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World Anti-Doping Code

Kolpak Case

Terror and Politics in Sport

Sports Torts and Negligence

Powers of USOC

Dual Nature of Football Clubs

Social Dialogue in European Football

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EDITORIAL

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 B3-4000 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

by **Janwillem Soek***

1. Introduction

The World Conference on Doping in Sport, which took place in Lausanne from 2 to 4 February 1999, led to the adoption of the Lausanne Declaration by representatives of governments, intergovernmental organizations and the international sports organizations, the IOC among them. The establishment of the World Anti-Doping Agency (WADA) was a direct result of this Conference. The WADA was established on 10 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. It may therefore be considered the first 'joint venture' between sports and public authorities. Initially the WADA had its headquarters in Lausanne, but on 21 August 2001 the Foundation Board put the permanent seat to the vote, the result of which was that the WADA seat would be transferred to Montreal.[1] The IOC committed itself to financing the WADA until the end of 2001 and as of January 2002 the sport movement and the public authorities would jointly take over the funding. 'The mission of the Agency shall be to promote and coordinate at international level the fight against doping in sport in all its forms; to this end, the Agency will cooperate with intergovernmental organisations, governments, public authorities and other public and private bodies fighting against doping in sport, inter alia, the International Olympic Committee (IOC), International Sports Federations (IF), National Olympic Committees (NOC) and the athletes', according to the Draft Mission Statement.[2] The Wada is also assigned '[...] to promote harmonised rules, disciplinary procedures, sanctions and other means of combating doping in sport, and contribute to the unification thereof taking into account the rights of athletes'.[3] After the establishment of the WADA, the International Intergovernmental Consultative Group on Anti-Doping in Sport (IICGADS) was created '[...] to coordinate the efforts of the public authorities in the WADA.'[4] The role which national and regional authorities were supposed to play in the WADA was subsequently clarified during various meetings of the IICGADS. One of the most important tasks of the WADA was to come up with universally applicable anti-doping regulations, whose drafting was entrusted to a Code Project Team. '[...] there had been several stages within an eighteen-month period; the consultation process had involved all categories of stakeholders in addition to independent experts for certain key areas; the comments and suggestions received had been addressed and incorporated into each new version of the document.'[5] An outline of the framework of the World Anti-Doping Code (WADC) was started immediately after the meetings of the Executive Committee and the Foundation Board between September and November 2001. This process involved athletes, the IICGADS, the Council of Europe, various governments, various national anti-doping organizations (NADOs), several IFs, the GAISF, the CAS and all the members of the various WADA working committees. The foundations for the Code were laid between December 2001 and April 2002 and were the product of consultations. Approximately 130 individuals and organizations submitted comments. During this stage, about 30 experts in the field of doping were involved as content producers. Meetings were held with athletes, IFs, the European Commission, the Council of Europe, governments, NOCs and NADOs. The WADA participated in the Harmonisation Conference in the Netherlands and in the IICGADS meeting in Kuala Lumpur in 2002. After the first version of the Code had been completed, it was circulated between May and September 2002. Meetings followed involving athletes, the IOC Athletes' Commission, the European Olympic Committees Athletes' Commission, the IOC, the majority of IFs, the GAISF, the ASOIF, the ARISF, the AIOWF, several governments, the Council of Europe, the IICGADS, the European Union Presidency, a number of NOCs and various NADOs. 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 90 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 sport.'[6] Taking part in the Conference were representatives of the IOC and of 80 governments, 60 NOCs, 70 IFs, 30 NADOs and 20 athletes, all in all around 1000 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'.[7] 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.'[8] 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 refused 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'.[9]

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.

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1 http://www.wada-ama.org/asiakas/003/wada_english.nsf/.
2 Available on the WADA website.
3 Draft Mission Statement, 4.6.
4 Balfour, ibidem.
5 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 12.
6 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 13.
7 World Conference on Doping in Sport Resolution, adopted by the World Conference on Doping in Sport, Copenhagen, Denmark, 5 March 2003, sub 1.
8 World Conference on Doping in Sport Resolution, adopted by the World Conference on Doping in Sport, Copenhagen, Denmark, 5 March 2003, sub 2.
9 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 1.

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.[10] The current list, which has been in force as of 1 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 2.1 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 attached 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[11] 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[12]
The following constitute anti-doping rule violations:

2.1 The presence of a prohibited substance or its metabolites or markers in an athlete's bodily Specimen
- 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. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.
- 2.1.2 Excepting those substances for which a quantitative reporting threshold is specifically identified in the prohibited list, the detected 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.
- 2.1.3 As an exception to the general rule of Article 2.1, the prohibited list may establish special criteria for the evaluation of prohibited substances that can also be produced endogenously.

2.2 Use or attempted use of a prohibited substance or a prohibited Method.
- 2.2.1 The success or failure of the use of a prohibited substance or prohibited 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.

2.3 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.

2.4 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.

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

2.6 Possession of prohibited substances and methods:
- 2.6.1 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.
- 2.6.2 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.

2.7 Trafficking in any prohibited substance or prohibited method.

2.8 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.'[13] 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-

10 Art. 4 WADC.

11 The possession of doping substances by persons in the athlete's entourage is very far removed from an actual act of doping by the athlete.

12 The comment to Art. 1.2 - Anti-doping rule violations, of the second draft of the WADC in part reads as follows: 'The purpose of this Article is to specify the circumstances and conduct which constitute violations of anti-doping rules. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated. Most of the circumstances and conduct on this list of violations can be found in some form in the OMADC or other existing anti-doping rules'. It is entirely right that this comment should not have returned in the final version of the WADC.

13 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 14.

competition testing programme that it had to be brought inside the scope of the term doping.[14] Also new as compared to the previous anti-doping regulations is that the possession of doping substances and methods has been made a violation of the anti-doping rules. It is important to note that Articles 2(6)(1) and 2(6)(2) only penalize possession when the doping substances where 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 prohibited substances in the sample that was taken from him/her, 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, JS] 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 be given the opportunity to defend him/herself against the charges (*Anscheinsbeweis*). 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 2 the drafters are of the opinion that 'in the same manner, athletes and 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.' 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 diatribes concerning human rights on the pitch, but we will find them before the disciplinary court which has to try a doping offence. The sporting world prefers to consider the offence of doping a sporting offence 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 *Frankfurter Algemeine Zeitung* reads: 'Wenn man mehr Flexibilität schaffen würde, wäre das kein Angriff auf den Antidoping-Kampf', sagte der schweizerische Jurist Denis Oswald, der Präsident des Internationalen Ruder-Verbandes und Vorsitzende der Gemeinschaft aller olympischen Sommersportverbände. Auch sein Schweizer Landsmann Jiri Dvorak, Mitglied der Sportmedizinischen Kommission der FIFA, beruft sich auf 'gute Erfahrungen in der Einzelfall-Beurteilung'. Sie ist schließlich kein sportliches Entgegenkommen, sondern sogar ein elementares Grundrecht'.[15] The harsh position taken in the WADC is somewhat mitigated by an escape clause: if the athlete can demonstrate exceptional circumstances, he/she may thereby force the authorities to consider the culpability of his/her act. The exceptional circumstances clause will be discussed below.

3. Out-of-competition testing[16]

Richard Young's team had asked several athletes their opinion concerning out-of-competition testing. 'With regard to out-of-competition testing, most of the athletes to whom he had talked thought that out-of-competition testing was a pain, but were strongly in favour of it as they believed that it was absolutely necessary to have a level playing field. The athletes were not, however, supportive of uncoordinated and disorganised out-of-competition testing. The Code tried to coordinate the process. Disagreements and power struggles between IFs and national bodies arose at times, due to a lack of transparency or a lack of confidence in the other party. The Code required transparency and stipulated that all parties work together, cooperate, collaborate and coordinate, because the fight against doping was big enough to provide enough work for everybody.'[17] 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 nevertheless believe that the fight against doping is a battle which the sporting world and national governments have to fight 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 tests.[18]

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. However, there are also substances on this list for which athletes are not tested 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 anabolics.[19] '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 2(2)(1) of the WADC.[20]

Athletes have to keep themselves available for out-of-competition testing. If an athlete fails to do this and does not inform 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-com-

14 The comment to Art. 2.4 reads in part: 'This Article, which is not typically found in most existing anti-doping rules, requires athletes that have been identified for out-of-competition testing to be responsible for providing and updating information on their whereabouts so that they can be located for no advance notice out-of-competition testing. The 'applicable requirements' are set by the athlete's International Federation and National Anti-Doping Organization in order to allow some flexibility based upon varying circumstances encountered in different sports and countries. A violation of this Article may be based on either intentional or negligent conduct by the Athlete.'

15 Frankfurter Allgemeine Zeitung, 5 March 2003.

16 In Appendix 1 - Definitions – 'out-of-competition' is understood as referring to 'Any doping control which is not in-competition'.

17 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 17. See also the comment to Art. 15 WADC: 'Rather than limiting the responsibilities of one group in favour of the exclusive competency of the other, the Code manages potential problems associated with overlapping responsibilities, first by creating a much higher level of overall harmonisation and second, by establishing rules of precedence and cooperation in specific areas.'

18 Art. 22.1 WADC.

19 Art. 4.2 WADC. In the comment to this Article it is also mentioned that the distinction '[...] between what is tested for in-competition and what is tested for out-of-competition is carried over from the OMADC'. Under Art. 2.6.2 WADC '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 [...]' is prohibited. It is not entirely clear from this provision whether 'possession of a substance' refers to persons from the athlete's entourage or to the athlete him/herself.

20 'Prohibited stimulants, for example, are not tested for out-of-competition because they have no performance enhancing benefit unless they are in the athlete's system while the athlete is actually competing. So long as the prohibited stimulant has cleared the athlete's system at the time the athlete competes, it makes no difference whether that stimulant could have been found in the athlete's urine the day before or the day after the competition', as Appendix 1 -Definitions - explains.

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.' 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 WADA. The WADA then makes the information accessible to other 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[21] The NADOs who administer the tests must first consult with their fellow organizations. Every NADO has to establish a 'Registered Testing Pool' for the country for which it is competent,[22] 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.[23] 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 individual athlete which the organizations would have had to guarantee in unannounced tests.

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.[24] 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/she 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 Signatory[25] 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 10.7 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 a provisional suspension has been imposed and it has meanwhile become apparent that the result of the analysis of the B sample does not confirm that of the A sample, the athlete shall not be subject to any further action. The drafters of 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 7.5 they have inserted a provision 'just in case'. 'In circumstances 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 competition, it is still possible for the athlete or team to be reinserted, the athlete or team may continue to take part in the competition.' It is hard to imagine a situation 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 satisfaction 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 athlete's individual results obtained in that event with all consequences, including forfeiture of all medals, points and prizes'.[26] 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 connection 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 accorded the status of 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 disqualified 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.' Strangely enough, it seems that an exception is made here to the strict liability rule.

6.2. Disciplinary sanctions for individuals

The WADC includes sanctions directed against individual athletes (Article 10), against teams (Article 11) and against sports organisations (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' exclusion for a first offence[27] and life-long exclusion for a second offence.[28],

21 Art. 14.3 WADC. Art. 14.5 WADC once more reiterates that: 'Private information regarding an athlete shall be maintained by WADA in strict confidence'.

22 I.e. 'The pool of top level athletes established separately by each International Federation and National Anti-Doping Organization who are subject to both in-competition and out-of-competition testing as part of that International Federation's or Organization's test distribution plan.' Appendix 1 - Definitions - of the WADC.

23 Art. 5.1.1 WADC.

24 Art. 7 WADC.

25 Signatories: 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 1 - Definitions - WADC.

26 Art. 9 WADC - Automatic disqualification of individual results and Art. 10.1 WADC - Disqualification of results in event during which an Anti-Doping rule violation occurs.

27 *Die Welt* of 3 March 2003 ('Die Radprofis stehen isoliert da' (2)) contained an interview with WADA president Richard Pound. To *Die Welt*'s question: 'Können Sie den Verbänden zusichern, dass Zwei-Jahres-Sperren juristisch so abgesichert sind, dass ihnen anschließend keine riesigen Schadensersatzforderungen von gesperrten Athleten drohen?' Pound replied: 'Renommierte Sport- und Menschenrechtsexperten haben uns die Unbedenklichkeit der Vorschriften in Gutachten bescheinigt.'

28 Art. 10.2 WADC.

29 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 10.2 expresses the fear that: 'flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting bodies to be more lenient with dopers'. The same comment persistently maintains that the two-year ban is upheld with a view to harmonisation. It would be truer to speak of uniformity, which may actually impede harmonisation. Imposing a two-year ban has different results depending on whether you are a short distance runner or an archer. Harmonisation can only be achieved when the sanction is related to the period of the athlete's life in which he/she is able to practise his/her sport professionally. 'A primary argument in favour of harmonisation is that it is simply not right that two athletes from the same country who test positive for the same prohibited substance under similar circumstances should receive different sanctions only because they participate in different sports'. Besides the fact that it makes no difference whether the athletes are from the same country, this argument could easily serve to defend differentiated sanctioning, related to each particular sport. The comment to Article 2.9.1.3. in the second version of the WADC, which is now Article 10.2, rightly did not make it to the third version. This comment defended the instrument of the two-year or life-long ban. It claimed that 'these disqualification periods are not unduly harsh when compared to the discipline that is applied to other types of professional misconduct. A lawyer who misuses his client's funds, a psychiatrist who has sex with a patient, and an airline pilot who arrives drunk for a flight will, in most countries, be permanently banned from their professions. An athlete who dopes commits a comparable breach of trust in his profession or vocation'.

During the Conference another heated discussion took place concerning the question whether the periods of exclusion (two years and life) were in conformity with human rights, principles of national justice, general principles of law and fundamental fairness. Richard Young, Team Leader of the WADA Code Project Team,[30] remarked that independent experts had been consulted concerning this question. 'Two Geneva law professors, experts in international law and human rights, had been hired, and they had agreed that two years and a lifetime were acceptable and consistent with human rights and natural justice, as long as there were clauses in the rules which said that, if the athlete had absolutely no fault, he or she could not be punished with a suspension or period of ineligibility. They had added that something would need to be built into the rules to deal with the concept of proportionality, so that if the athlete was just slightly at fault, the ineligibility period would have to be less than two years. With regard to the concept of exceptional circumstances, this was a crack in the two-year door.'

Article 10.4.2 provides that violations of the anti-doping rules referred to in Articles 2.7 and 2.8, i.e. including a possible failed attempt to administer doping to an athlete, will be punished by a minimum of four years to a maximum of life-long exclusion. The same article further provides that violations of an anti-doping rule involving a minor will be considered to be exceptionally severe offences. If a member of the athlete support personnel is involved in the offence, he/she will be banned for life.

6.3. Disciplinary sanctions for teams

What did 'team sport' have to be defined as? In Appendix 1 - Definition - WADC team sport is defined as 'a sport in which the substitution of players is permitted during a competition'. If several members of a team are suspected of a possible doping offence in the framework of a series of games (or event),[31] the entire team will be subject to target testin[32] throughout the event. If multiple players on a team are found to test positive during an event, the entire team may be disqualified and be made subject to disciplinary proceedings. This means that when only one team member is suspected or tests positive, this has no ramifications for the team as a whole. This indicates a departure from the idea of fairness with respect to the team's opponents.[33] In his presentation at the last World Conference on Doping Richard Young put the following question to his audience: '[...] what would happen to a team in the event of one of its athletes testing positive, there was some clarification as to what was considered a team sport' whereupon he cited the definition given above. 'In tennis doubles or team gymnastics, therefore, how disqualification worked was left to the rules of the individual IFs'. In such cases, it cannot be concluded from the text of the WADC what the fate will be of one team member who is suspected or has tested positive, nor what the fate of his/her team as a whole will be.

6.4. Remission of sentence

6.4.1. Exceptional circumstances

The OMADC already provided a rule for exceptional circumstances. After Article 3(1)(b) penalised the doping offence by a sanction of two years at least, it was further provided that '[...] based on specific, exceptional circumstances to be evaluated in the first instance by the competent IF bodies, there may be a provision for a possible modification of the two-year sanction'. During the World Conference on Doping the FIFA and UCI chairmen did not attend because their federations could not reconcile themselves with the fixed two-year sanction for the first doping offence.[34] The situation was all the more curious as the first version of the WADC already contained an exceptional circumstances clause which allowed for the flexible application of the prescribed fixed sanction of two years. This clause read as follows:

> 8.8.3.2 Exceptional circumstances.
> The minimum periods of disqualification provided above may be lessened 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.

This clause was couched in broader terms than its counterpart in 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.

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29 Pursuant to Art. 10.3 the sanctions for testing positive for certain 'specified substances' are: First violation: at a minimum, a warning and reprimand and no period of ineligibility from future events, and at a maximum, one (1) year's ineligibility. Second violation: two (2) years ineligibility. Third violation: lifetime ineligibility. A violation of the whereabouts rule is at a minimum 3 months and at a maximum 2 years (Art. 10.4.3) and a trafficking or administration violation is at a minimum four years up to lifetime ineligibility (Art. 10.4.2).

30 World Conference on Doping in Sport, plenary sessions, 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 1, 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 1 - Definitions - WADC.

33 '[...] it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently', according to the CAS in Quigley v. UIT. Cited by the drafters of the WADC in the comment to Art. 2.1.1.

34 'Unter den rund 1000 Delegierten und Beobachtern aus 100 Ländern fehlten ausgerechnet die beiden Weltverbandspräsidenten Sepp Blatter (Fußball) und Hein Verbrüggen (Radsport), die zu den schärfsten Kritikern des Codes zählen. Ihre Abwesenheit wurde von vielen Teilnehmern als Brüskierung angesehen. Sowohl die Fußballspieler als auch die Radsportler wenden sich gegen die vorgesehene Mindeststrafe von zwei Jahren auch für Doping-Ersttäter'. Frankfurter Allgemeine Zeitung, 4 March 2003, no. 53, p. 31.

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.

> 1.9.2.3.3 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 approach is consistent with basic principles of human rights and 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.'[35] 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.

> 10.5 Elimination or reduction of period of ineligibility based on exceptional circumstances.
> 10.5.1 No fault or negligence
> Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 [...] or 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.[36]

A rule which has been laid down in the final version of the WADC and which was not found in earlier versions is Article 10.5.2. 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 2.3 and 2.8.

> 10.5.2 No significant fault or negligence
> This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 [...], Article 2.2, [...] Article 2.3, 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'.[37]

One could argue that it is hardly proportional that the penalty for a second violation is 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, therefore limiting the fairness 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'.[38] 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 each apply clauses of their own.[39] 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.[40]

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'.[41] 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 2.1.1) and

35 Comment to Art. 10.5.2 WADC (final version).

36 The comment to Art. 10.5.1 states that this provision '[...] applies only to violations under Articles 2.1 and 2.2 [...] because fault or negligence is already required to establish an anti-doping rule violation under other anti-doping rules'. This is some cause for confusion as under the strict-liability-doctrine in the WADC any discussion of culpability is ruled out where the violation of an anti-doping rule is concerned. Such discussion can only take place in the framework of determining punishment. Given the comment to Art. 10.5.2 the Code Project Team was quite aware of this: 'These Articles [10.5.1 en 10.5.2] apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred'.

37 In the WADC's final version the condition under Art. 10.5.1 is supplemented as follows: 'In the event this Article is applied and the period of ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.'

38 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 32.

39 '[...] 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 nandrolone cases, ten of which had imposed a four-year sanction, and four of which had applied the exceptional circumstances rule to some extent, but only one of those had applied the penalty of less than two years (in this case, one year). FINA had a tight exceptional circumstances rule. The UCI had a very different exceptional circumstances rule, which was much broader, and allowed for consideration of the impact on the athlete, and the impact on his or her standing in the community. The UCI had had four cases since January 2001, when the two-year rule had been adopted. In one of these cases, the athlete had been sanctioned for 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.

40 Richard Young, World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 14.

have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the athlete's personal physician or trainer without disclosure to the athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the athlete's food or drink by a spouse, coach or other person 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). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on no significant fault or negligence. (For example, reduction may well be appropriate in illustration (a) if the athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to prohibited substances and the athlete exercised care in not taking other nutritional supplements.)

Article 10.5.2 applies only to the identified anti-doping rule violations because these violations may be based on conduct that is not intentional or purposeful. Violations under Article 2.4 (whereabouts information and missed tests) are not included, even though intentional conduct is not required to establish these violations, because the sanction for violations of Article 2.4 (from three months to two years) already builds in sufficient discretion to allow consideration of the athlete's degree of fault.'

Despite this explanation, a very real chance remains that the disciplinary bodies of the different IFs will each use their own interpretation of exceptional circumstances. If this interpretation conflicts with the WADA's point of view, the WADA does not need to stand idly by. Under Article 13.2.1 the final decision of an IF disciplinary tribunal may be appealed exclusively (without recourse to the courts) to the Court of Arbitration for Sport (CAS) when a case is involved arising from competition in an international event or in cases involving international-level athletes. Article 13.2.3 lists the 'Persons entitled to appeal'. Under (e) the WADA is included in this circle. In the future, CAS case law will further define the term 'exceptional circumstances'. Given Articles 21.1 and 21.1.3. it will not be easy to demonstrate exceptional circumstances. These Articles provide among other things that the 'roles and responsibilities of athletes [are] to be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code [and] to take responsibility, in the context of anti-doping, for what they ingest and use'.

6.4.2. Cooperating in the investigation

If an athlete has substantially assisted an anti-doping organization in the detection or establishment of violations of the anti-doping rules by athlete support personnel this organization may decide to reduce the ineligibility period of the athlete concerned. When the penalty was imposed for a first violation the reduction may be by as much as half the minimum period of exclusion. If the athlete was banned for life, his/her penalty may only be reduced by a maximum of eight years.

6.5. Reinstatement

Various IFs have by now introduced a review procedure which offers athletes who have been banned as a result of doping the opportunity to reduce the period of their ineligibility and return to competition early. The WADC does not provide for this type of review procedure. Where the Code mentions reinstatement (Article 10.10) it refers to the athlete's return to competition after the entire period of his/her exclusion.

7. Rights of the defence

Every anti-doping organization[42] which is responsible for results management has to ensure that a hearing takes place concerning every person who is suspected of having violated an anti-doping provision. Such hearings serve to establish whether a doping violation has in fact been committed and if so, what the appropriate penalty is. Hearings in connection with an event may be expedited. Article 8 WADC, which provides these matters, is not intended to take the place of the rules of the signatories, but rather to inform them of certain minimum requirements which a hearing must fulfil. These minimum requirements are:

- a timely hearing;
- fair and impartial hearing body;
- the right to be represented by counsel at the person's own expense;
- the right to be fairly and 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 (subject to the hearing body's discretion to accept testimony by telephone or written submission);
- the person's right to an interpreter at the hearing, with the hearing body to determine the identity, and responsibility for the cost, of the interpreter; and
- a timely, written, reasoned decision.

As in the realm of the law of association the influence of the ECHR and the ICCPR is non-existent, it was recommended at the end of chapter 15 above, that a sports federation (at least in the EU), in order

35 Comment to Art. 10.5.2 WADC (final version).

36 The comment to Art. 10.5.1 states that this provision '[...] applies only to violations under Articles 2.1 and 2.2 [...] because fault or negligence is already required to establish an anti-doping rule violation under other anti-doping rules'. This is some cause for confusion as under the strict-liability-doctrine in the WADC any discussion of culpability is ruled out where the violation of an anti-doping rule is concerned. Such discussion can only take place in the framework of determining punishment. Given the comment to Art. 10.5.2 the Code Project Team was quite aware of this: 'These Articles [10.5.1 en 10.5.2] apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred'.

37 In the WADC's final version the condition under Art. 10.5.1 is supplemented as follows: 'In the event this Article is applied and the period of ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.'

38 World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 32.

39 '[...] 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 nandrolone cases, ten of which had imposed a four-year sanction, and four of which had applied the exceptional circumstances rule to some extent, but only one of those had applied the penalty of less than two years (in this case, one year). FINA had a tight exceptional circumstances rule. The UCI had a very different exceptional circumstances rule, which was much broader, and allowed for consideration of the impact on the athlete, and the impact on his or her standing in the community. The UCI had had four cases since January 2001, when the two-year rule had been adopted. In one of these cases, the athlete had been sanctioned for 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.

40 Richard Young, World Conference on Doping in Sport, plenary sessions, Summary Notes, p. 14.

41 'This has been modified to allow individual sports bodies to reduce the ban in 'exceptional circumstances'. Professor Jiri Dvorak, the head of FIFA's medical committee, said football had no major disagreements 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 bans as well as reduce them - maybe to three or maybe four years." BBC Sport, Tough new sanctions for drug cheats, 5 March 2003.

42 A Signatory that is responsible for adopting rules for initiating, implementing or enforcing any part of the Doping Control process. This includes, for example, the International Olympic Committee, the International Paralympic 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 Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, National Anti-Doping Organizations, and WADA. Appendix 1, Definitions, WADC.

to be and remain recognised as such, should have statutes and household rules in which (at least) the ECHR are subscribed to. This recommendation has been amply followed in Article 8 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 3.1 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 hearing body'. 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* in the Code following the decision of the CAS in *Bernhard v ITU*[43]. Against the standard of proof as now also provided under the WADC the CAS argued that 'the situation in 'quasi-penal' procedures, such as doping in sport, should, on the other hand, be looked at differently, among other reasons also due to the principle *'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.'[44] 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 could rightly be criticized from a law of evidence perspective.[45] 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'.

Article 3.2.1 WADC provides that:

> 'WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for laboratory analysis.

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 instance to show that it conducted the procedures other than in accordance with its customary practices'.

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 departures did not cause the adverse analytical finding or the factual basis for the anti-doping rule violation.'

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 no 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 13.2.1 and 13.2.2 distinguish between appeals involving international-level athletes[46] and those involving national-level athletes.[47] Cases involving international-level athletes arising from competition in an international event or cases involving international-level athletes in general may be appealed exclusively[48] 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.[49] Article 13.2.2, which provides this, also lists the principles of a fair hearing which the deciding body has to apply. Suddenly here rules concerning the rights of the defence once more emerge. The principles referred to are:

- a timely hearing;
- fair, impartial and independent hearing body;
- the right to be represented by counsel at the person's own expense; and
- a timely, written, reasoned decision.

Why do not all the rights of the defence laid down in Article 8 apply to national doping procedures? Why do the right to be fairly and

43 CAS 98/222, 9-8-1999.

44 CAS 98/222, 9-8-1999, grounds 62 and 63.

45 Cf. *supra* (17.2.5.2.

46 Appendix 1 - Definitions - of the WADC defines international-level athletes as: 'Athletes designated by one or more International Federations as being within the Registered Testing Pool for an International Federation'.

47 Contrary to international-level athletes, Appendix 1 of the WADC does not define the term 'national-level athletes'. Art. 13.2.2 leaves the definition of this term to each particular NADO.

48 Does this mean that such cases may not be brought before other international arbitral tribunals besides the CAS or does it mean that such cases may not be brought before a court? The OMADC did not permit recourse to the courts as appeared from Art. 6 of Chapter III. 'Participants shall accept the individual or joint obligation to submit disputes concerning the application of this Code to the Court of Arbitration for Sport. Such acceptance is presumed by the very fact of participation by the Participants in the Olympic Movement. Any de facto refusal of such acceptance shall result in the Participants being considered as having excluded themselves from the Olympic Movement.'

49 The comment to Art. 13.2.2 states 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.' This possibility is not found in the legally relevant text of the WADC.

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 proper'.

Article 13.2.3 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 13.2.1 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. Athlete support personnel

One of the problems faced by the IOC Medical Code (MC) and the OMADC 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'[50] 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 21.2 WADC describes their function and responsibilities:[51]

'21.2.1 To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the Code and which are applicable to them or the athletes whom they support.

21.2.2 To cooperate with the Athlete 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 (Trafficking) or 2.8 (administration of Prohibited Substance or Prohibited Method), the period of 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 [...]'.[52] 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' included in its registered testing pool. ADOs that conduct testing have to consult with other ADOs conducting tests in the same athlete pool. The NADO has to establish a procedure for athletes under its jurisdiction who are not international-level athletes concerning the therapeutic use exemption with respect to substances and methods which would ordinarily speaking be prohibited. The NADO must promptly inform the WADA when it has granted a therapeutic use exemption to a foreign international-level athlete or a national-level athlete included in the registered testing pool of his/her own NADO. The WADA may verify whether the decision was justified.[53] The WADC defines 'registered testing pool' as 'the pool of top level athletes established separately by each

50 Appendix 1 - Definitions -. WADC.

51 Article 18.2 WADC further extends the scope of the functions of athlete support personnel: 'Athlete support personnel should educate and counsel athletes regarding anti-doping policies and rules adopted pursuant to the code'.

52 The comment to the first part of Art. 7, in which the ADOs are given various tasks, only mentions the 'Signatory'. Art. 15.4 concerning the mutual recognition of inter alia therapeutic use exemptions, hearing results or other final adjudications of signatories, considers as signatories the IOC, the IPC, IFs, NOCs, National Paralympic Committees, major event organizations, NADOs and the WADA.

53 Pursuant to Art. 13.3 WADA decisions concerning the therapeutic use exemption can only be appealed to the CAS. The athlete in question or the ADO may lodge the appeal.

International Federation and National Anti-Doping Organization who are subject to both in-competition and out-of-competition testing as part of that International Federation's 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 IF and every NADO have to prepare and carry out 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 13.2 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 3.2.1 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 athletes, but also persons from their entourage. 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 offence; 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 protection of the athletes' privacy in out-of-competition testing. It is not entirely clear whether the athlete is entitled to inspect the complete report of the laboratory's analysis. After the positive analysis of an A sample the athlete may face a provisional suspension. The situation where the analysis of the B sample does not confirm the analysis (with a negative result) of the A sample has not been adequately regulated from an athlete's point of view. The WADC imposes fixed penalties. Such penalties have the disadvantage of not taking account of the severity of the offence. One more possibility to become eligible for a reduced penalty other than due to exceptional circumstances is when the penalized athlete cooperates in exposing other doping offenders. This practice is viewed less positively on the Continent than in the US. The rights of the defence, which were treated rather shabbily in previous doping regulations, and which were criticized because of this, have been done full justice in the WADC, for which the drafters of the Code are to be commended. The possibilities for submitting evidence under the Code have been based on private law. In a penalty system, which is after all what disciplinary law in the field of doping is, it would have been preferable to seek a closer connection with the principles of criminal law. The inclusion in the WADC of, for example, the principle of *in dubio pro reo* would have been a valuable addition. When considered in the light of the MC and the OMADC, the position of the laboratories has become less sacrosanct in the WADC. This development is certainly one to celebrate. The possibilities of appeal have also changed as compared to the OMADC. The possibility to appeal to the CAS has been slightly limited. Nevertheless, it is not expected that there will be less doping cases brought before the CAS. The WADA has reserved the right to appeal to the CAS from any decision of the disciplinary bodies of the sports organizations and the NADOs with which it disagrees. Especially as regards the doctrine of 'exceptional circumstances' it is expected that the CAS will be delivering a great many decisions.

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 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 their national 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 to foreign clubs 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'Etat*. 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 abolishment 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 issues under review concerned the existence of nationality clauses in professional sports.

   The Bosman Case cannot be invoked directly by third-country nationals. The judgment in this case was based on Article 39 of the EC Treaty, which contains the principle of free movement of workers, and which is therefore in its scope limited to EU nationals and, by extension, to the nationals of countries belonging to the European Economic Area (EEA).[2]
2. Secondly, the recent sports cases must be considered in the light of 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.[3] 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.[4] Similar Association Agreements have been concluded with many other countries.[5]

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 invoking the non-discrimination provisions included in Association Agreements before the Court of Justice.[6]

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.[7] 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 based on 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 *Bosman*. 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.[8] Malaja's arguments were based on Article 37(1) of the Association Agreement concluded on 16 December 1991 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.

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1 M. Pautot, 'Sportifs, transfers et liberté de circulation', *Gazette du Palais*, Doctrine I, 171.

2 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 25% of total external trade of the European Community. Nowadays, the three EFTA countries of the EEA represent about 5% of the EU's external trade; cf. EEA, Resolution of the Consultative Committee of 26 June 2002 (2003/C 67/04), *O.J.* 20 March 2003, C67/10.

3 Such as Hungary, Poland, Czech Republic, Slovakia, Romania, Bulgaria, Estonia, Latvia, Lithuania and Slovenia.

4 I. Govaere, 'Een juridische schets van de Europa Akkoorden', *SEW* 1997, 42-47; K. Lenaerts and P. Van Nuffel, *Europees recht in hoofdlijnen*, Antwerpen, Maklu, 1999, 828.

5 R. Barents and L.J. Brinkhorst, *Grondlijnen van Europees recht*, Kluwer, Deventer, 1999, 517-522.

6 Cases C-63/99, C-257/99 and C-235/99, *E.C.R.* 2001, I-6369, 6557 and 6427; R.H. van Ooik and H. Staples, 'Het rechtstreeks beroep van Oost-Europese zelfstandigen op de Europa Akkoorden', *Nederlands Tijdschrift voor Europees Recht*, nr. 12, 2001 313-220.

7 S. Dorémus, 'Le sportif étranger à l'Union européenne', *Revue des Affaires Européennes*, 2001-2002, 333.

8 *Cour administrative d'appel de Nancy* 3 February 2000, case no. 99NC00282.

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 Basketball Association, on the basis of which contracts have to be approved by it, could not oppose the proper application of labour law. Since Malaja had both a valid employment contract and a valid residence permit, the Court held that the Basketball Association could not, as a result of the prohibition of discrimination, deny her the opportunity to play as a foreign player and national of a country of the European Economic Area. On these grounds, the contested rules of the Association were set aside.

The Basketball Association in turn decided to appeal this decision before the *Conseil d'Etat*, the highest administrative court in France. However, in a judgment of 30 December 2002, the *Conseil d'Etat* rejected the appeal. In its reasoning, the *Conseil d'Etat* referred to a recent judgment of the European Court of Justice[10] and held that Article 37 of the Association Agreement gave to Polish workers, who were lawfully employed on the territory of a Member State, the right to equal treatment in respect of working conditions in the same way as this right applied to Community citizens under Article 39 of the EC Treaty. This means that any discrimination which is directly or indirectly 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 rule 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. The Kolpak case

The Kolpak Case before the European Court of Justice involved a dispute between the German Handball Federation (*Deutscher Handballbund - 'DHB'*) and Maros 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 EU or from countries of which the citizens do not enjoy complete equality of treatment *vis-à-vis* Community nationals in respect of free movement of workers. Rule 15 provides:

'1 The letter A is to be inserted after the licence number of the licences of players (a) who do not possess the nationality of a State of the European Union (EU State), (b) who do not possess the nationality of a non-member country associated with the EU whose nationals have equal rights as regards freedom of movement under Article 48(1) [now Article 39] of the EC Treaty,
2 In teams in the federal and regional leagues, no more than two players whose licences are marked with the letter A may play in a league or cup match.'

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 Östringen 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, which in accordance with Rule 15 of the *Spielordnung* 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 *DHB's* 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 players by reason of the prohibition of discrimination resulting from the combined provisions of the EC Treaty and the Association Agreement with Slovakia.

The Regional Court allowed Mr Kolpak's claim and ordered the *DHB* 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 *DHB* then appealed to the *Oberlandesgericht* of Hamm. This Court concluded that the facts amounted to an infringement of the prohibition of discrimination under Article 38 of the Association Agreement with Slovakia, which meant that Rule 15 could not apply to Mr Kolpak. It further decided to stay the proceedings and refer a question to the European Court of Justice for a preliminary ruling.

3.2. The question before the European Court of Justice

Mr Kolpak relied on Article 38 of the Europe Agreement between the Community and Slovakia.[11] This Article provides:

> 'Subject to the conditions and modalities applicable in each Member State: treatment accorded to workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals'.[12]

The *Oberlandesgericht* of Hamm asked the European Court whether the first indent of Article 38(1) of the Association Agreement with Slovakia was to be construed as precluding the application to a professional athlete who is a Slovak national and 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, during league or cup matches, to field only a limited number of players from non-member countries that are not parties to the Agreement on the European Economic Area ('EEA').

3.3. Reasoning of the Court

The European Court of Justice first examined whether Article 38 of the Europe Agreement between the Communities and Slovakia had direct effect. The Court referred to its judgment of 29 January 2002 in *Pokrzeptowicz-Meyer*[13]. In this case, the Court had already recognised the direct effect of Article 37 of the Europe Agreement with Poland, the same principle which the French *Conseil d'Etat* referred to in the Malaja Case. The Court continued by pointing out that the wording of Article 38 of the Association Agreement with Slovakia was identical to that of Article 37 of the Association Agreement with Poland. The Court concluded that, having regard to both instruments and their similar wording and objectives, *inter alia*, of establishing an association to promote the expansion of trade and harmonious economic relations between the contracting parties so as to foster dynam-

9 'La possibilité, pour un sportif professionnel, de jouer dans une équipe déterminée, fait partie des conditions de travail et de rémunération qui, selon l'article 37 de l'accord d'association précité, ne peuvent fonder aucune discrimination à l'égard des travailleurs polonais légalement employés en France' (*Cour administrative d'appel de Nancy* 3 February 2000, case no. 99NC00282).

10 Judgment of 29 January 2002, Case C-162/00, *Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer*, *E.C.R.*. 2002, I-1049.

11 Decision 94/909 of 19 December 1994, *O.J.* 1994, L 359, 1.

12 Article 38(1) of the Association Agreement with Slovakia.

13 Judgment of 29 January 2002, Case C-162/00, *Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer*, *E.C.R.*. 2002, I-1049.

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*[14] in which it was decided that the non-discrimination principle of Article 39 of the EC Treaty is applicable to rules laid down by sporting associations which determine the conditions under which professional sportsmen can engage in gainful employment. The Court further pointed out that working conditions in the different Member States are governed sometimes by provisions laid down by law or regulations and sometimes by agreements and other acts concluded or adopted by private persons, and that, if the scope of Article 39 of the EC Treaty were to be confined to acts of a public authority, there would be a risk of creating inequality in its application. The Court concluded that the interpretation of Article 39 of the EC Treaty adopted by the Court in *Bosman* could be transposed to Article 38 of the Association Agreement with Slovakia.

Finally, the Court addressed the content of the non-discrimination provision laid down in the Association Agreement in order to establish whether 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 solely with regard to conditions of work, remuneration or dismissal. This means that three elements need to be present:

- a prohibited discrimination on grounds of nationality;
- with regard to conditions of work, remuneration or dismissal;
- of workers of Slovak nationality who are already lawfully employed in the territory of a Member State.

Where Mr Kolpak's lawful employment in Germany was concerned there seemed to be no problems. According to the Court, Mr Kolpak was lawfully employed as a goalkeeper under a contract of employment signed with a second-division German club, had a valid residence permit and did not, under national law, require a work permit in order to exercise his profession. In short, he already had lawful access to the labour market in Germany.

With regard to the question whether a rule such as the one laid down in Rule 15 of the sporting rules constituted a working condition, the Court referred to the Bosman judgment, as Mr Kolpak's complaint had arisen in connection with similar nationality rules or clauses as those drawn up by the Union of European Football Associations (UEFA) in *Bosman*. According to the Court, it followed from the judgment in *Bosman* that clauses of that kind concern not the employment of professional players, on which there is no restriction, but the extent to which their clubs may field them in official matches, and that participation in such matches is the essential purpose of their activity. It therefore also followed that a sports rule such as that in issue relates to working conditions within the meaning of Article 38 of the Association Agreement with Slovakia inasmuch as it directly affects participation in league and cup matches of a Slovak professional player who is already lawfully employed under the national provisions of the host Member State.

The Court further dealt with the question whether there was any prohibited discrimination of the type referred to in the Association Agreement. The Court again recalled the Bosman principles and stated the following. As far as Article 39 of the EC Treaty is concerned, it follows from *Bosman* that that provision precludes the application of rules laid down by sporting associations under which, in competition matches which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States. With regard to the interpretation of Article 38 of the Association Agreement with Slovakia, it follows that this provision introduces for the benefit of workers of Slovak nationality, on condition that they are lawfully employed in the territory of a Member State, a right to equal treatment as regards working conditions having the same scope as that which, in similar terms, nationals of the Member States are recognised as having by virtue of Article 39 of the EC Treaty, and that the rule in issue in the present case is similar to the nationality clauses in *Bosman*. On this basis, the Court decided that there had been an instance of discrimination as provided in the Association Agreement.

The Court nevertheless went on to examine whether the sporting rule could be justified on exclusively sporting grounds, as its purpose was, as appeared from the arguments of the parties, to safeguard training opportunities for the benefit of young players of German nationality and to promote the German national team. With reference to *Bosman* and the Court's judgment in *Donà* v *Mantero*[15], the Court recognised that the Treaty provisions on the free movement of persons do not preclude rules or practices excluding foreign players from certain matches for reasons which are not economic in nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as matches between national teams from different countries. In Bosman, however, the Court continued, it was stated that nationality clauses do not concern specific matches between teams representing their countries but apply to all official matches between clubs and thus to the essence of the activity of professional 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. 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 (*Bosman*, paragraphs 131 and 132).

3.4. 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 1993, 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, during league or cup matches, only a limited number of players from non-member countries that are not parties to the Agreement on the European Economic Area.

4. Final comment

The question of nationality clauses which was already dealt with in *Bosman* has resurfaced in the two cases discussed, this time with respect to so-called 'third countries', i.e. countries that are not EU Member State, nor belong to the EEA. The principles formulated by the Court in *Bosman* have 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

14 Judgment of 15 December 1995, Case C-415/93, *E.C.R.*. 1995, I-4921.

15 *Judgment of 14 July 1976, Case 13/76, E.C.R.* 1976, I-1333.

even others bound by equal or similar provisions.

The decision in *Kolpak* 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 *Kolpak* 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 *acquis 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

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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 pith and marrow, 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 sponsors'agreements with teams, individual players and governing bodies. On top of that, broadcasters and other rights purchasers/licensees 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[2] 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 1997 Grand National at Aintree. Coded warnings were received less than an hour before the race was due to start, causing it to be postponed

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1 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.

2 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 there is little doubt that the boycott was instrumental in bringing an end to the apartheid regime. Later on, we will look at another important example of the interrelation of politics and sport: the US boycott of the Moscow Olympics in 1980.

There are, of course, more recent instances of politics impacting on sport. The furore over whether England should play their World Cup match in Harare against Zimbabwe (who are currently touring England) reached its zenith in March of this year. The British government did not want the team to play the match as they believed it would lend succour to President Mugabe's regime. However, they were unwilling to demand that the team withdraw from the game and they were also unwilling to reimburse the England and Wales Cricket Board (ECB) for the fines and/or damages that were likely to become payable to the International Cricket Council (ICC). The ECB therefore made the initial decision to press ahead with the game.

The players, however, had concerns about the game and these were - initially at least - moral concerns. But whatever view one takes of Mugabe's Zimbabwe or, for example, of South Africa under the grip of apartheid, the fact remains that disapproval alone will not be enough (however strong and however justified) to constitute force majeure, certainly insofar as it is conventionally defined. This is why the ECB was under no illusion that damages or fines would be payable if they withdrew from the Zimbabwe game on purely political grounds.

As it turned out, their eventual withdrawal was stated to be on safety grounds: death threats were made against the England players and their families, a point we will return to shortly. All the same, the ICC technical committee awarded the four World Cup points on offer to Zimbabwe. On top of that, after the tournament ended the ICC withheld from the ECB €2.33 million of their €5.75 million World Cup fee in anticipation that the rights payments due to them would, in turn, be withheld. The ECB believes it has a strong case legally and is likely to take action through the courts to recover the rest of its fee. Any such legal action will almost certainly focus on whether or not withdrawal was as a result of force majeure. A key issue will be the extent to which England's reasons for withdrawing were based on the threat to the players'security.

6. Safety

When a group calling themselves the Sons and Daughters of Zimbabwe issued a death threat against the England players, political and moral concerns about playing the Harare match immediately turned to concerns over safety. While the death threat was dismissed by senior South African police sources, the ECB took it very seriously. ECB chairman Tim Lamb claimed that the letter constituted a force majeure event. There is certainly an arguable case for that and it will be interesting to see the results of any legal action taken by the ECB. Whether Australia's decision to go ahead with their game in Bulawayo 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 Australians, the England players received specific threats.

Of course, there have been numerous other instances of security concerns impacting on sporting events. On 8 May 2002, during the New Zealand team's cricket tour of Pakistan, a bomb exploded outside the Karachi hotel in which the team was staying. Although the players and management escaped unhurt, 14 people were killed and 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 Westerners 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 11 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', which strongly suggests force majeure was the cause. In relation to the Karachi bombing, we noted above that its immediacy was a factor that supported the view that it was a force majeure event. The September 11 attacks occurred 17 days before the Ryder Cup was scheduled to start. In spite of that, due to the overwhelming nature of the atrocities, the 17 day gap would probably not be enough to deny a claim that the attacks caused the postponement of the Cup, and that they constituted force majeure events.

7. Government intervention

Many force majeure clauses specifically mention, as an instance of force majeure, government intervention. Despite the British government's reluctance to intervene over England's match in Zimbabwe, it is not always the case that governments are so reticent. At the ICC Executive Board Meeting in Cape Town in March 2002, the members put pressure on the Board of Control for Cricket in India (BCCI) in relation to their repeated refusal to play Pakistan. There was some debate about the draft ICC contract and in particular the BCCI's desire, given the volatility of the situation with regard to Kashmir, to have provision made in the contract for government clearance for the team to play. Jagmohan Dalmiya, the BCCI president, apparently managed to persuade the other board members of the need to include a force majeure clause in the draft contract to cover the situation where the Indian government withholds permission for the team to play. So, where the BCCI is denied permission, they should be able to claim force majeure and avoid incurring fines that would otherwise be payable for breach of contract.

This is an important point. For, while the Indian government could refuse permission for the team to play Pakistan on grounds of risk to the players, they could also refuse simply for political reasons. Whatever the Indian government's reasons for refusing permission for the team to play Pakistan, the BCCI would still be prevented from fulfilling the contract due to circumstances beyond its control. In a case such as that envisaged by the BCCI, where the government denies the team permission to play certain matches or to play in a certain place, there is no need to balance certain factors as we did when considering New Zealand's withdrawal from Pakistan and the postponement of the Ryder Cup. In such a set of circumstances, the government's decision will usually be a straightforward case of force majeure.

Such clear cut cases of government intervention are uncommon. Sometimes, it may even be difficult to tell whether the decision to pull out of a game or contest has ultimately been made by the government or by the sporting body. Take as an example the decision that the United States would boycott the 1980 Olympic Games in Moscow in protest at the invasion of Afghanistan by the then Soviet Union. The common conception is that President Carter himself took the decision. Admittedly, he put intense pressure on the United States Olympics Committee (USOC) to boycott the Games, threatening to withdraw funding and to revoke the organisation's special tax status. 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 [...]. Olympic committees made the final decision about whether to send athletes to Moscow.'

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 types of 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 11 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 now as it has ever been, we should be wary of wrapping ourselves and our sportsmen and women in cotton wool. Australian swimming coach Otto Sonnlietner 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?'

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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 apace.[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 Basi* 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 was, in his opinion, a clear cut case of negligence, involving as it did a late, deliberate foul by the defendant that broke the leg of the claimant.[3]

Since *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 Maguire and Fitzgerald*[4] and *Vowles v Evans and the Welsh Rugby Union Limited*,[5] 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' of the claimant.[8]

Most of the issues that had concerned both the courts and academic writers on this subject were addressed by the decisions of the High Court and the Court of Appeal in *Caldwell v Maguire and Fitzgerald*.[9] The case involved serious injuries caused to a professional jockey who had been unseated by the interference of another horse with his own mount.[10] 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 made upon its contestants, its inherent dangers (if any), its rules, conventions and customs, and the standards, skills and judgment 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 competing with the remaining contestants for the best possible placing, if not for a win. Such must further include the Rules of Racing and

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1 See further in Gardiner, S et al, *Sports Law*, (2001) London: Cavendish Publishing, ch.16. Hereafter, *Sports Law*.
2 *Condon v Basi* [1985] 1 WLR 866, per Donaldson MR.
3 Ibid p.868
4 [2001] EWCA Civ 1054.
5 [2003] EWCA Civ 318.
6 Felix, A 'The Standard of Care in Sport' (1996) 4(1) Sport and the Law Journal 32.
7 *Sports Law* p.701 et seq.
8 See for example Drake J in *Elliott v Saunders* (1994) unreported decision of the High Court.
9 [2001] EWCA Civ 1054.
10 See further James, M & Deeley, F 'Care on the Court' (2001) 145(35) Sol J 864.

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 stresses of a race. Such are no more than incidents inherent in the nature of the sport.

5 In practice, it may be difficult to prove a breach of duty unless there is proof of conduct amounting to reckless disregard for a fellow contestant's safety.[11]

The case establishes a number of significant points. It confirms conclusively that the applicable test to sports torts 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 evidential 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 contacts, 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.[12]

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 a sport is played in its wider context. It is the way that it is acknowledged and accepted as being played by those who play it.[13] 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 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 *Condon*, the Master of the Rolls held *obiter* 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.[14] This proposition was doubted in *Elliott v Saunders* as being without basis in law.[15] 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, sports 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 Whitworth*. 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-19's rugby union match in which he was playing for the negligent non-application of the safety rules relating to scrummaging. 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 apply the correct scrummage engagement procedure, had failed to identify the reason why the scrums kept collapsing, had failed to ensure that there were equal numbers on each side of the scrum and had failed to award uncontested scrums or abandon scrums altogether in the light of his inability to identify the problem.

Contrary to a number of outraged reports at the time, this case did not lead to referees throughout the country laying down their whistles and retiring from the game. Nor did it lead to the total collapse of junior and amateur sport. What it did demonstrate, however, is that wherever someone connected with sport causes injuries to a sports participant through their negligence, then the injured player will be able to bring an action to recover compensation. There is no public policy reason why a referee cannot be sued when his or her negligent acts have caused injuries to a player under his control.

It took a further six years before the Court of Appeal had to return to the issue of a referee's liability for negligence. The facts at issue in *Vowles v Evans and the WRU Ltd*,[16] bear a chilling resemblance to those of *Smoldon*. Vowles was the hooker for his club, Llanharan. After about 30 minutes of play, the Llanharn prop dislocated his shoulder and left the field of play. As there was no specialist front row replacement, one of the flankers, Jones, who had some previous experience at prop, said that he would play there for the last 50 minutes of the game. It was found by the court that most of the scrums from the time that Jones began playing at prop had been defective and unstable. In the fourth minute of injury time at the end of the second half, the scrum failed to engage properly causing the claimant to suffer a dislocation of his neck leading to permanent incomplete tetraplegia.

The court held that the referee was responsible for the injuries caused to Vowles. Unlike in Smoldon's case, it was found that, overall, his standard of refereeing was good. His negligence was grounded on one decision alone. When Vowles' team-mate was forced to leave the field through injury, the referee should have enquired whether there was a specialist front row replacement. Following a discussion with the Llanharan captain, Jones said that he would 'give it a go' as the alternative was to play with uncontested scrums. If this option was followed Llanharan could not receive any points should they have won the game. The court held that by offering Llanharan the choice of playing Jones at prop or playing uncontested scrums, the referee had breached his duty of care to the players under his control by failing to adequately ensure their safety. If there was no specialist replacement, he should have taken the decision to play uncontested scrums. The choice should not have been offered to Llanharan.

Alternatively, as Jones did have some limited experience of playing in the front row, the referee could have allowed him to try the position and then assess whether or not he was competent to play there. From the facts, however, he was not competent. For example, in summing up the evidence in paragraphs 68-72 of his judgment, Judge Morland refers to players calling the srummaging farcical, that the scrums collapsed or failed to engage two or three times per scrum and that Jones' timing was out of synch with the rest of the front rows causing either collapses or misengagements. Therefore, the referee should have kept Jones' ability to play prop under constant scrutiny and should have declared uncontested scrums at some point well before the scrum collapse that caused the claimant's injuries. Thus, additionally, the referee was held negligent for not declaring uncontested scrums.

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11 [2001] EWCA Civ 1054, at para. 11, per Tuckey LJ.

12 *Pitcher v Huddersfield Town FC Ltd*, Westlaw, (2001) WL 753397.

13 *Sports Law* p. 72-4.

14 [1985] 1 WLR 866, at 867 per Donaldson MR.

15 Op. cit. n.8, Per Drake J.

16 [2003] EWCA Civ 318.

17 *Nettleship v Weston* [1976] 2 QB 691.

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 *Vowles*. 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 *Vowles* 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,[17] or whether there should be separate standards for all of the different levels at which sport is played is yet to be estalished. 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 should ensure 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.

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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 (hereafter USOC) was reviewed by the United States courts shortly after the passing of the Amateur Sports Act, 1978 had ascribed 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 a governmental one,[1] or if the state substantially involves itself in the entity's activities,[2] or if its conduct has been influenced by the state's own use of its coercive power.[3] 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 *DeFrantz v. United States Olympic Committee*[4] 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 of *San Francisco Arts and Athletics v. United States Olympic Committee*[5] the anomalous nature of USOC, and the curious extent of its powers, vexed the courts and culminated in the Supreme Court handing down a majority decision.

Prior to the USOC cases, the application of the 'state actor' doctrine in respect of sports governing bodies had been explored in several cases concerning the National Collegiate Athletic Association. The NCAA is an organisation whose legal position is no less anomalous than that of the USOC but whose role is certainly no less important, given that it governs University and College sports in the United States, and the *de jure* and *de facto* similarities between them are worthy of note. In several cases heard prior to 1984, its activities were regarded as constituting state action under both the 'public function' doctrine laid down in *Flagg Bros.* and the 'entanglement' doctrine as espoused in *Burton*. In *Parish v. NCAA*[6] the district court applied *Flagg Bros.* when determining that the NCAA regulated cer-

* Robert Gordon University Aberdeen Scotland; author of '*From Boot Money to Bosman: Football Society and the Law*' London, Cavendish Publishing, 2000.

1 *Flagg Bros. Inc v. Brooks* (1978) 436 US 149.

2 *Burton v. Wilmington Parking Authority* (1961) 365 US 715.

3 *Reitman v. Mulkey* (1967) 387 US 369.

4 (1980) 492 F. Supp 1181.

5 (1987) 483 US 522.

6 (1975) 506 F. 2d 1028 (5th Cir).

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'[7] 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 *Howard University v. NCAA*[8] 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 governmental action was 'just one of several co-operative forces' working together.[9] However, both these approaches were undermined by the decision in *Arlosoroff v. NCAA*.[10] First, the federal court decided that the recent Supreme Court decision in *Rendell-Baker v. Kohn*[11] meant the 'entanglement' doctrine was only applicable if the federal and state representatives on the NCAA's governing body had more influence than those who represented private bodies. 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'[12] had been rendered untenable by *Rendell-Baker*. Second, under the rule in *Jackson v. Metropolitan Edison Co Ltd*[13] a privately owned and operated utility corporation is not a state actor even though it is subjected to state regulation. The court decided that the functions assumed by a private entity 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 the various circuit appeals courts was resolved in 1988 by the Supreme Court's ruling in *National Collegiate Athletic Association v. Tarkanian*.[14] The respondent was suspended from his post as a University sports coach after the University of Nevada adopted the NCAA's rules and policies regarding recruitment violations specifically in order to deal with 'poaching' allegations made against Tarkanian. The Supreme Court held that because Nevada University had (along with 'several hundred other public and private member institutions'[15]) decided to adopt NCAA policy of their own volition, it could not be said that the NCAA was acting under the colour of state law. Like the USOC, therefore, the NCAA was not a state actor despite the long-held perception that the doctrines espoused in *Flagg Bros.* and *Burton* rendered it amenable to suit on that basis.

2. The USOC cases

The first of the USOC cases, *DeFrantz v. United States Olympic Committee*, arose as a consequence of the USOC's decision not to send a team to represent the United States at the Moscow Olympics in 1980 in protest over the (then) Soviet Union's invasion of Afghanistan earlier that same year. Twenty-five athletes and one US team official (Anita DeFrantz, in whose name the case was filed) claimed that the decision not to send a team violated the provisions of the United States' Amateur Sports Act, 1978. That Act revised the USOC's Charter and corporate status (originally granted in 1950)[16] and accorded the USOC exclusive jurisdiction over all matters relating to the United States' representation and participation in the Olympic Games.[17] DeFrantz argued that the USOC had yielded its exclusive jurisdiction over Olympic matters to the nation's political leaders, and that it had acted in a political manner by succumbing to political and economic pressure. Consequently, the case turned on 'the statutory authority of the USOC, its place and appropriate role in the International Olympic movement and its relationship with the United States government'.[18] The court determined that USOC was not a state actor notwithstanding the undoubted political pressure that had been placed upon it by the President[19] and the Acting Defence Secretary[20] in the period immediately prior to the decision not to send a team had been taken.

DeFrantz was considered in *San Francisco Arts and Athletics v. United States Olympic Committee*[21] 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[22] summary judgment and a permanent injunction[23] 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 110 of the 1978 Act provides that the use of 'Olympic' or 'Olympiad', or of the Olympic motto 'Citius, Altius, Fortius'[24]

> 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 unauthorised used of these words or phrases is confusing, 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 110 as a consequence of *Cohen v. State of California.*[25] 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 overturned on the ground that the conviction was unconstitutional:

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

7 (1975) 506 F. 2d 1028, 1032.
8 (1975) 510 F. 2d 213 (DC Cir).
9 (1975) 510 F. 2d 213, at p. 219.
10 (1984) 746 F. 2d 1019 (4th Cir).
11 (1982) 457 US 830.
12 (1984) 746 F. 2d 1019, 1021.
13 (1974) 419 US 345.
14 (1988) 48 US 179.
15 (1988) 48 US 179, at p. 185.
16 The predecessor to the 1978 Act was USOC's Charter of 1950, which had been introduced specifically to vest the powers relating to the United States' Olympic participation in a sole body. This was considered necessary because a number of organisations shared responsibility for the United States' Olympic affairs and it was felt that this situation had contributed to the US not winning as many medals as it ought to have done in the 1948 Games. Similarly, the revisions that were made to USOC's structure by the 1978 Act were deemed necessary to correct 'the disorganisation and the serious factional disputes that seemed to plague amateur sports in the United States' (see *Oldfield v. The Athletic Congress* (1978) 779 F. 2d 205) and the perception that 'we are competing less well and other nations competing more successfully because other nations have established excellence in International athletics as a national priority'. (Final Report of the President's Commission on Olympic Sports, 1977, p. ix). For 'other nations', read 'the Soviet Union'. In the 1968 Mexico City Olympics the US won a total of 107 medals and the Soviet Union 91. The third-placed nation was Hungary with a total of 31. In the 1972 Munich Olympics the Soviet Union won 101 medals and the United States 91. East Germany was third in the medals' table with 66. In the four subsequent Olympiads up to the dissolution of the Soviet Union the position remained broadly the same, with the Soviets heading the medal count a dozen or so gongs ahead of the US and the next best lagging considerably behind those two.
17 S. 371.
18 *Defrantz* op cit., at p. 1183 per District Judge Pratt.
19 On April 10 1980 President Carter had stated that 'if legal actions under the Emergency Powers Act are necessary to enforce my decision not to send a US team to Moscow, then I will take those actions'. The USOC's decision not to send a team was taken three days after this statement was made.
20 In affidavit evidence given before the court in *Defrantz* Warren Christopher had stressed that, following the invasion of Afghanistan, the government's position had always been that 'the presence of American competitors at Moscow would be taken by the Soviets as evidence that their invasion had faded from the memory or was not a matter of great importance or concern to this nation'. *Defrantz*, op cit., at p. 1184.
21 Op cit.
22 (1986) 789 F. 2d 1319.
23 Granted at (1986) 781 F. 2d 733.
24 'Faster, higher, stronger'.
25 (1971) 29 L. Ed. 2d 284.

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,[26] make this defendant's simple public display of this single four-letter expletive 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[29] that similar protection had been granted, in other cases, to 'Boy Scouts', 'Girl Scouts', 'Little League Baseball' and 'Veterans Organisations'. It determined that, when balancing the detrimental effects of granting exclusive control over words and phrases against 'the principle that when word acquires value as 'the result of organisation and the expenditure of labour, skill and money' by an entity, that entity constitutionally may obtain a limited property right in the word'[30] 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.

3. Discussion

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 and reflecting a shared identity between individuals possessing a common link) and 'Olympic' or the Olympic Motto. These words and phrases have their roots in religious festivals held in ancient Greece between 776 BC and approximately 2609 BC[31] and have other, general connotations that 'Veterans Association' and the other protected phrases lack. As Justice Harlan pointed out in *Cohen*,

> Much linguistic expression serves a dual communicative function. It conveys 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.[32]

This point was considered at length by the ninth circuit appeals court in *SFAA*.[33] The court noted that 'the word 'Olympic' has a meaning unique within our language', connoting qualities that Congress had a broader public interest in promoting through the activities of the USOC - notably, the participation of amateur athletes in the Olympics and the furtherance of the ideals of the Olympic movement.

At first instance, Judge Powell had similarly spoken of those 'Olympic Ideals' as being

> To promote the development of those physical and moral qualities which are the basis of sport. (...) To educate young people through sport in a spirit of better understanding between each other and of friendship, thereby helping to build a better and more peaceful world. (And) to spread the Olympic principles throughout the world, thereby creating international goodwill.[34]

Indeed, the IOC's own Charter states that 'international goodwill', 'physical and moral qualities' and 'a spirit of better understanding' are 'Olympic qualities'. The word 'Olympic' has general connotations that other protected phrases do not; it should be no more amenable to protection than, say, 'Corinthian' because both these words connote a notion, ideal or belief that gives it an emotive force and, as such, takes it outwith the scope of that which can be protected without violating the Constitution. Semantically, 'Olympic' appears to be a world away from 'Little League Baseball,' but the view of the Supreme Court was that the degree of protection afforded by section 110 of the 1978 Act 'is not broader than necessary to protect the legitimate congressional interest (in 'Olympic virtues') and therefore does not violate the First Amendment.[35] The Supreme Court also upheld the first instance ruling that the granting of a corporate charter to USOC under the 1978 Act did not render it a state actor that was amenable to suit, Judge Kozinski opining[36] that 'even extensive regulation by the government does not transform the actions of the regulatory entity into those of the government'. However, in his dissenting judgement Judge Brennan argued that the USOC 'performs a distinctive, traditional governmental function (because) it represents this nation to the world community'. Congress had endowed the USOC with traditional governmental powers that enabled it to perform a governmental function. 'In the eyes of the public (...) the connection between the decisions of the United States government and those of the United States Olympic Committee is profound.' Congress had granted USOC federal funds and a corporate charter and, in return, the USOC was required to be apolitical and account for how its federal funds were spent.[37] On any objective consideration, the USOC met all three criteria for 'state actor' status as laid down in *Flagg Brothers*, *Burton* and *Reitman*. Moreover, the political machinations leading to *DeFrantz* had already illustrated that the purported apoliticism of USOC was a myth.

Indeed, the very absence of the apoliticism that the 1978 Act required of it illustrated the extent to which the USOC could have been regarded as a state actor had the district court in *DeFrantz* been so minded. In its consideration of *DeFrantz*, the Supreme Court majority was swayed by the fact that the political pressure placed on 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 governmental influence (on participation in Moscow) is hardly representative in view of the absence of such influence on the majority of USOC decisions'.[38] Put another way, the fact that government had not intervened in USOC's affairs so overtly before persuaded the Supreme Court to overlook its intervention 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 with powers or functions governmental in nature, they become agencies or instruments of the State and subject to its constitutional limitations".[39] The frequency and degree of the state's intervention ought not to have been an issue: the USOC could have been ascribed 'state actor' status solely and squarely on the basis of the powers accorded to it by the 1978 Act. It was true to say that 'neither the conduct nor the co-ordination of 'sports has been a traditional governmental function,'[40] but the legislative history of USOC (indeed, the fact that it had a legislative history in the

26 Details.
27 *Cohen*, op cit., at p. 284.
28 *SFAA*, op cit., at p. 534.
29 *SFAA*, op cit., at p. 532.
30 *SFAA*, op cit., at p. 532, citing *International News Service v. Associated Press* (1918) 248 US 215, 230.
31 Guttmann, A. (1978) *From Ritual to Record: the Nature of Modern Sports*. Columbia University Press, pp 16-24.
32 *Cohen*, op cit., at p. 294.
33 (1986) 789 F. 2d 1319.
34 (1987) 483 US 522, at p. 537.
35 (1987) 483 US 522, at p. 540.
36 (1987) 483 US 522, at p. 543.
37 (1987) 483 US 522, at p. 557.
38 (1987) 483 US 522, at p. 545.
39 (1987) 483 US 522, at p. 549, quoting *Evans v. Newton* (1966) 383 US 296, 299.
40 (1987) 483 US 522, at p. 545.

first place) placed it outside the norm. There were 'serious constitutional concerns' about the nature and scope of USOC's powers[41] and a narrow interpretation of the 1978 Act rather was preferable to according 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 category'.[42] It was the prospect of a Gay Olympics that persuaded it to invoke its statutory powers, not concerns 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.'[43] That the Supreme Court connived in the USOC's institutionalised 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 homoerotic nature of the ancient Greek Games upon which the contemporary marketing- and media-driven frenzy is purportedly based: only Freemen could compete in the ancient Olympics; they competed naked 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 contemporary versions - an irony that was lost on both the USOC and a Supreme Court packed with New Right Reagan appointees.

41 (1986) 789 F. 2d 1319, at p. 1322 per Brennan, J.

42 (1986) 789 F. 2d 1319, at p. 1321 per Brennan, J.

43 (1986) 789 F. 2d 1319, at p. 1322.

❖

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 decided an issue concerning sports agents and client stealing. Sports agent Leigh Steinberg and his firm, Steinberg & Moorad, successfully 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 competing with Steinberg's firm.

In 2001, Dunn left Steinberg's sports agency, with about 50 National Football League clients in tow, to establish Athletes First. Steinberg sued, and in November 2002, a jury found Dunn had violated his employment agreement and awarded $44.6m (€42.2m) 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 denied Steinberg's motion to add $23.5m (€22.2m) 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 $2.7m (€2.5m). Dunn also owes his lawyers $1m (€0,9m) and has been declared bankrupt.

Australia: Are Sporting Receipts Assessable Income? - Stone v. Commissioner of Taxation [2002] FCA 1492.

The Federal Court has held that sporting receipts income including sponsorships, appearance fees and money received from incentive schemes, should be deemed taxable income for the purposes of the Income tax Assessment Act 1936 (Cth), as the taxpayer was carrying on a business as a professional 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 businesslike way and in accordance with ordinary 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.

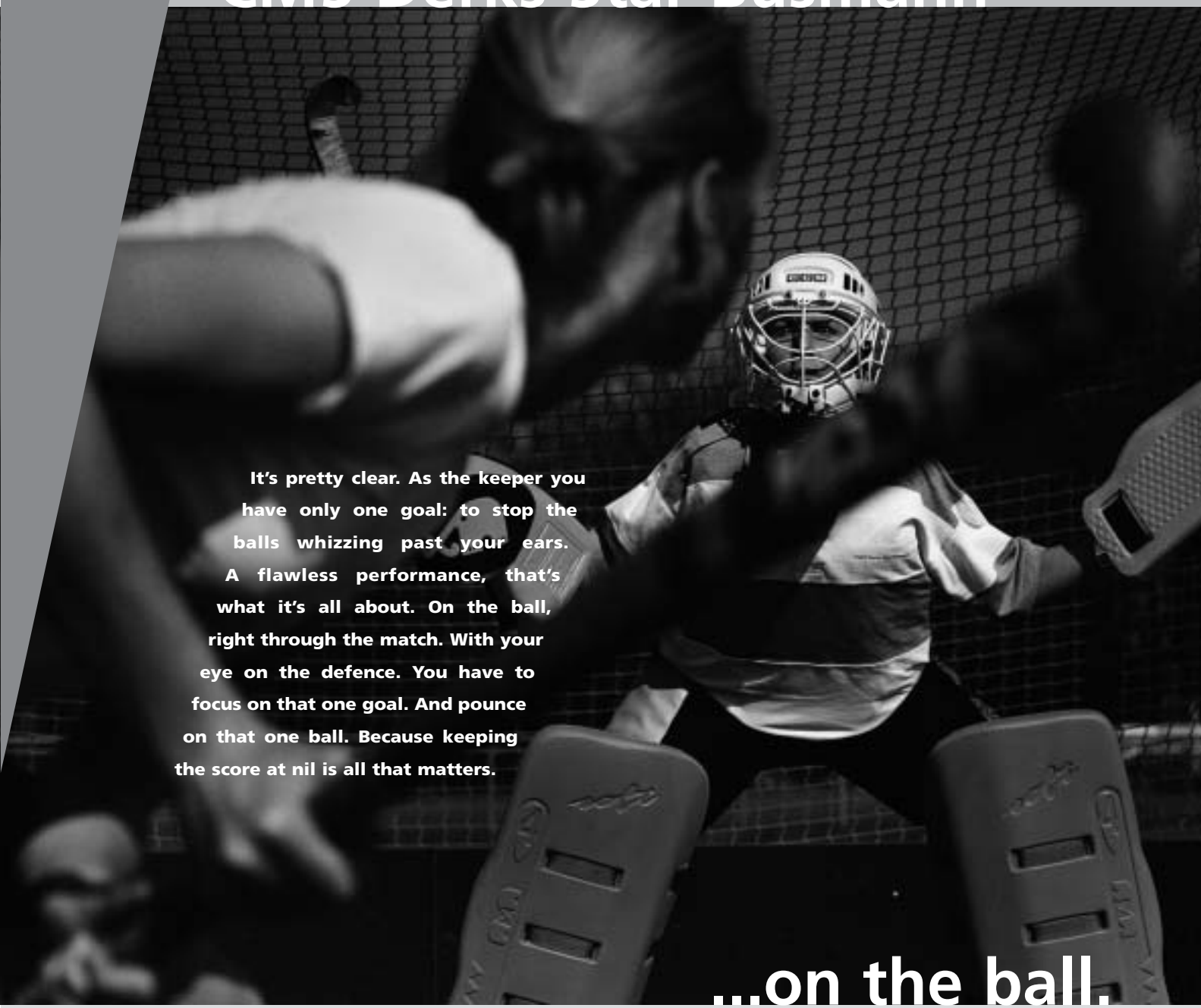
United Kingdom: Image Rights and Sportsmen - Irvine v. Talksport [2003] EWCA CIV 423

In 2002, Eddie lrvine, the Fl racing driver won 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 advertisements. The material had included a brochure, which had featured Irvine holding a radio with the words 'Talk Radio'. This was a doctored picture - in the original Irvine had been holding a mobile telephone. 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 activity' i.e. selling advertising rather than specifically 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 (€2,931/$3,098m). 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 £25,000 (€36,647/$38,744m). 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 £25,000 ($38,772/€36,281).

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

Taken from SportBusiness International May 2003, p. 50

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.

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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 debate 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 company nowadays - and are often incorporated as commercial 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 accountancy rules, to straightforward forms such as cash injections of public money under the more diverse justifications. Most of such helps 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. Many football clubs have managed to escape liquidation or bankruptcy proceedings thanks to the awareness of government, courts of law and creditors that the disappearance of a football club would have an enormous impact on the local community. It is for that reasons that it is suggested that the *favor creditoris* principle may not be available where football clubs are concerned. Experience, on the contrary, seems to suggest the existence of a *favor debitoris* principle in those cases.

As we will see below, another example of the diversity of football clubs from other businesses is that football clubs benefit from very peculiar market circumstances. The demand for the product supplied by football clubs tends to remain unaltered notwithstanding the changes in the quality of such product that often occur. As a matter of fact, football clubs' customers, as they are sometimes misleadingly described, namely the supporters of the club, tend to follow and buy the product offered by their beloved team no matter how poor the performance of the club is. On the contrary, experience shows that in many cases the demand for the football product may be even higher when the team is struggling. Outside the football industry, no one would even think to buy any product if the quality were not up to standard or patently no good value for money no matter how accustomed to such product the buyers were. A drop in quality almost invariably triggers a drop in popularity and therefore in market performance. This is not the case in football.[1]

The additional difference with other industries can be found in the fact that unlike the vast majorities of non-football companies - which are all suffering from the current slow down in the economy - football clubs are currently benefiting from a huge popularity of the game. 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 viewers. 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 12.9 million viewers, which amounted to about 52 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 1999 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

* Avvocato and Sollicitor, Mayer, Brown, Rowe & Maw LLP, London, United Kingdom. This paper was presented at the ASSER International sports law seminar on *'Licensing Systems and the Financing of Professional Football in Europe'* on 10 June 2003 in Utrecht, which was organised in cooperation with CMS Derks Star Busmann.

1 For an interesting study on this phenomenon see Hamil, Michie, Oughton and Warby, *The Changing Face of the Football Business, Supporters Direct,* Frank Cass, 2001.

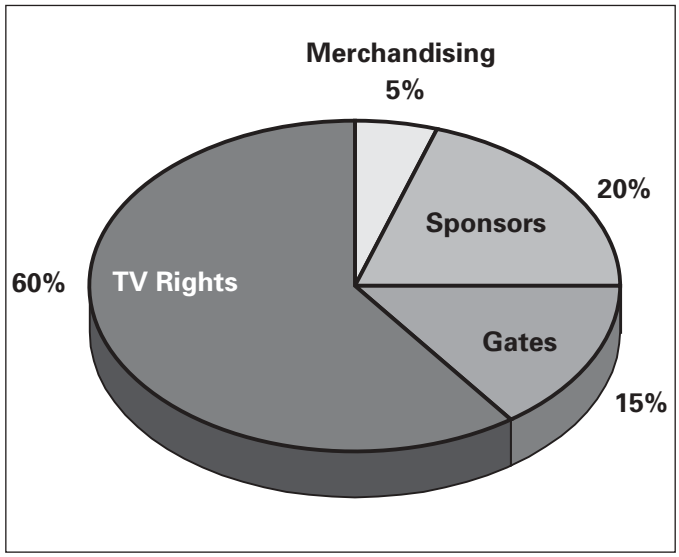

Figure 1

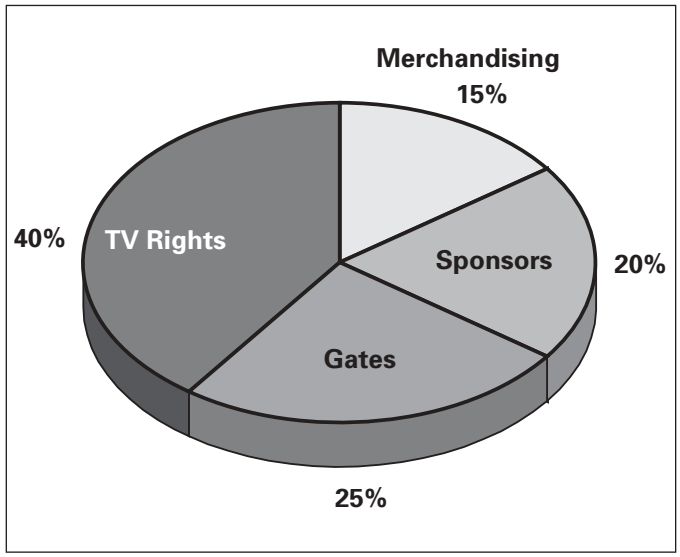

Figure 2

clubs and their difference from other businesses. The figures shown are a summarised version of those normally featuring in football club's 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 summarized 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 always seem to account on average for about 60% of the combined sources of income. An important part is also played by gates revenue, including both season tickets and single match tickets, accounting for about 15%, and by sponsorship agreements which account for about 20% of it. As it is clear from the chart, in such structure only a minor role is played by merchandising. This is especially true in countries where such activity is still undeveloped.

In other countries, where merchandising is considered as one of the most reliable sources of income, it can amount up to about 15% and even more. Traditionally, merchandising is particularly developed in England where Manchester United lead by example with extraordinary domestic and worldwide sales. A stronger and more constant exploitation of merchandise may contribute to a more balanced income structure as we can see from figure 2. Such financial structure is definitively more balanced than the previous one. Here the income of the clubs is more evenly spread among the different sources.

It is believed that the achievement of well balanced and diversified systems of income may guarantee a good financial performance for the club. This may be true in theory. In reality, even those clubs who have managed to achieve a financial structure similar to the one summarized with the second apple chart, are struggling to survive in the current economic situation where the largest source of income has, on average, dropped by 30-40% and the other sources have either remained unchanged or have also dropped slightly.

The reason for this is that football clubs are characterised by the imperfect balance between sources of income and sources of expenditure. As we have seen, the income is mainly composed of flexible sources that can react very quickly to the changes in the market place. TV rights contracts last on average for one or two years. Sponsorship agreements have duration ranging from one to three years. Gate revenue's 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 contracts in football, notwithstanding the sources of income relied upon to make such payments are short-term, volatile and may not endure for more than one or two years. Sometimes, where the broadcaster providing the club with its main source of income goes bust, as happened in the case of ITV 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.

2 For a thorough analysis of the subject see Staudohar and Mangan, *The Business of Professional Sports,* University of Illinois Press, 1991; Bobson and Goddard, *The Economic of Football,* Cambridge, 2001.

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, the oldest Roman football club, with some 90% of the players currently employed. The so called 'framework agreement' provides, amongst other things, for the reduction of existing wages, the rescheduling of payments which will be due for the competition 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' side not to re-sale 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. The 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 72 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 a source 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

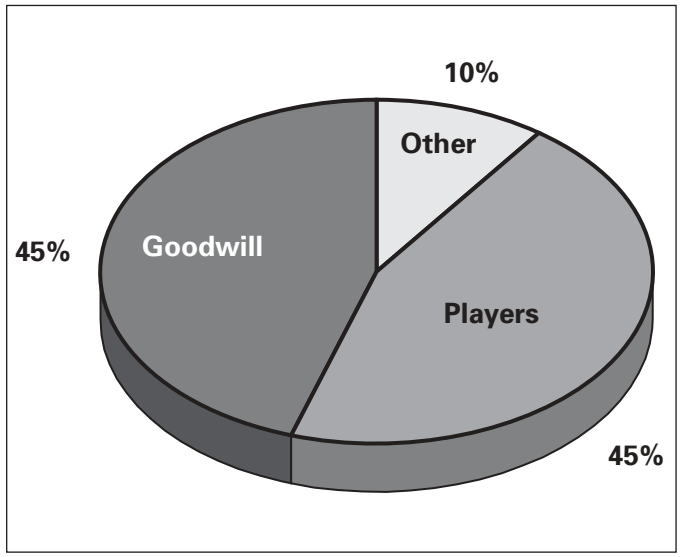

Figure 3

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 cases 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 £503,000. 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 £597,000, with £150,000 paid for a pay-per-view screening and £59,000 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

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 £25,000 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 model just described, the assets of football 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 was displaying 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 the fire sale of assets like Batistuta, Rui 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 sum 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 at the bankruptcy auction for as little money as 2.5 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 aimed at gaining 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 spotlights 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's. 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 4 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.

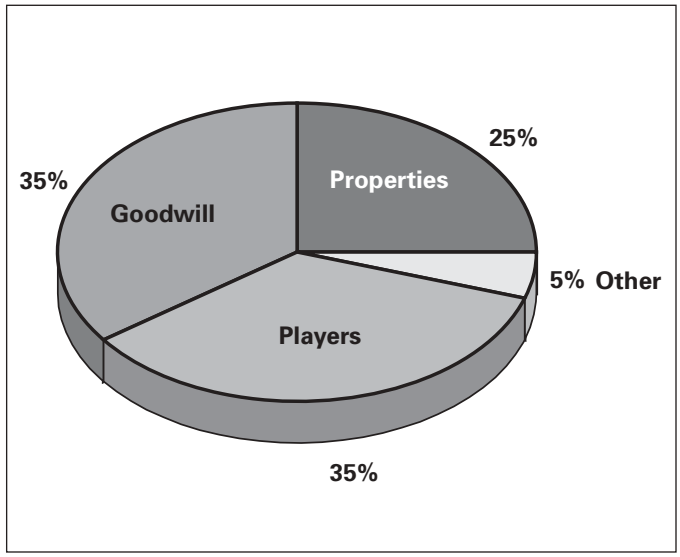

Figure 4

3. Related legal problems

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

the Inland Revenue cancelled. The construction firm that built their new stadium also lost around £7 million in outstanding payments. Leicester, meanwhile, have remained in business under the control of a new consortium and will benefit from the above described windfall next season since they have just made it back to the English Premiership. It is argued that they were allowed an unfair advantage on both other clubs - which tackled their own financial troubles by cutting back on staff and selling players - and generally on other businesses that would have not been offered such a sweet get-away had they found themselves in a similar situation.

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 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 teamed up and demanded £10 million each for screening their games. The broadcasters offered about half of that, and the eight clubs demanded that the start of the season be postponed until October, threatening a mass blockade. Eventually, an interim agreement was struck and the championship started with a two-week delay. However, the problem is likely to arise again this year since the situation is not yet settled.

4. Conclusions

We have seen that football clubs have a peculiar nature. Even though they are incorporated as business entities they are characterised by features uncommon to any other commercial companies. Furthermore, their financial and asset structures are different from those of other businesses. Also, football clubs are community-sensitive in that they are affected by and affect local communities. This invariably leads to different treatment before state courts and administrative bodies. The way football clubs are treated before insolvency courts, moreover, has lead to the suggestion about the existence of a *favor debitoris* principle as opposed to the *favor creditoris* which is normally applied in the bankruptcy proceedings of most jurisdictions.

Also, the application of general laws and regulation at both national and European level conceived for non-football entities appears to be inappropriate in the football world. It is perhaps time for institutions in charge of the regulation of football to take a courageous stance in this matter and admit that football clubs are special entities and should be treated accordingly. Although they are incorporated as business companies, football clubs are structured, financed and run in a different way, function in a different way and react to market and community inputs in a different way.

All the troubles faced in the last few years in the football world point to the fact that it would be appropriate to concert and implement legislation taking into account such different nature. Clarity and consensus come at a premium in the football world but a radical, innovative move of this kind should be welcomed by all parties.

❖

European Imperialism in Sport

by **Steve Cornelius***

1. Introduction

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?'[1]

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 standardised rules and international federations, began to appear in Europe.[2] It is also no coincidence that this period represented the heyday of European imperialism as continents were carved up and plundered by colonial powers without regard to the people who had lived on the land for many 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.[3]

* Senior Lecturer in Commercial Law, Rand Afrikaans University, Johannesburg, South Africa, and Director of the RAU Centre for Sports Law. This paper was presented at a debate on *'European Imperialism in Sport'* hosted by the W.J.H. Mulier Institute for sport research (social sciences) in Den Bosch, The Netherlands on 10 April 2003. The topic was proposed by the organisers of the debate. My aim with this paper was neither to advocate anti-European sentiments, nor promote pro-African views, but rather to reflect on one (of the many) difficulties with which sports federations in Africa and other developing countries seem to be faced. I wish to express my appreciation to my assistant, Ms Mienkie van Dyk, as well as Mr Chris Fortuyn of the RAU Department of Sport and Movement Studies, for their contributions with the research for this paper. The views expressed are entirely my own.

1 *Beck Scoring for Britain: International Football and International Politics 1900 - 1939* (1999) 272.

2 Rigauer 'Marxist Theories' in Coackley and Dunning *Handbook of Sports Studies* (2000) 34.

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.[4] 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?[5]

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[6]; 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 promoted the virtues of Capitalism at the 1984 Olympics in the absence of the Soviets and their allies.[7]

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 keg. 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.[8]

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.[9] 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![10] 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 any regional, 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 in a community or society.
- To increase citizen support for political leaders and the political structures they represent.
- To promote general economic development in the community and society.[11]

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.[12] 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 colonial power could now be overrun on the sports fields by its former colonies.[13] 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.[14] 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 luring the best talent from the less wealthy countries with promises of great 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.[15] More than any other social influence, save perhaps war with a common enemy, sport has the potential to unify a people. This is obviously the case when the national team of a country is taking part, but even in local competitions where individuals support different teams, their love for a particular sport binds them together, irrespective of race, religion, language, education, social or economic status or occupation. But unity and identity are also connected to power and social relations.[16] Politicians have long since realised the potential 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 this view, sport legitimises the technocratic capitalist practises and uses them as a repressive method of general socialisation.[17] Sport is used as an aid to protect bourgeois class interests and to regulate the use of free time.[18] This view is not new. Ever since the ancient Romans' cries of *panes et circenses* have gone up, rulers have

3 Darby *Africa, Football and FIFA: Politics, Colonialism and Resistance* (2002) 168 *et seq*; Maguire 'Sport and Globalization' in Coackley and Dunning (2000) 359 - 360.
4 Allison 'Sport and Nationalism' in Coackley and Dunning (2000) 351.
5 Beck (1999) 272.
6 Coackley *Sport in Society: Issues and Controversies* (1997) 410.
7 Coackley (1997) 416.
8 Moore 'Ad Hoc Chambers of the International Court and the Question of Intervention' 1992 *Case Western Reserve Journal of International Law* 667; Allison in Coackley and Dunning (2000) 351. See also 'Soccer War 1969' at http://www.onwar.com/aced/data/sierra/soccer1969.htm accessed on 17 January 2003.
9 Beck (1999) 37.
10 Beck (1999) 23.
11 Coackley (1997) 403.
12 Houlihan 'Politics and Sport' in Coackley and Dunning (2000) 216.
13 Coackley (1997) 407.
14 Maguire in Coackley and Dunning (2000) 365 - 366.
15 Houlihan in Coackley and Dunning (2000) 215 - 216.
16 Coackley (1997) 408.
17 Rigauer 42.
18 Houlihan in Coackley and Dunning (2000) 215.

realised that people can be more easily manipulated and oppressed if they were kept entertained and their minds were kept occupied.[19] 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 disgruntled groups occupied and off the streets. The main goal of such programs have been to use sport as a means of social engineering to control crime rates and vandalism and to promote social interaction among individuals.[20] According to Houlihan,[21] successive British governments have invested in sports facilities and programs as a solution to urban unrest. In Northern Ireland, sports programs were aimed at bridging the gap between Catholics and Protestants.

Sport is further seen as a way to ensure military and police preparedness. In almost all countries, soldiers and police officers are encouraged to participate in state funded sports activities.[22] In many countries, especially in the times before all-out professionalism took hold in the 1990s, talented sports people were assimilated into the military where they, in fact, became 'professional' amateur sports people.

It is, therefore, in the interest of politicians to ensure that the maximum number of people in their constituencies take an active interest in sport. And the best way to ensure continued spectator interest, is to ensure that play remains of the highest standard. To maintain very high standards of play, European clubs and teams spend millions of Euros annually to acquire the best talent from across the globe. European governments do their part by ensuring that the necessary residence and work permits are issued to such athletes without too much difficulty. In a time when European borders are more and more closing down to foreigners, it seems that the ability to kick a football still ensures relatively easy access.

2.3. Education

Sport fulfils a vital educational role in modern societies. Governments support sports programs and events because sports people can serve as role models for other members of society. It is in their interest to promote the notion that success requires discipline, loyalty, hard work, determination and the ability to keep on going in the face of hardship and bad times. World class and elite sports promote these ideals. They also foster a certain ethic and moral consciousness that are commended in society. In socialist societies, teamwork is promoted as the goal in sport; the team is the reason why the individual excels. But in capitalist societies, the emphasis is on competition and personal achievement; the efforts of the individual is the reason why the team succeeds.[23] It is for this particular reason that much emphasis was once placed on school sports. Sport was seen as an important medium to instill young participants with common modes of thought, cooperation and social cohesion.[24]

2.4. Improved public health

In most societies today, governments spend billions of dollars annually on public healthcare. If the overall health and fitness of people in a particular society can be improved, the need for such spending should decrease or, at least, be less prone to inflationary forces. Rightly or wrongly, there is a perception that large-scale participation in sports will improve the overall state of public health and fitness which, in turn, would lead to reduced medical expenditure.[25] There is also a belief that fitness and physical skills are related to economic productivity. Improved fitness amongst workers is assumed to have numerous beneficial results: as workers become fitter and healthier, less working hours are lost due to illness; increased fitness increases longevity so that workers have a longer active lifespan; a fitter individual can deal better with work-related stress and the demands of the workplace.[26]

2.5. Economic growth

In the course of the 20th century, sport has grown into a multi-billion dollar global industry. There are, consequently, also substantial economic incentives for governments to promote sport.[27] The time when sport had been a mere pastime has long since gone. Sports merchandising and marketing has exploded into one of the largest industries in the modern world economy. Sports venues are no longer places where athletes and a few spectators meet for an afternoon of entertainment. Modern sports facilities are littered with all kinds of vendors selling food, drinks, memorabilia and other goods. Branded merchandise is sold at stores all over the world and television networks pay ridiculous amounts of money for the rights to broadcast sports events. This creates a healthy movement of capital within a particular economy, earns vast amounts of foreign exchange and creates substantial employment opportunities.

Success in sport also has further economic advantages for the powerful and wealthy nations of the world. As poorer nations yearn to compete on the international stage in sports that almost exclusively reflect the cultural preferences of the wealthier nations, they are invariably forced to turn to those wealthier nations for assistance that ranges from the provision of technical expertise to the sale of specialised equipment. The result is that the poorer nations become even more dependent on wealthier nations and wealthier nations are able to tighten their hold on the cultural aspects of life in the global community.

The major corporations in the wealthier states also turn to sport to market their products to people in the poorer nations of the world.[28] Adidas, Siemens and British Airways do not sponsor foreign sports teams or events in other countries for altruistic purposes. They provide these sponsorships because they want people in those countries to purchase their products. By associating themselves with sports in those countries, they attract the attention of consumers in those countries and open up markets for their products. Sports clubs and federations in poorer countries have little control over or participation in the management of the major corporations that are, because of the importance of their sponsorships, exercising more and more control over the future shape and direction of sport. As a result, the sponsorships are also means to transmit capitalist values and consumerism to countries and communities who are powerless to resist.[29]

The manufacturers of sports equipment also use their perceived association with sports in poorer countries as a means to move their factories to those poorer countries, where unemployment is rife and labour costs are minimal, with the result that the equipment required by sports people in the wealthier countries can be produced at such low cost that everybody who participates can afford state-of -the-art equipment. In the poorer countries, on the other hand, the equipment remains expensive and only elite athletes have access to superior equipment. It has been reported, for instance, that the official footballs sanctioned by FIFA, are hand-sewn in third-world countries by child labourers who earn below poverty level wages; athletic shoes that sell for approximately $100.00 are produced in third-world countries by workers who earn far less than $1.00 per hour[30] and work for more than ten hours per day, six days per week to earn an income of $50.00 per month.[31] Working conditions are often inhumane and all kinds of human rights violations and abuses take place. Occupational health and safety measures, which would impact on the overall profitability of corporations, are often ignored in countries where regulation is absent, enforcement is lax or bribery and corruption is rife. In a similar way, pollution and other environmental issues are swept under the carpet.[32]

19 Black, Crabbe and Solomos *The Changing Face of Football: Racism, Identity and Multiculture in the English Game* (2001) 271.
20 Coackley (1997) 404; Magee and Sugden 'The World at their Feet: Professional Football and International Labour Migration' 2002 *Journal of Sport & Social Issues* 426.
21 In Coackley and Dunning (2000) 215.
22 Houlihan in Coackley and Dunning (2000) 215.
23 Coackley (1997) 409; Sage in Coackley and Dunning (2000) 264.
24 Sage in Coackley and Dunning (2000) 264.
25 Coackley (1997) 405.
26 Coackley (1997) 405.
27 Houlihan in Coackley and Dunning (2000) 217.
28 Coackley (1997) 416.
29 Houlihan in Coackley and Dunning (2000) 220 - 221.
30 Coackley (1997) 425.
31 Sage 'Political Economy and Sport' in Coackley and Dunning (2000) 272.
32 Sage in Coackley and Dunning (2000) 271.

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

> [s]ports organizations, in administering international sports activities, develop the bases for ongoing communication and cooperation. In this work, [they] travel and communicate across national boundaries ... further the ideals of freedom ... [and] also develop leadership, which is needed especially by the developing nations as they struggle to reduce the gap between the 'have' and 'have not' peoples of the world.[33]

The problem is that talented sports people are frequently lured by the riches offered in wealthier nations. As a result, developing countries are plundered of the much needed leadership and the gap between the 'have' and 'have not' peoples of the world is increased, rather than decreased.

European sport and football in particular, has become one of the great employers of migrant labour as athletes from across the globe are lured 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 English players made the starting line-ups in the match between Arsenal and Manchester United.[34] 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.[35] It is often athletes from poorer regions that are attracted by the promises of wealth to be found in Europe.[36] 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 particular athlete. In many instances, talented players from developing countries, who are often not well-educated and almost always ignorant 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 skills would earn.[37]

The migration of players certainly takes place without any consideration 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 1990 World Cup played professional football outside their own country.[38] 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.[39] 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.[40] 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 loose 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 contribute 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 migration 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.[41] 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.[42]

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.[43] While the acquisition of players with similar 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.[44]

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. Service in national teams deprives clubs of the players' services and always carries 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 necessarily 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 academies. 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.[45]

33 Coackley (1997) 413.
34 Magee and Sugden 2002 *Journal of Sport & Social Issues* 421.
35 Black, Crabbe and Solomos (2001) 271; Darby (2002) 193 n 25.
36 Magee and Sugden 2002 *Journal of Sport & Social Issues* 427.
37 Darby (2002) 215 n 32.
38 Houlihan in Coackley and Dunning (2000) 221.
39 Darby (2002) 157.
40 Since 1985, African countries have taken two silver medals and two bronze medals at the under 20 event, as well as 4 gold medals, three silver medals and a bronze medal at the under 17 event, while Nigeria and Cameroon have won the Olympic gold medals in 1996 and 2000 respectively.
41 Darby (2002) 51.
42 Coackley (1997) 421.
43 Darby (2002) 158.
44 Darby (2002) 176 *et seq*.
45 To mention a few: FIFA (football) has its headquarters in Zurich; The IAAF (track and field athletics) headquarters are in Monaco; ISU (ice skating), FILA (wrestling) and FINA (swimming) have their headquarters in Lausanne; The FIG (gymnastics) headquarters are in Moutier, Switzerland; the IRB (rugby union) headquarters are in Dublin; The ICC (cricket) is based in London; IWF (weight lifting) has its headquarters in Budapest; IBU (badminton) is based in Gloucestershire.

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 27 Olympic Games that have thus far been held, only nine have been held outside of Europe, with the next Games in 2004 to be held 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 1983, presented eight World Championship meetings with a ninth scheduled for August 2003. Of these nine meetings, only two have not been held in Europe.[46] Of the 17 races on the annual Formula 1 motor racing calender, one takes place in Australia, one in South America, two in North America, two in Asia and 11 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[47], 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[48]. 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:

> '[W]ithout 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.'[49]

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.[50] 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 *status quo* remains.

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?'[51]

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46 http://www.gbrathletics.com/ic/wc.htm accessed on 28 March 2003.
47 Such as racing drivers Jody Schekter (1979 Formula 1 World Champion) and Iain Schekter, designer John Barnard and engineer Rory Byrne, to name a few.
48 Darby (2002) 192 n 3.
49 Darby (2002) 131.
50 Darby (2002) 51. Brazil (4), Argentina (2) and Uruguay account for seven World Cup victories, while Germany (2), Italy (2), England and France account for six victories.
51 Beck (1999) 272.

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 11 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 $1 million agreement signed with 'OK!' 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. Indeed, the judge refused to create a new law of privacy in the UK. Judges traditionally - at least so the theory goes - do not create law but interpret and apply existing law. It is up to Parliament to change the law. The Judge in the 'Hello!' case ducked the issue of invasion of privacy.

The decision will be a blow to media lawyers anxious to have a law of privacy, which will protect their clients from intrusion and unauthorised exposure in newspapers and magazines. The decision has important implications for sports personalities and celebrities and their legal advisers too. Take David Beckham, for example: last year, he reputedly earned over $15 million, but only $1.5 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 1 & 2 and 2 & 3 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', generally speaking, are easier to register. 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 FI 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. Litigation 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 1 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 Counterfeiters

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. Thus, there is a lot to play for!

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 holders.

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 follow from registration of that mark at the Trade Marks Registry.

A sports logo can also be legally protected by copyright as a 'pro-

tected work' - that is, an 'artistic work'. And, generally speaking, the rights arise without the need for any registration. However, it is advisable to give notice of a copyright claim by marking the goods and their packaging with the international copyright symbol, 'C' in a circle followed by the name of the copyright holder and the year. This copyright claim should also be followed by the words 'all rights reserved' to cover the sale of the copyright goods in countries that do not recognise the international copyright symbol under the Universal Copyright Convention.

So, counterfeiters can be stopped by suing in the Courts for trade mark or copyright infringement. Apart from damages - financial compensation for the infringement - injunctions can also be obtained from the Courts to stop the sale of the counterfeit goods. And even, in some cases, to destroy them.

In the case of 'pirated' goods, copyright holders can seize the offending goods under special powers granted to them by the UK Copyright, Designs and Patents Act 1988 (see section 107).

However, counterfeiting is not only a civil matter; it may also be a criminal offence.

Under section 92 of the UK Trade Marks Act 1994, fraudulent application or use of a trade mark constitutes a criminal offence, and the offender can face a fine and/or imprisonment, if the necessary criminal intent is proved. In other words, the application or use of the mark by the accused must be either with a view to a gain by himself, or with the intent to cause loss to another, and, in either case, must be without the consent of the trade mark owner.

Likewise, under section 107(1) of the 1988 Act, there are similar criminal provisions for copyright infringements where the infringer knows, or has reason to believe, that he is infringing.

Before resorting to legal proceedings, 'cease and desist letters' may be sent to infringers, and these often prove successful in practice. But watch out: to claim trade mark rights falsely and threaten legal action can result, under section 21 of the 1994 Act, in a counterclaim for a declaration that the threats are unjustified and also claims for damages and/or an injunction. So you need to be sure of your ground and have secure trade mark rights.

The position regarding the legal protection of trade marks and copyright is similar in the rest of Europe and other major sports markets, like the US and Australia.

Help to fight counterfeiters is also available in other ways. Copyright holders can enlist the aid of HM Customs and Excise to stop counterfeit goods entering the country. This right applies throughout the EU under EC Regulation No: 3295/94. Copyright holders can apply to the Customs Authorities of the country or countries concerned to intercept and suspend the importation of suspected counterfeit or 'pirated' goods. This is a very valuable tool for fighting counterfeiting on a large scale.

Apart from all these measures, licensors and licensees need to be vigilant and pro-active against counterfeiting. And, wherever possible, collaborate closely with one another, to nip any counterfeiting in the bud, or, at least, undertake a pre-agreed damage limitation exercise to prevent it spreading. This form of self-help should be expressly covered by appropriate provisions in the corresponding sports merchandising and licensing agreements. A typical clause of this kind runs as follows:

'The Licensee shall promptly bring to the attention of the Licensor any unauthorised representation or imitation, wrongful use or any other infringement of the Licensed Product(s) in the Territory or any threat to do any of those things which may come to its notice; and shall assist the Licensor in taking any and all steps which the Licensor may deem necessary to protect and defend its rights; but the Licensee shall not take any such action without the prior written consent of the Licensor.'

The following general clause is also useful and often used in addition to the above specific clause in sports merchandising and licensing agreements:

'The Licensee agrees to co-operate fully, in good faith and in a timely manner with the Licensor for the purpose of securing and/or preserving the intellectual property and any and all other rights of the Licensor in respect of and in relation to the Licensed Product(s) under and for the purpose of this Agreement.'

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

Ian Blackshaw

Pregnancy and Sport

Sport now accounts for more than 3% of world trade and 1% 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 39 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

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*'.[1] Such an obligation may apply even to the sphere of relations of individuals between themselves.[2] It indeed obligates the national court to take into account these principles when applying private law rights between private parties.[3]

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 if an area fails to come within the direct application of human rights law itself. This is especially true as individuals are at the core of sport.

To this end, human rights law and principles must include not only the exploitation of personality assets of professional sportsmen and women[4] 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 must also be considered under the ECHR.[5]

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[6] 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 unlikely 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.'[7]

The sports industry allegedly comprises 3% of global output. Clubs, federations and corporate sponsors are actively involved in the development of young players and must increasing show fiscal integrity and transparency within its Board and business operations. They engage individual sportsmen and women, interact with players' 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 increasingly becomes a consumer and 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.

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Julie King

1 *X and Y v. The Netherlands,*(1985) 8 EHRR 235, para. 23.
2 *X and Y v. The Netherlands,* para. 23.
3 See Jonathan Taylor, Stephen Boyd, David Beckers, *Image Rights*, Chapter 3 D3.59 The right to privacy, Butterworths 2002: referring to the case Douglas v Hello! Ltd [2001] 2 WLR 992, CA, which applies the Human Rights Act 1998 to UK law.
4 Included in this area are doping and anti-social behavioural issues and the use of morality clauses by sponsors. It may very well include terms in sponsorship agreements as regards the business ethics of corporate officials.
5 Article 8 in particular, but also Article 3, 6, 10 and Article 1 of Protocol 1 of the European Convention on Human Rights.
6 *Promoting a European framework for Corporate Social Responsibility*, Commission of the European Communities, COM (2001) 366 final, Brussels, 18.7.2001.
7 *Financial Times*, European Edition, 3 April 2003, Inside Track, p. 9.

Case Digest

Australia: Cost of Sports Insurance - Waverley Municipal Council v. Swain [2003] NSWCA 61 (3 April 2003)
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. Worsley (2000) Aust Torts Reports 81-569 and Woods v. Multi-Sport Holdings (2002) Aust Torts Reports 81-640. However, whether 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. Kasky, No. 02-575
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 Kasky, to obtain redress 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, Kasky 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 Sieghert Alber in Case C243/01
Internet gambling has become big business. Advocate General Alber's opinion supports the position that a bookmaker who is established in another member state and carries out his activity in accordance with the legislation of that state should also be able to carry out business in another member state, in this case Italy. The facts are that Mr Gambelli and over 100 other →

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 Asser Instituut. 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 the European Union. Such 'Foreign Players Regulations' should be designed by management and labour. They have the necessary qualities to fill the gap between sports federations and the European Commission, lawyer Roberto Branco Martins of the Asser Instituut this week claimed in a topical lecture.

On 8 May, the existing arrangement for foreign players which limited the number of non-EU players in EU clubs was called to a halt. On that day, the European Court in Luxembourg delivered its decision in the case concerning Maros Kolpak. Kolpak, a Slovak handball goalkeeper with TSV Östringen, successfully complained of being designated a non-EU athlete by the German handball federation. 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 until 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.

However, these dangers only really threaten Germany, Spain and France, but not the Netherlands, as in order to become eligible for a work permit here, non-EU players not only have to fulfil a quality requirement but also need to pass an income test which deters clubs from bringing mediocre players from outside the European Union to the Netherlands. Players of 18 and 19 years of age have to be paid 292,000 Euro in wages. Players of 20 or over even have to earn 420,000 Euro. Juan Schot of employers' organisation FBO feels that these rules should be relaxed. 'Clubs have learned their lesson by now. They are no longer all trying to get the new Romario or Ronaldo to come to the Netherlands. The income test should be critically reviewed. It is based on a percentage of the average income in professional football. But this also includes the salaries of the foreign players.'

Branco Martins further examined the conditions which professional athletes from non-EU countries have to fulfil 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 Kolpak 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.

The International Sports Law Journal

* **Report taken from *NRC Handelsblad* of 3 July 2003.**

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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 establishment and the freedom to provide services.

The Advocate General concluded that the legislation of the member state of origin of the organiser of the bets already provided a sufficient guarantee of the integrity of the organiser. If as is likely, the ECJ follows this opinion, the decision will be good news for internet gambling providers' ability to expand their services throughout the European Union.

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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, marketeers, event managers, sponsors, merchandisers, hospitality providers, sports advertising agencies, broadcasters, and legal advisers.

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

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Promoting the Social Dialogue in European Professional Football

Background

The European Federation of Professional Football Clubs (EFFC) was founded on 20 September 2002. The founding organisation is the Dutch *Federatie van Betaald Voetbal Organisaties* (FBO). FBO represents all Dutch professional football clubs regarding socio-economic issues and is, in fact, the employers' organisation in the Dutch professional football industry. FBO members 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 is a consultation mechanism set-up for employers and employees (both sides of the industry) at the central European level and at the level of the European industrial sectors. The Social Dialogue is laid down in articles 138 and 139 of the EC Treaty. 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 EFFC 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 transfer system officially came to an end.

At first, it seemed that this would result in a disaster for clubs and players. The clubs were seeing their players move to a new club at the end of their contracts without the payment of a transfer fee. The players would not be able to benefit anymore from the circulation of money in the football sector and the amount of their wages would decrease. Eventually, the abolition of the transfer system would lead to the end of the professional football sector as a whole, according to the opponents of Bosman. The disaster was prevented by concluding contracts for a definite time (fixed term contracts) for a very long term. Sometimes fixed term contracts had the duration of even ten years. The transfer of players would occur during the contract period. As a result, the player would never reach the end of his contract and, as a consequence of this, he would never, in fact, be 'transfer free'. The transfer fee had disappeared, but the payment of damages for mid-contract breach made its appearance in the professional football sector.

This system did not last for long. The European Commission argued that this 'alternative transfer system' was breaching European competition law. The EC went on to look for a solution to this problem. The solution was found after laborious negotiations with FIFA and UEFA. FIFA drafted new transfer regulations, which came into force in September 2001. The transfer regulations function as a framework for the international movement of professional football players from one club to another. Commissioners Reding (sport), Diamantopoulou (social issues) and Monti (competition) agreed to the new transfer system, but they added an observation: employment law issues need separate regulation. So, FIFA and UEFA were asked to introduce the Social Dialogue in international football. The reason is that the new transfer system is covered by European law, because the main object of its regulation are employment contracts. This has important consequences. In the International Labour Organization (ILO) employers and employees are equally represented. The regulation of international football has a different, i.e., pyramidal structure, with FIFA at the top as the main regulatory body. The FIFA regulations can be defined as 'association law' and need to respect national and European law, which are higher in the legal hierarchy.

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 fact that the use of fixed term contracts is customary in professional football in the EU. Moreover, FIFA regulations prescribe 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 to 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

legal tool is the Social Dialogue, as the Commissioners had suggested in their communications to FIFA and UEFA.

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 are even permissible 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 strived for in such agreements will be 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 instrument to solve and 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 induce member states to improve industrial relations in the professional football sector at a national level and promote the conclusion of CBA's in those member states where such is not yet the case. EFFC was founded, amongst others, in order to realise these objectives.

In the following, it will be made clear what the criteria are to enter into the Social Dialogue as a social partner organisation.

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 and recognised part of the structures of social partners in the member states, can negotiate agreements and are, as much as possible, representative for all 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 UNICE and CEEP are most closely involved in consultation and advice. The employees are represented by ETUC. These three 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.

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 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.

Objectives of EFFC

The general objective of EFFC is to look after the interests of professional football organisations in the European Union. EEFC 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 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. 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.

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Attn: Mr. Roberto Branco Martins

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 relationships between national associations and the confederations, as well as their officials 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 52 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 employers in the Social Dialogue. 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 the 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 1998. Professional football leagues, consisting of the clubs participating in the highest divisions of professional football in the member states of the European Union, and which are recognised by their national football association, can become members of the Association. The (founding) members of the Association are the premier leagues in the following countries: Austria; Belgium; Denmark; England; France; Germany; Greece; The Netherlands; Italy; Portugal; Scotland; and Spain.

The main objective of the Association of Leagues, is to promote cooperation; to foster friendly relations; and to create unity between the national leagues. The Association is the centre at which an exchange of relevant information is coordinated for the benefit of individual members. Additionally, the Association looks after the interests of its members. An important fact is that the Association closely cooperates with UEFA. The Association discusses new UEFA regulations and assists its members in the implementation of UEFA regulations in the football sector at the national level. As a consequence, the Association of Leagues has expressed views about the efficient regulation of the transfer of players amongst the leagues.

The Association of Leagues has a pan-European structure. For several reasons, the current organisational and legal structure of the Association does not make it possible to represent the clubs as employers in the Social Dialogue. The first reason is the fact that the leagues are members of the Association, not the clubs. And the leagues are not members of the Association as an employers' organisation or social partner. The Association's objectives are rather commercially motivated. Secondly, the Association only represents the highest divisions (premier leagues) in a member state. That means that the clubs that are relegated to the second division do not benefit anymore from the actions of the Association, or, at least, they are not the direct addressees of the efforts of the Association. Thirdly, national leagues do not only consist of clubs, but also represent the players. The Association looks mainly after the sound economic existence and the efficient management of the leagues as a whole. However, the Association also needs to defend the (collective) rights of the players when the overall interests of the national leagues is at stake. This could imply a conflict of interests in the context of the European Social Dialogue.

G-14

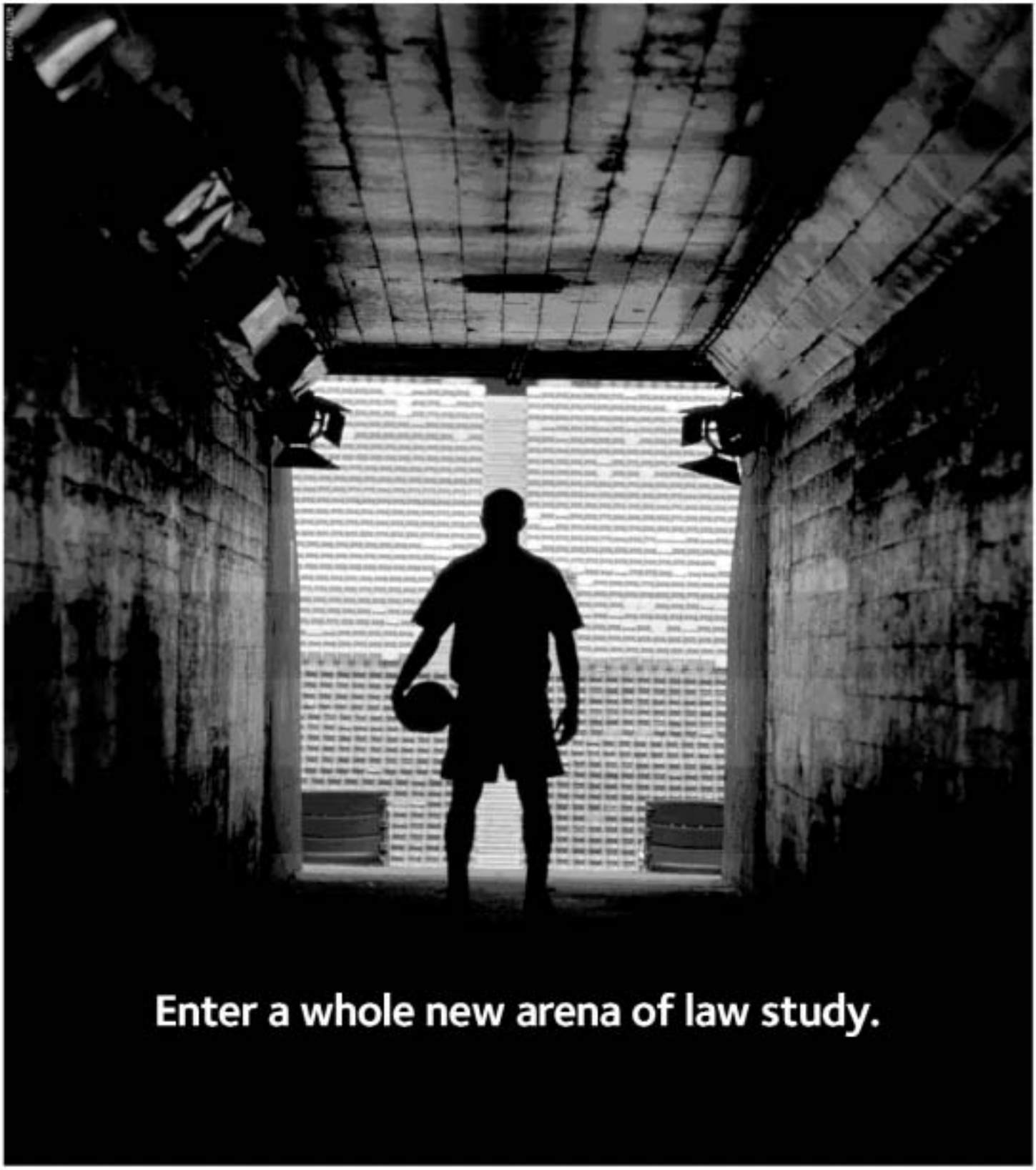
In legal terms, G-14 is a European Economic Interest Grouping (EEIG). The G-14 headquarters are in Brussels. The following clubs were involved in the foundation of the G-14: AFC Ajax; Borussia Dortmund; FC Bayern Munchen; FC Barcelona; FC Internazionale Milano; Juventus; Liverpool FC; Manchester United FC; AC Milan; Olympique de Marseille; Paris Saint-Germain; FC Porto; PSV; Real Madrid CF. At a later stage, four other clubs joined the G-14: Arsenal FC; Bayer 04 Leverkusen; Olympique Lyonnais; Valencia CF. The G-14 now has a total of 18 members. To become a member of the G-14, clubs have to meet certain requirements. In the first place, clubs have to participate in UEFA competitions. If they fail to qualify for these competitions in three consecutive years their membership can be suspended. The same goes for the clubs that have been relegated from the top division in their country. If they fail to win promotion the next year they can be suspended as a member. The most important requirement for the membership of the G-14 is the annual membership fee. The amount of this fee makes it only possible for elite clubs to become members.

The main purpose of the G-14 is co-operation. 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 has made several statements concerning 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 salary cap for the G-14 members. And the G-14 raised discussion about the fact that national associations should reimburse salary costs when a player of a G-14 club has to play for his national team. The G-14 can be characterised as a lobby organization, without political interests.

The G-14 cannot represent the clubs as employers because its sole duty is to defend the interests of its members in general (not in relation to the players). The G-14 cannot act objectively on socio-economic issues because the socio-economic topics of the G-14 clubs differ from the socio-economic topics as a whole for the sector.

Conclusion

From the survey presented above, it becomes clear that the present representative organisations in European professional football cannot act as an employers' organisation in the Social Dialogue. In order to introduce the Social Dialogue in the European professional football sector, it is necessary to create a European employers' organisation.



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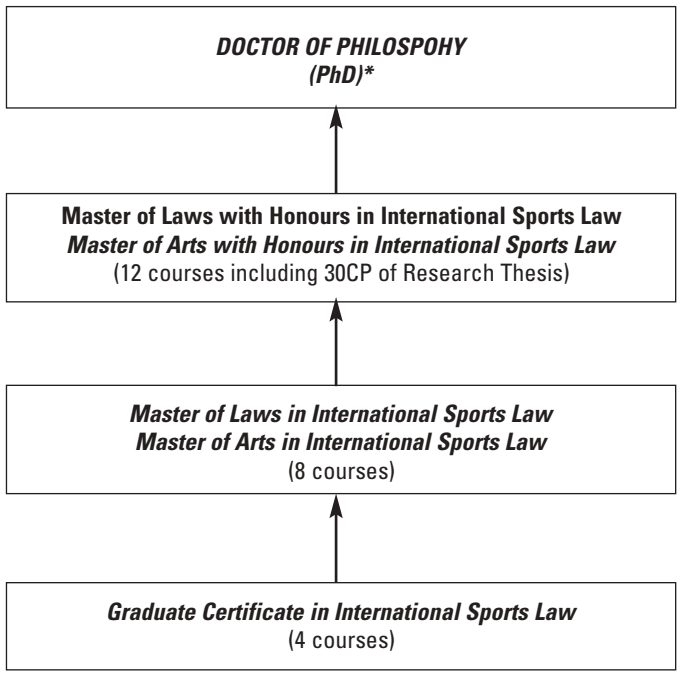
We understand that candidates are busy and already face the challenging demands of a career and 'having a life' outside the office. For that reason, the Certificate and Masters are offered in flexible delivery mode with a one week intensive teaching mode offered in each semester to fit in with a busy 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 recognized 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.



* 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 1992, the Griffith Law School has established itself as a leading provider of quality legal education and research in Australia at its Nathan and Gold Coast campuses.

The Griffith Law School has produced innovative courses and programs at undergraduate and postgraduate level. Its distinctive undergraduate law degrees integrate two disciplines and their acceptance in the workplace has been recognized by its graduates achieving a high success rate in gaining employment after graduation. The School also offers equally innovative course work and research higher degrees at Masters and Doctoral levels.

With an international reputation in teaching and research, and linkages with academics, practitioners and industry around the world, the Griffith Law 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.

An important and innovative linkage with the program is the involvement of the TMC Asser Institute, with whom the Griffith University Law School has close ties. The T.M.C. Asser Institute was founded in 1965 by the Dutch universities which offer courses in international law in order to promote education and research in the fields of law in which the Institute specializes. International Sports Law is one of the main areas of the T.M.C. Asser Institute's research programme and since 1 January 2002 it has been a Centre. The research is of an interdisciplinary as well as comparative character, covering all fields of law in which the Institute specializes, i.e., private international law, public international law including the law of international organisations, international commercial arbitration and the law of the European Union.

Griffith University
Griffith University is one of Australia's fastest growing universities and the eight largest university in Australia with almost 24,000 students. The University has six campuses - Nathan, Mt Gravatt, Logan, and the Gold Coast, as well as Australia's largest music school, the Queensland Conservatorium, and the nation's oldest are institution, the Queensland College of Art.

Griffith has forged significant industry and academic partnerships around the globe and figures prominently on the international research stage across a diverse range of areas including law and sport management.

Application and Admission
Applications for admission to the Master of International Sports Law are invited from candidates who have successfully completed a law degree or a recognized and relevant bachelor degree; or who have completed at least five years full-time work experience in an upper management capacity within the sport or recreation industry. Applicants who have not completed an appropriate bachelor degree will be considered on an individual basis by the Program Convenor.

Applicants who have completed their bachelor degree in a language other than English or who are applying from a country with a non-English speaking background, must provide evidence of their English language proficiency.

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

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

The International Sports Law Journal

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

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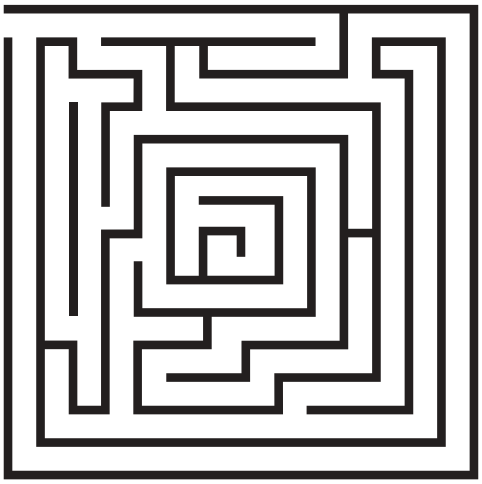

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