elliott v Saunders as being without basis in law. However, by requiring of Maguire and Fitzgerald that they exercise the skills and judgement of professional jockeys it is possible that the existence of a variable standard has been confirmed by the Court of Appeal. Caldwell has clarified the law in this area by requiring that future courts pay specific attention to the way that sports and games are played and in particular to the playing culture of such sports and games. In identifying the circumstances that are relevant to a claim of sports negligence, participants should be better able to understand in advance what actions are likely to attract liability and which are likely to be considered to be an inherent part of the way that the sport is played.

The High Court and Court of Appeal both held that there were no public policy reasons that should act to prevent a duty being imposed on a referee in this situation. Adult players, including those who are paid to play, are owed a duty of care by the referee just as much as are child players. That duty is to take reasonable care to ensure the safety of the players that are under the control of the referee by sensible and appropriate application of the rules of the game having regard to the circumstances in which the game is being played. In particular, this will include the correct application of all relevant safety rules. In games such as rugby, where heavy contact and technical skills such as scrummaging are an integral part of the game, the safety of the players must be paramount. The evidential threshold, as under Caldwell, is a high one and that to amount to negligence there must have been more than a mere error of judgment. Thus, negligence was established and the WRU admitted vicarious liability as they had appointed Evans to referee the game.

4. Conclusions: the future of sports torts

The law applicable to sports injury cases is constantly evolving. Players can not only sue each other and the referee as demonstrated by Caldwell and Vinalo. They can also now sue the defendant's employer if the injury was caused in a professional game, the coach, the occupier of the sports facility and the governing body. What Caldwell and Vinalo demonstrate is that there is an increasing awareness of the problems involved with bringing cases involving sports injuries and an increasing degree of sophistication in the judgments being handed down. The development of the test for negligence in sports torts in Caldwell bears almost no resemblance to the very basic test applied by the court in Condon. What these recent cases have done is to ensure that there is a much greater degree of clarity and certainty in the law that applies to these cases.

In the future, the courts will continue to develop the concept of the playing culture of sport. When analysing the circumstances that are relevant to the incident before them, they will need to know in as much detail as possible how a game is played and whether a particular injury-causing act is one that is accepted and expected by the players of that sport as an integral and inherent means of playing the game. This can only occur on a case by case, sport by sport, basis.

There will also need to be further clarification over whether there is a variable standard of care to be applied within the same sport. Whether all players are subject to the same standard of care because they are involved in the same sport, or whether there should be separate standards for all of the different levels at which sport is played is yet to be established. If the latter course is followed, then the courts must decide how many levels they wish to create. At present, following the reasoning in Condon and Caldwell, there appears to be a distinction between professional players and non-professional players. How far this can be broken down, for example on a league by league basis, is far from clear.

Finally, the next under-explored area that is likely to be exploited is for an injured player to sue his own club for forcing him to play whilst injured. With precedents already existing for defendants in most other sports-related capacities, this cause of action has yet to be fully investigated. What these cases all demonstrate is that the complacency that has infected sport for so many years can no longer be allowed to continue. Where there is a possibility that injuries could be caused to the players of a particular game, all of those concerned with that sport should take notice. It is now possible for an injured player to sue almost anyone connected with a sport, from an opponent to the governing body. The law has developed to a degree of certainty that ensures that all those connected with sport should be aware of the potential liabilities that they may face from that connection. If they choose to ignore these warnings and continue with unsafe practices, they could find themselves being the next defendants in this ever-growing field of sports law.

Outside the Norm: The Curious Powers of the United States Olympic Committee

by Dave Mcardle*

1. Introduction

This contribution considers two cases in which the status of the United States Olympic Committee (henceforth USOC) was reviewed by the United States courts shortly after the passing of the Amateur Sports Act, 1978 which had accredited USOC a statutory base. In these cases, persons aggrieved by the decisions of USOC claimed that the terms of the 1978 Act meant that, rather than it being a private entity, it operated under colour of state law and, as such, its decisions were open to challenge under public law principles. In the United States, susceptibility to public law remedies can be established if the State authorises a private entity to perform an action which is traditionally governmental one, or if the state substantially involves itself in the entity’s activities, or if its conduct has been influenced by the state’s own use of its coercive power. Given that the USOC had responsibility for implementing the rules of the International Olympic Committee rather than giving effect to the decisions of the US government, it seemed to operate firmly outside the public sphere. In DePante v. United States Olympic Committee the district court accepted that was the case and rejected the contention that USOC’s behaviour in respect of the United States’ boycott of the 1980 Moscow Olympics amounted to ‘state action’. However, in the subsequent case


References


The International Sports Law Journal

ARTICLES

2003/2

19

2003/2

19
tain educational aspects of college life in addition to carrying out its athletics-based functions. Accordingly, it was held that because states have a ‘traditional interest’ in the education system, and because the NCAA was organised under the auspices of educational institutions rather than by athletic departments, it reflected a traditional governmental function and was therefore a state actor. In Board of Trustees v. NCWA, the court decided that because approximately 50 per cent of NCAA membership is comprised of federal- and state-funded institutions, the ‘entanglement’ doctrine was made out even though government involvement was indirect and the premise that the ‘indirect involvement of state governments could convert what otherwise would be considered private action into state action’ had been rendered untenable by Rendell-Baker v.edio. First, the federal court decided that the recent Supreme Court decision in Rendell-Baker v. Kohl meant that the ‘entanglement’ doctrine was only applicable if the federal and state representatives on the NCAA’s governing body had more influence than private representatives. It found on the facts that the public and private representatives had an equal voice, this meant that governmental involvement was indirect and the premise that the ‘indirect involvement of state governments could convert what otherwise would be considered private action into state action’ had been rendered untenable by Rendell-Baker. Second, under the rule in Jackson v. Metropolitan Edison Co (ed.) a private utility corporation is not a state actor even though it is subject to state regulation. The court decided that the functions assumed by a private utility had to be traditionally and exclusively reserved for the state before the entity could be regarded as a state actor. Since the primary function of the NCAA was the regulation of college sports, which was not a traditional state activity, there were no grounds for a finding of state action with regard to the NCAA. This conflict between various circuit appeals courts was resolved in 1988 by the Supreme Court’s ruling in Rendell-Baker v. edio which has been considered to be the end of the ‘entanglement’ doctrine.

The first of the USOC cases, DeFrantz v. United States Olympic Committee where the Supreme Court similarly held that the USOC was a private body as a consequence of its links to the IOC. The case arose from the activities of the SFAA in promoting the first ‘Gay Olympics’, held in San Francisco in 1978. The SFAA had used the words ‘Gay Olympic games’ on letterheads, in press releases and on various items of merchandise such as T-shirts and car stickers. The federal district court had upheld summary judgment and a permanent injunction that prevented the SFAA from using the word ‘Olympic’ to promote their games. The injunction was affirmed by the Supreme Court on the ground that the Amateur Sports Act 1978 granted the USOC exclusive use of the word ‘Olympic’. Section 210 of the 1978 Act provides that the use of ‘Olympic’ or ‘Olympiad’, or of the Olympic motto ‘Citius, Altius, Fortius’[vii] for the purpose of trade, theatrical exhibition, athletic performance and competition or as an advertisement to induce the sale of any article whatsoever or attendance at any theatrical exhibition, athletic performance and competition or for any business or charitable purpose (...) by any person other than the USOC is unlawful unless the USOC has given its permission to the organisation seeking to make use of the protected words. The USOC does not need to show that the unauthorized use of these words or phrases is confusing, it is intended to confuse or is likely to confuse before an injunction will be granted, for their proprietorial rights in respect of them are absolute.

The SFAA contended that Congress was prohibited from affording to the USOC the protections offered by section 210 as a consequence of Cohen v. State of California. Here, a criminal conviction for disturbing the peace by offensive conduct (to wit, the wearing in a courtroom of a leather jacket bearing the words ‘fuck the draft’) was overthrown on the ground that the conviction was unconstitutional.

The (State of California) could not exist, as offensive conduct, one particular scurrilous epithet from public discourse, either upon the

---

[^vii]: The respondent was suspended from his post as a team official (Anita DeFrantz, in whose name the case was filed) because his jacket showed the words ‘fuck the draft’ was overthrown by the court on the ground that the conviction was unconstitutional. The court determined that the First Amendment’s guarantee of freedom of speech protected words. The USOC does not need to show that the unauthorized use of these words or phrases is confusing, it is intended to confuse or is likely to confuse before an injunction will be granted, for their proprietorial rights in respect of them are absolute.

The SFAA contended that Congress was prohibited from affording to the USOC the protections offered by section 210 as a consequence of Cohen v. State of California. Here, a criminal conviction for disturbing the peace by offensive conduct (to wit, the wearing in a courtroom of a leather jacket bearing the words ‘fuck the draft’) was overthrown on the ground that the conviction was unconstitutional.

The (State of California) could not exist, as offensive conduct, one particular scurrilous epithet from public discourse, either upon the
the theory that its use was inherently likely to cause violent reactions or a more general assertion that the States, acting as guardians of public authority, could properly remove this particular word from the public vocabulary (...). (In the absence of) a more particularised and compelling reason for its actions, the state could not, consistent with the First and Fourteenth Amendments, make this determination. A public display of this single four-letter前夕e a criminal offence.\(^{27}\)

However, the Supreme Court ruled that Congress had not acted unconstitutionally in granting the USOC those rights. Its reasoning was based on the fact that, since the inception of the modern Olympics in 1896, the word 'Olympic' had acquired a secondary meaning that 'had become distinctive of (the USOC's) goods in commerce' and was therefore amenable to protection under the Lanham Act.\(^{28}\) The Court noted that similar words and phrases have their roots in religious festivals held in ancient Greece and reflecting a shared identity between individuals possessing a common bond of patriotism. The word 'Olympic' has general connotations of 'physical and moral qualities' and 'a spirit of better understanding' are accounted for in the balance weighed in favour of the USOC. The court went on to say that the defences usually available (under the Lanham Act) in respect of an alleged trademark violation are not available to an entity that violates the provisions of section 110 of the 1978 Act.\(^{29}\) The decision in SFAA was problematic because it failed to take into account the difference between such phrases as 'Veterans Association' and 'Girl Scouts' (which were created solely as a means on instilling patriotic values by conveying not only ideas capable of relatively precise, detached explication, but otherwise inexplicable emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.\(^{30}\)

This point was considered at length by the ninth circuit appeals court in DeFruntz, Inc. v. USOC (1987). The court noted that the word 'Olympic' has a meaning unique within our language, connoting qualities that Congress had endowed the USOC by the Carter administration occurred only one specific occasion and was in response to extraordinary political circumstances. Accordingly, the considerable governmental influence brought to bear on this occasion did not turn USOC into a state actor, either on that specific occasion or with regard to its activities across the board. The Court's rationale was that 'the government's influence (on participation in Moscow) is hardly representative in view of the absence of such influence on the majority of USOC's decisions.'\(^{31}\) But another way, the fact that government had not intervened in USOC's affairs so overtly before persuaded the Supreme Court to overlook its inter- vention on this occasion and maintain the status quo.

4. Conclusion

As was pointed out in one dissenting judgement, in earlier cases the Supreme Court had 'repeatedly held that 'when private individuals or groups are endowed by the state upon a particular occasion or with regard to its activities across the board. The Court's rationale was that 'the governmental influence (on participation in Moscow) is hardly representative in view of the absence of such influence on the majority of USOC's decisions.'\(^{32}\) Put another way, the fact that government had not intervened in USOC's affairs so overtly before persuaded the Supreme Court to overlook its inter- vention on this occasion and maintain the status quo.

**ARTICLES**

**Law Journal**

---

16 Details.
17 Cohen, op cit., at p. 284.
18 SFAA, pp 61, at p. 136.
19 MIA, pp 161, at p. 332, 335.
22 Cohen, op cit., at p. 234.
23 (1967) 79 US 57. 142.
27 Cohen, op cit., at p. 234.
first place) placed it outside the norm. There were ‘serious constitu-
tional concerns’ about the nature and scope of USOC’s powers64 and a
narrow interpretation of the 1978 Act rather was preferable to
accord USOC exclusive dominion over particular words, symbols
and phrases. The Supreme Court decision in SFAA amounted to the
granting of a permanent injunction that significantly blunted rights
to public expression without good cause.
Worse, prior to SFAA the USOC had sanctioned the holding of
Special Olympics, Junior Olympics, Police Olympics and even
Canine Olympics, normally involving competition among the best
and finest within the denoted category65. It was the prospect of a Gay
Olympics that persuaded it to invoke its statutory powers, not con-
cerns over franchising, marketing or other financial interests. ‘The
USOC is using its control over the term ‘Olympic’ to combat the very
image of homosexuals that the SFAA seeks to promote. Handicapped,
juniors, police, Explorers, even dogs are allowed to carry the Olympic
torch, but homosexuals are not’.66 That the Supreme Court consisted
in the USOC’s institutionalized homophobia should be a matter for
regret, even if it should not occasion surprise. The irony, of course, is
that the ‘Olympic qualities’ that USOC purportedly held so dear
found no greater expression than in the decidedly homosocial nature
of the ancient Greek Games upon which the contemporary market-
ting- and media-driven frenzy is purportedly based: only Freemen
could compete in the ancient Olympics; they were free and women and slaves could be put to death just for watching. Indeed,
one could argue that the Gay Games have more in common with the
original spectacle than the current versions – an interpretative
framework which was lost on both the USOC and a Supreme Court packed with New Right
Reagan appointees.

Case Digest

United States: Sports Agents and Client Stealing - Steinberg v. Dunn US District Court, Central District of California. In February 2003, an American jury decid-
ed an issue concerning sports agents and client stealing. Sports agent Leigh Steinberg
and his firm, Steinberg & Moosad, success-
fully sued his former partner, David Dunn,
and his new company, Athletes First.
Steinberg alleged that Dunn breached his
employment contract approximately
two years after he agreed to a deal worth $7m (€6.6m). Further, Dunn’s agreement
included a $2m (€1.9m) signing bonus and a clause that prohibited him from compet-
ing with Steinberg’s firm.
In 2001, Dunn left Steinberg’s sports
agency, with about 90 National Football
League clients in tow, to establish Athletes First. Steinberg sued, and in November
2001, a jury found Dunn had violated his
employment agreement and awarded $44.6m (€42.0m) against Dunn and
Athletes First. Claims of unfair competition and interference with prospective economic
advantage were also upheld by the jury.
However, in January 2003, the judge granted
Steinberg’s motion to add $23.5m (€21.2m) in lost revenue to the jury award.
In February 2003, the judge granted
Steinberg’s motion for Dunn to pay his
legal fees which totaled $1.7m (€1.5m).
Dunn also owes his lawyer $5m (€4.6m)
and has been declared bankrupt.

receipts income including sponsorships, appearance fees and money received from
incentive schemes, should be deemed tax-
able income for the purposes of the Income
Tax Assessment Act 1936 (Cth), as the tax-
payer was carrying on a business as a pro-
fessional athlete. This has ramifications for
many of Australia’s struggling elite athletes
and thousands of amateur ‘sportspeople’.
The judge’s view as to whether the taxpayer
was carrying on a business depended on a
number of factors including whether the
activity was being carried on in a busi-
nesslike way and in accordance with ordi-
nary commercial principles, whether there
was system in the activity and whether the
activity was being carried on for profit. He
found that the taxpayer, an Australian
javelin thrower, had turned her talent to
the pursuit of money in the way that one
would expect a professional athlete would,
I.e. through sponsorship, participation in
competitions to win prizes and personal
appearances for money. As a result, all of
the rewards of that business, or the rewards
that were incidental to that business, were
income according to ordinary concepts.

drew a case for ‘passing-off’ against the
radio station, Talksport, formerly Talk
Radio. In 1999, the station’s marketing
company had sent promotional material to
a number of people who were likely to be
responsible for the placement of advertise-
ments. The material had included a
brochure, which had featured Irvine hold-
ing a radio with the words ‘Talk Radio’.
This was a doctreted picture – in the origi-
nal Irvine had been holding a mobile tele-
phone. The main significance of the High
Court case was that the judge held that an
action for passing off could be based on
false product endorsement which this
advertisement was. It did not matter that
this was outside a ‘common field of activi-
ty’ I.e. selling advertising rather than specif-
ically connected to Fl racing. Irvine had a
substantial reputation or good will and
Talksport had created a false message.
However at the High Court Irvine’s loss to
his reputation was estimated to amount to
only £2,000 (£2,035/$3,098p). In April
2003, the Court of Appeal allowed Irvine’s
appeal that he would not have signed an
endorsement deal with Talksport for less
than £23,000 (£26,647/$47,744p). The
evidence as to the endorsement deals that
Irvine signed during 1999 was a factor to be
taken into account. Therefore the correct
damages were £23,000 (£26,647/$47,744).
CMS Derks Star Busmann

It's pretty clear. As the keeper you have only one goal: to stop the balls whizzing past your ears. A flawless performance, that's what it's all about. On the ball, right through the match. With your eye on the defence. You have to focus on that one goal. And pounce on that one ball. Because keeping the score at nil is all that matters.

...on the ball.

Being on the ball is just as important in business as in hockey. CMS Derks Star Busmann supports your business with full legal and fiscal services. A goal-focused and practical approach with you at the centre. Cases and faces is what CMS Derks Star Busmann is all about. Contact our sports law specialists Eric Vile (e.vile@cmsderks.nl), Dolph Segaar (d.segaar@cmsderks.nl) or Robert Jan Dil (r.dil@cmsderks.nl) www.cmsderks.nl
The Dual Nature of Football Clubs and the Need for Special Legislation

by Domenico Di Pietro

1. The Issues

In the last years, football clubs have been at the centre of animated debates about the need for more stringent regulation of their activity. The subject matters of the debate range from commercial and financial to regulatory issues. It is often asked why the football industry is characterised by such high level of controversy which is unknown to other industries and also uncommon to most of the other sports. A close analysis of the problems encountered in the regulation of football clubs seems to show that controversy mainly arises because of what can be defined as the ‘two souls’ of football clubs. Football clubs are indeed a complex mixture of top-level money-spinning business activity and a long-standing recreational activity deeply rooted in almost every social and geographical context. In summary, football clubs look like any other business companies and sometimes even floated in the stock exchange, but, unlike business companies, retain a strong link with the community. Indeed a football club is deeply affected by the local community to which it is most closely linked. At the same time, however, a football club can normally exercise a strong influence on the life of the community. This is perhaps the reason why managing football clubs has also become an appealing practice among those who are in need for an increase in their popularity. Many have relished such challenge, irrespective of whether getting involved with the management of a football club would make sense from a merely financial point of view. Sadly, most of the time it does not make sense while popularity is only awarded to the few who manage to deliver victories. In any event, football-related popularity has always proved to be an ephemeral achievement.

One practical example of the interaction between the ‘two souls’ of football clubs can be found in the financing of football clubs. Almost every government in Europe has at least once enacted a piece of legislation providing for State aid to football clubs. Aid has taken many different forms. From indirect help in the form of tax relief and more favourable accounting rules, to straightforward forms such as cash injections of public money under the more diverse justifications. Most of such help are at least questionable, if not plainly unlawful, under European Competition laws. However, the increasing interest taken by the European competition authority has not prevented the recurrence of such practice. The same sort of support is not normally available, at least to such large extent, to normal businesses or other undertakings to use the terminology adopted by Competition laws. Such difference in treatment is also felt before insolvency authorities. For an interesting study on this phenomenon see [1].

As we will see below, another example of the diversity of football clubs from other businesses is that football clubs benefit from a huge popularity of the game. Football TV shares are on the high with highlight matches being watched by record number of viewers. The four exciting quarter-final second-leg matches of this year’s UEFA Champions League saw viewing figures in the six major markets reach about 62 million for the match week, the highest figures for over three years. In Spain, a season’s high of 8.1 million viewers - a 54 per cent share of the market - watched the match at Old Trafford between Real Madrid and Manchester United. The same game also attracted a season’s high in France, with 6.8 million views. In the United Kingdom, an outstanding 10.6 million viewers - 44.9 per cent market share - watched the match, the highest UEFA Champions League audience recorded by the local broadcaster in the last three years. The audience even peaked at full time, with 11.9 million viewers, which amounted to about 43 per cent market share. Also in Italy there were two exceptional audiences. The AC Milan versus Ajax match attracted 9.4 million viewers - the highest live match audience in Italy since the 1993 semi-finals.

The advantages enjoyed by football clubs on other businesses and the incredible popularity that the sport is recording, however, seem to be not enough to make football clubs successful businesses. This is mainly due to the fact that the peculiarities of football clubs are also reflected in their economic structures. It seems therefore appropriate to devote part of the present study to the economic characteristics of football clubs. This will help us understand their nature fully and therefore to conclude that football clubs are very special entities and that their peculiarities, which extend to every aspect of their activity, should be taken into account at legislative level.

Our short analysis of the economics of football clubs will concentrate on the sources of income and then will briefly move to look at the assets of football clubs. In doing so we will compare at least two different financial models which are the most frequently encountered in European football.

2. The Economics of Football Clubs

It is certainly not the aim of the present article to provide the reader with detailed analysis on the economics of football clubs. This would be beyond the ability of the author and definitively outside the subject matter of this article. The short economic analysis contained in this article is only aimed at providing the reader with the highlights of this topics which are necessary to understand the nature of football clubs. For an interesting study on this phenomenon see [2].

As an example of the mixture of top-level money-spinning business activity and the incredible popularity that the sport is recording, however, seem to be not enough to make football clubs successful businesses. This is mainly due to the fact that the peculiarities of football clubs are also reflected in their economic structures. It seems therefore appropriate to devote part of the present study to the economic characteristics of football clubs. This will help us understand their nature fully and therefore to conclude that football clubs are very special entities and that their peculiarities, which extend to every aspect of their activity, should be taken into account at legislative level.

Our short analysis of the economics of football clubs will concentrate on the sources of income and then will briefly move to look at the assets of football clubs. In doing so we will compare at least two different financial models which are the most frequently encountered in European football.

1. Avocats et Solicitors, Mayer, Brown, Rowe & Maw LLP, London, United Kingdom. This paper was presented at the ASER International sports law seminar on ‘Licensing Systems and the Financing of Professional Football in Europe’ on 16 June 2003 in Utrecht, which was organised in cooperation with CMS Deek, New Zealand.
2. For an interesting study on this phenomenon see [3].
clubs and their difference from other businesses. The figures shown are a summarised version of those normally featuring in football clubs’ balance sheets.2

2.1. The income of football clubs

As we have already said above, our analysis will concentrate on two main models that appear to be the most widespread in Europe.

The first one of the two relating to the sources of income of football clubs is summarised in figure 1. In this structure, a predominant role is played by income coming from the exploitation of TV rights, i.e. the money paid by broadcasters to national or international leagues or federations, as well as single football clubs depending on the competition to which the rights relate or/and the system of sharing which may have been adopted by national and international leagues. The proceedings of the sale of TV rights related to international club competitions such as the UEFA Champions’ League are paid to the owner of such competition which then allocates a share of this money mainly on a performance-based system. At national level, the proceeds from TV rights are paid to the local football league which then redistribute the money equally among the member clubs. Alternatively, where such system has never been adopted or it has been dismissed on the basis of concerns about the potential breach of competition law - the income is the result of the negotiation carried out by each club with one or more broadcasters operating in that area and willing to broadcast that club’s home matches. We cannot embark on the analysis of TV rights income sharing here. However, it is important to bear in mind that, depending on the system adopted, the income from TV rights can vary substantially. In any event, TV rights contracts last on average for about 3–10 years and may not endure for more than one or two years. Gate revenues’ duration is even shorter. This means that such sources of income do normally manage to adjust to the change of economic circumstances. As we are experiencing now, a slow down in the economy triggers a reduction in the quantity of money spent for the acquisition of TV rights by broadcasters and the money invested by other business in sponsorship campaigns linked to football clubs.

Unlike the income, the nature of the main source of expenditure of football clubs, namely employees’ salaries, is rigid and cannot react to changes of economic circumstances as quickly. The reason for this is that, in order to acquire the assets needed to run the business successfully, namely good footballers, clubs must almost invariably face heavy and long-term investments. Moreover, once the ‘asset’ is acquired, it is in the interest of the club to keep it with the club for the longest possible period of time in order to fully exploit the investment made. This is always the case unless an unmissable chance to transfer the ‘asset’ and make a considerable profit arises during the employment period. For that reasons, clubs normally commit to pay their footballers for five years, the maximum period allowed for employment contract in English law, as happened in the case of TV Digital in England, the needed stream of finance can last even less than expected.

There is currently no device that can be used to fix this situation. Basically, because of the huge rise in employees’ wages experienced after the famous Bosman case, football clubs have been gambling on their survival signing contracts for enormous amounts of money which they do not have and simply hope to receive in the future.

In order to correct such unsustainable economic model and therefore to avoid the bankruptcy of many clubs, it is felt that drastic action should be taken at both club and institutional level. At club level, great efforts are being made in order to decrease the level of expenditure to which the management has somehow dangerously committed. An example of what can be done is the deal struck by S.S. Lazio, with some 90% of the players currently employed. The so called ‘framework agreement’ provides, amongst other things, for the reduction of existing wages, the rescue settlement which will due for the contract years 2003/04 and 2004/05, and the payment of the outstanding wages by means of club’s shares with consequential obligation on the players’ sides to sell the shares for at least eight months (the so called ‘lock-up obligation’).

Action aimed at rescuing football clubs is also being taken at institutional level. In Italy, for example, legislative measures adopted by the current government allow for football clubs to depreciate the accounting losses deriving from the decrease of the market value of the players. This legislative measure was not surprisingly perceived as a breach of European legislation. In particular article 87 of the Treaty which states that ‘Save as otherwise provided in this Treaty, any aid granted by a member state or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between member states, be incompatible with the common market’. It is felt by many that such provision may hinder the chance of local governments to help struggling football clubs.

Apart from legislative measures, remedies are also being enacted by the relevant sporting bodies. Salary capping will be introduced into English football for the first time next season as part of a programme agreed by 73 member clubs of the Football League. The programme is still at experimental level and will only apply to the Third Division for the time being. One of the key features of the programme allows clubs to spend no more than 60% of their turnover on all their staff costs combined. There will be no punishment for failure to comply although sanctions are possible at some stage in the future. In England it is also being discussed whether ‘sporting sanctions’ - such as deduction of points or relegation - should be applied to clubs going into administration. The sanctions are regarded as necessary to prevent clubs from taking an unfair advantage by going into administration and having most of their credits wiped off as opposed to clubs that instead of benefiting from the favourable treatment offered to clubs before the relevant judicial authorities prefer to cut corners and sell their valuable assets in order to repay their creditors.

2.2. The assets of football clubs

The peculiar nature of football clubs also becomes apparent when looking at the structure of the assets of such entities. As already done when dealing with the income, we will analyse the assets of football clubs by looking at the two most common structures. One of them is summarised in figure 3. The pool of assets is mainly composed of the goodwill of the club, which accounts on average for some 45%, and the rights to the performance of football players amounting to a similar percentage. The asset structure described in the third chart does not contain any specific reference to immovable properties or tangible assets. This structure is especially common in Italy and in those other countries where football clubs do not own the premises where they play official matches. Properties and tangible assets of football clubs are very limited in value in those countries. For that reason they have been grouped under the heading ‘Other’ where they concur with other assets to an average percentage of about 10%.

Even a quick glance at the chart suggests that some of the mentioned assets are in fact sources of liability for the club. The right to a footballer’s performance (‘Players’ in the chart) can definitively be seen both as a valuable asset and as a source of expenditure. To this extent, the right to players’ performance differs from normal assets. Unlike the former, normal assets provide their owner with a source of income repaying back the investment made for their acquisition. Furthermore, the right to players’ performance is extremely expensive to acquire and can only be used for a comparatively limited period of time. Moreover, it is a comparatively unstable asset since the risk of depreciation is normally very high.

Equally peculiar are the remaining assets of football clubs under this model, which are normally grouped under the heading ‘Goodwill’. The goodwill of a company is the ability to produce income and can be described as the momentum generated by a company’s activity. The goodwill of football clubs is mainly composed of trademarks, customers and the right to play in a major league.

As regards the trademarks of football clubs, they include symbols and logos - in some case the name of the club itself - that can be commercially exploited on an exclusive basis. Some of them are extremely valuable and have an incredible power of commercial attraction.

Another item that can be regarded as an important element of football clubs’ goodwill is composed by the customers of the club. We have already seen that, unlike the clients of any other business company, clubs’ supporters are very valuable because they tend to remain loyal to the club irrespective of the quality of the ‘product’ offered by the club. The loyalty of football supporters is not even comparable to that of any other business like the commodity industry or the entertainment industry where poor quality of the goods produced or poor quality of the service offered would invariably lead to customer disaffection and loss of market share. This is not the case for the football industry where loyalty to the club is only seldom affected by the actual performance of the team.

Another fundamental element of the goodwill is the right of the club to play in a major league or rather their league license as otherwise described. A football club without a license to play in a major league would make no business sense and would not exist as such. It is possible to understand the importance of such right by looking at the financial implications connected to it. A good example of this is offered by the English Premiership where every place in the final championship table is worth £505,000. The team finishing at the bottom of the table gets such sum. The second last takes twice as much and so on. The team winning the championship would cash in about twenty times as much. All 20 Premiership clubs then receive further 10 millions as part of the annual fees from Sky and ITV. Further income is divided on the basis of actual TV appearances. Each club featured in a live game receives £397,000, with £150,000 paid for a pay-per-view screening and £35,000 for being involved in one of the three main matches on the evening highlights. Broad TV screening also entails the chance to win lucrative sponsorship agreements and so on. The value of playing in the Premiership, or rather not playing in it, can be easily assessed by looking at the figures involved in the lower

![Figure 3](image-url)
football divisions of the same country. In Division One the champions receive £50,000 while the runner-up gets £25,000. In the Second Division, the first-place club gets £15,000 and second-spot team £10,000. It is therefore easy to imagine the financial implications for the clubs that are relegated from the Premiership to Division One.

What is clear even after a very brief analysis is that, especially under the new regime, clubs - no matter how appealing they can be in terms of cash flow performance in any given moment of time - can turn out to be difficult items to deal with when it comes to converting them into money. A good example of this was sadly provided last summer by the insolvency of Fiorentina, one of the then major football clubs in Europe. Not earlier than 4 years ago Fiorentina's supporters were watching thrilling football in the Champions League playing and beating clubs like Arsenal and Manchester United. Fiorentina was displaying thrilling football in the Champions League then major football clubs in Europe. Not earlier than 4 years ago Fiorentina's supporters were watching thrilling football in the Champions League playing and beating clubs like Arsenal and Manchester United. During the winter preceding the insolvency, Deloitte & Touche, using figures relating to the 1999-2000 season, ranked Fiorentina the 14th richest club in the world. That season the club had banked £54 million in revenue. The debt burden, however, was already soaring past £100 million and, if the sale of assets like Baratrita, Rai Costa and Toldo did not prove enough to remedy the situation. Last summer Fiorentina went suddenly - and to some extent surprisingly - bankrupt. The outcome was partially unexpected because the sums of money required in order to satisfy the Italian League as to Fiorentina's ability to meet the financial burden needed to complete the season in Serie B - the Italian second division, where they had just been relegated - was comparatively small, about £20 million Euros. Since they could not guarantee sufficient finance the club was relegated to amateur football and eventually went bankrupt.

The interesting aspect of the story for the purpose of our study, however, is what happened to the then valuable assets of the club. We can do that bearing in mind the elements of the third apple chart. Beside the disappearance of Fiorentina, we will also describe the parallel story of a shadow club incorporated in record time to fill the gap left by Fiorentina. The shadow team called Florentia, i.e. a more archaic word describing the link with the city of Florence, was set up by a smart Italian businessman backed by the local city council acting under considerable pressure from the media and the local community. The plan, as it will appear, was from the very beginning not aimed at rescuing the old glorious team - since this exercise would have been more expensive - but rather aimed at creating a new club looking pretty much like the old one.

As far as Fiorentina's assets were concerned, the right to the players' performance vanished as soon as the club was relegated to non-professional football. The relevant contracts were resolved by operation of law as a consequence of such relegation and the club was entitled to no compensation for this. Some of the players who used to play with Fiorentina were signed by Florentia on a free transfer basis. Among them, Angelo Di Livio, the Italian international midfielder. Other players joined other clubs on a similar basis.

As regards the trademarks of the old club, only the name, Fiorentina, was suitable for exclusive exploitation. The well known logo of the team, the Florentine Iris, was also the logo of the city of Florence and therefore could not be retained as an asset of exclusive exploitation. For this reason the logo could be picked up and adopted by the new team Florentia. More recently, Florentia have acquired the right to use the name Fiorentina. A good example of this was the bankruptcy auction for as little money as 3.5 million Euros.

The two missing bits of the assets, namely the supporters of the club and the right to play in a major league were also somehow acquired by the new club. As far as the supporters were concerned, they immediately identified in the new club their old beloved Fiorentina, notwithstanding the difference in name and ownership. They did not attempt rescue their old team and immediately transferred their affection to the new one. More challenging was the operation of getting a place in professional football, no matter at which level. According to Italian regulations, the newly created team was supposed to start from the very bottom of the amateur football ladder, far away from professional football. However, the Italian League allowed the newly born club to play in Serie C2, the Italian fourth division. It was neither Serie A nor Serie B, but still professional football, only a couple of 'promotions' away from the spotlight of Serie A. The League, acting under enormous pressure, justified such decision saying that they were compelled to do so after taking into account the football achievements of the city of Florence. The League perhaps failed to bear in mind that the undisputed achievements were Fiorentina's and not the city of Florence. It is difficult to imagine anything like this happening to any other business company.

Going back to the assets of football clubs, we have also seen that notwithstanding their capacity of generating high level of income, clubs may fail to display an appropriate quantity of tangible assets that could be used to provide creditors with suitable security. The situation may be different where clubs do have valuable tangible assets. Figure 3 describes the other most widespread model relating to clubs owning a substantial quantity of tangible property. This situation is particularly common in England where most football clubs, unlike Italian clubs, own their stadium as well as other properties like training grounds, residential developments and so on. However, even the presence of such additional positive feature does not manage to play a major role in making the economics of football clubs any more reliable. As a matter of fact, football clubs whose asset structure fall under the description of the fourth chart, are proving to be as financially frail as teams characterized by the lack of major tangible property (third chart). The reason for this as we have seen is the too burdensome financial models adopted by most teams described in the previous chapter.

The double nature of football clubs is now being felt in some areas of the law where the activity of football clubs is being looked closely. We have already mentioned the problem of the insolvency of football clubs. When it comes to the liquidation of the assets most creditors are likely to experience disappointment. This is mainly due to the fact that football clubs' assets are difficult to liquidate and have little value if taken out of context. Additionally, football clubs tend to enjoy better treatment than any other business when it comes to insolvency proceedings. The need for an insolvency policy relating to football clubs has arisen partially because of concerns that some clubs have used administration as a means of escaping their debts, thereby securing an unfair advantage over their rivals. The English club Leicester City, for example, went into administration earlier this season and had 90% of their debts to
In order to comply with European competition laws. In Spain, small-a fraction of the money that the two top teams would be likely to the smaller clubs in the Premier League would only be able to cash in prove inappropriate. Suffice to say that if it were not for such system. The Premiership system, the TV rights are sold jointly so that the proceeds them without the presence of the other teams. In the English competitors and partners. They compete against each other in order to a single buyer. In assessing the problem, however, the competition authorities should not fail to take into account that football clubs are different from other businesses. Football clubs are at the same time competitors and partners. They compete against each other in order to achieve higher revenues and yet they would not be able to generate them without the presence of the other teams. In the English Premiership system, the TV rights are sold jointly so that the proceeds can be shared equally and healthy competition maintained. The unqualified application of competition laws in this area may prove inappropriate. Suffix to say that if it were not for such system the smaller clubs in the Premier League would only be able to cash in a fraction of the money that the two top teams would be likely to receive. This scenario is being experienced in other countries like Italy and Spain where the football TV rights market is being transformed in order to comply with European competition laws. In Spain, smaller clubs have been unable to sell their rights and are struggling to pay employees. They are now strongly supporting the introduction of a collective selling system. In Italy the situation is similar and the controversy triggered by the introduction of the new system in line with competition law caused a blockade by the smaller clubs last year which refused to start the championship. The Italian Football League failed to strike a deal for eight Serie A clubs and the two main TV broadcasters. The eight clubs proposed that a new system be put in place, leading to a mass blockade. What happened to Fiorentina is another, although different, example of the problem. It would not be unreasonable if the creditors of the old club would argue that they were not allowed a fair chance to recover their money.

Another area of the law where the problem of the different nature of football clubs is being experienced is competition law. The European Commission is currently investigating the Premier League’s broadcasting contract with Sky. The Commission believes that the collective and exclusive nature of the system adopted in England for the negotiation and sharing of TV rights income ‘tantamounts to price-fixing’. According to the Commission, the system adopted in England for the distribution of TV revenue creates barriers to entry in the broadcasting market and is a root of Sky’s dominant position. From a competition perspective, the Commission may even be right. For a normal product, it would be strange for several producers to fix the price and supply. It would be even stranger if they agreed to sell to a single buyer. In assessing the problem, however, the competition authorities should not fail to take into account that football clubs are different from other businesses. Football clubs are at the same time competitors and partners. They compete against each other in order to achieve higher revenues and yet they would not be able to generate them without the presence of the other teams. In the English Premiership system, the TV rights are sold jointly so that the proceeds can be shared equally and healthy competition maintained. The unqualified application of competition laws in this area may prove inappropriate. Suffice to say that if it were not for such system the smaller clubs in the Premier League would only be able to cash in a fraction of the money that the two top teams would be likely to receive. This scenario is being experienced in other countries like Italy and Spain where the football TV rights market is being transformed in order to comply with European competition laws. In Spain, smaller clubs have been unable to sell their rights and are struggling to pay

dated rules and international federations, began to appear in Europe. It is also no coincidence that this period represented the hey-day of European imperialism as colonies were carved up and plundered by colonial powers without regard to the people who had lived on the land for generations. With the establishment of colonial rule, traditional games were also to a substantial extent marginalised or destroyed as a result of the introduction of ‘Western’ organised sports by the imperial powers. Consequently, sport fulfilled a vital cultural role in the overall Westernisation of the colonies with blatant disregard for the cultural interests of the colonised peoples.

The Consul’s brow was sad, and the Consul’s speech was low, And darkly looked he at the goal and darkly at the foe.
The Consul’s brow was sad, and the Consul’s speech was low, And darkly looked he at the goal and darkly at the foe.
The Consul’s brow was sad, and the Consul’s speech was low, And darkly looked he at the goal and darkly at the foe.

Sport has, since the 19th Century, played an ever increasing role in shaping Europe and the world beyond. It is no coincidence that this was the period during which sport in the modern sense, with stan-
In the course of the 20th Century, success in sport has become a matter of nationalistic pride. In the periods of strained peace in Europe, the battles on the playing field took the place of struggles on the battlefield and entire peoples projected their need for superiority on their athletes. Despite this, Brian Glanville questioned what correlation was there between kicking an inflated bladder between three wooden posts more times than one’s opponents, and acquiring national prestige?

Perhaps he should have posed the question to the Nazis who aimed to use the 1936 Berlin Olympic Games as a showcase of Aryan supremacy and the blow which Jesse Owens gave to that ideal, or to the Soviets who showcased their ideological superiority at the 1980 Olympics in the absence of many of its Western opponents, or to the Americans who go in a community of Capitalism at the 1994 Olympics in the absence of the Soviets and their allies.

Perhaps Glanville should have posed the question to the Governments of El Salvador and Honduras, who, in 1969, took nationalism in sports to record lengths when war broke out between the two countries as a result of three hotly disputed matches between the national football teams of the two countries. Of course, other issues and disputes between the two countries had been brewing for centuries, but the final football world cup qualifier match provided the spark that ignited the ig. Both sides blamed each other for initiating hostilities. After four days of fighting, an estimated number of 3,000 people were dead, 6,000 wounded and $50 million in damage was caused on both sides. And while the actual fighting ceased after four days - mainly because the Honduran military ran out of fuel and ammunition - a formal peace treaty was only signed in 1980.

In spite of what many people may try to maintain, sport has certainly since the advent of major international competitions, become one way, perhaps the least bloody one, in which countries could flex their muscles, so to speak, and display their power. In a famous mistranslation, the Spanish football authorities once informed the English Football Association that Spain would be honoured to fight England on the football pitch. Against this background, it is little wonder that, even today, many countries invest heavily in sport. Despite the destruction of two World Wars, even though the Cold war has ended and in spite of the modern culture of globalism and the establishment of the European Union, nationalism is still an important aspect of any modern society.

2. Government intervention in sport

If one speaks of imperialism in sport, the term invariably implies some form of active political involvement in sport which is mostly pursued through some measure of overt or covert government intervention and supported by extra-governmental institutions. However, this begs the question why governments would wish to become involved in sport. What perceived benefits could a national, national or transnational authorities hope to obtain by means of their direct or indirect involvement in sport?

Various reasons for government involvement in sport have been cited. This includes:

• Promotion of public order.
• Maintaining fitness and public health.
• The need to promote the prestige of a community or nation in wider realms of political relations.
• To promote a sense of identity, belonging and unity among citizens.
• To emphasise values and orientations consistent with dominant political ideology.
• To increase citizen support for political leaders and the political structures they represent.
• To promote general economic development in the community and society.

There is little doubt that sport has become a powerful political tool which governments across the globe wield with varying degrees of success. It is a tool which is inherently subtle and those exposed to it, hardly ever notice that they are being manipulated in some clever way.

2.1. National prestige

More than any other reason for government intervention in sport, governments use sport as a means to promote national prestige and legitimacy. Success in sport is a statement of national prestige. It signals that a country has arrived on the world scene and will in future take its place as an equal among the nations of the world. On the other hand, a series of failures on the international front could prove disastrous. Commentators described England’s run of dismal performances on the sports field during the 1990s as a symptom of the general state of decline in which English society was supposed to have found itself. It was inconceivable to some that the once mighty colonies would be beaten by former colonies. Former colonies were beginning to beat the colonial powers at sport in which the colonial powers once believed they had a god-given birthright to win. And, it seems, as the sports talent from the former colonies improved, the powerful nations sought to maintain the superiority of their domestic leagues and tournaments by hurling the best talent from the less wealthy countries with promises of big riches. This ensured not only that the domestic leagues in the powerful nations maintained a high level of competition and an aura of superiority, but also that their athletes could hone their skills against some of the best athletes in the particular sport and maximise the development of their skills.

2.2. Fostering identity

Sport is also a powerful means to promote a sense of belonging and identity. More than any other social influence, save perhaps war with a common enemy, sport has the potential to unify a people. This is more than any other reason for government intervention in sport. Politicians have long since realised the potential of sport holds in this regard. Through the ages and across the globe, politicians have promoted themselves and their interests by aligning themselves with high profile sports events and sports stars. Political leaders nowadays arrange spectacular media events to see off their national Olympic teams and receive the successful athletes at lavish ceremonies. They use award ceremonies at major events to gain maximum exposure.

It has been suggested that sport stabilises the power structures of capitalist societies by producing technical and disciplined behaviour. In terms of sport, this legitimises the technocratic capitalist practices and uses them as a repressive method of general socialisation. Sport is used as an aid to protect bourgeois class interests and to regulate the use of free time.

This view is not new. Ever since the ancient Romans’ cities of pana et circenses have gone up, rulers have...
realised that people can be more easily manipulated and oppressed if they were kept entertained and their minds were kept occupied. Sport has long since been recognised as a means to promote public order. In some cases, governments have sponsored and encouraged sports events and programs to keep potentially disruptive or disgran-
tiled groups occupied and off the streets. The main goal of such pro-
groms is the notion that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mination and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mination and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mination and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, deter-
mation and the ability to keep on going in the face of hardship. The result is that success requires discipline, loyalty, hard work, dete-
3. Migrant Labour

Alan Reich, a former official in the United States State Department, indicated that one of the benefits in modern sport, is that

(sports) organizations, in administering international sports activi-
ties would earn. In this work, they travel and communicate across national boundaries... further the ideals of freedom... and also develop leagues in the successful Cameroon football side in the

players have moved to foreign clubs. Similarly, almost all the players

convert their astounding successes in recent under

to the rich playing fields of Europe. At the opening games for the 1999/2000 football season in England, only one English player was selected for the Chelsea starting line-up and a total of only nine

European players made the starting line-ups in the match between

Arsenal and Manchester United.19 The French football team that won the World Cup in 1998, included four players born outside of France and six players whose families were recent immigrants to France.20 It is often athletes from poorer regions that are attracted by the promis-
ung of wealth to be found in Europe.21 In many instances, this is done with scant regard to the cultural difficulties that such athletes may encounter in the process and the social impact it may have on the partic-
ticular athlete. In many instances, talented players from developing countries, who are often not well-educated and almost always igno-
 rant of the intricacies involved in the world of professional sport, are

exploited by agents and clubs, to the extent that such players often

receive less than half of the payment that other players with similar

talent would earn.22

The migration of players certainly takes place without any consider-
ation of the consequences for the country from which these athletes are taken. Since the 1990s, the majority of the top Brazilian football players have moved to foreign clubs. Similarly, almost all the players

in the successful Cameroon football side in the 1990s World Cup played professional football outside their own country.23 By the end of the 20th century, almost 1,000 of the best African footballers were playing at various levels in the European leagues. This exodus of Africa’s elite footballers is generally seen as one of the major factors contributing to the underdevelopment of football in Africa.24 This could certainly explain why African countries have been unable to convert their astounding successes in recent under 17 and under 20 Football World Championships and (under 23) Olympic Championships to the professional level.25 In fact, in view of these figures, it is nothing more than a miracle that football continues to survive as the predominant sport in Africa. If Europe were to lose its best 1,000 footballers to other continents, I doubt whether the European leagues will be able to last very long. It could, however, be argued that the exodus of players is not one of the reasons that con-

tribute towards the underdevelopment of football in Africa. After all, most of the top Brazilian players have also been lured to Europe, yet Brazil and other South American countries remain at the forefront of international football. This view is somewhat distorted. The migra-
tion of players from South America to Europe has only truly occurred
during the last two decades or so, at a time when football had already

developed to the highest levels and South American teams had already been crowned World champions.26 On the contrary, African football has not reached this level yet and perhaps never may. In the first instance, the talent pool on which local leagues have to operate is depleted and clubs or teams have to operate with second-

string players. The result is that leagues in those countries suffer from the lack of world class players. Young and upcoming stars are deprived of contact with players that should have been their role models. The only way for local people to see their own athletes perform is for their
television networks to acquire rights to broadcast events taking place in

Europe - at tremendous expense.27

Secondly, clubs in developing countries are further seldom fairly compensated for the cost and effort of developing young talent and

for the loss of such talent.28 While the acquisition of players with simi-

lar talent in Europe would generate transfer fees that run to millions of Euros, few clubs in developing countries ever receive more than a token amount at best. This is certainly a major contributing factor towards the financial difficulties from which African football cannot seem to escape.29

Thirdly, there is, particularly in football, a constant struggle between national unions and professional clubs for the availability of

players. European clubs invest vast amounts of money in their players and wish to have the maximum returns on that investment. If national teams deprives clubs of the players’ services and always car-

ries with it the risk of injury. The end-result is that national unions of the less wealthy nations are often compelled to field second rate teams because European clubs refuse to release players for national duty.

A further recent development is the establishment of European academies and training schools in Africa. While the provision of European expertise through these academies could assist with the development of football in Africa, it would only be an honest attempt at development and truly successful if the majority of the talented players developed by these academies are allowed to remain in their countries of birth to foster further development and an overall improvement of standards. However, European clubs do not neces-
sarily invest in Africa for altruistic purposes. In the modern world of commerce and professional sport, investments are only made if there are clear returns that can be obtained. In the case of the academies, the returns are the identification and recruitment of talented players, thereby adding to the overall problem of talent migration to Europe. In this regard, the current FIFA president, Sepp Blatter, voiced the concern that these academies should

not just show up, take the best players, not let anyone have them and take them off to Europe. But the recruitment of talented players is not the only benefit of acad-

emies. By establishing a presence in African countries, European clubs are certainly also opening vast and lucrative markets for the distribution of

their merchandise.

4. European monopolisation of sports

In spite of the culture of globalism and the fact that the majority of

members affiliated to international federations are from so-called
developing countries, the control and administration of most sports are still very much Eurocentric. This is firstly reflected by the fact that the headquarters of the International Olympic Committee and most of the major international sports federations are located in Europe.

34. Darby (2002) 159 et seq.
39. Since early African countries have taken two silver medals and two bronze medals at the under 17 event, as well as a gold

medal, two silver medals and a bronze medal at the under 20 event, while

Nigeria and Cameroon have won the Olympic gold medals in 1998 and 2000 respectively.
Apart from that, the Court of Arbitration for Sport is also situated in Lausanne, Switzerland.

It is further highlighted by the fact that very few of the major international sports events have been held outside of Europe. Of the 17 Olympic Games that have thus far been held, only nine have been held outside of Europe, with the next Games in Athens. Admittedly, though, since the 1950s, eight of the 13 Games were held beyond Europe. Of these Games, four were held in North America and two each in Asia and Australia. Africa and South America are yet to host the biggest games of all. Similarly, nine of the 17 Football World Cup tournaments have thus far been staged in Europe, with the next one scheduled for Germany in 2006.

The International Association of Athletics Federations have, since 1981, sponsored eight World Championship meetings with a ninth scheduled for August 2005. Of these nine meetings, only two have not been held in Europe. Of the 17 races on the annual Formula 1 motor racing calendar, one takes place in Australia, one in South America, two in North America, two in Asia and one in Europe. South Africa was the only country in Africa to have hosted Formula 1 racing, but despite the provision of state-of-the-art facilities and despite the fact that South Africa has produced some of the great names in Formula 1, the South African Grand Prix has long since disappeared off the calendar.

Although football is often called the sport of nations and despite the fact that African countries have dominated recent Olympic football competitions and World Youth Championships, FIFA has for decades now been the theatre of struggle for developing countries trying to assert themselves as equals on the playing fields of the world.

European countries, on the other hand, clung to their position of superiority within the realms of world football. When the former FIFA President, João Havelange, suggested that South Africa should stage the 2006 World Cup tournament, UEFA officials were infuriated and the English and German federations threatened a European boycott of the event. The words of former English FA head, Sir Bert Millichip, in this regard was indicative of the European supremacist attitudes that still dominate world sport and football in particular:

[I]f without UEFA, they could not carry on. I don't think this is fully recognised, but we are quite capable of carrying on without Asia or Africa or even South America.”

Millichip’s comment is extremely short-sighted. In the first instance, it blatantly ignores the fact that South American countries have won more World Cup victories than European countries. It is also sadly isolationist, implying that Europe can stage its own World Cup, without the participation of the rest of the world. It sorely misses the whole point of staging a World Cup event - the global celebration of humanity and of peace and goodwill through a particular sport. As long as such sentiments prevail in Europe, there can be no measure of equality and fair play for poorer countries.

5. Conclusion

There is no doubt that Europe has in the past played a dominant role in the world of sport. After all, most of our modern organised sports arose and developed in Europe and were exported from there to the rest of the world. There can also be little doubt that Europe will continue to play a leading role in international sport. And while the developing countries of the world are taking a stand and fighting for greater equality on the world stage, Europe will continue to resist these pressures in an attempt to maintain European supremacy and domination. And the statue of Mu does.

The Consul’s brow was sad, and the Consul’s speech was low;
And darkly looked he at the goal and darkly at the foe.
They surely score again, he cried, ‘before the game doth cease’;
And if they once defeat our team what hope for Europe’s peace?”

\[http://www.gbrathletics.com/ic/wc.htm\]

PAPERS
Protecting Sports Image Rights in Europe

The long awaited decision in the Catherine Zeta-Jones and Michael Douglas case against ‘Hello!’ Magazine over the taking and publication of their ‘unauthorised’ wedding photographs was given in the High Court in London on 21 April 2003. And both sides are claiming victory. Certainly, the judge held that there was a breach of commercial confidentiality on the part of ‘Hello!’ because of the $4 million settlement agreement with ‘OVO’ to produce and publish the ‘authorised’ photographs. But he did not hold there had been any breach of privacy by ‘Hello!’ as claimed by the Hollywood stars. Take David Beckham, for example: last year, he reputedly earned over $51 million, but only $31.5 million was for actually playing football. Most sports stars nowadays earn more off the field of play than on it through lucrative commercial deals exploiting their images and notoriety. Tiger Woods is another leading example of this phenomenon.

Unlike the UK, in the rest of Europe, there are privacy laws protecting the valuable image rights of sports stars from unauthorised commercial exploitation by the media and others. In France, for example, article 9 of the Civil Code confers a general right of privacy. And there are also similar provisions in the German and Italian Constitutions - articles 182 and 240 respectively. In Sweden, unauthorised use of an individual's name or picture to promote goods and services is a civil wrong and also a criminal offence, where the use is intentional or grossly negligent, under the Act on Names and Pictures in Advertising of 1979. There are also provisions in the Australian Trade Practices Act of 1974, which provide legal protection against unauthorised exploitation of reputation and personality. Likewise, in many States in the US, there are also laws granting celebrities a right of personality and publicity 'as an inherent right of every human being to control the commercial use of his or her identity'. Not surprisingly, this right is very strong and rigorously enforced in the State of California, under section 3344 of the California Civil Code, largely because of the needs of Hollywood - the home of American cinema.

So what can sports stars in the UK do to protect their image rights? They have to rely on a ragbag of legal rights, concepts and principles, which, when applied to given cases, do not always produce the favourable outcomes desired. These rights include copyright and trade marks and also the Common Law concept of 'Passing Off'. There is no copyright in a face or a name. And copyright in photographs belongs to the photographer as 'the author' of the protected work - to use the language of the Copyright Designs and Patents Act of 1988. However, if the photographs are taken on a private occasion and published without the individual's consent, it may be possible to stop this under the protection of privacy provisions of certain extra-statutory Codes of Practice governing broadcasting and the print media. But this kind of protection can, in practice, be problematic too.

As for trade mark protection, it is difficult to register a sports star's name - some have been registered, like Ryan Giggs, but many others have not, including Mark Hughes, on the ground of lack of distinctiveness. However, 'nicknames' are a new law in privacy protection. Hence Paul Gascoigne has registered his nickname 'Gazza' as a trade mark. And so any use of that name with his image without his consent would constitute a trade mark infringement. It is also interesting to note that F1 stars Jacques Villeneuve and Damon Hill have registered certain images of themselves. In the case of Hill, his distinctive eyes looking out through the visor of his racing helmet 'Passing Off' consists of one trader 'passing off' his goods or services as those of another. And to succeed legally, the claimant must have acquired a reputation or goodwill in his name, goods or mark; the defendant must have caused confusion through misrepresentation; and damage must have resulted. And last year, F1 racing driver, Eddie Irvine, successfully brought a 'Passing Off' action in the High Court against a commercial radio station.

The case arose out of brochures distributed by the radio station owner to potential advertisers using a manipulated picture of Irvine holding a portable radio, with the words 'Talk Radio' added. This promotional campaign, unauthorised by Irvine, was timed to coincide with the British Grand Prix. Irvine claimed that the promotion constituted an improper endorsement of the defendant's radio station causing damage to his reputation. And the court agreed. But not all 'Passing Off' claims are successful - it all depends on the particular circumstances of the particular case. Judgement in this field is just as much a lottery as it is in many others.

However, all of this is a rather 'hit and miss' way of legally protecting sports image rights in the UK. But, perhaps the recent UK Human Rights Act of 1998, which came into force just over two years ago, may provide more legal certainty to sports celebrities. The Act incorporates directly into UK Law the provisions of the European Convention on Human Rights of 1950. Of particular interest to sports personalities are the rights to privacy and property. Article 8 of the Convention protects privacy and family life; whilst article 10 of its First Protocol guarantees the 'peaceful enjoyment' of one's property. Both of these rights are directly applicable in the UK, and may provide a more secure legal basis for a general law of privacy and property protection that sports stars can invoke to safeguard their valuable image rights from unauthorised commercial exploitation.

It will be interesting to see what the future holds.

Ian Blackshaw

Sports Merchandising: Fighting Counterfeitters

Copying, it is said, is a form of flattery. But unauthorised copying - counterfeiting - is another matter, which is costing the EU economy a staggering Euro 250 billion per annum. Counterfeiting is also a problem globally, costing around 5% of world trade. Counterfeiting of sports merchandise, which is also big business, is a growing problem for sports rights owners, particularly licensors and their licensees. There is a lot to place in sports.

So, what is counterfeiting? And, more importantly, what can be done to stop it?

In strict legal terms, counterfeiting is the unauthorised use of registered trade marks in connection with the production and/or distribution of goods. And, in a wider sense, counterfeiting also involves the production and/or distribution of what are called ‘pirated’ goods. These are copies of goods produced and/or distributed without the consent of the copyright holder.

A sports logo, such as an event mark, used for the marketing of consumer goods can be registered as a trade mark, if it satisfies certain legal requirements - in particular, it is distinctive and indicative of the origin of the goods. The legal rights flow from registration of that mark at the Trade Marks Registry. A sports logo can also be legally protected by copyright as a ‘pro-
Pregnancy and Sport

Sport now accounts for more than 5% of world trade and 5% of the European Union GNP. With such money at stake, winning is now the end game for most athletes. Rather than, paraphrasing the Olympic motto, merely participating.

Not surprisingly, eligibility disputes in major sports events are increasing. And an unusual case of this has just been decided in the Australian Courts.

The All Australia Netball Association (AANA) runs netball competitions in Australia. And recently imposed a ban on pregnant women competing for one of their most prestigious trophies - the Commonwealth Bank Trophy. Trudy Ann Gardner, an elite netball player, who was pregnant at the time, wanted to compete, but was refused. As a result, she lost match payments, sponsorship, as well as was suffering hurt and humiliation.

So, she sued the AANA claiming sexual discrimination under the Australian Sex Discrimination Act 1984, which aims: ‘To eliminate, so far as is possible, discrimination against persons on the grounds of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of commonwealth laws and programs . . .’

The AANA claimed their action was exempted under section 9 of the Act. This provides that: ‘Nothing […] renders it unlawful for a voluntary body to discriminate against a person, on the grounds of the person’s […] pregnancy, in connection with: (a) The admission of persons as members of the body; or (b) The provision of benefits, facilities or services to members of the body.’

On March 13, the Federal Magistrates Court of Australia rejected this, holding that Gardner was not an AANA member and the exception could not be broadly interpreted to include her.

So, she won her case and got damages.

Sexual discrimination in sport also arises in the UK. The Sex Discrimination Act 1975 has similar aims to those of its Australian counterpart, but does not expressly refer to pregnancy. However, section 1, which outlaws sexual discrimination generally, has been held by the House of Lords to include pregnancy cases. There is also a ‘sporting exception’ in section 44, which provides that: ‘Nothing […] shall, in relation to any sport, game or any other activity of a competitive nature where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man, render unlawful any act related to the participation of a person as a competitor in events involving that activity which are confined to competitors of one sex.’

Preventing a woman competing in a sporting event, because she is pregnant, does not fall within the express terms of this exception. And the UK courts would also probably interpret it strictly. So, a Gardner type case in the UK would also likely be upheld.

Ian Blackshaw

Copyright

The Copyright, Designs and Patents Act 1988 (see section 107).

Copyright, Designs and Patents Act 1988 (see section 107). This provides that: ‘Nothing . . . renders it unlawful for a voluntary body to discriminate against a person, on the grounds of the person’s . . . pregnancy, in connection with: (a) The admission of persons as members of the body; or (b) The provision of benefits, facilities or services to members of the body.’

As this opinion has shown, there is plenty of ammunition in a sports merchandise's legal armoury, so, counterfeiters beware!

Ian Blackshaw

Discrimination Act

Pregnancy and Sport

Sexual discrimination in sport also arises in the UK. The Sex Discrimination Act 1975 has similar aims to those of its Australian counterpart, but does not expressly refer to pregnancy. However, section 1, which outlaws sexual discrimination generally, has been held by the House of Lords to include pregnancy cases. There is also a ‘sporting exception’ in section 44, which provides that: ‘Nothing […] shall, in relation to any sport, game or any other activity of a competitive nature where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man, render unlawful any act related to the participation of a person as a competitor in events involving that activity which are confined to competitors of one sex.’

Preventing a woman competing in a sporting event, because she is pregnant, does not fall within the express terms of this exception. And the UK courts would also probably interpret it strictly. So, a Gardner type case in the UK would also likely be upheld.

Ian Blackshaw

Copyright

The Copyright, Designs and Patents Act 1988 (see section 107). This provides that: ‘Nothing . . . renders it unlawful for a voluntary body to discriminate against a person, on the grounds of the person’s . . . pregnancy, in connection with: (a) The admission of persons as members of the body; or (b) The provision of benefits, facilities or services to members of the body.’

As this opinion has shown, there is plenty of ammunition in a sports merchandise's legal armoury, so, counterfeiters beware!

Ian Blackshaw

Discrimination Act
Human Rights Protection in Sports Industry

Under the European Convention on Human Rights, the Court has held that the State may have a positive obligation to provide effective protection, which is ‘inherent in the respect for private and family life, the protection of the home and other personal belongings’. It indeed obligates the national court to take into account these principles when applying private law rights between private parties. The application of human rights law and principles is of fundamental importance to sports marketing practices on several levels, particularly as the industry has come to be valued according to ‘who owns what rights’. Leaders must become more fully aware of the growing trend within corporate culture of applying human rights principles, even as the area falls to consider within the direct application of human rights law itself. This is especially true as individuals are at the core of sport.

In this end, human rights law and principles must include not only the exploitation of personality assets of professional sportmen and women but how companies deal with employees generally, including treatment of their contractors’ employees. This area is of direct concern to sporting goods and sportswear corporations, which manufacture goods in markets with lower labour costs. Personality rights protection will likely come within the ambit of national legal protection. But human rights law and principles must also include terms in sponsorship agreements as regards the business ethics of corporate officials.

Attention is increasingly being paid by European Union bodies to the movement of ‘Corporate Social Responsibility’ (CSR) and the adherence by companies to fundamental Codes of Business Ethics. In a Green Paper published in 2001, the European Commission stated as its objective the application of human rights principles to all corporate and business activities, including the sectors of finance and investment, product production within developing countries, management training, anti-fraud and corruption auditing and child labour practices. Although voluntary in compliance, it is a trend, which is not likely to be reversed. An article published by the London Financial Times reports that research by the UK’s Institute of Business Ethics ‘provides strong evidence that those [corporations] clearly committed to ethical behaviour perform better financially over the long term than those lacking such commitment.’

The sports industry allegedly comprises 5% of global output. Clubs, federations and corporate sponsors are actively involved in the development of young players and must increase their ethical transparency within their Board and business operations. They engage individual sportmen and women, interact with player’s unions and seek to sponsor or recruit talent from sports camps in developing countries. These activities are in addition to making day-to-day decisions, which impact local communities. In the full gamut of its commercial endeavours, the global sports industry will not escape scrutiny as CSR increases the need for national and international ethical expectation rather than being an option. Sports marketing firms would be well advised to understand this trend and to lead the way in encouraging human rights law and practices in their own - as well as their clients’ - future business activities.

Julie King

Case Digest

This recent decision of the New South Wales Court of Appeal provides further support for the view that plaintiffs who willingly participate in sporting or leisure activities which carry an inherent risk of injury, and which are well-known and voluntarily accepted by the participant, are going to have to accept the consequences of their actions, at least in Australia.

This decision should come as no surprise given the decisions of the High Court in cases such as Agar v Hyde; Agar v Worley (2000) Aust Torts Reports B7-159 and Woods v Multi-Sport Holdings (2002) Aust Torts Reports B7-640. However, whereas the decision will bring any public liability premium relief to suppliers of recreational activities seems dubious at best. While insurers have seen a significant increase in claims for injuries arising from recreational activities in the last decade, and some large payouts, the reality in Australia is that insurers are still recovering from the result of years of heavy discounting, the fallout from the collapse of the discount insurer HIH and the September 11 attacks in the US.

United States: Sports Marketing and Misleading Statements - Nike, Inc. et Al v. Kaskey, No. 02-375 In April, the United States Supreme Court began to hear oral argument as to whether the First Amendment of the United States Constitution permits a private citizen, Marc Kaskey, to obtain relief for Nike’s allegedly false and misleading statements regarding the goods that it produces in Asia and sells in California. Further, can Nike be found to have violated the law that prohibits false or misleading advertising or statements? In sum, Kaskey contends that Nike uses sweatshop labour and failed to disclose this information, as required under California law. In contrast, Nike has vigorously denied these allegations and argues otherwise. This case presents important questions regarding the relationship between the First Amendment and laws that prohibit commercial entities from making false statements in the marketplace relating to products and services. The United States Supreme Court will render its decision regarding this matter later this year.

Europe: Internet Gambling - Opinion of Advocate General Steigler Alber in Case C-446/04
Internet gambling has become big business. Advocate General Alber’s opinion supports the position that a bookmaker who EU governance expectation rather than being an option. Sports marketing firms would be well advised to understand this trend and to lead the way in encouraging human rights law and practices in their own - as well as their clients’ - future business activities.
Influx of Foreign Athletes Unstoppable

by Erik Oudshoorn*

The Kolpak ruling limits sports federations in their policy to regulate the influx of foreign players. This will have a major impact, according to a lecture at the Asier Institute. Could a quota system be the ultimate solution?

A European quota system would be able to prevent the unrestricted influx of professional athletes from countries outside Europe. Only two non-EU players are allowed in the line-up of German handball teams. The European Court held that Kolpak’s treatment amounted to a violation of the Association Agreement concluded between the European Union and the Slovak Republic. Article 38 of this Agreement provides that Slovak nationals are entitled to equal treatment with respect to EU nationals as regards working conditions. Professional sports also comes under this provision.

The Court’s decision has far-reaching consequences for international sports (federations) because the EU has concluded similar agreements with another 23 countries. Furthermore, in March 2000 a hundred countries from Europe, Africa, the Pacific and the Caribbean signed an anti-discrimination agreement in Cotonou. The decision of the Court put a stop to the rules provided by the European federations to stop the mass arrival of non-EU athletes.

Branco Martins can imagine that Joseph Blatter, chairman of the worldwide football federation FIFA, has voiced the fear that fans will no longer be able to identify with the players once increasing numbers of foreigners join the teams. Crowds would stay away from the untold now well-filled stadiums. He also mentioned other consequences for professional sports in general and the game of football in particular. For example, investing in players’ training would become less inviting, which would affect the clubs’ own training programmes and the numbers of players trained. In addition, if the market were to be flooded with foreign players, players’ salaries would take a tumble. And clubs needing fewer work permits because they have their own young players’ training programme should have to be able to sell their surplus permits.

Branco Martins further examined the conditions which professional athletes from non-EU countries have to fulfill in Spain, Germany and Italy in order to become eligible for a work permit. He discovered three completely different sets of rules. In the Primera Division, the highest-ranking teams in Spanish football, clubs may have no more than 25 players under contract of which a maximum of four can be players from non-EU countries. Of these, only three may be lined up at a time. Following the Kelpak case, this system will no longer be able to function. In Germany, professional footballers do not need a work permit at all.

Recently, Italy has introduced the by far most interesting system for keeping non-EU athletes at bay. A quota established by the Minister of Social Affairs each year determines how many foreigners are to be admitted to Italy. Together with the Minister of Welfare the Minister of Social Affairs also decides the quota for professional sports. The system will come into force in the new season.

Branco Martins believes that this scheme could be the starting point for uniform requirements in European professional football. He considered variations like granting a maximum of ten work permits per club. And clubs needing fewer work permits because they have their own young players’ training programme should have to be able to sell their surplus permits.

Branco Martins considers it the task of FIFPro (international players’ organization) and the newly established employers’ organization, the European Federation of Professional Football Clubs (EFFC), to submit draft EU-wide ‘Foreign Players Regulations’ to the European Commission. Given that Branco Martins is the EFFC’s Secretary this suggestion is not as striking as it appears.

Case Digest (continued)
defendants ran data transfer centres in Italy, linked by internet with an English bookmaker and collected sporting bets in Italy on behalf of that bookmaker. In Italy, however, such activity is reserved for state-licensed undertakings. The Advocate General’s view is that the Italian licensing system is framed in a discriminatory manner and is not adequate for the protection of consumers and social order and infringes the EC principles of freedom of establish-

Compiled by the Teaching Faculty of the Asier-Griffith International Sports Law Programme - www.gu.edu.au/sportlaw

Taken from SportBusiness International June 2003, p. 12

Mayer, Brown, Rowe & Maw LLP International Sports and Entertainment Group

Striking the right note in sport law

Contact:
Dominic Spencer Linderhill
Tel: +44 (0)20 / 020 011

Domenico Di Pietro
Tel: +44 (0)20 / 028 8152

www.mayerbrownrowe.com/london
Mediating Sports Disputes: National and International Perspectives

Ian S. Blackshaw

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, marketers, 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.

Distributed for T.M.C. Asser Press by Kluwer Law International:

For North and South America:
Aspen Publishers, Inc.
7301 McKinnon Circle
Broomfield, CO 80021, USA
Customer Care: 877-725-4477
Direct Dial Number: 303-644-7700
Fax Number: 303-644-7739
Email: customer.care@aspenpub.com

All other countries:
Turpin Distribution Services Limited
Blackhorse Road
Letchworth Garden City
Hertfordshire SG6 7AR
United Kingdom
Tel: +44 1462 673575, Fax: +44 1462 434547
Email: Kluwerlaw@TurpinLd.com
Promoting the Social Dialogue in European Professional Football

Background

The European Federation of Professional Football Clubs (EFFFC) was founded on 30 September 2002. The founding organisation is the Dutch Federatie van Betaald Voetbal Organisaties (FBO). FBO representatives include not only Ajax Amsterdam, Feyenoord Rotterdam and PSV Eindhoven, but also the smaller clubs in the second division. Clubs in Holland have established the FBO in 1968 to operate as a counterweight to the players’ associations. One of the main areas of FBO activity is concluding collective bargaining agreements with the players’ associations. Under the authority of the FBO, a research study has been carried out in a number of EU member states. The main conclusion of the study was that the only way to create a legitimate basis for the regulation of employment law aspects in European professional football is by means of a collective agreement resulting from the Social Dialogue at the European level.

The Social Dialogue has a number of functions. In the first place, both sides of the industry can consult with regard to the social subjects that they consider to be important in connection with European integration. They can draw up recommendations, which, however, are not legally binding. Besides, the Social Dialogue has a co-legislative function. The Commission is obliged to consult the Social Dialogue partners on all plans for social regulations that the Council can decide upon with a qualified majority. Both sides of the industry can then decide to negotiate about the subject concerned and to try to come to an agreement. They have nine months in which to do so. When an agreement is reached, both sides of the industry can present it to the Council, with the request to make it binding for the member states. However, the parties concerned, the employers and employees, are not dependent on action taken by the Commission. They can come up with agreed proposals on their own initiative.

In this context, a second important conclusion could be drawn from the above mentioned research study. In order to establish the Social Dialogue in the professional football industry, it is necessary to create an employers’ organisation at the European level. By means of the incorporation of the EFFFC, a counterpart to the worldwide players’ union, FIFPro, was established and the first steps towards a social dialogue were taken.

The structure of European professional football and employment law

Professional football in Europe is on the eve of a new legal revolution. After the much-discussed Bosman case, the roots for this new legal revolution lie once again in European employment law. Since the Belgian football player pointed out to his club that the payment of a transfer fee at the end of an employment contract is an infringement of the free movement of persons as formalised in the EC Treaty, the new transfer system officially came to an end. In this context, a second important conclusion could be drawn from the above mentioned research study. In order to establish the Social Dialogue in the professional football industry, it is necessary to create an employers’ organisation at the European level. By means of the incorporation of the EFFFC, a counterpart to the worldwide players’ union, FIFPro, was established and the first steps towards a social dialogue were taken.

The Social Dialogue has a number of functions. In the first place, both sides of the industry can consult with regard to the social subjects that they consider to be important in connection with European integration. They can draw up recommendations, which, however, are not legally binding. Besides, the Social Dialogue has a co-legislative function. The Commission is obliged to consult the Social Dialogue partners on all plans for social regulations that the Council can decide upon with a qualified majority. Both sides of the industry can then decide to negotiate about the subject concerned and to try to come to an agreement. They have nine months in which to do so. When an agreement is reached, both sides of the industry can present it to the Council, with the request to make it binding for the member states. However, the parties concerned, the employers and employees, are not dependent on action taken by the Commission. They can come up with agreed proposals on their own initiative.

This state of affairs causes confusion in the member states of the European Union. Not only in the member states where there is a collective bargaining agreement (CBA) in force between the social partners in the professional football sector (for example, in the Netherlands an agreement is in force between the VVCS and ProProf at the players’ side and FBO as a representative of the clubs), but also in member states where such an agreement is not (yet) negotiated. In the first place, the confusion results from the fact that the CBA has legal precedence over FIFA regulations. In practice however, it is not easy to put the FIFA regulations aside and to apply national law, since FIFA is the most powerful organisation in world football. In the second place, where there is no CBA in force, the situation, in fact, is the same. General national labour laws regulating the fixed term contracts have to be respected. The management of football clubs and other entities in professional football are not always aware of this fact because they are embedded in the organisational structure of international football, with FIFA at the top.

This lack of clarity leads in certain cases to conflicts in the legal regulation of the sector. A clear example is the case of the use of fixed term contracts in professional football in the EU. Moreover, FIFA regulations prescibe the minimum and maximum duration of a contract. Due to the compulsory implementation of EU directives in national law, fixed term contracts can change into contracts for an indefinite period. In some member states, like England and Germany, a solid legal framework has not yet been drafted to prevent the possible negative effects of European law on fixed term contracts in professional football. As was mentioned before, the use of fixed term contracts is the only possibility to ensure the circulation of money resulting from the transfer of players. The termination of this system could eventually mean the end of professional football in Europe. In fact, there is only one solution in order to have a legally sound, logical, transparent and efficient regulation of the framework for employment contracts in the European professional football sector. The appropriate
The agreements between both sides of the industry can, in principle, deal with any subject. So, the agreements between both sides of the industry should not only deal with social subjects. The Brentjens ruling by the European Court of Justice is relevant in this regard. According to this ruling, in principle, provisions that restrict economic competition between member states, when they were laid down on the basis of collective negotiations. Although a certain amount of restriction of competition is not unusual in collective agreements between employers’ organisations and trade unions, the possibility of reaching the objectives of social policies that is the case in such agreements, has been seriously hampered, as article 81 of the EC Treaty should always be taken into account.

The European Commission considers the Social Dialogue the most important effort to avoid legal conflicts, to create stability and clearness in the regulation of contracts of employment between players and clubs at the European level. Additionally, the Social Dialogue can improve the management for the purpose of future negotiations, effective industrial relations and, in particular, by creating common ground amongst management for the purpose of future negotiations with labour. The creation of a social partner organisation, which meets the criteria set up by the European Commission, is envisaged as a result of the project.

In separate meetings with representatives of the management of national football clubs, EFFC will start to organise cooperation between clubs at the European level to achieve the above-mentioned objectives.

Objectives of EFFC

The general objective of EFFC is to look after the interests of professional football organisations in the European Union. EFFC tries to achieve this objective, inter alia, by:

• Looking after general and particular interests in the fields of socio-economics and labour law;
• Supplying information about developments that are important to the collective and individual position of the members;
• Promoting co-operation and undertaking intermediary activities between the members and other entities;
• Concluding collective labour agreements;
• Using all other lawful and permitted means that may be conducive to achieving the objective.

In 2003/2004, EFFC will undertake the project ‘Promoting the social dialogue in European professional football’, which is supported by the European Commission. The project will consist of the organisation of a series of regional seminars throughout Europe. It is expected that the project will be helpful to pave the way for starting the Social Dialogue in the European football industry by creating awareness amongst organisations concerned of the purposes of the Social Dialogue offers for establishing effective industrial relations and, in particular, by creating common ground amongst management for the purpose of future negotiations with labour.

What is EFFC?

EFFC has been created in order to promote the idea of the Social Dialogue as a platform for the regulation of employment law issues in the European professional football. After the one-year project (see below), EFFC will communicate to the European Commission, and to the ‘football world’ at large, what the status of industrial relations in the sector is and, additionally, whether the introduction of the Social Dialogue is feasible considering relations in the sector.

EFFC can, at this moment, be characterised as an academic research instrument having the required structure to possibly operate as a social partner organisation in the future.

EFFC intends to inform about and thereby promote the concept of the Social Dialogue and of collective bargaining at the sectoral level of the professional football industry in Europe; at the level of the individual member states; as well as at a European level. Its aim is to contribute to facilitating the start of consultations of management and labour at Community level and, in pursuance thereof, the establishment of relevant contractual relations. In this context, EFFC also intends to help to improve knowledge on industrial relations by the exchange of information and experience on a European basis, in particular, regarding employment contracts and collective bargaining agreements.

EFFC is a non-profit organisation. Its head office is in The Hague. Members of EFFC may only be organisations working in the European Union, having legal personality and which were admitted as members to the official national football association (individual professional football clubs). Moreover, organisations working in the European Union that are authorised to represent individual clubs in the fields of socio-economics and labour law (for example, FBO), can also become members of EFFC.

Criteria for participation in the European Social Dialogue

In general, it can be stated that the level of representation of social partner organisations must be in accordance with the nature and scope of the subject. In a Notice from 1993 the Commission has set out in detail what is expected from a European social partner organisation. In this Notice, the Commission described three criteria that are to be met in order to have adequate representativeness:

• The organisations must be representative at branch-coordinating, branch and professional levels and be organised at the European level;
• They must consist of organisations that are themselves an integral part of the core of industrial relations in those member states;
• They must have adequate structures so that they can effectively take part in the consultation process.

So far, we have seen that the branch-coordinating employers’ organisations are UNICE and CEEP. These organisations have been involved in the process that eventually led to the present articles in the EC Treaty with regard to the Social Dialogue.

Apart from that, sector organisations have been active for a long time already at the Community level. On the basis of its Notice concerning the development of the social dialogue at the Community level, the Commission has taken the initiative to strengthen the sectoral dialogue. By now, the Commission has over 25 committees in different industrial sectors to support the Social Dialogue. These include civil aviation; sea transport; railways; telecommunication; trade; and electricity.

Now it is necessary to point out which organisations play a key role in the professional football sector in Europe.
FIFA
FIFA is an association under Swiss law and is based in Zurich. At a global level, FIFA unites the national football associations and their members, which it has recognised as the organisations controlling football. Only one association is allowed per country. Within FIFA, there are several confederations and they each represent a continent of the world. The registered aim of FIFA is to promote football with all means at its disposal, to encourage friendly relations between national associations and the confederations, as well as the clubs and players, by promoting the organisation of football matches at club and national team level. FIFA is involved with all types of football. It implements measures to prevent the violation of its articles of association and regulations. FIFA provides the basic rules, in the form of regulations, in order to solve any possible conflicts, which may arise within or between national associations.

In short: FIFA is mainly concerned with the organisation of the game.

UEFA
UEFA is one of the regional confederations of FIFA. The members of UEFA are the football associations in Europe. UEFA now has a total of 54 member countries. UEFA is based in Nyon, Switzerland. The statutory purpose of UEFA is to deal with questions relating to European football; to promote football in Europe in a spirit of peace; to promote unity amongst member associations in matters relating to European and world football; and to organise and conduct international football competitions and international tournaments at the European level.

For several reasons, UEFA is not in a position to represent the clubs participating in the highest divisions of professional football. In the first place, UEFA is an organisation of associations. It is an association itself. The associations at the national level deal with the regulation of football at large in a particular country. The clubs are the members of the national association. Professional football players also have to become members of the national association in order to be able to perform their employment contracts. This means that the players and the clubs are both linked with UEFA. However, it is impossible for an organisation to represent both employers and employees in the Social Dialogue, since it would result in a conflict of interests. The second reason is that UEFA is above the clubs (and players) in the pyramidal structure of European football.

Association of Leagues
The Association of European Union Premier Professional Football Leagues was founded in 1988. Professional football leagues, consisting of the clubs participating in the highest divisions of professional football, have become members of the Association. The (found) members of the Association are the following clubs: Austria: Austria Vienna; Belgium: Anderlecht; Vienna, Manchester United; AC Milan; Olympique de Marseille; Paris Saint-Germain; FC Porto; PSV; Real Madrid CF. The registered aim of the Association is to promote unity amongst the leagues. The Association of Leagues has a pan-European structure. For several reasons, UEFA is not in a position to represent the clubs participating in the highest divisions of professional football. In the first place, UEFA is an organisation of associations. It is an association itself. The associations at the national level deal with the regulation of football at large in a particular country. The clubs are the members of the national association. Professional football players also have to become members of the national association in order to be able to perform their employment contracts. This means that the players and the clubs are both linked with UEFA. However, it is impossible for an organisation to represent both employers and employees in the Social Dialogue, since it would result in a conflict of interests. The second reason is that UEFA is above the clubs (and players) in the pyramidal structure of European football.

One of the topics recently discussed also was the introduction of a social package. The clubs want to exchange know-how; to fine-tune their policies; and, in particular, to make their voice heard in the leading institutions of European professional football. First priority was given to the commercialisation of media rights by clubs at the European level. The G-14 leagues have expressed views about the distribution of income from UEFA competitions. Additionally, the G-14 wishes to implement measures to regulate the budgets and financial stability of the member clubs. One of the topics recently discussed also was the introduction of a social package. The clubs want to exchange know-how; to fine-tune their policies; and, in particular, to make their voice heard in the leading institutions of European professional football. First priority was given to the commercialisation of media rights by clubs at the European level. The G-14 leagues have expressed views about the distribution of income from UEFA competitions. Additionally, the G-14 wishes to implement measures to regulate the budgets and financial stability of the member clubs. One of the topics recently discussed also was the introduction of a social package. The clubs want to exchange know-how; to fine-tune their policies; and, in particular, to make their voice heard in the leading institutions of European professional football. First priority was given to the commercialisation of media rights by clubs at the European level. The G-14 leagues have expressed views about the distribution of income from UEFA competitions. Additionally, the G-14 wishes to implement measures to regulate the budgets and financial stability of the member clubs.
Enter a whole new arena of law study.

Enter the rough and tumble of today’s sports world. At 3% of world trade, it’s truly big business. A Graduate Certificate or Masters in Sports Law will give you the skills to become a key player in this exciting field. Sharpen your skills to negotiate player and sponsorship contracts and tackle the big issues like litigation, drug abuse, discrimination and club mismanagement. You’ll gain unique qualifications from the only degree program of its kind linked to the prestigious TMC Asser Institute in The Hague. For more details contact Andy Gibson on +61 7 5552 8750 or email a.gibson@mailbox.gu.edu.au
What is Sports Law?

Sport is now big business. It has developed into a global industry and it is estimated that it represents more than 5% of world trade. For the sport industry, as for society in general, legal regulation and litigation are a reality of modern life. The law has expertise and values that can contribute to the running and organisation of modern sport.

Recent years have seen the emergence of a recognisable and distinct set of principles and doctrine concerning the legal regulation of the sports world such that it can now be designated as a distinct legal area.

Graduate Certificate and Masters of International Sports Law (LLM/MA ISL)

The Certificate and Masters programs have been designed to satisfy practitioner and graduate demand for further education to meet the reality that in the globalised world of sport, an international and comparative understanding of legal issues in sport is vital.

The program provides a qualification for lawyers and sports administrators and managers in both the amateur and professional sports industry, wherever they may be employed. The program offers two streams, one for law graduates and one for non-law graduates. It also offers candidates a choice of exit points. Candidates are able to leave the program after completing four core courses with a Graduate Certificate or after completing eight courses and obtaining a Masters (or twelve courses and a Masters with Honours).

Candidates may be seeking to formalize their experience into a recognised post-graduate degree or credential, or may simply wish to advance their personal knowledge, skills and abilities. It will similarly provide a sound foundation for those graduates with related bachelor degrees who see this on-going study as an opportunity to further their career aspirations.

The programme will prepare you:

• with both a theoretical and practical understanding of sports law issues as they apply to the sports industry, both nationally and internationally;
• to address the issues of ethics and ethical behaviour for those working and competing within amateur and professional sports;
• to appreciate the role of law within the socio-economic and cultural context of sport;
• to understand and apply law to the amateur and professional sports industry within a global setting;
• with skills and knowledge that will aid career progression in the sports industry;
• to attain a sound postgraduate education that form the basis for further higher degree studies, for example, a Doctor of Philosophy (PhD) if desired

* Conditional upon achieving PhD entry standards

Designed for You

We understand that candidates are busy and already face the challenging demands of a career and ‘having a life’ outside the office. For that reason, the Certificate and Masters are offered in flexible delivery mode with a one week intensive teaching mode offered in each semester to fit in with a busy professional’s schedule. Intensives will be offered both in Australia at the Gold Coast campus of Griffith University and in Europe at the TMC Asser Institute at the Hague. Other venues may also be used if student demand warrants it.

Course offerings will be delivered through print, CD-ROM, and Internet based materials throughout the semester, making it easy for home-based study by candidates anywhere around the world.

Teaching in each one week intensive will be by internationally recognised experts in the sports law field and supported by guest lectures from the sports industry. Teaching will be undertaken through a focused combination of lectures, seminars, workshops, case studies, and reflective analysis of professional experiences and project work.

Program Structure

The Master of International Sports Law is awarded after the successful completion of eight courses. Students may elect to graduate with a Graduate Certificate of International Sports Law after the completion of four courses, or alternatively, a Master of International Sports Law with Honours through the successful completion of the core courses plus study in advanced research methods and the completion of a research thesis.

DOCTOR OF PHILOSOPHY (PhD)*

Master of Laws with Honours in International Sports Law
Master of Arts with Honours in International Sports Law
(12 courses including 30CP of Research Thesis)

Master of Laws in International Sports Law
Master of Arts in International Sports Law
(8 courses)

Graduate Certificate in International Sports Law
(4 courses)

* Conditional upon achieving PhD entry standards.

Optional Electives

Elective courses in areas of sport management provide students with an opportunity to broaden their understanding of sport issues from a management perspective, thus making the program distinctive. The program actively encourages students to develop skills and become flexible problem solvers, and to see legal issues not only from the point of view of a lawyer but also from a non-lawyer. Elective courses currently available include:

• Financial Management in Sport
• Strategic Management in Sport Organisations
• Sport Media
• Sport Event Management
• Honours Research Methods
• Organisational Behaviour in Leisure Service Organisations

Students should check availability of additional elective courses each semester.
Griffith Law School and the TMC Asser Institute

Established in 1965, the TMC Asser Institute is one of the world’s leading research institutes in private and public international law. The Institute is an international research hub for academics, practitioners, and policy makers in the field of international law. It is located in The Hague, Netherlands, and is closely affiliated with the University of Leiden.

The TMC Asser Institute offers a range of programs and activities, including research projects, conferences, and workshops. It is recognized as a top-tier research institution in the field of international law and is home to a diverse community of scholars and practitioners.

Applications for admission to the Master of International Sports Law are invited from candidates who have successfully completed a law degree or an equivalent degree in a relevant field. Applicants must demonstrate a strong academic record and relevant work experience in the field of international sports law.

The Master of International Sports Law is a full-time, one-year program offered by Griffith University in collaboration with the TMC Asser Institute. The program is designed to provide students with a comprehensive understanding of the legal frameworks governing international sports, including the law governing professional sports leagues, international competitions, and the regulation of sports organizations.

The program is taught in English and offers a unique opportunity for students to study international law in a dynamic and diverse academic environment. Students will have the opportunity to interact with leading scholars and practitioners in the field, as well as with students from around the world.

Griffith Law School

Griffith Law School is one of the leading law schools in Australia, offering a range of undergraduate and postgraduate programs. The School is well positioned to equip graduates with the skills and knowledge they need to meet the global challenges that the 21st century will bring.

The School has a strong reputation for its innovative teaching and research, and has forged significant industry and academic partnerships around the globe. Griffith Law School is well positioned to provide students with a high-quality education and a strong career preparation.

For additional information, please visit the School’s website: www.gu.edu.au/centre/guic/Students/home.htm

How to Apply

International applicants should apply through the:

International Centre
Griffith University
Gold Coast Campus
PMB 50 Gold Coast Mail Centre
Queensland, AUSTRALIA, 9726
Tel: 61 7 5552 8819
Fax: 61 7 5552 8978
Email: guic@mailbox.gu.edu.au
Internet: www.gu.edu.au/centre/guic/Students/home.htm
Is it really that hard to find a good adviser?

You run your business as well as possible and naturally only want the best advisers. Specialists who listen to you, who share your views and are genuinely interested in everything that matters to you. Fortunately, they are very easy to find. All you have to do is call us for an appointment. Or visit us at www.ey.nl
For high-quality translations you need a reliable partner: Wilkens c.s.

- One of the foremost translation companies in the Netherlands, employing more than 40 in-house translators/editors and experienced project managers.

- Offices in the Netherlands and Belgium.

- Years of experience in both general and specialist translation. Subjects include (sports) law, finance and economics, medicine and pharmaceutics.

- Provider of translation and interpreting services in Western and Eastern European languages (as well as Japanese and Chinese).

- Assignments for the European Commission, the European Parliament and the Translation Centre for the Bodies of the European Union.

- Extensive and efficient use of modern translation tools and terminology software.

- Client-oriented terms and conditions plus professional liability insurance.

*Member of OVIN (Organisation of Translation Companies in the Netherlands)