The International Sports Law Journal

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OPINION

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EDITORIAL

In The Hague, on 28 May 2010, the ninth Asser International Sports Law Lecture dealt with the European Court of Justice's verdict in the Bernard case on training compensation in professional football. Under the chairmanship of Marjan Olfers, Free University of Amsterdam, the speakers were: Frans de Weger, ForzaFides, Amsterdam, Prof. Dr Stefaan van den Bogaert, University of Leiden, Prof. Dr Frank Hendrickx, University of Leuven, and Dr Steven Jellinghaus, University of Tilburg.

On 1 August 2010, Dr Robert Siekmann, General Editor of ISLJ, was appointed Professor of International and European Sports Law at the Erasmus University Rotterdam, the Netherlands. This Special Chair was established by a Foundation to which representatives belong of *inter alia* the Netherlands Olympic Committee, the municipalities of The Hague and Rotterdam and the Dutch Province of South Holland.

In Genval, Belgium, on 17 September 2010, at an informal meeting Dr Robert Siekmann (project manager) and Dr Janwillem Soek of the ASSER International Sports Law Centre presented the final report on the study regarding "The Implementation of the WADA Code in the European Union" to the sports directors of the 27 EU Member States. The report was commissioned by the Flemish Minister responsible for Sport in view of the Belgian Presidency of the European Union during the second half of 2010.

From 12 to 15 September 2010, Dr Amaresh Kumar, Secretary General of the All India Council of Physical Education in New Delhi, visited the T.M.C. Asser Institute. On this occasion, a Memorandum of Understanding on Cooperation between the ASSER International Sports Law Centre and the All India Council and Sports Law India was signed. Dr Kumar became a Honorary Fellow of the ASSER International Sports Law Centre.

In Jakarta, on 22 September 2010, a Conference on "The Concept of Lex Sportiva Revisited" took place which was organized by Pelita Harapan University (UPH) in cooperation with the Indonesia Lex Sportiva Institute and with the support of the Office of the Minister of Youth and Sport of the Republic of Indonesia, the National Olympic Committee of Indonesia, the T.M.C. Asser Institute, and the Indonesian League of professional football. At the Conference introductions were held by the Rector of UPH, Prof. Dr Jonathan L. Parapak, the Dean of the Faculty of Law of UPH, Prof. Dr Bintan R. Saragih, the Minister of Sport, Dr Andi Alfian Mallarangeng, the Chairman of the Indonesian Olympic Committee, Dr h.c. Rita Subowo, and the President of the National Olympic Committee of Slovenia, Dr Janez Kocijancic, who, as one of the co-founders, spoke on behalf of the newly established *Hague International Sports Law Academy* (HISLA). Under the chairmanship of Mr Hinca IP Pandjaitan, Director of the Indonesia Lex Sportiva Institute, the speakers at this Conference on behalf of HISLA were: Prof. Dr Klaus Vieweg, University of Erlangen-Nuremberg, Germany, Prof.Dr Franck Latty, University of Auvergne, France, who is the author of the handbook "La *lex sportiva* - Recherche sur le droit transnational" (2007), Prof. Dr James Nafziger, Willamette University, Salem, Oregon, United States of America, Alexandre Mestre, PLMJ Law Firm, Lisbon, Portugal, who is the author of the monograph "The Law of the Olympic Games" (2009), and Robert Siekmann. The present issue of ISLJ includes relevant papers on the subject by Jim Nafziger, Stephen Weatherill, University of Oxford, Prof. Dr Ken Foster, University of Westminster, United Kingdom, and Andreas Wax, Thummel, Schütze and Partners Law Firm, Stuttgart, Germany. As Weatherill, Foster and Wax were unable to attend the Conference, their papers were presented by their colleagues in Jakarta. At the conclusion of the Conference the "Jakarta Declaration on Lex Sportiva" was adopted and signed by the HISLA members present.

In Brussels, on 18 November 2010, Prof. Dr Richard Parrish and Samuli Miettinen of Edge Hill University and Dr Borja Garcia Garcia of Loughborough University, both in the United Kingdom, presented the final report on the Study regarding "The Lisbon Treaty and EU Sports Policy" at a hearing of the European Parliament's Commission for Culture and Education. The implementation of the Study, which consists of a legal assessment of the potential of Article 165 TFEU for the development of an EU Sports Policy, and the presentation of the results of a Europe-wide stakeholders consultation, were coordinated by Robert Siekmann on behalf of the T.M.C. Asser Institute.

In The Hague, on 6 October 2010, the ninth Asser/Clingendael International Sports Lecture dealt with "The Lisbon Treaty and EU Sports Policy: New Possiblities for EU Action?". Under the chairmanship of Robert Siekmann, presentations on the subject were given by Prof. Dr Stephen Weatherill, Richard Parrish, Borja Garcia Garcia, and Mr Toine Manders, Member of the European Parliament. The following representatives of stakeholders' organizations then gave their opinion on what the EU's priorities for sport should be: Jacob Schouenborg (International Sport and Culture Association (ISCA Europe)), Anna-Mari Hämäläinen (European Non-Governmental Sports Organization (ENGSO)/EOC EU Office), Walter Palmer (European Elite Athletes Association), Dave Boyle (Supporters Direct Europe), René Haantjes (European Athlete as Student Network (EAS)), Julien Zylberstein (UEFA), and David Frommer (European Club Association (ECA)).

Finally, we extend a heartfelt welcome to Amaresh Kumar, Frank Latty, Alexandre Mestre and Prof. Marios Papaloukas, Athens and Peloponnese Universities, Greece, as new members of ISLJ's Advisory Board.

The Editors

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The Principle of Fairness in the Lex Sportiva of CAS Awards and Beyond*

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

ARTICLES

1. *Lex Sportiva* and the Court of Arbitration for Sport

The concept of a *lex sportiva* refers to a limited body of emerging law that is roughly analogous to the *lex mercatoria* or law merchant in international commercial practice and commercial arbitration. These two bodies of law have numerous similarities, particularly in their origins of general practice and their development by arbitral tribunals. They also have numerous differences, particularly as the *lex sportiva* has matured.[1]

Although the scope of the *lex sportiva* has been variously defined, sometimes expansively to embrace most if not all of international sports law.[2] Ordinarily, however, the term is limited to its original definition as a body of rules and principles derived from awards made by the Court of Arbitration for Sport (CAS), primarily, and other formal pronouncements of general practice.

CAS, which is headquartered in Lausanne, Switzerland with branches in New York and Sydney, celebrated its twenty-fifth anniversary in 2009, having arbitrated well over 700 cases. Its purpose is to provide a specialized body of experts to decide a broad range of sports-related disputes. By contrast to litigation, the advantages of CAS, like other arbitral tribunals, include confidentiality, expertise, flexibility, and simplicity of procedures, speed, reduced costs, and international effectiveness of an award by CAS. Its arbitral panels, however, do not resolve technical questions involving the rules of the game, scheduling of competition, or dimensions of the playing field, for example. Instead, they generally hear three kinds of disputes that transcend field-of-play and other technical questions: disciplinary measures against athletes, other issues involving the eligibility of athletes, and commercial issues.

Either individual athletes or sports organizations can bring disputes to CAS for arbitration. In disputes between athletes and their sports organizations, the interests of the athletes receive priority. On the issue of an athlete's strict liability for doping, for example, the interests of the athlete take precedence over those of an IF if questions of fact or legal interpretation arise. More generally, CAS will always have jurisdiction to overrule IF decisions and rules in order to protect the due process of athletes, even if the IF rules declare those rules and decisions under them to be nonappealable.[3]

CAS has three divisions: ordinary arbitration, involving such issues as media rights and contracts between athletes and their agents or sponsors; appeals arbitration to review decisions by sports bodies, often addressing issues that involve sanctions against athletes and typically based on choice-of-forum clauses mandated by sports bodies between them and athletes; and ad-hoc arbitration during major sports competition such as the Olympic Games, British Commonwealth Games, and World Cups. Alternatively, the parties may also submit their dispute to mediation organized by CAS or authorize CAS to decide the dispute *ex aequo et bono*, an approach that would almost inevitably engage considerations of fairness. CAS also issues advisory opinions concerning any sports-related legal questions asked by designated organizations such as the International Olympic Committee and international sports federations.

According to the CAS Rules of Procedure, the parties to a dispute are generally at liberty to agree on the governing law; in the absence of such choice, Swiss law applies. Switzerland's Federal Act on Private International Law governs CAS arbitrations to the extent that CAS Rules do not otherwise prescribe a particular procedural rule. CAS awards may be appealed to the Swiss Federal Tribunal, but the majority of appeals have failed because of the tribunal's normal deference to CAS. With a few exceptions, awards generally are not appealeable to courts of law. This is so as a matter of Swiss law regardless of the actual location of a CAS hearing and award insofar as the legal seat of CAS proceedings is always deemed to be in Lausanne, Switzerland.

CAS awards are final and binding on the parties and are enforceable internationally under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to the extent that it binds a state where enforcement is sought (as it usually does among nearly 150 parties to the agreement).[4] Although the awards do not constitute precedent in the sense of the common law, they provide firm guidance in future cases[5] and are gradually forming the body of law that we call *lex sportiva*.

The emerging *lex sportiva* does not address all issues involving sports-related arbitration, however. Besides issues involving field-of-

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* Presented at the International Conference on Lex Sportiva, Universitas Pelita Harapan (UPH), Tangerang, Indonesia, 22 September 2010.

** Thomas B. Stoel Professor of Law and Director of International Programs, Willamette University College of Law. The author is Honorary President of the International Association of Sports Law.

1 *See generally* Boris Kolev, *Lex Sportiva and Lex Mercatoria*, Int'l Sports L.J. 2008/1-2, at 57 (noting similarities and differences between the ancient tradition and authority of the *lex mercatoria* and the recent development of a *lex sportiva*, in their respective origins and developments); Ulrich Haas, *Die Vereinbarung von "Rechtsregeln" in Berufungs-Schiedsverfahren vor dem Court of Arbitration for Sport*, Causa Sport, 3/2007, at 271, 272; Luc Silance, Les Sports et le Droit 86, 87 (1998) (noting a difference in the reception of the term between Latin-based (Romance) languages and other languages and considering the term in the context of a transnational juridical order).

2 *See, e.g.*, Franck Latty, La Lex Sportiva: Recherche sur Le Droit Transnational (2007) (drawing upon Judge Philip Jessup's concept of transnational law that blends private and public processes and rules).

3 *See, e.g.*, Hellenic Olympic Comm. and Kaklamanakis v. Int'l Sailing Fed'n, CAS 2004/ Athens ad hoc. Div./009 (Aug. 24, 2004).

4 *Done* June 10, 1958, 330 U.N.T.S. 3.

5 *See* Int'l Ass'n of Athletics Fed'n v. U.S.A. Track & Field and Jerome Young, CAS 2004/A/628 (June 28, 2004) (making it clear that although CAS awards do not form a *stare decisis*, CAS will try to come to the same conclusion on matters of law as previous panels).

play decisions, rules of the game, or other technical questions that are not susceptible to formal arbitration under international sports law, such issues as the arbitrability of a dispute, the validity of an arbitration agreement, and judicial relief from arbitral awards do not normally fall within the *lex sportiva*. Instead, these issues are subject to the applicable rules of a particular arbitral tribunal, such as the *lex arbitrii* of Swiss law in the instance of CAS. Also, arbitral pronouncements on the civil rights of athletes or on labor, anti-trust (competition), and other regulatory law generally fall outside the scope of the *lex sportiva*, as do any awards that are deemed to violate mandatory domestic law or public policy (*ordre public*).

In the end, the important point is that CAS awards are indeed creating "a unique body of law known as *lex sportiva*."[6] Although much of the general practice is still *lex ferenda* - that is, law still in the process of formation and acceptance - *lex sportiva* rules are evolving steadily, as is the larger process of international sports law itself.[7]

2. The Principle of Fairness

A core principle, perhaps *the* core principle, to inform the *lex sportiva* and the larger body of international sports law is *fairness*. This commentary considers a broad range of sports-related contexts in which legal issues of fairness arise. The many examples are by no means definitive. They are intended only to stimulate further reflection about the role of fairness in guiding the decisions of CAS and other tribunals and in more broadly addressing fundamental issues of international sports law. Let us begin with two negative examples, that is, examples of dispute resolution that in one case rejected and in the other case ignored the principle of fairness in sports activity.

2.1. The *Mercury Bay* Case

Twenty years ago, the most famous litigation in the history of the sport of sailing was tacking in and out of United States courts. *Mercury Bay Boating Club v. San Diego Yacht Club*[8] concerned an interpretation of the Deed of Gift that established the America's Cup in 1851. As later amended in 1887, it has served as the foundation for sailing's premier competition, which, in the words of Deed of Gift, is to be a "friendly competition between foreign countries." The winning yacht club becomes the trustee of the Deed and is thereby responsible for planning and conducting the next competition. The New York Yacht Club, having won every competition since the first race in 1851, became a sort of everlasting trustee until 1983, when the Royal Perth Yacht Club of Australia won the Cup. Since then, Australian, New Zealand, American, and Swiss clubs have served as trustees of this strangely established and organized competition.[9] The competition normally takes place only every few years, based on the initiation of a challenge under the Deed of Gift. In the 2010 competition, the Golden Gate Yacht Club of San Francisco won the Cup against a Swiss-based club that had been the trustee.[10] The victorious Golden Gate Yacht Club will therefore stage the next competition.

As of 1988, the load water-line lengths of the competing boats and other terms of the competition were defined by customary practices and mutual consent provisions. In that year, however, such stability of expectations and cooperation collapsed after the Mercury Bay Boating Club of New Zealand challenged the San Diego Yacht Club, which was then the trustee of the Cup. Mercury Bay announced that it would compete with a boat that was nearly three times as long as the customary length. The New Zealand gambit virtually invited a radical response by the San Diego Yacht Club, which obliged by announcing that it would compete with a multi-hulled catamaran. Mercury Bay then brought a civil action in a New York court against the San Diego Yacht Club, claiming that its selection of a catamaran for the race did not comply with the Deed of Gift. The trial and appellate courts disagreed, ruling that the Deed of Gift did not preclude the San Diego Yacht Club from entering a catamaran and that the club had satisfied its fiduciary responsibilities as trustee. The court rejected the admission of extrinsic evidence, ruling strictly within the four corners of the Deed of Gift.

It is noteworthy that the courts refused to consider the fairness of the strange race. Instead, the appellate court held that

> [t]he question of whether particular conduct is "sporting" or "fair" in the context of a particular sporting event . . . is wholly distinct from the question of whether it is legal. . . . Questions of sportsmanship and fairness with respect to sporting contexts depend largely upon the rules of the particular sport and the experience of those knowledgeable in that sport; they are not questions suitable for judicial resolution.[11]

A strong dissenting opinion[12] argued, however, that issues of fairness are fundamental to a proper interpretation of the Deed, particularly its requirement of "friendly competition between countries." This view echoed the words of a dissenting opinion in the trial court that "[t]he 1988 America's Cup races were manifestly unfair in every sense. True sportsmanship and the integrity of this great sport demands far more."[13] After all, the original settler of the trust had emphasized that "the governing principle of America's Cup competition is fairness."

Surely, the dissenting opinion is correct, not only on the facts of the *Mercury Bay* case itself, but more generally. If we expect fairness from athletes and officials on the playing field, we should likewise expect that the principle would play a central role in sports-related litigation. It is surprising, however, how limited the principle seems to be in guiding the decisions of courts and other decision-makers in sports-related disputes.

2.2. The Example of the Chinese Gymnasts

Another example of a failure to give formal effect to the core principle of fairness occurred in a controversy concerning the actual ages of Chinese women gymnasts who won medals at the 2008 Games in Beijing.[14] They were widely suspected of being underage and therefore ineligible to compete in the Games. Although the International Federation of Gymnasts (FIG) and the IOC, after investigation, retroactively confirmed their eligibility, it is noteworthy that FIG extended its investigation to earlier Olympic competition. As a result, the FIG stripped a Chinese gymnast of her medal, concluding that she was only 14 years old when she received a medal during the 2000 Games, contrary to the certification of her eligibility by the Chinese.[15] It is also noteworthy that at no time in the process of review was the standard of fairness explicitly invoked even though it is embedded in China's own sports law. Article 34 of that law speaks of "fair competition" and "sports morality," forbidding organizers of sports competition from "resorting to deception or engaging in improper practice for selfish ends." Article 49, in the interest of fair competition, provides that "[v]iolations of sports etiquette and rules in athletic contests, such as fraud and deception, shall be punished by sports associations in accordance with their respective rules."[16] Even though China's Sports Law was not in itself capable of governing the outcome of the

6 *2009 Annual Survey: Recent Developments in Sports Law*, 20 Marq. Sports L. Rev. 497, 541 (2010). For a retrospective on CAS by a leading expert, see Richard H. McLaren, *Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror*, 20 Marq. Sports L. Rev. 305 (2010); *see also* Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 Val. U. L. Rev. 379 (2001).

7 This overview of CAS and the *lex sportiva* draws from more extensive discussion in James A.R. Nafziger, International Sports Law 40-43, 48-61 (2d ed. 2004). The definitive work on CAS is The Court of Arbitration for Sport 1984-2004 (Ian Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds. 2006).

8 557 N.E.2d 87 (1990).

9 On the history and legal analysis of the America's Cup, see James A.R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 Am. J. Int'l L. 489, 510 (1992).

10 N.Y. Times, Feb. 25, 2010, at D10 (reports on the victory of the high-tech BMW Oracle trimaran of the Golden Gate Yacht Club over Alinghi of the Societé Nautique de Genève).

11 557 N.E.2d at 92.

12 557 N.E.2d at 102 (Hancock, J., dissenting).

13 545 N.Y.S.2d 693, 710 (Kassal, J., dissenting).

14 *See* Sports Illustrated, Oct. 13, 2008, at 20; Juliet Macur, *I.O.C. Is Seeking Proof of Chinese Gymnasts' Ages*, N.Y. Times, Aug. 23, 2008, at B13; George Vecsey, *A Hint of Doubt in Every Shiny Medal*, N.Y. Times, Aug. 23, 2008, at B11; *Gymnast Only 13, Xinhua Said in '07*, Int'l Herald Trib., Aug. 16-17, 2008, at 27.

15 Juliet Macur, *Medal of Underage Chinese Gymnast Revoked*, N.Y. Times, Feb. 27, 2010, at Sports.

16 For an English translation of this legislation, which is subject to revision or replacement, see James A.R. Nafziger & Li Wei, *China's Sports Law*, 46 Am. J. Comp. L. 453, 474 (1998).

dispute, its provision for fair competition and related ethical prescriptions clearly obligated Chinese authorities to produce credible age documentation.

2.3. The Definition of Fairness

But what exactly is "fairness"? We all agree that "fair play" in competition requires athletes, coaches, and referees to be in full compliance with the rules of the game on the playing field. Beyond that, however, definitions of the principle as applied to sports have been disappointing. For example, in 2001 the federal, provincial and territorial sports ministers of Canada issued a lengthy and elaborate declaration entitled "Expectations for Fairness in Sport," but it is essentially meaningless because of its failure to come to grips with the term "fairness."[17]

In attempting to develop a meaningful principle of fairness as a core principle of the *lex sportive* and international sports law as a whole, we can generally rely on standard definitions. According to a leading legal dictionary, "fair" has "the qualities of impartiality and honesty; free from prejudice, favoritism, and self-interest. Just; equitable; even-handed; equal, as between conflicting interests."[18] We should add two additional elements: acting in good faith and what we can call "coherence," embracing the values of consistency and uniformity.

For further guidance, we can turn to public international law. A leading commentary on fairness in public international law emphasizes the substantive aspect of distributive justice and the procedural aspect of right process.[19] This distinction between substantive and procedural fairness is important. Turning first to procedural fairness, as a matter of due process or natural justice, we can identify two rules: the rule against bias and the right to a fair hearing. In turn, the right to a fair hearing can be seen to involve seven requirements: prior notice of a decision, consultation and written representation, adequate notice of applicable sanctions, an oral hearing, a right to call and cross-examine witnesses, an opportunity for legal representation, and a reasoned decision.[20]

A definition of substantive fairness, in the sense of distributive justice, is more elusive. Of course, in some statutory contexts, such as that of labor and employment law governing claims of unfair dismissal, the principle of fairness is well elaborated in its application to sports.[21] But otherwise the meaning of fairness is somewhat less clear, varying as it does according to the issue. Moreover, many issues of fairness cannot be pigeon-holed as either "procedural" or "substantive," particularly those involving organizational and institutional structures. Often issues are both procedural and substantive, such as in the resolution of disputes arising out of claims of discrimination. In any event, it will suffice for present purposes simply to reiterate the qualities of impartiality, equity, good faith, and coherence in the sense of consistency and uniformity.

2.4. Fairness in Three Contexts

Despite the obvious indeterminacy of the standard definition of fairness, it is worthwhile to consider its applicability in three contexts of international sports law: first, organizational and institutional structures; second, the eligibility of athletes and the conduct of competition; and third, dispute resolution. These three contexts roughly correspond, respectively, to the time framework before competition, during competition, and after competition.

Sometimes a determination of the appropriate context for applying the principle of fairness will in itself be significant. For example, the Lisbon Treaty of 2009[22] specifies the role of the European Union (EU) in sports for the first time in an EU treaty. Article 165 requires the EU to "contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function ... by promoting *fairness* and openness in sporting competitions"[23] and in other ways. It is unclear, however, whether this explicit mandate of fairness applies only to the field of play - that is, to actual competition, as a literal reading of the phrase would suggest. If so, then the EU mandate of fairness would largely lie beyond the competence of courts except to review issues involving governmental enforcement of the mandate. Or does the mandate apply more broadly to matters beyond field of play that impinge on sports competition but do not occur there - for example, to the organizational structure of the sports industry in ensuring a fair distribution of revenue, financial solidarity and stability, an acceptable nationality profile of clubs, and a general and competitive balance among sports clubs?[24] This is a likely but not obvious interpretation of Article 165. In any event, if the European Court of Justice and other EU authority expect to apply Article 165 properly, they will first need to explain its contextual scope.

3. Fairness in Organizational and Institution Structures

3.1. Match-Fixing: Corrupt Betting and Playing-Field Activity

Match-fixing is a serious problem. Corrupt sports betting and gambling activity by athletes, coaches, and other stakeholders in sports, particularly on the Internet, poses a serious threat to the fairness of sports competition and therefore to its very structure.[25] In addition, corrupt playing by athletes and the so-called "black whistles" of referees have been all too common recently in the lesser leagues of European football/soccer. Sumo wrestlers in Japan have also been the subject of match-fixing controversy. In response to the general problem of corruption in and around the sports arena, the International Olympic Committee (IOC), as a leading stakeholder in the supervision of international sports law, has expanded its initiatives to detect and penalize match-fixing. It has employed International Sports Monitoring, a Swiss corporation, to monitor and track betting rings around the world. This effort involves the cooperation of some 400-450 odds-makers, betting firms, and lotteries, and will also involve an educational program for athletes and officials.[26]

3.2. Selection of Sports and Sports Events

A second problem of organizational and institutional fairness is a lack of coherent, impartial criteria for adding or dropping Olympic sports and sports events other basic rules of a general process. According to the Olympic Charter, each Session, as the IOC's Supreme Organ constituted as a general meeting, may add a limited number of sports to a "core" list of sports in the Olympic program, so long as it does not

17 Federal-Provincial-Territorial Sports Ministers, Declaration: Expectations for Fairness in Sport, August 10, 2001 (Canada).

18 Black's Law Dictionary 633 (8th ed. 2004).

19 *See* Thomas M. Franck, Fairness in International Law and Institutions 7 (1995).

20 *See* Ian Blackshaw, *The Rules of Natural Justice: What Are They and Why Are They Important in Sports Disciplinary Cases?*, Int'l Sports L.J., 2009/1-2, at 134.

21 *See, e.g.*, Simon Gardiner et al., Sports Law 580 (2d ed. 2001).

22 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 17, 2007, 500 O.J. (C306) (emphasis added).

23 *Id.* art. 165.

24 *See* Stephen Weatherill, *Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?* [paper presented at the Tangerang Conference]; Union of European Football Associations (UEFA) Club Licensing and Financial Fair Play Regulations (2010) (mandating, for example, a "break-even requirement on financial fair play," according to which a club's relevant expenses must align with its "relevant income" within stipulated margins in order to accomplish several purposes such as to better ensure that clubs are in a position to settle their liabilities with players and that they generally benefit football on a basis of fairness to other football clubs). *See also* European Parliament, Directorate General for Internal Policies, Policy Dep't B: Structural and Cohesion Policies, Lisbon Treaty and EU Sports Policy Study, Sept. 6, 2010, at 37 (observing that Article 165 may discourage nationality discrimination in amateur sport).

25 *See* Declan Hill, The Fix: Soccer and Organized Crime (2008); *see also* Declan Hill, *The Usual Suspects: Fixers' Actions and FIFA's Inaction*, N.Y. Times, Dec. 6, 2009, at Sports 9; Rob Hughes, *Soccer Found Riddled with Corruption in Europe*, Int'l Herald Trib., Nov. 21-22, 2009, at 1; Hugh McIlvanney, *Video Refs Can Catch the Cheats*, Sunday Times, Nov. 22, 2009, at 18; Rory Smith, *Premier League Must Not Be Complacent on Match-Fixing, Expert Warns*, Sunday Telegraph, Nov. 22, 2009, at 10.

26 *See* John Leicester, *IOC Sets Up System to Watch for Illegal Betting*, Pittsburgh Post-Gazette, Oct. 4, 2009, at Sports; *IOC to Watch for Irregular Betting at Olympics Via a New Swiss-Based Company*, http://www.cbsnews.com/stories/2009/10/04/ap/sportline/main536.

exceed a maximum number of sports.[27] The Session may also drop sports from the core list. In 2007, the Olympic Charter was amended to eliminate more precise rules that were based on widespread practice and geographical representation on multiple continents. The unfortunate trend has therefore been to vest the IOC with even more discretion than it already enjoyed. The selection of sports and sports events for the Olympic program may seem rather trivial, but it is a critical process, given the centrality and influence of Olympic sports, its nearly universal allure, and its specific role in shaping the aspirations of young people.

In 2004, the IOC established the Olympic Programme Commission to conduct systematic evaluations of each Olympic program, including recommendations to the IOC Executive Board and ultimately to the IOC itself for the inclusion and exclusion of particular sports and events within particular sports.[28] Supposedly, the Commission applies seven criteria: the history and tradition of a particular sport, its universality, its popularity, its general image, its implications for the health of participating athletes, the development of the sport's international federation, and the costs of staging a competition in the sport. In each instance, these criteria are to be considered in assessing the value that a particular sport or event in a sport may add to global competition. In practice, however, the process has proven to be arbitrary and shaped by financial considerations. As it turns out, the value added is expressed more in commercial than sporting terms.

An example of how unsatisfactory the selection process remains is the preliminary decision of the IOC, based on the International Cycling Union's recommendation, to eliminate from future Games cycling's signature endurance race of individual pursuit. IOC President Jacques Rogge explained the decision in terms of a general shift from endurance events to sprint events. He hinted at the reason for the decision when he said it would be "more appealing."[29] Pat McQuaid, the president of the cycling union, put it more candidly when he explained that individual pursuit events do not come across well on television. "We have to think about what would be attractive to viewers."[30]

Of course, the latest additions to the Olympic roster of mixed doubles in tennis, women's boxing, seven-a-side rugby, and golf are suitable. For example, insofar as mixed-gender events such as in tennis have come of age, adding women's boxing is only fair. But the inclusion of such sports as baseball and softball has also been suitable since they were added as Olympic sports in 1994. And yet they will be eliminated after the 2012 Games in London, having been in the Olympic program for less than twenty years after failing to be included in the 2012 Games in London or to make a comeback in the 2016 Games scheduled for Rio de Janeiro. Extraneous issues and the extraordinarily broad discretion that the revised Olympic Charter vests in the IOC seem to have influenced this result. As to baseball, the issues included the failure of organized baseball to ensure the participation of its best players (a problem shared with other sports in the Olympic program) and the failure of Major League Baseball (MLB) effectively to combat doping before 2002. On the other hand, softball, a women's sport in the program, seemed to suffer from a mistaken guilt by association with baseball, a men's sport. Why single out these two sports for exclusion? After all, baseball, at least, is a national pastime in such countries as the Dominican Republic, Nicaragua, Panama, Venezuela, Cuba, Taiwan, and Japan, and is a dominant sport in Mexico, the United States, Canada, Micronesia, and elsewhere.

This is not to argue for or against particular sports and events, only for a coherent standard that will focus on the interests of the athletes themselves and, as much as possible, will resist the siren call of money and the media. One possible criterion for selection, among others, might be whether a particular competition such as the Olympics offers the pinnacle or signature championship in a particular sport. That certainly is not a criterion today. For example, both of the two most recent additions to the Olympic program, rugby and golf, have their own pinnacle or signature championship - the Opens in golf and the World Cup in rugby. Another criterion for selection might be the number of countries in which a particular sport is truly a national pastime or close to it. Above all, the selection of particular sports and events must be undertaken with greater integrity and transparency than exists today. We need to maintain the specificity or special nature of sport as distinct from pure entertainment.

3.3. The Allocation of Financial and Other Resources Among Different Sports

A recent study surveyed presidents and executive directors of national sports bodies concerning their perceptions about the allocation of resources among different sports.[31] Although the respondents identified a "need to be competitively successful" as the fairest principle for resource allocation, they perceived that "equity based on medals won" was the most likely principle in practice, to the effect that "the rich get richer" and sports such as team handball, archery, and curling suffer. The Chinese Olympic Committee achieved success in Beijing by targeting lower-visibility sports for long-range development, essentially on the principle of their comparative advantage and thus potential for competitive success. Whether that approach is taken or not, an over-allocation of resources on winning medals may run contrary to the broader vision of international sports law as a vehicle for promoting and encouraging physical fitness, public participation in sports, and athletic development.

The effort to allocate resources properly is seriously challenged and complicated, of course, by available funding for minor sports as well as pressures from the media and the public at large to emphasize the major or big-ticket sports. On the positive side, the experience at the domestic level indicates that as the major sports generate surplus revenue, integrated systems of sports such as among colleges and universities in the United States, have incentives to reallocate the surplus revenue for the development of minor sports.[32]

3.4. Leadership in Organizing Competition

Yet another fairness issue is the European dominance of the leadership of international sports federations, the IOC, the International Council of Arbitration for Sport, and CAS. Although some progress has been made in recent years to diversity leadership, plus ça change, plus cést la même chose.

Of the IOC's 106 members, 46 (43%) are European, and all but one of the IOC Presidents since 1894, in the runup to the first Olympic Games, have been European. In CAS, it is much the same: of 270 members, 125 (46%) are European. In the International Council of Arbitration for Sport, of 19 current members, 9 (47%) are European, and four of the five members (80%) of the Council's governing Board are European.[33] What is more, the leadership of the IFs is also European-dominated.[34]

This is not at all to suggest that the European-dominated leadership of international sports organizations is monolithic in its decision-making, let alone corrupt, but only to suggest that the leadership is unrepresentative, not always geographically impartial in decision-making, and very slow to diversify. Perhaps as importantly, it just looks bad: the governance of international sports still looks like and operates as a disproportionately European network of old boys and a few girls.

27 These guidelines are established under Olympic Charter Rule 46 (2007) and its Bylaws.

28 *See* International Olympic Committee, Evaluation Criteria for Sports and Disciplines, Aug. 11, 2004 (658 kb).

29 Sports News, Dec. 10, 2009.

30 Juliet Macur, *I.O.C. May Eliminate Phinney's Best Event*, N.Y. Times, Dec. 10, 2009, at Sports.

31 Stephen W. Dittmore et al., Examining Fairness Perceptions of Financial Allocation in U.S. Olympic Sport (2009).

32 *See, e.g.*, Joe Drape & Katie Thomas, *As Athletic Directors Compete, Big Money Flows to All Sports*, N.Y. Times, Sept. 3, 2010, at A1 (reporting on reallocation of revenue of major sports to a broad range of minor sports by college and university sports directors competing for greater reputation and status of their comprehensive sports programs within the National Collegiate Athletic Association (NCAA)).

33 *See* http://www.tas-cas.org/arbitrators-genlist; http://www.tas-cas.org/icas-members (last visited Sept. 8, 2010).

34 *See* International Olympic Committee, Olympic Movement Directory, *passim* (2010).

4. Fairness in Determinations of Eligibility and in the Conduct of Competition

4.1. Doping Issues

It is elementary that sports bodies must ensure both procedural and substantive fairness in determining the eligibility of athletes for competition. CAS has made that clear.[35]

Doping has been a particularly troublesome threat to eligibility. Sanctions for violations of anti-doping rules may result in both withdrawal of medals from athletes and suspensions of their eligibility. More broadly, it has been a persistent threat to an even playing field for all athletes and to overall fairness in sport. Trying to combat this threat is enormously challenging, however. One problem involves rapid advancements in pharmaceutical and genetic technology. Another concerns the due process and the rights of athletes.[36] Four of the most important current issues of fairness are, first, the "whereabouts" rule; second, the use of circumstantial evidence against athletes; third, the standard of strict liability; and fourth, a piggyback sanction that enables the IOC to suspend the eligibility of athletes beyond the limits of sanctions under the World Anti-Doping Agency (WADA) Code,[37] even though it is the core of anti-doping efforts within the Olympic Movement. Let us briefly look at each of these issues.

The whereabouts rule requires that world-class athletes generally inform their sports organizations of their whereabouts at all times throughout the year in order to facilitate out-of-competition testing for performance-enhancing drugs or masking agents. Multiple failures to do so when such testing has been scheduled can result in suspension from eligibility for competition. The privacy rights of athletes implicated by this rule are, of course, very serious and open to court challenge. Do we really want to establish a sort of police state in sports?[38]

Circumstantial evidence of doping, such as e-mail messaging and receipts for payments of drugs, in lieu of laboratory evidence of doping, is also controversial.[39] Is it fair? The answer may be "yes," in fairness to all athletes, by creating a level playing field. But we may need a more equitable and stable standard of proof than the current one of "comfortable satisfaction." As to the third issue - strict liability - the WADA Code establishes health, fairness, and equality as goals. On that basis, athletes, coaches, and other stakeholders in sports charged with violations of the Code must overcome an evidentiary presumption of strict liability regardless of the circumstances. The standard for burden of proof is "the comfortable satisfaction of the hearing body, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt."[40] Is that standard rigorous enough? Is its application sufficiently coherent? In other words, is it equitable?

In *Quigley v. Int'l Shooting Union*,[41] CAS articulated the rationale for the strict liability standard as follows:

> It is true that a strict liability test is likely in some sense to be unfair in an individual case, such as that of Quigley, where the athlete may have taken medication as the result of mislabeling or faulty advice for which he or she is not responsible - particularly in the circumstance of sudden illness in a foreign country. But it is also in some sense unfair for an athlete to get food poisoning on the eve of an important competition . . . . Just as the competition will not be postponed to await the athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair.
>
> Furthermore, 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. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations - particularly those run on modest budgets - in their fight against doping.

The last specific issue of fairness in anti-doping efforts involves the piggyback sanction. With reference to the Olympic Charter's Rules 19 (3.10) and 45, this ruling of the IOC Executive Board provides that

> Any person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.

Can this piggyback sanction be justified, given the understanding that the WADA Code provides a complete regime of doping control, including sanctions for violating the Code? Fortunately, a panel of the American Arbitration Association, in the case of the swimmer Jessica Hardy, noted the special precautions she took in order to avoid violating anti-doping rules as well as the absence of significant fault or negligence on her part, and therefore reduced a two-year suspension of her eligibility to one year. As to the piggyback rule, the panel ruled that its application to bar Hardy from Olympic competition would violate the fundamental principle of proportionality.[42] CAS dismissed WADA's appeal of this arbitral award, concluding that the one-year suspension was proportionate to the offense. As a matter of procedural fairness, CAS reiterated that when the measure of a sanction is at issue, it will overturn a disciplinary body of a sports federation in the exercise of its discretion only when the sanction is evidently and grossly proportionate to the offense.[43]

4.2. Discrimination

4.2.1. The Case of Oscar Pistorius

Three prominent issues of discrimination in the global sports arena are instructive. The first issue involves Oscar Pistorius, a South African runner born without fibulae, who has worn prosthetic legs since he was eleven months old. The International Amateur Athletic Federation (IAAF) ruled, however, that competitive running on his "cheetah" legs, which contain springs, violates IAAF rules. When Pistorius appealed this decision to CAS, the tribunal, after reviewing the results of scientific testing and analysis, concluded that he had no "overall net-advantage" or metabolic advantage over his competitors.[44]

But what is the test of fairness, given what was acknowledged to be a substantial measure of indeterminacy in the scientific analysis? On the one hand, the "cheetah" legs would seem to be as fair as oxygen tents, ice-filled vests for runners before a race to cool their core temperatures, and other technology employed by runners. Also, expensive medical procedures unavailable or unaffordable in much of the world, such as lasik eye surgery for golfers, would seem to be no less discriminatory than spring-assisted prosthetic legs. On the other hand, international sports federations have properly taken measures to avoid too much reliance by athletes on technology and facilitative wearing

35 *See, e.g.*, Boxing Australia v. AIBA, CAS 08/A/1455 (April 16, 2008) (insisting that international sports federations must announce all final qualifications for competition prospectively at a reasonably early stage of the qualification process).

36 *See, e.g.*, Robyn R. Goldstein, *An American in Paris: The Legal Framework of International Sport and the Implications of the World Anti-Doping Code on [sic] Accused Athletes*, 7 Va. Sports & Ent. L.J. 149 (2007).

37 World Anti-Doping Agency, World Anti-Doping Code (2010).

38 *See, e.g.*, James Halt, *Where Is the Privacy in WADA's "Whereabouts" Rule?*, 20 Marq. Sports L. Rev. 267 (2009).

39 *See* James A.R. Nafziger, *Circumstantial Evidence of Doping: BALCO and Beyond*, 16 Marq. Sports L. Rev. 45 (2005).

40 World Anti-Doping Code, *supra* note 37, arts. 2.1 (strict liability basis), 3.1 (burden of proof).

41 CAS 94/129, 193.

42 U.S. Anti-Doping Agency v. Hardy, Am. Arb. Ass'n, AAA No. 77-190-00288-08 (May 2, 2009).

43 World Anti-Doping Agency v. Hardy, CAS 08/A/1870 (May 21, 2010).

44 Pistorius v. IAAF, CAS 2008/A/1480.

45 *See Record-setting Swimsuits Fail to Win FINA's Approval*, Global Times, May 21, 2009, at 22.

apparel. For example, FINA, the international swimming federation, now bans a large variety of body suits that were acceptable for a few experimental years, on the basis that the suits inordinately aid speed, buoyancy, and endurance, in violation of FINA's standards.[45] In doing so, FINA acted in part for reasons of fairness to earlier athletes who had not benefited from the body suits.

In the end, we are left wondering: what sports equipment, clothing, and training technology is fair and what is unfair? Clearly, international sports federations need to take the principle of fairness more seriously and interpret it more precisely.

4.2.2. The Case of Caster Semenya

During the 2009 world championships in track and field, laboratory testing raised questions about the gender of South African runner Caster Semenya. The questions became front-page features when Semenya easily won the women's 800-meter race and the IAAF failed to protect the still-inconclusive laboratory results. Eventually, the IAAF concluded that Semenya had been eligible for the women's event, but questions of both procedural and substantive fairness remained.[46] Why had the IAAF allowed inconclusive test results to be leaked to the media? Why had Semenya not been granted a medically supervised, therapeutic-use exemption to enable her to boost her androgen level and suppress her testosterone level, from which both women and men athletes have benefited? Should naturally mixed-gender athletes be allowed to compete in their choice of either men's or women's events?

4.2.3. The Case of the Women Ski-Jumpers

Finally, let us consider an issue of gender equality. Several world-class women ski-jumpers brought a civil action in the courts of British Columbia, Canada, claiming that the organizing committee of the 2010 Winter Games in Vancouver had violated Canada's Charter of Rights and Freedoms. Their claim was based on the Vancouver Olympic Committee's routine implementation of an IOC decision to bar women ski-jumpers from the Winter Games. In reaching a final judgment, the British Columbia Court of Appeal[47] first upheld findings of the provincial Supreme Court[48] that the gender-based bar to participation was, indeed, discriminatory; that the organizing committee's planning, organizing, financing, and staging of the 2010 Games was tantamount to a governmental activity under a Canadian constitutional test of an ascribed activity; and that the organizing committee was therefore subject to the anti-discrimination provisions of Canada's human rights Charter in making all local arrangements within its control for the Winter Games.

The courts held, however, that the organizing committee, in its contractual relationship with the IOC, could not control the selection of sports or sports events in the program; it therefore had no discretion to allow women's ski jumping. The critical decision-maker was a non-party to the action, namely the IOC, to which the Charter did not apply. The class action brought by the women ski jumpers therefore failed. Although the decision is technically reasonable in the context of a conflict between national and international authority and fully in conformity with the authority vested in the IOC under international sports law, it seems reasonable to ask whether the outcome was fair.

5. Fairness in Dispute Resolution

The gold standard in resolving sports-related disputes has been set by CAS. The greatest value of the tribunal is one of ensuring fairness in terms of even-handedness, impartiality, acting in good faith, and coherence. As a matter of distributive justice, it has often applied equitable doctrines such as the *lex mitior.* According to that doctrine, if newly applied sanctions against an athlete such as under the WADA Code are less severe than those in effect at the time of an offense, the new sanctions must be applied.[49] CAS panels have also contributed to coherence as an element of fairness by turning to the tribunal's prior awards for guidance. CAS has been at its best when, for example, it has taken fully into account its past awards and those of national tribunals to evaluate the fairness, on a comparative basis of equality, of a proposed sanction against an athlete.[50] As a matter of procedural justice, CAS has insisted that international sports federations provide for an appeals jury or some equivalent to review decisions involving issues of compliance with its rules.[51] Also, CAS has taken pains to avoid bias in dispute resolution. For example, in remitting issues for further fact-finding and other determination by sports bodies, CAS has insisted on reconstitution of decision-making panels and tribunals.[52]

Because CAS is an arbitral body, its decisions have no legal compulsion as precedent although they do provide firm guidance for future cases as part of an emerging *lex sportiva*. Even so, the gradual accretion of awards does not ensure consistency, an element of fairness, within the larger framework of international sports law. For example, although CAS itself has been careful to follow precedent in making decisions about reallocating Olympic medals after a medal winner has had to forfeit a medal, the IOC has not always followed CAS precedent. In 2009 the IOC decided not to award a gold medal to silver medalist Katrina Thanou of Greece that the sprinter Marion Jones had won at the 2000 Games in Sydney but had had to forfeit. The IOC's decision was based on Thanou's own disqualification from the 2004 Games in Athens. This rationale did not follow CAS precedent that had limited such a denial of a forfeited medal to only those athletes who had tested positive in the *same* Games.[53]

5.1. The Non-Interference Rule

It has also been difficult for CAS and other tribunals to draw a sharp line between their competence to hear a dispute and the well-established rule of non-interference. This rule generally precludes judicial or arbitral review of complaints about rules of the game or field-of-play rules and their enforcement by referees. At the international level CAS has repeatedly confirmed that the technical rules of each sport and field-of-play decisions are shielded from arbitral or judicial scrutiny unless they are capricious, grossly erroneous, or malicious. Another exception to the non-interference rule involves sanctions against athletes that appear to be excessive or unfair on their face. Otherwise, according to an award of CAS, athletes are entitled to "honest 'field-of-play' decisions, not necessarily correct ones."[54] Three examples of the non-interference rule are noteworthy in disclosing problems that the rule may create but that can be corrected.

A first example, unrelated to CAS, is from organized baseball in North America's, the MLB. Earlier this year, in what was called MLB's "worst call, ever,"[55] an umpire's huge error denied pitcher Armando

46 For an account of the controversy after its conclusion, see Robert Mackey, *South Africa Says Gender Controversy Is Over*, The Lede (N.Y. Times News Blog), Nov. 19, 2009. For discussion of the issues and policy options, including therapeutic use exemptions, see Alice Dreger, *Seeking Simple Rules in Complex Gender Realities*, N.Y. Times, Oct. 25, 2009, at Sports 8; see also Alice Dreger, *Swifter, Higher, Stronger? Science Adds a Variable,* N.Y. Times, Sept. 13, 2009, at 10. On gender-testing of athletes, see Jennifer Finney Boylan, *The XY Games*, N.Y. Times, Aug. 3, 2008, at 10.

47 Sagen v. Vancouver Organizing Committee, [2009] B.C.C.A. 522.

48 Sagen v. Vancouver Organizing Committee, [2009] B.C.J. 1393.

49 *See* United States Anti-Doping Agency v. Brunemann, Am. Arb. Ass'n/N. Am. CAS Panel, AAA No. 77-190-E-00447-08 JENF (Jan. 26, 2009) (noting that "this doctrine is well-established *in lex sportiva* through many cases arising in several different sports," and citing numerous previous decisions applying *lex mitior*).

50 Brunemann, *supra* note 49 (comparing a swimmer's negligent ingestion of a banned substance to the negligence of other athletes).

51 *See, e.g.*, SNOC v. FILA, CAS, Ad Hoc Div. OG 08/007 (Aug. 23, 2008).

52 *See, e.g.*, Michael v. Australian Canoeing, CAS 08/A/1549 (June 4, 2008).

53 *See* A., B., C., D., & E. v. IOC., CAS 2002/A/389, 390, 391, 392, & 393, and COC & Scott v. IOC, CAS 2002/A/372. On the reallocation of the medals initially claimed by Marion Jones, see Lynn Zinser, *Jones's Gold in 100 Meters Won't Go to Greek Sprinter*, N.Y. Times, Dec. 10, 2009, at B17.

54 Yang Tae Young v. FIG, CAS 2004/A/704 (Oct. 21, 2004) (refusing to overrule a field-of-play decision for failure to raise a timely objection). *See also* Neth. Antilles Olympic Comm. v. IAAF, CAS 2008/A/1641 (Mar. 6, 2009) (also refusing to overturn field-of-play decision).

55 *See* George Vecsey, *Worst Call Ever? Sure. Kill the Umpires? Never.*, N.Y. Times, June 4, 2010, at 1; *see also* Micheline Maynard, *Good Sportsmanship and a Lot of Good Will*, N.Y. Times, June 4, 2010, at B9; Alan Schwarz, *Replay Gets Another Look After a Gaffe Seen by All*, N.Y. Times, June 4, 2010, at B9.

Galarrago of the Detroit (Michigan) Tigers a rare perfect game. After the game, when video replay confirmed the error, the umpire apologized profusely, but nothing could be done about it. That is because during a game MLB Rule 9.02(a) prohibits teams from questioning judgment decisions, and Rule 9.02(c) provides that "[n]o umpire shall criticize, seek to reverse, or interfere with another unless asked to do so by the umpire making it."[56] The only official consolation for Galarrago, who himself was utterly gracious about the incident, came in the form of a proclamation by the governor of Michigan that he had, indeed, pitched a perfect game.[57] Although MLB's use of electronic replay is currently limited to disputed home-runs, the use of electronic replays will inevitably expand beyond home-run disputes. Until that happens, however, imperfect umpires will continue to be "as much a part of this sport as imperfect fielders who muff a pop fly or imperfect runners who neglect to touch a base."[58]

Another case in point involved the gold medal in men's gymnastics at the 2004 Olympic Games in Athens. A CAS decision confirmed the award of the medal to the American Paul Hamm despite a patent error in judging that, had it not occurred, would have given the gold medal to a Korean, Yang Tae Young, and relegated Hamm to a silver medal. Although the technical basis of the award was the failure of the Korean Olympic Committee to raise a formal objection in a timely manner, it was on this occasion that the tribunal also observed that field-of-play decisions must be honest but not necessarily correct.[59]

We should reflect further on the scope of this dictum. In the football/soccer match between France and Ireland to fill the last qualifying slot for the 2010 World Cup, should the International Federation of Football Associations (FIFA) have applied the non-interference rule despite the clear evidence of French team member Thierry Henry's hand ball in violation of the rules?[60] Although at the time of the incident FIFA applied the rule strictly, it evidently has had some doubts since the 2010 World Cup. Although FIFA has continued to reject the immediate use of goal-line technology, it agreed after the 2010 World Cup to consider adding two goal judges, one at each end of the field, a practice that is already employed by the Europa League.[61] FIFA also holds open the possibility of installing goal-line technology before the 2014 World Cup.[62]

5.2. The Taint (Again) of Money

A final example of an issue of fairness involves what was described as Formula One motor racing's "worst scandal."[63] It began when a member of the Renault team in the 2008 Grand Prix in Singapore[64] deliberately crashed his vehicle in a way that enabled a teammate to maneuver through the crash scene to victory. When the matter came before the International Automobile Federation (FIA), its disciplinary tribunal not surprisingly described the crash as one of "unparalleled severity [that] not only compromised the integrity of the sport but also endangered the lives of spectators, officials and other competitors." A severe penalty was therefore expected, including probable expulsion of Renault from Formula One racing. After all, the same tribunal had recently imposed a $100 million fine on the McLaren Mercedes Formula One team when it admitted stealing secret technical documents from its rival, Ferrari.

In the *Renault* case, however, the tribunal simply accepted Renault's apology for the deliberate crash, its offer to pay the costs of FIA's investigation, and its willingness to make other incidental contributions. The tribunal imposed no fine, however, and suspended its two-year disqualification of Renault, saying that it would "only activate this disqualification if the Renault F1 team is found guilty of a comparable breach in this time." FIA President Max Mosely went so far as to assert that it would be wrong to impose an immediate penalty insofar as Renault had demonstrated that it had no moral responsibility for the crash. How can that be? What explains FIA's charitable attitude toward Renault? Quite simply, money is the explanation. More precisely, the earlier withdrawal of Honda and BMW from Formula One racing, this "vast money-making machine" as it is known, had endangered the survival of Formula One racing or at least its capacity to maintain its customary level of financial support and media attention. Formula One racing therefore needed Renault more than it seemingly needed to punish Renault. Is that a fair basis for distinguishing the pseudo-sanction against the Renault team from the $100 million award against the Mercedes team? At the level of the athletes themselves, is a mere rap on Renault's knuckles fair to the competing drivers and teams in a Grand Prix race?

6. Conclusion

The globalization of sports has been nurtured by the modern Olympic Movement, facilitated by communications technology, fueled by high-profile professional athletes and commercial interests, and challenged by difficult problems, such as the doping of athletes. International sports law, still in its youth, is growing along discernible lines of authority and dispute resolution such as the *lex sportiva* formed primarily by CAS awards.

The most prominent issues within the global sports arena in the immediate future are apt to include, roughly in general order of importance: (1) the development of effective prevention and control of doping; (2) the expanded role of international marketing, broadcast media, and other corporate influence; (3) the full merger of the separate legal regimes pertaining, respectively, to amateurs and professionals; (4) the further blurring of the line between true legal issues and field-of-play issues; (5) tensions between national law and national courts, on the one hand, and the decisions of international sports federations, on the other hand; and (6) the growing role of government in sports.[65] It is difficult to imagine how international sports law can respond effectively to any of these and other probable developments without full attention to the principle of fairness.

The issues discussed in this commentary might suggest that the principle of fairness is still too unsettled to be effective as a core principle of international sports law. Quite the contrary is true. On the basis of accepted attributes of fairness - impartiality, equity, good faith, coherence, and so on - the principle can be readily adapted to a broad range of sports and sports-related issues. Fairness should be fundamental in the future of sports and the growth of a creditable regime of international sports law. The challenge is simply to take the principle seriously and further develop it within a definitional and institutional framework that already exists.

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56 Major League Baseball, Rule 9.02(a), (c) (2010).

57 Maynard, *supra* note 55, at B11.

58 Vecsey, *supra* note 55.

59 *Supra* note 54.

60 *Despite Uproar*, *FIFA Rejects Irish Call for Replay*, Int'l Herald Trib. , Nov. 21-22, 2009, at 8; Peter Berlin, *Irish Blood Up After the French Hand Ball*, Int'l Herald Trib., Nov. 20, 2009, at 12; Ian Hawkey, *Fallen Idol*, The Sunday Times, Nov. 22, 2009, at 11.

61 *See* Jeff Z. Klein, *FIFA May Add Extra Officials*, N.Y. Times, June 29, 2010, at B11.

62 *See Referee System Faces Changes in 2014*, China Daily, July 10-11, 2010, at 7.

63 John F. Burns, *Renault Team Escapes Expulsion for Fixing Race*, N.Y. Times, Sept. 22, 2009, at B16. The quoted material in the paragraphs that immediately follow in the text is taken from this article.

64 This annual Grand Prix is one of five "flyaways" (races outside Europe) that complete the Formula One season and is perhaps the most demanding of the flyaways. *See* Brad Spurgeon, *Closing of Formula One Season Is Race Around the World*, N.Y. Times, Sept. 26, 2010, at Sports 9; Javier Espinoza, *Formula 1 Is Racing to Bridge a Gap with Fans*, Asian Wall St. J., Sept. 24-26, 2010, at 15.

65 For further forecasting and commentary, see James A.R. Nafziger, *The Future of International Sports Law*, 42 Willamette L. Rev. 861 (2006).

Opening Address on behalf of the Hague International Sports Law Academy (HISLA) at the International Conference on Lex Sportiva, Djakarta, 22 September 2010

by **Janez Kocijančič***

Dear colleague Dr. Rita Subowo, Chairperson of the Indonesian Olympic Committee, esteemed Rector Professor Jonaan Parapak, esteemed Professor Bintan R. Saragih, ladies and gentlemen, distinguished guests,

I have been given a difficult task to deliver the opening address on behalf of The Hague International Sports Law Academy (HISLA). Although it is hard to speak to such experts as some of you are, allow me, nevertheless, to go through some basic issues of sports and law:

- Sport is a very important phenomenon of the modern society

1. It strengthens some basic human values, it establishes sports ethics and it enhances social cohesion and solidarity. It is beneficial for the public health and I would even say it constitutes an element of democracy.
2. It brings people, especially young people, together, regardless of the social, religious, political, gender and other differences. Moreover, it helps them to overcome these differences.
3. It increasingly represents an important economic activity.
4. In the EU (White book on sport of EU Commission) 2006 - sport represents 3.7 % of EU GDP (in my country Slovenia 2,7% in comparison with 2.2% GDP coming from agriculture)
5. It is an important employer: for example, in the EU it employs 5.4% of the entire European workforce; that is 15 million workers.
6. It gradually narrows the division between developed and developing countries, or better said, emerging countries. This boundary is disappearing in sports and belongs more and more to the past. Just look at the extraordinary sports achievements of China, Caribbean and some African countries, just take into the account the choice of the next organizer of the summer Olympic Games in Rio de Janeiro of Brazil.

There is no doubt that sport is subject to the rule of law. But at the same time sport is an area which belongs to the civil society and should, therefore, enjoy large autonomy, including essential self-regulation, which consequently results in the creation of numerous autonomous rules (e.g. rules of the game, organizational rules, etc.)

This international conference is going to explore the difficult question of the so-called "lex sportiva". The basic theoretical problem of the legal science in sport is to define the specificity of sport. That means that we have to define what the particular characteristics of sports are, i.e. the typical features which compared to other social substructures (like culture or science) allow a set of specific sports rules, or in other words, which allow even the sport exception or immunity, complete or partially, with many theoretical and practical legal problems involved. In short, we have to examine what is so important in sporting problems and relations that it could command different legal treatment.

In addition to the principle of specificity, our special attention should also be given to the autonomy of sport, although this principle is less disputed. It is more than logical and largely accepted that the state and political authorities should not intervene in the organizational structure of sports.

When we discussed these problems in the Executive committee of European Olympic Committees we came to the conclusion that the application of "specificity" and "autonomy" of sport so far, is still not regarded as the guiding principles for the relationship between the public sector and civil society. That is why legal certainly is still missing.

Besides that, financial resources for a sport funding program in Europe remain doubtful.

These are not only the questions for the lawmakers, politicians and sports leaders. Before they act it would be advisable that they know the results of the analysis, the positions and the advice of the sports legal science. Before they or we act we should use our critical and analytical minds.

This is why a small group of sport lawyers, enthusiasts and scientists, who met on different occasions and at some congresses of the International association of the sports law, came to the conclusion that we have to join our forces and do everything needed to bring the sports legal science to a higher level. We are aware that high standards of sports legal science exist in some countries, at some universities and in some institutes, we know of some brilliant scholars, but the international exchange of views, the international circulation of knowledge and the high level of scientific dialogue is still missing.

Therefore, a small group of us, Professor Robert Siekmann, Professor Klaus Vieweg, Professor James Nafziger and myself decided to found The Hague International Sports Law Academy. You are aware that The Hague is supposed to be the legal capital of the world and that is the reason why we think that our Academy belongs there, especially also because the famous Asser Institute is located in The Hague. We are planning to organize the activities and legal events all over the world. With great pleasure I am announcing that this meeting in Jakarta is our first activity and we are going to continue this way.

Let me, at the end, tell you that our wish to found the academy has never been a reflection of an ambition to form and run yet another parallel institution and that we do not consider ourselves to be competing with other present organizations in the field of legal science. Our aim is not competition and not quantity; on the contrary, we would like to direct our efforts to the quality. With this in mind, I wish the Dean Professor Bintan R. Saragih and all the participants fruitful deliberations and challenging exchange of views.

* **President of the National Olympic Committee of Slovenia.**

Developing Asser/China Sports Law Cooperation

From 1-17 November 2010, Prof.Dr Robert Siekmann lectured on "International and European Sports Law" in the People's Republic of China - at the Law Schools of China University of Political Science and Law (CUPL), Research Center of Sports Law, Beijng; Beijing Normal University; Sports Law Center of Shandong University in Jinan; Wuhan and Xiangtan Universities. During these visits also structured mutual cooperation in the field of sports law was discussed.

Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?

by **Stephen Weatherill***

1 Introduction

The Lisbon Treaty has for the first time brought sport within the explicit reach of the Treaties establishing the EU. It is, however, well known that the EU has a track record of almost forty years in subjecting the practices of sports bodies to the control of the Treaty rules governing free movement law and competition. So, as a minimum, the Lisbon Treaty makes a change that looks more dramatic than it actually is - the Lisbon Treaty marks the first time that sport is explicitly and unambiguously affected by EU law but the practice of an interplay between EU law and sport pre-dates Lisbon and is, in short, nothing new. The more awkward question asks whether Lisbon alters any of the pre-existing practice. In particular, do the provisions on sport inserted by the Treaty of Lisbon run contrary to the existing decisional practice of the Court and/or the Commission? For sporting organisations the hope is that even if Lisbon has not delivered an *exemption* from the application of EU law it may nonetheless increase the level of *autonomy* they enjoy. This is where the impact of the Lisbon Treaty is and will remain contested, especially in the context of the Lisbon Treaty's explicit embrace of the 'specific nature' of sport, a concept that is clearly centrally important yet left undefined in the Treaty. The purpose of this short paper is to argue, first, that the structure of the analysis of the compatibility of sporting practices with EU law will be rhetorically affected by the Lisbon Treaty; and second to agree that it is possible that the Lisbon Treaty will mark a change in the interpretation and application of free movement and competition law to sport, but that this is by no means inevitable -and still less is it necessarily desirable. Using two small-scale case studies, concerning fairness and openness, the paper shows how the Lisbon reforms offer the possibility of driving EU sports law according to new guiding principles of interpretation. In judging whether change is helpful, much rests on one's perception of whether EU law was truly inattentive of sport's special character in the first place.

2 The Lisbon Treaty: the new provisions

The Lisbon Treaty brings sport within the explicit reach of the founding Treaties for the first time. The effect of the Lisbon reforms is formally to abolish the three pillar structure crafted for the EU at Maastricht. From 1 December 2009 the European Union has been founded on two Treaties which have the same legal value: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). It is the amendments to what was the EC Treaty, and is now the TFEU, which grant sport its newly recognised formal status.

In formal terms, it is profoundly significant that the Lisbon Treaty brings sport within the explicit reach of EU law. The EU does not possess, and never has possessed, general regulatory competence. Instead it has only the competences and powers attributed to it by its Treaties. In the EC Treaty this was stipulated in Article 5(1) EC, whereas since the entry into force of the Lisbon Treaty this 'principle of conferral' is located in Article 5 TEU. Sport was not a conferred competence prior to the entry into force of the Lisbon Treaty - more, it was not even mentioned in the Treaty prior to the entry into force of the Lisbon Treaty. Now it has been added to the list.

However, although the *fact* of sport's addition to the list of EU competences is undeniably important, the detailed content of this competence newly granted by the Member States to the EU is far less remarkable. The details are located in the ramblingly huge Part Three of the TFEU, which is entitled 'Union Policies and Internal Actions', specifically in Title XII of Part Three *Education, Vocational Training, Youth and Sport*. Sport, as a newly granted EU competence, is inserted into an amended version of Chapter 3 in Title XI of the old EC Treaty, which was designated 'Education, Vocational Training and Youth'. Under the post-Lisbon re-numbering the relevant Treaty Articles are Articles 165 and 166 TFEU.

Article 165 TFEU stipulates that the Union 'shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function'. And, pursuant to Article 165(2), Union action shall be aimed at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.' Article 165(3) adds that the Union and the Member States 'shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe'.

Article 165(4) provides that in order to contribute to the achievement of the objectives referred to in the Article, the European Parliament and Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States; and that the Council, on a proposal from the Commission, shall adopt recommendations.

3 Negotiating Lisbon

The detail of these provisions will be examined below, but there is an intriguing story underpinning the emergence of this wording. It was by no means inevitable that sport would emerge as a formal EU competence as a result of the process of Treaty revision which was set in motion by the Laeken Declaration agreed in December 2001 at a meeting of the European Council in Belgium and which led via the Convention on the Future of Europe and the failed Treaty establishing a Constitution to the entry into force of the Lisbon Treaty in December 2009. Political ripples had admittedly begun to reach the surface. Sport reached the EU's political agenda in a visible manner before the turn of the millennium. However, at Amsterdam and subsequently, in more sophisticated form, at Nice, all that had been extracted from the process of Treaty reform was a non-binding Declaration on sport, couched in aspirational and frankly vague terms. Sports bodies had not been able to provoke the relevant political actors to grant them an exemption from EU law - and in fact it appeared they had not even extracted anything conducive to teasing wider their sphere of autonomy. For the Court, at its first opportunity, declared the Amsterdam Declaration 'consistent' with its own case law.[1] Change was *not* afoot. At first the Convention on the Future of Europe seemed likely to offer similar resistance to sporting change. Working Group V on *Complementary Competencies*, chaired by Henning Christophersen, concluded in its Final Report, published on 4 November 2002, that 'A proposal providing for the adoption of supporting measures with respect to international sports was not broadly supported' and sport was consequently excluded from the list of matters which the Working Group recommended be treated as apt for supporting measures adopted by the EU.[2]

But sports bodies are formidably well equipped to burrow beneath the surface. Both during the Convention on the Future of Europe, which stretched from early 2002 to the middle of 2003, and the sub-

* Somerville College and Faculty of Law, University of Oxford, United Kingdom.

1 Cases C-51/96 & C-191/97 *Deliege v Ligue de Judo* [2000] ECR I-2549 paras 41-42; Case C-176/96 *Lehtonen et al v FRSB* [2000] ECR I-2681 paras 32-33.

2 CONV 375/1/02, http://register.consilium.europa.eu/pdf/en/02/cv00/cv00375-re01.en02.pdf, last accessed 29 July 2010.

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sequent intergovernmental conference which finally agreed the text of the Treaty establishing a Constitution in late 2004 individuals and organisations representing interests of sporting bodies were able to gain access to the process of negotiation in order to achieve, first, inclusion of sport in the text and, second, adaptation of the relevant provisions better to suit the preferences of sports bodies. This story is told in full elsewhere - the core of the narrative is the realisation on the part of sports bodies that it was politically impossible to extract an exemption from the application of EU law but that they could nevertheless induce a recognition in the Treaty of their particular concerns and sensitivities.[3] That - they hoped - might form the basis for subsequent attempts to persuade the EU's institutions - most of all, the Court and the Commission - to soften the grip of EU law on sporting practices. The ultimate prize was greater autonomy from EU law, if not its total exclusion. And although the Treaty establishing a Constitution was capsized by its rejection in popular referenda in France and the Netherlands in 2005 its provisions on sport were rehabilitated in the Lisbon Treaty. So what is now Article 165 TFEU, set out above, was the product of hard bargaining culminating in agreement at the IGC in late 2004, and the deal on sport was then carefully preserved untouched as the Lisbon Treaty was shoved through the ratification process with calculatedly minimal input from the sceptical peoples of Europe.

4 New - or not so new?

On the face of it, Article 165 TFEU is a major breakthrough for EU sports law. Sport is for the first time brought explicitly within the scope of the EU Treaties. And yet Article 5(1) TEU itself is deceptive. The principle of conferral operates rather differently in practice from normal expectation - most of all, the mere fact that a matter is not the subject of *explicit* mention in the Treaty does not mean, and never has meant, that it is wholly immune from the influence of EU law.

This is because there are two dimensions to the competence of the EU. The first is positive - or legislative. The EU cannot put in place common rules in a sector unless the Treaty authorises such legislation. Sport was, prior to the entry into force of the Lisbon Treaty, devoid of such authorisation and consequently any sports-relevant legislative activity had to be adopted pursuant to other sector-specific powers. So, for example, the designation of 2004 as the European Year of Sport was necessarily presented in the governing legal measure as the European Year of Education through Sport, based on what was then Article 149 EC on education. [4] In this respect the Lisbon Treaty marks an important change. With effect from 1 December 2009 legislation directly concerned with sport may be validly adopted by the EU, and there will be a (small) budget. The Commission's 2007 White Paper on Sport already provides a framework for EU action[5], and the entry into force of the Lisbon Treaty is likely to prove important in facilitating a coherent and financially secure pattern of development - although the limits of such legislative intervention are drawn with some care, both by Article 165 and by Article 6(e) TFEU, the master provision governing supporting competences, the weakest of the three main types of competence conferred on the EU which are mapped in Title I of Part One of the TFEU.

So much for positive law, or legislation. The second dimension of the EU's competence is negative. This involves forbidding practices which run contrary to the core principles of the Treaty. So practices that are hostile to the free movement of goods, persons and services across borders are likely to fall foul of the prohibitions contained in the Treaty; so too anti-competitive practices and practices that discriminate on the basis of nationality. Any sector which has the economic context necessary to bring it within the scope of the Treaty is subject to the discipline of these Treaty rules, and it does not matter at all that the sector in question is left unmentioned in the text of the Treaty. It is here, in the broad scope of EU negative law as a set of legal prohibitions, that sport has long found itself subject to control rooted in EU law. Lisbon does not change this basic pattern. 'EU sports law' - meaning the control of sporting practices pursuant to the 'negative' law provisions of the Treaty - has long compromised the autonomy of sports bodies active on EU territory. Article 165 TFEU does not concern this basic point of principle at all.

'EU sports law' has emerged from the collection of decisions issued by the Court and more recently the Commission which apply free movement and competition law (in particular) to the sports sector. The decisional practice visibly accepts the peculiar characteristics of professional sport as relevant to the legal assessment in the light of EU law. *Walrave and Koch* [6], famously the Court's first venture in the practices of sports bodies, rejected a line of reasoning rooted in respect for sporting autonomy that would have rigidly separated sports governance from EC law and preferred instead the view that in so far as it constitutes an economic activity sport falls within the scope of the Treaty and sporting practices must comply with the rules contained therein. But they *may* comply, even if apparently antagonistic to the foundational values of the Treaty. In *Walrave and Koch* the Court accepted that the Treaty rule forbidding discrimination on grounds of nationality does not affect the composition of national representative sides. Such 'sporting discrimination' defines the very nature of international competition, and EU law does not call it into question.

In its even more famous *Bosman* ruling[7] the Court declared that:

> 'In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.'[8]

The Court, while finding that the particular practices impugned in *Bosman* fell foul of the Treaty because they did not adequately contribute to these legitimate aims, showed itself receptive to embrace of the special features of sport. So sport's distinctive concerns are *not* explicitly recognised by the Treaty but they are drawn in to the assessment of sport's compliance with the rules of the internal market (in casu, *free movement*) by a Court which is visibly anxious to identify what is *legitimate* in the special circumstances of professional sport. Similarly in *Meca-Medina and Majcen v Commission*[9] the Court refused to accept that choices about anti-doping rules in swimming could be exempted from review pursuant to EU law but the Court in *Meca-Medina* did not abandon its thematically consistent readiness to ensure that sport's special concerns should be carefully and sensitively fed into the analysis. It took the view that the general objective of the rules was to combat doping in order for competitive sport to be conducted on a fair basis; and the adverse effect of penalties on athletes' freedom of action must be considered to be inherent in the anti-doping rules. The rules challenged in *Bosman* were not in the Court's view necessary to protect sport's legitimate concerns but in *Meca-Medina* the Court concluded that the sport's governing body was entitled to maintain its rules. It had not been shown that the rules concerning the definition of an offence or the severity of the penalties imposed went beyond what was necessary for the organisation of the sport.

The application of the Treaty competition rules to sport was a matter carefully avoided by the Court in *Bosman* itself. But the Commission came to adopt a functionally comparable approach to sport: that is, it did not exclude sport from supervision pursuant to the relevant Treaty provisions but equally it did not rule out that sport might present some peculiar characteristics that should be taken into account in the analysis. In *ENIC/ UEFA* the Commission concluded that rules forbidding multiple ownership of football clubs suppressed demand but were indispensable to the maintenance of a credible competition marked by uncertainty as to the outcome of all matches.[10] A competition's basic character would be shattered were consumers to suspect the clubs were not true rivals. The principal message here is

3 B. Garcia and S. Weatherill, 'Engaging with the EU in order to minimise its impact: sport and the negotiation of the Treaty of Lisbon', forthcoming.
4 Dec 291/2003/ EC [2003] OJ L43/1.
5 COM (2007) 391. Full documentation is available *via* http://ec.europa.eu/sport/white-paper/ index_en.htm, last accessed 29 July 2010.
6 Case 36/74 [1974] ECR 1405.
7 Case C-415/93 [1995] ECR I-4921.
8 Para 106.
9 Case C-519/04 P [2006] ECR I-6991.
10 COMP 37.806 ENIC/ UEFA, IP/02/942, 27 June 2002.

that sporting practices typically have an economic effect and that accordingly they cannot be sealed off from the expectations of the Treaty. However, within the area of overlap between EU law and 'internal' sports law there is room for recognition of the features of sport which may differ from 'normal' industries.

Sale of rights to broadcast sports events has become an extremely lucrative market in recent years as a result of technological innovation in a sector which has been aggressively deregulated. This has forced the Commission to develop an understanding of how arrangements struck between clubs and governing bodies should be treated.[11] In *Champions League* it accepted that agreeing fixtures in a league is essential to its effective organisation.[12] However, by contrast, an agreement to sell rights to broadcast matches in common is not essential to the league's functioning, because individual selling by clubs is perfectly possible (though doubtless less convenient and lucrative). So collective selling *is* a restriction on competition within the meaning of the Treaty and it damages the economic interests of, in particular, purchasing broadcasters. Such an agreement can stand only if exempted according to the criteria set out in the Treaty. The Commission concluded by giving a green light to the collective selling arrangements, persuaded by the economic advantages consequent on creation of a branded league product which could be sold in packages via a single point of sale, reducing transaction costs. So in *Champions League* - as in *Walrave* and *Meca Medina* and *ENIC* but not in *Bosman* - the consequence of subjection to scrutiny pursuant to EU law was that sporting practices were left undisturbed.

5 'Sports law and policy'

The previous sub-section merely scratched the surface of a fertile field. There is a rich literature in this vein, dealing with the accumulated case law and analysing the extent to which EU law is prepared to concede autonomy to sports bodies in setting the rules of their game - and in exploiting its commercial worth.[13] Part of this literature involves analysis of the precise jurisprudential basis for the application of EU law, a matter revealing an erratic approach over time by the Court.[14] However, looking at the broad picture, a guiding theme which helps one to understand the structure of these disputes is that typically sporting bodies argue for the most generous possible interpretation of the scope of the 'sporting rule' which is wholly untouched by the Treaty, and, if the matter is judged to fall within the scope of the Treaty, they have then aimed to defend their practices as necessary to run their sport effectively. It is for the Court (or in appropriate cases the Commission) to consider the strength of these claims, and in doing so the EU institutions are forced to reach their own conclusions on the nature of sports governance - conclusions which are frequently (though not invariably) less persuaded by the need for sporting autonomy than is urged by governing bodies. The contested area of the debate asks whether - beyond the rhetoric - the Court and the Commission are genuinely adequately sensitive to the peculiarities of organised sport. One's perspective on past practice will affect one's hopes and fears about whether the Lisbon reforms will change the law.

6 Assessing the impact of the Lisbon Treaty

The principal motivation behind the inclusion of sport in the Treaty is not to elevate the EU to a position of primary importance in the regulation of the sports sector. There is a new legislative competence - but, as explained above, it is narrowly drawn, and it is not likely to be generously funded. 'EU sports law' is likely to remain focused on 'negative law' - the application in a sporting context of the Treaty prohibitions against impediments to cross-border trade and anti-competitive practices. From the perspective of sporting organisations one would expect the structure of the debate about free movement and competition law to be adjusted, in particular in so far as one can anticipate that they will no longer waste time by denying the EU has any legitimate role in the area of sport - Lisbon kills that plea - but rather that they will rely on Article 165 TFEU's stipulation that the Union 'shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function' to strengthen an argument for enhanced autonomy. Sport has a 'specific nature' - and who better to define, protect and promote that specific nature than sporting bodies themselves? This is likely to be the post-Lisbon first line of defence - exemption from EU law was a step that was politically too far but enhanced autonomy is doubtless a welcome second best.

But is this even second best? Is it a change at all? This is the contest to come. In short, is the reference to the 'specific nature' of sport something new, or is it simply a summary of all the evolved Commission and Court practice? Plainly if one is seeking to defend sporting practices imperilled by past decisional practice one will argue that Lisbon constitutes a rebalancing of the law in favour of a greater degree of respect for sporting autonomy. The alternative view would hold that Lisbon is in essence a codification of existing EU practice.

7 The Commission's White Paper on Sport

The Commission's White Paper on Sport issued in July 2007 reveals clearly that the Lisbon wording is readily connected to pre-existing practice.[15] In the White Paper the Commission examines aspects of practice explicitly in the light of *The specificity of sport* (para 4.1). It explains that the specificity of European sport can be approached through two prisms:

The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions;

The specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport.

It extracts this from the decisions of the Court and it insists that future application of the rules, embracing 'specificity', must comply with the Treaty. Elaboration is provided by the supporting (and well-written) Staff Working Document, which identifies key features of the 'specificity of sport' to include interdependence between competing adversaries, uncertainty as to result, freedom of internal organisation, and sport's educational, public health, social, cultural and recreational functions.[16] Substantial Annexes, containing detailed legal analysis, deal with *Sport and EU Competition Rules* and *Sport and Internal Market Freedoms.*

The key point, however, is that in so far as concessions are made to sporting 'specificity' they are made on terms dictated by EU law; and, moreover, a case-by-case analysis of sporting practices is required. A general exemption is 'neither possible nor warranted', in the judgement of the Commission.[17] This legal analysis is (quite correctly) heavily dependent on *Meca-Medina*[18], which is the only decision of the Court explicitly referred to in the body of the White Paper. From the perspective of governing bodies in sport there are two principal objections to this position. The first is that EU law misperceives the

11 S. Weatherill, 'The sale of rights to broadcast sporting events under EC law' (2006) 3 *The International Sports Law Journal* 3.

12 Decision 2003/778 *Champions League* [2003] O.J. L291/25

13 See eg R. Parrish, *Sports law and policy in the European Union* (2003); S. Weatherill, *European Sports Law* (2007); E. Szyszczak, 'Is Sport special?' in B. Bogusz, A. Cygan, and E. Szyszczak (eds), *The Regulation of Sport in the European Union* (2007); S. Van den Bogaert and A. Vermeersch, 'Sport and the EC Treaty: a Tale of Uneasy Bedfellows' (2006) 31 ELRev 821. Placing the debate in the particular context of Lisbon, see S. Weatherill, 'EU sports law: the effect of the Lisbon Treaty' forthcoming in A. Biondi and P. Eekhout, *The Treaty of Lisbon* (2011).

14 For extended analysis see R. Parrish and S. Miettinen, *The Sporting Exception in European Law* (2007); also S. Weatherill, 'On overlapping legal orders: what is the 'purely sporting rule'?' in Bogusz, Cygan, and Szyszczak n 13 above.

15 COM (2007) 391. Full documentation is available *via* http://ec.europa.eu/sport/white-paper/index_en.htm, last accessed 20 July 2010.

16 Also available via http://ec.europa.eu/sport/white-paper/index_en.htm.

17 Staff Working Document n 16 above p.69, 78.

nature and purpose of sport and that it intervenes in an insensitive and destructive manner. The second is that a case-by-case approach generates great uncertainty for those involved in the organisation of sport. Such anxieties have been audible for many years, but *Meca-Medina* inflamed the debate and the ruling attracted pained criticism from those close to sports governing bodies[19] - though other sources too have expressed anxieties about *inter alia* the expertise of the Court in Luxembourg to investigate such matters.[20] Similarly the White Paper has been greeted from this perspective with a degree of mistrust from those detecting a diminished concern on the part of the Commission to take full account of the supposed special character of sport.[21] This is the more general context within which *Meca-Medina* has been attacked for stripping away some of the autonomy to which sports governing bodies regularly lay claim as necessary and appropriate. Such rebukes may be fair, they may be unfair - but the essential *contestability* of the practice of EU intervention in sport, allied to the deficiencies and constitutional restraint embedded in the Treaty itself, is plain. So too is the magnitude of the sums of money at stake.

Again, the key question: does Lisbon change anything? Is greater deference by the Court and Commission and correspondingly enhanced autonomy enjoyed by sports bodies the likely consequence?

8 'Fairness' as a principle of EU sports law

Textual analysis of the new Article 165 TFEU is irresistible to the lawyer, even if ultimately inconclusive pending the attention of the Court. Union action shall be aimed at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.' This is a mix of the obscure, the glib and the self-evident. Sports lawyers have plenty of new toys to play with - or, put more formally, Article 165 TFEU offers the possibility of extracting principles of EU sports law that enjoy more constitutionally deep roots than those found scattered through the incremental decisional practice of the Court and the Commission which has been accumulated over several decades since *Walrave and Koch*.[22]

But what force might these principles carry - in particular, what *transformative* force? Do they change anything in EU sports law and policy? 'Fairness' could be a vacuous notion which has no legal or policy bite or it could convey a very specific commitment to competitive balance: sports bodies might argue that practices which restrain competition should nonetheless be treated as compatible with the Treaty in so far as they achieve a better balanced distribution of wealth within a sport as a device to promote 'fairness.' In *Champions League*, mentioned above[23], UEFA, seeking exemption for collective selling of rights to broadcast matches which in principle amounted to an unlawful restriction of competition contrary to the interests of buyers, pressed on the Commission the benefits of its financial solidarity model, which supports the development of European football by ensuring a fairer distribution of revenue. The Commission expressly declared itself in favour of the financial solidarity principle, noting also in its Decision its endorsement in the Nice declaration on sport.[24]

But since it had already concluded that the collective selling arrangements were economically advantageous and therefore justified pursuant to what was then Article 81(3) EC, now Article 101(3) TFEU, the Commission declared that it had no need to offer any conclusion of the status of arguments rooted in 'solidarity'. For the purposes of the *Champions League* Decision, the matter was not relevant. It is, however, a matter that is likely to recur, and the Lisbon reforms may prove relevant. Collective selling of rights *per se* does not improve solidarity. Such improvements will come about only to the extent that the revenue raised is shared more widely than among the immediate participants. But, were such distribution to occur in a system which (unlike that prevailing in *Champions League*) did not yield sufficient economic benefits to deserve exemption pursuant to the Treaty, then the vocabulary newly introduced by the Lisbon Treaty could certainly be deployed as part of a case in favour of a green light under EU competition law for arrangements that are restrictive of competition (to the detriment of buyers) but conducive to improved solidarity within the sport. One would expect a careful examination of the extent to which the income raised from collective selling is truly applied to the benefit of sporting 'solidarity'[25] - but this is part of the detailed analysis. The broader point is that the Lisbon vocabulary raises intriguing possibilities for using 'fairness' to adjust the orthodox application of the Treaty competition rules in favour of greater sporting autonomy. In this way the Lisbon Treaty's explicit embrace of fairness and the specific nature of sport could be used to tilt the application of EU law in favour of sport's (claimed) particular concern for solidarity. This is a battle to come.

9 'Openness' as a principle of EU sports law

Article 165 TFEU provides that Union action shall be aimed at promoting '… openness in sporting competitions and cooperation between bodies responsible for sports …' 'Openness' is another possible principle of EU sports law. It could be flabby window-dressing which has no legal bite or it might be employed to argue for example that EU law, interpreted in the light of Article 165(2) TFEU, does not tolerate rules that exclude non-nationals from competitions designed to crown a national champion. The argument - there should be greater openness! This was mentioned as an issue deserving attention in the Staff Working Document accompanying the White Paper[26] and in 2008, the Commission, answering a question by MEP Ivo Belet, contented itself with a cautious reply setting out its basic approach to the application of EU law to sport and promising a study on access to individual sporting competition for non-national athletes.[27] Access restrictions vary state by state, sport by sport, and it is at least possible that recognition in the Lisbon Treaty of the promotion of openness as a feature of the European dimension of sport will strengthen the force of a legal challenge by an excluded participant.

Similarly it might be argued that the organisation of Leagues along national lines is not compatible with 'openness' as enshrined in Article 165 TFEU in so far as it leads to the suppression of cross-border club mobility. This issue has attracted attention on occasion: both the two major football clubs in Glasgow, Celtic and Rangers, have expressed periodic interest in joining the English league, while some years ago the English football league club Wimbledon was thought to be interested in re-locating to Dublin while retaining its status as a member of the English league. On a narrow jurisdictional point the former case would not appear to raise questions of EU law, since the border crossing, that between England and Scotland, is internal to a single member State, the UK, but the latter would fall within the scope of the Treaty in so far it concerned trade between the UK and Ireland. There are many reasons why such switching is not encouraged but part of the reluctance of the football authorities to sanction such changes lies in the concern to protect Leagues which are, and have long been, based on national structures. EU law would already encourage such choices to be tested against the rules of the Treaty - arguably the Lisbon Treaty's embrace of the principle of 'openness' strengthens the case of those seeking to go to law to relax such restraints on club mobility. In the summer of 2010 it was reported that French football club Evian had been refused the option to play home

18 Note 9 above.

19 See eg G. Infantino (Director of Legal Affairs at UEFA), 'Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?' UEFA paper 02/10/06, available at http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf; J. Zylberstein, 'Collision entre idéaux sportifs et continges économiques dans l'arret *Meca-Medina*' 2007/1-2 CDE 218.

20 See eg R. Subiotto, 'The adoption and enforcement of anti-doping rules should not be subject to European competition law' [2010] ECLR 323.

21 J. Hill, 'The European Commission's White Paper on Sport: a step backwards for specificity?' (2009) 1 International Journal of Sport Policy 253.

22 Note 6 above.

23 Note 12 above.

24 Note 12 above para 165.

25 For vigorous scepticism see H. Moorhouse, 'Financial Expertise, Authority and Power in the European Football 'Industry'' (2007) 7 *Journal of Contemporary European Research* 290.

26 Note 16 above page 45.

27 WQ P-4798/08. The contract was awarded to TMC Asser Instituut in 2010, Contract Notice 2010/S 31-043484

matches a short distance over the Swiss border at the much better equipped stadium in Geneva. The French and Swiss national football authorities were in favour, but UEFA was not - because '[t]he organisation of football on a national territorial basis constitutes a fundamental principle and a well-established characteristic of the sport'.[28] Adjust the facts by replacing Switzerland in this situation with an EU Member State and one can readily envisage a challenge based on EU law, nourished by reliance on 'openness' recognised by the Lisbon Treaty - fortified further by the argument that banning not only switching between national Leagues but even switching between home venues while retaining membership of a club's 'home' League is a disproportionately restrictive rule.

I do not here argue that clubs in the position of Rangers, Celtic, Wimbledon or Evian would certainly be able to set aside the rules established by sports federations by relying on EU law. Clearly the national organisation of Leagues does have and always has had an important role in the organisation of sport. My point is simply that the Lisbon Treaty offers a new vocabulary apt to challenge the durability of sporting autonomy in the shadow of EU law. The key question is how much extra weight, if any, the Lisbon Treaty lends to the force of the legal arguments. Does it transform our pre-Lisbon understanding of the impact of EU law on sporting practices? It might: and it is here notable that in contrast to 'fairness', which I have considered above as a means to protect sporting autonomy, reliance on 'openness' tends to strengthen the attack on sporting autonomy by affected actors.

10 Conclusion

This is merely to scratch the surface of an intriguing debate, but the purpose of this paper is not to offer a concluded view. Rather, it merely questions whether the adjustments made by the Lisbon Treaty make any difference. The Lisbon reforms might alter the outcome, or they might merely re-frame the analysis. Post-Lisbon, one would expect the football authorities to headline their defence by asserting the 'specific nature of sport' recognised by the Treaty as a reason for accepting rules of this type that one would not expect to find in other industries. Moreover, one might anticipate that it would be argued that the 'specific nature of sport' recognised by the Treaty dictates that the institutions of the EU should adopt a light touch in reviewing the choices made by sports bodies, who have much greater expertise in understanding what really is 'specific' about sport. It is at least possible that the Court and the Commission will be tempted to show a greater deference to sporting choices than they did prior to the entry into force of the Lisbon Treaty. Moreover, there is, as revealed in this paper, enough meat in the new provisions - fairness, openness - to feed the smart advocate, whether he or she is aiming to defend or to attack sporting practices. But the changes are sufficiently ambiguous to rule out confident prediction about what changes, if any, may emerge. In *Bernard* [29], the first and so far only 'post-Lisbon' ruling of the Court, the Court simply - and very briefly - used Lisbon to 'corroborate' its own case law, which suggests it is not minded to alter course. The slippery quality of the Lisbon innovation is such that one can do no more than observe that sport can, at last, rely on explicit wording contained in the Treaty to structure its argument that sport is 'special' while reflecting that this may be merely a confirmation of how the Court has always treated sport since *Walrave and Koch*.

So EU sports law since the entry into force of the Lisbon Treaty is guided by candidate 'principles'. They may have transformative force and, if they do, the Lisbon Treaty will prove a true landmark in the growth of an EU sports policy. But much depends on subsequent practice - and, crucially, it is the EU's own institutions, most obviously the Court, which will decide future questions of interpretation. Underlying this narrative is the appreciation that for sport to secure protection from the EU and its legal order it must in some way engage with it, not dismiss it as irrelevant. The problem for sports bodies is that the place where resolution of these finely balanced issues occurs remains the place where it has always occurred: before the Commission or ultimately the Court. Sporting bodies have achieved a protection of sorts in the Treaty, but they have not escaped the grip of the EU institutional architecture. This is 'sporting autonomy' - but on the EU's terms. As a result UEFA, in particular, is notable for adapting its strategy towards a more co-operative model with the EU, especially the Commission.[30] The Lisbon Treaty's ambiguities might serve to push the EU and sporting organisations closer together as all those involved seek to make sense of the 'principles' contained in Article 165 TFEU.

28 H. Simonian, 'UEFA blocks Evian proposal' Financial Times 20 July 2010, http://www.ft.com/cms/s/0/36457136-937c-11df-bb9a-00144feab49a.html.

29 Case C-325/08 judgment of 16 March 2010 para 40.

30 See in particular B. García's pathbreaking article, 'UEFA and the European Union: From Confrontation to Co-Operation' (2007) 3 Journal of Contemporary European Research 202.

From left to right: Robert Siekmann, Dr Amaresh Kumar, Sports Law India, New Delhi, and Prof. Frans Nelissen, General Director of the T.M.C. Asser Institute, on the occasion of Dr Kumar's visit to the Institute, The Hague, 12-15 September 2010.

DECLARATION ON LEX SPORTIVA

Jakarta, Indonesia
September 22, 2010

Meeting in Jakarta, the capital of Indonesia, to confer on the fertile concept of *Lex Sportiva* in its many manifestations;

Recognizing the public and private dimensions of *Lex Sportiva* as well as the significance of both national and international perspectives in defining this concept;

Expressing gratitude for the initiative by the Universitas Pelita Harapan and the Indonesia Lex Sportiva Instituta in Jakarta, as supported by the Indonesia Ministry of Youth and Sport, the National Olympic Committee of Indonesia, and the Indonesian League of association football;

Noting the official establishment today in Jakarta of the Hague International Sports Law Academy;

Emphasizing the crucial role of the rule of law and justice to govern the organization of sports and sports activity on the playing field as a corner-stone of civil society;

Commending the participants in this Conference for the variety and depth of their insights and outlooks concerning the concept of *Lex Sportiva*;

Concluding with the expectation of further international collaboration in the study and progressive development of international sports law in its broadest sense:

We, the undersigned, declare that the success of this initiative today provides a solid foundation for our shared commitment as lawyers and legal scholars from around the world to work together in the interest of the global sports community and public.

Prof. Dr. Robert CR Siekmann
Director of International Sports Law Center, TMC ASSER Instituut, Den Haag, The Netherlands

Prof. Dr. Bintan R. Saragih, SH
Dean of Faculty of Law, Universitas Pelita Harapan, Tangerang, Indonesia

Prof. Dr. Klaus Vieweg
Faculty of Law, Friedrich-Alexander University Erlangen Nuremberg, Germany

Dr. Janez Kocijancic
President of the National Olympic Committee of Slovenia

Prof. Dr. Franck Latty
Law Faculty of Clermont-Ferrand, University of Auvergne, France

Prof. Dr. James Nafziger
Thomas B. Stoel Professor of Law, Willamette University College of Law, Salem, Oregon, USA

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PLMJ, Sociedade de Advogados, Lisbon, Portugal

Lex Sportiva

Transnational Law in Action

by **Ken Foster***

What's interesting about the concept of lex sportiva?

Lex sportiva is a fascinating legal concept, especially to legal theorists as well as sports lawyers and practitioners, for several reasons.

- It is global, transnational and stateless. It is not just international law but transnational law[1]; and CAS has become an important example of successful global governance. So Yi has argued 'in a time of increasing global complexity, the CAS represents one of the world's more successful attempts at bringing order to transnational issues…a working, functioning international tribunal that can serve as an example for future efforts at transnational dispute resolution.'[2]
- It is an example of global legal pluralism akin to lex mercatoria. Lex mercatoria is not created by international agreement between states but by private commercial interests. It is not enforced by state sanctions but by arbitral awards that are recognized by states. In a similar manner Mitten and Opie describe lex sportiva thus 'For legal theorists, the evolving body of *lex sportiva* established by CAS awards is an interesting and important example of global legal pluralism without states arising out of the resolution of Olympic and international sports disputes between private parties. It is an emerging body of international law with some similarities to *lex mercatoria*, a much older and well established body of international commercial law that has developed in the essentially private domain of commercial activity based on custom and arbitration awards.'[3]
- As a private contractual order, it has a degree of autonomy. Its norms come from two main sources. First from the regulations of international sporting federations, which create a private contractual order and also from the WADA code, which is a hybrid of public-private norms and institutions.
- It is a variety of Alternative Dispute Resolution used to settle international sporting disputes and so can be seen as part of a wider 'privatization' of sports law, which takes issues away from national courts by reference to contractual agreement.

What is 'lex sportiva'?

Is there such a concept to discuss at all? In 2005 CAS itself was not so sure. It said that 'the Panel is not prepared to take refuge in such uncertain concepts as that of a "lex sportiva", as has been advocated by various authors. The exact content and the boundaries of the concept of a lex sportiva are still far too vague and uncertain to enable it to be used to determine the specific rights and obligations of sports associations towards athletes.'[4]

Since that comment there have been no further references to it in the published awards of CAS until the recent arbitration of Anderson et al v IOC[5], which appeared to accept that such a concept exists. In discussing whether team sanctions were allowed when an individual member of the team was guilty of a doping offence, the panel said that it did 'not discard the theoretical possibility that an established principle of *lex sportiva* might serve as legal basis to impose a sanction on an athlete or a team.'[6] The panel however found no evidence of such a principle and concluded that it saw 'no definite pattern in international sports law that could support the argument that a general principle of *lex sportiva* has nowadays - let alone in 2000 - emerged and crystallized to the effect that a team should inevitably be disqualified because one of its members was doped during a competition. The matter is still subject to the multifarious rules that can be found in the regulations of the various International Federations.'[7] This is an especially interesting use of the concept for it implies that there are principles above and beyond the contractual rules of international sporting federations that can be employed to settle cases.

Conversely, there is an emerging academic consensus as to both the existence and the content of the concept of 'lex sportiva'. For example, Lenard confidentially claims that 'That a *lex sportiva* currently exits is beyond debate. You cannot read a CAS opinion or a brief to CAS that does not cite prior arbitral opinions.'[8]

Nafzinger endorses this view with a wider notion that lex sportiva has three essential elements. He says 'a fully developed lex sportiva would help apply three values that the principle of stare decisis serves: efficiency of the legal process, predictability or stability of expectations: and equal treatment of similarly situated parties.'[9]

Several authors agree that precedent is a key element in establishing that there is a lex sportiva, as opposed to individual decisions on the merits by arbitrators. Kaufmann-Kohler in 2006 appeared to accept that an emerging lex sportiva was hallmarked by an increasing use of precedent in CAS awards and so concluded that 'a coherent corpus of law, some call it *lex sportiva*, is being built.'[10] Mitten and Davis also stress the significance of precedent in building a body of principles. They say 'Nevertheless, although the CAS is an arbitral tribunal and the majority of its arbitrators have a civil law background, it is ironic that CAS awards are forming a body of *lex sportiva.*'[11] They later point out that the principle of equal treatment of cases used by CAS contributes to the development of a set of consistent principles even without the explicit use of precedents[12]. CAS itself has recognized the power of precedent. In Devyatovskiy v IOC[13] the CAS panel said 'In accord with previous CAS rulings on earlier versions of the "Different Analyst" Rule, the Panel applies a strict interpretation of the above rule.'[14] This is a strong acceptance of the need for consistency in interpretation of the rules thus ensuring equal treatment and fairness to athletes

From the published academic literature it is possible to see various uses of the term 'lex sportiva'.

- A narrow view is that lex sportiva and the **jurisprudence of CAS** are synonymous. What is decided by CAS arbitrators constitutes the corpus of lex sportiva. The fallacy of this equation can easily be shown by reversing the statement. The jurisprudence of CAS is wider for it has many sources[15]. Many arbitrations are specifically governed by Swiss law. Each award now specifies the governing law, which may be a national law other than Swiss. Beyond national laws[16] it can be seen that 'general principles of law' and principles derived from 'the practices of international sporting federations which have crystallized into a norm' are also used. There are even awards that refer to 'Aequo et bono' as a guide to decision making.[17] This is specifically authorized by the CAS Code which states 'The

* Centre for Law, Society and Popular Culture, University of Westminster, United Kingdom. Paper presented on the author's behalf at the International Conference on Lex Sportiva, Universitas Pelita Harapan (UPH), Indonesia on 22 September 2010.

1 On the concept of transnational law see Zumbansen
2 Yi p.290-1.
3 Mitten & Opie p.21
4 FIFA v WADA, 2005/C/976 & 986,
5 Anderson et al v IOC, 2008/A/1545, published 16/07/2010
6 Ibid. para.128
7 Ibid. para.137
8 Lenard p.179
9 Nafzinger (2004a) p.50
10 Kaufmann-Kohler p. 365
11 Mitten & Davis p.81
12 Ibid p.88
13 2009 A 1752 Vadim Devyatovskiy v IOC
14 Ibid. para 5.173
15 See Foster (2006) for a detailed discussion of CAS's jurisprudence.
16 In Galatasaray SK v. Frank Ribéry & Olympique de Marseille, CAS2006/A/1180, the panel said that 'It is generally agreed by academics and commentators that the parties may choose to subject the contract to a system of rules which is not the law of a State…. However, the parties freedom to agree a non-state law also has its limits, which derive from public policy. This results, not least, from the fact that even an arbitration court which has been authorized to decide *ex aequo et bono* is bound by these limits. (paras. 6 & 7)

Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorise the Panel to decide ex æquo et bono.'[18]

- Conversely there is a view, very well argued by Erbsen[19], that the jurisprudence of CAS treated as a lex sportiva, includes nothing distinctive that justifies treating it as a distinctive concept and so CAS functions as **no more than a forum** for contractual interpretation of documents.. He says 'Lex sportiva is now an umbrella label that encompasses several discrete methods of lawmaking, distilling a medley of variables into an oversimplified motto.'[20] Erbsen identifies four types of norms within CAS jurisprudence:- a norm which applies a clear interpretation of a contractual text - an offsetting norm which allows the incorporation of fair and equitable principles to modify formal norms- norms to assist in the interpretation of ambiguous texts - norms that allow textual gaps to be filled by using general legal principles.[21] He argues that these are functions that are no more than the normal legal task of interpreting texts and offer nothing distinctive. CAS does not thereby create a 'new form of substantive law' and so 'the Lex Sportiva label thus overstates the novelty of international sports law while understating its nuance.'[22]
- A broader version of this view argues that CAS uses a **set of unwritten legal principles** which embody the use of doctrines and sources beyond the written contractual documents of international sporting federations. This view is distinguishable from that of Erbsen above and is well expressed in the Anderson award above. Although the lex sportiva is a private legal order created by contract and reinforced by agreements to arbitrate, this does not mean that it is expected to be limited to the sole task of interpreting the source documents of international sporting federations. Lex sportiva thus can incorporate other sources, norms and principles in the task of interpretation.
- Others argue that Lex sportiva is just a **branch of international sports law**. Nafzinger has consistently argued for this categorization. He wrote in 2004 that it is 'limited to arbitral awards within the larger sphere of international sports law. Although by one interpretation the term is very broad, nearly coinciding with the term "international sports law,"[23] the present commentary adopts the normal limitation of the concept to CAS awards.'[24] This implies that it can be seen as the application of international law principles to the context of sport through the forum of CAS. Gilson also seems to see lex sportiva as sub-branch of international sports law. He defines it thus 'CAS awards have been recognized as developing a *lex sportiva*, that is, a set of guiding principles and rules in international sports law.'[25]
- An even wider definition is that it is simply the application of **general principles of law** to sport. In FCP v FIRS[26] the panel said of the most appropriate rules that 'Ces règles sont constituées pour l'essentiel des principes généraux du droit applicables au sport (*lex sportiva*).'[27]
- Alternatively it could be seen as **sub-category of arbitration**. Carter has described 'a developing body of transnational arbitral principles - though not particular to sports disputes' which come from the transnational networks of private actors. [28] Unfortunately he does not specify the content of these 'transnational arbitral principles' but it does hint at a wider argument about the privatisation of law and the removal of disputes from courts to arbitration tribunals.
- Casini has recently argued that lex sportiva is included within a '**global sports law**'. He argues that a global sports law 'has emerged, which embraces the whole complex of norms produced and implemented by regulatory sporting regimes'.[29] Within this definition he then specifies three main sources for this law. These are the transnational norms set by international sporting federations, 'hybrid' public-private norms produced by agencies such as WADA and international law itself.[30] Thus global sports law is highly heterogeneous.[31] Casini concludes 'In this paper, the term *lex sportiva* is used in a broad sense as a synonym of "global sports law". The formula "global sports law" thus covers all definitions so far provided by legal scholarship (such as *lex sportiva* or "international sports law") in order to describe the principles and rules set by sporting institutions.'[32]
- Latty sees lex sportiva as a **manifestation of transnational law**. He says 'L'étude de la lex sportiva nécessite que soit précisée la notion de droit transnational et établie la pertinence de son application au champ sportif.[33] This is very similar to lex sportiva as a global sports law.

I have argued elsewhere[34] that it is crucial to distinguish between international sports law and global sports law. This usage limits international sports law to signifying general principles of law, especially those derived from international law, that are applicable to sport. This means that the field of regulation, international sport under the jurisdiction of international sporting federations, is unique but not that the applicable law is different, adapted or unique to the context. The concept of global sports law can then be applied to a unique field of transnational law and regulation that has distinctive features. These unique features are first that its norms come from the rules and regulations of international sporting federations, which even if juridified, are distinct from legal sources; second that its legitimacy rests on contract; third that it has a unique forum of interpretation in CAS; and finally but most importantly it is global and transnational outside the review of national courts giving the decisions immunity and autonomy. Papaloukas likewise summarises the distinction thus: 'when one mentions the term Lex Sportiva meaning a separate, autonomous and independent legal order, one cannot refer to an international sports law, which by definition should be governing relations between states. Therefore the term Lex Sportiva should refer to a global sports system and not an international sports system.[35]

Characteristics of lex sportiva

What then are the characteristics of a lex sportiva? My definition is that it is characterized as being a private autonomous legal order established by contract between international sporting federations and those subject to their sporting jurisdiction and which then emerges from the statutes and regulations of federations as interpreted by institutions of alternative dispute resolution.

Each element of this definition is important. First, there has to be a private and autonomous order. The constitution of norms that govern sport is assumed to stem from the quasi legislative role of the international sporting federations rather than the application of general norms of law or laws of specific national regimes. It is this key distinction that separates lex sportiva from other legal orders and prevents it being merely a sub division of national, European or international law. The claim is further that it is autonomous, reflecting the desire of the Olympic movement especially but international sporting federations generally to be self regulating and free from interference by national governments. To be a genuine transnational legal order requires this degree of autonomy. Lex sportiva claims immunity from judicial review in national courts.[36] The concept implies that it is outside the jurisdictional competence of national courts, that a conflict

17 See 0001/07 FAT, FIBA Arbitral Tribunal, para.6.1.1
18 Statutes of the Bodies Working for the Settlement of Sports-Related Disputes (2010 Code) R45 'Law Applicable to the Merits'.
19 Erbsen
20 Ibid p.441
21 Ibid p.442
22 Ibid p.445
23 Nafzinger (2006) p.862 defined international sports law as 'the process that engages more or less distinctive rules, principles, procedures, and institutions which govern important consequences of transnational sports activity.'
24 Nafzinger (2004b) p.3
25 Gilson p.504
26 2004/A/776
27 Ibid para.16
28 Carter (2004) p.798
29 Casini (2010) p.2
30 See Casini (2009) for a fuller discussion.
31 Casini (2010) p.3
32 Ibid p.4
33 Latty p.5
34 Foster (2003)
35 Papaloukas p.11
36 In the arbitral award 0001/07 FAT the Fiba Arbitral Tribunal said that the contract gave it exclusive jurisdiction rather than the national courts. It proclaimed 'One important "legal effect" resulting from a breach of the Contract obligations, is that the FAT, rather than the national courts, is competent to adjudicate any claims arising out of or related to the Contract.'

between national law and lex sportiva norms will be resolved in favour of the latter and even that national systems of regulation are inapplicable.

Second, it is a contractual order. The fact that now every competitor is theoretically linked by contract to the sporting federation is the legitimising factor of lex sportiva. This includes an agreement to submit all disputes to the relevant private arbitration body and normally also a clause that prohibits any proceedings before a national court. For example[37] Article 28 of the Constitution of the Commonwealth Games Federation provides that

1. *Any dispute arising under or in connection with the interpretation of this Constitution or the Regulations shall be solely and exclusively resolved by mediation or arbitration by the CAS according to the Code of Sports-Related Arbitration.*
2. *The decision of the CAS shall be final.*

And in the Olympic Games[38] also

> *The Appellants accepted the jurisdiction of CAS by signing the declarations described in Bye-law to Rule 45 of the Olympic Charter:*
> *"I also agree that any dispute arising on the occasion of or in connection with my participation in the Olympic Games shall be submitted exclusively to the CAS, in accordance with the Code of Sports-Related Arbitration (Rule 59)."*

See also the WADA code, which explains in a comment[39] in the introduction to the Code that

> *By their participation in sport, Athletes are bound by the competitive rules of their sport. 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. Each Signatory, however, shall take the necessary steps to ensure that all Athletes and Athlete Support Personnel within its authority are bound by the relevant Anti-Doping Organization's anti-doping rules.*

Third, the sources of lex sportiva appear to be internal to the sporting order. To distinguish the concept from international sports law, it is necessary for lex sportiva to have unique sources for its norms. The main legislative source of lex sportiva is the rules and regulations of international sporting federations or of hybrid institutions such as the WADA code.

Fourth a key feature of lex sportiva is that it results from the jurisprudence of CAS[40] or of other arbitration systems for the sport, such as FIFA's Dispute Resolution Chamber.[41] For several authors the concept is specifically restricted to the interpretations of the arbitral institutions which have exclusive power to issue awards. I am prepared for the purpose of this paper to focus on CAS as the primary arbitration system of sport but it would be prudent to recognize that there are tribunals beyond CAS, which concentrates on Olympic sports. More interesting would be the investigation of whether lex sportiva has any independent existence outside these tribunals, for example in its recognition by national courts. This leads to the next related question - is there anything in the content of lex sportiva above its unique source in the constitutions of international sporting federations, and its exclusive forum for interpretation.

Is lex sportiva the application of general principles of law or has it distinctive principles?

The difficulty with identifying the uniqueness of lex sportiva is caused partly by blurring of what is unique. There is firstly a unique content that stems from the legislative sources of lex sportiva, essentially in the regulations of international sporting federations. Second there is an exclusive procedure for decisions and interpretations of those regulations through CAS and related ADR institutions. Third there is a view that its uniqueness derives from its context. As Erbsen says 'CAS's jurisprudence is thus best conceptualized not as an entirely new species of law, but rather as a subtle adaptation of general legal norms to the idiosyncrasies of a specific regulatory environment.'[42]

In many ways the debate about the precise meaning of lex sportiva reflects a similar debate as to whether the academic discourse is sports and the law, implying the application of general principles and categories of law to sport, or sports law, which implies a distinct and different set of rules applying only to sport. Beloff for example describes it as 'a hardy perennial. Whether there is such a coherent entity as sports law, or whether sports law is only a mosaic randomly aggregated from a variety of what are accepted to be discrete legal areas.'[43]

The argument for the uniqueness of lex sportiva requires some analytical precision. In my view, the best formula is to reserve lex sportiva for those general principles that can be extracted from the diverse practice of sports federations and the codes by which they govern themselves and the principles of interpretation used by arbitration tribunals to adjudicate. This is merely a uniqueness of context.

The use of distinctive principles applicable to sporting disputes is then best described as lex ludica. Casini seems to adopt this distinction. He talks of 'principia sportiva' which occurs 'when CAS does not apply a principle of general law, but creates a "new" principle. This happens, for instance, whenever CAS refers to the so called "principia sportiva", i.e. principles conceived of for sport only, such as "fair play" or the principle of "strict liability" applied to doping cases.[44] It is these distinctive principles that are equivalent to a lex ludica, the unique norms and elements that are only found in the regulation and adjudication of sporting disputes. We can treat it as sub-category of les sportiva if necessary as long as this distinction is maintained.

Lex ludica: what's in it?

Under many of the definitions that we have looked at, there is a struggle to identify and locate the unique elements of lex sportiva. One approach is to argue for a lex ludica. I have defined this previously as:

'A further set of principles and rules that can be distinguished, and separated from the concept of 'lex sportiva', are what can be termed the sporting law, or rules of the game. I propose to call these principles 'lex ludica'. These encompass two types of rules that are distinctive and unique because of the context of sport in which they occur and are applied. One covers the actual rules of the game and their enforcement by match officials. The approach here by the CAS has been to treat these rules as sacrosanct and immune from legal intervention. The second type is what can be termed the 'sporting spirit' and covers those ethical principles of sport that should be followed by sports persons. The concept 'lex ludica' thus includes both the formal rules and the equitable principles of sport. They are arguably immune from legal intervention because they are an 'internal law' of sport - a private governance that is respected by national courts, and as such is best applied by a specialised forum or system of arbitration by experts.'[45]

I would like to broaden this concept of lex ludica to include further issues that demonstrate the different approach of both regulatory structures and arbitral bodies to sporting disputes. Lex ludica is the distinctive element of the transnational private order of lex sportiva, which equates to global sports law. So for example we could provisionally discuss these issues[46]:

- That match decisions and results are unchallengeable. The autonomy of sport requires a final result that cannot be reopened. As Beloff puts it ' at the heart of the lex sportiva lies a paradox, namely that one of its key objectives is to immunise sport from the reach of the law, to create in other words a field of autonomy within which even appellate sports tribunals should not trespass. The referee, umpire or other match or competition official must be allowed free play within his own jurisdiction'[47] This also extends to respecting expert technical decisions as final because of the expertise involved.
- Sporting ideology has always claimed that a key principle of sport is 'fair play.[48] FIFA for example has a Fair Play Code. The Laws of

37 See CAS2010/O/2039 Fiji Association of Sports and National Olympic Committee v. Commonwealth Games Federation
38 Quoted in CAS2009/A/1752 Vadim Devyatovskiy v/ IOC p.28
39 WADA code 2009 p.17
40 See Foster (2006)
41 See De Weger (2008)
42 Erbsen p.445
43 Beloff p.49. See also Joklik
44 Casini (2010) p.14
45 Foster (2006) p.421
46 A fuller discussion of some of these issues is in Foster (2006)
47 Beloff p.53

Cricket have a preamble entitled 'The Spirit of Cricket' which begins 'Cricket is a game that owes much of its unique appeal to the fact that it should be played not only within its Laws but also within the Spirit of the Game. Any action which is seen to abuse this spirit causes injury to the game itself.'[49] Exactly what is included within the concept of 'fair play' is somewhat nebulous but seems to include observing the laws, not cheating or acting dishonestly, respect for opponents and officials, and accepting decisions and results with good grace. One body - the International Fair Play Committee - defines it as 'Respect, friendship, team spirit, fair competition, sport without doping, respect for written and unwritten rules such as equality, integrity, solidarity, tolerance, care, excellence and joy, are the building blocks of fair play that can be experienced and learnt both on and off the field.'[50]

- Sporting integrity, which is the idea that the competition and the result are honest and not tainted by cheating or under-performance. There is a major problem of corruption in sport, especially in those sports that attract substantial betting, such as football, horse racing and cricket. Here sporting federations have taking powers to impose restrictions on competitors that might seem excessive in other areas, such as preventing communication with specified persons and banning the use of mobile phones in the vicinity of an event. Many such provisions may be of debatable legality under national laws.
- Punishments for doping and other offences. There are several issues here. One is the seasonality of the sport; so that bans given at different times of the year may have different effects in a seasonal sport. In Olympic events athletes aspire to one big day every four years so that a ban just before the event will have a disproportionate effect. CAS awards have recognized this differential. Another issue is whether an immediate suspension from competition is justified whilst a disciplinary procedure is exhausted.
- A related issue is that of team punishments and whether it is permissible to punish the team for the infraction of an individual. In FIN v FINA[51], a CAS panel refused to intervene when the governing body banned the Italian water polo team from future competitions despite a plea that the sanctions were not fair and appropriate. Conversely in Anderson et al[52] where the US women's relay teams were disqualified because of a doping violation by one of the team. The other athletes argued that they had unfairly been stripped of their medals. In deciding the award the panel considered the IOC's argument that in order to safeguard sports from cheats they were required to annul any team results whenever a member of the team is found to have competed while being doped and that such a principle could be deduced from a general principle of lex sportiva even as here in the absence of a specific rule. The panel said that 'the Panel does not discard the theoretical possibility that an established principle of *lex sportiva* might serve as legal basis to impose a sanction on an athlete or a team. Needless to say, the existence of such principle must be convincingly demonstrated and must also pass the mentioned predictability test.'[53] The panel could find no clear evidence and accordingly permitted the athletes to keep their medals. The WADA Code deals with this issue for doping offences but requires two offences within a period before team sanctions shall be imposed on the team.[54]
- The issue of selection for events has been at the heart of several CAS awards. In such cases the traditional view that selection for an event was an issue solely the prerogative of selectors has been challenged and modified so that objective criteria need to be applied. A related problem is the right of international sporting federations to place limits on national teams in Olympics. In Boxing Australia v AIBA[55], a panel discussing the qualification system for the Olympic boxing tournament described equal opportunities to qualify as a 'requirement of a level playing field [that] is a *lex sportiva* principle to be respected by all sports governing bodies and protected by the CAS.'[56]
- The manipulation of nationality for sporting purposes. This can be done in several ways. Most sports allow looser criteria to qualify as a 'sporting national' than to become a citizen. Some athletes can exploit dual nationality. States may allow the manipulation of citizenship requirements, especially residency rules, to permit foreign players to become nationals. And in extreme case whole squads of athletes have changed nationality for financial reward to compete under a flag of convenience.[57]

Where does lex sportiva live?

The argument of international sporting federations is that lex sportiva is de-localized, that it is stateless and so is outside the jurisdiction and control of national laws. The policy substance behind this apparently theoretical argument is that thereby a policy of self regulation by international sporting federations is strengthened and troublesome litigation by athletes is defeated. Particularly in relation to bans for doping offences there was a degree of inconsistency in the approach of national courts with different countries apparently outlawing sentences of particular lengths. Here the freedom to remove these kinds of issues from the national legal systems into a transnational autonomous regulatory regime as established under the WADA Code was much needed. In the introduction to the 2009 Code it is stated that:

> 'These sport-specific rules and procedures aimed at enforcing anti-doping rules in a global and harmonized way are distinct in nature from and are, therefore, not intended to be subject to or limited by any national requirements and legal standards applicable to criminal proceedings or employment matters. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders.'[58]

This is a bold statement that tries to argue for a sport -specific approach and is a plea for transnational autonomy because the Code has been created by WADA, which is a hybrid transnational institution involving national governments as well as private sporting bodies.

A further leg of the argument for autonomy is the need for a system of harmonized principles to cover international sport. Such harmony cannot be achieved through the courts of many nations and so it is argued that sport requires a centralized tribunal which can implement the collective will of the international sporting community.

More legalistically, the notion of immunity for lex sportiva is perhaps simply an argument that CAS awards will be respected by national courts. The New York Convention permits mutual recognition and enforcement of awards in the courts of those nations that have accessed the Convention so long as arbitration awards meet minimum standards.

In addition the CAS holds to the fiction that all awards are given in Lausanne, Switzerland thereby giving the Swiss courts the final appeal. In cases such as Gundel, they have upheld the validity of awards. Rigozzi in a careful recent study concludes that the Swiss Supreme Court has 'emphasized that revision is an extraordinary legal remedy, to be used only in exceptional circumstances'[59] and that consequently 'for the athletes: the foregoing makes it clear that the CAS is becoming the only instance where they can assert their rights.'[60]

Ravjani has argued further that adjudication by CAS is an acceptable delegation of jurisdiction and competence by national courts to an international tribunal. This express, arguably in the case of WADA, or implied delegation thus validates the immunity from national courts that is claimed by arbitration tribunals such as CAS.

The absence of a further appeal from CAS is crucial. It is reinforced by contractual provisions whereby athletes must agree to forego any

48 On the concept of fair play see Vieweg.
49 Las of Cricket, 2000 Code (MCC, London).
50 www.fairplayinternational.org/fairplay/the-essence-of-fair-play, accessed 06/09/10.
51 96/157
52 2008/A/1545
53 Anderson et al v IOC, 2008/A/1545 para. 128
54 WADA Code 11.2
55 2008/O/1455
56 Ibid para.42
57 For more detail see Foster (2008)
58 WADA Code p.18
59 Rigozzi p. 263
60 Ibid p. 265

right of appeal. Being able to create and gain recognition for a self regulating micro legal system of arbitral awards is a considerable achievement. Mitten has concluded that to achieve the objective of a uniform, world-wide body of *lex sportiva,* a valid CAS award should bar post hoc relitigation of the merits of the parties' dispute under national or transnational law in a judicial forum.'[61]

The complex relation between national laws and lex sportiva as declared by CAS has two aspects. First can national laws be ignored or overturned? A study by Mitten argues that CAS has refused to 'use national law to invalidate clearly articulated international sports governing body rules.'[62] Second, would national courts recognize lex sportiva and accept it in preference to, or in contradiction to, its own laws and principles in a similar way that international law is treated? In the nearest recent example the British Columbia Court of Appeals rejected a claim that the exclusion of women's ski jumping from the 2010 Winter Olympics was unlawful discrimination under Canadian law.[63] The court refused to intervene against the IOC for refusing to include the event and concluded 'There will be little solace to the plaintiffs in my finding that they have been discriminated against; there is no remedy available to them in this Court. But this is the outcome I must reach because the discrimination that the plaintiffs are experiencing is the result of the actions of a non-party which is [not] subject to the jurisdiction of this Court.'[64]

Conclusion

To summarise, lex sportiva has been much described and it is now clear that the jurisprudence of CAS has contributed to confirming that there is a clear field of transnational regulation of international sporting disputes. Within this field many norms created by international sporting federations and general legal principles are used and a global sports law has emerged. As a sub category, there are distinct principles here that are unique to sport. These I would prefer to be designated as 'lex ludica', precisely because that encapsulates the elusive 'spirit of the game', and distinguishes them from the application of other principles that are external but are applied to the sporting context as part of a wider lex sportiva.

The now well developed jurisprudence of CAS, which has been accelerated by the publication of most of its awards, has acquired a status that allows its awards to be recognized as final and unchallengeable. This confirms the desire of the international sporting institutions, especially the IOC and WADA, to be self-regulating and autonomous. Nevertheless it is arguable that the lex sportiva remains valid only within its own community and its own micro legal system. Like all varieties of global legal pluralism, a question remains as to its relation to other legal systems. National courts have retreated from intervening in sporting matters since Alternative Dispute Resolution has improved, WADA has proved an effective hybrid international institution of governance in doping matters and international sporting federations have juridified their rules and procedures. However it is noticeable that a reaction is setting in. As Casini argues 'national courts.….due to a lack of review mechanisms at the global level, have begun to act like review bodies over international organizations.'[65] Transnational law, including global sports law, has the capacity to create private realms of regulation and justice but such private justice is not necessarily a public good.

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61 Mitten p. 65

62 Ibid p.64

63 Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games, (2009) BCCA 522; 98 B.C.L.R. (4th) 141

64 Ibid para.132

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Public International Sports Law - A "Forgotten" Discipline?

by **Andreas Wax***

International sports law has still not been fully researched.[1] Therefore, it is no surprise that public international sports law - a key component of international sports law[2] - has so far received little attention.[3] This is, nonetheless, somewhat surprising, since public international sports law has undergone extremely interesting developments in recent decades.

The aim of the following short paper is to provide a brief overview of the previously "forgotten" discipline of public international sports law. For this purpose, a definition of the concept will first be provided, followed by a description of its main areas of application.

1. Definition of public international sports law

Defined in a positive manner, public international sports law includes all norms of public law that apply to legal issues concerning sport and according to which the subjects of public international law allow themselves to be directly or indirectly governed. Defined in a negative manner, public international sports law encompasses all the norms of sports law that are not associated with one of the categories of national law applicable to sports law, including the regulations of national or international sports organisations, European laws covering sport or national sports law. Public international sports law covers only those norms that directly relate to sport (public international law on sports), regardless of whether the sport also has a *means* of regulating (other) issues.

As an element of public international law, public international sports law is generally integrated in public international law and obtains legitimacy as well as legal institutions from the larger field. Of particular interest in this regard are the legal sources of public international law (Article 38 ICJ Statute), which give rise to immediately binding rights and obligations to the relevant parties based on public international law.[4] They are different from the norms of *soft law.* Even when they, in effect, have political and moral weight but no direct binding legal force, they deserve attention on the basis of their overarching significance for international sports.

2. The scope of public international sports law

Specifically, public international law on sport applies to the following five areas: [5] the struggle against apartheid and other forms of prejudice and discrimination in sport, peacekeeping during the Olympic Games as well as preventing football hooliganism and combating spectator violence in sport, preventing and fighting doping in sport and the question of recognising a "right to sport" as a human right.

These five fields of application can, in turn, be divided into two categories: The struggle against apartheid (general racism) and other discrimination in sport, the question concerning the recognition of a "right to sport" as a human right and the prevention of and fight against doping in sport involving the actual practice of sport. In this case, it is possible to speak of public international sports law *in the strict sense* of the term. Ensuring peace during the Olympic Games and preventing and combating violence in sport (i.e. at sporting events) do not pertain to sports activities as such but exist in immediate (spatial) relation to them. This category consequently involves public international sports law *in the broader sense.* The main fields of application of public international sports law are outlined below.

2.1. The struggle against apartheid (in South African sport)

2.1.1. Findings relating to public international sports law

In 1968, the General Assembly of the United Nations began passing a series of resolutions to combat apartheid in sport. The essential content of these resolutions was a call for discontinuing sports relations with the South African apartheid regime and the South African sports federations practising apartheid.

In passing Resolution 32/105 M of 14 December 1977, the General Assembly adopted the International Declaration against *Apartheid* in Sports in a legally non-binding form; it was largely a summary of the resolutions previously adopted. To "expose" athletes who engaged or intended to engage in sporting relations with South Africa, the *United Nations Centre against Apartheid* under the authority of the *Special Committee against Apartheid* published a so-called "black list" containing the names of those persons maintaining sporting contacts with South Africa. In 1988, the "black list" contained the names of more than 3,000 persons from 56 countries.

After numerous resolutions it was possible to submit a draft of the International Convention against *Apartheid* in Sports to the 40th annual meeting of the UN General Assembly;[6] the Convention came into effect on 3 April 1988 and contained provisions that went far beyond the requirements of the International Declaration. The corresponding measures to combat apartheid in sport include the denial of financial support to sports clubs, teams or athletes, limiting the potential uses of public sports facilities and the refusal (and withdrawal) of national honours, awards and official receptions for "South Africa starters". The Convention also established the *Commission against Apartheid in Sport* (CAAS) with a role consisting of monitoring compliance with the Convention. In furthering the Convention, the General Assembly adopted annual resolutions aimed at fighting

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1 Nafziger, in: Heere [ed.], International Law and The Hague's 750th Anniversary (1999), pp. 239, 241: *"The general process of international sports law is complex and confusing".*

2 For more on this point, see Wax, *Internationales Sportrecht. Unter besonderer Berücksichtigung des Sportvölkerrechts* (2009), p. 65 ff.

3 *See* Siekmann / Soek [ed], Basic Documents of International Sports Organisations (1999), p. XI: *"Specific public international law (in the sense of the law of nations) with regard to (...) sports".*

4 Graf Vitzthum, in: Graf Vitzthup [ed.], *Völkerrecht* (2007), S. 1, 56, MN. 113.

5 For an extensive discussion of this issue, *see* Wax (especially footnote 2), p. 197 ff.

6 GA Res. 40/64 G v. 10.12.1985 (Policies of apartheid of the Government of South Africa, International Convention against Apartheid in Sports).

apartheid in sport up to and including 1993, after which it was determined in 1994 that apartheid no longer existed in South Africa. In addition, the UN Security Council[7] and UNESCO[8] were involved with the fight against apartheid in South African sport, in a legally non-binding manner.

2.1.2. Assessment

From the perspective of public international sports law, the struggle against apartheid in South African sports occurred in non-binding legal form (*soft law*), which is why it is (still) not possible to speak of public international sports law in this regard. However, these resolutions paved the way for the International Convention against Apartheid in Sports, and thus led to an international agreement (Article 38, paragraph 1a of the ICJ Statute), which is to say to public international law. Since the Convention directly applies to issues of (international) sport, its adoption made it possible to speak of universal public international sports law for the first time.

However, no Western country and, overall, only 60 States (including only 20 of the 52 independent African states by the end of apartheid) acceded to the Convention. The general rejection of the Convention was essentially due to the incompatibility of various provisions with the constitutions of many UN member states. Moreover, some provisions of the Convention were regarded as unacceptable interference in free international sporting activities, since signatory states could only indirectly influence the sporting activities of states practising apartheid, and this only by acquiescing to a reduction of their own sports autonomy. The refusal of many states to ratify the Convention was, however, more than compensated by the fact that even these states were willing to give their consent to subsequent resolutions from 1986 onward, admittedly without granting them any legal force but nevertheless expressing the *political* will to fight against apartheid in sport. These states were also regularly involved in the boycott of South African sports ("The effective scope of the Declaration depends on the willingness of states to apply it."

It is fully acknowledged that South Africa's isolation in international sport placed it under a great deal of psychological pressure and the experience of the sports boycott proved to be a fundamentally effective means of peacefully opposing racial discrimination both *in* sport and in general.[9] As a result, South Africa began in 1986 to allow mixed-race teams and mixed-race spectators. Although this practice was criticised as an attempt to deceive world public opinion, the United Nations viewed it as a successful outcome of its efforts in the fight against apartheid (in sport).[10] The role of sport in the elimination of discrimination is given high value. For instance, *Nelson Mandela* took the opportunity of the first *Laureus Sports Awards* in Monaco on 25 May 2000 to state: "Sport has the power to change the world, the power to inspire, the power to unite people in a way that little else can. (...) It laughs in the face of all kinds of discrimination".[11] In this respect, the role of public international law should not be underestimated. The pressure needed to combat apartheid could only be generated by the international community (even in a legally non-binding form and manner). Despite all the weaknesses that were held against the International Convention, it was a clear sign by governments of their intention to confront apartheid (in South African sport). With the abolition of apartheid, South Africa could then initiate its return to the international sports family. After the South African NOC was first re-admitted to the Olympic Games in 1992, a milestone was set in the post-apartheid era (of sport): The Rugby World Cup Final in 1995 between South Africa and New Zealand became a "celebration of the lifting of apartheid".[12] The images showing *Mandela* in the stands wearing a *Springbok* jersey, once the emblem of the superiority of the white population, went around the world. The fact that South Africa has now finally returned to the international sports family was ultimately demonstrated by the successful organisation of the FIFA 2010 World Cup, an accomplishment that is also attributable to public international sports law.

2.2 Ensuring the peace during the Olympic Games

2.2.1 Findings relating to public international sports law

The revival of the *Ekecheiria* (Olympic truce), which was the longest lasting peace treaty in history[13] and, therefore, an example of early public international law[14] (in the domain of sports), along with the tradition of peacekeeping at the Olympics (or sometimes worldwide during the duration of the Games) has also now been a commitment of the United Nations since October 25, 1993, when the General Assembly adopted resolution 48/11[15]. Specifically, it calls on member states to observe the Olympic truce throughout a period from seven days prior to and seven days after the Olympic Games. This appeal was first "answered" in a cruel manner. On 5 February 1994, exactly seven days before the opening of the Olympic Winter Games in Lillehammer and on the very day that the Olympic ceasefire was first implemented in modern times, a mortar shell fired in the Bosnian civil war caused a devastating blood bath in the market place of Sarajevo. Undeterred by this terrible event, the UN General Assembly also adopted resolutions for the Olympic Games in Atlanta and Nagano which urged compliance with the Olympic ceasefire for the period of the Olympic Games. Resolution 54/34 of 24 November 1999 (Sydney) also appealed to world governments to work together with the IOC in implementing the ceasefire beyond the period of the Olympic Games as a means of promoting peace, dialogue and reconciliation in conflict areas.

Resolution 56/75[16], adopted on 11 December 2001 for the Winter Games in Salt Lake City, contained significantly more limited aims than its predecessors as a result of the attacks of 9/11. Although until this time the Olympic truce was supposed to suspend all hostilities during the Olympic Games and beyond, only the safe passage and participation of athletes in the Games was to be guaranteed. In contrast to previous resolutions, there was no longer any call for member states to take initiatives promoting individual and collective compliance with the ceasefire and to strive for the peaceful settlement of all international conflicts (through diplomatic solutions) in accordance with the purposes and principles of the United Nations. In 2003, the General Assembly began to make renewed calls for the observance of the Olympic truce. In a slight deviation from resolution 56/75, the goal of the ceasefire was now "individually and collectively to promote" a "peaceful environment" and to ensure the safe passage and participation of athletes and others participants at the Games. Member states were again asked to cooperate with the IOC in its efforts to use the Olympic truce "beyond the period of the Olympic Games" as a means to promote peace, dialogue and reconciliation in conflict regions.

2.2.2. Assessment

First, it is noteworthy that no resolution in the history of the United Nations was met with more approval than those of the General Assembly calling for the Olympic truce. Nevertheless, it is not just the widespread support for the resolutions that is remarkable. Regardless of their legally non-binding nature and despite the "setback" in 1994 involving Sarajevo, they have *actually* enjoyed a great deal of success. For example, the IOC and the Swiss Federal Council acknowledged that the ceasefire proclaimed on the occasion of the Winter Games in Nagano in 1998 was partly responsible for the United States refraining from invading Iraq in February 1998. Only then was it possible for *Kofi Annan* to travel to Baghdad in order to conclude an agreement

7 SC Res. 569 (1985) v. 26.7.1985 (South Africa).

8 UNESCO MINEPS II ED-99/MINEPS II/REF.4.E Rec. 4 v. 25.11.1988 (Promotion of sport for all and its extension to all sections of the population in a spirit of respect for human dignity).

9 Nafziger, *International Sports Law* (2004), p. 228 ff, 229 f.

10 UN Chronicle, August 1986, p. 39.

11 Cited in UNESCO DG/2004/006 v. 19.1.2004.

12 Chappell, The Sport Journal 2005, Vol. 8, N° 4.

13 Vassilakis, GA/10415 v. 3.11.2005 (Sixtieth General Assembly, Plenary, 43rd Meeting).

14 Jacobs, Annuaire de l'A.A.A. 1972/73, 52: „An early example of the impact of sport on the evolution of international law is provided (…) by the Games of ancient Greece. These games (…) can also be regarded as one of the first steps in the formation of a genuine international law".

15 GA Res. 48/11 v. 25.10.1993 (Observance of the Olympic Truce).

16 GA Res. 56/75 v. 11.12.2001 (Building a peaceful and better world through sport and the Olympic ideal).

with *Saddam Hussein* on the evening the closing ceremony of the Games and thus defuse the crisis.[17]

In terms of public international sports law, it is clear that the appeals by the General Assembly in the form of its *resolutions* have no binding legal force. It is, nevertheless, possible to describe them as public international sports *law* whenever such resolutions are based on the *customary law nature* of the Olympic truce.[18] The question is whether this assessment is correct. Here the following distinctions must be made. To the extent that any appeal to the Olympic truce propagates a global and lasting peace, an *opinio iuris* cannot be assumed to exist. This was made clear by the 2001 "break" with the purposes of the Olympic truce. As undeniably demonstrated by the practices of certain countries that heed the call for Olympic peace only to wage war afterwards, [19]the element of *general observance* required for customary international law is missing here. In complete contrast, the "narrow" concept of the Olympic ceasefire, i.e. the guarantee of safe passage and participation of all those taking part in the Games in any manner whatsoever, is recognisable under customary international law. The widely accepted observance of this qualified local ceasefire might now be viewed not only as a political concession but also a legal obligation. Assuming such basis in customary law, there is still a further question concerning the extent to which there are any appropriate sanctions for non-compliance. Apart from actions that the IOC may take against warring host countries on the basis of sports law that involve withdrawal of the Games, there are no applicable *concrete* sanctions available to address transgressive behaviour relating to the Olympic ceasefire other than those *basic* sanctions permitted by public international law. For this reason, codifying the content of the relevant resolutions in an international convention would yield no further significance other than that of a symbolic gesture. One undeniable result would nevertheless be that "ensuring the safe passage and participation of athletes and others at the Games" would change from a matter of customary international law to one of public international sports law.

Furthermore, general recognition of a global, lasting but currently utopian truce on the basis of customary international law would not give rise to public international sports law, since, in contrast to safe passage to and participation at the Games, such practice involves an area of life apart from sport, namely "general" peace-building and peacekeeping. Without a doubt, sport would be and is one, if not *the most* suitable tool for realising the objectives of the United Nations because of its impact in furthering international understanding. Although it may be a utopian idea, sport may one day be the key instrument in bringing about lasting world peace: "If we can have peace for 16 days, then maybe we can have it forever."[20]

2.3 Preventing and combating doping in sport

2.3.1 Findings relating to public international sports law

Subsequent to the Council of Europe's fight against doping that it had been carrying out since the early 1960s and that involved a series of non-binding resolutions and recommendations, a decisive step in terms of public international sports law was taken in 1989, when the first intergovernmental agreement against doping was adopted in the form of the Council of Europe Anti-Doping Convention. The Convention was extended in 2004 by means of a supplementary protocol, which is the first binding international agreement recognising the competence of WADA (World Anti-Doping Agency).

17 Kidane, *Olympic Review* 1999, N° 28, S. 48, 50.

18 Latty, *Le Comité International Olympique et le Droit International* (2001), pp. 86, 145.

19 Kofi Annan, *United Nations & Olympic Truce* (2003), p. 5: „Just think what could be achieved (…), if the Truce had as many practitioners as it has supporters in paper".

20 Vassilakis, GA/10415 v. 3.11.2005 (Sixtieth General Assembly, Plenary, 43rd Meeting).

21 ECOSOC Res. 1968/1925(XLIV) v. 23.5.1968 (Doping).

22 GA Res. 50/13 v. 7.11.1995 (The Olympic Ideal).

23 GA Res. 58/5 v. 3.11.2003 (Sport as a means to promote education, health, development and peace).

24 GC UNESCO Res. 32 C/9 v. 15.10.2003 (Preparation of an international anti-doping convention in sport).

An initial foray by the United Nations into doping occurred by means of ECOSOC in May 1968. In a manner that matched this legally non-binding resolution[21], UNESCO and the UN General Assembly exhibited a loose commitment to the fight against doping during the previous century. UNESCO's International Charter of Physical Education and Sport of 1978 warned athletes against the dangers of doping. In November 1995, the General Assembly suggested that member states should cooperate with the Olympic movement to fight against doping.[22] In November 2003,[23] an appeal was made to member states to formulate an anti-doping convention at the universal level, in association with a request by UNESCO to work in cooperation with other international and regional organisations in order to coordinate the drafting of such an agreement.

The Convention that the General Assembly called for in November 2003 also met the requirements of the Copenhagen Declaration on Anti-Doping in Sport on 5TH March 2003. In this declaration, the states supporting the WADC (World Anti-Doping Code) made a commitment to create an intergovernmental agreement to strengthen the WADC. This commitment ultimately took the form of the International Convention against Doping in Sport initiated by UNESCO.[24] After nearly two years of intensive work, the Convention was adopted on 19 October 2005 and entered into force on 1 February 2007. As of 1 September 2010, it had been ratified by 145 countries.

The Convention states that doping can only be effectively combated through international cooperation and the gradual harmonisation of the anti-doping standards and practices of governmental authorities and private sports organisations. Signatories agree to adopt appropriate measures to combat doping in sport in accordance with the principles of the WADC. Close cooperation among Convention signatories and the WADA or alternatively the WADC is already discernible in this respect. Specifically, Article 4 of the Convention deals with its relationship with the WADC. Accordingly, the WADC, the *International Standard for Laboratories* and the *International Standard for Testing* are appended as supplements to the Convention (for informational purposes) without being components of the Convention. They will not, therefore, become public international law legally binding on signatory states as a result of their incorporation in the Convention. Unlike the above-mentioned supplements, the WADA annexes to the Convention such as the *Prohibited List* and the *Standards for Granting Therapeutic Use Exemptions* are, under Art 4, para. 3 of the Convention are integral to its operation.. The appending and referencing of these documents may give the impression that the WADA, a private organisation, is empowered to create public international law by making changes to these statutes. However, Article 34 of the Convention indicates that such is not the case by prescribing a special procedure for amending the annexes to the Convention.

Generally speaking, the Convention (primarily) undertakes the eradication of doping by implementing preventive measures. There is no provision in the Convention concerning the imposition of sanctions against doping offenders apart from the explicit single reference to the WADC in Art. 4, para. 2. Article 17 of the Convention establishes a *Fund for the Elimination of Doping in Sport* (*voluntary fund*). The resources of the voluntary fund are used to support the signatory states in their development of programmes to combat doping and to implement or to help cover the costs of implementing the Convention. Article 28 et seq regulate the mechanisms needed to monitor the Convention. Just as in the case of the *monitoring group* established under the Council of Europe Anti-Doping Convention, Article 28 of the International Convention sets up a *conference of parties* as a steering committee. The tasks of the Conference are to promote the purpose of the Convention, to decide on deployment of voluntary fund resources, to consider draft amendments to the Convention and to continuously monitor compliance with it.

2.3.2. Assessment

From the viewpoint of public international sports law, it should first be noted that the fight against doping initially involved discussions among governments regarding various legally non-binding resolutions and recommendations *(soft law)*. Regional forms of public inter-

national sports law in this area were first visible when the Council of Europe Convention was adopted in 1989. The law only reached a universal level in 2007, when the International Convention against Doping in Sport came into effect. Moreover, active state commitment to any specific convention based on public international sports law did not occur until the latter anti-doping convention, as a result of which it is only now possible to speak of a "breakthrough" in public international sports law.

Both anti-doping conventions indicate that, in contrast to private sports organisations that use both preventive and enforcement measures to combat doping, the international community is mostly confined to schemes for prevention. In general, both conventions pursue the same objectives: the Council of Europe Convention expresses the will of member states to take measures in order to eradicate doping in sport, and the International Convention demonstrates the same intentions. The primary goal of the conventions is to provide states and international sports organisations with the same anti-doping regulations; this is also shown by the recognition of the WADA in both the International Convention and the Supplementary Protocol to the Council of Europe Convention. They both, therefore, respond to the argument that the prevention of and fight against doping in principle can only be efficient and fair if the same rules apply to all parties involved. Among other things, this goal will be achieved by improving the mutual cooperation of signatory states and the cooperation between states and sports organisations as well as by adopting uniform standards to fight against doping. A legal framework should be provided for this harmonisation which provides governments with legislative, administrative or policy measures to actively combat doping. These steps involve tasks that can only be performed by states, such as restricting the availability of prohibited substances. State activity is essential for any effective curtailment of doping in sport, since the anti-doping measures of sports organisations do not generally have sufficient scope.

In general, both conventions reveal that the doping problem can only be effectively addressed if prevention and enforcement are coordinated worldwide. Preventive measures alone will hardly deter athletes prepared to dope from resorting to banned substances or methods. The effective combination of anti-doping prevention and enforcement can only succeed if the international community and privately organised sports act together. The *partnership principle* thus underlies both conventions.

A weakness of both conventions is the fact that they (only) partially entail a general obligation to take steps to prevent and fight against doping without mentioning any concrete measures. This is, however, not specific to anti-doping conventions and offers countries a certain amount of flexibility, which also means that there is no guarantee that all signatory states will act effectively in the same manner.

At the very least, the International Convention is still a clear sign of the international community's responsibility in the fight against doping. Under certain circumstances, this endeavour might have also been realised by a larger number of non-European states acceding to the Council of Europe Convention. Such extension of the European agreement is theoretically possible, but only a few non-member states of the Council of Europe were actually aware of it. Furthermore, such an expansion of a European agreement would have also likely given the wrong sign. The Council of Europe Convention made its (predominantly European) signatory states aware of the significance of the doping issue. The International Convention against Doping in Sport, which was also identified as a "fundamental step forward in the harmonisation of the fight against doping"[25], simply has, however, the necessary universal "attire". Governments can now demonstrate that they really want to fight doping *all around the world*. If sport is characterised by its universality, its greatest scourge - doping - must also ultimately be universally fought. Insofar as private sports organisations are concerned, this has been happening for some years by means of the WADC. The (universal) international community now has the means at hand to meet its self-proclaimed responsibility. This is the *added value* that the International Convention has over the Council of Europe Convention. There is still no answer to the question concerning the extent to which public international sports law is *in fact* the appropriate means to alleviate or even eliminate the problem of doping in sport. The will to undertake collectively the prevention of and fight against doping is certainly evident: ratification of the Convention is occurring around the world. It is now up to the signatory states to ensure the practical effectiveness of its provisions.

3. Conclusion

This brief description of each area to which public international sports law applies makes it clear that public international sports law is a central component of international sports law. In an era when sport is undergoing steady *legalisation*, public international sports law represents an appropriate corrective measure made necessary by the *internationalisation of sport*. Firstly, the statutes and regulations of international sports organisations have an appropriate "doubles partner" in the legal regulations governing international sport. Secondly, international public sports law is the suitable instrument for regulating international sports (and consequently enhancing their prestige) in those areas that elude the regulatory powers of international sports federations due to the nature of such organisations. International public sports law can do this simultaneously without affecting the autonomy of the sport. Therefore, the appeal for public international sports law, together with international law on sports associations was aptly made nearly 40 years ago, when *Luc Silance* stated: "Sport law can only be international, since we are living in an era of frequent travel and established international relations".[26]

25 WADA Play True Magazine, Issue 3 - 2005, S. 10.

26 Silance, Olympic Review 1971, S. 586, 593.

Delegation of Indonesian Youth and Sports Ministry Visiting The Hague

On 1 October 2010 a delegation of the Ministry of Youth and Sport of the Republic of Indonesia visited the ASSER International Sports Law Centre to discuss current topics of national and international sports law and its study and development in Indonesia, in particular Law Number 3 Year 2005 of the Republic of Indonesia concerning the National Sports System.

MEMORANDUM OF UNDERSTANDING
FOR COOPERATION BETWEEN
THE ASSER INTERNATIONAL SPORTS LAW CENTRE AND
THE ALL INDIA COUNCIL OF PHYSICAL EDUCATION & SPORTS LAW INDIA

Considering the close, traditional ties between the Republic of India and the Kingdom of the Netherlands,
Considering that close cooperation in the field of international sports law between our institutions would be conducive to strengthening these ties,
Considering that close cooperation in the field of education and research in international sports law between our institutions would be an important contribution to the promotion and development of international sports law - our Institutions being seated in the western and eastern hemisphere of the world respectively,
We have decided - by signing this Agreement - to create a framework for cooperation, in particular focusing on the following forms of cooperation:

- the exchange of information and library services;
- the joint organization of specialized courses;
- the joint organization of conferences, seminars and workshops on topical issues of international sports law;
- the exchange of students and trainees in sports law;
- the joint undertaking of studies;
- the publication of books.

All decisions regarding this cooperation will be taken after mutual consultations between the institutions.
The Agreement is valid for a period of four years, to be renewed by mutual agreement.

The Hague, 14 September 2010

Prof. Dr. Robert Siekmann
Director
ASSER International Sports Law Centre
The Hague
The Netherlands

Dr. Amaresh Kumar
Secretary General
All India Council of Physical Education & Sports Law India
New Delhi
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2010 FIFA World Cup South Africa: Legal Protection of the Marks and the Event

by **Ian Blackshaw***

Introductory Remarks

Sport nowadays is big business representing more than 3% of world trade. And Football is not only the world's favourite game, but it is also the world's most lucrative sport. Indeed, according to Sepp Blatter, President of FIFA, the world governing body of football, it is a product in its own right.[1]

Football's premier event is the World Cup, which in 2010 took place in South Africa - for the first time in its history on the African Continent. And, by all accounts, it was a great success, despite the many doubts about security, logistics and other concerns expressed before the event. In order to organise and stage such a major sporting event, claimed by FIFA to be the world's biggest and most popular one, the name and the event itself need to be legally protected. Otherwise, sponsors and others wishing to associate themselves and their products and services with the event - so-called 'commercial partners' - would not be prepared to pay mega sums for the privilege, if others could usurp and infringe their rights with legal impunity.

And that is where Intellectual Property Rights (IPRs) kick in. Their importance in the marketing and commercialisation of sports events cannot be overstated. Indeed, without them, many major international sports events, such as the World Cup, could not take place - much to the disappointment of sports persons and sports fans. In this Chapter, therefore, we will explain the legal nature of these rights and in what particular ways they have been protected and exploited by FIFA in relation to the 2010 World Cup in South Africa.

The Importance of IPRs in Sport Generally

IPRs play an important role in the protection, commercialisation and exploitation of sports events as the following examples demonstrate.

For example, licensing and merchandising rights in relation to major sports events, such as the FIFA World Cup, are 'hot properties', commanding high returns for the rights owners ('licensors') and concessionaires ('licensees') alike. See Chapters 10 on '*Intellectual Property Rights and Sport*' & 11 on '*Sports Marketing, Sponsorship and Ambush Marketing*' by Ian Blackshaw in '*Sports Law*' by Gardiner et al, 2006 Third Edition, Cavendish Publishing, London, ISBN 10: 1-85941-894-5.

Again, the commercial exploitation of the image rights of famous sports persons, such as the footballer David Beckham, is also big business. See '*Sports Image Rights in Europe*', Ian S. Blackshaw & Robert C. R. Siekmann, 2005 TMC Asser Press, The Hague, The Netherlands, ISBN 90-6704-195-5.

Likewise, sports broadcasting and new media rights are also money-spinners. For example, the English FA Premier League sold its broadcasting rights for the 2007-2010 seasons for a record sum of £1.7 billion!

Underpinning all these examples of the marketing, promotion and commercialisation of sport and sports events are the corresponding IPRs, especially trademarks and copyright. Take English Law, for example, there is no legally recognized right in a sporting event *per se*. See *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor and Others* [1937] 58 CLR 479. In that case, Latham CJ held that:

"*A spectacle cannot be 'owned' in any ordinary sense of that word.*"

Event organizers, therefore, have to rely on a variety of IPRs and other legal measures, including 'passing off' and 'unfair competition' - in an economic and business sense.

Likewise, under English Law, there is no right of personality *per se*. So, again, sports 'stars' have to rely on a 'rag bag' of rights, including trademarks, copyright and 'passing off' to protect their images and capitalise on them. However, in Continental Europe, so-called 'personality rights' are generally protected under specific Constitutional provisions. In Germany, for example, articles 1 and 2 of the Constitution protect image rights. And Oliver Khan, the former German national team goalkeeper, successfully sued Electronic Arts (EA), the electronic games manufacturer, for using his image and name in an official FIFA computer football game. EA claimed that collective consent had been obtained from the national (VdV) and international (FIFPro) football players' unions. But not, in fact, from individual players, including Khan himself! This the Hamburg District Court ruled off side![2]

Other IPRs, such as Patents and Registered Designs, for example, are of limited application and importance in sports law, although they do figure - to a certain extent - for example, in connection with the commercialisation of sports equipment and goods as well as so-called 'sports movements' such as the '*Fosbury flop*'.

As regards trademark protection, which is probably, in practice, the most important form of legal protection for sports events, sports bodies and organisations and sports persons, the UK Trade Marks Act of 1994, for example, defines a trademark in section 1(1) in broad terms as follows:

> "*… any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.*"

This is a wide definition and so a trade mark may be granted in respect of, for example, distinctive sounds, as in the case of the Australian Football League, which has registered the sound of a football siren for football and associated services.

Thus, provided the basic legal requirement of distinctiveness is satisfied, it is possible to register the names and associated *logos* of sports events as trademarks. However, an attempt in 1998 to register the name 'World Cup' failed through lack of distinctiveness. But, when combined with a distinctive and original logo, such a mark - known as a '*composite*' or '*device*' mark - can be protected as a trademark and also enjoys copyright protection as an 'artistic work'. Under section 4 (1)(a) of the UK Copyright Designs and Patents Act of 1988, "*a graphic work, ….. irrespective of artistic quality*" qualifies for legal protection as an 'artistic work' under the Act.

Sports event 'mascots' may also qualify, in principle, for registration as trademarks, again subject to their being distinctive (see later).

See further on the subject of the role played by IPRs in Sport: 'The Importance of IP Rights in Sport' by Ian Blackshaw.[3]

2010 FIFA World Cup South Africa Marks

As the owner of all the commercial and marketing rights in the World Cup, FIFA registered a number of trademarks in South Africa in relation to the organisation and marketing of the 2012 event in South Africa, which took place between 11 June and 11 July, 2010.

According to FIFA and the Local Organising Committee, the 2010 identity is unique, vibrant and dynamic, graphically encapsulating the

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* Ian Blackshaw is an international sports lawyer and *inter alia* a member of CAS.

1 For more information on FIFA and its activities, log onto their official website at: www.fifa.com.

2 *Kahn v Electronic Arts GmbH* unreported 25 April, 2003 (Germany).

3 The International Sports Law Journal, ISLJ 2008/3-4, at pp. 146-150.

African continent while more intimately dipping into South Africa's rich and colourful heritage for inspiration.

The graphic figure strikes a resemblance to the earliest rock art paintings for which South Africa is also famous. This figure is caught in mid-action performing a bicycle kick - a style of play that captures the flair of African football.

The figure is lucid, energetic and indirectly illustrates an inherent passion for the beautiful game. It is kicking a football upwards - an invitation from Africa to other nations of the world to join the game.

The actual ball is a modern representation of a football, suggesting that it belongs to FIFA. And for the first time ever, this ball that has travelled across the globe will touch African soil.

The colourful backdrop behind the figure represents the South African national flag. The 'swishes' extend upwards, from south to north, reaching out to the world. They embody the energy, diversity and fiery passion of the country; and they also symbolise the rise of the rainbow nation.

The typeface is an original creation. It reflects the South African personality and reinforces the idea that in South Africa they do things uniquely. It is playful, naïve and free-spirited. It is also bold, welcoming and friendly.

The official 2010 FIFA World Cup™ poster was unveiled on 23 November 2007 following a board meeting of the Local Organising Committee in Durban. The poster was designed by the South African creative agency Switch, who also created the 2010 FIFA World Cup™ emblem. The design beat three rivals in a public vote held throughout South Africa from 11 September to 30 September 2007. As the lucky winner in a lottery among all of the voters, South African Marilyn Rhoda was presented with a prize of two 2010 FIFA World Cup™ tickets provided by official sponsor MTN.

"*Portraying a country in the shape of a man heading a ball is a new idea with potent symbolism. For me, football is all about emotion and passion, which is why I was particularly attracted to this poster. It invites the world to join in the celebration of the greatest football event on earth, while highlighting the pride and passion of the African continent and her people. It represents the African dream come true. The South Africans made a good selection for the poster, which will represent their country all the way up to 2010*," said FIFA President, Sepp Blatter.

For the first time in football history, the FIFA World Cup™ was hosted on African soil from 11 June to 11 July 2010. So, the artwork depicts a celebration of the African continent as well as everyone who calls it home. The simple and yet iconic rendering is symbolic of the relationship between football and Africa and captures a sense of excitement, awe and aspiration. It also reflects the positive impact that the 2010 FIFA World Cup™ has had and will have on Africa. Africa is the "hero" of the official event poster. The unique shape of the continent almost naturally lends itself to the shape of a man's profile, while the face represents every single African supporter from Morocco in the north, Gambia in the east, Somalia, Kenya and Ethiopia in the west to South Africa in the south.

"*The official poster symbolises the important role of football in the history, tradition and culture of the African continent. It's also a recognition that football has always been an inspiration for a better future and a generator of hope in Africa. It recognises that Africa has a football face and a football heart*," explained Danny Jordaan, CEO of the 2010 FIFA World Cup Local Organising Committee.

Bright, vibrant and celebratory, the colours of the poster are inspired by the South African flag, but also draw upon the African continent. The strong yellow background symbolises the sun as the source of warmth, energy and life.

From a total of 16 creative entries, all submitted by South African-based agencies, three proposals had been pre-selected for the public vote by South African residents. The jury was made up of FIFA General Secretary Jérôme Valcke, CEO of the 2010 South African Local Organising Committee Danny Jordaan, Minister in the South African Presidency Essop Pahad, Deputy Finance Minister Jabu Moleketi, South African playwright and author Wally Serote, and artist and director of the Vega School of Brand Communication Gordon Cook. Following on from the 2006 FIFA World Cup™ in Germany, this was the second time that residents of the host country had been actively involved in the selection of the official event poster.

17 international artists with a special relation to the African Continent created beautiful and extraordinary works on football for the Official Art Poster Edition 2010 FIFA World Cup South Africa™. International celebrities such as Marlene Dumas, William Kentridge and Romero Britto, as well as exciting emerging talents are represented in the series of artworks for the 2010 FIFA World Cup South Africa™.

The Official Art Poster Edition 2010 FIFA World Cup South Africa™ is a strictly Limited Edition. Only 2010 Complete Editions in 2010 FIFA World Cup™ Portfolio are available worldwide.

Individual prints of the Official Art Poster Edition 2010 FIFA World Cup South Africa are also available.[4]

So what can one say about him? According to FIFA: one thing is for sure, Zakumi will be first on the dance floor and last off it at the biggest party in the world - the 2010 FIFA World Cup South Africa™. He wants to dance and entertain as many people as he can. He is an animator for fans, players and officials, for schoolchildren, teenagers and big kids alike!

Needless to say, he is extremely proud to be the Official Mascot and determined to be the best host for everyone visiting his beloved country. He symbolizes South Africa and the rest of the African continent through his self-confidence, pride, hospitality, social skills and warm-heartedness.

Zakumi is a jolly, self-confident, adventurous, spontaneous, and actually quite shrewd little fellow. He loves to perform and always follows his instinct and intuition, yet sometimes has the tendency to exaggerate a bit. You will often find him fooling about and teasing people but not in a mean way. He is warm-hearted and caring, and wants to make as many friends as possible.

He loves to play football as it is a great way to connect with others and break down language barriers. He always carries his football around which he will use to invite people to play with him.

At one time he decided to dye his hair green as he felt it would be the perfect camouflage against the green of the football pitch; a bit like his rosette spots are when hunting in the wilderness!

He does have one striking weakness. With all his energy, he needs frequent rests. Occasionally, in-between performances on stage, he may suddenly fall asleep on the spot at the most random times! But rest assured, these are only short breaks that a leopard of his calibre needs to recharge his batteries.

Over the last years he has travelled the whole of Africa where the leopard habitat is good (pretty much everywhere from open savannahs, forests, jungles to mountainous areas, even deserts). He has, therefore, learned to adapt to new environments; enjoying the diversity in nature and people across the African continent

The name 'Zakumi' is a composition of 'ZA' standing for South Africa and 'kumi', which translates into '10' in various languages across Africa.

Zakumi's main priority was to turn the 2010 FIFA World Cup South Africa into one huge, joyful and unforgettable party and show the thousands of international guests the warmth and spirit of the African continent.

"*He wants to create a good mood for the fans and raise the excitement for the 2010 FIFA World Cup, the first on African soil. He is a proud South African and wants to ensure that the world will come together in South Africa*," explained Lucas Radebe, South Africa's football icon and close friend of Zakumi.

On the subject of '*Character Sports Merchandising*' generally, which is a lucrative form of licensing if handled properly, see '*Character Sports Merchandising: International Legal Issues*' by Karen Williams.[5]

4 **For more information about these Posters, e-mail 'mail@brandsunited.de.'**

5 **The International Sports Law Journal, ISLJ 2009/1-2, at pp. 7-18.**

The actual 2010 World Cup South Africa trademark registrations are quite extensive and cover a wide range of goods and services.

'Ambush Marketing' and Counter Measures

'Ambush Marketing' is a form of unfair marketing and has been described as 'parasite marketing'. Norman Mandel of The Coca-Cola Company, one of the world's leading marketing companies and probably the biggest sponsor and promoter of international sports events, put the case a number of years ago against 'Ambush Marketing' in the following forthright terms:

"*What impacts on sponsorship is when you don't get value. This happens when ambush marketing is allowed to occur. Let's get this straight. Ambush marketing is ….. stealing, thievery. Michael Payne [former Marketing Director of the IOC] got it right when he called it 'parasite marketing'. You know what parasite means. It is when one organism lives off another with no benefit to the host*."

On the other hand, others claim that it is clever and creative marketing and fair game! And, as such, they regard 'Ambush Marketing' as a challenge to their creativity and ingenuity. Some get away with it; whilst others do not. But the 'Ambush Marketers' think it is worth a try and go to great lengths to gain a marketing and commercial advantage over their competitors. And the supporters of 'Ambush Marketing' say good luck to them! See further on the arguments against banning 'Ambush Marketing' an interesting and thought-provoking article entitled, 'Ambush Marketing: Criminal Offence or Free Enterprise' by Luisa Leone.[6] In this article, Leone, a Partner and Head of the Sports Law Unit at *Hewitsons*, Cambridge, UK, supports her arguments against banning 'Ambush Marketing' by asking and answering the following "key questions":

- *Does a ban on ambush marketing benefit sport?*
- *Does a ban on ambush marketing benefit the economy?*
- *How far can you go in limiting ambush marketing?*
- *Is a ban on ambush marketing necessary?*
- *Does existing law adequately protect the interests of sponsors?*

Whether you agree with her arguments or not, her Conclusions are worth reproducing in full as follows:

"*Rather than demanding ever more stringent legislation, sponsors should be expected to counter ambush marketing themselves by pursuing all the commercial opportunities afforded by a particular event. We should bear in mind that sponsors of major sporting events tend to be large transnational corporations well able to look after themselves, with little need for additional protection. Above all, governments should remember the adage that "he who pays the piper calls the tune"; it is one thing for sponsors to demand the exclusive right to exploit a major sporting event for which they have provided all of the funding, but quite another to expect the same degree of exclusivity when, as more often occurs, the bulk of the money is coming from the taxpayer*."

But what is 'Ambush Marketing'?

Basically, a company or firm claims an association, through advertising and consumer promotions, with a sports event, which it does not have, and, perhaps more importantly, for which it has not paid a penny. In such a case, sponsors do not get value for the considerable sums that they have expended on the particular sponsorship. 'Ambush Marketing' not only adversely affects official sponsors and their sponsorships, it also dilutes the value of the sports events themselves, as well as causing confusion amongst consumers.

For further general information on this important topic of 'Ambush Marketing' and the corresponding 'Brand Protection Programmes,' see Chapter 11 by Ian Blackshaw in '*Sports Law*' by Gardiner et al, 2006 Third Edition, Cavendish Publishing, London, ISBN 10: 1-85941-894-5.

Of course, the more popular and more global reach the sports event enjoys, the more it is likely to be the subject of attack from 'Ambush Marketers'! And, therefore, the more protection the organisers need to safeguard and defend their legitimate interests.

So, what are these interests and why, in the case of the World Cup, is it important for FIFA to fight 'Ambush Marketing'? What is the rationale? These questions have been very well answered by Dr Owen Dean, a partner and IP specialist in the leading South African Law Firm, Spoor and Fisher, and FIFA's legal adviser on these matters:

"*The main objective of the Federation Internationale de Football Association (FIFA) for the 2010 World Cup Tournament is to make it a success not only for the players, the football fans and the game of soccer, but also from a financial point of view and in particular for the sponsors of the event. Sponsorship is an integral and essential part of a world cup tournament and without the funds provided by sponsors the enormous costs involved in running an event such as a Soccer World Cup could not be met. FIFA therefore sets itself the goal of giving its sponsors value for money so that sponsor will continue to support the event in the future and thus make it viable.*

When FIFA signs up a sponsor for a world cup tournament it undertakes to give that sponsor, and its sponsors in general, exclusivity in the use of the event as a platform to parade and promote their brands. More particularly, when FIFA signs up a sponsor which operates in a particular field, for instance providing credit card and other financial facilities, it commits itself to exclude that sponsor's competitors from using the event as a platform from which to promote their brands. It also assumes obligation to prevent all non-sponsors from seeking to gain promotional benefit from the event and thus from undermining the privilege which sponsors obtain from payment of the sponsorship fees.

In consequence it behoves FIFA to strictly control and police the use of the Soccer World Cup as a promotional platform. FIFA must ensure that non-sponsors do not ride on the back of the World Cup and bask in its limelight to the detriment of the sponsors. To this end FIFA has in the case of past Soccer World Cups pursued, and is actively pursuing in regard to the 2010 World Cup in South Africa, a rigorous rights enforcement program to curtail unauthorised use of the event for promotion purposes. The threats that FIFA faces in controlling the use of a World Cup Tournament for promotional purposes comes basically from two quarters, namely the distribution of counterfeit merchandise and from so-called 'ambush marketing'."[7]

So what legally can be done about 'Ambush Marketing'?

Depending on the facts and circumstances of the particular case and depending on whether the sports event is protected by a special law or statute, which is usually a requirement of FIFA for awarding a host country the right to stage the World Cup, it may be possible to obtain a Court Injunction or an award of damages or other legal remedies. Apart from special legal measures, FIFA can also rely on the general law of 'passing off' and 'unfair competition' to combat 'Ambush Marketing' as David Gill, Senior UK and European Trademark Attorney, *Rouse*, a Global IP Firm, points out as follows:

"*Even if a word or a term is not a registered trade mark in that country, if it is used without permission to refer to FIFA's tournament in a way that creates an association in the mind of the consumer between the user and the tournament, the activity may amount to passing off or unfair competition. FIFA hit the headlines back in 2002 when it successfully obtained emergency injunctions in several European and Latin American jurisdictions forcing a multinational soft drinks company to immediately pull their TV adverts at great expense because they included the unregistered term 'TOKYO 2002'. This was considered by the courts to be a clear unauthorised association with the 2002 World Cup Korea/Japan*."[8]

On the subject generally of protecting IPRs under 'passing off' and 'unfair competition' concepts, see 'Protecting IP Rights under English Common Law and European Continental Law: 'Passing Off' and 'Unfair Competition' Compared' by Ian Blackshaw.[9]

In the case of the 2010 South Africa World Cup, special legal measures were, in fact, put in place and available to FIFA and the local

6 **The International Sports Law Journal, ISLJ 2008/3-4, at pp. 75-77.**

7 **Log onto Spoor & Fisher's website at www.spoor.com for more information.**

8 **'*2010 FIFA World Cup South Africa: how to stay on side*', The In-House Lawyer Magazine, 16 October 2009.**

9 **The International Sports Law Journal, ISLJ 2008/3-4, at pp. 150-152.**

organising committee to counteract various forms of 'Ambush Marketing'! In fact, leading up to and during the staging of the event, some 450 cases of 'Ambush Marketing' were brought by the organisers. One spectacular case brought against two Dutch women, who were among a group of about three dozen who wore skimpy orange dresses, accused of an illegal promotion stunt by the brewer Bavaria at a match between The Netherlands and Denmark on 18 June, 2010 was prosecuted by FIFA, but then the case was dropped on 22 June, 2010. According to the South African National Prosecuting Authority:

"*Fifa was not interested in proceeding with the matter. There was a settlement that was reached between the parties and we ... decided to exercise discretion and not proceed with the matter*."

These anti 'Ambush Marketing' legal measures, their background and the need for their enforcement are explained by FIFA in the following terms:

"*FIFA works all year and all around the world to ensure that its official trademarks and other intellectual property (IP) rights are properly protected and enforced, but when it comes to the protection of its major tournaments there is no substitution for good old legwork. Ever since the 1998 FIFA World Cup France™, FIFA's own "tournament line-up" has included rights protection experts pounding the streets of the host country during the event to ensure that businesses and individuals are playing by the rules when it comes to the proper observance of FIFA's rights. Sometimes misrepresented, particularly in local media, as an attempt to stifle the creativity of small businesses, the rights protection programme (RPP) is in fact aimed primarily at tackling organised "ambush marketers", counterfeiters, unauthorised ticket sellers and other "event pirates", all of whom seek to profit from an event to which they have contributed nothing.*

Without constant vigilance and swift action to prevent such infringements, high-profile tournaments such as the FIFA World Cup™ would face extreme difficulty in attracting official sponsors, in turn damaging FIFA's ability to stage its eleven other international tournaments, many of them in the women's game or at youth level, and carry out its important work in promoting the game and funding football-related social programmes.

There was little need for active rights protection measures during the first six decades of the FIFA World Cup but the rise of event piracy in the early 1990s saw rights protected as official trademarks coming under increasing attack. In 1994 FIFA recorded 258 infringements across 39 countries. By the time the 1998 World Cup came around, FIFA's newly-created RPP patrols helped to identify 773 cases in 47 countries. This more than doubled to 1,884 instances in 94 countries in 2002, when the FIFA World Cup was staged in Japan and Korea, and rose at a similar rate to reach 3,300 cases when the 2006 FIFA World Cup Germany™ came around.

According to FIFA RPP Manager Miguel Portela: 'You only have to look at the recent rise in deliberate event piracy activities like ambush marketing to understand why the active enforcement of trademarks and other marketing rights protection is both necessary and logical. It is the same for any company, or you could even take organising a private event as an example. When you have spent time organising a special event like a birthday party or a wedding, you don't want gatecrashers coming along to ruin things. The FIFA World Cup is of course on a completely different scale, but the principle is the same.' "

Over the years, the FIFA Rights Protection Programme has been generally criticised for attacking small and local businesses and traders as being easy targets. And this criticism has been roundly denied by FIFA in the following terms:

"*The situation is similar when it comes to small businesses who are naturally keen to benefit from the financial opportunities that arise from staging a FIFA World Cup. Before and during the 2006 FIFA World Cup™ there were many inaccurate media reports claiming that FIFA was taking vigorous action against local bakers for selling "World Cup buns" or "World Cup bread". The truth is that FIFA decides in each individual case whether an infringement should be pursued and how to do so. In the case of the last World Cup, there were no instances of FIFA taking such steps against a small business.*

Indeed, the public information sheet produced by FIFA to explain its official trademarks clearly sets out a number of "do's and don'ts" to help businesses understand the ways in which they can benefit from the financial knock-on effects of a FIFA World Cup without abusing FIFA's protected rights. As well as setting out what companies and individuals should not *do, the sheet actively encourages firms to get involved with the event by, for example, becoming service providers or suppliers for stadium construction or general infrastructure requirements, or for events and activities staged by FIFA, Local Organising Committees, Host Cities and other partners. There is also the opportunity to apply for an official product licence, or simply impressing clients by treating them to one of the various hospitality packages offered by FIFA. More generally, businesses can of course conduct non-specific football promotions, so long as they do not make direct or indirect reference to the FIFA World Cup™. Beyond all that, local companies can naturally benefit from the large influx of visitors created by the tournament, from the increase in the host country's international profile and from the physical legacy left by the building of new stadiums and infrastructure.*

The messages contained in the information sheet are actively followed up by FIFA with regular information seminars which are presented to local industry bodies and trade associations during the build-up to major tournaments, with the aim of informing companies across the region in question about their commercial options.

FIFA is as keen as anybody to see local businesses doing well out of the FIFA World Cup, as this helps to further enhance the attraction of the event while also fostering good relations with the people who live and work in the areas where the football is taking place," points out Jürg Vollmüller, head of FIFA's Commercial Legal Department. "So long as companies understand the rules, everyone is happy, because local business can enjoy the obvious benefits of having a FIFA World Cup on their doorstep while the official FIFA Partners remain satisfied that their exclusivity has also been respected."

The FIFA Public Information Sheet is indeed very helpful in setting out the parameters and the rules and, in view of its importance, it is reproduced in full in Appendix I to this Chapter. Its purpose is to provide guidelines to avoid marketing programmes and activities from infringing FIFA's interests and valuable IPRs, without which it would be impossible to organise and stage such a major global sporting event as the World Cup.

Anti Ambush Marketing 2010 South Africa World Cup Statutory Provisions

These special legal provisions to protect the marketing of the 2010 World Cup in South Africa are contained in an amendment to the Merchandise Marks Act of 1941 which was passed on 17 January 2003.

The text of this Statutory amendment as published in the Republic of South Africa Government Gazette is as follows:

Government Gazette
Vol. 451 Cape Town 17 January 2003 No. 24278
THE PRESIDENCY
No. 114 17 January 2003
It is hereby notified that the President has assented to the following Act, which is hereby published for general information:-
No. 61 of 2002: Merchandise Marks Amendment Act, 2002.

GENERAL EXPLANATORY NOTE:
Words in bold type in square brackets indicate omissions from existing enactments.
Words underlined with a solid line indicate insertions in existing enactments.
(English text signed by the President.)
(Assented to 30 December 2002.)

ACT

To amend the Merchandise Marks Act, 1941, so as to define "event" and "protected event"; to prohibit the abuse of a trade mark in relation to an event; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 1 of Act 17 of 1941, as amended by section 1 of Act 39 of 1952, section 1 of Act 47 of 1954, section 1 of Act 54 of 1987, section 1 of Act 49 of 1996, section 1 of Act 38 of 1997 and section 1 of Act 50 of 2001

1. Section I of the Merchandise Marks Act, 1941, is hereby amended-

a) by the insertion after the definition of "document" of the following definition:

recreational or entertainment nature which is-

(a) held or to be held in public;

(b) likely to attract the attention of the public or to be newsworthy; and

(c) financed or subsidised by commercial sponsorship, and includes any broadcast of such exhibition, show or competition;";

and

b) by the insertion after the definition of "Dremises" of the following definition:

" 'protected event' means an event designated as such under section 15A;".

Insertion of section 15A in Act 17 of 1941

2. The following section is hereby inserted in the Merchandise Marks Act, 1941, after section 15:

"**Abuse of trade mark in relation to event**

15A. (1) *(a)* The Minister may, after investigation and proper consultation and subject to such conditions as may be appropriate in the circumstances, by notice in the *Gazette* designate an event as a protected event and in that notice stipulate the date-

(i) with effect from which the protection commences; and

(ii) on which the protection ends, which date may not be later than one month after the completion or termination of the event.

(b) The Minister may not designate an event as a protected event unless the staging of the event is in the public interest and the Minister is satisfied that the organisers have created sufficient opportunities for small businesses and in particular those of the previously disadvantaged communities.

(2) For the period during which an event is protected, no person may use a trade mark in relation to such event in a manner which is calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit from the event, without the prior authority of the organiser of such event.

(3) For the purposes of subsection (2), the use of a trademark includes-

(a) any visual representation of the trade mark upon or in relation to goods

(b) any audible reproduction of the trade mark in relation to goods or the

(c) the use of the trade mark in promotional activities, which in any way, directly or indirectly, is intended to be brought into association with or to allude to an event.

(4) Any person who contravenes subsection (2) shall be guilty of an offence.

(5) For the purposes of this section 'trade mark' includes a mark.".

or in relation to the rendering of services.

Short title

3. This Act is called the Merchandise Marks Amendment Act, 2002.

The provisions of this Statutory measure are, however, somewhat secondary to the main thrust of the FIFA plan of attack against ambush marketers, which is to utilise the provisions of Section 15A of the Merchandise Marks Act, which empowers the Minister of Trade and Industry to designate major sporting events as so-called "protected events". By this means, ambush marketers can be prevented from competing unlawfully with FIFA by obtaining special promotional benefit from, or associating themselves with, the 2010 World Cup, without being official sponsors. This objective was achieved in May 2006, when the Minister of Trade and Industry published a notice declaring the 2010 South Africa World Cup to be "a protected event".

As will be seen, this Statutory measure is a criminal one used in a civil law context, and this point and the rationale of the legal provisions is well explained by Dr Owen Dean, a leading South African IP lawyer, who helped to draft the amendment, in the following extract from his article:

"*In order to forearm itself and to place it in a position to ward off the unwelcome attentions of counterfeiters and ambush marketers FIFA has in the case of the 2010 World Cup, as it has done with previous World Cups, acquired various forms of protection for its intellectual property associated with the event and more particularly its trade marks, designs, artworks and the like. For the 2010 World Cup, FIFA has registered various words and logos, including the official emblem, as trade marks, registered designs, and has sought protection of various marks in terms of Section 15 of the Merchandise Marks Act, which provides for the Minister of Trade & Industry to declare various trade marks as prohibited marks. It has also arranged for the 2010 World Cup to be declared a protected event in terms of Section 15A of the Merchandise Marks Act and this measure affords special protection against ambush marketing. Over and above this, FIFA has placed itself in a position to rely on copyright in various works, the common law of passing-off and unlawful competition and the Trade Practices Act which has a provision criminalising the making of false associations or connections with a sponsored event.*

With the 2010 tournament less than three years away, FIFA has decided to launch litgation in the High Court against four transgressors who have infringed its rights. This litigation is the culmination of demands made during the past few years by FIFA against unlawful activities pertaining to the 2010 World Cup and it marks the advent of a new phase of enforcement where FIFA is demonstrating its resolve to deal firmly with recalcitrant wrongdoers.

In mid-November FIFA issued papers out of the Pretoria High Court against four separate infringers of their rights. The wrongdoers conduct business in, respectively, the trade in key rings, ornaments and the like, restaurant services, accommodation and hospitality services and foodstuffs. Although the nature of the infringing activities brings about variations in the causes of action and claims which FIFA has brought against the transgressors, there is a significant amount of commonality in the various cases.

In general the four complaints and causes of action rely on a variety of the weapons at FIFA's disposal and they are aimed at the use of marks such as SOUTH AFRICA 2010, SOCCER WORLD CUP, SOUTH AFRICA WORLD CUP and the use of devices depicting soccer balls in conjunction with 2010 or SOUTH AFRICA 2010.

The cases rely on infringement of various of FIFA's registered trade marks consisting of or incorporating the aforementioned elements. The trade mark infringement claims are supported by claims of passing-off, relying on the reputation attaching to the 2010 Soccer World Cup Tournament and insignia denoting it and the resultant confusion which arises when third parties use marks or other insignia which suggest a connection in the course of trade with the event or with FIFA. Furthermore, it is claimed by FIFA that the use of the offending insignia and the transgressors' trading activities in that regard amount to making undue associations with the event and thereby derive promotional benefits from it in contravention of Section 15A of the Merchandise

Marks Act and the Trade Practices Act. Contraventions of these statutes are criminal offences and it is argued by FIFA that, by acting contrary to law in conducting the offending trading practices, the transgressors are competing unlawfully with FIFA. On the strength of these unlawful acts, FIFA is seeking interdicts restraining the unlawful conduct, delivery-up of all goods bearing offending marks, costs of suit as well as various other forms of ancillary relief. FIFA also reserves its rights to claim damages from the transgressors in further proceedings.

In one of the cases the transgressor has registered the shape and configuration of its offending product as a design under the Designs Act. In this instance FIFA is also seeking the cancellation of the registered design on the grounds that, because the distribution of the articles in question is unlawful, the design has been registered in fraud of FIFA's rights. This is a novel point in South African design law and to this extent the case in question is something of a "test case" on the issue in question.

It is likely that these cases will cause considerable interest in the business community, as well as some controversy in view of the nature of the marks which FIFA is seeking to enforce. The cases also mark the first occasion on which civil litigation, based on unlawful competition, has been brought against a party transgressing the criminal provisions of Section 15A of the Merchandise Marks Act, dealing with ambush marketing. These legal issues give the cases additional significance and importance and their outcome could well have a significant bearing on the ability of South African law to counteract ambush marketing. This in turn is of importance to South Africa's ability to attract major international sporting events, such as world cup tournaments, in the future."

The case referred to by Dr Dean in the penultimate paragraph of the above extract has now been decided by the Pretoria High Court in favour of FIFA and the following report posted on the FIFA official website[10] on 1 October, 2009:

"*The Pretoria High Court in South Africa has today (1 October 2009) confirmed FIFA's rights in relation to the 2010 FIFA World Cup™, and with its ruling against an infringement committed by Metcash Trading Africa (Pty) Limited ("Metcash"), the court also underlined the effectiveness of South Africa's anti-ambush marketing legislation (Section 15A of the Merchandise Marks Act). This pronouncement in FIFA's favour reaffirms the fact that no companies other than FIFA's Partners may associate themselves with the 2010 FIFA World Cup™.*

"This is a major victory for FIFA in its battle against unauthorised association with the FIFA World Cup through ambush marketing initiatives and campaigns. FIFA is as keen as anybody else to see local businesses doing well out of the FIFA World Cup, as long as companies understand the special rules surrounding the competition and respect the exclusivity of the commercial rights granted to FIFA Partners," explains Jörg Vollmüller, Head of FIFA's Commercial Legal Department.

Without constant vigilance and swift action to prevent such infringements, high-profile tournaments such as the FIFA World Cup would face extreme difficulty in attracting official sponsors, which in turn would damage FIFA's ability to stage its eleven other international tournaments, many of them in the women's game or at youth level, and carry out its important work in promoting the game and funding football-related social programmes.

FIFA launched proceedings against Metcash in November 2007 when Metcash refused to cease selling a lollipop product marketed under the name "2010 POPS" in its Trade Centre stores. The packaging of the product features images of footballs in the design of the official ball of a past FIFA World Cup™ tournament combined with the South African flag. FIFA claimed that this, taken together with the name of the product, took advantage of the publicity surrounding the 2010 FIFA World Cup™ and constituted ambush marketing."

The full text of the judgment in this landmark *Metcash* case, which makes very interesting reading, is reproduced in Appendix I to this Chapter.

Another case, referred to above, worth mentioning is that of the Eastwood Tavern, which was also resolved in favour of FIFA. Eastwood Tavern, a restaurant located very close to the Loftus Stadium in Pretoria, one of the match venues for the 2010 World Cup, supplemented its main signage displaying its name by emblazing it with the legend "World Cup 2010". At the same time, banners were erected featuring the flags of a number of prominent soccer playing countries, accompanied by the numerals 2010, as well as the words "Twenty Ten South Africa".

Accordingly, an application was launched in FIFA's name in the Pretoria High Court, claiming interdicts against Eastwood Tavern on the grounds of infringing the registered trade marks WORLD CUP 2010, SOUTH AFRICA 2010 and TWENTY TEN SOUTH AFRICA; 'passing off' a form of unfair competition under the English Common Law; and unlawful competition through violating Section 15A of the Merchandise Marks Act and Section 9(d) of the Trade Practices Act. FIFA also claimed the costs of the court proceedings against Eastwood Tavern. The case achieved the desired result when an order granting all the relief sought was made in the High Court of South Africa (North Gauteng), Pretoria on 7 April 2009.

A brief word or two about the so-called 'dress rehearsal' for testing the efficacy of the Anti 'Ambush Marketing' measures that took place during the staging of the FIFA Confederations Cup in South Africa in June 2009 and that used the same four venues for the upcoming World Cup, would not be out of place either!

"*Working together with legal advisers, volunteer patrollers, Host City representatives and South African police officers, the RPP venue managers maintained a constant presence around the stadiums and Commercial Restriction Zones, checking that the laws were being adhered to and, just as importantly, learning lessons that will help improve operations at next year's flagship event.*

Although not perhaps on the scale that might be expected at the World Cup itself, there was plenty of unauthorised activity to keep the patrols busy. Unlicensed traders or "hawkers" were frequently seen circling the stadiums and the police were able to snatch bag-loads of counterfeit goods, including fake Bafana Bafana *shirts bearing a slightly-adjusted "2010 FIFA World Cup" emblem in a misguided attempt to circumvent IP laws.*

There were also several more serious instances of ambush marketing, the main priority for FIFA's on-site RPP teams, including a convoy of branded cars in Mangaung/Bloemfontein which sought to distribute samples of a particular energy drink, and a South African beer brand which was spotted handing out free T-shirts and other fan items at bars just outside the Royal Bafokeng and Free State Stadiums in a concerted campaign clearly aimed at stadium-goers.

The latter activity is taken particularly seriously by FIFA, since it attempts to turn large numbers of fans into "human billboards" inside football grounds - and can also infuriate unwitting supporters if it leads to them having to surrender the items as they enter the stadium precinct. This in turn can be portrayed as heavy-handedness on the part of FIFA, but aside from such coordinated ambush marketing campaigns, there has never been any desire on FIFA's part to prevent genuine, individual supporters from watching a match while wearing the "wrong" type of T-shirt or baseball cap.

The situation is similar when it comes to small businesses who are naturally keen to benefit from the financial opportunities that arise from staging a FIFA World Cup. Before and during the 2006 FIFA World Cup™ there were many inaccurate media reports claiming that FIFA was taking vigorous action against local bakers for selling "World Cup buns" or "World Cup bread". The truth is that FIFA decides in each individual case whether an infringement should be pursued and how to do so. In the case of the last World Cup, there were no instances of FIFA taking such steps against a small business.

Indeed, the public information sheet produced by FIFA to explain its official trademarks clearly sets out a number of "do's and don'ts" to help businesses understand the ways in which they can benefit from the financial knock-on effects of a FIFA World Cup without abusing FIFA's protected rights. As well as setting out what companies and individuals should not *do, the sheet actively encourages firms to get*

10 **See fn 1** ***supra.***

involved with the event by, for example, becoming service providers or suppliers for stadium construction or general infrastructure requirements, or for events and activities staged by FIFA, Local Organising Committees, Host Cities and other partners. There is also the opportunity to apply for an official product licence, or simply impressing clients by treating them to one of the various hospitality packages offered by FIFA. More generally, businesses can of course conduct non-specific football promotions, so long as they do not make direct or indirect reference to the FIFA World Cup™. Beyond all that, local companies can naturally benefit from the large influx of visitors created by the tournament, from the increase in the host country's international profile and from the physical legacy left by the building of new stadiums and infrastructure.

The messages contained in the information sheet are actively followed up by FIFA with regular information seminars which are presented to local industry bodies and trade associations during the build-up to major tournaments, with the aim of informing companies across the region in question about their commercial options.

FIFA is as keen as anybody to see local businesses doing well out of the FIFA World Cup, as this helps to further enhance the attraction of the event while also fostering good relations with the people who live and work in the areas where the football is taking place," points out Jürg Vollmüller, head of FIFA's Commercial Legal Department. "So long as companies understand the rules, everyone is happy, because local business can enjoy the obvious benefits of having a FIFA World Cup on their doorstep while the official FIFA Partners remain satisfied that their exclusivity has also been respected."

Again, as will be seen from the above cited final paragraphs and, as already noted in this Chapter, FIFA is very much at pains to justify and defend its single-mindedness pursuit and enforcement of its Anti 'Ambush Marketing' campaign to protect its legitimate rights and interests in the 2010 World Cup in South Africa and with the aim of making this major sporting event a great success for all concerned!

Concluding Remarks

It is clear from the above that FIFA and the organisers of the 2010 World Cup in South Africa assembled and successfully relied on a number of general, especially IP, rights, whose importance in a sporting context cannot be over emphasized, and also special legal measures, including Section 15A of the Merchandise Marks Act, to protect their goodwill and investment in this major sporting event.

This not only enured for their benefit but also for the benefit of their sponsors and all their other 'commercial partners' who wished to legitimately associate themselves and their products and services with the event and have paid good money for the privilege of doing so. It is also beneficial for consumers and fans, who, as a result of these legal measures, are saved from being misled by false and misleading claims and unfair marketing practices.

Whether or not FIFA is overzealous in waging its war on 'Ambush Marketing' and 'Ambush Marketers', especially small and medium-sized businesses, considered to be 'easy targets' is, of course, always open to some debate, despite FIFA's protestations and arguments to the contrary. *Pace* those who think 'Ambush Marketing' is clever marketing and fair game!

However, what can be said, I would submit, without fear of contradiction and some certainty, is that the whole area of protecting major sporting events and attacking 'Ambush Marketing' in particular is - and will continue to be in the foreseeable future - a very interesting and challenging area of legal practice. And, one might add, no doubt a lucrative one too for the sports lawyers!

Appendix I - FIFA Public Guidelines on 'Ambush Marketing'*

2010 FIFA World Cup South Africa ™ FIFA Rights Protection Programme (RPP)

The FIFA World Cup™ is the world's largest single-sport event, attracting wide-ranging interest from both sports fans and business people alike. It is however important to remember that it is still privately funded.

For the 2010 FIFA World Cup South Africa™, FIFA's Commercial Affiliates, the Host country and the nine Host Cities, as well as the Local Organising Committee have all made significant contributions in order to make the tournament possible.

These range from financial contributions, value-in-kind and human resource support, through to the provision of infrastructure, transport and security.

In return for this substantial investment, these entities - known as the FIFA Rights Holders - are guaranteed exclusive use of the Official Marks and an exclusive marketing association with the 2010 FIFA World Cup™. Without this exclusivity, attracting official sponsors for the event would be extremely difficult. This in turn would damage FIFA's ability to stage its eleven other international tournaments, many of which are staged at youth level and in the women's game, in addition to the promotion of the game and related social programmes. Any unauthorised use of the Official Marks by another party therefore not only undermines the integrity of the FIFA World Cup™ and its marketing programme, but also puts the interests of the worldwide football community at stake.

For this reason, FIFA works all year and all around the world to ensure that it's official trademarks and other intellectual property rights are properly protected and enforced. The Rights Protection Programme is aimed primarily at tackling organised ambush marketers, counterfeiters and unauthorized traders, all of whom seek to profit from an event to which they have not contributed.

"The FIFA Rights Holders are guaranteed exclusive use of the Official Marks …"

What is the FIFA Rights Protection Programme?

2010 FIFA World Cup South Africa ™ FIFA Rights Protection Programme

The entities are guaranteed exclusive use of the Official Marks and an exclusive marketing association with the 2010 FIFA World Cup™.

Official Licensees:

Entities to which FIFA has granted the right to use the Official Marks on items of merchandise on a direct basis or through the Global Brand Group acting as FIFA's licensing representatives.

Official Broadcast Partners:

Entities to which FIFA has granted rights to broadcast and or transmit a feed of any match in the 2010 FIFA World Cup™.

Official Sponsors:

FIFA has developed and protected an assortment of logos, words, titles, symbols, and other official trademarks.

For the full list of FIFA's trademarks in relation to the 2010 FIFA World Cup™, please refer to the South African Companies and Intellectual Property Registration Office (CIPRO) at info@cipro.gov.za or seek advice from an intellectual property attorney.

The most important trademarked terms include, but are not limited to:

2010 FIFA World Cup South Africa™ 2010 FIFA World Cup™ FIFA World Cup™ World Cup World Cup 2010 Football World Cup SA 2010 ZA 2010 South Africa 2010 Ke Nako - Celebrate Africa's Humanity Soccer World Cup Zakumi The Official Mascot The Official Emblem Official Posters The FIFA World Cup Trophy.

FIFA Partners:

Who are FIFA's Commercial Affiliates?
What are the Official Marks?
FIFA World Cup™
Sponsors
National Supporters

Just like any other entity with registered and unregistered trademarks, FIFA's Official Marks are protected in most territories around the world.

In South Africa the Official Marks are protected by the Trade Marks Act, the Copyright Act, the Counterfeit Goods Act, the common law delict of passing off in addition to other specific statutory provisions such as the Trade Practices Act and the Merchandise Marks Act. These laws protect FIFA against the unauthorised use of both identical reproductions of the Official Marks and confusingly similar variations and modifications.

* **Miguel Portela, Legal Counsel on Intellectual Property to FIFA and Manager of the FIFA Rights Protection Programme informed the author of this Article that consideration has been given to updating these Guidelines, which were prepared for the 2010 FIFA World Cup in South Africa, but added:**
"***we never completed our project of updating the FIFA Guidelines, due to several different reasons. The only thing we did was to put out a media-friendly pamphlet on our Rights Protection Programme which was widely distributed in South Africa. Additionally, we are now thinking about what should be our strategy regarding public communication for the 2014 FIFA World Cup in Brazil.***
As you know, this is not an easy topic, as there are pros and cons of doing it, and several different ways to do it."
As the above remarks clearly show, as far as FIFA is concerned, there is no let up on their efforts to protect their marks and combat 'Ambush Marketing' in all its forms.

FIFA's rights protection experts use these tools to protect FIFA's intellectual property working together with local law enforcement authorities, customs officials and external legal advisers.

In the Commercial Restriction Zones, FIFA's tools are supplemented by the Host City By-Laws, which have been approved and published by all nine cities involved in the 2010 FIFA World Cup™.

In implementing the Rights Protection Programme, FIFA has adopted a policy of "business as usual", meaning that businesses in this area may continue as usual, barring any additional promotional or marketing activity and ambush marketing.

"FIFA's Rights Protection experts work together with local law enforcement authorities, the Metro Police, customs officials and external legal advisers."

How is the FIFA Rights Protection Programme implemented?
The 2010 FIFA World Cup™ offers a wide range of opportunities for small and medium enterprises. According to research by Grant Thornton, the 2010 FIFA World Cup™ will contribute R55.7 billion to the South African economy, generate 415,400 jobs and contribute R19.3 billion in tax to the government. Thousands of international visitors are expected to pour into the country over the period of the tournament, creating opportunities in accommodation, health services, travel services, event management, logistics, arts, crafts and entertainment - to name but a few. In addition to this, local companies stand to benefit naturally from the increase in the host country's international profile, and from the physical legacy left behind in improved infrastructure.

Experience from previous FIFA World Cups™ has shown that there are many ways in which businesses can benefit, without using the Official Marks or creating a marketing association with the event. In particular, the 2010 FIFA World

Cup™ offers a wide range of opportunities for small and medium enterprises who stand to benefit by becoming suppliers for general infrastructure requirements or service providers for events and activities staged by FIFA, the Local Organising Committee, Host Cities and other partners.

As an example, FIFA is strongly committed to commissioning small local businesses to provide logistical services such as audiovisual sound systems, tents and stages with various tenders being published from time to time by FIFA, the Local Organising Committee, MATCH Hospitality and some of the commercial partners of FIFA.

Businesses can of course also conduct nonspecific football promotions, provided that no direct or indirect reference is made to the FIFA World Cup™.

"Thousands of international visitors are expected to pour into the country over the period of the tournament …"

Opportunities for local business
FIFA, the Organising Committee and the Host Cities are working jointly to integrate the informal sector. Informal traders will be integrated around operational areas including the Fan Miles and Fan Fests and will be able to trade in these areas provided they do not sell counterfeit products or engage in ambush marketing activity. A successful pilot project was conducted during the FIFA Confederations Cup with a special market area next to Ellis Park stadium established under the guidance of the city of Johannesburg where informal traders could trade in their African handcraft items and local food specialities. With the intent of uplifting and empowering local communities, FIFA's Master Concessionaire for food and beverages - South African company Headline Leisure Management - trained 1,004 community staff for the FIFA Confederations Cup and will train a further 2,700 for the FIFA World Cup™, providing catering services for fans at the stadium venues. Among them are informal traders and small businesses.

"Informal traders will be integrated around operational areas including the Fan Miles and Fan Fests"

Opportunities for informal traders
The public information document produced by FIFA clearly sets out a number of illustrated "do's and don'ts". The document is available on FIFA.com.

Do's and Don'ts
Advertising and merchandise using material related to football or the host country in general is allowed. Any legitimate editorial use for newspapers is allowed, as is the no promotional use of the match schedule.

Use of any Official Mark or any modified variations which create an unauthorised association with FIFA are strictly not allowed. Ticket promotion, or any type of competition involving ticket promotion, is also not allowed since it creates the impression that there is a link to FIFA.

DO DON'T
The general principles
DON'T
An advertisement using an Official Mark (such as emblems, words, slogans, event titles, etc.) creates an unauthorised association.
DO
An advertisement using general football terms/imagery does NOT create an unauthorised association which can be considered "legitimate".

ADVERTISEMENTS/PROMOTIONS
General advertisement: an advertisement using general football terms/imagery does NOT create an Unauthorised Association.

General advertisement: an advertisement using an Official Mark (such as emblems, words, slogans, event titles, etc.) creates an Unauthorised Association.

Advertisements/Promotions
DON'T
The use of an Official Mark (such as emblems, words, slogans, event titles, etc.) on in-store decorations creates an infringement of FIFA's rights.
DO
General football-related or South Africa related in-store decoration does NOT create an unauthorised association.

In-Store Decoration (Restaurants, Bars, Retail Outlets)
IN-STORE DECORATION (RESTAURANTS, BARS, RETAIL OUTLETS)
General terms: general football-related or South Africa-related in-store decoration does NOT create an Unauthorised Association.

Official Marks/event titles: the use of an Official Mark (such as emblems, words, slogans, event titles, etc.). on in-store decorations creates an infringement of FIFA's rights.

Who can produce and sell products bearing Official Marks such as the Official Emblem?
Only Commercial Affiliates (Licensees, official sponsors, etc) appointed by FIFA for the 2010 FIFA World Cup™ may produce, sell and/or distribute items bearing the Official Marks. If you are interested in acquiring a licence please contact Global Brands (enquiries@globalbrandsgroup.com/ fax: +27 11 537 4641), FIFA's Master Licensee.

Are spectators and other persons attending the matches allowed to travel to the FIFA World Cup™ stadiums in their "normal" cars?
Yes. Spectators can, of course, come to the matches in any vehicle they wish. Only commercial vehicles or large vehicles with heavy branding used for marketing and promotional purposes may be prevented from entering the official parking areas and any traffic-restricted perimeters, especially if they circulate in large numbers and block the traffic around the stadiums.

How can I use the Official Emblem of the 2010 FIFA World Cup™?
The Official Emblem of the 2010 FIFA World Cup™ is protected around the world by trademark registration, copyright and/or other intellectual property laws. The Official Emblem (as well as other Official Marks such as the Official Mascot and Official Poster) may be used for non-commercial purposes only, i.e. for informational, descriptive or editorial purposes. For more information on the use of the official marks please consult the public information document available on www.FIFA.com.

Are spectators allowed to bring vuvuzelas into the stadiums?
Yes. FIFA recognises that vuvuzelas are a typical football object in South Africa, widely used by fans at matches to support their teams. Vuvuzelas will be allowed inside the stadium although they should comply with safety regulations and not be commercially branded. For further information, please consult the FIFA Safety Regulations on www.FIFA.com.

FAQ's
Are official sponsors allowed to conduct advertising activities in the Commercial Restriction Zones (e. g. distribute leaflets outside the stadiums)?

No. These restrictions have been set up to ensure an efficient operation in the vicinity of the stadiums. Therefore, no company or business, including the official sponsors, is allowed to conduct any promotional activities in these areas. In particular, no leaflets, newspapers or other products are to be distributed or sold. Uncontrolled distribution or vending in the direct vicinity of the stadiums may disturb spectator flows, is not in keeping with the status of the event, produces unwanted refuse and may be considered ambush marketing.

Are the protocol routes affected by the RPP?
The protocol routes are unaffected by advertising rights agreements. There are no restrictions on the use of external advertising space. Companies along the route do not need to cover company logos on their buildings. The protocol routes are the main transport routes to the stadium and are decorated in FIFA World Cup™ livery by the respective city and the Organising Committee solely for the purpose of welcoming guests.

Are restaurants/bars or kiosks allowed to open in the Commercial Restriction Zones and can the company logos remain visible on buildings?
Yes. Restaurants and kiosks in the controlled areas can continue to conduct their business as usual and sell products from any brands, regardless of whether or not these companies are official sponsors. Existing company logos on the company's premises do not have to be covered up. The Host Cities together with the Local Organising Committee and FIFA will simply ensure that no additional external advertising is placed on these buildings during the event or in the period leading up to it.

Is there a "protected zone" around the FIFA World Cup™ stadiums?
Yes, there is a controlled area, often referred to as the "Exclusion Zone" or the ommercial Restriction Zone, created by each Host City in the direct vicinity of each FIFA World Cup™ stadium for safety, traffic, environmental, commercial and other organisational reasons. In these areas the "business as usual" principle applies - i. e. existing businesses and establishments will be asked to cooperate with the organisers, but will not be prevented from conducting their regular business activities. However, these areas will also be under the special attention of safety and security authorities, who may need to implement some special measures to ensure the smooth running of the event. External branding or decoration in addition to the existing branding may not be set up, and any extraordinary promotional, marketing and other special activities (like launches, parties or receptions coinciding with the matches) or special initiatives such as the distribution of free gifts or premiums are pre event. The definition of the so-called protocol routes as well as of the exclusion zones or

Commercial Restriction Zones has been developed by the Host Cities together with FIFA and the Organising Committee, as well as the respective authorities. For details please contact the respective Host City manager.

Are spectators allowed to enter the stadiums wearing fan shirts with advertising on them? Yes. There is no "dress code" for attending the FIFA World Cup™. Fans can wear their normal clothes or their normal supporter jerseys (especially replica national football shirts) with or without advertising, i.e. regardless of the manufacturer or sponsor's branding. This does not however include commercially-branded clothing or accessories which are mass-distributed prior to the matches by commercial entities clearly targeting FIFA World Cup™ fans. Spectators may be asked to leave these items at the entrance gates. In addition, and in the interest of public safety, pieces of clothing or any accessories bearing inflammatory political or religious messages which are provocative and/or which can cause aggressive behaviour are prohibited.

Appendix II - The Metcash Case Judgement

In the High Court Of South Africa (North Gauteng High Court, Pretoria)
Case No: 53304/07
In the matter between
Federation Internationale de Football Association (FIFA) (Applicant)
And
Metcash Trading Africa (Pty) Ltd (Respondent)

Judgment
Msimeki, J
Introduction

[1] The Applicant is an association which is organised and exists under the laws of Switzerland. The Applicant is a world wide body of "association football". According to Mr David Murray the deponent to the founding affidavit, the Applicant was founded in 1904 and its membership consists of National Football Associations of 208 countries around the world. The Applicant is the organiser and manager of the world famous international soccer tournament officially called the FIFA WORLD CUP and commonly known as The soccer world cup' or World cup'. The tournament is staged once in four years. Mr Puckrin, on behalf of the Applicant, contended that it is probably the best known and supported sports tournament the world over. Several national teams compete in several qualifying matches and the final competition which will be staged in South Africa in 2010. The deponent to the founding affidavit, Mr David Murray, ("Murray") has given figures of international coverage of the final competition in a few world cups as follows: 1998 tournament had 33 billion viewers, the 2002 tournament 28 billion and the 2006 tournament 26 billion. Organising and conducting a soccer world cup tournament is said to be very expensive. According to him it cost in excess of R5 billion to stage the 2006 tournament which was held in Germany. To stage the tournament, the Applicant is said to rely on: television rights which it grants to broadcasters; sponsorships by commercial enterprises, merchandising goods and services that have a connection in the course of trade with the tournament and licensing its sponsors and merchandisers who use its intellectual property. The licensees and sponsors expect protection and a measure of exclusivity when they pay the fees. It follows therefore, it is submitted on behalf of the Applicant, that no licensee or sponsor would want to be associated with the soccer world cup unless all who enjoy the benefits pay fees which usually comprise large sums of money. Because of the position it occupies, the Applicant enjoys both statutory and common law protection in its trade marks and in the soccer world cup event that it stages. The Applicant is the registered proprietor of trade mark number 2003/040150 SOUTH AFRICA 2010 BID & DEVICES ("the Applicant's trade mark") which is registered in class 30 in respect of, inter alia, "confections". The soccer world cup has been declared a "protected event" in terms of section 15 A of the Merchandise Marks Act of 1994 ("the MMA") which permits the Minister to designate an event as a "protected event". Government Gazette Notice 28877 of 25 May 2006 ("the Ambush Marketing Notice") read with section 15 A of the MMA evidences the declaration of the soccer world cup as such protected event. It is submitted on behalf of the Applicant that soccer world cup tournaments have had significant publicity and public interests in South Africa. It is further submitted that there is enormous repute and goodwill in the 2010 soccer world cup in South Africa and that strong common law rights in the event vests in the Applicant.

Facts of the Case

[2] The Respondent is said to be one of the largest South African distributers of fast moving consumer goods which has made use of the mark Astor since 1985. Astor is said to enjoy a very substantial representation in the market place. The Astor lollipops, the subject matter of this application, are marketed under the trade mark Astor. The trademark was registered in 1985. Mr Clive Kairuz, ("Kairuz") the deponent to the answering affidavit, averred that the Astor 2010 pops formed an extension of the Respondent's range of confectionery and that they were launched in December 2004. He further averred that they have contributed 3.3 million Rands worth of revenue since they were launched and the sales for the period March to November 2007 contributed R816.539.00. The Applicant alleges that the Respondent is in unlawful competition with the Applicant on the strength of the fact that the Respondent is contravening section 15 A of the MMA. The Applicant contends that the Respondent intended its pops to be associated with, not only soccer, but also the 2010 soccer world cup. Contrariwise, the Respondent, contends that it intended its pops to be associated only with soccer in general. It is further the Applicant's contention that the soccer world cup was uppermost in its mind when the Respondent considered its trade mark for its pops. According to the Applicant, the Respondent's use of its trade mark in relation to the event is calculated to achieve publicity for its trade mark and in the process derive special promotional benefit from the event without the prior authority of the organiser of the event and without paying for it. The Applicant contends that the Respondent's use of the trade mark in its promotion activities directly or indirectly is intended to bring it into association with or allude to the event. This, the Respondent denies. The Applicant, initially brought its application on the basis that the Respondent's conduct complained of constituted passing off, a contravention of section 15 A of the MMA and/or section 9 (d) of the Trade Practices Act of 1976 (TPA); and trade mark infringement in terms of the Trade Mark Act of 1993 ("the TMA").

At the end the matter was argued on the unlawful competition on the strength of the contravention of section 15 A of the MMA. The argument did not include the other two heads which, Mr Puckrin submitted, were not necessarily abandoned. This then narrowed the issues to be resolved or determined. The Applicant, initially, had sought an order in the following terms:

"1. restraining the Respondent from infringing the Applicant's trade mark registration no. 2003/04015 SOUTH AFRICA 2010 BID & device in class 30 by making unauthorised use, in the course of trade, of the mark 2010 POPS and/or 2010 in conjunction with depictions of the South African flag or parts thereof and/ or depictions of soccer balls in relation to confectionery products;
2. restraining the Respondent from passing its products off as being those of the Applicant or as being products made by or with its licence or authority and/or as being connected or associated with the Applicant and/ or the 2010 FIFA WORLD CUP SOUTH AFRICA event (hereinafter referred to as "the event") by using the marks 2010 POPS and/or 2010 in conjunction with depictions of the South African flag or parts thereof and/or depictions of soccer balls in relation to confectionery products;
3. restraining the Respondent from competing unlawfully with the Applicant by contravening Section 15 A of the Merchandise Marks Act of 1941 (read with Notice 683 of 2006 appearing in Government Gazette no 28877 of 25 May 2006, designating the event as a protected event) and/or Section 9 (d) of the Trade Practices Act of 1976 by using the mark 2010 POPS and/or 2010 in conjunction with depictions of the South African flag or parts thereof and/or depictions of soccer balls in relation to confectionery products;
4. ordering the First Respondent to pay the costs of this application, including the costs of two counsel;
5. further and/ or alternative relief"

The Issues to be Determined

[3] The issue then to be determined is whether or not the Respondent is contravening Section 15 A of the MMA, the issue that was argued on behalf of the parties.

Common Cause Facts

[4] The following facts are common cause.

1. The Applicant is the organiser and manager of the world famous international soccer tournament.
2. The tournament is staged once in 4 years.
3. The international coverage of the final competition in each world cup is enormous.
4. Organising and conducting the soccer world cup tournament is very expensive.
5. The organiser and manager relies heavily on:
   5.1 granting television rights to broadcasters;
   5.2 sponsors and commercial enterprises;
   5.3 merchandised goods and service that have connection in the course of trade with the tournament;
   5.4 The use of the intellectual property by the licensees and merchandisers.
6. Licensees and sponsors pay fees which are of great assists to the organiser and manager.
7. The Applicant is the registered proprietor of inter alia, trade mark number 2003/04015 SOUTH AFRICA 2010 BID & DEVICES ("The Applicant's registered trade mark ") registered in class 30 in respect of inter alia, "confections".
8. In terms of section 15 A of the MMA read with GG Notice 28877 of 25 May 2005 ("The ambush marketing notice"), the soccer world cup has been declared a "protected event."
9. The soccer world cup tournaments have received significant publicity and public interest in South Africa.
10. The 2010 soccer world cup has enormous repute and goodwill which presupposes the existence of common law rights which vests in the Applicant.

[5] It is important when determining the issue to have regard to the relevant legislation. The Applicant relies on section 15 A of the MMA.

Section 15 A of the MMA provides:

"No person may use a trade mark in relation to such event ***in a manner which is calculated to achieve publicity for that trade mark and thereby derive special promotional benefit from the event, without the prior authority of the organiser of such event.****"* (my emphasis)

The use of the trade mark referred to in section 15 A (2) includes:

"the use of the trade mark in promotional activities, which in any way ***directly*** *or* ***indirectly, is intended*** *to be brought* ***into association with or to allude to an event.****"* (my emphasis)

[6] Mr Puckrin on behalf of the Applicant submitted that section 15 A needs no complicated interpretation as the section means what it says. It is his contention that the words should be given their simple meaning.

[7] The Applicant contends that the manufacturing and/or the offering for sale and/or the selling of confectionery products under the trade mark 2010 pops coupled with the partial depiction of the South African flag and depictions of soccer balls ("the offending marks") seen on paginated papers 175, annexure "DM8" being images of the Respondent's ASTOR 2010 POPS products showing the manner of use of the offending marks constitutes unlawful competition in that the Respondent is thereby contravening section 15 A of the MMA. The Applicant contends that in the event of the conduct of the Respondent being contrary to the provisions of section 15 A of the MMA then and in that event the conduct will amount to unlawful competition. The contention, in my view, has merit.

[8] It is contended on behalf of the Applicant that regard must be had to the fact that licensees and sponsors of a world cup tournament use their own trade marks on the licensed products to promote their own trade marks and businesses. The examples are: MTN, FNB and TELKOM. The use of its trade mark by the Respondent, according to the Applicant, shows that it intended its pops to be associated with soccer and 2010 soccer world cup. If the Respondent had only intended its pops to be associated with soccer only, then the need would not have been there to mention 2010 world cup. The soccer world cup, it is further contended, was in the Respondent's 'mind' when its trade mark for its pops was considered. A proper consideration of the offending marks seem to confirm this. It is submitted on behalf of the Applicant that it cannot be correct that the numeral 2010 was chosen because the Shona Khona programme would run up to and until 2010. This, according to the Applicant, is simply because the offending marks make no reference to Shona Khona. The submission, in my view, appear to have merit. The change of the initial get up packaging of the Respondent to its current get up i.e. from annexure "J" to annexure "DM8", according to the Applicant, with. This according to Mr Puckrin, simply means that section 36 of the Constitution would allow and justify the limitation of the Respondent's rights to freedom of expression or to the intellectual property if their use would deceive or confuse the public and end up jeopardising an event such as the soccer world cup and at the same time prejudicing the sponsors and the licensees of the event. There is again, in my view, merit in this submission.

[11] It was contended by the Respondent that section 15 A should be used in circumstances where "the user of a trade mark which has no reputation of its own relies on the event rather than the mark's reputation to sell its products." I do not think this is what the legislature intended as section 15 A envisages the use of one's own trade mark in a manner which would derive special promotional benefit from the event. This is the Applicant's contention which, in my view, appears to be correct.
The nub of the matter, is whether the Respondent's conduct is calculated to achieve publicity for the trade mark which results in the deriving of special promotional benefit from the event **without the prior authority of the organiser of the event**", (my emphasis)
If the answer is yes, then the conduct is unlawful, as Mr Puckrin submitted, irrespective of any damage to the "trade mark" of the Applicant. I agree.

[12] Mr Morley on behalf of the Respondent submitted that section 15 A has some constitutional implications. The submission, in my view, is correct. He further submitted that the court should favour an interpretation of legislation which is consistent with the constitutional provisions than the interpretation which would lead to invalidity (See *Daniels v Campbell N.O. and Others 2004 (5) South Africa 331 (CC) at [16]/ F - G).* This is trite law.
The facts of the case and the Respondent's version however, do not support the Respondent's case.

[13] It was contended on behalf of the Respondent that section 15 A of the MMA limits the prohibited use to that which is unfair and likely to result in material harm to the Applicant's marks. Section 15 A, as shown above, is not complicated. According to it, the conduct is either unlawful or lawful. The Respondent's version supports the Applicant's case. The Respondent's conduct clearly, falls foul of the provisions of 15 A of the MMA. The submission, on behalf of the Respondent, "that the Respondent's trade mark use cannot reasonably possibly be seen to constitute use in relation to the event itself nor that its use is intended to derive special promotional benefit from the event itself, as required by the section" in light of the facts of the case, in my view, cannot be correct.

[14] The Respondent's version clearly discloses its intention in the marketing of its lollipops which is to derive special promotional benefit from the event itself. Evidence shows how the sales have gone up since the trademark use was implemented. The association with the event or the link thereto has generated a lot of money for the Respondent without the prior authorisation or authority of the organiser of the event. This conduct is therefore, unlawful. No money is paid for the association or the link while other sponsors and licensees are paying fees for the use of their trade marks.

[15] The Applicant, in my view, has made out a case for the relief that it seeks. The application, therefore ought to succeed.

[16] The order that I make, in the result, is as follows:

1. The Respondent is restrained from competing unlawfully with the Applicant by contravening section 15 A of the Merchandise Marks Act no 17 of 1941 (read with Notice 683 of 2006 appearing in Government Gazette no 28877 of 25 May 2006, designating the event as a protected event.)
2. The Respondent is ordered to pay the costs of this application including the costs of two counsel one senior the other junior

M.W. MSIMEKI
Judge of the High Court
Heard on: 11 December 2008
For the Applicant: Adv. C. Puckrin (S.C.) with Adv R. Michau Instructed by: Adams & Adams
For the Respondent: Adv. G. E. Morley (S.C.) with Adv. A. M. Annandale Instructed by: Bouwers Inc.

❖

Chinese Professional Football League from the Perspective of Antimonopoly Law

by **Pei Yang***

Introduction

From China Football League-A (hereinafter referred to as League-A) to Chinese Football Association Super League (hereinafter referred to as CSL), Chinese football has always been capturing the hearts of its nationals. Various disputes arising from professional leagues have sparked public concern and controversy. There is considerable disagreement on whether Chinese Football has been monopolized. On August 30th, 2007, Antimonopoly Law of People's Republic of China (hereinafter referred to as Antimonopoly Law) was passed by the tenth NPC Standing Committee, which came into effect officially on August 1st, 2008. The author intends to analyze the practice of Chinese professional football league (hereinafter referred to as CPFL) so as to confirm its monopoly and propose the corresponding solution.

I. Overview of Antimonopoly Law

Antimonopoly Law is divided into 8 chapters totalling 57 articles as follows: General Rule, Monopoly Agreement, Abuse of a Dominant Market Position, Concentration of Undertakings, Abuse of Administrative Power to Eliminate or Restrict Competition, Restrictions on Competition, Investigation of the Suspected Monopoly Conducts, Liability and Supplementary Rules, etc. The third article of Antimonopoly Law generalizes monopoly acts provided in the present law, which includes such three types as monopoly agreement, abuse of a dominant market position and centralization of undertakings which may exclude or restrict competition.

A. Monopoly agreement

Antimonopoly Law divides the monopoly agreement of operators into two types: horizontal agreement and vertical agreement. According to Article 13 of Antimonopoly Law, horizontal agreement refers to the agreement reached by competing undertakings. Vertical agreement refers to the agreement reached between undertakings and counterparts of the deal in accordance with Article 14 of Antimonopoly Law. Despite the above provisions, undertakings are still entitled to exemption in condition that the agreement between undertakings accords with the provision of Article 15 of Antimonopoly Law.

* **Associate professor, Law School, Beijing Normal University, and a member of the China Society of Studies on Sports Law; LL.D, Wuhan University, People's Republic of China.**

B. Abuse of dominant market position

Article 17 of Antimonopoly Law provides that undertakings in a dominant market position shall not abuse this position and are banned to conduct such practices as: sell commodities with unfair high price or purchase commodities with unfair low price; refuse to deal with its counterparts without legitimate reasons, etc. Article 18 and 19 of Antimonopoly Law provide how to identify the undertakings' dominant market position.

C. Centralization

According to article 20 of Antimonopoly Law, centralization includes situations as follows: first, the merge of undertakings; second, the acquisition by undertakings; third, the acquisition of control of other undertakings or of possibility of exercising decisive influence on other undertakings.

D. Administrative monopoly

It is worth mentioning that in view of the widespread administrative monopoly in China's marketing economy, Antimonopoly Law first provides in article 8 of General Rule that administrative organs and organizations with functions of public affairs management granted by law and regulations should not abuse administrative power, so as to preclude and restrict competition. In Chapter 5, the Abuse of Administrative Power to Eliminate or Restrict Competition in particular generalizes the concrete means of administrative power abuse, of which, Article 36 and 37 specify that it is banned for administrative organs and organizations with functions of public affairs management granted by law and regulations to abuse administrative power, force undertakings to engage in monopoly acts or draft regulations with the idea of elimination and restriction of competition.

II. Chinese Football Association's Status under Antimonopoly Law

Of all the organizations relating to CPFL, Chinese Football Association (hereinafter referred to as CFA) becomes the first target of public criticism, and the various suspected monopoly acts in the CPFL are normally carried out in name of the CSA. Therefore, to explore the issues of antimonopoly law in the CPFL, the CFA's status under antimonopoly law should be ascertained, as it is significant to the following points: first, it should be made clear whether the CFA itself is an industrial association or administrative organ so as to ascertain whether suspected restrictive measures should be attributed to either monopoly agreement reached by undertakings or abuse of a dominant market position or administrative monopoly acts; second, based on the correct answer to the above question, it should be decided who is to bear the liability and how to shoulder the reliability.

The author believes that the functional multiplicity of the CFA endows itself with different status under Antimonopoly Law when it is dealing with different issues.

A. CFA in role of an undertaking

According to the Charter of CFA, Article 3, the CFA is the sole national non-profit corporation voluntarily formed by individuals and units engaged in football in the territory of China.

It does not hinder the CFA from engaging in various profit-gaining activities though it is a non-profit organization. According to the provision of article 30 of the Charter of the CFA, the source of its fund comes not only from membership fees, registration fees, endowments, financial subsidies, but also incomes from gate revenue, sales of broadcasting rights, advertisements, sponsorships, marketing of immaterial assets, lottery and other sports businesses, etc. The above income is undoubtedly the outgrowth of the CFA's role as an undertaking actively participating in market operation. Therefore, the CFA can be defined as an undertaking subject to Antimonopoly Law. In particular, whereas the CFA is the sole national organizer and administrator of football in China, it naturally possesses the dominant position in the organization and operation of football leagues. On condition that the CFA abuses its dominant position, it can be considered as an infringement of Antimonopoly Law, Article 17.

B. CFA in the role of industrial association

Industrial association is a non-profit corporate organization targeted at the common interest of the same industry, providing various services to undertakings of the industry, taking independent actions under the government supervision as the norm and participating in non-governmental activities.[1] The formation and content of industrial association should include the following: first, taking undertakings of the same industry as subjects; second, based on the principle of voluntariness; third, aiming at seeking and prompting the common interest of all the member undertakings; fourth, being a kind of economic corporation with legal personality.[2]

In the course of fulfilling its responsibilities and prompting the healthy development of the industry and the common interest of corporate members, industrial association will be self-disciplined so as to restrict the activities of member undertakings and make them abide by the competition rules and regulate the acts against competition rules by employing corporate power of autonomy[3]. But in practice, industry association normally restricts the competition between member undertakings in forms of charters, rules, arrangements, advices, etc. Such restrictive measures seem made by industry association on the surface, but in fact, they are the results of collective negotiation of all members, therefore it can be regarded as a special form of monopoly agreement. What is more, as compared with general joint restrictive measures, the decisions of industrial association can be performed with more efficiency, owing to its unity, therefore they are more destructive[4]. Therefore, the regulation over industrial association's anti-competition acts according to Antimonopoly Law focuses on monopoly agreement, and Article 16 is included into chapter of Monopoly Agreement, which goes to the extent that industrial association shall not organize the undertakings of the industry to engage in monopoly acts banned in the present chapter.

However, the CFA doesn't fully accord to constitutive requirements of the above-mentioned industrial association.

1. In form, football clubs, the most fundamental and important undertakings in China's football industry, are not the members of the CFA.

According to article 8 to 10 of Charter of the CFA, members of the CSA are divided into two kinds: unit members and individual members. The unit members referred to herein include football associations of provinces, autonomous regions, municipalities directly under central government and key regions or important cities, as well as football associations of various national industry and walks of lines, and football organizations of the army, exclusive of football clubs. Plenty of articles of the CFA Charter, however, concern football clubs, and Chapter 8 of Professional Football Club specifically regulates in detail the content like its nature, rights and duties and management, etc. The whole structure lies that football clubs are the members of football associations of different areas, industries and walks of lines, which are members of the CFA. The CFA's power over football clubs can be interpreted as 'contract implied in fact', namely, some football club is the member of some local football association (the two concluded a contract), and the local football association is the member of the CFA (a contract was concluded too between the two parties), therefore, it can be inferred that the football club concluded a contract with the CFA, and shall be supervised by the CFA though the former did not conclude any factual contract with the CFA. Therefore, the following understanding seems to hold more water: football associations of various areas, industries and systems are industrial associations composed of clubs, and the CFA is the federation composed of those industrial associations.

1 Liang shangshang, *On Antimonopoly Acts of Industrial Association*, Legal Research, 1998, vol.4, p. 114.

2 *industrial association: the Important and Indispensable Role in Market,* Economy Daily, Jan 10th, 2002.

3 Economy Section, Legal Commission, Nation Congress Standing Committee of PRC, *Antimonopoly Law of PRC:Articles Illustration, Legislative Ground and Corresponding Regulations,* Beijing University Press, 2007, p. 93.

4 Meng yanbei, *Industrial Association in Perspective of Antimonopoly Law,* Yunnan University Learned Journal (Legal Edition), March, 2004, p.24.

2. In substance, the CFA's regulations can hardly be viewed as the agreement reached by various clubs.

According to the substantial spirit of antimonopoly law, even though a corporation is not an industry association formed by the undertakings on surface, its restrictive measures can be defined as the one enforced by industrial association without minding its formation, so long as the acts reflect the concerted will of the undertakings. However, when the CFA is examined by the above criterion, it can be found that the acts of the CFA can be hardly defined as the agreement reached by various clubs.

a. **The public interest property of the CFA conflicts with private interest orientation of professional football clubs.** According to article 5 of the CFA Charter, the key goal of the CFA is to unite national football operators, launch extensive football enterprises, greatly develop football, build body of people, enrich the recreational and cultural life of the public, improve football skill and facilitate the construction of social spiritual civilization, perfect management mechanism and operation system of Chinese football, and to promote the management level of various member associations, professional football clubs and other football organizations. The CFA is mainly aimed at public interest, whose main task to professional clubs is to promote their management level rather than gain financial interests. As for professional football clubs, ever since Chinese professionalization reform of football, they have become an economic entity of independent property and undertake a self-responsibility system of profit and loss. According to the Criterion of Chinese Premier Football Club, the participant clubs to CSL now must be corporations or Co., Ltd set up according to Company Law, officially registered in Commerce and Administration Organ and therefore granted with business corporation license. Football clubs, therefore, should take the interest of its stakeholders as first priority. What is more, the document mentioned above not only strictly provides the exact amount of the club's annual operating income, but also requires that the club cannot suffer loss for three years running, and must gain profit in the year of application for the participation of the CSL. All these facts show that gaining profit is the chief goal of professional football clubs to whom the function of public welfare is secondary. It can be seen that as a result of the fundamental conflict of interest orientation between the two, the acts of the CFA can hardly be defined as the agreement between professional clubs.
b. **Professional football clubs are excluded from the formation and decision procedure of the CFA.** It needs no further illustration that professional football clubs are neither direct nor indirect members of the CFA. In view of the provisions of the CFA Charter, professional football clubs' right of speech within the CFA is only limited to the participating in corresponding league committee, attending meetings and voting etc. Professional clubs occupy no seat where they can voice their opinions in the core decision system of the CFA, namely the assembly, executive committee, chairman conference. Thus, it is impossible for the professional clubs to exert the due influence upon important and significant matters. In general, professional clubs carry more obligations than rights in the CFA, which is actually under the leadership of the CFA and the CSA's decision and regulations are far from the outgrowth of its negotiation with professional clubs on equal terms.

3. The CFA can be viewed as industrial association composed of professional clubs in some cases.

The real situation is rather complicated. Though the CFA in general conflicts with clubs in interest orientation and overrides professional clubs as an administrator, some decisions made by CFA indeed took into consideration the opinions of professional clubs and reflected the concerted wills of clubs. A good example in point is the Salary Restriction Order. The order was intended to inflate the salary increase of football players and it will be explored in the latter part of the article. In this case, with an exception, CFA was viewed as an industry association composed of professional clubs, and it is acceptable to regard its regulations and decisions as the monopoly agreement reached by clubs.

Therefore, the author holds that if the relevant regulations and decisions made by the CFA are defined as acts banned by Antimonopoly Law, such acts should be analyzed in depth, and consideration should be especially given to what extent the decisions and regulations embody the wills of clubs so as to determine whether they shall be identified as the monopoly agreement reached by professional clubs and subject to the jurisdiction of article 16 of Antimonopoly Law.

C. The CFA in Role of Administrative Entity

Now that the CFA's status of industrial association under antimonopoly law has been denied in a general sense, the CFA is actually performing administrative monopoly acts in role of administrative organs, which should be regulated in accordance with the provisions of administrative monopoly of Antimonopoly Law.

Administrative monopoly refers to a kind of illegal act in which administrative entities abuse administrative power to exclude or restrict competition and harm fair competition of market[5]. Administrative monopoly is performed by administrative entities which include local governments, governmental departments of various levels as well as organizations in charge of public issues granted by laws and regulations. Administrative monopoly is embodied in acts like administrative compulsive deal, compulsive restrictive competition and market access restriction, etc. To some extent, with regard to the present state of China, administrative monopoly deserves more public attention for it is more harmful than economic monopoly.

1. The CFA assumes the status of administrative entity.

Chinese associations are the outgrowth of interaction between the government and the civil society in course of economic mechanism reform[6]. In view of activities of Chinese associations, most associations were set up to help accomplish specific missions of certain governmental organs, thus the governmental organs, rather than the public or association members, become the first object to serve.[7]. So is it with Chinese sports associations. Article 31 of China's Law on Physical Culture and Sports (hereinafter referred to as Sports Law) provides that national competitions of individual sport are administrated by the national sports associations of the said sport. In view of the theory of administrative jurisprudence, various national associations of sports including the CFA are all granted by article 31 of Sports Law to administrate various sports events in the territory of China. As far as the CFA is concerned, it is not only an association but also an organization with legal authority in charge of public issues, amounting to virtual administrative entity.

2. What the CFA is performing is administrative power.

Article 29 of Sports Law provides that the national sports associations for individual sport are responsible for the registration of athletes of each relevant sport. Athletes that have been registered are permitted, in accordance with the regulations set by the sport administrative department under the State Council, to participate in relevant sports competitions and move among different sports teams. Article 49 provides that anyone who commits fraud or other acts violating the discipline or sports rules in competitive sports shall be punished by the relevant sports organization in accordance with the provisions of its charter; Article 50 provides that whoever resorts to banned drugs or methods in sports activities shall be punished by the relevant sports organization in accordance with the provisions of its charter. Thus, according to Sports Law, as the national association of football, CFA is entitled to the following powers: first, organization of national football events; second, deciding participation qualification of football

5 Shang ming, *the Theory of Chinese Anti-Monopoly Law and Practice,* Beijing University Press, 2008.,p.320.

6 Yuan shuhong, Su xigang, *On Punishment of Corporation*, Legal Research, Edition 5, 2003, p.61.

7 Wang ming, Liu guohan, He jianyu, the Reform of *Chinese Associations - from Governmental Choice to Social Choice,* Social Science Literature Press, 2001, p41.

players; third, penalizing acts breaking disciplines and rules of sports in course of sports events. There has always been debate over the source of CFA's power mentioned above. Some scholars claim that they are of the autonomous power of sports industrial associations[8], while others deem them administrative power[9]. But currently, it has been accepted by most scholars that what CFA is performing is function and power of public management, which is a kind of administrative power, therefore, an administrative proceeding can be instituted against such acts.

3. Supervise the CFA's acts via provisions of administrative monopoly in Antimonopoly Law

Now that CFA has been defined to assume status of administrative entity enforcing administrative power, in the case that it restricts competition when organizing, managing and marketing professional football league, it shall be subject to the supervision of the provisions of administrative monopoly of Antimonopoly Law. In the CFA's practice, most of its acts restricting competition are manifested in compulsory Charter or regulations to be abided by its members or football clubs, therefore, article 36 and 37 of the Antimonopoly Law are significant and applicable here. Article 36 states that administrative organs and organizations granted by laws and regulations in charge of public issues shall not abuse administrative power to force undertakings to engage in monopoly provided in the present law. And article 37 states that administrative organs shall not abuse the administrative power to draft regulations of eliminating or restricting competition.

In addition, article 51 of Antimonopoly Law provides the legal liability for administrative monopoly. According to this provision, in the case that administrative organs and organizations in charge of public issues granted by laws and regulations abuse administrative power to eliminate or restrict competition, the superior organ has the right to order it corrected and penalize the personnel directly liable and other persons directly liable according to the law. This means that when the concerned acts restricting competition are identified, it is the CFA and its personnel rather than clubs that shall be penalized.

III. Analysis of Monopoly Conducts in the CPFL

A. Relocation of Clubs

Prior to the professionalization reform of Chinese football, clubs were generally owned by its local provincial or municipal governments, and the clubs were supervised by the local authorities with the home stadium in the capital city of the province. After the professionalization reform, a growing number of clubs set about emigrating out of the province of locality, some even moving out to remote areas. The following account for the above phenomenon. First, more and more private capital flows into football industry. As a result, clubs are less and less connected with local government. Second, the environment of Chinese football industry is worsening and many clubs in poor economic condition were compelled to move to less developed areas where they stand more chances of development. Third, some cities badly need a club of high level to promote the city image, and they have to resort to endemic clubs because of the poor performance of the local club. Fourth, some clubs decided to move out to shun the negative consequences of ultra competition because some big cities are crowded with several clubs at the same time. It is especially eye-catching that the former Shanxi Guoli Club relocated to Harbin and the former Shanghai International Club relocated to Xi'an.

Ever since Guoli was set up in 1996, Xi'an has been famous for its high stadium attendance. However, as time passes, nowadays few care about the matches of Guoli. In 2005, Guoli was struggling at the edge of survival for it drummed up no patronage in Shanxi. Then, enterprises from Heilongjiang constantly showed favour to Guoli, buying out Guoli's naming right and front and back advertisement rights on their jerseys. Leading officials of Heilongjiang government, along with Guoli, eventually persuaded the CFA to approve the relocation of Guoli to Harbin, which was ratified soon after.

Shanghai International was once able to counterbalance Shanghai Shenhua-an established club. But recent years saw the hard time of football market, in addition, the third premier club-Shanghai Zhongbang presently Shanghai Liancheng landed in Shanghai, Shanghai International was even more handicapped with annual ticket sales totaling around only two hundred thousand Yuan. Thus it decided to move to Xi'an at the beginning of 2006. Now, the club has been renamedXi'an Chanba International.

Club relocation is commonly seen in American professional sports league whose final target is aimed at profit maximization. The league decides whether or not to approve the relocation of club after globally assessing the operation state of the club, market size of the primary city and target city, and the profitability prospect of the whole league[10]. But now clubs relocation has appeared in China whose sports structure resembles the European model. In the author's opinion this phenomenon shows that the CPFL at the initial stage is confronted with the challenge of Americanization. But the two successful approved relocations without causing a stir should to a great extent be attributed to the CPFL's absence of the cultural tradition of European football and the lack of 'league thinking' permeating enterprise style operation in American professional sports.

Surveying the two clubs relocations with reference to experience of American professional sports league's rules of club relocation, the author thinks that club relocation may improve the interest of concerned clubs, but it may not be good for the whole professional league. Since Guoli's relocation to Heilongjiang from Shanxi left a vacuum of high level football clubs, majority of Northwestern football fans could not watch top football matches; and the target city —- Heilongjiang, where it moved to has become an area in northeastern China with the highest football level in China and most dense distribution of professional football clubs (cities like Dalian, Shenyang and Changchun etc. are all quartered with premier clubs and series A clubs. Therefore, the disadvantage of this relocation outweighs the advantage in the long term production and sales of professional football league if it can be compared to a product. In retrospect to Shanghai International's relocation to Xi'an from Shanghai, it is evacuating an over-saturated market to fill a vacuum market, therefore the football market and fans of Shanghai would not be influenced notably for the two existing clubs of high level in Shanghai and the fans from Xi'an , even the whole western China benefit. So the advantage of Shanghai International's relocation outweighs its disadvantage as a whole for it not only lives up to its own interest, but also benefits the whole interest of the league. It can be imagined that if CSL enacts the similar rules in future restricting clubs relocation as American professional sports leagues, the above mentioned Shanghai International's relocation will stand little chance of being approved and the relocation of Guoli will involve more of censoring. What is more, if the denial of Guoli's relocation application triggered investigation of antimonopoly organ, the latter should apply rule of reason, making a decision by measuring and comparing CFA's rules from the aspect of the relocation's beneficial and negative aspects. The relocation rule shall not be viewed as acts through which CFA abuses dominant position or horizontal agreement restricting competition.

B. Sales of broadcasting right

1. Survey

Before Chinese professionalization reform of football, TV stations don't have to pay to broadcast football matches. Ever since the reform, CFA and clubs have come to attach importance to the exploitation of broadcasting right. In 1994, CFA signed with CCTV an agreement of broadcasting rights over Series A matches spanning five years from 1994 to 1998, providing that the CCTV plays 2 minutes advertisement for CFA for the broadcasting of one match as a kind of cost.

8 Xiao zongtao, Xiao ping, Dai tianxiu, Li zhebo, *Research on Sports Associations' Power of Penalty Endowed by Law of Physical Culture and Sport,* Wuhan P.E Academy Learned Journal, edition 5, 2002, *pp.*5-8.

9 Guo shuli, the Plural Remedy Mechanism for Sports Disputes in International and Comparative Law Perspectives, Law Press, 2004, p.461.

10 Pei yang, *On the Application of Sherman Act to Club Relocation*, in International Law Review, Vol.2, edited by Mo shijian, pp.121-148, China Legal Press, 2007.

In 2002, CFA significantly reformed the marketing of broadcasting rights to Series A as follows: first, CFA put broadcasting rights into its own package, and no club could sell the broadcasting right of its home match; second, broadcasting rights are divided into three items for respective sale as live broadcasting right, highlights and on-the-spot report; third, the supervision over local TV station's employment of match signals was facilitated. As a result, broadcasting rights of Series A rocketed.

From 2004 until now, the environment of Chinese football has been worsening. More and more fans are shying away from stadiums and the coverage of the CSL decreased sharply. Meanwhile, the CSL faced dual pressure from broadcasting rights of Chinese national teams and foreign football leagues of high level, thus, it can be said that the broadcasting right of CSL turned from a hot cake to a wet blanket. In 2007, SMG bought the five-year broadcasting right of the CSL from Chinese Football Association Super League Co., Ltd for 70 million RMB, while the CCTV also got to broadcast the matches of that year at the cost of 6 million RMB.

2. Problems existent in sales of broadcasting rights of the CPFL and the legal analysis

a. Vague identification of the ownership of broadcasting rights

Article 49 of the CFA Charter provides that the CFA is the administrative organ of Chinese football and initial owner of all rights of various football events. The rights include financial ones, copyright of video, audio, broadcasting recording, duplicating, multi-media copyright, market development and promotion rights as well as immaterial assets like badge and copyright, etc. This article stresses that the CFA is the initial owner of all rights of various events in its charge including football leagues, and 'all rights' possessed by CFA are listed for detailed explanation. It can be seen from the listing that though the wording of "broadcasting rights" is not employed, the terms of various financial rights, audio, video, broadcasting and recording obviously include broadcasting rights. In addition, article 22 of former Series A Charter made by the CFA provides that TV broadcasting rights of Series A belongs to the CFA, and the CFA is responsible for the broadcast in China and abroad. The CFA authorizes the local club to transfer the broadcasting rights in each home territory. Literally, the CFA considers itself the owner of broadcasting rights. Though the clubs can sell the broadcasting rights of their home matches, they do not actually own the broadcasting rights which is in fact authorized by the CFA. However, the ownership of broadcasting rights installed by the CFA itself is doubtable. Firstly, of most football powers in Europe, the clubs' ownership of broadcasting rights has been recognized by legislation or courts awards, football associations or federations assuming at most the status of co-owner of the broadcasting rights.[11] Second, in contrast with the CFA, who can always collect the warranted commission turned in by clubs, clubs devote a large amount in financial, material and human resources, and take much more risks, therefore, clubs are more justified to be the owner of broadcasting rights.

However, as is different from European countries, no heated dispute has been witnessed between the CFA, clubs and TV stations in practice. Clubs seldom complain in public about the acts that the CFA claims itself as the owner of broadcasting rights and even recalls clubs' exploiting rights in their home stadium, as can be explained in the opinion of the author by the fact that China's economy development level is still in lower level and football leagues are less attractive, pay-TV service is less developed, as a result, the value of broadcasting rights itself is far from enough attention of clubs. No matter whether the broadcasting rights belongs to clubs or the CFA, there is not much difference of profit gaining from the sales of broadcasting rights that goes into the hands of clubs with the exception of several powerful or well managed clubs. As a result, clubs do not care much about the ownership of broadcasting rights. Secondly, some clubs are located in less developed areas or of low level income, so they can barely survive the hardship without the CFA's collective marketing. Thirdly, owing to the special condition of China, in which local government frequently intervenes in the clubs' sales of broadcasting rights, some clubs would rather hand in the broadcasting rights to the CFA so as to avoid troubles. The above seems to deem reasonable the monopoly acts of the CFA's collective sale. But, it is believed that the reconsideration and competition for broadcasting rights are inevitable as the conditions gradually improve, the value of broadcasting rights will be reviewed.

b. Proposals for regulation of broadcasting rights by Antimonopoly Law

Controversy arises with the transfer of broadcasting rights concerning collective sale, exclusive agreement and collective purchase in Europe.

Would China be an exception? The author questions the marketing value of broadcasting rights of the CPFL as an independent product market, considering its worse environment, lower quality and less attraction for audience. Broadcasting rights of leagues is far less attractive and profitable to TV stations than that of Chinese national teams and even of European professional leagues. In that sense, broadcasting rights of the CPFL is only one part of the general football broadcasting rights market, and it is easily substituted by other broadcasting rights, as it lacks enough influence to intrigue the intervention of Antimonopoly Law.

Despite its present condition, the CPFL has substantial potential to be a single product market in the near future when it earns a better reputation with higher quality. On the other hand, the broadcasting rights market only stands on a firm foundation of developed TV industry. China ranks world No. 6 in GDP, whereas the contribution of TV industry ranks among 40s. However, real rivalry for broadcasting rights would possibly take place in the right circumstances, and issues involving antimonopoly rules would occur, which is not of the least significance for discussion.

As the author believes, if the CFA would continue the collective sale of broadcasting rights of the CSL, it could be regarded as an agreement between all the clubs; it would lead to horizontal monopoly agreement since it could in effect make negative impacts, such as restricting the competition between clubs in the broadcasting rights market and decreasing the number of matches to be broadcast. However, it would probably be exempted according to article 15 of Antimonopoly Law if some revisions could be made on the means of sale, because collective sale is helpful to build the brand image of CSL and to preserve the economic balance and competitive balance between clubs. For example, the CFA could allow clubs to sell broadcasting right of their home matches individually if it is not to be marketed by the CFA.

Exclusive agreement would lead to vertical monopoly agreement and could not be exempted because it would raise the purchase price considerably higher than accepted so that the chances for medium and small undertakings' access to the broadcasting rights market would be restricted and the cost of common audience would probably be increased. The author suggests that the CSL could introduce a tendering system as UEFA Champions League and FA Premier League do, and design different packages to enhance opportunities for more broadcasting undertakings.

C. Multiple ownership of football clubs

As more magnates enter Chinese professional football market in the recent years, multiple ownership has occurred between clubs, known as "Shi De group" and "Jian Li Bao group", the former of which has been confirmed by the CFA.

1. How "Shi De Group" Formed

Dalian Dahe Investment Co. declared in early 2002 that they had purchased 100% of the shares of Quanxing football club and renamed it as Sichuan Dahe club. The CFA having approved its registration, investigations showed that clubs of Dalian Shide, Sichuan Dahe and Dalian Sidelong (from Series B) overlapped in staff and shareholders.

11 **Commission Decision, C(2003)2627 final, Brussels, 23/7/2003,p.33.**

Many of other clubs stated their strong objection and argued that the fairness of the competition will possibly be violated if one undertaking owns two clubs. According to article 8 of *Rules of Series A*, no club shall hold stock shares or be a member of any other clubs; no club shall participate in or influence the management of any other clubs. Therefore, Dalian Shide, as the CFA required, transferred Dahe Club to Pacific Insurance Co. and Guancheng Group. However, evidences showed that, as independent Guangcheng Club was, in the legal sense, still under control of Shide Co. in the aspects of finance, human resource management and even team uniforms distribution. When Guancheng successfully registered in the year of 2004, the matches between Shide and Guancheng were sheer meaningless. The CFA notified the concerned parties of the so-called "Shide group" in January 2006 that Guancheng Club would be forbidden to play any match that year in the CSL until Guancheng club was completely transferred. Transfer agreement was finally achieved between Shide Co. and Sichuan Football Association, and the 4-year-old "Shide group" came to an end.

2. Observations on "Shide Group" Phenomenon

As the author believes, prohibition of multiple ownership between clubs in a same league is necessary for fair matches and real results, though it sets up barrier for investors to the market; the organization of sports games would be impossible without this "inherent rule", therefore, it is not what Antimonopoly Law forbids. In this sense, the CFA's decision to separate Guancheng Club from Dalian Shide was reasonable and legal.

Nevertheless, it is questionable that the CFA also required Dalian Shide to separate from the non-series A clubs, such as Dalian Saidelong. Purposed to protect the fairness, prohibition against multiple ownership between clubs shall accord to proportionality to pass the censor of Antimonopoly Law. Though correlated, Dalian Shide and Dalian Saidelong are of different League levels and would not conspire in the matches or impact any negative influence on the result of the match. CFA's requirement, therefore, was an unreasonable restriction on the competitions between the investors and a horizontal agreement which Antimonopoly Law forbids. Regrettably, it is stipulated in articles 48 of the Charter of the CFA that any natural person or legal person (including holding company and subsidiary company) shall not control over, hold shares of or have crucial influence on more than one club by any means; any violation would be severely punished. The author argues that prohibition of multiple ownership between any clubs is an unnecessary article which shall be nullified according to Antimonopoly Law; it shall be revised as prohibition of multiple ownership within the same series of the league.

D. Player transfer

1. A Survey

January 1, 1995 witnessed the beginning of the Chinese professional football player transfer. In 2008, hundreds of players were transferred, a drastic increase from only thirty 13 years ago, and the price, 10 times the amount of the highest back then (660,000).

The CFA classifies transfers into domestic and international transfers. A player eligible for domestic transfer shall be above the age of 26 and have stayed in the former club for over 5 years, otherwise the club can refuse his transfer application. The buyer club shall pay the transfer fee. A club can introduce 5 domestic players at the most. Inverse de-listing is taken when transferred players are selected by the clubs in a way that starts from the lowest ranking in the previous season. International transfer is free transfer in that clubs directly contact players. A club can introduce as many as 3 foreign players. The CFA reformed domestic transfers in 2003 so that free transfer was introduced along with inverse de-listing, but a club can select only one player in the transfer list. Inverse de-listing was abolished in 2004, and a club can obtain 3 players by means of free transfer.

Meanwhile, other measures such as salary restrictive order are taken to prevent some clubs from drastically raising salaries to attract talented players.

2. Observations on Several transfer rules

a. Inverse De-listing

The introduction of inverse de-listing aimed at a reasonable player allocation so that transfers would not be monopolized by the few wealthiest clubs and the balance between all the clubs would not be upset. This system is obviously quoted from the draft of North American professional sports league while an important difference lies in that inverse de-listing covers all the players in the market whereas the draft, only the rookies, hence considerable disparity in the influence on transfer. Inverse de-listing ignores the wishes of the clubs and the players and it frequently occurs every season that a player is selected by a club of the first ranking when he wishes to join the latter club, which in turn have to pick up players they are not quite satisfied with. Inverse de-listing, as the author observes, consists of agreements of restriction on player competition, whose effect of anti-competition outweighs that of pro-competition. It shall be decided as against Antimonopoly Law.

b. Transfer Fee

According to the present transfer fee system of the CPFL, the recipient club shall pay a transfer fee or training fee to the former club or training units unless a special agreement is reached, no matter whether the former contract expires or not; the amount shall be determined by the two parties (article 18 of *Player Identification and Transfer of the CFA*). However, the validity of this article is questionable.

In the sense of civil law, contract freedom is protected by article 4 of Contract Law that any organization or person shall not restrict or interfere. A transfer fee is in effect a form of intervention of contract freedom. In the sense of Labor Law, as a labourer, the player can select a new club when the old contract expires. According to article 23 of Labour Law, a contract terminates when it expires or the conditions of termination occurs. Article 37 of Law of Employment Contract allows the labourer to terminate the contract with a 30-day notice period to the employer. Therefore, the player can terminate the contract by notifying the club 30 days in advance, and join another club which accepts him. In the sense of Antimonopoly Law, a transfer fee is an unreasonable restriction on labour freedom of the players and the clubs' competition in the labour market. Regardless of the fact that a transfer fee is illegal in any sense, it is a common and long-lived practice in the football circle all over the world and still "at large" in China where sports traditionally go beyond the legal system.

Though the employment contract practically expires in one year time, the club has priority for contract resumption (article 17 of *Player Identification and Transfer of CFA*). Even when resumption is impossible, the club has the right to price the player for the transfer market and will scare away any potential buyer with an unreasonably higher price if they wish to keep the player. Negotiation of transfer fees is one of the greatest businesses of the clubs during the transfer period every year. Absurdly, the players may have to pay for the balance. Some players even declare to retire to protest against the unacceptable transfer.

The author holds that transfer fees should be cancelled for an expired contract, and a free transfer system should be established as a substitute.

c. Salary Restrictive Order

The monthly salary of a top player was around 3,000 in 1994 when Chinese professional football reform began. The annual income was under 100,000, allowance and bonus included, but the figure in 1998 soared as high as one million for half of the players in a club. This unusual rapid increase has drawn great attention. The first salary restrictive order was announced by the CFA in 1999 that a player's monthly salary shall not exceed 12,000, and the bonus for one winning match shall not exceed 400,000, which meant the average annual income of a player shall be no greater than 600,000. Nevertheless, the clubs wage money campaigns by all means to attract or keep top players, by paying enormous amounts in transfer fees and "signing fares", or promising huge annual incomes. The player's

income is consequently being raised. A revision of the salary restrictive order was launched at the beginning of the CSL, which exerted impact on the total amount of a clubs salary instead of on the personal income of a player. The CFA state that the total amount of salary and bonus for all the players shall not exceed 55% of the total profits of the club. 55% is believed to be the demarcation between profit and deficit, from the observation of the CFA on the overall conditions and the average data of most foreign professional football clubs.

Salary restrictive order has been positively received by more and more clubs in recent years and the income of a professional player has been dramatically decreased to the range of 300,000 to 1,000,000. Another CFA document of salary restriction was issued in 2006 that the annual income of a player shall not exceed 1,000,000.

When observed from the viewpoint of Antimonopoly Law, some arguments may be raised from the CFA's making and revisions of salary restrictive order.

Firstly, restriction is necessary on player's salary. The CSL is possibly "crashed" if the salary constantly soars until beyond the limitation of the clubs. The author believes that reasonable restriction on unacceptable high salaries is constructive for financial mechanism of the clubs and healthy competitions and future development of the CSL.

Secondly, restriction on amount of the player's personal income is against Antimonopoly Law, while restriction on total amount of the club salary may pass the censor. Since personal income is a reflection of the value of the player, the CFA's restriction on personal income without any objective foundations is a violation of the player's interest as well as a restriction to competition for valuable players between clubs. It is an example of "fixed price" agreement in article 13 of Antimonopoly Law. Good intention as it may have, it cannot be exempted according to article 15 of Antimonopoly Law, for it has great negative influence and better alternatives exist. The author believes that restrictions on the total amount of club salary, which bears much resemblance to the "salary cap" system in American professional sports, is one of the better alternatives. It is a standard that is directly connected with the management of the club so as to encourage clubs to take reasonable measures; on the other hand, its influence on the players' income is indirect so that it can be exempted.

Thirdly, salary restrictive order may pass the censor of the Antimonopoly Law if it determines the bottom line of the player's salary. As a matter of fact, many players are suffering from the dramatic salary decrease. The monthly salary of a younger player or a substitute is around 2,000-3,000, the lowest 1,500 or even less (pre-tax). The bonus for the players unable to appear in a match is highly limited (around 500) even when the club wins. In that case, the annual income for these players is under 20,000. Short career life and indispensable injuries undermine the future of most Chinese professional football players. Therefore, the author believes that the bottom line salary would be a positive policy, which would protect the player's interest and steady the operation of the CPFL. It would not be a restriction to competition since its positive effect outweighs its restriction.

Conclusion

Since the CPFL has undoubtedly become an economic industry, it should be operated in the pattern of economic industry and managed in accordance with the substance of economic industry and should go by the legal norms of competition law. From the analysis of the disputes and issues concerning club relocation, sales of broadcasting rights, multiple ownership of clubs and player transfer, etc., it can be found that it is absolutely necessary to regulate the various monopolies in the CPFL by Antimonopoly Law. The league governors especially the CFA must practically revise various restrictive measures if it wants to pass the censorship of Antimonopoly Law. However, it should be noted that since the CFA is endowed with the exclusive legal power by Sports Law to be in charge of the organization of national football leagues, Antimonopoly Law alone cannot avoid the abuse in the administration mechanism of the CPFL in a fundamental way.

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The Need for WADA to Address Confidentiality Leaks in Drug Testing in Olympic Sports - The Ian Thorpe Situation

by **John T.Wendt***

Introduction

Ian Thorpe is one of the greatest swimmers of all-time. He has won more international championship medals than any other Australian swimmer in history, including five gold medals in two Olympic Games. Thorpe has also been one of the leading opponents of doping. He was a founding athlete-member of the World Anti-Doping Association's (WADA) "Athlete's Passport" Program and was one of the first to provide blood samples to be frozen for future testing in accordance with WADA's new testing procedures (World Anti-Doping Code Annual Report, 2002). But, that reputation was tarnished when someone leaked confidential information to Damien Ressiot, a journalist for the French newspaper, *L'Equipe*, who accused Thorpe of committing a doping offense. For Ian Thorpe, there were two volatile issues – first, the truth of the allegations, and second the breach of confidentiality of his personal records.

Confidentiality is at the heart of any drug testing program. Names should not be revealed, unless it is firmly and legally established that a doping offense has been committed. A breach of confidentiality and media leaks undermine the entire system. It is essential that there is confidentiality throughout the whole process until there is a finding that an individual has in fact committed a doping offense. This comment looks at the breach of confidentiality of Ian Thorpe's records, and the need for WADA to act to remedy the problem.

Thorpe's Accomplishments

Thorpe has broken more than 22 World Records. At the Olympic Games in Sydney in 2000 he was a three time gold medalist and two time silver medalist. At the 2004 Olympic Games in Athens he was a two time gold medalist, silver medalist and bronze medalist. He is the only swimmer in history to successfully defend the 400 Meter Freestyle at the World and Olympic Championships

In three world championships from 1998 to 2003 he won 11 gold medals, one silver and one bronze medal. When he was 18 he became the first swimmer to win six gold medals at a single world championship. He established four new world records, including the 200 Meter, 400 Meter and 800 Meter Freestyles, making him one of three men in history to hold world records over three distances simultaneously. Perhaps his most famous accomplishment occurred at the 2004 Olympic Games in Athens in the 200 Freestyle when he defeated defending Olympic champion Peter van den Hoogenband of the Netherlands, Australian teammate Grant Hackett, and Michael Phelps, considered by many as the most successful swimmer in history.

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After concluding his swimming career he established *Ian Thorpe's Fountain for Youth,* a non-profit charitable organization "empowering children through education and improving their health and wellbeing" (Ian Thorpe's Fountain for Youth, 2007). He is also an Athlete Ambassador for *Right to Play*, an international humanitarian organization that uses sport and play programs to improve health, develop life skills, and foster peace for children and communities in some of the most disadvantaged areas of the world (Right to Play, 2010).

Thorpe as an Anti-Doping Crusader

Over an elite career that has spanned more than a decade, Thorpe was tested hundreds of times but never failed a drug test. Thorpe has also been an outspoken critic of doping in swimming often criticizing organizers for not doing enough in anti-doping. In 2001 Thorpe said, "As a clean athlete, from an outside point of view I don't think it looks good for this sport…I don't think there's a deterrent that's strong enough within the sport that is going to allow all athletes an equal opportunity to be able to race against each other" (New York Times, 2001a). Thorpe criticized Federation Internationale de Natation (FINA), the international governing body of swimming, for its reluctance to implement tighter doping tests saying, "With FINA, a lot of the different things that have happened disappoint me…One is the lack of tests that they've done and the way the tests are done. As a clean athlete, from an outside point of view I don't think it looks good for this sport" (Passa, 2001).

In a 2004 interview with Fox Australia Thorpe said, "For anyone to think that they're swimming at a clean Olympic Games, they'd be naïve…Of course I've swum against athletes that have been on drugs…" (Scott, 2004). FINA was furious at Thorpe and in a press release said, "FINA, the swimming world governing body, acknowledged with regret the statements made by the great swimming champion Ian Thorpe (AUS) and his intention to bring the sport of swimming into disrepute" (Federation Internationale de Natation, 2004). Cornel Marculesco, FINA executive director, put it more bluntly encouraging Thorpe to be quiet, "He [Thorpe] should respect the position of the scientific people…The swimmers should swim" (New York Times, 2001a).

Ressiot and *L'Equipe*

Damien Ressoit is a journalist for the French newspaper *L'Equipe* and is no stranger to controversy. He is the author of several articles on doping including those that claimed that there was proof that Lance Armstrong took EPO to win the 1999 Tour de France (Cyclingnews.com, 2005). He is also the author of "Le mensonge Armstrong" ("The Armstrong Lie") and "La vérité sur Armstrong" ("The Truth on (sic) Armstrong") (Cyclisme-dopage.com, 2005). Ressiot is also no stranger to publishing leaked information and breaches of confidentiality. In 1999 the international governing body of cycling, Union Cycliste Internationale (UCI) condemned Ressiot's and *L'Equipe's* story on alleged doping allegations from the 1999 Tour de France saying that the "UCI confirms its commitment to investigate how and why confidential information was disclosed to members of the news media. In particular, we deplore the fact that the long-established and entrenched confidentiality principle could be violated in such a flagrant way, without any respect for fair play and the rider's privacy" (Kröner, 2005). Ressiot was also formally placed under investigation by a Versailles Court of Appeal for "helping to violate the confidentiality of a judicial investigation" into the use of banned drugs by the Cofidis cycling team (Reporters without Borders, 2006).

On March 30, 2007 *L'Equipe* published an article by Ressoit claiming that Thorpe's May 2006 sample showed unusually high testosterone values and the presence of a luteinizing hormone. Both would be violations of the World Anti-Doping Code. The newspaper went on to state that the Australian Sport Anti-Doping Authority (ASADA) was aware of Thorpe's test results, but chose to ignore them (Ressiot, 2007). Without mentioning any names, FINA issued a statement that there was an investigation into a possible violation by an Australian athlete. Though Thorpe was not explicitly named, everyone knew that it was he to whom FINA was referring.

Reactions to the Leak and Accusation

Not surprisingly, Thorpe was deeply stung by the news. "I was in complete shock, I didn't know what to do, how to react and you know, I think I sat in my room, you know, kind of physically shaking… It is gut-wrenching. It really is" (Lohn, 2007). The problem for any athlete, especially an elite athlete, is that just an accusation alone, whether true or not, can immediately cause serious damage to the athlete's image and reputation. Thorpe commented about his reputation, "It is already tarnished…It is as simple as that. Quite simply because of this leak that has happened" (Lohn, 2007).

Thorpe also specifically talked about the legal issues involved in the leak saying:

> The obligations of confidentiality that are owed to me under the WADA Code are meant to protect the reputations of innocent people from being damaged by media speculation while the routine results management processes are being undertaken. I have been deprived of this protection by the deliberate act of the person who leaked this information (FoxSports, 2007).

Australian swimming officials were also incensed and demanded an explanation for the leak. Glenn Tasker, Swimming Australia's Chief Executive expressed support for Thorpe, said, "Somebody has leaked the information and (Thorpe's) privacy has been grossly invaded…" (Linden, 2007). Tasker was appalled that information was leaked to Ressiot and *L'Equipe* saying, "I think it behoves (sic) organizations involved ... to find out how this was leaked…I think we should have a head on a platter. We should know who it is and there should be some punishment" (The Standard, 2007).

Tasker said that Thorpe had not been given the chance to confront his accusers, "The penalties are very, very strong in the doping code, but athletes have to have the opportunity, to be able to face their accusers…Ian has not had the B-sample tested and he certainly hasn't been accused of anything, although the French article (in *L'Equipe* newspaper) certainly has implied he is guilty" (Foxsports.com.au, 2007b). Finally, Tasker stressed the long term implications is not just for Thorpe alone, but for all athletes, "If it is Ian Thorpe then somebody has leaked this information and his privacy has been invaded and it's not good for that athlete or any athlete around the world" (Shanahan, 2007). Alan Thompson, Australia's head swimming coach, echoed Tasker's remarks, "There needs to be an investigation to find out how it happened, why it happened and actions put in place to reaffirm to the athletes that they have complete privacy and confidentiality in all testing" (The Standard, 2007).

Jacco Verhaeren, Dutch head coach, was disappointed that Thorpe's outstanding career could be tainted by allegations that could have no basis in fact, "This is damaging somebody's career without any reason and I think that's the worst about it…It is shocking it is happening in this way…The media should be very careful with this kind of information... I think there are people to investigate these kinds of things and I think we should first listen to these people before damaging somebody who is an exceptional sportsman and to me a very honest guy and to me he is not under suspicion" (Fairfax-Digital, 2007)

For Ian Thorpe, as for all other elite athletes again there are two issues. The first issue deals with the truth of the allegation, but the second issue deals with the breach of confidentiality. That breach of confidentiality undermines the integrity of the entire anti-doping system. Perhaps Glenn Tasker put it best, "The first issue is extremely important to Ian, but the side-issue is extremely important to everyone else - athletes like Libby Lenton and Grant Hackett and Aaron Peirsol and Natalie Coughlin - because they have to have faith in the system" (Jeffrey, 2007a).

WADA and Confidentiality

Since the beginnings of the modern anti-doping period confidentiality has been at the core of the anti-doping movement. In the European Commission "Harmonization of Methods and Measurements in the Fight Against Doping Final Report" the original IOC Medical Commission insisted that, "complete transparency shall be assured in

all activities to fight doping, *except for preserving the confidentiality necessary to protect the fundamental rights of athletes*." (emphasis added) (HARDOP Final Report, 1999). That confidentiality must last throughout the entire investigative and judicial processes.

The World Anti-Doping Agency condemned the serious breach of confidentiality in Thorpe's case. David Howman, WADA executive director said, "We did not have a name, and if we did we would never have given it to anyone, let alone a journalist" (Jeffrey, 2007b). In a press release WADA went on to say, "WADA is especially shocked that the name of an athlete was apparently given to the media while no adverse analytical finding has been determined at this point…Only when this process is completed and if an adverse analytical finding is then made, will WADA be informed of an athlete's name" (CNN.com, 2007). WADA criticized FINA for its handling of the situation saying, "WADA expects FINA and the Australian Sport Anti-Doping Authority (ASADA) will deal responsibly with the matter. The apparent provision of an athlete's name to the media when it should have been kept confidential is unacceptable" (Reuters, 2007). Richard Pound, then head of WADA, said "[I]t's a very important policy issue that the names not be out there and bandied around, particularly if it turns out there is no doping case…If we come to the conclusion that the wrong result has been achieved, we would get involved" (Mangall, 2007).

The need for privacy and confidentiality on drug testing throughout the process is essential. Weston has pointed out that, "The accusation alone converts the admired athlete into an apparent pariah. The years an athlete spends focused on training, competing, and working with coaches and teammates hardly prepares him or her for the complex process involved in clearing his or her name…"(Weston, 2009). This point cannot be stressed enough - to preserve the reputations of innocent athletes, there must be complete privacy and confidentiality throughout the process. Only after the process is completed can there be a public disclosure. In Ian Thorpe's case, there was never a hearing by an anti-doping agency, yet someone leaked Thorpe's confidential medical records to Ressiot, and *L'Equipe* published them claiming that there was a doping offense.

Thorpe and Ressiot

Thorpe vowed to hunt down the leak and considered legal action. Ressiot said that Thorpe was wasting his time, "He has to concentrate mostly on his defence (sic) if he has a clear conscience…Because he will never find the source of the leaks" (Bourke, 2007). Ressiot also denied any wrongdoing and deflected any blame on to ASADA saying, "If ASADA had respected procedures, he [Thorpe] would have been informed of the problem posed by his sample taken in May 2006 and he would not have discovered it in my paper…I am not responsible therefore for this negligence" (Bourke, 2007).

But, there were also questions about the timing of the release of the story which came just after Thorpe retired and at the 2007 FINA World Championships in Melbourne, where Thorpe was being feted. Ressiot stated that the report came out during the Championships because that was when the investigation was concluded. However, he went on to say, "Besides, the leaders of the swimming world treated me in a rather uncivilized manner…" (LEN Magazine, 2007).

Pierre Lafontaine, Canadian head coach, expressed his disgust at the *L'Equipe* report, "I find it astonishing that it's done at this time…I just think it's ridiculous …why is it done in the middle of this meet when we are in the middle of a celebration of swimming all around the world…I can only tell you that (Thorpe) has been a great ambassador for sports all around the world…" (Shanahan, 2007). Pete Geyer, editor of Cyclingfans.com commented on Ressiot's and *L'Equipe's* motives saying, "The goal is getting the *L'Equipe* brand out there as it seeks to expand beyond France…The objective is not to inform the public, much less to educate it, but rather to increase *L'Equipe*'s influence, and profits, beyond France" (Bourke, 2007).

FINA, ASADA and Thorpe

Australia has been a leader in the fight against doping and was one of the first signatories to the World Anti-Doping Code. ASADA chairperson Richard Ings said, "At this point there is no suggestion that an athlete has committed an anti-doping rule violation...Media reports that an athlete has failed a drug test are simply incorrect" (IOL.co.za, 2007a). On August 31, 2007, the Australian Sports Anti-Doping Authority (ASADA) said that it had closed its examination of a sample provided by Thorpe on May 29, 2006. ASADA said that they had sought expert medical and scientific opinions from not only the Australian Sports Drug Medical Advisory Committee, but also the ANZAC Research Institute and the WADA accredited laboratories in Sydney and Montreal. ASADA stated that all were "unanimous in their opinion that the evidence available does not indicate the use of performance enhancing substances by the athlete" (Lord, 2007). Based on ASADA's report, FINA also closed its examination of the Thorpe affair.

David Flaskas, Thorpe's manager said, "We were also pleased that ASADA consulted independent experts from internationally respected organizations (sic) and they were unanimous in their opinion that there was no evidence of the use of performance enhancing substances by Ian Thorpe. We always believed this would be the outcome and Ian's reputation as a fair competitor would be affirmed" (World News Australia, 2007). Thorpe said, "My reputation as a fair competitor in swimming is the thing I value most… I have always been, and remain, a strong supporter of anti-doping testing. I firmly believe drugs have no place in sport…" (Ian Thorpe's Fountain for Youth, 2007). Tony O'Reilly, Thorpe's attorney stressed:

> While we stand by the testing process, I'd like to remind people the routine results management process should have been confidential. Ian was denied his right to confidentiality due to an information leak. This breach of confidentiality jeopardizes (sic) the integrity of the entire testing code. Ian still regards this information as private and confidential and he has only agreed to disclose the outcome of what is a confidential process because of the intense media interest that the breach has provoked (Ian Thorpe's Fountain for Youth, 2007).

Thorpe's doping allegations were addressed, but his reputation was still tarnished.

Thorpe Sues Ressiot and *L'Equipe*

Thorpe decided to sue Ressiot and *L'Equipe* for defamation and a claim for infringement of privacy in the New South Wales Supreme Court. Through legal action there could be a chance to recoup damages for the injuries committed to Thorpe's reputation. Thorpe, the anti-doping crusader, found himself now linked with the very people he attacked through the years. "Never will it be completely clean now, it's as simple as that. Whatever happens, and you can have concrete evidence there that proves that, but people will still question. That is one of the saddest things. My accomplishments in this sport have been, in people's eyes, they are starting to become diminished and questioned" (IOL.co.za, 2007b)

Thorpe went on to explain that impact that the allegations had on him, his career and on his legacy:

> People say to me, "Most people think that you didn't do it". But Google it, look it up. Whatever website you go on to and it will have something along the lines of "accused of taking drugs at this point"…That will remain in history. For me in my career and how I feel in my about sport, that's not acceptable...No matter how many baths that you take, a little bit of it (the mud) will stay…I know in Australia the vast majority of people believed me and know that I wouldn't do something like that, but around the world, it may be a different story. I want to make sure that this doesn't happen again (The Daily Telegraph, 2008).

However, in the end the legal system could not provide Thorpe with a proper remedy. On September 28, 2009, even though none of the defendants appeared or even filed a response, Thorpe dropped his lawsuit. Thorpe's manager David Flaskas said, "I think it definitely has been (frustrating) for Ian. It is an expensive process and at some point in time you have to make the call…Ian feels he has been vindi-

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cated and that it is time for him to move on and let it go. This has dragged on over two years and how long do you keep going?" (Guardian.co.uk, 2009). Thorpe's solicitor Tony O'Reilly explained, "In these circumstances Ian has decided not to pursue the proceedings as he sees little point in obtaining a verdict in the absence of Mr. Ressiot and the publisher of *L'Equipe*" (HeraldSun.com.au, 2009).

Reforms and Need for Confidentiality

Over 100 years ago in their groundbreaking article arguing for a right to privacy, Samuel D. Warren, Jr., and Louis Brandeis said, "The press is overstepping in every direction the obvious bounds of propriety and decency…Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery ..." (Warren and Brandeis, 1890). Warren and Brandeis were referring to newspapers. Since those days there has been an exponential explosion in different media forms and communication channels. Peck (2006) has pointed out that professional athletes face unrelenting scrutiny from all avenues. Storm (2007) argued that "most athletes never receive full confidentiality due to their popularity" and "that the media regularly leaks confidential drug test results" (Storm, p. 29)

Ressiot and *L'Equipe* overstepped their bounds by publishing this gossip. Ressiot and *L'Equipe* overstepped their bounds by publishing this gossip. It is an invasion of an athlete's privacy. When the Code was designed it needed the support of all stakeholders, who insisted on confidentiality. It is the cornerstone of the World Anti-Doping Program. The provisions of the World Anti-Doping Code are designed to protect all athletes, including their reputations, from media gossip. Numerous commentators have discussed the need for a journalism shield and the protection of sources. However, Thorpe's case is not dealing with protection of sources. It deals with leaking confidential information. A more analogous case would be with Troy Ellerman, an attorney who once represented the founder of the Bay Area Laboratory Co-Operative (BALCO) in a steroid scandal. Ellerman admitted in court that he provided journalists, Mark Fainaru-Wada and Lance Williams with transcripts of confidential grand jury testimony. Ellerman pled guilty to two counts of contempt of court for leaking the transcripts, making a false declaration and obstruction of justice (Egelko, 2007). Ellerman was sentenced to 30 months in prison and was required by the court to make ten presentations to law students to dissuade them from violating the rules of court (Brown, 2007). The distinguishing difference between the BALCO case and Ian Thorpe's is that WADA does not have direct power to issue a contempt of court order.

In 2002 the United States government began an investigation into BALCO, suspected of giving steroids to major league baseball players. Major League Baseball and the Major League Baseball Players Association (MLBPA) had entered into an agreement for drug testing of all major league players. "The players were assured that the results would remain anonymous and confidential; the purpose of the testing was solely to determine whether more than five percent of players tested positive, in which case there would be additional testing in future seasons" (United States v. Comprehensive Drugs Testing, 2009, p. 993). The collection of specimens and record storage was done by Comprehensive Drug Testing, Inc. Federal investigators seized those test results as part of the BALCO investigation. The Ninth Circuit Court of Appeals found that the seizure was illegal and found that "the Players Association is aggrieved by the seizure as the removal of the specimens and documents breaches its negotiated agreement for confidentiality, violates its members' privacy interests and interferes with the operation of its business." (United States v. Comprehensive Drugs Testing, 2009, p. 1002). The court went on to stress, "The risk to the players associated with disclosure, and with that the ability of the Players Association to obtain voluntary compliance with drug testing from its members in the future, is very high" (p. 1003).

Dealing with the leak of "The List" of names in *Comprehensive Drug Testing*, New York Times Michael Schmidt reporter credited his sources as "lawyers with knowledge of the results" and that the "lawyers spoke anonymously because the testing information was under seal by a court order" (Schmidt, 2009). In a response to the New York Times articles, Donald Fehr, then Executive Director of the MLBPA stated that, "The leaking of information under a court seal is a crime" (Fehr, 2009). Kobritz (2009) reiterated that divulging information under court seal is a crime and used the analogy of discredited attorney Troy Ellerman. Kobritz also castigated the attorneys who leaked the names to the New York Times saying:

> Forget The List. The list I want to see is the one with the names of all the lawyers who are spilling their guts to the *Times*, violating their oath of office (lawyers are officers of the court), breaking the law, and selling out the honest and law-abiding members of their profession. I want to see that list published in *The New York Times*. And I want to see the people on that list get what they deserve (Kobritz, 2009).

Kobritz went even further saying that Schmidt was "guilty as his sources" (Kobritz, 2009).

Murray Chass was a reporter for the New York Times and winner of the J.G. Taylor Spink Award which honors baseball writers "for meritorious contributions to baseball writing" (National Baseball Hall of Fame, 2010). Chass talked about Schmidt crossing the line:

> In 39 years at the Times, I collected and published a significant amount of information that people didn't want to have disclosed. But I don't recall any instance where my acquisition of the information crossed a line. There was also a valid reason for getting the information. I'm not sure getting the 2003 names is valid. Why are the newspaper and the reporter so eager to get the names? The answer is easy to arrive at. Schmidt and the Times are pursuing a prurient pastime. The name of its game is beating the Times' competitors to the names, not uncovering some nefarious practice that cries out for sunlight. (Chass, 2009).

Chass talked about why Schmidt wanted to disclose the names. Schmidt himself said, "I think there's a lot of curiosity... I started to realize that there was an interest out there, that people really wanted to know what was on this list. There was a certain amount of intrigue about it" (Chass, 2009). As Chass pointed out, "that doesn't give anyone the right to show disdain for and flout the law just to satisfy someone's curiosity" (Chass, 2009).

Changes to the World Anti-Doping Code

There have been recent revisions and improvements to the World Anti-Doping Code. Under Article 14, "Confidentiality and Reporting" WADA included a new Section 14.1.5 "Confidentiality" which now states:

> The recipient organizations shall not disclose this information beyond those persons with a need to know (which would include the appropriate personnel at the applicable National Olympic Committee, National Federation, and team in a *Team* Sports) until the *Anti-Doping Organization* with results management responsibility has made public disclosure or has failed to make public disclosure as required in Article 14.2 below (World Anti-Doping Code, 2009)

In the Comment to Section 14.1.5 WADA also placed responsibility on each anti-doping organization to provide "in its own anti-doping rules, procedures for the protection of confidential information and for investigating and disciplining improper disclosure of confidential information by any employee or agent of the Anti-Doping Organization" As a result of the Thorpe case WADA also revised Section 14.2 dealing with "Public Disclosure" which now states that the identity of an athlete can be disclosed only after notice has been provided to the athlete. In Ian Thorpe's case the disclosure occurred before Thorpe was notified.

Finally WADA added Section 14.2.3 which states:

> In any case where it is determined, after a hearing or appeal, that the *Athlete* or other *Person* did not commit an anti-doping rule violation, the decision may be disclosed publicly only with the consent of the *Athlete* or other *Person* who is the subject of the decision. The

> *Anti-Doping Organization* with results management responsibility shall use reasonable efforts to obtain such consent, and if consent is obtained, shall publicly disclose the decision in its entirety or insuch (sic) redacted form as the *Athlete* or other *Person* may approve. (emphasis added) (World Anti-Doping Code, 2009)

Again, this is at least a start at protecting the rights and reputation of athletes. But, it needs to go further. Connolly (2006) has pointed out that, "Those in charge of anti-doping efforts must be careful to follow their own rules if they want others to trust in the legitimacy of the system they orchestrate. The accusations levied at seven-time Tour de France champion Lance Armstrong during August 2005 are an example of how anti-doping authorities can sometimes unethically exceed their boundaries" (p. 196).

Conclusion

Ian Thorpe is an Australian citizen. On a national level Australia has strong privacy laws and ASADA is also subject to the strict provisions of the *Privacy Act* (ASADA, 2007). Any ASADA official who leaks confidential information faces not only civil penalties, but also criminal penalties including possible jail time. Finally, Australia and the Australian Law Reform Commission have recently released their *Review of Secrecy Laws* calling for stricter privacy regulations (Australian Law Reform Commission, 2009). But, it was too little and too late for Thorpe. The legal system let him down. But, as Alan Thompson, Australia's head swimming coach said, there is a need for action "to reaffirm to the athletes that they have complete privacy and confidentiality in all testing" (The Standard, 2007). And as Glen Tasker, Australia's swimming executive said, all elite athletes "have to have faith in the system" (Jeffrey, 2007a).

That leaves it to WADA. Already "[A]t the request of its stakeholders, WADA developed an International Standard for the Protection of Privacy and Personal Information (Data Protection Standard), which went into effect on January 1, 2009" (World Anti-Doping Agency, 2009). The 2009 revisions and International Standard leave disciplinary actions for improper disclosure to anti-doping organizations. But that does not do enough. WADA needs to tighten their security procedures even more. In revisions to the 2009 World Anti-Doping Code, WADA has extended sanctions beyond athletes to include athlete support personnel. In a similar vein, WADA can create an Anti-Doping Rule Violation to deal with violations to protection of privacy.

Athletes have obligations and responsibilities under the Code. WADA and Anti-Doping Organizations also have corresponding responsibilities to the athletes. The key duty is confidentiality. The confidentiality leak happened within the WADA testing system. WADA has the power to create sanctions for any sports official found to have leaked the information. It needs to do so. If not, the whole integrity of the testing process and the international anti-doping system is jeopardized.

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Sports Arbitration: Determination of the Applicable Regulations and Rules of Law and their Interpretation

by **Andrea Marco Steingruber***

A discussion and comparison with commercial arbitration focusing on the Fédération Internationale de Football Association ("FIFA") and on recent cases of termination of football players' employment contracts without just cause[1] decided in appeal arbitration proceedings.

I. Introduction

Sport is characterised by its particular rules[2] and by what has also been perceived as the *lex sportiva*.[3] Therefore, unsurprisingly, arbitration has been seen as the privileged dispute resolution method in the field of sport even though the Swiss Federal Tribunal has held that rules issued by private associations[4] could neither be characterised as "law" nor recognised as *"lex sportiva transnationalis".*[5]

Sports arbitration presents distinctive features when compared to commercial arbitration.[6] These are mainly attributable to the structural organisation of sport, but also to the role of the Court of Arbitration for Sport ("CAS") in appeal arbitration proceedings, *i.e.* in cases of appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement, provides for an appeal to the CAS.

This article will, by focusing on the Fédération Internationale de Football Association ("FIFA") and on recent cases of termination of football players' employment contracts without just cause, discuss how the federation's structure of FIFA - an association in accordance to Swiss law - and the CAS Code influence the determination of the applicable regulations and rules of law and their interpretation in appeal arbitration proceedings.

The article begins with a brief description of the structural organisation of sport in general and of football in particular (Section II). Then the FIFA Regulations on the Status and Transfer of Players ("FIFA Status Regulations") are considered (Section III), followed by an overview of the dispute resolution instances involved in termination of employment contracts without just cause cases in football (Section IV). The main part of the article is devoted to a discussion about the determination of the applicable regulations and rules of law by CAS Panels (Section V) and about the law applicable to the merits in cases regarding the termination of football players' employment contracts without just cause (Section VI). The article will then analyse the interpretation of Article 17 of the FIFA Regulations on the Status and Transfer of Players by considering how features of sport affect interpretation of regulations (Section VII). Finally, conclusions are drawn (Section VIII).

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1 See Article 17 of the FIFA Regulations on the Status and Transfer of Players. The cases in question are the following:
- CAS 2007/A/1298, Wigan Athletic FC v/ Heart of Midlothian; CAS 2007/A/1299, Heart of Midlothian v/ Webster & Wigan Athletic FC; CAS 2007/A/1300, Webster v/ Heart of Midlothian, award of 30 January 2008 ("*Webster*"). On the *Webster* case see Ian Blackshaw, *The CAS Appeal Decision in the Andrew Webster Case*; Frans de Weger, *The Webster Case: Justified Panic as there is after Bosman?*; Janwillem Soek, *The Prize for Freedom of Movement: The Webster Case*, THE INTERNATIONAL SPORTS LAW JOURNAL, (2008/1-2), pp. 14-28.
- CAS 2007/A/1359, FC Pyunik Yerevan v/ E., AFC Rapid Bucaresti & FIFA, award of 26 May 2008 ("*Pyunik Yerevan*").
- CAS 2008/A/1453, Elkin Soto Jaramillo & FSV Mainz 05 v/ CD Once Caldas & FIFA and CAS 2008/A/1469, CD Once Caldas v/ FSV Mainz 05 & Elkin Soto Jaramillo, award of 10 July 2008 ("*Soto*").
- CAS 2008/A/1517 Ionikos FC v. C., award of 23 February 2009 ("*Ionikos 1*").
- CAS 2008/A/1518 Ionikos FC v/ L., award of 23 February 2009 ("*Ionikos 2*").
- CAS 2008/A/1519, FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA; CAS 2008/A/1520, Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v/ FC Shakhtar Donetsk (Ukraine) & FIFA, award of 19 May 2009 ("*Francelino da Silva*").
- CAS 2008/A/1644 Adrian Mutu v/ Chelsea Football Club Limited, award of 31 July 2009 ("*Mutu*").

Further CAS awards in the article are cited without abbreviation.

2 See, *e.g.* the eligibility rules for participating in sport competitions or the rules in the field of doping. However, there are also further rules. For an overview, see in particular Antonio Rigozzi, L'arbitrage International en Matière de Sport, (2005), [hereinafter Rigozzi], paras 31 *et seq.* On the distinction between *"Spielregel"* ("game rules" - not considered to be subject to judicial review) and *"Rechtsregel"* ("legal rules" - considered to be subject to judicial review), see in particular Max Kummer, Spielregel und Rechtsregel, (1973); for a more recent article see, *e.g.* Urs Scherrer, *Spielregel und Rechtsregel - Bestandesaufnahme und Ausblick*,, Causa Sport 2/2008, pp. 181 *et seq.*

3 See, *e.g.* Gérald Simon, *L'arbitrage des conflits sportifs*, 1995 Rev Arb. 185, [hereinafter Simon, *Arbitrage*], p. 190. See also

II. The structural organisation of sport

A. In general: the federation's structure[7]

Historically, the federation's structure has built up from the bottom with a relatively uniform mechanism, although in different epochs depending upon the countries and the sport disciplines.[8] Starting from the clubs, sport federations have developed, beginning at a regional level, then national, and lastly international and worldwide.[9] Sport clubs represent at the same time the basic cell and the initial grouping of the federation's structure.[10] Sport clubs can be party to international disputes in team sports, for instance when they participate in international competitions like the Champions League organised by the UEFA,[11] or when they engage a player playing in a foreign club.[12] In disciplinary matters the World Anti-Doping Code also provides consequences for teams.[13]

The *traditional structure of sport organisations is that of a pyramid*: the base consists of individuals or clubs who are members of associations which constitute regional or national federations; the national federations are then eventually combined in a single international federation.[14] The main characteristic of the federative movement resides in its *monopolistic character:* indeed for almost all sport disciplines[15] at every level only one federation exists[16] ("one flag" principle).[17] It is also important to note that there is a membership merely between individuals (*e.g.* athletes) and associations, or associations and national federations, but not between individuals and organisations of the level after next; also neither athletes nor any federation can be a member of the International Olympic Committee (IOC).[18]

B. Of football in particular

The Fédération Internationale de Football Association ("FIFA") is an association governed by Swiss law, founded in 1904 and based in Zurich.[19] It has 208 member associations and its goal, enshrined in its Statutes, is the constant improvement of football. FIFA employs some 310 people from over 35 nations and is composed of a Congress (legislative body), Executive Committee (executive body), General Secretariat (administrative body) and committees (assisting the Executive Committee).[20]

With regard to the admission as a Member of FIFA, Article 10 of the FIFA Statutes provides that:

1. Any Association which is responsible for organising and supervising football in its country may become a Member of FIFA. In this context, the expression "country" shall refer to an independent state recognised by the international community. Subject to par. 5 and par. 6 below, only one Association shall be recognised in each country.
   ….
4. The Association's legally valid statutes shall be enclosed with the application for membership and shall contain the following mandatory provisions:
   …
   c) to recognise the Court of Arbitration for Sport, as specified in these Statutes.
5. Each of the four British Associations is recognised as a separate Member of FIFA.
   …".

While, according to Article 10(1) of the FIFA Statutes, normally only one Association shall be recognised in each country, Article 10(5) of the FIFA Statutes provides for an exception for the four British Associations[21] which are recognised as separate Members of FIFA.[22]

III. An overview of the FIFA Regulations on the Status and Transfer of Players ("FIFA Status Regulations")

A. Adoption and scope of the FIFA Status Regulations

The Executive Committee of FIFA has issued the Regulations on the Status and Transfer of Players and annexes, which form an integral part of the basic text, based on Article 5 of the FIFA Statutes of 19 October 2003.

With regard to the scope, Article 1(1) of the FIFA Status Regulations states that the regulations "lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations."

Article 1(3)(b) of the FIFA Status Regulations provides that:

"Each association shall include in its regulations appropriate means to protect contractual stability, paying due respect to mandatory national law and collective bargaining agreements. In particular, the following principles must be considered.

…

- article 17 paragraphs 1 and 2: the principle that in the event of terminations of contract without just cause, compensation shall be payable and that such compensation may be stipulated in the contract;
- article 17 paragraphs 3-5; the principle that in the event of termination of contract without just cause, sporting sanctions shall be imposed on the party in breach."

B. Maintenance of contractual stability between professionals and clubs

1. General

According to Article 13 of the FIFA Status Regulations (Respect of contract) "a contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement". However, Article 17 of the FIFA Status Regulations deals with the consequences of terminating a contract without just cause.

2. Article 17 of the FIFA Status Regulations: consequences of terminating an employment contract without just cause

With regard to the consequences of terminating a contract without just cause, Article 17 of the FIFA Status Regulations provides that:

"The following provisions apply if a contract is terminated without just cause:

CAS 15 July 2005, No. 2004/A/776, Clunet 2005, p. 1322; CAS 2005/A/983 & 984, CA Penarol v/ PSG et al., 12 July 2006, paras 66-69.

4 In the case in question it was the FIFA.

5 Decision of the Swiss Federal Tribunal (DFT) 132 III 285, consid. 1.3. (Jean-François Poudret, Sébastien Besson, Comparative Law of International Arbitration - Stephen V. Berti & Annette Ponti trans., 2d ed., (2007), para. 702). In relation to the *Cañas* decision (DFT 133 III 235), see also Frank Oschütz, *Bundesgericht hebt erstmals Schiedsspruch des TAS/CAS auf, in* Jusletter 4 June 2007, paras 20 *et seq.*

6 On sports arbitration see in particular Ian S. Blackshaw, Sport, Mediation and Arbitration, (2009).

7 For a comparison of European and North American sports organisations, see James A.R. Nafziger, *A Comparison of the European and North American Models of Sports Organisations*, The International Sports Law Journal, (2008/3-4), pp. 100 *et seq.*

8 Rigozzi, *supra* note 2, para. 59.

9 Gérald Simon, Puissance sportive et ordre juridique étatique: contribution à l'étude des relations entre la puissance publique et les institutions privées, (1990), pp. 3 *et seq.*

10 See Rigozzi, *supra* note 2, para. 60.

11 CAS 98/199, Real Madrid v/ Uefa, in Matthieu Reeb (ed.), Digest of CAS Awards II 1998-2000, p. 479.

12 CAS 2003/O/486, Fulham FC v/ Olympique Lyonnais.

13 See Article 11 WADA-Code.

14 So Stephan Netzle, *Jurisdiction of Arbitral Tribunals in Sports Matters: Arbitration Agreements by Reference to Regulations of Sports Organizations*, in Arbitration of Sports-Related Disputes, ASA Special Series No. 11, (1998), [hereinafter Netzle], p. 46 for Europe.

15 An exception can be found in boxing with several organisations: IBF, WBA, WBC.

16 See, *e.g.* Articles 5.2. and 11.1. of UCI Constitution.

17 Rigozzi, *supra* note 2, para. 65.

18 Netzle, *supra* note 14, p. 46.

19 See Article 1 of the FIFA Statutes.

20 http://www.fifa.com/aboutfifa/federation/index.html (last accessed 15 May 2010).

21 Definition 4 in the FIFA Statutes provides for the following definition of the "British Associations": "the four Associations in the United Kingdom - The Football Association, The Scottish Football Association, The Football Association of Wales and The Irish Football Association (Northern Ireland)."

22 This fact was of relevance in the *Webster* case.

1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.
2. Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.
3. In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period. This sanction shall be a four-month restriction on playing in official matches. In the case of aggravating circumstances, the restriction shall last six months. In all cases, these sporting sanctions shall take effect from the start of the following season at the new club. Unilateral breach without just cause or sporting just cause after the protected period shall not result in sporting sanctions. Disciplinary measures may, however, be imposed outside the protected period for failure to give notice of termination within 15 days of the last official match of the season (including national cups) of the club with which the player is registered. The protected period starts again when, while renewing the contract, the duration of the previous contract is extended.
4. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two registration periods.
5. Any person subject to the FIFA Statutes and regulations (club officials, players' agents, players, etc.) who acts in a manner designed to induce a breach of contract between a professional and a club in order to facilitate the transfer of the player shall be sanctioned."

IV. The main dispute resolution instances involved in termination of employment contracts without just cause cases in football

International sports law has been described as a process for avoiding and resolving disputes.[23] In this process arbitration plays a main role.

The disputes involving the termination of employment contracts without just cause of football players are dealt with in the first instance by the competent sports authorities, and subsequently become the subject of an appeal arbitration proceeding to the CAS.[24] However, it has been observed that in the case of CAS arbitration proceedings the terminology "appeal" is not fully appropriate, because this would presuppose that the competent sports authorities cast themselves as arbitrators.[25]

A. Federation's intern: the FIFA Dispute Resolution Chamber ("DRC")[26]

1. The role and the functioning of the DRC

The Dispute Resolution Chamber ("DRC") is FIFA's deciding body that provides "dispute resolution on the basis of equal representation of players and clubs and an independent chairman. The DRC adjudicates on a regular basis in the presence of a varying composition of members. In total, the DRC includes 10 player representatives and 10 club representatives whereas decisions are regularly passed in a composition of 5 (2 player representatives, 2 club representatives, 1 chairman). The DRC is competent for employment-related disputes between clubs and players that have an international dimension as well as for disputes between clubs related to Training Compensation and Solidarity Mechanism."[27] The relevant decisions are published on FIFA.com.[28] DRC proceedings are free of charge.

2. The competence of the DRC

With regard to the competence of the DRC, Article 3(1) of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ("FIFA Status Procedures Rules") provides that the DRC shall examine its jurisdiction in particular in light of Articles 22 to 24 of the FIFA Status Regulations.

In accordance with Article 24(1) of the FIFA Status Regulations, the DRC shall adjudicate on any of the cases described under Article 22 a), b), d) and e) of the FIFA Status Regulations with the exception of disputes concerning the issue of an International Transfer Certificate ("ITC").[29]

Article 22 a), b), d) and e) of the FIFA Status Regulations provides that:

"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:

1. disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract;
2. employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement;
3. …
4. disputes relating to training compensation (article 20) and the solidarity mechanism (article 21) between clubs belonging to different associations;
5. disputes relating to the solidarity mechanism (article 21) between clubs belonging to the same association provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations;
6. …".

3. The regulations and rules of law to be applied by the DRC

According to Article 25(6) of the FIFA Status Regulations the Players' Status Committee, the DRC, the single judge or the DRC judge, shall, when taking their decisions, apply the FIFA Status Regulations whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport.

23 James A. R. Nafziger, *International Sports Law as a Process for Resolving Disputes*, 1996 INT'L & COMP. L. Q., p. 130.

24 See under http://www.tas-cas.org/en/infogenerales.asp/4-3-239-1011-4-1-1/5-0-1011-3-0-0/ (last accessed 15 May 2010).

25 Simon, *Arbitrage*, *supra* note 3, p. 194.

26 On the jurisprudence of the FIFA Dispute Resolution Chamber, see Janwillem Soek, *Termination of International Employment Agreements and the "Just Cause" Concept in the Case Law of the FIFA Dispute Resolution Chamber*, The International Sports Law Journal, (2007/3-4), pp. 28-45; Frans De Weger, The Jurisprudence of the FIFA Dispute Resolution Chamber, (2008).

27 http://www.fifa.com/aboutfifa/federation/administration/disputeresolution.html (last accessed 15 May 2010).

28 http://www.fifa.com/aboutfifa/federation/administration/decision.html (last accessed 15 May 2010).

29 According to Article 9(1) of the FIFA Status Regulations "players registered at one association may only be registered at a new association once the latter has received an International Transfer Certificate (hereinafter: ICT) from the former association. The ICT shall be issued free of charge without any conditions or time limit. Any provisions to the contrary shall be null and void. The association issuing the ITC shall lodge a copy with FIFA. …".

B. "Appeal mechanism": the Court of Arbitration for Sport

According to Article 62(1) of the FIFA Statutes, "FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents."

Moreover, Article 10(4)(c) of the FIFA Statutes provides that the Association's legally valid statutes shall be enclosed with the application to become a Member of FIFA and shall contain as a mandatory provision the recognition of the Court of Arbitration for Sport, as specified in the Statutes.

According to Article 63(2) of the FIFA Statutes "recourse may only be made to CAS after all other internal channels have been exhausted." However, contrarily to disciplinary proceedings where the federation and the athlete have opposed interests, in contractual disputes between football clubs and football players CAS Panels act as "real" second (adjudicatory-) instances.[30] Indeed the scope of remedy, differently from disciplinary cases, is not directed against FIFA, but against the contractual partner.[31] For this reason disputes between clubs and players have also been labelled as "appeal arbitration proceedings, in a non disciplinary case".[32]

V. Determination of the applicable regulations and rules of law by CAS Panels

A. Seat of arbitration

The seat of CAS arbitration proceedings is Lausanne, Switzerland. For ordinary[33] and appeal[34] arbitration proceedings Article R28 of the CAS Code (Seat) provides that:

"The seat of the CAS and of each Arbitration Panel ("Panel") is Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel or, if he has not yet been appointed, the President of the relevant Division may decide to hold a hearing in another place and issues the appropriate directions related to such hearing."

On the other hand, for *ad hoc* arbitration proceedings during the Olympic Games it is Article 7 of the CAS *ad hoc* Arbitration Rules for the Olympic Games (Seat of Arbitration and Law governing the Arbitration) which provides that:

"The seat of the ad hoc Division and of each Panel is in Lausanne, Switzerland. However, the ad hoc Division and each Panel may carry out all the actions which fall within their mission at the site of the Olympic Games or in any other place they deem appropriate.

The arbitration is governed by Chapter 12 of the Swiss Act on Private International Law."

B. Conflict of laws provisions

1. The conflict of laws provision of the seat of arbitration: Article 187 of the Swiss Private International Law Act ("SPILA")

The seat of the CAS and of each arbitration panel is in Lausanne, Switzerland. Chapter 12 of the Swiss Private International Law Act ("SPILA") governs all international arbitrations with their seat in Switzerland.[35] Indeed Article 176(1) of the SPILA provides that the provisions of chapter 12 shall apply "to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland."

Article 187 of the SPILA is the underlying conflict of laws rule which is applicable in determining the governing rules of law. According to Article 187(1) of the SPILA:

> "The Arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection".

Article 187(1) of the SPILA "recognizes the traditional principle of the freedom of the parties to choose the law that the arbitral tribunal has to apply to the merits of the dispute".[36] Indeed, the provision "gives the parties a large degree of autonomy in selecting the applicable rules of law - including the possibility of choosing conflict of laws rules (to determine the governing substantive law), a national law or private regulations."[37] The Panel in the *Mutu* case observed that the wording of Article 187(1) of the SPILA:

> "to the extent it states that the parties may choose the "rules of law" to be applied, does not limit the parties' choice to the designation of a particular national law. It is in fact generally agreed that the parties may choose to subject the dispute to a system of rules which is not the law of a State and that such a choice is consistent with Article 187 of the SPILA."[38] "It is in addition agreed that the parties may designate the relevant statutes, rules or regulations of a sporting governing body as the applicable "rules of law" for the purposes of Article 187(1) of the SPILA."[39]

Later, the Panels in the *Ionikos* cases also underscored that "not only the legal doctrine but also the CAS jurisprudence have acknowledged that Article 187 of the SPILA allows arbitrators to settle the disputes in application of provisions of law that do not originate in a particular national law, such as sport regulations or the rules of an international federation."[40]

The choice of law does not necessarily need to be direct, *i.e.* be done in the arbitration agreement itself or in a specific agreement between the parties.[41] Indeed, according to the CAS jurisprudence and the legal doctrine, "the choice of law made by the parties can be tacit or indirect, by reference to the rules of an arbitral institution."[42] "Moreover, there will be a tacit choice made by the parties when they submit themselves to arbitration rules that contain provisions relating to the designation of the applicable law."[43] In fact the submission to arbitration rules is a manifestation of parties' will.[44] A tacit choice by the parties can also result from their conduct during the proceedings.[45]

Therefore, when the parties submit themselves to the CAS Code they agree on the choice of law provision contained in this arbitration rules - Article R58 of the CAS Code for appeal arbitration proceedings - which as a manifestation of the will of the parties will have priority over Article 187(1) of the SPILA. In the world of football such a submission is done through Article 62 of the FIFA Statutes.

On the other hand, when the parties do not make use - directly or indirectly by choosing rules of arbitration containing a choice of law provision - of their faculty to choose the applicable law, the determination of the applicable law lies, according to Article 187(1) of the SPILA, within the powers of the arbitrators.[46]

30 Ulrich Haas, *Die Rechtsprechung des CAS zur Vertragsstabilität im Verhältnis zwischen Fussballspielern und Klubs*, Causa Sport 3/2008 [hereinafter Haas, *Vertragsstabilität*], p. 236.

31 Haas, *Vertragsstabilität*, *supra* note 30, p. 236.

32 *Ibid.*

33 Articles R38 *et seq.* of the CAS Code.

34 Articles R47 *et seq.* of the CAS Code.

35 This is expressly provided for in Article 7 of the CAS *ad hoc* Arbitration Rules for the Olympic Games.

36 *Mutu*, para. 91, citing Rigozzi, *supra* note 2, paras 1178 *et seq.*

37 *Webster*, para. 73.

38 *Mutu*, para. 91, citing Bernard Dutoit, Droit international privé suisse, (2005), p. 657; Pierre Lalive, Jean-François Poudret, Claude Reymond, Le droit de l'arbitrage interne et international en Suisse, (1989), p. 392 *et seq.*; Pierre Karrer, in Heinrich Honsell, Nedim Peter Vogt, Anton K. Schnyder (eds.), Kommentar zum schweizerischen Privatrecht, Internationales Privatrecht, (1996), Article 187, paras 69 *et seq.*; see also CAS 2005/A/983 & 984, Peñarol v/ Bueno, Rodriguez & PSG, paras 64 *et seq.*

39 *Mutu*, para. 91, citing Rigozzi, *supra* note 2, paras 1178 *et seq.*

40 *Ionikos 1, Ionikos 2,* para. 12 (Law), citing Rigozzi, *supra* note 2, para. 1178; TAS 2005/A/983-984, paras 20 *et seq.*; CAS 2006/A/1024, para. 6.9; and TAS 2006/A/1082-1104, para. 48.

41 Rigozzi, *supra* note 2, para. 1173.

42 *Ionikos 1, Ionikos 2,* para. 13 (Law), citing Rigozzi, *supra* note 2, para. 1172; Gabrielle Kaufmann-Kohler, Blaise Stucki, International Arbitration in Switzerland, A Handbook for Practitioners, (2004), [hereinafter Kaufmann-Kohler/Stucki], p. 118; CAS 2006/A/1024, para. 6.5; and TAS 2006/A/1082-1 104, para. 49.

43 *Ionikos 1, Ionikos 2,* para. 13 (Law), citing Kaufmann-Kohler/Stucki, *supra* note 42, p. 120; TAS 2005/A/983-984, para. 34; CAS 2006/A/1024, para. 6.7; and TAS 2006/A/1082-1104, para. 49.

44 Rigozzi, *supra* note 2, para. 1173.

45 *Webster*, para. 73.

46 See Rigozzi, *supra* note 2, para. 1175. "According to the rules of law with which the case has the closest connection".

It can also be observed that Article 187(1) of the SPILA constitutes the entire conflict of laws system applicable to arbitral tribunals, which have their seat in Switzerland, as "the other specific conflict of laws rules contained in Swiss private international law are not applicable to the determination of the applicable substantive law in Swiss international arbitration proceedings."[47]

2. The regulations and rules of law to be applied by CAS Panels

2.1. In *ad hoc* arbitration proceedings
For *ad hoc* arbitration proceedings during the Olympic Games the relevant provision is Article 17 of the CAS *ad hoc* Arbitration Rules for the Olympic Games (Law Applicable) which provides that:

> "The Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate."

2.2. In ordinary arbitration proceedings
For ordinary arbitration proceedings the relevant provision is Article R45 of the CAS Code (Law Applicable to the Merits) which provides that:

> "The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*."

2.3. In appeal arbitration proceedings
The relevant provision in appeal arbitration proceedings is Article R58 of the CAS Code (Law applicable to the merits). The far-reaching freedom of the choice of law in favour of the parties, based on Article 187(1) of the SPILA, is confirmed by Article R58 of the CAS Code.[48] As CAS Panels decide disputes between football teams and football players regularly through appeal arbitration proceedings, it is this provision which is applicable in cases related to the termination of football players' employment contracts without just cause.[49] Article R58 of the CAS Code provides that:

> "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

The application of this provision in CAS appeal arbitration proceedings follows from the fact that the parties submit the case to the CAS itself.[50] Article R27 of the CAS Code stipulates in fact that "the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS."[51]

3. The FIFA Statutes
In Article 62(1) of the FIFA Statutes FIFA "recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents".

In Article 62(2) of the FIFA Statutes[52] a choice of law clause is then contained, whereby:

> "The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

The CAS Panel in the *Webster* case held that "the foregoing choice of law clause underlines the primary application of the various FIFA Status Regulations, while referring to the CAS Code and Swiss law."[53]

C. Article R58 of the CAS Code

1. In any case to be applied: sports regulations
1.1. In general
From Article R58 of the CAS Code it follows that in disputes between football clubs and players the applicable federation's regulations have always to be applied, *i.e.* the regulations of FIFA. In cases regarding the termination of football players' employment contracts without just cause in particular the FIFA Statutes and the FIFA Status Regulations are of relevance.[54]

1.2. Parallel application of sports regulations and of the (other) applicable rules of law
It has been rightly observed that the wording of Article R58 of the CAS Code seems with all evidence to imply a ***parallel application of the sports regulations and of the (other) applicable rules of law***.[55]

Indeed, the Panel has to decide the dispute in accordance with the applicable regulations *"and"* the applicable rules of law, where the applicable rules of law can be:

- the ones chosen by the parties; or, in the absence of a choice,
- the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled; or again,
- the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.[56]

Therefore, differently from the ***regulations of the sport organisations*** which have to be applied ***in any case*** in the procedure of "appeal" in accordance to Article R58 of the CAS Code, the "other rules of law" are - in principle - only applicable to the dispute when there is a (separate) choice of them by the parties.[57] In the event of an absence of such a choice the Panel has, according to Article R58 of the CAS Code, primarily to apply the (national) law of the country in which the federation, association or sports-related body is domiciled.[58] Only when the so determined (national) law is, in the eyes of the Panel, not suitable to resolve the dispute can the arbitrators apply the rules of law they deem more appropriate. However, the Panel shall give reasons for its decision.[59]

1.3. Relationship between sport regulations/law and state law
It has been observed that one should ask whether circumstances exist where one can consider the field of application of the sport regulations as being exclusive of the field of application of state law.[60] Such an approach can well be seen in the following considerations of a CAS Panel:

> "[T]he Parties' declarations in their correspondence indicate a common acceptance the Panel adjudicate the dispute on the basis of the athletics' and anti-doping regulations it deems applicable. Consequently, the Panel need not apply a national law and shall decide the dispute on the basis of the IAAF[61] Rules and Procedural Guidelines. Which constitute the regulations applicable to all the Parties as the IAAF Rules have been accepted by CADA[62] as a member of the IAAF and by Ms Solange Witteveen as a member of CADA."[63]

47 *Mutu*, para. 90, citing Kaufmann-Kohler/Stucki, *supra* note 42, p. 116; Rigozzi, *supra* note 2, paras 1166 *et seq.*
48 *Mutu*, para. 92.
49 Haas, *Vertragsstabilität*, *supra* note 30, p. 237.
50 *Ibid.*
51 *Ibid.*
52 In the *Webster* case it was Article 60(2) of the FIFA Statutes.
53 See *Webster*, para. 78.
54 Haas, *Vertragsstabilität*, *supra* note 30, p. 237.
55 See Rigozzi, *supra* note 2, para. 1196 (emphasis by Rigozzi).
56 Rigozzi, *supra* note 2, para. 1196.
57 Ulrich Haas, *Die Vereinbarung von "Rechtsregeln" in (Berufungs-) Schiedsverfahren vor dem Court of Arbitration for Sport*, Causa Sport 3/2007 [hereinafter Haas, *Rechtsregeln*], p. 277.
58 *Ibid.* A full splitting up of the law of sport from the state law is provided for by article 17 of the ad hoc arbitration rules for the Olympic Games: "The Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate."
59 Haas, *Rechtsregeln*, *supra* note 57, p. 277.
60 Rigozzi, *supra* note 2, para. 1196.
61 International Association of Athletics Federations.
62 Confederación Argentina de Atletismo.

The view that the wording of Article R58 of the CAS Code seems to indicate that the arbitral tribunal has always to decide in accordance to the applicable regulations and that sports law always prevails against the eventually applicable state law[64] has been criticised, because while it is compatible with Article 187 of the SPILA, it is incompatible with the principle of parallel applicability of sports regulations and the (other) rules of law.[65]

Indeed, due to the fact that Article R58 of the CAS Code, as expression of the parties' will, has priority over Article 187 of the SPILA, only a "supplementary" choice of law of a sport regulations (or of other non-national rules) allows the CAS Panels not to examine which national law is applicable to the dispute.[66]

2. The parallel applicable rules of law

2.1. Alternative 1: "Rules of law chosen by the parties"

In accordance with the principle of party autonomy the parties have the priority in choosing the rules of law to be applied by the Panel in conjunction with the sports regulations. The wording of Article R58 of the CAS Code leaves no doubt that the parties may choose rules of law which are not national laws for parallel application with sports regulations.[67] This is also perfectly compatible with Article 187(1) of the SPILA.

The choice of the rules of law can be direct or indirect. The choice is indirect when the sports regulations themselves contain a choice of law, as is the case with Article 62(2) of the FIFA Statutes.

2.2. In absence of a choice of law by the parties

2.2.1. alternative 2: law of the country in which the federation, association or sports-related body is domiciled

It has been observed that in the CAS Code sports law has not been fully uncoupled from national law.[68] Indeed, by maintaining the rule according to which, in the absence of a choice by the parties, the Panel shall decide the dispute "according to the law of the country in which the federation, association or sports-related body is domiciled", the CAS Code maintains a link to national law.[69] Scholars, however, consider that national law only applies in a subsidiary way.[70]

In the case of international sports federations, the reference to the "law of the country in which the federation, association or sports-related body is domiciled" also fulfils the function of unification of the law applicable to the merits.[71] For the case of FIFA it is remembered that it has domicile in Switzerland. In fact, according to Article 1 of the FIFA Statutes:

1. FIFA is an association registered in the Commercial Register in accordance with Article 60 *et seq.* of the Swiss Civil Code
2. FIFA headquarters are located in Zurich (Switzerland) and may only be transferred to another location following a resolution passed by the Congress."

Therefore, in absence of a parties' choice, the law of the country in which FIFA is domiciled would be Swiss law.

2.2.2. alternative 3: rules of law, the application of which the panel deems appropriate

According to this alternative the Panel, instead of deciding in accordance to the "law of the country in which the federation, association or sports-related body is domiciled", could decide the dispute according to the "rules of law, the application of which the Panel deems appropriate". However, in such cases the Panel would have to give reasons for doing so.

D. Comparison with commercial arbitration

1. In general

It has been observed that "the determination of the applicable substantive law is a critical issue in international arbitration", because "it has a legal, practical and psychological influence on every arbitration".[72] Indeed, "nothing is more important in any international arbitration than knowing the legal or other standards to apply to measure the rights and obligations of the parties."[73]

Therefore, "choice of law by the parties is common in international commercial agreements. It is generally accepted for simple and logical reasons as it provides certainty, predictability and uniformity. It is part of the normal contractual process whereby parties try to regulate all or most issues between them and to avoid uncertainty in the future. A clear choice of the applicable substantive law removes a possible issue for dispute and allows the parties to control the scope of contractual interpretation and application."[74] In fact, an "important reason for a choice of law by the parties is to avoid the risk of unexpected decisions by the arbitrators, because arbitrators do not have their own substantive law or conflict of laws system."[75]

2. Special features of sports arbitration

Primarily with regard to commercial arbitration, it has been observed:

> "There is a complex relationship between the parties' choice of arbitration as the mechanism for resolving their disputes, the overriding authority of party autonomy in the arbitration process and the methods of determining the applicable law that arbitrators must apply. … The existence of the arbitration in every instance is the result of the exercise of party autonomy. The choice of law process should reflect that same party autonomy."[76]

However, the situation in the field of sports arbitration is in some aspects different from the one in commercial arbitration.

2.1. In general

The Swiss Federal Tribunal observed that "competitive sports are characterized by a very hierarchical structure, both at the international as well as the national level. Established on a vertical axis, the relationships between athletes and the organizations of the different sports disciplines are in this way different from the horizontal relations which bind the parties of a contractual relationship."[77]

According to the Swiss Federal Tribunal "the *structural difference* between the two types of relationships is ***not without influence on the consensual process leading to the formation of any agreement.*** While in principle, two parties are treated equally, each expressing its will without being subject to the will of the other in international commercial arbitration, the situation is quite different in the field of sports. … An athlete wishing to participate in competitions organized under the control of a federation that stipulates rules governing recourse to arbitration has no choice but to accept the arbitration clause, namely by adhering to the bylaws of such sports federation where the clause is inserted. This is even more applicable to a *professional athlete* who is confronted with the following ***dilemma: to consent to arbitration or practice sports as an amateur.***"[78] As a result, an athlete has no other choice than to accept arbitration *nolens volens*.[79]

While the aforementioned considerations of the Swiss Federal Tribunal were made for an individual sportsman (a tennis player), the same are also true for clubs which are affiliated to national sports federations which in their turn are part of an international federation, as is the case with football clubs affiliated to national football associations being part of FIFA.

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63 CAS 2002/A/417, IAAF c. CADA and Witteveen, paras. 82-83, cited by Rigozzi, *supra* note 2, para. 1197.

64 Eric Loquin, *Chronique TAS 2004*, p. 313, cited by Rigozzi, *supra* note 2, para. 1199, note 3283.

65 Rigozzi, *supra* note 2, para. 1199.

66 *Ibid.*

67 Rigozzi, *supra* note 2, para. 1201.

68 Rigozzi, *supra* note 2, para. 1203.

69 *Ibid.*

70 Rigozzi, *supra* note 2, para. 1204.

71 Rigozzi, *supra* note 2, para. 1207. This will, however, not be the case, when the federation which issued the decision is a national federation. In this respect see the critics of Rigozzi, *supra* note 2, paras 1207 *et seq.*

72 Julian D.M. Lew, Loukas A. Mistelis, Stefan M. Kröll, Comparative International Commercial Arbitration, (2003), [hereinafter Lew/Mistelis/Kröll], para. 17-3.

73 *Ibid.*

74 Lew/Mistelis/Kröll, *supra* note 72, para. 17-11.

75 Lew/Mistelis/Kröll, *supra* note 72, para. 17-12.

76 *Ibid.*

77 See DFT 133 III 235, consid. 4.3.2.2, citing DFT 129 III 445, consid. 3.3.3.2.

78 DFT 133 III 235, consid. 4.3.2.2., making reference on the question of "forced" arbitration to Rigozzi, *supra* note 2, paras 475 *et seq.* and 811 *et seq.* (translation by author) (emphasis added).

79 See DFT 133 III 235, consid. 4.3.2.2.

Moreover, even though the relationships between players and clubs are horizontal contractual relationships (employment contracts), one has to bear in mind that they nevertheless take place in a very hierarchical structure, where many legal aspects are predetermined by associations. Finally, with regard to the resolution of international sport disputes, the role of the CAS as appeal instance has to be considered.

2.2. Limited party autonomy, in particular with respect to choice of law

In sports arbitration party autonomy seems to be different when compared to the one that exists in commercial arbitration. However, party autonomy in sports arbitration seems not only to be different, but is in several other aspects a *de facto* limited one, and not only in respect of the choice of arbitration as a dispute resolution mechanism.

First of all, in CAS proceedings the seat is clearly defined. The seat is in Lausanne, Switzerland. The arbitration is therefore governed by Chapter 12 of the Swiss Act on Private International Law.[80]

Moreover, in sports arbitration the choice of law process is not the same as in commercial arbitration. Indeed in CAS appeal arbitration proceedings party autonomy is, with regard to the choice of law process, limited by Article R58 of the CAS Code. CAS Panels are therefore bound by the conflict of laws system provided for by Article R58 of the CAS Code and must take into account the applicable sports regulations - which often also contain choice of law provisions - when deciding. Conversely, the parties (football players and clubs) submitting themselves under the CAS Code accept this fact. However, the parties really have no another choice than to accept CAS arbitration and the CAS Rules *nolens volens*.

Finally, the fact that sports federations are organised and function in accordance with a particular national law - in the case of FIFA Swiss law - has to be considered, not forgetting however that there is also a relationship between football players and clubs.

VI. The law applicable to the merits in cases regarding the termination of football players' employment contracts without just cause

Now, more specifically, the determination of applicable rules of law in cases regarding the termination of football players' employment contracts without just cause will be discussed.

A. Sports regulations

From Article R58 of the CAS Code it follows that the applicable federation's regulations have always to be applied, *i.e.* here the regulations of FIFA.[81] In cases regarding the termination of football players' employment contracts without just cause, in particular the FIFA Statutes and the FIFA Status Regulations are of relevance.[82]

B. Rules of law

1. Express choice of the rules of law by the Parties

The question of which other rules of law are to be applied depends on whether the parties have or have not reached an agreement in this regard.[83] Often the parties choose the (subsidiary)[84] applicability of Swiss law.[85]

Such a choice of law can in principle be done until the end of the arbitration proceedings and has then to be respected by the arbitrator.[86] The parties can, through such a subsequent choice of law, also change (with retroactive effect) a previously chosen different applicable law.[87]

2. Implied choice of the rules of law by the Parties

Also without express choice of law during the arbitration proceedings the CAS Panels attain preponderantly a subsidiary and amendatory application of Swiss law.[88] Indeed a choice of law in accordance with Article 187(1) of the SPILA - respectively in accordance with Article 58 of the CAS Code - can also be made tacitly.[89] However, also a tacit choice of law supposes that there is effectively agreement between the parties in relation to the applicable law.[90] Habitually, CAS Panels base the implied choice of law on more evidences.[91]

2.1. Through parties' conduct during the arbitration proceedings

CAS Panels, in particular, derive an implied choice of law from the parties' conduct during the arbitration proceedings.[92] This is for instance the case when the Claimant bases his claim in the arbitration proceeding on Swiss law and the Respondent admits this fact without making an exception.[93]

2.1.1. THE WEBSTER CASE

In the *Webster* case the Panel first underlined that the FIFA regulations and bylaws contain a main choice of law clause under Article 60(2) (now 62(2)) of the FIFA Statutes[94] and that this choice of law underlines the primary application of the FIFA regulations, while referring to the CAS Code and Swiss law.[95]

The Panel then observed that all the parties involved were *basing their contentions in part on the FIFA regulations*, notably on the FIFA Status Regulations.[96] The Panel therefore found that all three parties had chosen the primary application of the FIFA regulations to the matters in dispute.[97]

2.1.2. THE FRANCELINO DA SILVA CASE

Another example can be found later in the *Francelino da Silva* case, where the Panel, after citing the wording of Article 58 of the CAS Code and of Article 60(2) (now 62(2)) of the FIFA Statutes,[98] held:

"The Panel is of the opinion that the parties have not agreed on the application of any specific national law. It is comforted in its position by the fact that, in their respective submissions, *the parties refer exclusively to FIFA's Regulations*. As a result, subject to the primacy of applicable FIFA's regulations, Swiss law shall apply complementarily. ..."[99]

2.1.3. COMMENTS

While in the *Webster* case the parties were apparently only basing their contentions *in part* on the FIFA regulations, in the *Francelino da Silva* case the Parties had not agreed on the application of any specific national law, but made *exclusive* reference to FIFA's regulations.

Theoretically in the *Francelino da Silva* case the issue could have been whether a choice of non-national rules of law by the Parties, *i.e.* an exclusive application of sports regulations (FIFA's regulations), would have been possible according to Article 58 of the CAS Code.[100] However this issue is, in the case of FIFA, *de facto* irrelevant if one considers that the parties' sole reference to FIFA's regulations also contains a choice of national law, *i.e.* Swiss law mentioned in Article 60(2) (now 62(2)) of the FIFA Statutes. Moreover, as FIFA has its seat

80 This is expressly provided for in Article 7 of the CAS *ad hoc* Arbitration Rules for the Olympic Games.
81 Haas, *Vertragsstabilität*, *supra* note 30, p. 237.
82 *Ibid.*
83 Haas, *Vertragsstabilität*, *supra* note 30, p. 237, mentioning CAS 2006/A/1180, Galatasaray v/ Ribéry & OM, award of 24 April 2007.
84 Haas, *Vertragsstabilität*, *supra* note 30, p. 237, citing Gabrielle Kaufmann-Kohler, Antonio Rigozzi, arbitrage International, (2006), [hereinafter Kaufmann-Kohler/Rigozzi], para. 615.
85 Haas, *Vertragsstabilität*, *supra* note 30, p. 237, mentioning *e.g.* CAS 2007/A/1258, Aris FC v/ Sérgio Silva de Souza Júnior, award of 23 October 2007, para. 51; CAS 2005/A/893, Metsu v/ Al-Ain Sports Club, award of 16 February 2006, para. 5.3; CAS 2005/A/937, Györi v/ Kartelo, award of 7 April 2006, para. 3.8; CAS 2007/A/1233&1234, FC Universitatae Craiova v/ da Silva & Masri, award of 19 December 2007, para. 61.
86 Haas, *Vertragsstabilität*, *supra* note 30, p. 237, mentioning CAS 2006/A/1024, FC Metallurg Donetsk v/ Lerinc, award of 27 June 2006, para. 6.5.
87 Haas, *Vertragsstabilität*, *supra* note 30, p. 237, mentioning *e.g.* CAS 2005/A/937, Györi v/ Kartelo, award of 7 April 2006, para. 5.4.
88 Haas, *Vertragsstabilität*, *supra* note 30, p. 237
89 *Ibid.*
90 *Ibid.*
91 Haas, *Vertragsstabilität*, *supra* note 30, p. 237, citing Kaufmann-Kohler/Rigozzi, *supra* note 84, paras 609 *et seq.*
92 Haas, *Vertragsstabilität*, *supra* note 30, pp. 237 *et seq.*
93 Haas, *Vertragsstabilität*, *supra* note 30, p. 238. CAS 2005/A/995, Caralho v/ Qadsia, award of 23 August 2006, para. 41.
94 *Webster*, para. 77.
95 *Webster*, para. 78.
96 *Webster*, para. 80.
97 *Webster*, para. 81.
98 *Francelino da Silva*, paras 50-51.
99 *Francelino da Silva*, paras 52-53 (emphasis added).
100 See *supra* Sec. V.C.1.3.

in Zurich, Switzerland,[101] the law of the country in which the federation is domiciled - according to Article 58 of the CAS Code - would also be Swiss law.

2.2. Tacit choice of law by submission under the CAS Code / choice of law by indirect affiliation to FIFA

2.2.1. THE IONIKOS CASES

In the *Ionikos* cases the Panels underlined the relevance of Article 187 of the SPILA and Article R58 of the CAS Code.[102]

The Panels then analysed Article 13(1)(d) of the FIFA Statutes, which establishes the obligation for all members of FIFA *"to ensure that their own members comply with the Statutes, regulations, directives and decisions of FIFA bodies"*.[103] The Panels also observed that "additionally, Article 12(d) of the Statutes of the Hellenic FF extends the previously-mentioned obligation to comply with the FIFA Statutes, regulations, directives and decisions to that all members of the Hellenic FF."[104]

The Panels held that the parties in both cases were "bound by the FIFA Statutes for two reasons:

- first, they made a tacit choice of law when they submitted themselves to arbitration rules that contained provisions relating to the designation of the applicable law; and
- second, all parties are - at least indirectly - affiliated to FIFA."[105]

As a result, since all the parties were - at least indirectly - affiliated to FIFA, and were thus bound by the FIFA Statutes,[106] the Panels examined and then held that the disputes were subject, in particular, to Article 60(2) (now 62(2)) of the FIFA Statutes, which states that *"the provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*.[107]

The Panels adhered to CAS jurisprudence stating that:

"only if the same terms and conditions apply to everyone who participates in organized sport, are the integrity and equal opportunity of sporting competition guaranteed". (CAS 2006/A/1 180, para. 7.9)."[108]

2.2.2. THE WEBSTER CASE

2.2.2.1. Applicability of the FIFA regulations and of the FIFA Statutes

In the *Webster* case the Panel observed that clause 10 of the Employment Contract provided that:

"The Player and the Club shall observe and be subject to the Rules, Regulations and Bye-Laws of The Scottish Football Association, The Scottish Premier League and such other organisations of which these bodies or the Club is a member and in the case of any conflict between this Agreement and such Rules, Regulations or Bye-Laws then such Rules, Regulations or Bye-Laws shall take precedence. The Player shall also at all times observe the reasonable Rules of the Club."[109]

The Panel then held that:

"Since the Scottish Football Association is a member of FIFA, the FIFA Status Regulations and bylaws are applicable and take precedence in accordance with the reference in clause 10."[110]

2.2.2.2. THE CHOICE OF LAW CLAUSE OF THE FIFA STATUTES

Later in the *Webster* case the Panel held that:

"The FIFA Status Regulations and bylaws in turn contain a main choice of law clause under Article 60(2)[111] of the FIFA Statutes, whereby: *"The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*."[112]

The Panel therefore concluded:

"The foregoing choice of law clause underlines the primary application of the various FIFA regulations, while referring to the CAS Code and Swiss law."[113]

2.3. Application of Article 62(2) of the FIFA Statutes

2.3.1. IN GENERAL

The CAS Panels have recognised an implied choice of law when the parties have consciously submitted themselves under the FIFA regulations,[114] either directly by referring the case to the FIFA Dispute Resolution Chamber[115] and/or indirectly through Article 58 of the CAS Code which makes reference to the FIFA regulations.[116]

In both ways, and independently from the fact that parties have agreed directly or indirectly to the FIFA regulations, the application of Article 62(2) of the FIFA Statutes is attained.[117]

2.3.2. REACH OF THE SUBSIDIARY APPLICATION OF SWISS LAW IN ACCORDANCE WITH ARTICLE 62(2) OF THE FIFA STATUTES

Article 62(2) of the FIFA Statutes does not contain an all-embracing reference to Swiss law, it only provides that Swiss law is additionally applicable.[118]

2.3.2.1. The Pyunik Yerevan *case*

In the *Pyunik Yerevan* case the Panel, after citing the wording of Article 58 of the CAS Code and of Article 60(2) (now 62(2)) of the FIFA Statutes,[119] held:

"The Employment Contract does not contain any choice of law clause and the Parties have not otherwise specifically agreed on the applicable law. The Panel will therefore decide according to the various regulations of FIFA and additionally, Swiss Law."[120]

2.3.2.2. The Soto *case*

In the *Soto* case the Panel, after citing the wording of Article 58 of the CAS Code and of Article 59(2) (now 62(2)) of the FIFA Statutes,[121] held:

"The parties have not expressly chosen any specific rules of law to be applicable to these proceedings. The FIFA Regulations necessarily apply."[122]

Moreover, the *Soto* Panel then held:

"As the seat of the CAS is in Switzerland, this arbitration is subject to the rules of the Swiss private international law (LDIP). Article 187(1) LDIP provides that the arbitral tribunal decides in accordance with the law chosen by the parties or, in the absence of any choice, in accordance with the rules with which the case has the closest connection.

In the event that no special request regarding the applicable law was made by the Appellant, the general rule of Article R58 of the CAS

101 See Article 1 of the FIFA Statutes.
102 *Ionikos 1, Ionikos 2,* para. 11 *et seq.* (Law).
103 *Ionikos 1, Ionikos 2,* para. 15 (Law) (cursive in the original).
104 *Ibid.*
105 *Ionikos 1, Ionikos 2,* para. 7 (Law).
106 "See Hans Michael Riemer, Berner Kommentar zum Schweizerischen Privatrecht, *ad* Art. 60-79 ZGB, (1990), paras. 511 and 515; CAS 2004/A/574; TAS 2005/A/983-984, para. 36; CAS 2006/A/1180, para. 7.10" (*Ionikos 1, Ionikos 2,* para. 16 (Law)).
107 *Ionikos 1, Ionikos 2,* para. 16 (Law) (cursive in the original).
108 *Ionikos 1, Ionikos 2,* para. 17 (Law).
109 *Webster*, para. 75 (cursive in the original).
110 *Webster*, para. 76.
111 Now Article 62(2) of the FIFA Statutes.
112 *Webster*, para. 77 (cursive in the original).
113 *Webster*, para. 78.
114 Haas, *Vertragsstabilität*, *supra* note 30, p. 238, mentioning CAS 2005/A/983 & 984, Penarol v/ Bueno, Rodriguez & PSG, award of 12 July 2006, paras 82 *et seq.*; Webster, paras 76 *et seq.*
115 Haas, *Vertragsstabilität*, *supra* note 30, p. 238, mentioning CAS 2006/A/1062, Da Nghe Football Club v/ Etoga, award of 27 July 2006, para. 6.2; CAS 2007/A/1210, Ittihad Club v/ Sergio Dario Herrera, award of 3 July 2007, para. 43; CAS 2006/A/1024, FC Metallurg Donetsk v/ Lerinc, award of 27 June 2006, paras 6.11 *et seq.*; CAS 2005/A/866, FC Hapoel v/ Siston, award of 30 March 2006, paras 33 *et seq.*
116 Haas, *Vertragsstabilität*, *supra* note 30, p. 238, mentioning CAS 2006/A/1061, de Brito Filho v/ Ittihad Football Club, award of 23 October 2006, paras 28 *et seq.*; CAS 2006/A/1141, Moises Moura Pinheiro v/ FIFA & PFC Krilja Sovetov, award of 29 June 2007, para. 61; CAS 2007/A/1267, Petit v/ Fedofoot, award of 20 November 2007, para. 41.
117 Haas, *Vertragsstabilität*, *supra* note 30, p. 238.
118 *Ibid.*
119 *Pyunik Yerevan,* paras 4-5 (Law).
120 *Pyunik Yerevan,* para. 6 (Law).
121 *Soto*, paras 3 and 4 (Law).
122 *Soto*, para. 5 (Law).

Code applies. It follows that the rules and regulations of FIFA shall apply primarily and Swiss law shall apply subsidiarily. ...."[123]

2.3.3. COMMENTS

In both cases the Panel, in the absence of an express choice of rules of law by the parties to the Employment Contracts, considered in accordance with Article 58 of the CAS Code, besides the regulations of FIFA, the law of the country where FIFA is domiciled to be applicable, *i.e.* Swiss law.

th awards cited the wording of what is now Article 62(2) of the FIFA Statutes without, however, expressly indicating that the Parties could have made a choice of law through their indirect affiliation to FIFA. Nevertheless this is not relevant because the result: either focusing on Article 58 of the CAS Code - the "law of the country in which the federation … is domiciled" is Swiss law - or on Article 62(2) of the FIFA Statutes - "CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law" - is *de facto* the same.

On the other hand, the Panels of the *Pyunik Yerevan* case and the *Soto* case both held that Swiss law would apply "additionally" or "subsidiarily". Indeed, CAS Panels have proceeded to a concretisation of Article 62(2) of the FIFA Statutes in the sense that it serves only for the filling of lacunas of the FIFA regulations.[124] Where the FIFA regulations on the other hand provide for a clear answer, the FIFA regulations shall take precedence over the "additionally" applicable Swiss law, and this even in the case of a mandatory applicable provision of Swiss law.[125]

3. Choice of the rules of law in the employment contract

3.1. In general

Often the employment contracts concluded between the parties contain a choice of law clause. In the case that a different law than Swiss law is applicable the question then arises as to how this choice of law relates to the choice of law contained in Article 60(2) (now 62(2)) of the CAS Code.[126] This question recently came up in the *Mutu* case.

3.2. The Mutu case

In the *Mutu* case the question was which "rules of law", if any, had been chosen by the parties, *i.e.* whether the parties had chosen the application of a given State law and the role in such context of the "applicable regulations" for the purposes of Article R58 of the CAS Code.[127] The issue was in fact debated between the parties: on one side, the Appellant submitted that English law had to find exclusive application as a result of a choice made by the parties; on the other side the Respondent agreed that English law applied, but submitted that the parties had incorporated, by way of reference, into the Employment Contract, the FIFA Status Regulations, which therefore fell to be applicable as contractual content.[128]

In solving the aforementioned question the Panel considered the following provisions:

"i. Article 21 ["Jurisdiction and Law"] of the Employment Contract, under which
"This contract shall be governed by and construed in accordance with English law and the parties submit to the non exclusive jurisdiction of the English Courts"

ii. Article 18 ["Specificity of Football"] of the Employment Contract, which provides that
"The parties hereto confirm and acknowledge that this contract[,] the rights and obligations undertaken by the parties hereto and the fixed term period thereof reflect the special relationship and characteristics involved in the employment of football players and the participation by the parties in the game of football pursuant to the Rules and the parties accordingly agree that all matters of dispute in relation to the rights and obligations of the parties hereto and otherwise pursuant to the Rules including as to termination of this contract and any compensation payable in respect of termination or breach thereof shall be submitted to and the parties hereto accept the jurisdiction and all appropriate determinations of such tribunal panel or other body (including pursuant to any appeal therefrom) pursuant to the provisions of and in accordance with the procedures and practices under this contract and the Rules"

iii Article 3.1.9 ["Duties and Obligations of the Player"] of the Employment Contract, specifying that
"The Player agrees [...] to observe the Rules [...]"

iv. the definition of "Rules" in the Employment Contract, as follows
"'the Rules' shall mean the statutes and regulations of FIFA and UEFA the FA Rules the League Rules the Code of Practice and the Club Rules"

v. Article 62.2 ["Court of Arbitration for Sport (CAS)"] of the FIFA Statutes:
"... CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"."[129]

In light of the foregoing, the Panel remarked that:

"it is common ground between the parties that the Employment Contract is governed by English law, and that therefore English law has to be applied to determine the damages due as a consequence of the breach of such contract. Its Article 21, in fact, contains a choice of law provision which is fully enforceable pursuant to Article 187(1) of the SPILA and Article R58 of the CAS Code."[130]

At the same time, the Panel found that, in order to determine the damages due as a consequence of the breach of the Employment Contract, the FIFA Status Regulations were also to be applied.[131] The Panel was led to this conclusion by several factors:

"i the parties referred in the Employment Contract to the Regulations, being part of the "Rules" that
- the Player agreed to comply with (Article 3.1.9),
- match "the special relationship and characteristics involved in the employment of football players" (Article 18, first part), and
- determine "all matters of dispute [...] including as to [...] any compensation payable in respect of [...] breach" which the parties agreed to submit to the peculiar dispute resolution mechanisms referred to in Article 18, second part;

ii. the appeal is directed against a decision issued by the DRC, and is based on Article 62(2) of the FIFA Statutes, mandating the application of the "various regulations of FIFA";

iii the applicability of the Regulations to the contractual dispute between the Club and the Player has been endorsed by two CAS panels, in the First CAS Award (at page 9: "[...] this matter shall be decided in accordance with FIFA Regulations and with English law [...]") and in the Second CAS Award (at § 39: "[...] the Panel holds that the 2001 FIFA Regulations are applicable to decide on this dispute")."[132]

In light of the foregoing the Panel concluded that the dispute had to be determined on the basis of English law and the FIFA Status Regulations.[133]

3.3. Comments

In accordance with Article 58 of the CAS Code in CAS proceedings the Panel has to decide the dispute according to the applicable sports regulations. Moreover, in the *Mutu* case the parties made an express choice for the rules of law - a national law, *i.e.* English law - to be applied in parallel.

The issue here is whether such an express choice of national law (English law) has priority over an implied choice of national law, *i.e.* the second sentence of Article 62(2) of the FIFA Statutes, or not.

It has been observed that CAS case law is not uniform at this regard:

123 *Soto*, paras 6 and 7 (Law).
124 Haas, *Vertragsstabilität*, *supra* note 30, p. 238.
125 *Ibid.*, citing CAS 2005/A/983 & 984, Penarol v/ Bueno, Rodriguez & PSG, award of 12 July 2006, paras 92 *et seq.*; CAS 2004/A/791, La SASP Le Havre Athletic Club v/ FIFA & Newcastle United FC et al., award of 17 July 2007, para. 60.
126 Haas, *Vertragsstabilität*, *supra* note 30, p. 238.
127 *Mutu*, para. 94.
128 *Ibid.*
129 *Mutu*, para. 95 (cursive in the original).
130 *Mutu*, para. 96.
131 *Mutu*, para. 97.
132 *Ibid.*
133 *Mutu*, para. 98.

- Sometimes Panels make recourse, besides the FIFA regulations, solely to the law chosen by the parties in the employment contract.[134]
- Another view considers that the subsequent (implied) choice of law based on Article 58 of the CAS Code fully prevails over the (timely) previous express choice of law in the employment contract with the consequence that only Swiss law is considered to be (additionally) applicable.[135]
- Other times a differentiation is preferred.[136] According to this view the law applicable to the employment contract is insofar of relevance when for a legal issue there is no provision in the FIFA regulations providing for an answer; however, even a lacuna would still have to be filled in accordance to Swiss law.[137] Therefore, following this view, different national laws could possibly find application in a same case.[138]

It has been observed that the first alternative is somewhat problematic due to the fact that Article 58 of the CAS Code provides for the primary applicability of federation's regulations, which therefore take precedence over the law chosen by the parties in the Employment Contract.[139]

On the other hand the difference between the other two options is small, because the FIFA Status Regulations regulates quite comprehensively questions which could form part of disputes between clubs and football players and therefore the field of application of the law chosen by the parties in the employment contract is quite small.[140]

4. *Domicile of FIFA*

The importance of the law of the country in which the federation is domiciled is well reflected in the *Ionikos* cases where the Panels held:

"As a result, CAS jurisprudence has consistently interpreted article 60(2)[141] of the FIFA Statutes as to contain a choice of law clause in favour of Swiss law governing the merits of the disputes:

- For example, the Panel in the case TAS 2004/A/587 ruled that since the FIFA has its seat in Zurich, Swiss law is applicable subsidiarily to the merits of the case (TAS 2004/A/587, para. 8.2).
- This rule was subsequently supplemented by the Panel in case TAS 2005/A/902-903, which found that since the parties had subjected themselves to the FIFA Statutes and the CAS Code, and since the FIFA has its seat in Zurich, the matter would be settled by application of Swiss law (TAS 2005/A/902-903, para. 16 and 36).
- More recently, CAS jurisprudence cleared possible doubts and affirmed that *"the reference in article 17(1) of the FIFA Status Regulations to "the law of the country concerned" does not detract from the fact that according to the clear wording of Article 60(2)*[142] *of the FIFA Statutes, the FIFA intended the interpretation and validity of its regulations and decisions to be governed by a single law corresponding to its law of domicile, i.e. Swiss Law" (CAS 2007/A/1298-1300, para. 83)."*[143]

Although Article 62(2) of the FIFA Statutes provides that Swiss law is only additionally applicable, an enlargement of the field of application of Swiss law takes place, because of the seat of FIFA.

Here it has to be recalled that Article 58 of the CAS Code itself provides that the Panel shall decide the dispute according to the applicable regulations and, in absence of a choice of the rules of law by the parties, according to the law of the country in which the federation is domiciled.

Moreover, it has to be remembered that FIFA is an association registered in the Commercial Register in accordance with Article 60 *et seq.* of the Swiss Civil Code.[144] As it will also be discussed later, this has an influence on the interpretation and validity of the regulations and decisions of FIFA.

5. Limits of the choice of law

Limits on the application of the law chosen by the parties (or determined by the arbitrators) are given by public policy.[145] "This is because its effect would be to contravene some fundamental standard reflected in the public policy being applied."[146] Indeed, "every legal system, national and international, has certain immutable moral and ethical standards that cannot generally be ignored or avoided by a different choice of law."[147]

Usually it is not a mere Swiss connotation of public policy which is followed, but an international or transnational one.[148] However, "the real issue is to determine the nature and content of public policy relevant to the arbitration process."[149] While the existence and the content of national and regional[150] public policy may be identifiable, the existence of an international and transnational public policy is controversial as is its effect on international arbitration.[151]

VII. How features of sport affect interpretation and the role of CAS case law: the interpretation of Article 17 of the FIFA Status Regulations as example

A. The interpretation of sports regulations in general

"The methods of interpretation of (private) regulations of sports organisations are less oriented towards the principles of contracts' interpretation than towards those of statutes' interpretation.[152] The latter does not exclude expanding and amending interpretation, when the applicable regulation has a lacuna.[153] On the other hand, there are, however, clear limits to a free development of the law.[154]

In the context of interpretation besides the wording of the provision[155] also the spirit and purpose of it has to be considered[156] as well as the historical materials."[157] This approach has also been followed in the *Webster* case when it was held that "in keeping with the practice under Swiss law relating to the interpretation of bylaws of an association, the Panel shall first have regard for the wording of Article 17, *i.e.* its literal meaning, and if this is unclear shall have regard to the provision's internal logic, its relationship with other provisions of the FIFA Status

134 Haas, *Vertragsstabilität*, *supra* note 30, p. 238, mentioning CAS 2004/A/678, Apollon Kalamaris FC v/ Oliveira Morais, award of 25 May 2005, paras 5.3 *et seq.*

135 Haas, *Vertragsstabilität*, *supra* note 30, p. 238, mentioning CAS 2006/A/1180, Galatasaray v/ Ribéry & OM, award of 24 April 2007, paras 7.9 *et seq.*

136 Haas, *Vertragsstabilität*, *supra* note 30, p. 238, mentioning CAS 2005/A/1123 & 1124, Al Gharafa Sports Club v/ Paulo Cesar Wanchope Watson, award of 18 December 2006, paras 69 *et seq.*

137 Haas, *Vertragsstabilität*, *supra* note 30, p. 238.

138 Haas, *Vertragsstabilität*, *supra* note 30, pp. 238 *et seq.*, mentioning CAS 2006/A/1082 & 1104, Valladolid v/ Barreto Càceres & Cerro Porteno, award of 19 January 2007, para. 51.

139 Haas, *Vertragsstabilität*, *supra* note 30, p. 239.

140 *Ibid.*

141 Now Article 62(2) of the FIFA Statutes.

142 Now Article 62(2) of the FIFA Statutes.

143 *Ionikos 1, Ionikos 2,* para. 17 (Law) (cursive in the original).

144 See Article 1(1) of the FIFA Statutes.

145 Haas, *Vertragsstabilität*, *supra* note 30, p. 239.

146 Lew/Mistelis/Kröll, *supra* note 72, para. 17-32.

147 *Ibid.*

148 Haas, *Vertragsstabilität*, *supra* note 30, p. 239, citing Kaufmann-Kohler/Rigozzi, *supra* note 84, para. 666.

149 Lew/Mistelis/Kröll, *supra* note 72, para. 17-33.

150 There is, for example, European (EC) public policy.

151 Lew/Mistelis/Kröll, *supra* note 72, para. 17-33, citing Pierre Lalive, *"Transnational (or Truly International) Public Policy and International Arbitration"* in Pieter Sanders (ed.), ICCA Congress series no 3, (1987), 258, pp. 312-317.

152 Haas, *Rechtsregeln*, *supra* note 57, p. 275 (translation by author), making reference to "CAS (20.12.1999 - 99/A/230) B v/ International Judo Federation, in: Matthieu Reeb (ed.), Digest of CAS Awards II 1998-2000, 2002, 369, 375 (12.02.1998-1998/002) R v/ International Olympic Committee (IOC), in: Matthieu Reeb (ed.), Digest of CAS Awards I 1986 - 1998, 419, 424 *et seq.*: "regulatory documents (...) should be strictly interpreted by the sports authorities and the CAS." in this sense also CAS (22.07.1996 - 1996/001) US Swimming v/ FINA, in: Matthieu Reeb (ed.), Digest CAS Awards I 1986-1998, 1998, 377, 380 *et seq.*" (Haas, *Rechtsregeln*, *supra* note 57, footnote 39).

153 Haas, *Rechtsregeln*, *supra* note 57, p. 275 (translation by author).

154 *Ibid.*

155 See *e.g.* "CAS (27.04.2007 - 2007/A/1198) Piveteau v/ FIFA, para. 80." (Haas, *Rechtsregeln*, *supra* note 57, footnote 41).

156 "CAS (13.03.1997 - 96/149) A.C. v/ Fédération Internationale des Natation Amateur (FINA), in: Matthieu Reeb (ed.), Digest of CAS Awards I 1986-1998, 1998, 251, 258 (10.11.2006 - 2006/A/1018) River Plate v/ Hamburg, Rn. 7.3.7 f. (18.02.1998 - OG 004-005/98) CNO Tchèque, CNO Suède et S. v/ IIHF, Clunet 2001, 259, 264 *et seq.*" (Haas, *Rechtsregeln*, *supra* note 57, footnote 42).

Regulations as well as its purpose revealed by the history of its adoption."[158]

> "As a matter of principle the interpretation is, however, autonomous, *i.e.* resulting from itself and without making recourse to the common or particular linguistic use of a particular national legal system."[159] Therefore it may be that terms like "nationality" or "states" have in a sport-related context another meaning than the one of the "normal" legal language use.[160]

The particularities in the methods of interpretation of the (private) regulations of sports organisations have also been seen as forming part of the "*lex sportiva*".[161]

B. Interpretation of the FIFA Status Regulations and validity of the DRC decision in accordance to Swiss law

In the *Webster* case the Panel held that:

> "the reference in Article 17(1) of the FIFA Status Regulations to "*the law of the country concerned*" does not detract from the fact that according to the clear wording of Article 60(2)[162] of the FIFA Statutes, the FIFA intended the interpretation and validity of its regulations and decisions to be governed by a single law corresponding to its law of domicile, *i.e.* Swiss law."[163]

Thus, the Panel found "that the interpretation of the FIFA Status Regulations and the validity of the DRC decision under appeal must be determined in application of Swiss law."[164]

In this respect it has also to be remembered that FIFA is an association registered in the Commercial Register in accordance with Article 60 *et seq.* of the Swiss Civil Code.[165] Therefore in the *Webster* case the Panel in interpreting Article 17 of the FIFA Status Regulations kept with the practice under Swiss law relating to the interpretation of the bylaws of an association.[166]

C. Interpretation of Article 17 of the FIFA Status Regulations

1. *The historical background and the spirit and purpose of Article 17 of the FIFA Status Regulations*

A comprehensive overview of the historical background and the rationale of Article 17 of the FIFA Status Regulations has been provided in the *Francelino da Silva* case, where the Panel recalled:

> "Article 17 of the FIFA Status Regulations is part of chapter IV of the FIFA Status Regulations, *i.e.* of that part that deals with and try to foster the maintenance of contractual stability between professionals and clubs. Within the framework of the "reconstruction" of the FIFA and UEFA rules following the well-known *Bosman* decision,[167] the concept of contractual stability was introduced to move forward and replace the former transfer fee system: accordingly, the pre-*Bosman* transfer fees due after the expiry of a contract have been replaced by compensations due for the breach or undue termination of an existing agreement."[168]

It is observed that these new rules were also welcomed by the European Union.[169] Then, the *Francelino da Silva* Panel continued by remarking that:

> "Within such system of values, the provision contained in Article 17 of the FIFA Status Regulations, *i.e.* the financial and the disciplinary consequences due under certain conditions in the event of a breach and a unilateral, premature termination respectively, plays in view of the Panel a central role. The purpose of Article 17 is basically nothing else than to reinforce contractual stability, *i.e.* to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player."[170] "This, because contractual stability is crucial for the well functioning of the international football. The principle *pacta sunt servanda* shall apply to all stakeholders, "small" and "big" clubs, unknown and top players, employees and employers, notwithstanding their importance, role or power."[171]

It is observed that the purpose of reinforcement of contractual stability has also been underlined in several other awards.[172] The *Francelino da Silva* Panel further held that:

> "The deterrent effect of Article 17 of the FIFA Status Regulations shall be achieved through the impending risk for a party to incur disciplinary sanctions, if some conditions are met (cf. Article 17 paragraphs 3 to 5 of the FIFA Status Regulations), and, in any event, the risk to have to pay a compensation for the damage caused by the breach or the unjustified termination. In other words, both players and club are warned: if one does breach or terminate a contract without just cause, a financial compensation is due, and such compensation is to be calculated in accordance with all those elements of Article 17 of the FIFA Status Regulations that are applicable in the matter at stake, including all the non-exclusive criteria listed in paragraph 1 of said Article that, based on the circumstances of the single case, the panel will consider appropriate to apply."[173]

2. *Factors to be considered when calculating compensation*

Article 17(1) of the FIFA Status Regulations refers to three factors, which CAS Panels have to consider when calculating the compensation for the breach of contract: the law of the country concerned, the specificity of sport and any other objective criteria.[174] In the *Soto* case the Panel observed that "the criteria cited which are to be taken into account are exemplary and not exhaustive with no priority or means of reconciliation identified."[175]

2.1. The "law of the country concerned"

2.1.1. PURPOSE

In the *Francelino da Silva* case the Panel observed that the purpose of the "law of the country concerned" "is to make sure that any outcome, which the judging body will reach, shall somehow take into consideration any special aspect of the concerned local law."[176] "Depending on the content of the relevant law, such corrective influ-

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157 Haas, *Rechtsregeln*, *supra* note 57, p. 275 (translation by author), making reference to "CAS (14.03.2007 - 2006/A/1176) Belarus Football Federation v/ UEFA, Rn. 7.6 (09.10.1998 - 98/199) Real Madrid Club de Futbol v/ UEFA, Clunet 2001, 270, 272 f. (31.01.2002 -2001/A/357) Nabokov et ROC, RIHF v/ IIHF, Clunet 2004, 313, 314" (Haas, *Rechtsregeln*, *supra* note 57, footnote 43).

158 *Webster*, para. 115.

159 Haas, *Rechtsregeln*, *supra* note 57, pp. 275 *et seq.* (translation by author).

160 Haas, *Rechtsregeln*, *supra* note 57, p. 276 (translation by author).

161 Haas, *Rechtsregeln*, *supra* note 57, p. 275 (translation by author).

162 Now 62(2) of the FIFA Statutes.

163 *Webster*, para. 83.

164 *Webster*, para. 84.

165 See Article 1(1) of the FIFA Statutes.

166 *Webster*, para. 115.

167 "Cf. ECJ, Case C-415/93, *Bosman*, [1995] ECR I-4921" (footnote 3, *Francelino da Silva,* para. 79).

168 *Francelino da Silva,* para. 79.

169 "Cf. Statement IP/02/824 of 5 June 2002 of the then Competition Commissioner Mario Monti: *"FIFA has now adopted new rules which are agreed by FIFpro, the main players' Union and which follow the principles acceptable to the Commission. The new rules find a balance between the players' fundamental right to free movement and stability of contracts together with the legitimate objective of integrity of the sport and the stability of championships. It is now accepted that EU and national law applies to football, and it is also now understood that EU law is able to take into account the specificity of sport, and in particular to recognise that sport performs a very important social, integrating and cultural function. Football now has the legal stability it needs to go forward".*" (footnote 4, *Francelino da Silva,* para. 79).

170 *Francelino da Silva,* para. 80.

171 *Francelino da Silva,* para. 81.

172 "CAS 2005/A/876, Mutu v/ Chelsea, p. 17: "[...] it is plain from the text of the FIFA Regulations that they are designed to further 'contractual stability' [...]"; CAS 2007/A/1358, FC Pyunik Yerevan v/ Carl Lombe, AFC Rapid Bucaresti & FIFA, N 90; CAS 2007/A/1359, FC Pyunik Yerevan v/ Edel Apoula Edima Bete, AFC Rapid Bucaresti & FIFA, N 26: "[...] the ultimate rationale of this provision of the FIFA Regulations is to support and foster contractual stability [...]"; confirmed in CAS 2008/A/1568, Tomas Mica & Football Club Wil 1900 v/ FIFA & Club PFC Naftex AC Bourgas, N 6.37." (footnote 5, *Francelino da Silva,* para. 80).

173 *Francelino da Silva,* para. 82.

174 See *Webster*, para. 125.

175 *Soto*, para. 26 (Law).

176 *Francelino da Silva,* para. 144.

ence may be in favour of the player, and diminish the compensation due to his former club, or in favour of the club, and lead to an increase of the compensation."[177]

2.1.2. NOT A CHOICE OF LAW CLAUSE

In the *Webster* case the Panel found "that Article 25(6) of the FIFA Status Regulations and the reference in Article 17(1) to the "*law of the country concerned*" are not, properly speaking, choice of law clauses:"[178]

- "Given its formulation, Article 25(6) must be deemed a general reminder to the decision-making bodies of FIFA (PSC, DRC, Single Judge and DRC Judge) that in making their decisions under the FIFA Status Regulations they must not apply those regulations in a vacuum but must account for the applicable contractual arrangements, collective agreements and national law. Article 25(6) does not purport to specify what national law is relevant."[179]
- "As to Article 17(1) of the FIFA Status Regulations, it is clear from its wording that the reference to the *"law of the country concerned"* is not a choice of law clause, since it merely stipulates that such law is among the different elements to be taken into consideration in assessing the level of compensation."[180]

In the *Webster* case the law of the country concerned was Scottish law, since Scotland had the closest connection with the contractual dispute; being at once the country where the Employment Contract had been signed and performed and where the club claiming compensation (Hearts) and the Player were domiciled at the time of signature and termination.[181]

2.1.3. WHICH IS THE RELEVANT LAW

Whereas in the *Pyunik Yerevan* case the Panel observed that "the jurisprudence of CAS on the question as to which is the relevant law is not consistent"[182], later in the *Francelino da Silva* case the Panel held that:

> "… The law of the country concerned is the law governing the employment relationship between the player and his former club, *i.e.* normally the law with which the dispute at stake has the closest connection. This will be under ordinary circumstances the law of the country of the club of which the employment contract has been breached or terminated, respectively. …"[183]

Indeed, in the *Webster* case the Panel had considered that the "law of the country concerned" was Scottish law.[184] It has been observed that this reasoning was in line with general conflict of laws rules, which determine the law with the closest connection to be the law where the employment contract was performed,[185] and that one may safely assume that the drafters of the FIFA Status Regulations had the same principle in mind.[186]

Furthermore, in the *Francelino da Silva* case the Panel also observed that "the fact that the law of the country concerned is the one of the country of the club, of which the employment contract has been breached or terminated, is confirmed in the Commentary to the FIFA Regulations published by FIFA itself."[187] Indeed, commenting on Article 17(1) of the FIFA Status Regulations, FIFA confirms that the provision refers to the law of the country "where the club is domiciled."[188]

Therefore, "to apply instead of such governing law automatically Swiss law as being the law applicable 'by default',[189] would mean to possibly overlook the corrective influence that the 'law of the country concerned' shall have."[190]

2.1.4. DISCRETION WHETHER OR NOT TO APPLY THE CRITERION

In the *Webster* case the Panel held that it had the discretion to decide whether or not any provisions of Scottish law should be applied in determining the level of compensation.[191] The Panel found that there were several reasons not to apply the rules of Scottish law invoked by Hearts.[192]

Later, also in the *Soto* case, the Panel - by making reference to the *Webster* case - held that it had discretion whether or not to apply the law of the country concerned.[193] In the *Soto* case the Panel considered the Employment Contract between the Colombian professional football player and the Colombian Club to be clearly governed by Colombian law, as there was no alternative candidate.[194] However, the Panel then held:

> "The Panel has not had any evidence as to how Colombian law would assess any compensation, so need not, indeed cannot, consider that factor."[195]

2.1.5. REASONS FOR NOT APPLYING THE CRITERION

2.1.5.1. General rules and principles of national law vs. special solutions of Article 17 of the FIFA Status Regulations

In the *Webster* case the Panel considered that Hearts was relying on general rules and principles of Scottish law on damages for breach of contract, *i.e.* on provisions of Scottish law that were neither specific to the termination of employment contracts nor to sport or football, while Article 17 of the FIFA Status Regulations was adopted precisely with the goal of finding in particular *special solutions* for the determination of compensation payable by football players and clubs who unilaterally terminate their contracts without cause.[196]

2.1.5.2. Particularities of the football labour market and the organization of sport and atypical nature of football players' employment contracts

The Panel of the *Webster* case then also remarked that it was important to bear in mind that "it is because employment contracts for football players are atypical, *i.e.* require that *the particularities of the football labour market and the organization of the sport be accounted for*, that Article 17 was adopted. At the same time, footballers' contracts remain more akin to employment contracts (and are generally characterized as such under national laws), than to some form of commercial contract to which general rules on damage are applicable."[197]

2.1.5.3. No comments or representations of the involved parties

In the *Pyunik Yerevan* case the Panel, considering that neither of the involved parties had made any particular comments or representations with regard to the "law of the country concerned", was inclined to decide that this criterion was not relevant for the determination of the compensation in relation with the present dispute.[198]

In the *Francelino da Silva* case the Panel, after having observed that the law of the country of the club of which the employment relationship is at stake has to be considered by the judging authority while it is assessing the amount of the compensation due under Article 17(1) of the FIFA Status Regulations,[199] held:

"In the present matter, after review of all the submissions made and the evidence produced by the parties, the Panel is of the opinion that neither of the parties have submitted to the Panel any compelling legal arguments according to which a national law could have an effect on the calculation of the compensation due, nor have they specified in particular any arguments of Ukrainian (or of Swiss) law which - within the meaning of the criterion - should be taken into due consideration by the Panel."[200]

177 *Francelino da Silva,* para. 146.
178 *Webster*, para. 85 (cursive in the original).
179 *Webster*, para. 86.
180 *Webster*, para. 87 (cursive in the original).
181 *Webster*, para. 89.
182 *Pyunik Yerevan*, para. 39 (Law).
183 *Francelino da Silva,* para. 144.
184 See *Webster*, para. 126.
185 See *e.g.* Article 121(1) of the SPILA.
186 Andrea Meier, *At What Costs May a Football Player Breach his Contract? Case Note on CAS Award of 30 January 2008* in 26(3) ASA Bull. (2008) [hereinafter Meier], p. 534.
187 *Francelino da Silva,* para. 145.
188 FIFA Commentary on the FIFA Regulations, fn 74, cited in *Francelino da Silva,* para. 145.
189 Cf. Article R58 of the CAS Code and CAS 2005/A/893, Metsu v/ Al-Ain Sports Club, N 7.5 *et seq.*
190 *Francelino da Silva,* para. 144.
191 See *Webster*, para. 126.
192 See *Webster*, para. 127.
193 *Soto*, para. 27 (Law).
194 *Soto*, para. 28 (Law).
195 *Ibid.*
196 See *Webster*, para. 128.
197 See *Webster*, para. 128 (emphasis added).
198 *Pyunik Yerevan*, para. 39 (Law).
199 *Francelino da Silva*, para. 146.
200 *Francelino da Silva*, para. 147.

For the aforementioned reasons the Panel then concluded that it was not in position to take the criterion of the "law of the country concerned" in due consideration.[201]

2.1.6. How far should a CAS panel distance itself from national law?

In the *Webster* case the Panel in determining the level of compensation did not rely on Scottish law.[202]

This has been criticised. Indeed, it has been sustained that the CAS panel should not have completely distanced itself from basic principles of national law regarding compensation for breach of contract, because both civil law and common law provide that a party who breaches a contract should compensate its contractual partner for the loss it has incurred as a result of the breach.[203] "This firm principle of national law has found its way into the expectations of the parties regarding the consequences of a breach of contract,[204] and should not be ignored."[205]

While the critics were based on principles of Swiss labour law and general Swiss law principles regarding compensation for breach of contract, it has been observed that those principles are, however, in line with the principle of *restitutio in integrum* (restoration to original condition) as the primary guiding principle behind the awarding of damages under common law.[206] Therefore, it has been underlined that there appears to be a certain universality of principles[207] among civil law, common law and mixed law[208] legal systems.

2.2. The specificity of sport

In the *Francelino da Silva* case the Panel stressed that "sport, similarly to other aspects of social life, has an own specific character and nature and plays an own, important role in our society".[209]

2.2.1. Content of "specificity of sport"

In the *Webster* case the Panel with respect to the "specificity of sport" observed that Article 17(1) of the FIFA Status Regulations stipulates that it shall be taken into consideration, without however providing any indication as to the content of such concept.[210] In light of the history of Article 17, the Panel found that "the *specificity of sport* is a reference to the goal of finding *particular solutions for the football world* which enable those applying the provision to strike a reasonable *balance* between the *needs of contractual stability*, on the one hand, and the *needs of free movement of players*, on the other hand, *i.e.* to *find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of clubs and players*."[211]

Later, in the *Francelino da Silva* case the Panel held:

> "[T]he judging body has to take into due consideration the *specific nature and needs of sport* when assessing the circumstances of the dispute at stake, so to arrive to a solution which takes into reasonable account *not only the interests of player and club but, more broadly, those of the whole football community*."[212]

This broad approach was adopted by the *Francelino da Silva* Panel by making reference to the *Pyunik Yerevan* case:[213]

> *"The Panel considers that the specificity of the sport must obviously take the independent nature of the sport, the free movement of the players (cf. CAS 2007/A/1298, 1299 & 1300, no. 131 ff.) but also the football as a market, into consideration. In the Panel's view, the specificity of the sport does not conflict with the principle of contractual stability and the right of the injured party to be compensated for all the loss and damage incurred as a consequence of the other party's breach. This rule is valid whether the breach is by a player or a club. The criterion of specificity of sport shall be used by a panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognised as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football.*
>
> *Therefore, when weighing the specificity of the sport a panel may consider the specific nature of damages that a breach by a player of his employment contract with a club may cause. In particular, a panel may consider that in the world of football, players are the main asset of a club, both in terms of their sporting value in the service for the teams for which they play, but also from a rather economic view, like for instance in relation of their valuation in the balance sheet of a certain club, if any, their value for merchandising activities or the possible gain which can be made in the event of their transfer to another club. Taking into consideration all of the above, the asset comprised by a player is obviously an aspect which cannot be fully ignored when considering the compensation to be awarded for a breach of contract by a player (cf. CAS 2005/A/902 & 903, no. 122 ff.; more restrictive CAS 2007/A/1298, 1299 & 1300, no. 120 ff.)."*[214]

2.2.2. The special features of football players employment contracts

In the *Francelino da Silva* case the Panel, in absence of a choice of law by the parties, applied the FIFA regulations and, additionally, Swiss law.[215]

In the *Francelino da Silva* case the Panel underlined that when assessing the amount of compensation payable by a party under Article 17(1) of the FIFA Status Regulations it had to keep duly in mind that the dispute was taking place in the somehow special world of sport.[216] "In other words, the judging body shall aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case."[217]

In the *Francelino da Silva* case the Panel observed that, taking into account the specific circumstances and the course of the events, it might consider, as guidance, also that under Swiss law "a judging authority is allowed to grant a certain 'special indemnity' to the employee, in the event of an unjustified termination by the employer, and to the employer, in the event of an unjustified termination by the employee."[218] However, the Panel later held:

> "In *'ordinary' employment law* the employee is normally considered the weak party, and it is therefore understandable that such "special

201 *Francelino da Silva*, para. 148.
202 *Webster,* paras 127 *et seq.*
203 Meier, *supra* note 186, p. 535.
204 "This is particularly true since Article 17 of the FIFA Status Regulations identifies national law as one of the express criteria for calculating the compensation due for breach of contract." (Meier, *supra* note 186, p. 535).
205 Meier, *supra* note 186, p. 535.
206 See Meier, *supra* note 186, p. 540.
207 *Ibid.*
208 Although in the period starting with the nineteenth century Scots law came very strongly under the influence of English Common Law, Scots law has so far managed to maintain its independence in the heartland of private law. Indeed Scotland has a legal system quite different from Common Law (see Konrad Zweigert, Hein Kötz, An introduction to comparative law, Third edition, (1998), pp. 201 *et seq.*).
209 *Francelino da Silva*, para. 152. "This rather simple consideration has found an important confirmation in December 2000 in the European Council's Declaration on the specific characteristics of sport and its social function in Europe (the "Nice Declaration"), then for instance in the Independent European Sport Review (IESR, edited by J. L. Arnaut and the UK EU Presidency, cf. para. 3.10 et seq.), and recently in the White Paper on Sport (COM [2007] 391 final) and the Lisbon Treaty of the European Union, which provides explicitly that the European Union "shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function" (Treaty of Lisbon, 2007/C 306/01, para. 124, revised Article 149)." (*Ibid.*).
210 See *Webster*, para. 131.
211 See *Webster*, para. 132 (emphasis added).
212 *Francelino da Silva*, para. 153 (emphasis added).
213 *Francelino da Silva*, para. 154.
214 "CAS 2007/A/1358, FC Pyunik Yerevan v/ Carl Lombe, AFC Rapid Bucaresti & FIFA, N 104-105; 2007/A/1359, FC Pyunik Yerevan v/ Edel Apoula Edima Bete, AFC Rapid Bucaresti & FIFA, N 107-108; confirmed in CAS 2008/A/1568, Tomas Mica & Football Club Wil 1900 v/ FIFA & Club PFC Naftex AC Bourgas, N 6.46 and 6.47." (cited in *Francelino da Silva*, para. 154, footnote 33) (cursive in the original, emphasis in bold added).
215 See *supra* Sec. V.C.3.4.1.1.
216 *Francelino da Silva,* para. 155.
217 *Ibid.*
218 *Francelino da Silva,* para. 156.

indemnity" is potentially much higher in the event of an unjustified termination by an employer than by an employee. However, *professional football is a special sector*, and the Panel considers that it may be often *wrong to treat the players as being the weak party per se*. Much more, the specific circumstances of a case may lead a panel to increase the amount of the compensation, …"[219]

2.3. Any other objective criteria
In the *Francelino da Silva* case the Panel observed that "any other objective criteria" include in particular:
- "The *remuneration and other benefits* due to the player under the existing and/or the new contract;
- The *time remaining* on the existing contract up to a maximum of five years;
- The *fees and expenses* paid or incurred by the Former Club (amortised over the term of the contract); and
- Whether the contractual breach falls *within the Protected Period* as defined under the "Definitions" chapter in the FIFA Regulations."[220]

D. Influence of previous cases on later cases

1. In general: some considerations
Although the CAS does not know a "*stare decisis doctrine*" nor a system of "precedents",[221] there is nevertheless a certain - whenever not absolute - coherence in the case law.[222] This is due to the fact that many awards of the CAS are published in reviews or books[223] or on the homepage of the CAS.[224] This obliges CAS Panels, but also the parties to the dispute, to consider the previous case law of the CAS and thus to contribute to the development and concretisation of the principles of the case law.[225]

2. An illustration through cases of termination of football players' employment contracts without just cause
A good illustration of the influence of previous cases on later cases can be seen in cases of termination of football players' employment contracts without just cause.

In the *Soto* case the Panel first underlined that:
"Article 17(1) has produced a considerable range of case jurisprudence all of which exemplified the difficulty in its application [see *e.g.* TAS 2005/A/902 and, most recently, CAS 2007/A/1298 ("*Webster*")]."[226]

and then the Panel made express reference to the *Webste*r case:
"Webster establishes at least the following propositions:
1 What is in issue is the interpretation of the FIFA Regulations governed by Swiss law (paras. 115 and ff.).
2 Compensation is not intended to deal directly with Training Compensation, which is specifically regulated elsewhere (para. 84).
3 Any provisions in the employment contract have primacy (para. 121).
4 Three categories of factor must be considered:
(i) the law of the country concerned.
(ii) the specificity of sport.
(iii) any other objective criteria (with examples) (para. 125).
5 As to (i) the Panel has discretion as to whether to apply such law (para. 126).
6 As to (ii) it seeks a reasonable balance between the needs of contractual stability and the need of free movement of players (para. 132).
7 With regard to the other objective criteria (iii) the deciding authority has a substantial degree of discretion (para. 134).
8 Article 17(1) provides a broad range of criteria, many of which cannot in good sense be combined, and some of which may be appropriate to apply to one category of case, and inappropriate to apply in another (para. 135)."[227]

Later, the Panel of the *Francelino Da Silva* case made reference to the previous *Pyunik Yerevan* case by literally citing some considerations of the *Pyunik Yerevan* award on "the specificity of the sport".[228]

Other examples where strong reliance was made to previous CAS cases are the *Ionikos* cases. In those cases the Panels signposted several times their reliance upon previous CAS cases:
- "The Panel underscores that not only the legal doctrine but also the CAS jurisprudence have acknowledged that article 187 [of the SPILA] allows arbitrators to settle the disputes in application of provisions of law that do not originate in a particular national law, such as sport regulations or the rules of an international federation ..."[229]
- "According to the CAS jurisprudence and the legal doctrine, the choice of law made by the parties can be tacit or indirect, by reference to the rules of an arbitral institution. …"[230]
- "Lastly, the Panel adheres to CAS jurisprudence stating that *"only if the same terms and conditions apply to everyone who participates in organized sport, are the integrity and equal opportunity of sporting competition guaranteed …* "[231]
- "As a result, CAS jurisprudence has consistently interpreted article 60(2) of the FIFA Statutes as to contain a choice of law clause in favour of Swiss law governing the merits of the disputes …"[232]
- "More recently, CAS jurisprudence cleared possible doubts and affirmed that …"[233]

VIII. Conclusions

With regard to commercial arbitration it has been observed that "as international arbitration has an independent, non-national and transnational character varying from case to case, so too the applicable laws and the choice of law methodologies also differ in every case."[234]

While sports arbitration also has an independent, non-national and transnational character, it has however, with regard to applicable laws and the choice of law methodologies, the special feature that it is much more uniform than commercial arbitration. Essentially this is attributable to two reasons:
- The seat of the CAS and of each Arbitration Panel is Lausanne, Switzerland. The arbitration is therefore governed by Chapter 12 of the Swiss Act on Private International Law.
- Arbitrators, due to the fact that the parties have chosen the CAS Rules, are bound by Article 58 of the CAS Code. According to Article 58 of the CAS Code arbitrators have necessarily to apply the sports regulations. This provides therefore within a sport discipline for certain uniformity. But, on the other hand, to some extent also for more complexity, as a further legal order comes into play.

Moreover, party autonomy in international sports arbitration is, compared to international commercial arbitration with regard to the choice of law process, a limited one, as the parties do not really have a choice other than to accept CAS arbitration and the CAS Rules *nolens volens* if they wish to participate in sports competition organised by a sport federation.

The parties (football players and clubs) have the possibility to

219 *Ibid.* (emphasis added).
220 *Francelino da Silva,* para. 76 (cursive in the original). See also Article 17(1) of the FIFA Status Regulations.
221 "CAS (13.03.1997 - 96/149) A.C. v/ Fédération Internationale des Natation Amateur (FINA), in: Matthieu Reeb (ed.), Digest of CAS Awards I 1986-1998, 1998, 251, 257 *et seq.* (29.11.2006 - 2006/A/1132) Ismail Mohammed v/ FEI, Rn. 61 Rigozzi, *supra* note 2, paras 1254 *et seq.*", cited by Haas, *Rechtsregeln*, *supra* note 57, p. 274, footnote 31.
222 Haas, *Rechtsregeln*, *supra* note 57, p. 274.
223 See *e.g.* Matthieu Reeb (ed.), Digest of CAS Awards I 1986-1998; Matthieu Reeb (ed.), Digest of CAS Awards II 1998-2000.
224 See under http://www.tas-cas.org/jurisprudence-archives (last accessed 15 May 2010).
225 Haas, *Rechtsregeln*, *supra* note 57, p. 274.
226 *Soto*, para. 25 (Law).
227 *Soto*, para. 27 (Law).
228 See *supra* Sec. VI.C.2.2.1. *Francelino Da Silva,* para. 154.
229 *Ionikos 1, Ionikos 2,* para. 12 (Law).
230 *Ionikos 1, Ionikos 2,* para. 13 (Law).
231 *Ionikos 1, Ionikos 2,* para. 17 (Law) (cursive in the original).
232 *Ibid.*
233 *Ibid.*
234 Lew/Mistelis/Kröll, *supra* note 72, para. 17-4.

choose a national law for governing the employment contract. This is what happened in the *Mutu* case. However, many times an express choice of law is not done by the parties. We can see that CAS Panels then make reference to the choice of law provision in the FIFA Statutes, according to which CAS "shall primarily apply the various regulations of FIFA and, additionally, Swiss law." Swiss law is also the law of the country (Switzerland), where FIFA has its seat. Also this leads to a greater uniformity.

With regard to interpretation the following can be observed:

- The methods of interpretation of (private) regulations of sports organisations are less oriented towards the principle of contracts' interpretation than towards those of statutes' interpretation.
- The dwindling importance of national laws, even when the sports regulations themselves mention the "law of the country concerned", as it is the case with Article 17 of the FIFA Status Regulations.
- The importance of "specificity of sport" which is already underlined by mentioning this criterion in the sports regulations themselves (see Article 17 of the FIFA Status Regulations). Moreover, the importance of the specific features of sport in the process of interpretation emerges also from the fact that employment contracts of single football players are not considered alone, but in the broader context of the football labour market.
- The importance of the influence of previous cases on later cases. This feature arises from the fact that in international sports disputes - differently from commercial arbitration - there is a central arbitration instance for "appeal cases", *i.e.* the Court of Arbitration for Sport.

❖

Minors in Sport. Position Paper on Legal Aspects of Minors in Sports in the Slovak Republic

by **Július Šefčík* and Tomáš Gábriš****

1 General overview: International and European aspects

Since within the European Union and the globalized world of today the domestic regulations can not be isolated from the international situation, an overview of global problems of minors in sport has to be offered first. The basic problems identified thereby will be subsequently briefly analyzed in the context of Slovak Republic.

A wide-spread view of position of young players, especially of those involved in football, is based on terms such as "new slave trade" or "human trafficking". This viewpoint is shared not only by theoreticians such as prof. Roger Blanpain, founder of FIFPro, who equals trade with young players to cattle handling, but also by officials of international sporting federations.

For Lennart Johansson, the former president of the Union of European Football Associations (UEFA), the business with African talent is "*child abduction and nothing else*." The United Nations Commission on Human Rights issued a report warning that "*a modern 'slave trade' is being created with young African players*." In Belgium, the politician Jean-Marie Dedecker investigated 442 cases of alleged human trafficking with Nigerian players. Many of them ended up on the street or even in prostitution. There are also reports of thousands of boys who went to Italy, hoping to make careers as footballers, and then disappeared. This is what a French non-governmental organization, Foot Solidaire, is fighting against, being backed also by the representatives of FIFA and UEFA. Michel Platini from UEFA is reported to have said not so long ago:

"*Everybody is shocked when children are discovered to make footballs in a factory, yet nobody seems to be shocked when a nine-year-old Brazilian prodigy signs up with a European club. There is no difference between paying a child to play football or paying a child to work at an assembly line. It is in both cases nothing less than child labour. And to fly the child together with his parents from one continent to another is child trafficking. The majority of them simply do not turn out to be the new Ronaldinho… In the eyes of Europe free trade of employees exists from the age of 16 onwards. But is this realistic when many countries have a compulsory school attendance until 18? According to the United Nations' treaty on the rights of children anybody under eighteen is considered to be a child. If young players leave their club at a tender age, it will make it difficult for countless clubs to continue their training efforts. This measure undermines clubs that train youngsters, and it encourages child trafficking… It is for this reason that international transfers of players younger than 18 ought to be prohibited. I put the protection of a child before free trade of employees. Children have the right to grow up amongst their friends and family… I have therefore thought about this problem a great deal and I am now convinced that the international transfer of players under 18 should be prohibited, fully in accordance with the FIFA statutes. Some people talk about the free movement of workers. I am talking about the protection of children. Some talk about competition law. I am talking about the right to respect human integrity; a child's right to grow up surrounded by their friends and family.*"

Sepp Blatter from FIFA took a similar position:

"*They are taken at 14 or 15 years old with clubs saying that their parents are going too. But they get put into another family, and what happens to them? One out of say 20 has a chance to go on in their career. The others are left, and they need to be protected… We now have a committee where each case is dealt with individually to see if a transfer can be allowed or not… It is the start of greater control of our game. It is to protect the young players.*"

From the given quotations, the following main problem areas can be identified on the international level:

1. Transfer of young players
2. Player-agent-club relationship
3. Club-player-parents relationship
4. Child labour aspects of sporting
5. European freedom of movement of workers vs. protection of minors
6. Personal development of the young players

1.1 Transfer of young players

FIFA is changing its regulations and rules in order to protect the young players, mainly through its Regulation on status and transfer of players. According to a study by the Asser Institute, relating to the Regulation:

"*Protection of minors is covered in article 19 of the current regulations. Non-EU minors may only be transferred after they have reached the age of 18. Minors may only be transferred when their parents move to the country in which the player is going to work. Within the EU territory, players between 16 and 18 may be transferred only if a sporting, training and academic education is guaranteed… If national labour laws in a specific country allow a player to sign a contract from an age earlier than*

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18, then such a law prevails over the FIFA regulations, and the objective that FIFA has in protecting a minor cannot be guaranteed. It is also common practice for (top) clubs to offer a working position to the parents of talented non-EU players so that they can relocate for non-footballing reasons, bringing their child. Another element is the fact that some countries have football academies connected to clubs. These academies are not regarded as being football clubs, so that here no transfer takes place."

To sum up, even though FIFA created rules for protection of young players, these can be circumvented by the clubs or agents using:
1. the argument of national law allowing for freedom of movement since younger age
2. misusing the exemption from FIFA rule by offering non-footballing reasons for the parents to move to the country where the club is situated
3. football academies where no formal transfer takes place.

The explicit FIFA Regulation reads as follows:

"*art. 19 Protection of minors*

1. International transfers of players are only permitted if the player is over the age of 18.

2. The following three exceptions to this rule apply:

a The player's parents move to the country in which the new club is located for reasons not linked to football.

b The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfil the following minimum obligations:

i. It shall provide the player with an adequate football education and/or training in line with the highest national standards.

ii. It shall guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football.

iii. It shall make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, appointment of a mentor at the club, etc.).

iv. It shall, on registration of such a player, provide the relevant association with proof that it is complying with the aforementioned obligations;

c The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighbouring association is also within 50km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent.

…

4. Every international transfer according to paragraph 2 and every first registration according to paragraph 3 is subject to the approval of the subcommittee appointed by the Players' Status Committee for that purpose. … The sub-committee's approval shall be obtained prior to any request from an association for an International Transfer Certificate and/or a first registration."

I.e., a sub-committee of the Players' Status Committee, is in charge of the examination and the approval of every international transfer of a minor player, and every first registration of a minor player who is not a national of the country in which he wishes to be registered for the first time.

A problem could be here unequal treatment of Europeans and non-Europeans, as well as the unitary age of 16 for Europeans, not taking into account different national age limits for capacity to work legally.

To prevent a misuse of academies, art. 19 *bis* was entered into the FIFA Regulation:

"*Art. 19bis* ***Registration and reporting of minors at academies***

1. Clubs that operate an academy with legal, financial or de facto links to the club are obliged to report all minors who attend the academy to the association upon whose territory the academy operates.

2. Each association is obliged to ensure that all academies without legal, financial or de facto links to a club:

a run a club that participates in the relevant national championships; all players shall be reported to the association upon whose territory the academy operates, or registered with the club itself; or

b report all minors who attend the academy for the purpose of training to the association upon whose territory the academy operates.

3. Each association shall keep a register comprising the names and dates of birth of the minors who have been reported to it by the clubs or academies.

4. Through the act of reporting, academies and players undertake to practice football in accordance with the FIFA Statutes, and to respect and promote the ethical principles of organised football.

5. Any violations of this provision will be sanctioned by the Disciplinary Committee in accordance with the FIFA Disciplinary Code.

6. Article 19 shall also apply to the reporting of all minor players who are not nationals of the country in which they wish to be reported."

A practical matter here could be the lack of precise data on the age (date of birth) of some players from the Third world, who are often smuggled to Europe using false passports and visa. Annex 2 specifies what kind of documents is necessary to be presented, including information on parents of the player.

The Regulation represents an attempt of FIFA to avoid maltreatment of minors in sports. In practice, the Court of Arbitration for Sport (CAS) has upheld a decision of the FIFA Players' Status Committee in 2009, which considered as established that the Danish Football Association had regularly registered minors from Nigeria at the request of the club Midtjylland FC, infringing the article 19 of the Regulations for the Status and Transfer of Players, related to the protection of minors. Therefore, it seems, certain measures are available in this respect. Still, organizations such as Foot solidaire claim that the measures are not enough.

On the other hand, this Regulation may be in contravention with the aims of the European Union and its law, what was the argument of the Danish club in the abovementioned case. Philippe Piat himself, president of FIFPro Division Europe, has stated: "*In principle we see the relationship between a club and a professional player as a normal labour agreement. It has been proven that this approach works within the framework of European labour law.*" To what extent is this position compatible with the specific needs of minors in sports, being considered either apprentices, or workers?

This is, however, not only a European or international problem. The same questions and matters arise also on the domestic, national level in every country. According to art. 1 (3) a) of the FIFA Regulation, arts. 19 and 19*bis* are applicable also on the national level, however, the enforceability of this art. 1 (3) a) is questionable, especially in the light of domestic labour law.

Conclusions

On the level of professional football, measures have been taken to track the fate of young football players. In order to prevent maltreatment, transfer of minors (under 18) has been limited with certain exceptions. Still, the limits can be circumvented and the exceptions misused, therefore a special sub-committee has been established to decide on the matter. Impartiality of the sub-committee can be doubted, though. It is also questionable whether this model could be introduced in other branches of sports as well and whether there is no other way to prevent the misuse so that the freedom of movement of workers will not be hindered unproportionately, discriminating against foreign (especially non-European) players. The conflict between the freedom of movement and limits to the transfer will be dealt with later in this position paper. Exceptions to the limits should always be safeguarded, though. A matter of training compensation while transferring should also not be forgotten, in the light of the latest ECJ award in the Bernard case from March 16, 2010.

1.2 Player-agent-club relationship

The European Parliament has pointed out in its resolution on the future of professional football (of 29 March 2007) that it is "*convinced*

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that additional arrangements are necessary to ensure that the home-grown players initiative does not lead to child trafficking, with some clubs giving contracts to very young children (below 16 years of age)" and that "*young players must be given the opportunity for general education and vocational training, in parallel with their club and training activities, and that the clubs should ensure that young players from third countries return safely home if their career does not take off in Europe*." Both of these quotations point to the relationship between clubs, agents and players. The greatest danger in this respect lies in the agents' behaviour.

"*The European Parliament wants to put a stop to fraudsters' games and prevent primarily minor players getting caught by profiteers. Mostly underage players from African countries who hope for a career in Europe are affected. The system of players' agents should be made more transparent all-in-all and the financial incentive for doing business with minors should be suppressed*", says Doris Pack (CDU), Chairwoman of the Culture and Education Committee, which is also in charge of sport policy.

For this reason, the European Parliament has passed a resolution of 17 June 2010 on players agents in sports, demanding that commission payments should be stopped for underage players, reading that the EP:

"*Believes that considering the confusing diversity of regulations applicable to the activities of sports agents, a coherent EU-wide approach is needed in order to avoid loopholes due to unclear regulation and to ensure proper monitoring and control of the agents' activities…*" and that "*an EU initiative concerning the activities of players' agents that should aim at:*

- *strict standards and examination criteria before anyone could operate as a players' agent,*
- *transparency in agents' transactions,*
- *a prohibition for remuneration to players agents related to the transfer of minors,*
- *minimum harmonised standards for agents' contracts,*
- *an efficient monitoring and disciplinary system,*
- *the introduction of a EU wide "agents' licensing system" and agents' register,*
- *the ending of the "dual representation",*
- *a gradual remuneration conditional on the fulfilment of the contract."*

However, the Parliament "*Believes that doing away with the existing FIFA license system for player's agents without setting up a robust alternative system would not be the appropriate way to tackle the problems surrounding player's agents in football.*"

Conclusions

On the international as well as national level, the matter of representation of young players is of high importance, since it is mainly the agents/managers that do not fulfill the promises given in contracts with the young players. A more detailed regulation on the agents is necessary, maybe following the recommendations of the European Parliament. Prohibition of remuneration for transfer of minors could indeed lead to a lower interest of agents in "trafficking" with the children.

1.3 Club-player-parents relationship

Another important aspect, already mentioned above, is the responsibility of parents for the fate of their children - the players. Legal capacity to sign a contract with an agent or with a club (academy) depends on the domestic legal system. Still, probably everywhere, consent of parents is required. Here it can be questioned whether the consent of one parent alone is enough, or both parents (if applicable) should agree, complementing the consent of the minor.

From another point of view, in some cases (especially in the common law system) indemnification clauses in the contract ask the parents to waive potential entitlements for indemnification in case of an injury. It can be questioned whether the parents can waive this right in the name of the child, and in the name of the other parent.

Conclusions

The matter of necessity and capability of parents to legally represent the child and to waive its potential rights should be paid attention to.

1.4 Child labour?

Considering sporting relationship to be an employment like any other, the basic labour standards should apply. These standards can be found mainly in the instruments of International Labour Organization (ILO).

The ILO Standards can be divided into various categories depending on their applicability to sport. The first group of standards does not have anything in common with the sports because it is dealing with specific employments such as fisheries. The second group is the standards not guaranteeing any labour rights, but rather dealing with the procedural and policy matters - e.g. social policy, employment policy, labour administration. The third group is standards applicable to every possible employment. A subdivision of this category could be into standards which are applicable without exception (freedom of association, prohibition of forced labour, child labour, tripartite consultations, wages, occupational safety, social security, maternity, migrant workers) and standards where a sporting exception applies due to the specificity of sports. The latter category comprises for example standards on equal treatment (men can not compete with the women, only nationals can play in national teams etc.), employment security, and potentially also working time and vocational guidance.

The current situation is thus characterized by certain deviations of sporting employment in comparison with a regular employment. It can be doubted whether these exceptions are always proportionate, adequate and necessary.

Still, breach of certain standards, such as prohibition of child labour and forced labour should not be accepted under any circumstances, if not meeting the allowed exceptions of the ILO international documents. Such an exception is e.g. in the Minimum Age Convention, 1973 (No. 138), Article 7:

"*1 National laws or regulations may permit the employment or work of persons 13 to 15 years of age on light work which is*

a. not likely to be harmful to their health or development; and

b. not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received.

2. National laws or regulations may also permit the employment or work of persons who are at least 15 years of age but have not yet completed their compulsory schooling on work which meets the requirements set forth in sub-paragraphs (a) and (b) of paragraph 1 of this Article."

This is relevant for the sports as well. Disregarding the countries where sporting is not considered work (e.g. in Slovak Republic), the ever lower age of players should be of concern both from the point of view of protection of health and development, but also the school attendance should be paid attention to. Many sportsmen namely finish their careers as early as in their 30s and then need to switch to a different job.

Another ILO instrument in this area is the Worst Forms of Child Labour Convention, 1999 (No. 182), which seems generally not applicable to sports. Only the art. 3 letter a) on slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, could be applicable, should the factual position of the young players from abroad resemble such a practice.

Further, the Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78) in its arts. 2 and 3 requires medical examinations and supervision of young workers.

Finally, migration of workers is relevant both in the non-sporting as well as in the sporting employments. The Migration for Employment Convention (Revised), 1949 (No. 97) should apply to sportsmen just like to other employees who are not excluded by the Convention. The importance of the Convention lies in the task of the country to give the migrant worker information on the country, and how to seek a job - i.e. before the player is employed by a club. The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) further added an obligation to respect the basic human rights of all migrant workers.

Any exemptions from these standards can only be explained by the specificity of sports, a term that is a matter of dispute also on the level of the European Union, and is applied by the Court of Justice regularly in its awards on sporting disputes. Lately, it was also recognized in the Lisbon treaty. It was applied also previously, for instance, in the 1980s, Arnold Mühren turned to the European Commission to decide on the nature of transfer rules in football as being forced labour. This was refused by the European Commission in 1984. The argument against the nature of sporting employment as a forced labour was the fact that sportsmen have voluntarily entered this kind of employment, they are not forced to do anything against their will, and they are just limited to a certain extent. Still, this explanation does not leave the athletes space to change their mind - a right that every other employee does have.

Conclusions
The work of young players, if meeting the standards required by the ILO, i.e. not being harmful to the health and development, should not be considered a prohibited child labour. However, the protection of health and development needs to be ensured, just like all the other standards guaranteed to workers by the ILO standards. This could be done with the help of labour inspection.

1.5 European freedom of movement of workers vs. protection of minors
In 2001, an agreement was concluded between FIFA-UEFA and EU, under which the FIFA has undertaken to modify its regulations to comply with the EU law. It was specifically in the areas of protection of minors, their education, contractual stability, solidarity mechanism, transfer windows and introduction of an arbitration system. The specificity of sport is namely not a general exemption from the EU law, football has to comply with the law, and every exemption needs to be specifically recognised by the EU.

Currently, sport is mentioned in Article 6 of the Treaty on the Functioning of the European Union (TFEU), as one of the policy fields where the Union has competence to support, coordinate or supplement the actions of its Member States. In art. 165 TFEU, it is stated that "*The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function*" and that "*Union action shall be aimed at: …developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen*."

This means that the European Union has now competence to interfere in sports not only based on the Treaty articles on protection of workers in certain areas which belonged to the competence of the EU even previously, but it can extend its actions also to areas of amateur sports, where the players are not considered workers, but "only" EU citizens.

The "youngest sportsmen and sportswomen" were considered vulnerable already in the European Council's Nice Declaration (2000) and in the White paper on sport:

"*There are concerns that the exploitation (sometimes also referred to as "trafficking") of young players is continuing. It is reported that an international network managed by agents takes very young players to Europe especially from Africa and Latin America. The most serious problem concerns children who are not selected for competitions and are abandoned in a foreign country, often falling in this way in an irregular position which fosters their further exploitation*."

Currently, two basic areas need to be investigated in this respect:
1. Freedom of movement of young workers within the EU, which seems to be limited by the FIFA Regulation to a certain extent, and
2. Factual use of Council Directive 94/33/EC of 22 June 1994 on the Protection of Young People at Work. There are namely indications that the practical enforcement of the Directive is only partial with regard to minors in sport.

The second aspect namely allows for employment of children in sports (in harmony with the ILO standards on child labour, i.e. provided that the health and development of children is safeguarded), subject to prior authorisation by the competent authority in each individual case:

"*Article 5*
Cultural or similar activities
1. *The employment of children for the purposes of performance in cultural, artistic, sports or advertising activities shall be subject to prior authorization to be given by the competent authority in individual cases.*
2. *Member States shall by legislative or regulatory provision lay down the working conditions for children in the cases referred to in paragraph 1 and the details of the prior authorization procedure, on condition that the activities:*
   - *i are not likely to be harmful to the safety, health or development of children, and*
   - *ii are not such as to be harmful to their attendance at school, their participation in vocational guidance or training programmes approved by the competent authority or their capacity to benefit from the instruction received.*
3. *By way of derogation from the procedure laid down in paragraph 1, in the case of children of at least 13 years of age, Member States may authorize, by legislative or regulatory provision, in accordance with conditions which they shall determine, the employment of children for the purposes of performance in cultural, artistic, sports or advertising activities.*"

The Directive therefore allows for Member states to set rules for child work - by authorisation, or through a different procedure (in case of children older than 13 years of age).

This possibility to work in young age should be in compliance with the rules of the EU on the freedom of movement of workers, whereby the term worker is not limited by age, and in some countries (such as Slovak Republic) the capability to work is set at already 15 years of age. However, as already noted earlier, the FIFA Regulation allows only exceptionally a transfer of players younger than 18 years of age, and older than 16 years.

Conclusions
The rules on the freedom of movement of workers in the EU should on one hand take into account the capability to work according to national legal standards, and on the other hand should prevent "child trafficking" in case of workers younger than 18. This should not be done by limiting the freedom of movement of young workers, but rather different measures should be taken to prevent potential abuse or misuse of the freedom by third persons (e.g. agents) as intermediaries.

1.6 Personal development
As already noted, an exemption from prohibition of child labour is allowed only if the personal development of the child is guaranteed. This is, however, a very vague term. So far, this was guaranteed mainly in the form of codes of conduct for parents, spectators, officials, couches, players etc. Labour inspection or other institution could potentially be used as well.

Conclusions
Personal development, and protection of health and safety of young athletes can not only be left over to non-binding codes of conduct, but needs to be regularly inspected by relevant inspection bodies.

2 Situation in the Slovak Republic

All the six abovementioned problematic areas are also relevant in the current situation in the Slovak Republic:
1. Transfer of young players
2. Player-agent-club relationship
3. Club-player-parents relationship
4. Child labour aspects of sporting

5. European freedom of movement of workers vs. protection of minors
6. Personal development of the young players

Ad 1.) According to transfer rules of Slovak football association, art. 20 (3), international transfer of players younger than 18 is not possible, except in case when parents can present a certificate that they can legally reside in Slovak Republic or abroad where the minor should be transferred to. This very brief rule clearly does not reflect the detailed FIFA regulation. However, in the international transfers, FIFA regulation would be used anyway. Another problem is that rules concerning domestic transfers, which should be prohibited as well (see art. 1(3)a) of the FIFA Regulation) are not transposed into the Transfer rules of Slovak football association. Therefore, in Slovakia, international transfers are allowed under condition of parents having domicile in the country, and domestic transfers are not hindered in any manner. From the point of view of the European law, however, not even international transfers should be hindered in any way, as that would be in breach with the freedom of movement.

Moreover, rules on training compensation (so-called "costs of education") while transferring a player do not meet conditions of the ECJ award in the Bernard case from March 16, 2010, according to which real costs should be asked for as a training compensation, not a sum laid down voluntarily by the Association.

Ad 2.) In the area of football, agents licensed on the basis of FIFA rules are acting in the territory of Slovakia. A problem which occurs is the fact that sometimes these do not fulfil their obligations which they undertook in a contract with the player, namely that they do not help him find a work, and moreover hinder the player to accept a sporting work offered by a third person.

Ad 3.) According to Registration rules of Slovak football association, art. 19, schoolboys(-girls) of the age from 6 to 14 (in case of girls 15), and junior players from the age of 15 can be registered in football clubs only upon a consent by the parents. However, professional contract can be signed only with a player of at least 16 years of age. It is not explicitly stated whether both parents need to consent and whether the consent of the child (minor) is required as well. According to Act on family, if parents can not agree on essential matters in relation to the performance of parental rights and duties, e.g. on the minor moving abroad, a court will decide on the matter upon a proposal filed by one of the parents. That means should a Slovak child (minor) be registered with a foreign club abroad, and one of the parents would not agree, the parents could turn to a court to decide the matter. However, in case of domestic registration, it can be doubted whether the matter is essential enough to be allowed to turn to the court. Minors themselves are capable only to acts which they are able to understand taking into account their intellectual and psychological capacities of their age (para. 9, Civil Code). Para. 43 of the Act on family allows the minor to express his will in matters relating to the minor. After reaching majority, the minor can sue his parents for any damage caused to his property during his legal incapacity to administer his property.

In case of a transfer, according to art. 5 (3) d) of the Transfer rules of Slovak football association, consent of parents is required besides the request for transfer by the player.

The consent of parents is not required should the player older than 15 years sign an employment contract. For the sake of labour law, natural persons of at least 15 years of age have full legal capacity to conclude an employment contract. In case of a professional contract based on Civil Code or Commercial Code, the consent of parents will be required, though.

Ad 4.) In Slovakia, even though the Labour code considers (young) sportsmen workers, in practice, sporting is not considered work, and sportsmen (players) are not treated as workers. They are considered self-employed. Still, despite the different national evaluation of the relationship in practice, from the point of view of international labour law, the work, even though labelled as self-employed work, could be considered a prohibited child labour should the health and development of the child (minor under 18) be harmed.

Ad 5.) According to Slovak Labour Code, minors of the age up to 15 years or above 15 if they haven't finished their mandatory education yet, can work only upon consent of the Labour Inspectorate and of a body of Public Health, whereby these issue a certificate with the number of hours the minor is allowed to work, under condition that his health, safety, and school attendance is not endangered (para. 11 Labour Code). From 15 years of age onwards, provided that the mandatory school attendance is over, the worker can work without any restraints (with the exception of responsibility for entrusted values, which arises only from the age of 18). According to Slovak football association, a person can sign a professional player's contract only if he is at least 16.

He should also be allowed to move freely within the European Union. However, the FIFA Regulation allows this only in case of players above the age of 16, and only under certain circumstances which have been mentioned above. Therefore, the FIFA Regulation limits the freedom of movement of Slovakian workers (for the sake of their protection, which is however not recognized by the EU).

Ad 6.) As already mentioned, the Labour Code of Slovak Republic requires the young players under 15 or older but still attending mandatory education, to be supervised by the Inspectorate of Labour and by a Public Health Institution. Otherwise, their work is not allowed. Based on the rules of the Slovak football association, a professional contract can be signed only with a player of at least 16 years. In case of such worker, if still attending mandatory education, the approval by the mentioned institutions is necessary. Otherwise, if not attending mandatory education anymore, the protection of health and safety of a player (worker) is guaranteed by other paragraphs (171 ff.) of the Labour Code, requiring protection of his health and safety and cooperation with his parents. However, in practice, contracts based on Civil Code and Commercial Code are used instead of employment contracts in case of players in Slovakia, which causes them not being protected by labour and social law.

Conclusions

In the Slovak Republic, freedom of movement of young players is hindered by certain rules of the Slovak football association, being partially in harmony with FIFA attempts for protection of young players, but restricting a basic European freedom of movement. Therefore, a compromise needs to be found.

Otherwise, the young players health and development are protected by law, and under the age of 15 (or older if still attending mandatory education) even by inspections, so that the work is not considered child labour in breach of the ILO standards and EU standards. Professional contracts are awarded only to players of at least 16 years of age.

Interests of the young players are also safeguarded by the necessity of a parental consent to important decisions on the future of the player. To sign an employment contract, approval of parents is not necessary if the player is at least 15 and not attending mandatory education. However, in practice, civil or commercial contracts are signed, were consent of parents is required.

A problem to be solved is the question of agents and managers, who may not fulfil their contractual duties and hinder thereby the future development of the player.

The major problem is that players in general are not considered workers in Slovakia (using civil and commercial law contracts), and therefore they are not protected as workers by law (especially in cases of social risk).

Finally, the rules on calculation of training compensation are not in compliance with the decision of the ECJ in Bernard case from March 16, 2010.

The Taxation of Sportspeople in Portugal*

by **Ricardo da Palma Borges, Miguel Cortez Pimentel and Pedro Ribeiro de Sousa****

1. Introduction

Individuals are liable in Portugal to a Personal Income Tax (*Imposto sobre o Rendimento das Pessoas Singulares*).

The Portuguese tax legislation, namely the Personal Income Tax (PIT) Code, does not currently foresee a specific tax regime for sportspeople, who are generally taxed according to the rules applicable to every taxpayer.

A special regime existed up until 2007 according to which contracted athletes, sports players and referees were given the option to have their gross income from sports activities taxed at a reduced autonomous and flat rate, instead of being subject to net taxation under the general progressive PIT rates.

Whereas there are few specific provisions applicable to sportspeople, sports agents are taxed in Portugal according to general PIT rules. The case of referees is somehow undefined as none of the aforementioned specific provisions clarifies whether it also applies to them. However, for historic reasons, and in light of the transitory rules applicable during the special regime's phasing out, we believe that referees benefit from those provisions.

In this article we summarize the Portuguese PIT rules applicable to sportspeople, with a special focus on the recent enactment of a regime applicable to the so-called "non-habitual residents"- or inward expatriates -that may also benefit to sportspeople.

2. The Portuguese PIT framework as applicable to sportspeople

PIT taxpayers are subject to different sets of rules depending on whether or not they qualify as Portuguese tax residents. In broad terms, a Portuguese tax resident is someone who either (i) spent at least 184 days within the Portuguese territory (including the mainland and the Madeira and Azores archipelagos) during the year on which the income is deemed to arise; (ii) or has a dwelling available in Portugal on the 31ST of December of that same year, which is deemed to be maintained and occupied as habitual abode.[1]

A member of a household will also be considered a Portuguese tax resident whenever one of the spouses is also a resident, for tax purposes, in Portugal. However, a spouse is allowed to provide evidence that the centre of his economic activities is outside Portugal, thereby departing from this criterion.[2]

a. General PIT rules applicable to residents

Portuguese tax residents are taxed on their worldwide income. However, there is no general and synthetic definition of income such as, for instance, the one established in Section 61 of the US Internal Revenue Code (*gross income is all income from whatever source derived*).

Instead, Portuguese law takes an analytical approach, characterizing income according to a schedular system: taxable income is defined as pertaining to legally established tax categories and any item which is not specifically foreseen is simply not taxed. The relevant schedules are:

Schedule A - Employment income
Schedule B - Business and professional income
Schedule E - Capital income
Schedule F - Real estate rental income
Schedule G - Capital gains and other net worth increases
Schedule H - Pensions

Taxable income is the aggregated net income the abovementioned schedules (i.e. there are schedule by schedule pre-rate itemized deductions), to which a progressive rate structure that varies from 10.5% to 42% is applied.[3]

Some after rate deductions (i.e., not linked to a specific Schedule) also apply. These deductions serve the main goal of taking the taxpayer's personal and family situation into consideration and are targeted at measuring the taxpayer's ability to pay. Figure 1 illustrates the main steps to determine Portuguese tax residents PIT liability.

Generally speaking, Schedule A income encompasses income derived from sports activities performed under a labour contract, including sign-up premiums and other bonuses.

The following are Schedule A's most significant pre-rate itemized deductions:

- 72% of the annual minimum wage (under certain circumstances the threshold is 75%[4]) or social security contributions, whichever higher;
- 150% of the amount of contributions paid to labour unions and other professional organizations (deduction limited to 1% of gross Income); and
- 100% deduction of contributions by short life-term professionals to life, personal illness and accident insurance policies, as well as to insurance plans covering death, disability and retirement, which, in the latter case, may only be benefitted at the minimum age of 55 and, in all cases, are not reimbursable in the first 5 years of contract. The PIT code expressly includes athletes and sports players as short life-term professionals but excludes referees and sports agents.

Figure 1

* This article was drafted pursuant to a kind invitation of Professor Ian Blackshaw, following a lecture on "International taxation regimes for sportspersons and sports activities in Portugal", in the Sixth International Sports Law and Taxation Seminar, organized by NOLOT Seminars, that took place in Amsterdam, The Netherlands, on 3 and 4 December 2009, to which all three authors, at the time jointly working at RPBA (www.rpba.pt), contributed and attended. We welcome comments to: ricardo@ricardodapalmaborges.com / miguel.pimentel@garrigues.com / pedro@ricardodapalmaborges.com.

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1 Crewmembers of a ship or aircraft who on the 31st of December are at the service of an entity with residence, head office or effective management in Portugal and public servants in the exercise of official functions overseas are also residents for PIT purposes.

2 This option is not available to the remaining members of a household, which are basically dependents up to a certain age (a maximum of 25 years old) and earning income up to the amount of the national minimum wage (see note 11 below). This restriction may be relevant for young sportspersons earning taxable income.

3 There are exceptions, namely in Schedules E and G, where autonomous flat rate taxation applies. Additionally, the government has recently announced that PIT rates are to be increased by 1% in the lower brackets and by 1,5 % in the higher ones and also that a new highest PIT rate of 45% will be created for taxable income above €150.000 (currently, the highest rate is of 42%, for taxable income above circa €64.000). This will lead to a maximum rate of 45,88% in fiscal year 2010 (the 1% and 1,5% increases are being applied on a *pro rata temporis* basis as regards fiscal year 2010, the government trying to avoid retroactivity claims by taxpayers, based on the fact that the new rates will be applicable to the entire fiscal year although they only will be approved by Parliament at the end of May/beginning of June). As of 2011, this maximum rate will be increased to 46,5%.

4 If the difference between the 72% and the 75% relates to education and work-related education expenses paid to recognized private or public schools, universities or equivalent entities, as well as to contributions to labour unions and other professional organizations, then the latter applies.

Schedule B income is computed according to two alternative methods: a simplified method, which is basically a form of presumptive taxation, and the standard method, which is based on accounting rules as defined in Portuguese Generally Accepted Accounting Principles (GAAP).

Although the simplified method is applicable by default, the taxpayer must use the standard method of accounting if gross income from schedule B is in excess of € 99.759,58 during the relevant tax period. A taxpayer below this threshold may, nonetheless, switch from one method to the other subject to mandatory communication until March of the relevant year. Otherwise the previously selected method will apply for a minimum period of three years.[5]

The main difference between the simplified and the standard methods is at the level of pre-rate deductions. Thus, under the simplified method net schedule B income corresponds to 70% of gross income (i.e., 30% of it is deemed to be expenses) and no itemized deductions are available.

Under the standard method net income is computed according to Portuguese GAAP, which, starting from January 1, 2010, are generally in line with the International Accounting Standards and the International Financial Reporting Standards, as endorsed by the European Union.

Income, as determined under accounting rules, is adjusted as per the Corporate Income Tax Code, namely:

- Travelling and accommodation business expenses exceeding 10% of total earnings subject to taxation are not deductible;
- 25% of housing related expenses are deductible if the taxpayer chooses to partially impute his or her house to his or her business or professional activity;
- Expenses incurred in the course of illegal activities are not deductible;
- Remuneration and other related expenses paid both to the taxpayer and to his or her family members are not deductible for PIT purposes.

It is worth mentioning, given its importance to professional sportspeople, that the Portuguese PIT Code does not devote a single line to image rights, which allows us to conclude that income from image rights is excluded from PIT taxation, provided it (i) is not paid by the employer nor connected with work performed under a labour contract, (if this is the case it will be taxed under schedule A as employment income) or (ii) connected to a pre-existent service rendering or commercial activity (if this is the case it will be taxed under schedule B as business and professional income).

In short, it will not be taxable unless the licensing of image rights is accessory to a main employment or business and professional activity. In our view, schedule B does not encompass image rights derived autonomously from other business income and, therefore, unless the PIT Code is amended, there is no legal basis to tax income arising from the surrender of image rights outside of the above mentioned cases. This implies, for instance, that income obtained by a socialite by allowing photographs to be taken of his/her private life (such as a wedding or holidays) may not be taxed under category B as it does not derive from the rendering of a service of any kind.[6]

Different positions, taking the view that the licensing of image rights gives rise to income from schedule B even outside these cases, as a stand-alone "service rendering" activity, are possible. No official guidance from the tax authorities has ever been given on this topic.[7]

b. PIT rules applicable to non-residents

Non-residents are subject to PIT in Portugal according to the territoriality principle, i.e., PIT is only imposed on income deemed to derive from a Portuguese source.

The following examples are items of income expressly listed which cover activities typically carried out by sportspeople:

- Employment income from activities performed in Portugal or paid by a Portuguese resident employer or permanent establishment (PE);
- Business and professional income from services rendered or used in Portugal (even if non-attributable to a Portuguese PE) and paid by a Portuguese resident acquirer or PE;
- Artists and sportspeople's income even if accrued to a different person or legal entity (which, at least in part, may be construed as an anti rent-a-star company provision).[8]

Non-listed items of income are not taxed in Portugal if derived by non-residents.

Non-residents are in most cases taxed on gross income at fixed rates, which, however, may vary according to each type of income. For instance, employment, business and professional income from activities expressly listed are taxed at a 20% rate,[9] whereas business and professional income from non-listed activities is taxed at a 15% rate - this would be the case of a self-employed referee, judge or agent.

Indeed, except for real estate rental income and capital gains, income liable to PIT and derived by non-residents is taxed *via* a final withholding mechanism and no deductions are available. In these cases it is not necessary to file an annual tax return with the Portuguese tax authorities.

However, following several decisions by the European Court of Justice,[10] EU residents deriving Portuguese sourced income, even if subject to the aforementioned withholding mechanism, may elect to be taxed on net income, i.e., to deduct expenses incurred to obtain such income and apply the progressive rate structure as residents.

c. The exception: provisions applicable only to (some) sportspeople

As stated above, sportspeople are treated for PIT purposes according to the general regime. The exception to this statement is the following set of exemptions applicable to athletes meeting certain requirements:

- Grants attributed to high performance athletes by the Portuguese Olympic Committee or Paralympics Committee under a contract of preparation for these games;
- Grants attributed to high performance athletes by domestic sports associations benefitting from "sportive public utility" status;
- Training allowances, as defined by joint decision of the Minister of Finance and the Minister of Sport, granted to non-professional sportspeople (including athletes, judges and referees) by domestic sports associations benefitting from "sportive public utility" status. This exemption, however, is capped to an amount up to five times that of the minimum national wage;[11]
- Prizes awarded to high performance athletes (and also to their coaches) for relevant results obtained in highly prestigious and competitive sport events, as defined by joint decision of the Minister of Finance and the Minister of Sport (including Olympic and Paralympics games, World and European championships).

Although the aforementioned exemptions are generally applicable, in practice they tend to be granted only to individuals who are Portuguese nationals.

5 Additionally, if a taxpayer derives schedule B income from one single entity he or she may elect to be taxed according to the rules applicable to schedule A income.

6 At least in the sense of the Portuguese Civil Code, where article 1155 establishes that under a service rendering contract one of the parties undertakes to provide to the other "*a result of its intellectual or manual labour*".

7 For an analysis of this issue see Silva, Fernando Castro (2008), "Portugal", in *Guide on sportsperson taxation in certain relevant jurisdictions*, Editorial Aranzadi, Cizur Menor, p. 112.

8 However, it must be noted that this rule will only apply in cases where the income is not taxed in Portugal at the hands of a non-resident company (or any other entity) liable to Corporate Income Tax. Therefore, the scope of the rule is narrowed, in theory, and under its formal wording, to individuals whose income accrues to other individuals or to Portuguese resident companies. In practice, the rule seems to aim at the taxation of *non-resident* individuals whose income accrues to other individuals or Portuguese resident companies. Additionally, and in light of its wording, it is also possible to construe this rule as being applicable also to *resident* individuals, which would create a wider number of cases for analysis.

9 This would be the case of a self-employed athlete, for instance.

10 Namely in *Gerritse* (C-234/01), *Scorpio* (C-290/04) and *Centro Equestre da Leziria Grande* (C-345/04) cases, the latter involving a Portuguese company. These decisions are available at http://curia.europa.eu.

11 For 2010 the minimum national wage is set at € 475/month, which means that the maximum yearly income exempt under this rule will be € 2.375.

Social security	Basis		Rates	Transitional rule
	Mandatory	Voluntary		
Employed	20% of income derived from contract including sign-up premium	100% of income derived from contract including sign-up premium	33,3% shared cost: 22,3% (employer); 11% (employee) Current regime 28,5% (17,5% + 11%)	2010 – 29,5% (18,5%+11%) 2011 – 30,5% (19,5%+11%) 2012 – 31,5% (20,5+11%) 2013 – 32,5% (21,5%+11%) 2014 – 33,5% (22,5%+11%)
Self-employed	Rate applies on 11 income brackets varying from € 419,22 to €5030,24	An option for the previous lower bracket available	24,6% (service provider) 5% (Service purchaser) Current regime 25,4% (just providers)	2010 – 2,5% 2011 – 5% (for service purchaser)
High-performance athletes not included	100% voluntary: rate applies on 10 elective income brackets varying from €419,22 to €3356,76		Elective pre-fixed rate depending on events covered Current regime 16,5%	Several rates depending on events covered

Figure 2

3. General Value Added Tax framework applicable to sportspeople

Value Added Tax (VAT) rules applicable to sportspeople, with very few exceptions, are those applicable to transactions in general.

Thus, VAT is charged on the supply of goods and services for consideration deemed to occur within the Portuguese territory. The following rate structure applies to transactions, which, under the domestic rules, are deemed to be located within the Portuguese Mainland, Madeira and Azores:[12]

	VAT Rates applicable in Portugal		
	Standard Rate	Reduced Rates	
Mainland	20%	12%	5%
Madeira and Azores	14%	8%	4%

The VAT concept of supply of services is generally viewed as broad enough so as to encompass the surrendering of image rights. However, there may be some instances where a taxable person may be lacking. Indeed, a person who independently and habitually carries out entrepreneurial or professional activities is a VAT taxpayer. Additionally, those independently practicing a single surrendering of image rights would be taxpayers if there is a connection between this taxable operation and the said activities. On the contrary, if such a connection is missing, or if the operation does not fit the objectivity liability of PIT (see the examples of the socialite on 2.a) above), no VAT taxpayer would be deemed to exist[13].

With regard to services, it is worth mentioning that Portugal implemented the rules enshrined in Directive 2008/8/EC, of February 12, which is a part of the so-called "VAT package".

As a result, as of January 1, 2010, sporting services rendered to Portuguese-based entities by foreign sportspeople are taxed in Portugal through a reverse charge mechanism, i.e., the acquirer of services (and not the supplier) has to charge VAT at the applicable rate and pay it to the Portuguese Treasury.

However, the new reverse charge rules are only applicable to sporting services taxable in Portugal, i.e. those rendered within the Portuguese territory.[14]

Sporting service supplies by sportspeople to sports events promoters located in Portugal for the purposes of such events are exempt from VAT. This exemption already existed before the VAT package, and it should be stressed that it applies to supplies by both domestic and non-resident sportspeople, provided that the supply is taxable in Portugal (i.e., deemed to occur within the Portuguese territory, according to the previous paragraph).

The Portuguese tax authorities recently issued a binding opinion that narrowed the meaning of the term "promoter" in the case of artistic performances, which are also exempted if supplied by the artist to the respective promoter. We believe that the underlying reasoning also applies to sportspeople due to similarities between the two rules, which implies that a wider number of sporting services rendered in Portugal may be out of the scope of the exemption.

4. Social Security rules applicable to sportspeople

Portuguese law governing social security contributions foresees different rules according to the taxpayer's employment status. Thus, different rules apply depending on whether the taxpayer is employed (with a labour contract), self-employed or working under a different status (for instance an athlete doing self-training and receiving a grant from the Portuguese Olympic Committee).

A new Social Security Contributions Code, which compiled and modified the substantive and procedure rules applicable to workers under each of the aforementioned status, was due to enter into for on January 1, 2010. However, following general legislative elections, the application of the new Code has been delayed until January 1, 2011, by a law issued in December 30, 2009.

Nevertheless, it is worth mentioning that both the old laws and the new Code foresee favourable regimes for sportspeople rendering their services under all of the aforementioned status. Figure 2 summarizes the main rules enshrined in the Code.[15]

12 The government has recently announced the intention to increase all of these rates by 1% starting at July 1, 2010 (the new rates will be of 21%, 13% and 6%). However, and as the VAT rates applicable in the Madeira and Azores are 30% lower than those applicable on the mainland, this implies that only the two highest rates will be affected in these cases (the new rates will be 15%, 9% and 4%).

13 According to article 2 (1) (a) of the Portuguese VAT Code.

14 According to articles 6 (7) (e) and (6) (8) (e) of the Portuguese VAT Code.

5. The new favourable regime for non-habitual residents

On September 23, 2009 the Portuguese Government passed a new Decree-Law which approved the Tax Code for Investment, a new legislative instrument that puts together some existing measures with several new regimes, all directed at improving the international competitiveness of the Portuguese economy.

In this context, and with the aforementioned purpose, a new PIT regime for non-habitual resident individuals was created, with effects as of January 1, 2009.[16]

According to the new rules, an individual who becomes resident in Portugal, for PIT purposes, under the general residency provisions described above may elect to be treated under a "non-habitual resident" status for a ten-year period if he or she was not taxed as a Portuguese tax resident during the previous five years.

The new regime will benefit all non-residents relocating to the Portuguese territory regardless of their nationality and combines two different sets of rules:

a) rules applicable to foreign-sourced passive income, similar to other non-domiciled taxation regimes such as those in force in the United Kingdom and in Switzerland and which, broadly speaking, provide for the application of the exemption method to eliminate international double taxation, subject to a progression rule;[17]
b) rules applicable to active income, either foreign or domestic sourced, and which is inspired in other expatriate, *rectius* impatriate, taxation regimes such as those applicable in Spain and France.

The application of the regime derives strictly from the circumstances of the individual and, therefore, qualifying taxpayers are not allowed to file their status as habitual residents. However, and as we shall see below, the special regime itself provides for certain options for comprehensive income taxation at progressive rates.

Despite this mandatory nature of the regime, the fact is that the Portuguese tax authorities have taken the position that, *vis-à-vis* the 2009 tax year, access to the regime will only be granted on a case-by-case basis apparently following a written request by the taxpayer and if the registration took place after 23 September 2009.

Moreover, the potential beneficiaries are also being requested to present a foreign certificate of residence establishing that they have suffered an effective tax burden abroad prior to their redomiciliation into Portugal.[18]

The authors cannot agree with any of these standpoints, as all of them are clearly contrary to the provisions of the regime. The regime expressly sets out that it is automatically applicable to all those become Portuguese tax residents starting from 1 January 2009 without having been so for the previous five years, regardless of any formalities - showing a foreign certificate of residence, proving the payment of taxes abroad or expressly making a claim to enter into the regime after 23 September should, therefore, be irrelevant under the black letter of the law.

Moreover, they create an additional problem: all taxpayers who acquired Portuguese tax resident status in 2009 without having it during the five previous years would apparently lose the possibility to be taxed as non-habitual residents in the future unless they have submitted the above mentioned written request. In its absence, they would be taxed as ordinary residents starting from 2009, thereby precluding the right to be taxed as non-habitual residents in the future.

Therefore, we believe that taxpayers affected by this administrative standpoint maybe able to successfully challenge it before the Portuguese tax courts.

a. Rules applicable to foreign-sourced passive income (capital income - including interest and dividends - capital gains, rentals and pensions)

Foreign sourced passive income (except for pension income) derived by non-habitual residents is exempt from PIT, provided that i) under the rules of a double tax treaty (DTT) entered into by Portugal (or, in the absence of such a treaty, according to the OECD Model Tax Convention and as per the observations and reservations of Portugal), it may be taxed in the source State, ii) it is not income from a Portuguese source under the PIT Code; and iii) the source State, region or territory is not blacklisted by Portuguese legislation as a tax haven.

Thus, the regime requires neither effective nor even potential taxation in the source state. In both cases, all that it is required is that a tax treaty or the OECD Model does not limit the source State's tax sovereignty. Therefore, double non-taxation may arise in cases where a specific item of income is simply not subject to tax at source or is exempted therein.

Income from pensions may also benefit from the exemption method but only if it is not connected to contributions that have been deducted as a PIT pre-rate Schedule A itemized deduction. The exemption method applies if one of the following alternative conditions is satisfied: the income is effectively subject to tax in the other State, as per the provisions of a DTT entered into between Portugal and that other State; it is not considered income from a Portuguese source as per the PIT Code.

b. Rules applicable to Portuguese sourced active income (employment and business income)

Portuguese sourced employment and business income derived by taxpayers qualifying as non-habitual residents is taxed at a 20% flat rate. The condition is that it is derived from certain high value-added activities of a scientific, artistic or technical nature, officially defined as such by the Portuguese Minister of Finance.

Those benefiting from this 20% rate are given the choice to be taxed as per standard PIT rules, i.e., as "normal residents". However, in this case, all income will be included and taxed at standard PIT progressive rates and the credit method for the elimination of international double taxation will apply.

The application of this 20% rate in 2009 has also been denied by the Portuguese tax authorities, on the grounds that the Ministerial Order defining qualifying activities has only been issued in 7 January 2010.[19]

c. Rules applicable to foreign sourced active income (employment and business income) and royalties

The exemption method applies to all foreign-sourced employment income derived by non-habitual residents, provided that, subject to the rules enshrined in a DTT entered into between Portugal and the source State, it is effectively taxed therein. If no such treaty is in place the exemption method will apply only if the following conditions are jointly met: the income is effectively taxed at source as per the applicable domestic rules and it is not Portuguese sourced income according to the PIT Code.

If for any reason the exemption method does not apply (for instance in a case where there is no effective taxation in the source State), foreign sourced employment income will be subject to the 20% flat rate, but only if derived from certain high value added activities.[20] The credit method should then apply, although Portuguese tax authorities have generally assumed the position that only foreign-sourced income subject to the general progressive rates is eligible for a credit. We believe this is not the case, at least when the application

15 We believe that the most likely scenario is that there will be a new version of the Code that will not differ much from the one which has been suspended. Therefore, we anticipate that displaying the rates set in the Code will prove to be more useful for our readers.

16 For a more detailed overview of this regime and of the issues surrounding it see Borges, Ricardo Palma / Sousa, Pedro Ribeiro "Portugal: New tax regime for non-habitual residents", *Tax Planning International Review*, Vol. 36, No. 10, October 2009, pp. 41-42, Fernandes, José Almeida / Pereira, Andreia Gabriel, "Portugal's New Nonhabitual Resident Tax Regime", *Tax Notes International*, Vol. 56, No. 4, October 2009, pp. 377-379 and Neves, Tiago Cassiano, "Portuguese Taxation of Inward Expatriates and Pensioners: A Sunny Welcome", *European Taxation*, Vol. 49, No. 5, May 2010.

17 The credit method is the standard for the avoidance of double taxation in Portugal and the only one existing up until the enactment of the new regime. For habitual (or ordinary) residents it remains the only unilateral method available to avoid international double taxation.

18 All of these requirements have been set out in an administrative ruling issued in 6 May 2010.

19 According to the above mentioned administrative ruling.

of a DTT is at stake, as that position directly contravenes their foreign tax credit provisions.

Similarly to the tax treatment granted to foreign sourced passive income, the exemption method applies to royalties and business income (if derived from certain high value added scientific, artistic or technical activities as officially defined by the Portuguese Minister of Finance) if: i) as per a DTT entered into between Portugal and the Source State (or, in the absence of such a treaty, according to the OECD Model Tax Convention as per the observations and reservations of Portugal), the latter State is allowed to tax ; ii) it is not income from a Portuguese source under the PIT Code; and iii) the source State, region or territory is not blacklisted as a Tax haven by Portuguese legislation.

The same timing restrictions mentioned above for Portuguese sourced active income apply to these cases, the 20% flat rate for non-exempt foreign-sourced employment income and the exemption for foreign-sourced business income only being applicable from 1 January 2010[21].

d. General aspects of the regime

Although the regime may be used to obtain very effective tax planning solutions (under certain circumstances, and in respect of certain sources of income, it may allow zero taxation), it must be noted that tax arbitrage possibilities are limited. For example, for the purposes of reducing/eliminating double taxation, it is not possible to combine the credit and the exemption methods, whenever the latter is admitted as per the provisions of this new regime.

Therefore, if a qualifying taxpayer decides to aggregate to the net taxation under progressive rates of his tax return a certain type of income that would otherwise be taxed at a flat PIT rate, he or she will be automatically giving up the possibility of applying not only this flat rate but also the exemption method (if ever applicable according to the new rules) in regard of all his other income.

Moreover the aforementioned option would, under general provisions of the PIT Code, also entail that all the taxpayer's income would be taxed at the standard progressive rates.[22] Thus, one must do careful computations before making this decision.

Finally, it is possible to switch the exemption method for the credit method in all of the abovementioned cases. In this case, the taxpayer will have all his foreign sourced income included but will be able to keep the 20% rate applicable to schedule A and B income, as described.

e. Applicability to sportspeople?

This regime was created to attract high net worth individuals, stimulate the domestic market, and foster tax revenues, as well as to repatriate Portuguese talent spread out all over the world.

Although never admitted *expressis verbis* by the Portuguese authorities, there were serious expectations that it could be assigned the role of twinkling the eye to sportspeople. Indeed, apart from a political judgment on the need to foster Portuguese professional sports activities, there were also tax competition considerations that apparently favoured such a solution, namely the enactment of several attractive tax regimes applicable to sportspeople in Europe, such as the so-called *Beckham law* in Spain.

However, the non-habitual residents' tax regime did not see the daylight as a *Ronaldo Law*. Indeed, against the initial expectations of the Portuguese tax community, the rules governing active income taxation of non-habitual residents excluded sportspeople from their scope.

Apparently, *high value-added activities of a scientific, artistic or technical nature* were initially supposed to include "world circuit athletes" among the beneficiaries of the active income features of the new regime. In the absence of an official justification, one may only guess what may have motivated this exclusion.

Firstly, it would be difficult to define and circumscribe the exact scope of "world circuit athletes". Secondly, the introduction of a favourable regime applicable only to certain sportspeople might raise constitutional issues, under the equality principle as per: the distinction between amateur and professional sportspeople; the distinction between worldwide, continental, national, regional and local circuit sportspeople; and, finally, the distinction between circuit and non-circuit sportspeople.

In this regard, one could ask, for legislative purposes, what is the difference between Messi and Tiger Woods, Kelly Slater and Andreas Thorkildsen, Formula One, the Diamond League and the Association of Surfing Professionals World Tour?

This issue, which might have led the legislator to include all sportspeople as beneficiaries of the regime, may have, on the contrary, originated their full exclusion. The social image of sportspeople as very wealthy people and the worldwide economic crisis may also have played a role here.

Despite its possible justifications, the final solution is rather deceptive and unfair as sportspeople do fit the legislative goals of this regime.

However, it must be noted that the regime applies to "company's senior personnel". Although the Portuguese tax authorities have adopted a very restrictive view on this issue in the recently issued ruling, defining that only persons with *management roles* and *powers to bind companies* may fit into this category, the concept, even in such a narrow interpretation, may still leave room for the incorporation of a rent-a-star company.

This could be the case of a golf player hired as a worker of a company for developing its golf course design business, which would be able to benefit from the active income provisions of the regime, provided that he can be viewed as a "Director of Design" or similar and granted a power of attorney to bind the company in certain instances. The golf player could then derive employment income, taxable at the above mentioned 20% flat rate.

If it is likely that "company's high management personnel" may benefit the consultancy stewardship activity rendered by the golfer it is harder to sustain that it will cover proceeds derived from his or hers sportive activity. Indeed, management supposes direction of personnel or of activities, more than actual performance.

20 It is worth noting that the Portuguese legislator intentionally created a mismatch between the rules applicable to Schedule A income derived by non habitual residents (whether Portuguese or foreign sourced) and the rule introducing the exemption method to eliminate double taxation which is applicable to foreign sourced schedule A income derived by non habitual residents. Indeed, whereas the 20% rate is applicable to schedule A income if it is derived from certain high valued added activities, the exemption method will apply to any foreign sourced Schedule A income derived by a non habitual resident. It is this mismatch that explains why, whenever the exemption method may not be applied, foreign sourced schedule A income which is not derived from the aforementioned high value added activities will be subject to the general progressive rate structure.

21 Still according to the above mentioned administrative ruling.

22 Indeed, according to a rule applicable also to habitual or ordinary tax residents, there are some items of income that, by default, need not to be included, but, instead, are taxed at a special flat rate. In that case, as an immediate effect of the taxpayer's election, all income that otherwise would be taxed at a special flat rate, must be included and taxed at the applicable progressive rate. In practical terms, a taxpayer must pre-assess his or her tax liability under each set of rules and choose the one that proves more beneficial.

The 9th Asser International Sports Lecture on the Bernard case on training compensation in professional football, The Hague, 28 May 2010

Prof. Frank Hendrickx

Prof. Robert Siekmann

Competition Rules and Sports Broadcasting Rights in Europe

by **Marios Papaloukas***

I. Sports TV broadcasting rights

Under Article 345 of the EC Treaty "*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*". Nor are there direct regulations pertaining to intellectual property, stipulating its type and/or the rules of possession of intellectual property rights.

One should start by defining the extent to which sports events can be considered as original audiovisual pieces of work, thus generating intellectual rights on behalf of their creator. In this case, there is usually a distinction between the creator's intellectual rights and the property rights resulting from their commercial exploitation.

In the case of sports events an obvious problem emerges though, i.e. how this "piece of work" can generate intellectual property rights protection given the competition involved, since the "piece of work" cannot be repeated as such, no matter how many times the specific sports event takes place. Contrary to the sports event itself, an audiovisual recording by modern technical means can imprint an event as a particular piece of work. In this case, however, there is no original audio-visual intellectual creation so that the rights of the person recording it are protected nor is that person to be considered its creator. This marketable audiovisual material is nothing but a simple recording of an event or perhaps of an intellectual creation (as would be taking a picture of a sculpture).

Defining the creator of a sports event examined as an audiovisual piece of work is the second problem one should deal with. The matter gets even more complicated when recording team sports events, since in this case there is more than one person involved in the sports spectacle.

Of course, from the old times, there is an unwritten rule, according to which, the organiser of a sports event holds the exclusive rights to its commercial exploitation.[1] This unwritten rule aside, these exclusive rights may also result from the fact that the organiser owns the event venue or has the right to commercially exploit this venue. The organiser may also establish broadcasting rights to a particular sports event on the basis of competition rules, claiming that live coverage by a third party may lead to poor attendance at his venue.

Therefore, if the sportsperson is not considered as the creator of a piece of work, it is obvious that he/she cannot transfer the creator's commercial rights to the organiser, simply because *nemo dat quod non habet*. The organiser may, however, acquire the sportsperson's rights to his/her image, which result from the sportsperson's rights on his personality. It is in this way that the organiser shall legally establish the right to commercially exploit a sports event broadcast.[2]

On the 10TH of March 2009 the European Parliament adopted a resolution on the integrity of online gambling.[3] In this resolution the European Parliament called on the Commission to examine whether it would be possible to give competition organisers an intellectual property right (a type of portrait right) over the sports events they are organising[4].

II. The competition rules within the European Union

One of the main targets of the EEC was to create a system ensuring free competition within the Internal Market as one may see in Article 3(f) of the Treaty of Rome for the European Economic Community (EEC) in 1957. The basic regulations pertaining to competition were stipulated in Articles 81 to 86 of the Treaty of Rome and were included in the following European Treaties as well.[5] According to article 81 of the Treaty of European Union, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within Internal Market are not compatible with it and are thus strictly prohibited.[6]

As an exception to this rule, Article 81(3) provided that this prohibition may be declared inapplicable in case of agreements, decisions and concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economical progress, while allowing consumers a fair share of the resulting benefit provided that:

1. no restrictions which are not indispensable to the attainment of these objectives are imposed upon the interested undertakings, and
2. such undertakings are not given the possibility of eliminating competition in respect of a substantial part of the products concerned.

III. Specificity of the Sports broadcasting Market

Sports broadcasting is among the most popular of television programmes. The viewers watching such programmes are usually the ones with the highest purchase capacity, i.e. male viewers between 16 and 50 years of age. This audience is of particular interest to publicists, as it is considered a very special audience not easily attracted by other programmes. As a result, the competition on publicity transmission during these programmes as well as on acquiring TV broadcasting rights to sports events is much higher.[7]

Sports television broadcasting is of a very individual nature in comparison with the broadcast of other events. Firstly, broadcasting sports events has an ephemeral value; viewers are particularly interested in live coverage at least as long as the result is still unknown. After the event takes place and the result is announced the product looses most of its broadcasting value.

Secondly, sports events are not easily interchangeable in the sense that it is difficult to have a particular sports broadcast substituted by another television product without displeasing viewers. To state an example, a viewer wishing to watch the Football World Cup will, most likely, not be satisfied with watching the Boxing World Cup instead.[8]

Apart from the above, granting broadcasting rights to sports federations and, subsequently, creating television packages including many sports events, on an exclusive and long-term basis, makes this product extremely expensive: only the most powerful market players can actually bid for these products.[9]

It is a common practice that sports broadcasting rights are offered

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1 See paras. 60-66, case T-185/00, Métropole.

2 See S. Nikoltchev, "Sport as Reflected in European Media Law", 2004. (http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus04_2004.pdf.en)

3 European Parliament Resolution No. 2008/2215, widely known as "Schaldemose Report". (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0097+0+DOC+XML+V0//EL)

4 Points 8-10 of the European Parliament Resolution No. 2008/2215.

5 Treaties of Maastricht, Amsterdam, Nice and Lisbon.

6 See M. Papaloukas, "Sport Law and the European Union" Sponsorship, *Sport Management International Journal*, Vol. 3(2): 39-49, 2007. (http://www.choregia.org/24.pdf)

7 M. Meltz, "Hand it Over: Eurovision Exclusive EU Sports Broadcasting Rights and the Art. 83(1) Exemption", 1999. (www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/23_1/06_FMS.htm)

8 T. Toft, "Football: Joint Selling of Media Rights", *European Commission Competition Policy Newsletter*, No. 3, Autumn 2003, p. 47-52.

9 M. Meltz, "Hand it Over: Eurovision Exclusive EU Sports Broadcasting Rights and the Art. 83(1) Exemption", 1999. (http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/23_1/06_FMS.htm)

for sale by each sport federation as a package. In this way the clubs do not compete with each other in order to sell this product and the competition between possible purchasers of these rights is correspondingly restrained; this is the so-called horizontal restraint of competition. It should also be noted that the exclusive rights are sold at a high price (especially when sold as a package), thus economically powerful networks stand more of a chance to be granted the broadcasting rights in comparison to smaller networks. Quite often though the purchaser of these rights may then decide to broadcast the most important matches only and to only partially broadcast the remaining ones. In this way the viewer is offered fewer options. This is the case of vertical restraint of competition. Instead the purchaser could have decided to sublicense the broadcasting rights of the remaining matches to other networks instead, thus allowing the sub-licenser to broadcast them live too.

On the one hand, sublicensing popular sports events (EURO and Champions League in football, for instance) is rather difficult and may decrease the product value.[10] The difficulties lie in the nature of the product itself, since the clubs qualifying to the next round are not known in advance. So an eventual purchaser of the broadcasting rights only to the final round would not know the exact value of this product and the way to promote it, since they are not able to predict which audience in which country the broadcast of the final round would be of interest to.

On the other hand, the value of the product as a whole is increased, when promotion can be made at an early stage advertising the total product and the championship as a whole, thus attracting the attention of all viewers regardless of whether their team participates in the finals or not. On the contrary, advertising a particular game of a particular championship is not possible since it is not known in advance which team will play against which and on which date. This factor of unpredictability is in fact what makes the product of great commercial value.[11]

IV. EBU and the Eurovision system

The European Broadcasting Union, usually referred to as EBU[12], plays a significant role in the field of TV broadcasting. Founded in 1950 as a non-profit association of radio and television broadcasters[13] EBU aimed at promoting the exchange of radio and television programmes amongst its members. Being a non-profit association, membership to EBU is not open to purely commercial undertakings. So, its first members were public broadcasters providing a public service, which is reflected on the kind of programmes they offer and their transmission range. They should provide good quality programming that are of interest even to smaller sections of the population regardless of the resulting commercial value. Their transmission range should also cover the entire national population or at least a substantial part thereof. The Eurovision system has been operated by the EBU since 1954 and consists in the joint acquisition of television rights to programmes and the exchange of these programmes amongst its members. As far as national sports events are concerned, the EBU members compete with each other and with private networks. The Eurovision system, therefore, applies to international sports events only and consists of the exchange, based on the principle of reciprocity, of news on sports and cultural events, which may be of interest to other members. So whenever a member (public broadcaster) covers a sports event in its territory, it offers this footage free of charge to the other members.

When the EBU was established in 1950 radio and audiovisual broadcasting was State controlled. Nowadays, however, there are plenty of private wide-range networks in Europe, which compete with the public networks and in most of cases they manage to attract the biggest share of the market. As a result, it was only a matter of time before there was a conflict between public and private networks about broadcasting the most profitable sports events.

It should be taken into consideration that unlike private networks the public ones, members of the EBU, are due to their national character subject to certain restrictions; the amount of publicities is limited and they are obliged to broadcast even sports events which may not be widely popular. On the other hand, private networks are interested in the most important and thus the most profitable sports events. There is no doubt that the Eurovision system as well as joint negotiation, acquisition and share of broadcasting rights amongst the EBU members, restricts and even eliminates competition amongst these public networks at the expense of private networks competing with the public ones. The question now is whether this system falls under the exemptions stipulated in Article 81(3).[14]

V. The decisions of the Commission and the ECJ Case Law

Most cases pertaining to sports events broadcasting rights have not been brought before the ECJ; the procedure is usually completed at the Commission level and thus very scarcely brought before the ECJ.

Already in 1991 the Commission issued a decision in the case of SCREENSPORT VS EBU, in which SCREENSPORT initiated proceedings against the Eurovision system.[15] This sports channel registered a complaint against the Eurovision system, which excluded non-EBU members from being granted sports broadcasting rights, given the fact that some EBU members participated in EUROSPORT, a channel competitive to SCREENSPORT. In fact, non-EBU members could be granted sports broadcasting rights, subject to many restrictions; EUROSPORT channel, however, could broadcast these sports events unconditionally.

According to the Commission, this practice contravened the principle of free competition in the Common Market. Nevertheless, the Commission in a later decision issued in May 2000, acknowledged that the Eurovision system might improve the production and distribution of programmes and contribute to technical and economical progress for the benefit of consumers. The Eurovision system would then fall within the scope of the Article 81(3) EC Treaty exception, according to which, any agreements, decisions and concerted practices which contribute to improving the production or distribution of goods or to promoting technical or economical progress, while allowing consumers a fair share of the resulting benefits provided are granted an exemption.[16]

In 2002 the Commission Decision was appealed at the ECJ (in joined cases T-185/00, T-216/00, T-299/00 and T-300/00)[17] by a French television station called MÉTROPOLE TÉLÉVISION, which had, in fact, submitted a request to become member of the EBU six times in the past, in order to enjoy the benefits in acquiring sports broadcasting rights. As their request was denied, MÉTROPOLE TÉLÉVISION could get broadcasting rights only to those sports events the EBU members did not wish to broadcast. In cases where any EBU member wished to broadcast an event or even just a part of it, the non-EBU members were denied access to it and were allowed delayed transmission only. The ECJ ruled that this practice distorted competition and was, therefore, prohibited.

The conflict between private and public EBU-member broadcasters is more intense when it comes to exclusive broadcasting rights to the Olympic Games. A lot has changed since 1960 when the Rome Olympic Games were the first to have been broadcasted on television. Nowadays, acquiring these exclusive rights involves billions of euros,

10 W. Rumphorst, "Sports Broadcasting Rights and EC Competition Law", International Conference on the Collective Selling of Sports Television Broadcasting Rights, London October 12 1999. (http://www.ebu.ch/CMSimages/en/leg_p_sports_rights_wr_tcm6-4406.pdf)

11 A. Schaub, "Sports and Competition: Broadcasting Rights of Sports Events", *Jornada dia de competencia*, Madrid 26-2-2002.

12 On EBU see R. Zeller, "Die EBU - Internationale Rundfunkkooperationen im Wandel", Baden-Baden, 1999.

13 See M. Papaloukas "Sports Law in Europe", Papaloukas Editions, 2008, pp. 137-138 (Greek edition).

14 M. Meltz, "Hand it Over: Eurovision Exclusive EU Sports Broadcasting Rights and the Art. 83(1) Exemption", 1999. (www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/23_1/06_FMS.htm)

15 Case IV/32.524-Screensport/EBU Members.

16 See A. Van der Wolk, "Sports Broadcasting: Fair Play from a Competition Perspective", *International Sports Law Journal*, January-April 2006.

17 See M. Papaloukas, "Sport: Case Law of the Court of Justice of the EC", Papaloukas Editions, 2008, p. 94-108. (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311939)

18 See D. Linsey, "Media davids vs. Goliath", Deutsche Welle, 19.8.2004. (www2.dw-world.de/southasia/germany/1.106200.1.html)

which the European private broadcasters can hardly offer. Public service broadcasters, on the other hand, have enormous economical potential, given the fact that they levy large sums of money through the duties compulsorily imposed by the Law upon the citizens of the European countries.[18] This conflict reached its climax in July 2004 when the International Olympic Committee (IOC) accepted the offer the EBU had made to acquire the rights of first broadcast of the 2010 and 2012 Olympic Games. Private broadcasters, among which was the German channel PREMIERE, submitted offers. Although private broadcasters outbid EBU the IOC opted for the latter. The IOC justified their decision on the grounds that, by granting the broadcasting rights to the EBU, a larger part of the population had access to the event since the EBU-members are public broadcasters with a wider transmission range than the private ones. PREMIERE registered a complaint against the EBU at the Commission claiming that the EBU was a cartel, monopolising sports broadcasting rights in Europe, and based its argumentation on the recent ECJ ruling in the METROPOLE case. It was, perhaps, under the pressure of these events that the EBU has accepted many private broadcasters as its members.[19]

There are also two other very important football cases which have never been brought before the ECJ: the UEFA case[20] and the Deutsche Fussball Bund (DFB) case.[21]

In the first case, UEFA submitted a request to the Commission in 1999 in order to get permission to a collective sale of the commercial rights of the Champions League as a package. Apart from the broadcasting rights, the package included sponsorship rights, publicity rights and intellectual property rights. UEFA claimed that it was, at least, a co-owner of the commercial rights of the Champions League because it had created this product and established it in the market as a separate institution with its own identity and its own consumers. UEFA also stressed it was responsible for a wide range of organisational burdens, such as organising matches, establishing regulations and monitoring their implementation, organising match venues, insurance etc. Their major contribution, however, lay in them bearing the financial risk for the success of such an organisation, since they guaranteed all participating clubs a minimum amount, irrespective of the fans attendance at the venue.[22] As a matter of fact, in 2003 UEFA had already amended its regulations concerning sports broadcasting by granting rights to the participating clubs as well. Thus, the clubs retained the rights to the Champions League qualifying rounds, whereas UEFA would hold exclusive rights to the group stages and the final phase. If, however, UEFA did not manage to sell the rights within one week after the draw for the group stage, the clubs would regain their right to sell the matches as well, in the same time frame as UEFA. The Commission ruled that the joint selling of these rights satisfied the criteria for exemption laid down in Article 81(3) EC.

The second case pertained to the request of the Deutsche Fussball Bund (DFB) for a permission concerning the collective selling of the television and radio broadcasting rights of certain football competitions in Germany. The DFB put forward a number of arguments, namely concerning the benefits the weaker clubs would get as a result, since the Federation would see to a proportional revenue distribution to all the clubs. Additionally, the distribution system would not totally exclude the clubs from broadcasting rights, so the Commission ruled once again in favour of this practice.[23]

VI. Application of the Principle of Proportionality in Sports Broadcasting

A case has recently been brought before the ECJ, which may give the exclusive sports broadcasting rights a new perspective. It is the case of UEFA VS Commission[24], in which the question is brought up as to whether some major sports events should fall under Article 3a of the Council Directive 89/552/EEC as "of major importance to society" and thus, cannot be subjected to exclusive radio and television broadcasting rights, otherwise a substantial proportion of the public in a Member State would be prevented from watching the event via live coverage or deferred coverage on free television. UEFA put forward many counterarguments, the most important being the principle of proportionality, in the sense that the Commission's decision ruling that a sports event such as the EURO could be considered as "of major importance to society" and thus, should not be subject to exclusive television and radio broadcasting rights, was neither adequate nor necessary for the objectives it purported to achieve.

This case is of great importance. It is usually the sports institutions who argue in favour of the importance of sport for society and of its public service,[25] in their effort to establish the so called specificity of sport that accounts for the particular status of sport and its exclusion from the competition rules. The aim is to show that sport is not yet another profitable activity but something more than that, which should be treated in a particular way. The specificity argument was used by sports authorities as well as member states as a shield against the efforts of European Institutions to include the sports sector in the range of European Competition law and it was the ECJ that used the principle of proportionality as a compromising solution. Now that the specificity of sport is widely recognised, it is a member State that claims the specificity and public service of sports and it is sports authorities that invoke as a shield for the principle of proportionality.

The proportionality rule has been applied by the ECJ in the most important sports related matters so far. The specificity of sports cases, sporting exemption cases and sports betting cases are all being decided by the application of the principle of proportionality. In fact, this rule has been the answer to all sports related cases. In all cases pertaining as to whether sport is included in the competition rules or not, the Court will invoke the proportionality rule. It remains to be seen whether this rule will also apply in sports broadcasting cases.

19 Symposium organised by Max Planck Institute for Comparative and International Private Law "Broadcasting Rights of Sporting Events under European Anti-trust Law", organized in Hamburg on May 20 2005. (http://www.forumsportrecht.de/)

20 See case IV/37.398-UEFA

21 See case IV/37.214-DFB

22 See T. Toft, "Football: Joint Selling of Media Rights", *European Commission Competition Policy Newsletter*, No. 3, Autumn 2003, p. 47-52.

23 See . Van der Wolk, "Sports Broadcasting: Fair Play from a Competition Perspective", *International Sports Law Journal*, January-April 2006.

24 See case T-55/08, UEFA v. Commission.

25 See The White Paper on Sport (http://ec.europa.eu/sport/white-paper/i'ndex_en.htm)

Italian Regulation of Sports and its Law n. 91 of 1981 - A Solution for Sports-Related Problems in The Netherlands?

by **Thomas Geukes Foppen***

1 - Introduction

Unlike several other European countries, the Dutch legal system does not have a specific Sports Act. The development of a body of sports-related law therefore mainly depends on civil judgments and decisions of the many judicial sports bodies. During such proceedings the question often arises to what extent the 'normal' law that in such cases is considered to be applicable, is able to resolve these sports matters[1].

In December 2001 two members of the Dutch Parliament, Jan Rijpstra and Bert Middel, presented a motion in which they posed the question whether a national Sports Act would be desirable[2]. As a consequence of this motion the Ministry of Health, Welfare and Sport requested Professor Heiko van Staveren[3] to investigate the desirability of such an Act. Van Staveren concluded that there was no need for a Dutch Sports Act[4]. His main arguments were that a Sports Act would isolate the sport sector from other public sectors and that the special rules of law that refer to sport are already sufficiently effective.

The Italian sports sector has been regulated by a specific Sports Act since 1981. This law n. 91 of 1981 is intended to provide the legal authorization for the regulation of the relationship between the participants in the sports sector and the clubs and federations to which these participants are affiliated. The law also pays attention to the practice of sport in the context of an employment relationship.

From a legal point of view many differences exist between the Dutch and Italian regulation of sports with Italy having several decades more experience than the Netherlands with respect to sports law. In this article I will describe to what extent the Netherlands could draw lessons from the Italian regulation of sports.

The second chapter of this article starts out by giving a detailed overview of the Italian sports legislation. Attention will be paid to the provisions of the Italian Constitution and to what extent they are applicable to the sports sector. Subsequently, the legislative history and the content of the various provisions of law n. 91 of 1981 will be discussed in detail.

The third chapter will discuss the role of the Italian Olympic Committee (CONI). The CONI occupies a prominent position within the Italian sports sector and is frequently mentioned in law n. 91 of 1981.

In his abovementioned research, Professor Van Staveren observes that a Dutch Sports Act would only be useful when "the current laws provide insufficient possibilities to resolve the perceived problems"[5]. This statement brings us to chapters 4 and 5 of this article, in which three current Dutch sports situations will be discussed. Which solutions would the Italian sports legislation provide to these problems?

2. Sports legislation in Italy

2.1. The Italian Constitution

When adopting the new Constitution in 1947[6], the Italian legislator did not yet find it necessary to include any provisions referring to sports. However, the remarkable growth of the sports sector in the following decades and the important role that sport played in Italy moved the Italian legislator to insert a provision on sport in the Constitution in 2001. In a constitutional amendment[7] which reallocated the legislative competence of the Italian state and the regions the *ordinamento sportivo* was added to Article 117. This reallocation of competences took place in accordance with the principle of subsidiarity which intends to bring decision making and the execution of public tasks in closer proximity to the citizen. Article 117 stipulates that the regulation of sporting activities must be carried out by both the Italian state and the regional authorities[8]. Legislative powers regarding sports issues now mainly reside with the many regional authorities. However, rules that are drafted by the national government will have priority over regional rules at all times.

Article 117 is the only provision of the Italian Constitution specifically mentioning the term 'sport'. It nevertheless goes without saying that certain other provisions of the Constitution may also apply to the sports sector. For example, the freedom of association laid down in Article 39 provides employees with the right to join a union that looks after their collective interests. As many sportsmen are considered to be employees, this Article also applies to sportsmen.

According to Article 40 sportsmen have the right to strike. In the history of the Italian sports sector however sportsmen have only rarely made use of this freedom. Announcing a strike was often already sufficient in itself to bring about the aimed for response obliterating the need to go on an actual strike. It further needs to be pointed out that the right to strike has never found full applicability in the sports sector given that, for example, sports federations have in many cases determined that if a team refuses to play it will be handed a forfeit loss[9].

In a more general sense, Articles 2, 3, 4 and 32 of the Constitution also apply to the sports sector. Article 2 guarantees inviolable human rights to individuals and their freedom to develop themselves individually or as a collective[10]. The general prohibition of discrimination as laid down in Article 3 also applies to sports. Nearly all of the sports federations and sports organizations have made the elimination of and the fight against discrimination one of their primary goals. Article 4 of the Constitution includes the freedom of labour, which in the Italian sports sector mainly applies to professional sportsmen due to the fact that only professionals have an employment contract with a sports club as opposed to amateur sportsmen who generally practice sport as a means of recreation. Article 32 applies to the sports sector because of the important role of sports for health purposes. The health of people as individuals or as a collective is considered a fundamental right according to this Article.

2.2. Law n. 91 of 1981

2.2.1 - History

Sport in Italy was initially regulated by law n. 426 of 16 February 1942[11] which over the years was amended several times[12]. This law gave the CONI (*Comitato Olimpico Nazionale Italiano*) legal personality and placed it under the supervision of the Ministry of Tourism and Entertainment[13].

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1 F. C. Kollen et al., *Praktijkboek voor de sportbestuurder*, Kluwer, Deventer, 1998, p. 10.

2 Parliamentary Paper II 2001/2002, 27841.

3 Heiko van Staveren is Emeritus Professor of Sports Law at the Free University of Amsterdam (VU).

4 See: Heiko van Staveren, *Sportwetgeving op nationaal niveau gewenst? Notitie naar aanleiding van de motie Rijpstra/Middel*, VWS, Den Haag, 2003.

5 Van Staveren, 2003, p. 6.

6 Decree n. 298 of the *Assemblea Costituente*, 22 December 1947. Announced in the *Gazzetta Ufficiale* on 27 December 1947.

7 *Gazzetta Ufficiale*, 24 October 2001, n. 248.

8 A. Chaker, *Good governance in sport. A European survey*, Council of Europe Publishing, Strasbourg, 2004, p. 69.

9 M. Colucci, *Italy, Sports Law, Encyclopedia of Laws,* Kluwer Law International, Alphen aan de Rijn, 2009, p. 81.

10 This will be further discussed in the next chapter of this article.

11 Law of 16 February 1942, n. 426. *Costituzione e Ordinamento del Comitato Olimpico Nazionale Italiano (CONI).* Announced in the *Gazzetta Ufficiale* on 11 May 1942.

12 *Regio Decreto Legge,* 2 August 1943, n. 704, *Decreto Legge del Capo Provvisorio dello Stato,* 11 May 1947, n. 369 and *Decreto del Presidente della Repubblica*, 2 August 1974, n. 530.

13 This meant that the Ministry of Tourism and Entertainment had the power to void CONI judgments, to make decisions relating to the CONI's financial affairs and to appoint the president (see: Article 12, *Decreto del Presidente della Repubblica*, 2 August 1974, n. 530).

In the course of the evolvement of Italian sports effective legal measures were being sought that would create a situation whereby a balance would be guaranteed between government regulation on the one hand and sports regulation on the other hand. Until the 1980s, the relationship between a (professional) sportsman and a sports club used to be regulated by the analogous application of the many provisions of the *Codice Civile*. This was by many considered to be "an indifference on behalf of the government towards the requirement of having regulations regarding sport"[14].

These relationships were further regulated by the statutes and rules of the various sports federations which themselves had to be recognized by the CONI. Sportsmen who were registered with a sports club were automatically linked to a sports federation and thereby to its rules[15]. In this way the sportsman acquired the status of professional.

As a consequence of registration a commitment (for an indefinite period of time) was thus created between the sportsman and the sports club: the so-called *vincolo sportivo*[16]. Because of this commitment the sports club could freely and exclusively dispose of the sporting performance of the sportsman and could therefore also transfer the sportsman to another club without his prior approval. This situation deprived the sportsman of his freedom to make certain decisions that he considered necessary for the optimal development of his sporting career.

The growing socio-economic importance of sport in the 1970s evoked the interest of the legislator in this sector which until that moment had remained mainly under the competence of the sports federations[17].

In 1978 the public prosecutor approached the subdistrict court of Milan for a judgment concerning the fact that the presidents of many football clubs in his opinion had acted contrary to labour laws during the summer transfer period[18]. The subdistrict court consequently decided that all negotiations and contract talks regarding the summer transfers had to cease, as a result of which the CONI and the *Federazione Italiana Giuoco Calcio* (FIGC) were compelled to put pressure on the Italian government to finally regulate the relationship between sportsmen and the various national sports federations. At that moment the Italian Supreme Court had already decided that - due to amongst other things the aforementioned *vincolo sportivo* - the labour laws could not be considered applicable to the purchase and sale of football players. The Italian government responded by promulgating a law that declared this decision not applicable to the transfer of football players. The government next appointed a commission that had the task of drafting a law that would define sportsmen as self-employed persons and that would guarantee "discipline and security, which are necessary for the regular practice of every sporting competitive activity"[19]. After much intense political debate, this draft finally led to the entry into force of a law that derogates from the 'normal' labour law rules[20]: the *legge n. 91 del 1981*[21].

2.2.2 - Structure

Law n. 91 entered into force on 23 March 1981. The key elements of this law are the qualification of the sportsman's working activity as *subordinato* (subordinate) and the abolishment of the *vincolo sportivo.* Although this law originated in a football setting, it was declared applicable to sports in general. The purpose of this law can be considered as the "complete regulation of the phenomenon of 'sport'"[22].

Law n. 91 of 1981 consists of provisions regarding the relationship between clubs and professional sportsmen and is divided into four different titles. Title I regulates professional sport in general; Title II concerns the functioning and the activities of sports clubs and national sports federations; Title III contains provisions with regard to taxation; and Title IV contains transitional and final provisions.

Article 1 of law n. 91 of 1981 states: "Sporting activities shall be freely engaged in, whether individually or collectively, as a professional or as an amateur". This provision makes certain constitutional rights directly applicable to sports as obviously recognizing and guaranteeing the inviolable human rights laid down in Article 2 of the Italian Constitution[23]. This Article 1 therefore intends to provide the freedom to all, except in certain situations defined by law[24], to practice sports unconditionally and unrestrictedly. It is thus of indispensable economic value for the professional sportsman, as through this provision he acquires complete contractual freedom[25].

The freedom that is underlined by this Article 1 is exclusively intended for the activities that are considered to be sporting activities under the regulations of the CONI.

The Article furthermore emphasizes that practicing a sporting activity is not subject to membership of any sports federations or the CONI. However, such membership does imply acceptance of the rules that these entities lay down in respect of amongst other things the distinction between amateur and professional sportsmen. This distinction is subject to several terms and conditions as laid down by the CONI and the sports federations in cooperation with the international sports federations and sports organizations[26].

2.2.3. Scope of application

Article 2 of law n. 91 of 1981 defines its scope of application. This Article determines which persons can be considered professional sportsmen. In the first place, these are athletes, trainers, technical sports managers and athletes' coaches who carry out remunerated sporting activities on a continuous basis. Secondly, these activities must take place within the framework of the disciplines governed by the CONI and be qualified as such by the national sports federations, in accordance with the rules laid down by the federations themselves. Again here the CONI is the competent authority to issue guidelines regarding the distinction between amateur and professional sporting activities.

The criteria enumerated in Article 2 are not exhaustive[27]. Case law shows that this Article should be considered as lex specialis in relation to Article 2094 of the Italian Civil Code which gives general rules regarding employees. It can thus be concluded that in accordance with the *ratio legis* the legislator when listing these criteria only intended to mention the most common categories without excluding other possible categories that are recognized by the sports federations[28].

Article 2 in the end imposes only two conditions for qualification as a professional sportsman, namely that authorization must have been obtained from a national sports federation and that the sportsman must be remunerated for his sporting activities.

It therefore follows that Article 2 cannot be applicable to those who practice sport as an amateur. Amateurs practice sports for other purposes than remunerated professionals. Amateurs can nevertheless, as is often the case in higher-level non-professional divisions, receive some remuneration for their sporting activities (for example match bonuses or expense allowances) which can make it complicated to dis-

14 G. Vidiri, *La disciplina del lavoro sportivo autonomo e subordinato*, Giustizia Civile II, 207, 1993, p. 41.

15 In Italy, this registration is called *il tesseramento* or *il cartellino*.

16 M. Sanino, *Il diritto sportivo*, Wolters Kluwer Italia, Padua, 2008, p. 243.

17 This development was also called the "emergence of sports organization at governmental level". See: S. Landolfi, *La legge n. 91 del 1981 e la emersione dell'ordinamento sportivo*, Rivista di Diritto Sportivo, 1982, n. 36.

18 Colucci, 2009, p. 74.

19 B. Cuccinello, *Considerazioni in tema di contratto di lavoro sportivo professionista: prescrizioni di forma e di contenuto nell'art. 4 l. 23 marzo 1981, n. 91*, Rassegna di Diritto Civile, 1994, 449.

20 Vidiri, 1993.

21 Legge del 23 marzo 1981, n. 91. *Norme in materia di rapporti tra società e sportivi professionisti.* Announced in the *Gazzetta Ufficiale* on 27 March 1981, n. 86.

22 A. Lener, *Una legge per lo sport?,* Foro Italiano, 1981, 298.

23 Article 2 of the Italian Constitution states that: "The republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity".

24 Colucci, 2009, p. 75.

25 I. Mariani Toro, *Sport e Lavoro,* Rivista di Diritto Sportivo, 1971, p. 175.

26 Colucci on p. 75 in this respect refers to: I. Mariani Toro, *Problematica della legge 91/1981*, Rivista di Diritto Sportivo, 1983 (Special Edition); D. de Silvestri, *Le Qualificazioni Giuridiche dello Sport e nello Sport,* Rivista di Diritto Sportico, 1991, 283; R. Frascaroli, *Sport (Diritto Pubblico e Privato)*, Erie, dir. XLIII, Milano, 1990.

27 G. Ambrosio, A. Mariani Toro, *L'iter Parlamentare della Legge 23 marzo 1981, n. 91, sui rapporti tra società e sportivi professionisti*, Rivista di Diritto Sportivo, 1981, 492.

28 Pretura di Venezia, 22 luglio 1998, Rivista di Diritto Sportivo, 1998, p. 164. Also further explained in: F. Bianchi d'Urso, G. Vidiri, *La nuova disciplina del Lavoro Sportio,* Rivista di Diritto Sportivo, 1982.

tinguish them from professionals. The legislator however dealt with this problem by providing that a sportsman needs to practice his sport almost exclusively in order to be considered a professional. Professionals pursue a career in sports on a fulltime basis and give prominence to their sporting activity, while this is obviously not the case for amateurs[29].

In this respect, many authors have found that the definition of a professional sportsman that most correctly sums up the situation is contained in the articles of association of the FIGC. Although these articles mainly apply to football, they could also apply to other sports. According to the FIGC a sportsman can only be considered a professional if he practices sport as his primary occupation, as opposed to sportsmen who practice sports as a means of recreation alongside their regular job and other occupations[30].

2.2.4. The legal definition of sport as labour

Defining the term 'labour' in the field of sport has been a challenging problem under Italian law, as the application of general labour laws regarding self-employment and the relationship of authority has proven to be complicated.

To be considered self-employed according to Italian law, an individual must perform a task or a service for which he is renumerated and carry out this activity on a personal basis without being in a subordinate relationship vis-à-vis his contractor[31]. An employee, on the other hand, is defined as an individual who commits himself to carrying out intellectual or manual labour for renumeration and under the supervision of an employer[32].

Article 3 of law n. 91 of 1981 clarifies how labour in the field of sport should be determined. It begins by stating that the provisions of this law are applicable to the remunerated services of athletes who are subject to a contract of employment. It must therefore be concluded that the law is not applicable to the sporting activities of individuals who are merely remunerated for these activities, which means that the sporting activities of amateur athletes do not fall within the scope of Article 3.

Article 3 lists three sets of circumstances in which no contract of employment shall be utilized and a contract for freelance work will be applicable instead:

1. the activities are carried out in the framework of a single sporting event or of several events linked together over a brief period of time;
2. the athlete is not contractually bound to attend preparation or training sessions;
3. although the services subject to the contract are continuous in nature, they are not carried out for a longer period than eight hours per week or five days per month or thirty days per year.

Article 3 for these situations therefore excludes a contract for an indeterminate period establishing a relationship of authority, i.e. it excludes the contract defined by Article 2094 of the *Codice Civile* as mentioned above. Thus, a contract for an indeterminate period establishing a relationship of authority cannot be used to regulate the carrying out of labour for a single or several events over a brief period of time (situation a) and vice versa, the mere fact that an individual is not contractually bound to attend means that his activities are not carried out under an employment contract (situation b).

The situation described under c) has however given rise to certain questions as to its practical application. It is unclear how the periods of time mentioned should be interpreted[33], even more so in cases where the period spanning the sporting activity is given in days, as a definition of the duration of a 'day' is lacking[34].

2.2.5. Form and content of the contract

According to Article 4 of law n. 91 of 1981, the relationship between a sportsman and a sports club whereby the sportsman supplies sports services and the club provides renumeration is created by the employment of the sportsman by the club through a written contract, on pain of nullity[35]. The specific sports services to be rendered by the sportsman (i.e. the services referred to in Article 2) must be listed in this contract. The sports club then has to file the contract with a national sports federation. The national sports federation in this way has been given an important task as it has to assess whether the content of a contract is acceptable[36].

The stipulation that a contract should be in writing and the requirement of filing it with a national sports federation were included by the legislator in order to guarantee the authenticity of the contract and to grant the athlete a certain safeguard of his legal rights[37]. The sports club is the entity that is responsible for drafting and filing the contract, which implies that if it neglects to perform these duties (causing the athlete to practice the sport without a contract), the athlete still has the same rights he would have had if a contract had been concluded.

Article 4 furthermore provides a summary of certain clauses that must be included in the sportsman's contract. Besides an obligation to include a specific definition of the (technical) instructions and provisions in place for the sportsman in order to achieve the competitive goals, it is also compulsory to include an arbitration clause which establishes that disputes between the sports club and the sportsman arising out of the implementation of the contract will be referred to a board of arbitration. Sports clubs are not allowed to include a non-competition clause in the contract, as this would limit the 'professional liberty'[38] of the sportsperson.

2.2.6. Transfer of the contract

Article 5 of law n. 91 of 1981 provides that an expiry term under the contract may not exceed five years from the time of conclusion of the contract. During these five years, the sportsman and the sports club are however allowed to prolong the contract or to alter its contents by mutual consent[39].

Article 5 also states that a sports club is allowed to transfer the contract to another sports club before expiry, provided that the other party agrees and that the procedures laid down by the national sports federations are observed. Such a transfer may occur on either a permanent or a temporary basis.

2.2.7. Coaching and training premium

Article 6 of law n. 91 of 1981 originally prescribed that a sports club when transferring a contract (and thus an athlete) always had to pay reimbursement for the training and technical development of the athlete. After the judgment of the European Court of Justice in the Bosman case[40] however, law n. 586 of 1996[41] was promulgated which amended Article 6 of law n. 91 of 1981 in the sense that reimbursement only has to be paid if the athlete signs his first ever professional contract.

The sports club that has provided the athlete's youth training is also the one entitled to give him his first professional contract. According to paragraph 3 of Article 6, any monetary reimbursement that the sports club receives for training or coaching a young athlete must be reinvested for sports purposes.

29 C. Zoli, *Sul rapporto di lavoro professionistico*, Giustizia Civile I, 1985.

30 B. Zauli, *Dilettantismo e Professionismo nello Sport,* Rivista di Diritto Sportivo, 1955, p. 97; B. Zauli, *I limiti Sociali del Professionismo Calcistico*, Rivista di Diritto Sportivo, 1959, p. 3; G. Mazzoni, *Dilettanti e Professionisti*, Rivista di Diritto Sportivo, 1968, p. 368; D. Duranti, *L'attività Sportiva come Prestazione di Lavoro,* Rivista Italiana di Diritto del Lavoro, 1983, p. 699.

31 Article 2222 of the *Codice Civile*.

32 Article 2094 of the *Codice Civile.*

33 M. de Cristofaro, *Problemi Attuali di Diritto Sportivo*, Diritto del Lavoro, 1989, p. 97.

34 Duranti, 1983, p. 706.

35 This corresponds with the general rule of Article 2126 of the *Codice Civile.*

36 M. de Cristofaro, *Commento al Art. 4, L. 23 marzo 1981, n. 91*. Nuove Leggi Civili Commentate, 1982, 574.

37 M. Sanino, F. Verde, *Il Diritto Sportivo,* Padova, CEDAM, 2008.

38 See Article 4 of law n. 91 of 1981, paragraph 6.

39 Duranti, 1983, p. 699.

40 European Court of Justice, 15 December 1995, C-415/93.

41 Legge 18 novembre 1996, n. 568. *"Conversione in legge, con modificazioni, del decreto-legge 20 settembre 1996, n. 485, recante disposizioni urgenti per le società sportive professionistiche"*. Announced in the *Gazzetta Ufficiale* on 20 November 1996.

2.2.8. Social security

Articles 7 to 9 of law n. 91 of 1981 contain provisions regarding social security rights. Article 7 provides that professional sportsman have to undergo a medical examination at least once every six months. Sports clubs are responsible for carrying out these examinations. In this, sports clubs must comply with the standards set by the national sports federations, which must in turn have been approved by the Italian Ministry of Health.

Article 8 obliges sports clubs to take out individual insurance policies for professional sportsmen against the risk of death and against injuries which could compromise the continuation of professional sports activities.

As regards a pension plan, Article 9 states that law n. 366 of 1973[42] is applicable. This law contains compulsory provisions concerning invalidity and old-age and concerning surviving dependents of a sportsperson[43]. Pensions are managed through a specific sports fund by the *Ente Nazionale di Previdenza e di Assistenza per i Lavoratori dello Spettacolo* (ENPALS), the Italian Entertainment Industry Employees' Pension Organization. The ENPALS is a public non-profit organization under the supervision of the Italian Ministry of Social Affairs and Employment (*Ministero del Lavoro e delle Politiche Sociali)* and its activities are subject to examination by the Court of Auditors (*Corte dei Conti*)[44].

In a judgment of 2002[45], it was determined which persons are eligible for the compulsory social benefits under the ENPALS pension plan. As a result of this judgment, ENPALS now only handles the pensions of professional sportsmen who are employed as employees or who are self-employed but carry out sports activities more than 8 hours per week, 5 days per month or 30 days per year[46]. This means that amateur sportsmen, even though they might be listed with one of the national sports federations, are completely excluded. This judgment once more made clear that the persons mentioned in Article 2 of law n. 91 of 1981 are professionals and that it does not matter whether they are considered employees or self-employed. For their pension plan all these persons are obliged to contribute to the specific sports fund that is managed by the ENPALS.

2.2.9. The abolishment of the vincolo sportivo

As was explained above, the *vincolo sportivo* was the commitment between an athlete and a sports club, by which the athlete - by signing a contract - was obliged, for an indefinite period and without the possibility of unilateral termination, to relinquish all exclusive rights regarding his sports career[47].

The *vincolo sportivo* could be considered as a kind of non-competition clause between the various sports clubs. Because of the *vincolo sportivo*, the athlete could no longer freely transfer from one club to another that might offer him a better salary. The club to which the athlete was affiliated had the exclusive right to transfer him.

Article 16 of law n. 91 of 1981 put an end to this practice by providing that: *"The limitations to the contractual freedom of the professional athlete, identified as 'vincolo sportivo' in current sports regulations, will be gradually eliminated over 5 years from the date on which this law comes into force, in accordance with the procedures and parameters established by the national sports federations and approved by CONI, in relation to the age of the athlete, and to the duration and financial content of the relationship with the club."*

The abolishment of the *vincolo sportivo* was also put into practice by Article 5 of law n. 91 of 1981 which provides that a contract cannot bind an athlete to a sports club for longer than five years. It has therefore become impossible for sports clubs to indefinitely and freely dispose of the exclusive rights that belong to the athlete himself[48]. As soon as the period stipulated in the contract comes to an end the athlete is once more 'free', which in Italian is also referred to by the term '*svincolato*'.

The introduction of the fixed-term employment contract in conjunction with Articles 2118 and 2119 of the *Codice Civile* guarantee the right of personal freedom to the professional athlete as well as his economic position. Athletes are hereby further provided with protection against dismissal[49].

2.2.10. Parts II and III

Part II of law n. 91 of 1981 amongst other things includes provisions concerning the structure of sports clubs and the role of the national sports federations. For example, Article 10 provides that sports clubs that enter into contracts with professional athletes have to be established in the form of joint stock companies[50] or limited companies[51] and that sports clubs can only carry out sports activities and activities associated with and instrumental to sport. Part of the sports club's revenue must be reinvested for the club's sports purposes. Article 10 also stipulates the topics that must in any case be included in the articles of association of a sports club. The CONI is charged with the supervision of all actions under this Article.

Article 11 states that the sports club's articles of association must within a certain time limit be registered with the national sports federation to which it is affiliated. Article 12 states that the sports clubs must, in collaboration with the CONI, strive for the smooth running of the sports championships. According to Article 13 sports clubs are entitled to bring claims before a court. Article 14 stipulates that the national sports federations are made up of the sports clubs and the bodies affiliated to them and that they are governed by statutory rules and regulations on the basis of the principle of internal democracy. The CONI will at all times supervise the activities of the national sports federations. Article 15, which is also the only provision of Section III, contains rules on taxation.

3. Comitato Olimpico Nazionale Italiano (CONI)

3.1. History

Sporting activities in Italy are mostly state organized in an almost monopolistic manner based on a normative system that has its origin in the Italian fascist era. Several important alterations were later made in order to adapt to the modern constitution[52]. The leading body in all national sport events is the CONI, which was founded in 1907 by a group of fanatical amateurs who strove to realize Italian preparation for and participation in the Olympics. In 1914, Member of Parliament Montrè called on representatives to form a first version of the future CONI. In 1927 it was decided that all national federations were to be centralized and in 1942 upon the entry into force of law n. 426 of 1942 the CONI finally acquired legal personality and was recognized by the Italian government.

Law n. 157 of 1986[53] provided the first codification of the articles of association of the CONI and the so-called *Decreto Melandri*[54] finally provided for the current structure and organization of the CONI. This latter law put an end to the characterization of the CONI as the 'federation of federations' and stipulated that the national federations would henceforth be associations with private legal personality which brought about the privatization of the sports federations. From that time on, the CONI is defined as a "public, non-profit organization that aims to regulate, supervise and administer all sporting activities

42 Legge 14 giugno 1973, n. 366. *"Estensione ai calciatori ed agli allenatori di calcio della previdenza ed assistenza gestite dall'Ente Nazionale di Previdenza e di Assistenza per i Lavoratori dello Spettacolo"*. Announced in the *Gazzetta Ufficiale* on 9 July 1973.

43 The law n. 366 of 1973 was originally drafted for the football sport. Later it has been determined that it would apply to sport in general.

44 Article 12 of law n. 259 of 21 March 1958.

45 Tribunale di Roma, sentenza 17 settembre 2002, n. 21072.

46 In accordance with Article 3 of law n. 91 of 1981.

47 A. d'Harmant Francois, *Note sulla Disciplina Giuridica del Rapporto di Lavoro Sportivo*, Massimario di Giurisprudenza del Lavoro, 1981.

48 Ambrosio, Mariani Toro, 1981, p. 492.

49 F. Rotondi, *La Legge 23 Marzo 1981 n. 91 ed il professionismo sportivo: genesi, effettività e prospettive future*, Rivista di Diritto Sportivo, 1985, p. 409.

50 In Italy, a joint stock company is called a *Società per Azioni (S.p.A.).*

51 In Italy, a limited company is called a *Società a responsabilità limitata (S.r.l.).*

52 M. Carli, *Olimpionica. Tra 'fascistizzazione' e 'italianizzazione' dello sport nella propaganda fascista dei tardi anni Venti*, Memoria e Ricerca, 2008, n. 27.

53 *Decreto del Presidente della Repubblica,* 28 March 1986, n. 157. Announced in the *Gazzetta Ufficiale* on 13 May 1986, n. 109.

54 *Decreto Legislativo,* 23 June 1999, n. 242. Recently amended by the so-called *Decreto Pescante*; *Decreto Legislativo*, 8 January 2004, n. 15.

on a national level, under the supervision of the Ministry of Culture (*il Ministero per i Beni e le Attività Culturali)*"[55].

3.2. Structure

The CONI, which is thus the central authority regarding sports organization[56], is made up of several organs: the National Council (which is composed of the presidents of the various national sports federations (FSN)[57], the President, the Italian members of the International Olympic Committee (IOC), sportsmen and sports experts, two representatives of regional organizations of the CONI, the National Committee and the Secretary-General.

According to Article 3 of the *Decreto Melandri* the National Council's main objective is to provide general guidelines that all the participants in sports must comply with. In this, the Council performs tasks concerning financial aspects and promotional matters. The Council furthermore provides the criteria for distinguishing between professional athletes and amateurs.

The President is the legal representative of the CONI and acts as chairman of the Council in national and international relations[58].

The National Committee generally carries out administrative duties in accordance with the main objectives and plans of the CONI[59]. These tasks mainly consist of defining objectives and plans, but also of supervising the legal and general organization of the CONI. Furthermore, the National Committee appoints the Secretary-General.

The Secretary-General organizes the administration of the CONI in accordance with the instructions laid down by the National Committee and directs the services and duties of the CONI. The Secretary-General can thus be considered the managing director of the CONI[60].

The main duties of the CONI are laid down in Article 5 of the *Decreto Melandri*. Article 5 originally stated that the national sports federations were bodies of the CONI and that they were authorized to lay down internal provisions concerning their technical and administrative duties in the organization of sporting activities. Such internal provisions had to be approved by the President of the CONI before they could enter into force. After the latest amendment of the *Decreto Melandri* in 2004 (the so-called *Decreto Pescanti*), the privatization of the national sports federations mentioned above took place, which emphasized that the CONI would maintain its status of non-governmental organization (NGO).

Through the *Decreto Melandri*, the Italian government delegated the task of regulating sports to the CONI. Thereby, the CONI must perform the tasks listed in Article 2. The CONI moreover must at all times take measures against doping, violence and discrimination in sports.

3.3. CONI Servizi S.p.A.

Since 2002, the tasks of the CONI have been carried out by a joint stock company (CONI Servizi S.p.A.) on the basis of an annual contract[61]. The Ministry of Economic Affairs is the sole shareholder of CONI Servizi S.p.A. which means that the Ministry - together with the CONI - is authorized to appoint the members of the board and the president. The CONI itself is financed by the Ministry of Economic Affairs (and thus by the Italian government). The Italian government is thus directly connected to CONI Servizi S.p.A.

In practical terms, the CONI continues to strive to attain its institutional goals as a public entity, while CONI Servizi S.p.A. is the entity that executes the tasks necessary to achieve these goals[62].

CONI Servizi S.p.A. aims to safeguard the important role of sports in Italy by means of the following[63]:

- By efficiently executing the mandate that has been set by the CONI,
- By allowing CONI to financially contribute to the nationals sports federations as much as possible,
- By providing the national sports federations with services of high added value,
- By developing own know-how, which is unique in Italy, in the field of sports,
- By attaching value to the present professional and material resources.

3.4. The financing of the sports sector

In Italy the central authorities do not directly take part in the financing of the sports sector. No yearly contributions are made. The sports sector is partially financed by more local authorities, such as the regions, provinces and municipalities. The bulk of the income of the sports sector comes from the revenue of lotteries. In 2002 the Italian government decided that part of the income earned from lotteries and sports betting (such as the *Lotto*, *Totocalcio* and *Super Enalotto*) should be invested in the development of sport. In this way, smaller-scale sports and sports facilities also stand a chance of survival. Between 2005 and 2008 approximately 450 million Euros have been invested in the development of sport[64].

3.5. The national sports federations and their relationship with the CONI

Besides providing clarity regarding the legal position of the *Federazioni Sportive Nazionali* (FSN), the *Decreto Melandri* also describes the relationship between the CONI and the national sports federations.

According to the *Decreto Melandri*, the national sports federations are organs of the CONI, of which the primary objective is identical to that of the general sports systems[65]. The national sports federations furthermore have a duty to compete with the CONI in both the area of the organization and the development of national sports and the area of preparing delegations of athletes for the Olympics or other significant sports events[66]. The important competence of recognizing and introducing to the FSN such associations that wish to take part in the organization of sports has also been delegated by the CONI to the national sports federations. In this way the associations obtain the status of *Società Sportiva*, which allows them to offer to individuals the possibility of participating in an activity that is part of the national sports organization. Without this status, associations would not be entitled to act as sports associations.

Even though sports federations are private entities with legal personality according to Article 18 of the *Decreto Melandri*, they still also have a public aspect. The sports federations remain under the supervision of the CONI, which is a public entity. The CONI in this respect has a duty - amongst other things - to produce the annual balance sheets of the sports federations and to arrange the financial contributions.

The fact that the national federations have both private and public features has created much turbulence in the Italian legal arena. According to many authors, entities should either belong in the private sector or the public sector. A combination of both is not considered desirable. Authors who argue in favour of the public sector[67] state that

55 S. N. Calzone, *Il Comitato Olimpico Nazionale Italiano. Istituzione, Organizzazione, Federazione.* Catanzaro, 1999, p. 12.

56 See Article 2 of the *Decreto Melandri* which states that: "*The CONI is the Confederation of the national sports federations and adapts itself to the international principles of sports regulation, in cohesion with the decisions and the guidelines of the International Olympic Committee. The CONI provides for the organization and the development of the national sport and especially the preparation of athletes and preparing the proper tools for the Olympics and for all other national sports events".*

57 Federazioni Sportive Nazionali.

58 Article 8, *Decreto Melandri.*

59 Article 7, *Decreto Melandri.*

60 Article 12, *Decreto Melandri.*

61 *Decreto Legislativo*, 8 July 2002, n. 138. *Interventi urgenti in materia tributaria, di privatizzazione, di contenimento della spesa farmaceutica e per il sostegno dell'economia anche nelle aree svantaggiate.*

62 Chaker, 2004, p. 71.

63 http://coniservizi.coni.it

64 E. Campofreda, *CONI, la crisi dietro le medaglie,* Rivista Aprileonline.info, 2008.

65 I.e. the realization of a programmatic competitive sport that ensures the continuous improvement of the sports sector. See: M. Tortora, G. Guarino, *I soggetti dell'ordinamento sportivo,* Diritto dello Sport, giurisprudenza sistematica civile e commercial, W. Bigiavi, Torino, 2007, p. 25.

66 As also becomes apparent from Articles 2 and 3 of law n. 426 of 1942.

67 G. Morbidelli, *Gli enti nell'ordinamento sportivo,* Torino, 1994, p. 171; L. Trivellato, *Considerazioni sulla natura giuridica delle Federazioni Sportive,* Rivista di Diritto Sportivo, 1986, n. 172.

the organs of the CONI listed in Article 5 of the *Decreto Melandri* are public entities, like the CONI itself. Furthermore, the CONI's supervisory tasks towards the national federations are considered evidence of a public relationship between the two parties. They further consider the sports federations' authority to recognize sports associations to be a public task as well. The fact that the objectives of the CONI and those of the sports federations show remarkable similarities is also argued to underline the public nature of the national federations.

Authors who consider the national federations as private entities[68] argue that if an entity falls under the supervision and control of a public entity this makes that entity a private entity. This they consider to be further supported by the fact that for the majority of their duties the sports federations make use of employees who are employed through a private employment contract[69].

Article 16 of the *Decreto Melandri* provides that national sports federations should be "governed by statutory and obligatory standards based upon the principle of internal democracy, the principle of free and equal participation for all in sporting activity, and in accordance with national and international regulations". This objective is to be achieved by acting in accordance with CONI and IOC guidelines. Furthermore, the objectives which the sports federations strive to achieve are of considerable public interest[70].

Article 20.5 of the CONI's articles of association provides that "the national sports federations shall carry out their sporting activities in accordance with the guidelines and directives enacted by the International Sport Federation to which each national sports federation is affiliated, provided that these do not conflict with CONI and IOC guidelines and directives". In the light of these principles, national sports federations adopting regulations governing professional competitions do so within the limits that are in the end established by the CONI and the IOC[71].

4. Three Dutch situations

The Dutch sports sector is currently grappling with a number of legal problems that have led to much debate. These problems urgently need to be solved. Below I will further explain 3 cases that have led to problems in the Dutch sports sector.

4.1. The collective agreement in sport

4.1.1. The Flexwet

In 1998 the Flexibilty and Security Act[72] (the *Flexwet*) came into force. This Act was intended to provide employers with increased flexibility in labour relations and to provide employees with increased security regarding their appointment[73]. The *Flexwet* provides that employment contracts that have been entered into for a definite period of time may by operation of law turn into employment contracts for indefinite duration in the following two cases:

- when the employee has been given three consecutive fixed-term employment contracts with no more than 3 months elapsing between contracts, the fourth contract to be offered him within 3 months after the expiry of the last will be considered to be a contract for indefinite duration;
- when the added duration of several consecutive fixed-term employment contracts with no more than 3 months elapsing between contracts is longer than 36 months (not counting the intervals) the contract turns into a contract for indefinite duration from the moment that the limit of 36 months is reached.

Employment contracts for indefinite duration cannot be terminated without consequences. The employer must first seek either the permission of the public employment service (UWV Werkbedrijf) or the approval of the court.

4.1.2. The Flexwet *and sport*

In the sports sector, contracts with athletes are always entered into for a definite period of time, given that the athlete provides sports services as a profession and given that the competition is mostly a seasonal affair and because the athletes' pay is usually provided from income derived from sponsorship agreements that are themselves temporary. Like all employment contracts, employment contracts in sport are subject to the provisions of the Dutch Civil Code, which means that the *Flexwet* also applies. Athletes signing their fourth contract with the same club are thus entitled to a contract of indefinite duration.

This situation gave rise to many disputes. Sports clubs argue that for sports-related reasons it should be possible to terminate a contract with a sports employee as soon as the term of the contract has expired, but athletes expect (and hope for) job security. In all this, the *Flexwet* has not always been correctly applied as the example from case-law below will clarify.

4.1.3. The Veneberg case

In 1999, professional cyclist Thorwald Veneberg was contracted by the professional cycling team Rabo. In 2007, a legal dispute arose between the parties, when Rabo did not intend to prolong Veneberg's contract due to a lack of notable achievements in official races on his part with no progress being foreseen[74]. Furthermore, Veneberg would simply have become too old to actively participate in competitive professional cycling. Because Veneberg had already been given more than three consecutive contracts for a definite period, he claimed to be entitled to a contract of indefinite duration. The court agreed with Veneberg and Rabo had to provide him with severance pay[75].

Obviously, the Veneberg case is not unique in the sports sector, but no specific legal provisions have yet been drawn up that do justice to the special position of professional sportsmen in employment relationships. The *Flexwet* thus remains applicable, even though employers often fail to heed this fact. Only the negotiation of a collective agreement determining that the *Flexwet* cannot be applied to employment contracts in professional sports could put a stop to the situation[76].

4.1.4. The Collective Agreement for Professional Football Players

Where employment contracts are concerned the situation in football is more advanced than in other sports. The football sector already made use of professional employment contracts between clubs and players as far back as 1967[77]. Where other sports still have to apply the entire *Flexwet*, the Dutch football sector has managed to reduce the scope of application of the *Flexwet* by declaring it inapplicable to football by means of the Collective Labour Agreement for Professional Football Players (CAO voor Contractspelers Betaald Voetbal) agreed between the Dutch Federation of Professional Football Organizations (FBO), the Association of Contracted Football Players (VVCS) and the ProProf in 1999. The agreement set aside Article 7:668a of the Dutch Civil Code to the effect that contracts entered into for a definite period by the same parties will remain contracts for a definite period. Article 6.2 of the collective agreement provides that the duration of the contracts and the number of consecutive contracts are irrelevant[78].

4.1.5. Solution

The Dutch Employers' Organization for the Sports Industry (WOS)[79] came up with a number of recommendations to resolve the situation. According to the WOS a collective agreement should be drafted that

68 R. Caprioli, *Le Federazioni Sportive Nazionali fra diritto pubblico e private,* Direttorio Generale, 1989, n. 6.

69 Article 14 sub 4 *Decreto Melandri*.

70 Article 20.4 of the articles of association of the CONI.

71 *The Role of Member States in the organizing and functioning of professional sport activities,* Report for the European Commission, tender n. VT/2008/106, T.M.C. Asser Instituut, Den Haag, 2009.

72 Law of 14 May 1998 amending the Dutch Civil Code, the *Buitengewoon Besluit Arbeidsverhoudingen 1945* and several other laws (Flexibility and Security), Stb. 1998, 300.

73 Trade Union 'de Unie', www.unie.nl, 19 April 2004.

74 Court of Breda, 22 October 2007, LJN: BB 609.

75 The parties eventually reached a settlement. See: Ktr. Utrecht, 5 December, 2007, LJN: BB 9399 and Hof Arnhem, 27 May 2008, rekestnummer: 104008091.

76 E. Lankers, *Een wereld te winnen. Professionalisering van de arbeidsverhoudingen van de beroepssporters in Nederland.* Deltahage, Den Haag, 2009, p. 37.

77 Sub-district court of Rotterdam, 5 April 1967, NJ 1967, 418 (Sparta/Laseroms).

78 C. A. Segaar, *Over twee jaar terugkomen: het nieuwe transfersysteem voor beroepsvoetballers,* Arbeidsrecht 2001, n. 52.

applies to the entire sports sector. Such a collective agreement would have to regulate the employment relationship between the professional athlete and his employer. Furthermore, clear agreements would have to be reached concerning the non-application of the *Flexwet* to the sports sector[80].

4.2. Social security

4.2.1. Pensions

The active working career of a professional sportsman is considerably shorter than that of a 'regular' person. When athletes end their active sports careers they are no longer receive a salary from employment, but like all other Dutch employees, professional sportsmen are entitled to a pension from the age of 65. However, most professional sportsmen have not made any provisions for the period in between, leaving them without a regular income during this time.

4.2.2. The Pension Plan for Professional Football Players of the Royal Dutch Football Association

One of the few sports sectors that has made provisions for the period following the termination of an active sports career is professional football. In 1972 already arrangements were made for this period in the Pension Plan for Professional Football Players of the Royal Dutch Football Association (CFK) stating that professional footballers had to contribute approximately half their income so as to be able to receive a fiscally lucrative monthly payment during this period until retirement age[81]. The contribution may also include bonuses and income earned from sponsoring deals[82].

4.2.3. Social security

In 2003, the Athlete's Committee of the NOC*NSF (the Dutch Olympic Committee) published a report which stated that medical care was insufficiently accessible to professional sportsmen[83] due to financial aspects of the preventive medical care needed to keep athletes in healthy condition. Furthermore, it turned out that large numbers of athletes are underinsured against specific costs relating to sport as most insurance policies only offer partial coverage of medical treatment as a result of sports injuries. There is as yet no specific health insurance plan for sportsmen even though this would be highly desirable[84].

In the Netherlands, the football sector is again ahead of other sports sectors in the matter of health insurance. In professional football a collective insurance contract (created after an initiative of the FBO) covers the costs of matters such as rehabilitation and physiotherapy[85].

4.3. *The distinction between professionals and amateurs*

Almost every Dutchman practices some form of sport. The majority practice sport as a hobby and therefore as an amateur. But when should an individual sportsman be considered an amateur and when a professional athlete?

4.3.1. The professional

A professional is an individual who practices sport as a profession. The professional can either work as an employee or be self-employed. Professional athletes who perform sports activities as an employee often have a contract with a sports club in a field of sport that is practiced as a team. Such a contract logically provides that the athlete is entitled to a monthly salary and to other rewards like bonuses and expense allowances. The employment relationship between a professional athlete and a sports club consists of all the essential elements of an employment contract under Article 7:610 (1) of the Dutch Civil Code: personal labour, remuneration and a relationship of authority.

Professional athletes who practice an individual sport are usually self-employed. A self-employed person derives his income from prize money earned through his participation in sports tournaments or from sponsor contracts.

4.3.2. The amateur

An individual who does not practice sport as a profession is generally considered an amateur. The amateur cannot be remunerated for his sporting activity and cannot have an employment contract with the amateur sports club. However, amateurs can be paid expense allowances for their participation in matches or training[86].

4.3.3. In practice

The difference between professionals and amateurs is however not as simple as it seems. A grey area exists between the two types of relationship between the athlete and the sports club. In the sports sector, and most notably in football, it is a well-known phenomenon that amateur sportsmen may receive compensation for expenses that considerably exceeds actual costs. In such cases it is difficult how these sporting activities should be qualified legally. Recent case-law has made clear that the fact that an amateur receives compensation for expenses does not automatically imply that he has an employment contract with the club paying the expenses[87].

5. Dutch problems, Italian solutions?

In Italy, law n. 91 of 1981 is often consulted for a solution to specific sports problems. It is therefore interesting to examine how Italy would handle the legal problems that plague the Dutch sports sector. Below, I will first discuss some essential differences between the Dutch and the Italian legal system in the field of sport and then I will describe how the three Dutch situations mentioned above would be dealt with in Italy.

5.1. Interventionism

This article has already revealed that Italy already has ample experience in the operation of a specific sports act, while this is not the case in the Netherlands. The mere presence of a sports act however does not necessarily imply that sports policy develops along the right lines and the mere lack of a sports act does not automatically means that the sports sector in a certain country is lagging behind. It cannot be denied however that a sports act can be a useful tool for shaping the sports sector and that the presence of a sports act can provide a country with a certain status and credibility in its international dialogue with the sports organizations of other countries[88].

Sports legislation comes in two categories: interventionist and non-interventionist[89]. An interventionist model implies that a country has specific sports legislation in place regulating the structure and the mandate of a substantial part of the national sports sector. All other models are to be considered non-interventionist.

The Dutch model concerning sports legislation is non-interventionist. This becomes clear from the fact that the Netherlands does not have a sports act and that the main parties involved in the sports sector are private. The sports organizations (such as the NOC*NSF or the sports federations) are furthermore supported by the government.

The advantage of a non-interventionist model is flexibility. No amendment of the law has to take place in order to change agreements in the sports sector. This way, policy makers are able to intervene quickly if necessary.

Italy has an interventionist model. This article has already described the role played by law n. 81 of 1981, as well as the important

79 The WOS is a non-profit employers' organization that looks after its members' interests in the area of labour relations. The members are sports organizations at regional and national level, associations of sports councils and associations of owners of sports accommodations. See: www.w-o-s.nl.

80 Lankers, 2009, p. 37.

81 The CFK arrangement is made compulsory by the Collective Labour Agreement for Professional Football Players (2008-2011). See Articles 25 and 26. However, not all professional football players are satisfied with this agreement, see for example: *'Profvoetballers leggen een bom onder gedwongen pensioenregeling'* in the Volkskrant of 10 January 1999 regarding the dispute between Ferdi Vierklau and his employer A.F.C. Ajax; or *'Profs uit buitenland mijden CFK'* in the Volkskrant of 10 November 2004.

82 www.cfk.nl

83 Atletencommissie NOC*NSF, *Toegankelijkheid sportmedische zorg voor topsporters,* APE, Den Haag, 2003, p. 7.

84 *Klachten bij topsporters over 'zorg',* Volkskrant, 21 November 2003.

85 Lankers, 2009, p. 39.

86 Cf. Article 3 of the Official KNVB Regulations on Amateurs for the football sector.

87 District Court of Roermond, 23 July 2008, LJN: BE 9354.

88 Chaker, 2004, p. 9.

89 According to Chaker in his research for the European Council.

function that the CONI fulfils in the Italian sports sector. CONI duties are regulated by the *Decreto Melandri* and under CONI supervision a prominent position is also reserved for the sports organizations.

The main advantage of an interventionist model is the legal certainty which it provides. Rules that are laid down in a sports act ensure the stability and continuity which the sports sector requires[90].

5.2. Contracts for a definite period in sports

Like the Netherlands, Italy is aware of the atypical character of the employment relationship between an athlete and his employer. It is a characteristic feature of the sports sector that it makes use of contracts for a definite period of time[91]. As mentioned before, Article 5 of law n. 91 of 1981 provides that the employment contract between an athlete and a sports club may not be concluded for longer than five years. If the parties involved agree, this period can be prolonged or altered in the course of time. This provision does not mention contracts for an indefinite period, which means that law n. 230 of 1962 is not applicable to employment contracts concluded by athletes. Law n. 230 of 1962[92] provides - amongst other things - that the third consecutive contract entered into by an employer and an employee for a definite period must be considered to be a contract for an indefinite period, thereby closely resembling the rules of the Dutch *Flexwet*.

The situation in Italy is thus that the parties to a contract in an employment relationship between an athlete and his employer can only enter into contracts for a definite period with the possibility of prolonging these contracts as many times as desired. In sport, a contract for a definite period cannot become a contract for an indefinite period, because contracts for an indefinite period do not exist in the Italian sports sector[93].

5.3. Social security: law n. 91 of 1981, Articles 7-9

In Italy professional sportsmen are obliged to make financial provisions for the period between the end of their active professional sports career and their retirement age under Article 9 of law n. 91 of 1981 which refers to law n. 366 of 1973 according to which athletes must take part in the ENPALS pension plan covering invalidity, old-age and survivors.

Law n. 366 of 1973 provides that professional athletes who have ended their active sports careers are thereafter entitled to a monthly payment from a specific fund. Male athletes are entitled to this pension from the age of 45 and female athletes from the age of 40, provided that the athlete in question has contributed to the specific fund for at least twenty years[94]. The costs of the fund do not have to be completely borne by the athletes: the sports association is obliged to contribute two-thirds of the fund[95].

Article 7 of law n. 91 of 1981 states that the sporting activities of professional athletes are subject to medical controls which are carried out in accordance with standards that have been established by the national sports federations and the Italian Ministry of Health. In order to guarantee the optimal wellness of athletes, sports associations must ensure that their athletes undergo medical controls at least once every six months. The data that originate from these controls must be recorded in a health dossier (the so-called *scheda sanitaria*)[96]. This dossier thus includes comprehensive information concerning the medical care that the athlete has received and gives a sports medical overview of the actual state of health of the athlete[97]. The athlete carries this dossier with him during his entire active sports career, so as to ensure his optimal state of health in competitions in his chosen field of sport.

According to Article 8 of law n. 91 of 1981, sports associations are obliged to provide all their athletes with insurance covering the risks involved in practising professional sport[98]. The sports clubs are responsible for financing these policies. As of the year 2000, legal provisions are in force stating that all professional athletes have to be registered with the *Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro* (INAIL)[99]. This insurance company provides the athletes with standard insurance that provides full coverage of the expenses made in the area of, inter alia, medical treatments and rehabilitation.

5.4. The distinction between professionals and amateurs in Italy

As mentioned above, Article 2 of the Italian law n. 91 of 1981 gives criteria for determining who can be considered professional athletes. Under this article, professionals must have permission from a national sports federation to operate as professionals and must be remunerated for their sporting activities. These sporting activities must also constitute the athlete's main working activity. This is the principal difference with regard to amateur athletes, who practice sport as a means of recreation while having a career in another field as their primary source of income.

In Italy amateur athletes are also sometimes remunerated for their sporting activities in the form of expense allowances or other allowances. The phenomenon of the remunerated amateur athlete appears to be difficult to qualify legally in Italy as well. Neither in Italian legislation, nor in the sports organization have legal rules been established regarding the remunerated amateur athlete. Only in the specific area of taxation have certain arrangements been made[100].

Article 2 of law n. 91 of 1981 is not the only provision determining when a sportsman is to be considered a professional. The legal qualification of the professional status of an athlete is brought about by a series of formal acts performed by stakeholders in sports such as the CONI and the various national sports federations, who are guided by the directives of the CONI itself concerning the distinction between amateur and professional athletes[101]. Article 31 of the CONI's articles of association states that athletes are persons who "participate in the association and the recognized sports federations (except in cases where the national sports federations have allowed individual registration) and in the united sports organizations and the organs that promote the sport". This article also shows that the CONI can recognize both the athlete who is employed and works under the authority of his employer and the athlete who is self-employed.

The professional status of an athlete is also brought about through the signing of a contract with a sports club that is allowed to conclude contracts. According to Article 10 of law n. 91 of 1981 a professional athlete can only sign a professional sports contract with an association that has the legal form of a a limited liability company or a joint stock company. An athlete who is a member of an association that is neither a limited liability company, nor a joint stock company can therefore not be considered a professional[102].

A disadvantage of the fact that the phenomenon of the remunerated amateur athlete has not yet been legally regulated is that the interests of such athletes are insufficiently protected. For example, the remunerated amateur athlete is not entitled to the safeguards applied to professional contracts under Article 4 of law n. 91 of 1981 or to the social security facilities provided by Articles 7 to 9 of that law[103].

Given that Article 2 of law n. 91 of 1981 cannot possibly apply to a remunerated amateur athlete a solution for this problem has been sought in Article 409(3) of the Italian Code of Civil Procedure[104] concerning the legal form of the *parasubordinato*. A *parasubordinato* is an individual who does not have a subordinate employment relationship

90 For more arguments in favour and against, see: Chaker, 2004, p. 10.
91 Duranti, 1983, p. 700.
92 Legge 18 aprile 1962, *Disciplina del lavoro di contratto a tempo determinato.* Announced in the *Gazzetta Ufficiale* on 17 May 1962, n. 125.
93 G. Nicolella, *Il contratto di lavoro sportivo,* Altalex, 27 September 2007.
94 Law n. 91 of 1981, Article 9, sub 7.
95 Law n. 91 of 1981, Article 9, sub 4.
96 Law n. 91 of 1981, Article 7, sub 2.
97 See Article 2, Decreto Ministeriale, *Norme sulla tutela sanitaria degli sportivi professionisti,* 13 March 1995.
98 Article 8 explicitly mentions death and (chronic) injuries that may intervene with a professional's sports career.
99 Decreto Legislativo, 23 February 2000, n. 38.
100 Articles 51 and 90 of law n. 289 of 27 December 2002. *Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato.* Announced in the *Gazzetta Ufficiale* on 31 December 2002, n. 305. See: P. d'Onofrio, *Manuale operativo di diritto sportivo. Casistica e responsabilita*, Rimini, 2007, p. 51.
101 Deliberazione del Consiglio Nazionale CONI, 23 March 2004, n. 1256.
102 K. Guerini Rocco, *Il rapporto lavorativo sportivo dilettantistico,* Altalex, 23 April 2009.
103 D'Onofrio, 2007, p. 54/55.
104 Il Codice di Procedura Civile.

with an employer, but can nevertheless be considered a subordinate, because this individual carries out his activities on a continuous basis for remuneration and in a relationship of authority[105]. According to Article 806(2) of the Italian Code of Civil Procedure however a remunerated amateur athlete cannot be considered as a *parasubordinato* as this would also have to be agreed upon in a collective agreement for the sector in question[106]. As of yet, no collective agreement concerning the remunerated amateur athlete has been concluded in Italy.

6. Conclusion

The present article discusses the Italian law n. 91 of 1981 in some detail. It also pays attention to the influence of the Italian Constitution on the sports sector and the role of the CONI and the national sports federations.

Currently, there are several problematic situations plaguing the Dutch sports sector for which no simple solution is at hand. In this article three of these situations have been discussed: the problems caused by the *Flexwet* in sport, the problem of the lack of social security provisions for athletes, and the problematic difference in the legal position between professional and amateur athletes. In order to examine which lessons the Dutch sports sector could learn from Italy's experience in regulating sport, the present article offers a hypothesis on how Italy would handle these three problematic situations.

Some observations can be made regarding the proposal of the WOS to introduce a general collective agreement in the area of sports. First it must be noted that the organization of the conclusion of a collective agreement that applies to the whole sports sector takes manpower and money. It also takes a stable representation of all employees in the sports sector. Moreover, the (legal) support that would have to be made available to the parties to such an agreement is also a matter of some expense. The parties concerned themselves often lack the expertise that would be required[107]. It would also be time consuming to bring together all the parties that have an interest in a collective agreement (such as the NOC*NSF, the sports federations, the sports organizations and the Ministry of Health, Welfare and Sport). In the light of these arguments, it would perhaps be less complicated to amend the *Flexwet* in such a manner that it would cease to apply to the sports sector in general.

In the previous chapter it was demonstrated that the Italian law n. 91 of 1981 can solve the problem of the *Flexwet* in sport as this law provides that employment contracts between athletes and their employers can only be concluded for a definite period of time.

Where a large part of the Dutch sports sector has made insufficient provisions regarding the medical care and retirement of athletes, Italy had already organized this matter through law n. 91 of 1981. This law could serve as an example to the Netherlands, as it includes rules concerning medical insurance, pension plans and the protection of the athlete's health. The biggest advantage of law n. 91 of 1981 as opposed to the way in which social security has been arranged in the Netherlands is that all of the relevant provisions have been laid down in the same piece of legislation. The fact that these matters have been regulated centrally provides for legal certainty and a comprehensive overview.

According to Articles 7 to 9 of law n. 91 of 1981, the costs of the measures contained in these provisions shall for the most part be borne by the sports associations of which the athlete is a member. The sports associations are also responsible for athletes' insurance and pension plans and for ensuring that they undergo medical controls. This allows the athlete to focus completely on the practice of his sport while the association, which will usually have more expertise than the athlete, takes care of the organizational matters.

It seems that the Italian sports sector could solve the problem of the difference in treatment between professional athletes on the one hand and (remunerated) amateur athletes on the other by a definition in a collective agreement of the amateur athlete as a *parasubordinato*. The remunerated amateur could then enjoy the same amount of protection that other persons have in an employment relationship with a legal person. The same solution could solve the Dutch problem of the 'grey area' in which the remunerated amateur athlete presently finds himself.

Can the Netherlands learn something from the Italian regulation of sports? This does indeed seem to be the case as Italy would be able to present a solution for the three Dutch sports problems or at least provide an option for a solution.

In the introduction to this article it was noted that professor Van Staveren in his report on the matter saw no immediate need for a specific sports act in the Netherlands. According to Van Staveren, such an act would only be necessary when "the current legislation provides insufficient options to fight the problems encountered". However, one may wonder whether this situation where the legislation provides insufficient options does not already exist in the Netherlands. No simple solution has yet been found for the three Dutch sports problems discussed. When Italian sports law is applied to these situations however it becomes clear that a solution is not unimaginable, which provides a further argument for concluding that the Netherlands may take an example from Italy's experience in this area.

In the past, the European authorities have shown little interest in sports-related matters. In the recently entered into force Lisbon Treaty the topic of sport was included for the first time. Article 6 of the Lisbon Treaty states that the European Union has the competence to carry out actions to support, coordinate or supplement the actions of the Member States in the areas of education, youth, sport and vocational training. This concept has been further elaborated in Article 165(2) which states: "Union action shall be aimed at (…) developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen". At this moment it is still too early to say what impact these two provisions will have on sports practice in the European Union, but it can be reasonably assumed that the EU is now able to intervene in sports-related matters (by means of the Lisbon Treaty), even though sporting activity is not directly defined as an economic activity[108]. This development at the level of the EU and the abovementioned advantages of having a sports act may possibly lead to further consideration of the matter in the Netherlands.

105 Zoli, 1985, p. 2088.
106 V. Frattarolo, *Il rapporto di lavoro sportivo,* Milano, 2004, p. 126/127.
107 Lankers, 2009, p. 33/34.
108 'Europa en Sport', www.parlement.com

Models of Sport Governance in the European Union: The Relationship between State and Sport Authorities*

by **Robert Siekmann and Janwillem Soek****

1. Introduction

In 2004 André-Noël Chaker published a study on "Good governance in Sport - A European survey" which was commissioned by the Council of Europe.[1] The Council of Europe was the first international organization established in Europe after the Second World War. With 46 Member States, the Council of Europe currently represents the image of a "wider Europe". Its main objective is to strengthen democracy, human rights and the rule of law. The Council of Europe was the first international intergovernmental organization to take initiatives, to establish legal instruments, and to offer an institutional framework for the development of sport at European level.[2] The study covers the sport-related legislation and governance regulations of twenty European countries. The aim of this study was to measure and assess sport governance in each of the participating countries. For the purposes of this study the term "sport governance" had been given a specific meaning. Sport governance is the creation of effective networks of sport-related state agencies, sports non-governmental organisations and processes that operate jointly and independently under specific legislation, policies and private regulations to promote ethical, democratic, efficient and accountable sports activities. The legislative framework of the countries under review was analysed according to whether they have references to sport in their constitutions and whether they have a specific law on sport at national level. There are two distinctive approaches to sports legislation in Europe. Countries have adopted an "interventionist" or a "non-interventionist" sports legislation model. An interventionist sports-legislation model is one that contains specific legislation on the structure and mandate of a significant part of the national sports movement. All other sports-legislation models are deemed to be non-interventionist.

In December 2009, the European Commission (Employment, social affairs and equal opportunities DG) commissioned the T.M.C. Asser Instituut (ASSER International Sports Law Centre) to undertake a study on "The Role of Member States in the Organising and Functioning of Professional Sport Activities". The background of the Study is as follows.

Article 39 of the European Community Treaty (EC Treaty) establishes the free movement of workers in what became the European Union. It prohibits all discrimination on the basis of nationality. The European Court of Justice has confirmed that professional and semi-professional sportsmen are workers within the meaning of this Article and consequently, Community law applies to them.[3] This implies the application of equal treatment and the elimination of any direct or indirect discrimination on the basis of nationality. The Court particularly stated that Article 39 EC Treaty not only applies to the action of public authorities but also extends to rules of any other nature aimed at regulating gainful employment in a collective manner and that obstacles to freedom of movement for persons could not result from the exercise of their legal autonomy by associations or organizations not governed by public law.[4]

In light of recent developments in the field of sport, however, certain international sport authorities have advocated the adoption of rules that might be contrary to Community law and in particular to the free movement-of-workers principle. National sport authorities, being members of the international sports authorities, should also apply the rules adopted at the international level. Therefore, the implementation at the national level of such rules would be contrary to EC law.

For example, the European Commission has published an independent study on the "home-grown players' rule" adopted by the European football governing body. This rule requires clubs participating in the European-wide club competitions - Champions League and UEFA Cup (as from the 2009/2010 season: Europa League) - to have a minimum number of "home grown players" in their squads. Home grown players are defined by UEFA as players who, regardless of their nationality or age, have been trained by their club or by another club in the same national association for at least three years between the age of 15 and 21. Compared with the "6+5" rule adopted by the world football governing body FIFA, which is incompatible with EU law, the Commission considers that UEFA has opted for an approach which seems to comply with the principle of free movement while promoting the training of young European players.[5] The "6+5" rule provides that at the beginning of each match, each club must field at least six players who are eligible to play for the national team of the country of the club.

The European Commission, as guardian of the EC Treaty and within the framework of its competences, can initiate infringement proceedings before the European Court of Justice (ECJ) against Member States that have breached Community law. According to the case-law, an infringement procedure can be initiated against a Member State if government authorities of that Member State are at the origin of the infringement.[6] As to the actions of private entities, the ECJ has indicated that Member States might be responsible for breach of EC law by private entities, recognised as having legal personality, whose activities are directly or indirectly under State control. Possible criteria that are mentioned in this context are, in particular the appointment of the members of the entity's management committee by state authorities, and the granting of public subsidies which cover the greater part of its expenses.[7]

Therefore, the fundamental element authorising the Commission to initiate an infringement procedure against a Member State is the existence of behaviour breaching Community law that can be attributed to the State. The same reasoning applies also in the field of professional sports activities, where in order for the services of the Commission to launch the infringement procedure, behaviour - breaching Community law attributed to the State must be present. Consequently, it is essential to determine whether and to what extent, Member States participate directly or indirectly in the organisation of professional sports activities.

Community law on the free movement of workers and in particular Article 39 of the EC Treaty being directly applicable in the Member States' legal orders, means that every EU citizen who considers that his/her rights have been violated might go and seek a redress in front of the national administrative authorities and jurisdictions. If the application of EU law is at stake, national courts may request a preliminary ruling from the European Court of Justice, which is entitled to give rulings about the compatibility of sporting rules with the EU legal order.

In the White Paper on Sport, adopted in 2007[8], the Commission

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1 Council of Europe Publishing, Strasbourg, September 2004.

2 See: Robert C.R. Siekmann and Janwillem Soek Eds., The Council of Europe and Sport: Basic Documents. T.M.C. Asser Press, The Hague 2007, at p. XIX.

3 Case 13/76 Donà, ECR 1976, p. 1333 and Case C-415/93 Bosman, ECR 1995, I-4921.

4 Case C-415/93 Bosman, ECR 1995, I-4921.

5 Cf., IP/08/807 of 28 May 2008.

6 Case C-95/97 Région wallone v. Commission, ECR 1997, I-1787.

7 Case C-249/81 Commission v. Ireland, ECR 1982, 4005.

8 COM (2007) 391 final, pp. 14-15.

reaffirmed its acceptance of limited and proportionate restrictions (in line with EU Treaty provisions on free movement and European Court of Justice's rulings) to the principle of free movement in particular as regards:

- The right to select national athletes for national team competitions;
- The need to limit the number of participants in a competition; and
- The setting of deadlines for transfers of players in team sports.

In order to improve knowledge of the functioning of sport regulations across the EU and to outline the general trends in Europe, analysis of national sport legislation is required in order to determine whether and to what extent, Member States participate directly or indirectly in the organisation of professional sport activities, with a view of clarifying the different levels of responsibility. This country-by-country analysis is to cover:

a) *Organisation of professional sport activities*: The way in which professional sport activities are organised with particular focus on whether the organisation is:
   - part of general organisation of sport activities or whether there are separate special rules regulating professional sport activities;
   - underpinned by general law, framework law or specific rules governing sectoral sport activities;
   - at the level of the state, or has devolved to, for example, the regional/local level.

b) *Organisation and functioning of sport authorities*: The way in which sport authorities are organised and function, with particular focus on whether the sport authorities
   - are private actors or whether they act or operate under the auspices of the State;
   - have State participation in any of their responsibilities for the organisation of professional sport activities (for example, nomination of members of governing bodies, financing, and adoption of regulations governing professional sport competitions).

c) *Discrimination*: Whether there are direct or indirect discriminatory rules and/or practices with regard to Community citizens. The following fields of professional sport activities must be covered: football, basketball, volleyball, handball, rugby and ice-hockey (as to both men and women championships, and in both first and second divisions).

The final purpose of the study was to determine, on the basis of the information gathered and the research undertaken, to what extent the organising and functioning of professional sport activities might be attributed to the State in the European Union.

In this contribution we present a summary of the results of the study in a comparative form, that is, in relation to the issues above under a) and b). We do not discuss the issue of c) since we are mainly interested in the current "abstract" relationship between state and sport authorities in the European Union from the perspective of the "interventionist"/"non-interventionist" models of sport governance. Of course, this perspective is relevant also for the determination of whether states may be considered responsible for the behaviour of the national sport-governing bodies.

2. State influence on the legal organisation of professional sport activities

2.1. The non-interventionist sports legislation model

In Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, Germany, Ireland, Luxembourg, Malta, the Netherlands, Slovakia, Slovenia, Sweden and the United Kingdom the sports federations set up according to the act of association are active private actors; they are not under control, responsibility or supervision of State authorities. Also, in Lithuania the sports federations have full autonomy, even though they must be recognised by the Department of Physical Education and Sports, which sets out the procedure and criteria for recognition. In Hungary other criteria for the legal existence of a sports federation are applicable. A sport federation will only be recognised in case, first, it has at least ten sport organisations operating in a particular sport as members; second, it operates a national contest scheme (championship) continuously for at least three years; and, third, it has a contest scheme involving at least one hundred sportsmen having a contest permit.

2.2. The interventionist sports legislation model

The situation of the sports federations in the remainder of the EU-countries contrasts strongly with that in the above mentioned countries. There, the interference of the state in the doings and dealings of the federations is more or less immanent.

In Bulgaria, according to the Law on Physical Education and Sport, one of the requirements for granting a licence to a sport federation is that it presents rules for the organization of sport competitions. The licence is issued for a period of four years and encompasses the right to organize and carry out sport competitions[9]. Every four years a commission appointed by the head of the State Agency for Youth and Sport assesses the sport organization with regard to renewal of its licence.

In Cyprus the sports federations are under control of the State, both in respect of their financial status and rules for operation. The semi-governmental organisation, Cyprus Sports Authority, supervises sporting activities, advises sports federations and to ensures the functional implementation of all athletics programs. Furthermore, the Cyprus Sports Authority organises the sport representation of Cyprus abroad, regulates the federations, runs competitions and imposes sanctions to sports federations for violation of sports law and international regulations.

In France, the law provides for separate structures to manage professional activities in disciplines to whose federations responsibilities have been allocated by the Minister of Sports. The French Sports Code covers the legal existence of the professional leagues, bodies charged with the representation, management and coordination of professional sporting activities. The sports federations act under the control and supervision of the State authorities insofar as the State delegated their powers to them through legislative measures and the State can therefore cancel these powers as provided by law. The sports federations operate independently but under the control of the Minister of Sport.[10] Before powers can be delegated to them, the sports federations must fulfil certain conditions: first, to be responsible for the organisation of one sport only or related sports; second, to have been approved beforehand by the State under the conditions of the Sports Act; and, third, to have an internal regulation that contains specific provisions as defined in the Sports Act.

In Greece, the State exercises supervision. The ompetent authorities control the legality of the statutes of association, and financial control is applied to all federations and clubs participating in a professional league. The delegation of the powers by the State to the sport authorities is provided by law. This delegation concerns the possibility to take decisions on every matter concerning the regulations of sport competitions.

In Italy all sport activities are controlled by the Italian Olympic Committee (CONI), which is a public body. CONI is independent although it is under State control (the Undersecretary for Sport). Although the governing authority of each sport is the sports federation, the technical, organizational and managerial autonomy of the federations is supervised by CONI.[11]

In Latvia the Council of Latvian Sports Federations controls the activities of the sports federations in the field of the organisation and management of particular sport activities according to the procedure provided by regulations of the Cabinet of Ministers (although such regulations have so far not been adopted). [12] Also the Ministry of Welfare, the Ministry of Interior, the Ministry of Defence and the Ministry of Justice have certain competencies in the field of sport.[13]

9 Law for the Physical Education and Sport, amend. SG. 96/29 Oct 2004, Art. 19(1).

10 Loi n° 2003-708 du 1er août 2003 relative à l'organisation et à la promotion des activités physiques et sportives, Art. 16.

11 Legge N. 91/81 sul Professionismo Sportivo, Art. 14.

12 Latvian Sports Law, Published: "Vestnesis", 13 Nov. 2002, No. 165 (2740), S. 10(3).

13 Idem S. 6.

In Poland the organisation of top sports competitions falls within the competence of the Polish sports federations, which are managed autonomously. However, their activity is subject to the supervision of the Minister of Physical Education and Sport. The Minister exercises control in order to verify the compliance of the activity with the applicable regulations, statutes and rules of procedure.

In Portugal sports bodies responsible for the organization and functioning of professional sport competitions - the professional leagues - are established as privately registered non-profit associations. On the basis of the Sports Act, in order to exercise those functions, the professional leagues must conclude a contract with the federations. The activities of the federations, as well as the professional leagues, are supervised by State authorities though enquiries and inspections.

In Romania, the Ministry of Youth and Sport is the specialized body of the central public administration coordinating activity in the field of sport, according to the Law on Physical Education and Sports. The national sport federations are given competence to establish, by means of their own regulations, the conditions for practising professional sport. These regulations have to be approved by the Ministry of Youth and Sport. This Ministry may also supervise and control compliance with the legislative provisions in force and the rules and statutes within all sport structures.

In Spain, although the sports federations are private entities with their own legal personality, they also exercise public functions which have been delegated to them by central administration. They act as partners of the public authorities. The articles of association and regulations of the sports federations have to be approved by the Higher Sports Council. In addition, the Higher Sports Council has the competence to conclude agreements with the Spanish sports federations on their objectives and sports programmes, in particular those concerning high-level sport, and on the organizational functions of the federations. Such agreements are governed by administrative law.

National umbrella organizations

In all EU countries, sports federations are affiliated with a national umbrella organization. The main purpose of these umbrella organizations is to act as intermediaries between the sports federations and the public authorities in order to establish a coherent sports policy. In various countries, however, the tasks of the umbrella organization are more comprehensive, and certain public powers are delegated to them in their relations with sports federations.

In Latvia the State has authorized the Council of Latvian Sports Federations to assume the responsibility of recognizing activities of the sports federations. The Council of Latvian Sports Federations gives sports federations the right to manage and coordinate activity in their respective fields of sports as well as to represent the State in the relevant international sports federation.

In Italy, the State has assigned to CONI all regulatory powers in the sports sector. More specifically, CONI manages the organisation of national sports and promotes the strengthening of national sports, deals with training of the athletes and makes available appropriate means for Olympic Games and any other national or international sporting event, fosters the practice of sporting activities, takes and supports any initiative necessary for fighting doping, discrimination and violence in sport. All CONI's tasks are listed in a Legislative Decree. These provisions state that CONI's National Council regulates and coordinates national sports activities, harmonizing the action of national federations, in accordance with deliberations and directives of the International Olympic Committee (IOC). Among its various tasks, the CONI National Council adopts the CONI statutes and any regulations within its competence, it issues decisions aimed at the recognition of national sports federations, affiliated sporting activities and other sporting bodies. The National Council also establishes the fundamental principles to which national sports federations' statutes must conform in order to be recognized. Moreover, the CONI National Council establishes, in line with international sporting rules and within each sport federation, the criteria for distinguishing professional sport from amateur sport. In addition, the National Council sets out conditions and criteria governing the exercise of its controlling powers over federations and any other sports bodies.

In Malta, the sports federations can opt to register with the Malta Sports Council. All sport organisations that register with the Malta Sports Council are entitled to receive assistance or benefits under the Malta Sports Act. Registration also entitles them to make use of State-run sport facilities at a subsidized rate or to receive by legal title or rent a sport facility to be administered by them.

In Slovenia the Sports Act authorizes the National Olympic Committee to implement the licensing system and to manage the benefits that come with the status of elite athlete (medical examinations, health insurance, social security, scholarships, special education and studying conditions, and so on).

In Sweden, the Sports Confederation has the authority to distribute State grants to sport.

2.3. Extent of state control

As Chaker observed in his 2004 study, "'interventionism' should not be taken to mean undue state control or governmental infringement of the basic freedoms of sports NGOs".[14] The Council of Europe's member states have accepted the European Sport Charter.[15] One of the essential prerequisites the Charter has achieved is to provide the necessary balance between governmental and non-governmental action and to ensure the complementarity of responsibilities between them. This is given expression in the fact that - even in interventionist countries - the law has bestowed upon the sports federations some public powers. Normally the State does not delegate powers or responsibilities to the sports federations through laws or regulations except in France, Greece, Romania and Spain. In Cyprus, these powers are mostly found in the competences that the State has given to the federations in order for them to have their own legal and arbitration committees as well as control of their own programmes. In Portugal, on basis of the Sports Act, the State delegates to the sporting authorities some disciplinary and regulatory powers. In Slovenia, the sporting authorities can appoint eight members to the Council of Experts. Among other tasks, this Council can make proposals for new laws and regulations in the field of sports. In Spain, the Sports Act establishes that sports federations, under the coordination and guidance of the Higher Sports Council, will, among other things, exercise disciplinary authority on the terms laid down in the Act and its implementation rules.

A State could most effectively intervene in the organisation and functioning of professional sport competitions if it is involved in the appointment of members of the sporting authorities. However, there are no EU countries where the public authorities have this right of appointment or participation in any way in the composition of the management bodies.[16] To help avoid electoral irregularities, however, the Electoral Guarantees Board of the Spanish Higher Sports Council is responsible for overseeing the electoral processes in the governing organs of the sports federations.

Another indication of the limits of the influence of the State on the organisational freedom of national federations can be found in the degree of autonomy of those federations to adopt regulations governing competitions. In almost all EU countries (25 out of the 27), the

14 André-Noël Chaker, Good Governance in sport - a European survey, Council of Europe Publishing, Strasbourg, September 2004, p. 9.

15 Recommendation No. R(92)13 Rev of the Committee of Ministers to Member States on the Revised European Sports Charter (adopted by the Committee of Ministers on 24 September 1992 and revised on 16 May 2001.

16 Most statutes of the international sports federations contain provisions relating to the independence of member associations and the independence of the decision-making process of the governing body in each country. State involvement in appointment and approval procedures may conflict with these provisions and could lead to national associations being suspended by the international federation. In Recommendation Rec(2005)8 of the Committee of Ministers to member states on the principles of good governance in sport (adopted by the Committee of Ministers on 20 April 2005) it was recommended that the governments of member states adopt effective policies and measures of good governance in sport, which include - inter alia as a minimum requirement - democratic structures for non-governmental sports organisations based on clear and regular electoral procedures open to the whole membership.

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supreme authorities of the sports federations (according to their statutes) are entitled to adopt regulations, rules and other provisions in line with international rules and the domestic general legal framework but independent of State intervention. Although in Poland the state is not involved in establishing the federations' statutes, they are subject to the control of the Minister of Physical Education and Sport, in respect of their compliance with applicable regulations. In Romania, conditions for practising professional sport are established by the national sport federations, by means of own norms, but there conditions must be approved by the Ministry of Youth and Sport. A specialized central public body is entitled to supervise and control the way the national sport federations observe these norms.

National Sports Acts do not necessarily imply the adoption of an interventionist sports legislation model. Indeed, 22 EU countries have promulgated sports legislation, of which 17 favour the non-interventionist approach.

3. State influence on the financing of professional sport activities

Article 12 of the revised European Sports Charter[17] reads that "[A]ppropriate support and resources from public funds, that is, at national, regional and local levels, shall be made available for the fulfilment of the aims and purposes of this Charter. Mixed public and private financial support is to be encouraged, including the generation by the sports sector itself of resources necessary for its further development." The sports authorities are thus expected to generate resources for themselves. In all EU countries, the first matter of importance is that the professional competitions are funded through the governing body. Principally the financing of sport associations consists of membership fees, sponsorship agreements, income from business activities such as owning property and selling fan products, the sale of broadcasting rights or even public listing on the stock exchange.[18] The popularity of only a few sport disciplines is great enough to render sports federations financially self-supporting. By contrast, the segments of the population that the majority of sports disciplines attract are too narrow to ensure their own funding. These sports federations are dependent on direct and/or indirect public financial support.

In Austria the legal basis for public financing is to be found in the Federal Sports Promotion Act.[19] Sport authorities can be financed through benefits from annuities, interests and credits, loans by the State, or subsidies through grants under private law.[20] Decisions on such financial support are made by the Chancellor in an annual plan, after consulting with the respective sport governing bodies.[21] If one single sport-related grant exceeds 2/100,000 of the total annual budget of Austria, it has to be expressly authorized by the Federal Minister of Finance.[22] In principle, the State exercises financial control, but the Chancellor is empowered to transfer the financial control to the Federal Austrian Sport Organisation (BSO) by a contract that must contain a reporting obligation for the BSO.[23]

In Belgium the professional bodies are dependent on commercial activities for their funding. The State does not participate directly or indirectly in their financing. In the Flemish Community, the sporting authorities do not receive any direct financial support from or experience any financial control by the Flemish government either. The State participates indirectly in their financing through granting subsidies to the Flemish sports federations under a decree concerning sports federations.[24] The Flemish government only exercises financial control over the Flemish sports federations within the framework of this decree.

In Bulgaria, according to Article 18 of the Law on Physical Education and Sport[25]: "The sport clubs and associations, members of a licensed sport federation, shall acquire the right [...] to receive state support and to use sport grounds and facilities which are state and municipal property, according to the regulations for this purpose." The State participates directly and indirectly in the financing of sports authorities responsible for the organisation of professional competitions. In compliance with the aims and tasks underpinning the programme for the development of physical education and sport and the Law on Physical Education and Sport, the State 1) finances (funds) the duly approved programmes and projects for public sport and youth activities; 2) supports and promotes non-profit legal entities to implement public sport and youth activities through tax, credit-interest, customs and other financial and economic concessions (relief), as well as different kinds of financing provided in various legal documents; and 3) establishes, maintains, modernizes and manages sports sites and facilities which are State property and controls the conditions for their use for this purpose only. The State exercises financial control over the funding so provided.[26]

In the Czech Republic, only the Ministry of Education, Youth and Sport offers financing, by allocating grants to the associations with a country-wide competence in the field of sport.[27] Regional authorities also give financial support to sport activities, and there is the possibility of funding through a special procedure that operates annually and through which the deputies of the Lower Chamber of the Czech Parliament present proposals for financial support, some of which may involve the financing of a volleyball court, a football field, or similar facilities. If the State decides to support an activity in this way, control is very rigorous.

In Denmark, one of the characteristics of sport is the large amount of public funding that may indirectly or directly be granted in support of professional sport. In addition to this, the Danish sport sector benefits from specific rules on VAT taxation. The State subsidy for sport is based on the Act on Football Pools, Lotteries and Betting Games which stipulates the allocation of the National Lottery's profits to a number of different cultural and humanitarian purposes, such as sport organizations.[28] The subsidies allocated to the Ministry of Culture are primarily granted to the main sport organizations[29] and the Danish Foundation for Culture and Sports Facilities. The Ministry of Culture exercises financial control in pursuance of the Executive Order on Accounts and Audit of Beneficiaries of Subsidies.[30] The Danish Foundation for Culture and Sports Facilities manages public venture capital and acts as an independent expert council under the Ministry of Culture. The mission is to develop and support construction in the field of sport, culture and leisure not based on interests of personal finance.[31] The Danish Foundation for Culture and Sports Facilities acts as the secretariat for the Elite Facility Committee established as a self-governing institution with the purpose of supporting construction in the area of elite sport with a view to international sport events. The Ministry of Culture exercises financial control in pursuance of the Executive Order on Accounts and Audit of Beneficiaries of Subsidies.[32] The Act on the Promotion of Elite Sport regulates elite sport in general by establishing the frame-

17 See supra nt. 2.

18 The activities of sports federations are in principle twofold: besides being charged with the organisation of a specific sport; they pursue a commercial activity. Priority, however, the sports performance is their priority and the financial aspects serve as constraints for their ambitions on the field.

19 Bundesgesetz Vom 12. Dezember 1969, Betreffend Förderungen des Sportes aus Bundesmitteln (Bundes-Sportförderungsgesetz) Stf: Bgbl. Nr. 2/1970.

20 Idem § 2. and § 4.(3)

21 Idem § 3.(1), (2)

22 Idem § 19.

23 Idem § 10.

24 Décret relatif à un mouvement de rattrapage en matière d'infrastructure sportive par le biais du financement alternatif of 23 May 2008, Moniteur Belge of 06-08-2008, no. 20082027 98, p. 41071.

25 Law for The Physical Education and Sport. Prom. SG. 58/9 Jul 1996, amend. SG. 53/4 Jul 1997, amend. SG. 124/27 Oct 1998, amend. SG. 51/4 Jun 1999, amend. SG. 81/14 Sep 1999, amend. SG. 53/30 Jun 2000, corr. SG. 55/7 Jul 2000, amend. SG. 64/4 Aug 2000, amend. SG. 75 2 Aug 2002., amend. SG. 95 8 Oct 2002., amend. SG. 120 29 Dec 2002., amend. SG. 96/29 Oct 2004.

26 Idem Art. 64e (1) and (2).

27 Act No.115/2001 on Support of Sport, dated 28th February 2001 § 3 (1) c).

28 Consolidation Act No. 273 of 17 April 2008.

29 Namely the organizations mentioned above under I and the Horse Race Finance Foundation, cf. Section 6B. Apart from the fixed allocation laid down in Section 6B earmarked for specific sport organizations, the Ministry of Culture also receives an allocated fixed amount which is not earmarked other than for 'cultural purpose' which includes sport.

30 Executive Order No. 924 of 28 September 2005.

31 By Act No. 349 of 9 June 1993, amending the Act on Football Pools, Lotteries and Betting Games ('Tips- og lottoloven'), cf. the Regulations on the Foundation.

32 Executive Order No. 924 of 28 September 2005. As for the Elite Facility Committee, this is stipulated in the Regulations Section 10.

work for Team Denmark.[33] Team Denmark is a self-governing State institution with the overall responsibility of developing elite sport in a socially justifiable manner through subsidies. Team Denmark must also procure commercial income for elite sport through media agreements in cooperation with the National Olympic Committee and Sports Confederation of Denmark (DIF). In addition, municipalities may support elitist sport where this is not actual business. Again, The Ministry of Culture exercises financial control in pursuance of the Executive Order on Accounts and Audit of Beneficiaries of Subsidies. Sport Event Denmark was established as a self-governing institution with the purpose of attracting major international sport events to Denmark through financial support and acts as an advisory to national federations, municipalities and others. Sport Event Denmark is owned and financed by DIF, Team Denmark, the Ministry of Economics and Business Affairs and the Ministry of Culture, the State being the largest sponsor. Moreover, a number of municipalities have established public-funded event offices.[34] Here too, the Ministry of Culture exercises financial control in pursuance of the Executive Order on Accounts and Audit of Beneficiaries of Subsidies.

In Estonia, sports activity is financed from several sources: State budget, local budgets, foundations, sponsors and an organization's financing.[35] Support from the state budget is paid to sports organizations that have a development plan and have timely submitted an official statistics report to the agency conducting official statistical surveys which complies with the relevant requirements. The procedure for the distribution of funds allocated from the State budget to support sport organizations is established by a regulation of the Minister of Culture. The Ministry of Culture concludes a contract with the sport authority receiving the support, stipulating the purpose for which the support may be used, the rights and obligations of the parties, the procedure for reporting proper purpose use of the support and sanctions for breach of contract.

In Finland, sport associations may apply for State subsidies for their activities. The Ministry for Education allocates the State subsidies to associations that have applied for them after obtaining an opinion from the National Sport Council. The grounds for granting State subsidies are set forth in the/1998 Sports Act[36] and the 1998 Sports Regulations). State subsidies can be used, among other things, for financing youth work, organizing competitions at different levels, and covering costs of participating in international competitions and tournaments. In addition to this, the State exercises financial control through tax law.

In France, according to the Sport Act the sport associations can obtain public funding for missions of general interest.

In Germany the sporting authorities finance themselves from the revenues that they earn. The State is neither directly nor indirectly involved in financing them and does not exercise any financial control.

In Greece, Article 16 of the Constitution states that sports shall be under the protection and the ultimate supervision of the State. The State shall make grants to and control all types of sport associations, as specified by law. The use of grants in accordance with the purpose of the associations receiving them shall also be specified by law. However, this financial support concerns only the national sport federations and not the sporting authorities in charge of the organisation of professional competitions. Law 2725/1999[37] provides that no state aid is available to professional athletes' unions. In reality, however, the State indirectly supports professional sports through broadcasting rights of public television and sponsorship from a betting company, which is also controlled by the State. The professional sporting authorities are financially controlled by the Ministry of Trade.

In Hungary, the State is involved in financing the sports authorities - sports organizations and sports associations - appointed to organize professional competitions. Financing takes place both directly - State aid pursuant to the Sports Act,[38] Act XXXVIII of 1992 on public finances, the Government Decree[39] on State financial procedures, and the Ministerial Decree on State support for sports purposes - and indirectly by tax allowances. Besides the national government, local government also takes part in financing the sport authorities. This financing may be carried out through tenders, in the form of sponsoring, by the municipality's own business activity, and so on. Regarding the monitoring of the use of State support, the State acts in accordance with the provisions of Act C of 2000 on accounting. In addition, pursuant to subsection (2) of Section 13/A of Act No XXXVIII of 1992 on public finances, all organizations or private persons financed from any subsystem of public finances or from EU funds or receiving any aid from those resources must account for the proper use of any amount granted to them for any special purpose other than as a social allowance. The funded institution shall verify the use of and account for the amounts. Should the organization or private person financed or subsidized fail to meet this obligation in due time, then any further financing or assistance shall be suspended until the obligation is fulfilled. In case of illegal or improper use of any assistance, the user shall be subject to reimbursement as laid down in separate laws. In addition, the State Audit Office and the Government Audit Office are entitled to carry out auditing activities concerning the use of central State aids.

In Ireland, there is some State financing. The Department of Arts, Sport and Tourism administers the Sports Capital Programme, which is funded by the National Lottery. Funding is also provided to specific national sporting bodies by the Irish Sports Council, acting under the Irish Sports Council Act 1999.[40] The Irish Sports Council sees itself as a resource for these bodies, with a priority of strengthening and developing their capabilities. Eligibility criteria establish minimum requirements for bodies wishing to apply for support. This eligibility process is currently under review. The Sports Council has to report before the Minister for Sport, Tourism and Recreation about each spending.[41] The State exercises financial control insofar as financial support is targeted, and the bodies concerned must show that they have delivered on key objectives. The Irish Sports Council sees this as a process of dialogue.

In Italy, CONI performs all its tasks and activities through a limited company called *Coni Servizi*.[42] *Coni Servizi* has a share capital amounting to €1,000,000, and all shares are assigned to the Ministry of Economic and Financial Affairs.[43] Any further increase in the capital is decided by the Minister of Economic and Financial Affairs in agreement with the Minister of Cultural Heritage and Activities. The relationship between CONI and *Coni Servizi*, including the financial one, is governed by an annual service contract. The president and the other members of the board of directors are appointed by CONI. The president of the board of statutory auditors is appointed by the Minister of Economic and Financial Affairs, and all other members are appointed by the Minister of Cultural Heritage and Activities. *Coni Servizi*'s accounts are controlled by the Court of Accounts in accordance with Art. 12 of Act no 259 of 1958.[44] The State finances CONI directly and directly controls *Coni Servizi*. The Court of Accounts is also competent to control national federations' accounts.[45] This is due to the public character of the service relationship between national sport federations and CONI, which directly or indirectly finances the national federations, and also to the public nature of CONI's resources.

In Latvia, the State budget funds for sport have been allocated in

33 Consolidation Act No. 1332 of 30 November 2007.

34 Formerly named 'Idrætsfonden Danmark'.

35 Sports Act, passed 6 April 2005 (RT1 I 2005, 22, 148), entered into force 1 January 2006, Chapter 4 - Financing of Sports, § 14 Sources of financing and § 15 Principles of financing from state budget.

36 Chapter 2 - State financing, Section 5 - Statutory state grants for local sport provision (Amendment 662/2002) and Chapter 3 - Miscellaneous provisions, Section 11 - Financing of state subsidy and grants.

37 2725/1999/ -121 Ερασιτεχνικός – Επαγγελματικός Αθλητισμός και αλλες διαπαξεις ΦΕΚ Α' 121/17.6.1999, ΝΟΜΟΣ ΥΠ' ΑΡ. 2725

38 See Chapter VIII of the Sports Act.

39 217/1998 (XII.30.) Korm.

40 Number 6 of 18th May, 1999.

41 Irish Sports Council Act, 1999, s. 26.

42 Law-Decree no. 138 of 2002, *Interventi urgenti in materia tributaria, di privatizzazione, di contenimento della spesa farmaceutica e per il sostegno dell'economia anche nelle aree svantaggiate,* Art. 8.1.

43 Idem Art. 8.4

44 Idem Art. 8.10.

45 See Corte dei Conti, Lazio sez., judgment of 23-01-2008 no. 120 at pages 9-12 (doc. 06).

accordance with the annual State budget law. The Financial Commission of the Ministry of Education and Science assesses financial proposals submitted by the sports federations in accordance with the internal regulations of the Ministry of Education and Science, by which State budget funds are to be allocated to sports. The Financial Commission submits the financial proposal to the Latvian National Sports Council, which develops recommendations for the division of the State budget funds in the field of sport and submits such recommendations to the Ministry of Education and Science.[46] The State participates indirectly in professional sports financing since State budged funds have been allocated to the specialised sports organisation - the limited liability company "Latvian Olympic Team" - which further contracts athletes.[47] The financing system provides a transparent process for monitoring the expenditures of the State allocations. The agreements on State budget funding signed for each sports organization stipulate that a financial report shall be submitted on a regular basis. The Ministry of Education and Science monitors the flow of finances and whether expenditures correspond to the particular objective stated in the agreement.

In Lithuania sports may be financed by allocations from the State budget and municipal budgets, by funding derived from lotteries, as well as other financing legally obtained. The State can participate directly in the financing of sporting authorities. Non-governmental physical education and sports organizations may receive funds from the State and municipal budgets for the implementation of physical education and sports programmes and projects.[48] A State institution or the municipal administration shall sign contracts for the use of such funds with the organizations involved. The procedure and format for the conclusion of such contracts as well as the procedure for accounting for funds used are laid down by the Department of Physical Education and Sports. If the State and the municipal institutions allocate funds, they have the right to check how these funds are used. The organizations which have received funds from the State and municipal budgets must submit a report on the use of these funds to the institutions which have allocated the funds.

In Luxembourg, the Sports Act provides that the funds that the State grants for sporting activities, for technical supervision and for sports administration are to be determined annually in the State budget.[49] State funding is divided into subsidies and financial contributions for a specific expense, the latter requiring supporting documentation. The State provides subsidies and financial contributions for competitive and leisure sports and sports infrastructure. The State provides ordinary subsidies to sports clubs and federations, based on a point system that takes into account the number of licensed members, particularly young members, the qualifications of club trainers, and the federation's participation in official competitions. With respect to the federations, the State is more inclined to provide financial contributions for the federations' operating expenses than ordinary subsidies.

In Malta, a company may prove to the satisfaction of the Commissioner that it has made a cash donation to an athlete or sports organisation participating in national or international sports events and such events are approved by the Malta Sports Council. Such donation may then be claimed as a deduction against income for the year of assessment in which it is made, provided that a certificate is issued in this respect by the Malta Sports Council and the said athlete or sports organisation is not in any way related to the donor company. The State participates indirectly through the schemes made available by the Malta Sports Council to those sport organisations that are registered.[50] There are several incentive Schemes for improvements of facilities, equipment and education to help grassroots athletes, including the maintenance and upgrading of sport facilities. The State, through its Sport Authority, verifies that the public funds received by the organisations were used for the purpose for which they were granted. At the end of their financial year, sport organisations registered with the Malta Sports Council must submit their audited accounts so that the Council can verify that the organisation has not become profit-making.

In the Netherlands, a general framework for subsidising the sport sector is laid down in the Public Welfare Act of 1994. National sports associations can file an application with the Ministry of Health, Welfare and Sport for an annual subsidy for performing their activities. Occasionally they may apply to other ministries for subsidies, for example to finance special projects in the field of sports. Besides this, municipalities and provinces spend many millions of Euros to maintain sporting facilities, to organise major events and to fund special projects, but also to stimulate elite sport. The associations and/ or clubs are accountable for their expenditures. In addition to public financing, the National Olympic Committee (NOC*NSF) provides subsidies to regular members. This money comes from the revenue generated by the National Lottery, which is involved in organising games of chance. Some of the funds that are available for sport are paid directly to sports associations. Another portion goes to umbrella organisations. These umbrella organisations receive funds in order to maintain themselves and to carry out activities for the purpose of supporting the sport associations.

In Poland, the sports federations are funded from different sources, that is, membership fees, voluntary contributions by sponsors, and the State budget, that is, by means of subsidies from the central budget, special purpose funds and the funds provided by local governments. The special purpose subsidies are aimed at financing certain tasks such as: the organisation of sports competitions or Olympic preparations. Some funds allocated from the subsidies may be spent on the administrative activity of sports associations. The use of public funds is subject to control of the national or local government that grants the subsidy and by the Supreme Chamber of Control.

In Portugal, professional leagues are registered non profit associations that have financial, technical and administrative autonomy[51] The State is not allowed directly to participate in financing the organization of professional sport competitions, except for the improvement of sport facilities. The financial activities of the federations and the professional leagues are supervised by State authorities though enquiries and inspections.[52]

In Romania, the Sports Act contains provisions regarding the financing of sports activities.[53] National sport federations can request support from the budget of national or local public authorities. The budget of public sport structures is determined by local or national public authorities. It is very important that all non-governmental sport structures are exempt from local contributions and taxes. Based on special contracts, the non-governmental sport associations and the Romanian Olympic Committee may receive funding from the State budget or from the budget of local authorities for organizing sport competitions or other sport events. The State, by means of its specialized bodies, can thereby exercise financial control over the activities of the national sport federations.

In Slovakia, according to the Law on Physical Culture, the sources of financing of sport are, among others, the State budget to a minimum of 0,5% of the annual budget; the State budget under a special Act on Support of Sport; profit from lotteries and other forms of betting; and support from municipalities.[54] The State participates directly in the financing of sport, which is regulated by the Sports Act.[55] Financing of sports from the State budget is implemented through grants that may be provided for securing the organization of sport competitions.[56] The beneficiary of a grant is obliged annually to publish the amount and type of grants received if the income from grants exceeds € 33,194 a year.[57] The law does not provide for any other specific means of financial control by the State.

46 Sports Law, Published: "Vestnesis", 13 Nov. 2002, No. 165 (2740), S. 9(3), 2).
47 Idem S. 14(1) and (2).
48 Law on Physical Culture and Sport of the Republic of Lithuania, December 20, 1995 No. I - 1151, Arts. 10, 3), 11, 2) and 5), 38 and 40.
49 Loi du 3 août concernant le sport, Mémorial A-N° 131, 17 August 2005, Art. 9.
50 Sports Act, Sports [CAP. 455. 1], Chapter 455, 27th January, 2003, Act XXVI of 2002, PART II.
51 Lei no 5/2007 de 16 de Janeiro, Lei de Bases da Actividade Física e do Desporto, Art 22(1).
52 Idem Art. 21.
53 Legea Educatiei Fizice i Sportului, Law no. 69/2000, Title XI, Arts. 67-75.
54 300/2008 Z.z., ZÁKON z 2. júla 2008 o organizácii a podpore športu a o zmene a doplnení niektorých zákonov, Zmena: 462/2008 Z.z., Art. 13.
55 Idem Arts. 10 to 18.
56 Idem Art. 11 (1) (b).
57 Idem Art. 18 (5).

In Slovenia, the State directly finances the sporting authorities if they organize competitions which fall under the National Sports Program and/or annual sports programme and if that programme is of a "public interest" as defined by the law.[58] Competitions can also be financed by local municipalities.[59] In the case of professional competitions that are financed by public funds, financial control is carried out by the Court of Auditors.

In Spain, the public authorities - State, autonomous regions and local authorities - may grant subsidies to sports associations. State subsidies are awarded by the Higher Sports Council. The grounds for granting State subsidies are laid down in a Ministerial Order.[60] Moreover, groupings of clubs at national level may receive State subsidies. The Higher Sports Council is not only responsible for granting these financial subsidies to the sports federations and other sports bodies and associations, but also for authorising the multi-annual budgets of the Spanish sports federations, determining the use of the federations' net capital in the event of their dissolution, controlling the subsidies that have been granted and authorising the levying and conveyance of their property assets, where these have been wholly or partially financed through State public funds.

In Sweden, the State contributes to the financing of sport activities. Subsidies are paid to sport associations on different levels. In principle, the State pays financial contributions to the national Sport federation, which transfers money to different levels of the national sport associations.[61] In general the State transfers money to the national federation, and most of that money is transferred to local sport clubs as operating grants. Beyond that, most subsidies for sport derive from the State-regulated organisation dealing with lotteries and other forms of betting. However, in a government proposal presented in January 2009 it was suggested that the financial contribution via this National Lottery be replaced by a more stable and predictable financial contribution directly from the State.[62] Regional county councils also pay contributions to the sport associations at the regional level, independently of State subsidies. At the local level, municipalities give direct or indirect financial support to sport clubs. For instance, a sport club could receive funding from the local authorities depending on the number of members. Furthermore, the local authorities are often in charge of football grounds, sports centres, and so on. Indirectly, this amounts to support for local sport activities since clubs can thereby rent time for playing, training, and so on, at a reasonable price. The State monitors the financial support to sport. Reports from the Swedish National Audit Bureau and the Swedish Agency for Public Management account for financial contributions to non-profit associations. One conclusion of such reports has been that there is no common basic policy for financial support from State authorities. Further, it was noted that there is no common policy or regulations governing financial support at the regional and local level and that monitoring systems were insufficient.[63] In 2009, Government proposals were presented for the establishment of a new monitoring system.[64] According to these proposals, the Centre for sport research (CIF) would be responsible for the annual monitoring activities whereby certain criteria - formulated in rather general terms related to general goals for State support - have to be used, such as sport as a "popular movement", the importance of sport for public health, sport and its relevance for children and youth, equal participation of men and women, training in democracy, and so on.[65] Before, monitoring was carried out by means of reports from national sport federations on different aspects of the use of financial contributions to sport. These reports, focusing on quantitative data, are now to be completed within the terms of the new monitoring instruments.

In the United Kingdom, the Department of Culture, Media and Sport (DCMS) advised that it undertakes the following funding activities in respect of sport: DCMS provides significant funding for sports provision, improving the quantity and quality of sporting opportunities at every level, from the playground to the podium. Our aim is to encourage wider participation in sport, helping to create a more active nation through sport and improve performance. In June 2008 the DCMS published "Playing to Win - a new era for sport", which sets out the Government's ambition to become a truly world-leading sporting nation, capitalizing on the 2012 Olympic Games and Paralympic Games. The main funding elements in connection with professional sports are:

- *Sport England*: The DMCS funds Sport England, which is responsible for delivering the government's sporting strategy in England in the same way as the Sports Councils do for the devolved Home Countries of the UK. It distributes exchequer and lottery funding and advises the DCMS on sports policy. Designated sports authorities such as governing bodies, clubs and local authorities may receive such funding. The Government's equality agenda in sport and their community programmes are channelled through Sport England.
- *UK Sport*: Established by Royal Charter in 1996, UK Sport works in partnership with the home country sports councils and other agencies in an effort to lead sport in the UK to world-class success. UK Sport is responsible for managing and distributing public investment and is a statutory distributor of funds raised by the National Lottery. UK Sport is focussed on elite sporting success. It develops and funds performance and events programmes.
- *Sports facilities*: The DCMS funds new or refurbished public sports facilities. For example, the government partly financed the construction of Wembley Stadium.

The State exercises financial control directly through the normal rules on taxation and indirectly through the funding programmes mentioned above.

4. Conclusion

To what extent are the public authorities of the EU countries involved in the organisation and functioning of professional sport competitions? Have they adopted an attitude of aloofness or do they intervene on the basis of sports legislation? In other words, have they adopted a "non-interventionist" or an "interventionist" model of sport governance? Another interesting question is if and to what extent the legislators in the various EU countries have provided the public authorities with powers to control the financial situation of the sport sector. Apart from legislation, another means available to governments to exercise control over the sports movement is access to funding[66]. By regulating the flow of money into the sports movement, a government with a non-interventionist sports legislation model can have as much or more of an impact on the sports movement than an interventionist-type country. In the Annex below the findings of the T.M.C. Asser Instituut's research study for the European Commission are summarized concerning these issues, country-by-country.

The European Model of Sport has as main feature its pyramid structure of sport organisations. Sport clubs are members of one national federation (known as the *One-Association-Principle)*; that federation forms part of an international federation. The regulations of the international federation must be implemented in the regulations of the lower echelons. Where an Olympic sport and a pre-Olympic or Olympic event is concerned, the international federation is subject to the rules and regulations of the International Olympic Committee

58 The Law on Sport of the Republic of Slovenia, art. 3.
59 Idem Art. 7.
60 Ministerial Order ECI/2768/2007, of 20 September, respecting the rules for awarding subsidies and financial grants by the Higher Sports Council.
61 See Ordinance Förordning (1999:1177) om statsbidrag till idrottsverksamhet.
62 The Government's proposition 2008/09:126 Statens stöd till idrotten. See also Official report SOU 2008:59 Föreningsfostran och tävlingsfostran - En utvärdering av statens stöd till idrotten.
63 Riksrevisionen, Offentlig förvaltning i privat regi - statsbidrag till idrottsrörelsen och ideella organisationer (RIR 2004:15). See also Bidrag till ideella organisationer - kartläggning, analys och rekommendationer, Statskontoret, Rapport 2004:17, Stockholm 2004.
64 The Government's proposition 2008/09:126 Statens stöd till idrotten. See also Official report SOU 2008:59 Föreningsfostran och tävlingsfostran - En utvärdering av statens stöd till idrotten.
65 The Government's proposition 2008/09:126 Statens stöd till idrotten, pp. 32 f.
66 André-Noël Chaker, Good governance in sport - A European survey, Council of Europe Publishing, Strasbourg, September 2004, p. 11.

(IOC). National federations in interventionist countries could be sandwiched between the sports legislation of the country and the rules and regulations of the higher echelons. Serving those two masters, normally, does not give way to conflicts, because - as said before - interventionism should not be taken to mean undue State control or governmental infringement of the basic freedoms of sports NGOs. However, the occurrence of conflicts is not a purely academic question. This was for example proven in 2006, when FIFA suspended the European football champion Greece and its member clubs from international competition because of government interference in the sport. The Hellenic Football Federation was suspended for not being in line with the principles of the FIFA Statutes regarding the independence of member associations and the independence of the decision-making process of the football-governing body in each country. In the shortest possible time the Greek Parliament approved an amendment to the relevant legislation to make the Greek Football Federation more independent; FIFA's emergency committee then lifted the suspension.

ANNEX

Sports legislation framework and sports financing in EU countries

Country	Sport in the Constitution	Sports Act	Type of Sports Legislation	Direct/indirect financing by the State
Austria	Yes	Yes	Non-Interventionist	Direct and indirect
Belgium	No	No	Non-Interventionist	No
Bulgaria	Yes	Yes	Interventionist	Indirect
Cyprus	Yes	Yes	Interventionist	Indirect
Czech Republic	No	Yes	Non-Interventionist	Direct
Denmark	No	Yes	Non-Interventionist	Indirect
Estonia	No	Yes	Non-Interventionist	Direct
Finland	No	Yes	Non-Interventionist	Direct
France	No	Yes	Interventionist	Indirect
Germany	No	No	Non-Interventionist	No
Greece	Yes	Yes	Interventionist	Direct
Hungary	Yes	Yes	Non-Interventionist	Direct
Ireland	No	Yes	Non-Interventionist	Direct
Italy	Yes	Yes	Interventionist	Indirect
Latvia	No	Yes	Interventionist	Direct
Lithuania	Yes	Yes	Non-Interventionist	Direct
Luxembourg	No	Yes	Non-Interventionist	Direct
Malta	No	Yes	Non-Interventionist	Indirect
Netherlands	No	No	Non-Interventionist	Direct and indirect
Poland	Yes	Yes	Interventionist	Direct
Portugal	Yes	Yes	Interventionist	No
Romania	No	Yes	Interventionist	Direct
Slovakia	No	Yes	Non-Interventionist	Direct
Slovenia	No	Yes	Non-Interventionist	Direct
Spain	Yes	Yes	Interventionist	Indirect
Sweden	No	Yes	Non-Interventionist	Direct
United Kingdom	No	No	Non-Interventionist	Indirect

The Bulgarian Model of Sports Governance

by **Veselina Kanatova-Buchkova***

1. Legal ground

The main legal act that regulates the public relationships concerning the physical education and sports in Bulgaria is the Bulgarian Physical Education and Sports Act /PESA/ which was passed by the Bulgarian parliament in 1996.

The term 'sports' is also used in the Bulgarian Constitution where article 52, par. 3 stipulates that: 'The state guards the health of the citizens and stimulates the development of sports and tourism'. This is the only constitutional norm that uses the term 'sports' in connection with the citizen's health. The norm is within chapter two of the Constitution which regulates the main rights and obligations of the Bulgarian citizens and is part of article 52 which outlines the main principles of the health system in the republic of Bulgaria. The correlative relation between sports and public health is stated further as a principle in article 3, par.2, p.2 of the Physical education and sports Act, which stipulates that the sports and physical education system should be: 'a complex binding of physical education and sports with health care and recreation activities, education and culture, into a common functional system for improvement of its balanced effect on all strata of the population.'

The concretization of the constitutional norm for sports related matters, namely the concretization of how the state 'stimulates' sports is made by Physical education and sports Act. Article 4 of the same outlines the means by which the state applies its powers in stimulating the sports in Bulgaria. In fact the 'right for sports' is firstly recognized as a main right of the citizens not in the Constitution but in article 4 of the Physical education and sports Act. According to art.4.1 the state encourages the development of physical education, sports and tourism by recognizing the physical training, sports and tourism as internal necessity and right of each Bulgarian citizen to maintain and perfect his moving activities. Further the named article lists the state's competence towards sports, that are, not comprehensively, as follows: The state throughout its organs creates the normative regulation of physical education and sports (art.4.3), establishes the conditions for the development of the 'sports for all' - the children sports, the sports for the pupils and students (art.4. 4); ensures the preparation and the participation of national and Olympic teams in international competitions and Olympic games (art.4.5); builds, maintains, modernizes and controls the exploitation of sports bases and equipment - public state property and establishes the conditions and procedures for their exploitation (art.4.6); supports, coordinates, regulates and controls the activity of the sports organizations (art.4.7); educates the sports specialists and supports their future qualification (art.4.10); finances the approved sports related projects (art.4.12). The same authorities are given to the municipalities as bodies of local self-governance, even though they are not mentioned in the Constitution as executive bodies which 'stimulate' sports.

In fact, the whole following legal regulation of sports activities in the Act on physical education and sports, namely - the type and competence of state bodies of physical education and sports governance, the status of the sports organizations and the degree of their dependence to the state, the regulation of the rights and obligations of the athletes, the exploitation of the sports bases, the financing of sports and other, is structured according to the abovementioned general principles about the state and the municipalities authority in sports. What I mean is that because it is the state, or a concrete municipality, which has the authority to regulate all the basic sports related matters, to control their execution and to finance the sports activities, it could be concluded that the sports system in Bulgaria is built according to the mentioned by Josef Cobra 'interventionist model'.[1]

2. Government bodies for management of the sports.

In accordance to Art. 7 from the active Physical Education and Sports Act /PESA/ the basic directions of the national policy in the field of the sports are approved by the Council of Ministers /CM/. CM accepts national program for development of the physical education and sports for the period of 4 years (the period of the mandate of the government according to the Bulgarian Constitution which coincides with the Olympic cycle) and reports its fulfilment before the National Assembly of the Republic of Bulgaria /NARB/. The CM also annually provides the necessary funds for the development of physical education and sports due to the State Budget Act of Republic of Bulgaria where financing of the sports activity is stipulated.

In the frame of its power in the capacity of a common executive - ordering body which determines and performs the government policy in every aspect and sphere of the government management and in particular the system of the physical education and sport, the CM determines the special administration institutions which will fulfil the government policy in the area of the physical education and sports. Regularly these are the respective Ministers which are members of the Government and which are approved by NARB after the newly chosen prime minister introduces the members of the new Council.[2] In the cases when for a definite sphere of government management CM does not provide a creation of separate ministry the same has the power, stipulated in Art. 35 from the Administration Act, to establish a new administrative structure due to a Council of Ministers decree which structure could be empowered and burdened with the fulfilment of the respective government policy in a certain sphere of public life. Namely due to that competency of the CM was the Committee for the physical education and Sports established as a special body of CM for pursuing the government policy in the area of the physical education and sports. The establishment of the body and the assigning of the functions in the field appointed above do not contradict the aims of the law and does not subordinate the government policy to the internal interests of the Committee. That is that way because CM exercises its constitutional powers by the help of its bodies which CM manages and controls. Its power is to cancel by its own will these acts of the government institutions which it considers to contradict the entire governing of the state (Arg. Art. 107 from the Constitution, respectively decision nr. 1562/15.03.2000. of Supreme administrative Court, 5 member jury).

When PESA was accepted in 1996 there were provisions for the powers of the chairman of the so-called by the law - State Agency of Youth and Sports /SAYS/. Art. 8 determines the powers of the chairman of State Agency of Youth and Sports, predestines the constitution of a special administrative body which should pursue the government policy in the field of physical education and sports. From the administrative point of view the capacity of "executive body" the chairman of the agency powers, as it was already said, were expressly determined by the law. The chairman was helped by administration which activity, structure and competence were determined by structure regulation accepted by CM (Art. 48 from the Administration Act).

Before the acceptance of PESA there was a lack of comprehensive

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1 Cobra, J., The Slovak Act on the Organization and Support of Sports; a Missed Opportunity?, ISLJ, 2009\3-4.

2 According to Art. 108. (1) from the Constitution of Republic of Bulgaria, The Council of Ministers consist of a Prime Minister, Deputy Prime Ministers, and government ministers.

legal regulation in the sphere of the society relations connected with the management of the physical education and sports in Bulgaria. This activity was firstly performed by the Bulgarian union for physical education and sports, then Committee for physical education and sports (its name has been changed many times), that also had the position of bodies established with governmental orders and subordinated to the Government. Probably that was the reason for accepting in PESA in its first edition the state organ to execute the government policy in sports to be an agency, not a ministry.

Together with the change of the Governments however, after PESA was accepted, the status of the administrative bodies which exercised the powers in the area of the physical education and sports was changed. In 2002 after the Parliament elections in Republic of Bulgaria the newly chosen Government took the decision for transforming SAYS into Ministry of Physical education and Sports and respectively the chairman position of SAYS was transformed into a Minister of Physical education and Sports. The transformation in the status was made by a change in PESA, which is the legal way for doing so, and in § 34 of the Act for amending and complementing of PESA was stipulated that everywhere in PESA the word "chairman of SAYS" to be changed with Minister of Youth. In § 35 from Act for amending and complementing of PESA was also stipulated that all the properties of SAYS would be legally accepted by the newly established CM Ministry of sports. On the next Parliament elections held in 2005 the Government was changed and the newly elected Government regained the position of the Ministry of sports into an Executive Agency. The change in the position of this specialized government body was made due to amending of PESA and especially the provisions of §4 & §5 from the Act for amending and complementing of PESA and respectively the secondary legislation was again changed by orders and decrees of CM.

The newly chosen Government during 2009 regained the position of the agency into a ministry. Among the members of the new Government which were introduced by the prime minister and approved by the NARB was elected a Minister of the physical education and sports as a special administrative body in that area of state government.

In a view to the change CM accepted - DECREE nr. 195 of CM dating from 6TH of August 2009 for closing of SAYS and for accepting a structure regulation of Ministry of physical education and sports (posted in State Gazette c. 64/ 11.08.2009 into force from 05.08.2009).

Neither at the moment of composing the present resumes and not before that was made a change in the *legislation* concerning the position of SAYS in the way that was described above and connected with the previous two amendments. The above mentioned change was made with the *decree of the CM* which from a legal point of view is a subordinate to the Law legal act. In that connection the decree in principle should be in compliance with the law.

The Lack of amendment in the legislation (amendment in the PESA) predestines the following legal conclusions:

Firstly, in view to the secondary character of the Decree in its capacity as secondary legislation which provisions should be complied with the provisions of the higher legislation - the laws, the decree contradicts to the active legislative act, namely the PESA. That is so because art.8 of the PESA stipulates that the chairman of an agency is the special administrative body that pursues the government policy in the area of sports but not a Minister. In the decree for closing of SAYS and the creation of Ministry for the Physical Education and sports it is appointed that the Ministry has been established on the grounds of Art. 35 form the Administration Act. Actually, as it was commented above, CM has the power to institute with a decree newly administrative bodies which are not provided in the Constitution of Republic of Bulgaria i.e. has the right and the power to establish a Ministry, as well as to accept a structure regulation for its activity, but CM has no power to amend the laws which are acts with a higher legal power by comparison to the acts of the government. The law should be changed with an act of the same level accepted by NARB. In this sense when such legislation is not accepted according to the present moment, the decree of CM contradicts to the law. In contradictory cases, according to the regulation of Art. 5, par. 1 of Administrative Procedure code in connection with Art 15, par 3 from the Statute instruments Act, the superior legislative act should be applied, or in the case PESA.

This contradiction leads to some legal paradoxes in the application of the sports related legislation. The following example describes some of the legal consequences of the abovementioned controversy:

In the secondary legislation regarding the application of PESA, as well as in the Act itself, it is provided that the chairman of SAYS issue, refuse, renew and withdraw licenses to sports federations and to the national sports organizations for carrying out sports activities (Art.8, par.3, p. 12 from PESA). In the Ordinance for the procedure of acquiring a license of the sports organizations in Republic of Bulgaria accepted with Decree of CM dating from 26.09.2008 is provided that, according to the law, the body that manages the licenses of the sports organizations is the chairman of SAYS. According to art. 1, par. 5 from the Ordinance which is an active secondary legislative act, the orders of the chairman of SAYS regarding licenses of sports organizations should be appealed in accordance with the Administrative Procedure Code. In that connection it should be pointed out that the procedure for appealing the administrative acts of the chairmen of executive agencies and the ministers is not the same.

In the cases where a subject of appeal is an administrative act issued by a Minister the competent Court that should consider the appeal as first instance is the three member jury of the Supreme Administrative Court /SAC/. The decision of the first instance court should be appealed in front of the five member jury of SAC. And, on the opposite, when we have an appeal against an administrative act of a chairman of a state agency the competent court for considering the case as first instance will be the respective administration court whereby the decision could be appealed in front of SAC which settles the dispute for the law compliance of the administration act issued by the chairman of an agency peremptory. In the present case the Decree due to which SAYS is closed and a Ministry of physical education and sports

3 According to Art. 4 of the Decree the ministry, in particular the minister, has the following powers:
1. shall manage, coordinate and control the implementation of the state policy in the sphere of physical education, sports and social tourism;
2. develops and proposes for approval by the Council of Ministers the objective and the basic tasks of a national strategy and national programme for the development of physical education and sports;
3. manages the organization together with the sports organizations of the administrations of the executive power and the National chamber of the Municipalities of Republic of Bulgaria, the development and implementation of the state policy in the sphere of physical education, sports as well as the social tourism;
4. coordinates the activity of the administrative structures in the system of the executive power municipalities and the sports organizations during the fulfilment of the National program for physical education and sports;
5. carries out a supervision over the activity of the sports organizations for abiding the Physical Education and sports Act;
6. implements, jointly with the sports federations and the Bulgarian Olympic Committee, the financing of a programme for training and participation of Bulgarian athletes in Olympic games;
7. supports the activities of sports organizations registered as non-profit legal persons for performing activities for the public benefit, for the implementation of the state policy in the field of sports and social tourism;
8. represents the ministry as a legal entity;
9. administers the state-owned sports sites and facilities;
10. exercises the rights of the sole owner of the capital in sole-owner trade companies and the rights of an owner of the capital of the state in trade companies in the sphere of sports where the state is a stock holder or partner in the frames of the powers given;
11. exercises control over the observance of the regime for using state or municipal-owned sports sites and facilities for the needs of physical education, sports and social tourism;
12. appoints and dismisses the managing bodies of the Bulgarian sports totalizer, concludes contracts for delivery of the management with each one of the members of the Board of Directors and with the executive director and proposes for adoption its rules of organization by the Council of Ministers;
13. issues licenses to sports federations and to the national sports organizations for carrying out sports activities;
14. represents the Republic of Bulgaria in concluding international agreements

was established without the necessary law amendment, every act of the minister of physical education and sports issued on the grounds of the CM`s Decree will be legally conforming because it would have been issued on the basis of an statutory instrument that contradicts to the law.

As a conclusion according to the present moment the basic body for sports management is a Ministry of physical education and sports which powers are stipulated in a Decree of CM for its creating having in mind the abovementioned.[3]

3. Sports organizations and clubs. Relations between the sports organizations and clubs and the ministry of physical education and sports. Status of the sports.

The sports organizations, according to the PESA, are separate legal entities which are incorporated as Joint Stock Companies according to the Commerce Act (for the professional sports clubs) or in the form of legal entities with non- benefit purpose for carrying out activity in private or public favour according to the Non profit Legal Persons Act.

PESA recognizes three basic kinds of sports organizations in Republic of Bulgaria.

The first basic kind of partnership is the sports club.

The sports clubs are voluntary associations of citizens, registered as non-profit legal persons, which develop and promote physical education and sport and carry out training and competition activities for one or more sports (Art. 11, par. 1 from PESA). Sports clubs which develop and practice professional sports may be registered as joint-stock companies - professional sports clubs, or as non-profit associations - professional sports clubs.

Professional sports clubs must also meet the following additional conditions:

1. their name should explicitly indicate that they are a "professional sports club";
2. to have stipulated through contracts the rights and obligations of the professional athletes according to their status;
3. one natural person or legal person should not hold the majority shares or the control of two or more professional sports clubs participating in one competition or championship;
4. professional sports clubs - joint-stock companies shall issue only registered stocks. The merger, separation, division and incorporation of professional sports clubs pursuant to the Commerce Act or pursuant to the Non-profit Legal Persons Act shall not lead to the change of the ranking of teams in the respective championships and their transition from one group to another.

Sports clubs build and manage sport facilities, organize and administrate sport contests, prepare competitors. The sports clubs after registration as a legal entity are obliged to submit an application for membership in the respective sports federation (Art.10, pat.6 from PESA). The membership in the respective federation is a condition for the sport club to have the right to propose to the respective sports federations the granting, termination and withdrawal of competition rights of athletes, carry out transfer of athletes and hold the rights of advertising, TV and radio broadcasting of sports events organized by them under conditions and following a procedure determined by the respective sports federation as well as to provide sports services (Art. 13, par.3 from PESA). That requirement has been initiated with the amendment of the law during 2008, before the amendment only the registration of a sports club as a legal entity was enough for exercising of the rights stipulated in Art. 13, par.3 from PESA.

The second kind of association is the sports federation. According to the law they are voluntary associations of sports clubs for one or similar type of sport which coordinate the development, practising and administration of the respective sport on national level and represent their members before the state and international sports organisations. (Art. 14, par.1 from PESA). It is an obligation of the sports federations to be granted a license by the competent state body.[4]

Together with gaining a sports license the respective sports organization receives some particular powers in the field of the sports activity developed. These are listed in Art 19 from PESA and are as follows:
(1) Sports federations holding a sports license shall have the right to:

1. regulate and organize the state championships of the country for the respective type of sport
2. determine the champions for the respective age groups;
3. confer titles to athletes, coaches and sports specialists under a procedure specified with a regulation of the Council of Ministers proposed by the Chairperson of the State Agency of Youth and sports;
4. develop and apply specific normative and methodological and administrative regulations for the respective sport;
5. select and organize the training of the national teams and represent the Republic of Bulgaria at international sports competitions and forums;
6. train specialists for the respective types of sport;
7. sanction athletes and officials who have permitted doping usage and application of doping methods in the training and sports activities;
8. adopt rules and carry out sports jurisdiction and sports and technical arbitration;
9. grant, terminate and withdraw the competition rights of athletes and hold the rights of advertising, TV and radio broadcasting of sports events organized by them by submitting, on a contractual basis, a percentage of the receipts to the sports clubs participating in the event.

In a view to the rules regulating the conditions for gaining a sports license in Republic of Bulgaria an important notice should be made. As I marked above, according to Art. 17, par 1 from PESA the chairman of SAYS gives a sports license when he considers that the respective sports federation is responding to the criteria and conditions established by the law, following the procedural rules established in the Ordinance accepted by CM. Therefore, on one hand, the law is the statutory act that should initiate the conditions to which the

for cooperation in sports and youth activities within the competences assigned to it by the Council of Ministers and coordinates the actions for their fulfillment;

15. in compliance with the requirements of international sports organizations, upon coordination with other state and municipal bodies, permits the holding of regional, European and world championships on the territory of the Republic of Bulgaria;
16. organizes the prevention and control over the use of doping in sports;
17. supports and interacts with the competent state and municipal bodies, as well as with their administrations, in the fight against violence in sports;
18. adopts and supports programmes for improvement of the qualification of sports specialists and training of instructors for the needs of mass sports;
19. distributes the subventions from the state budget and other state funds for the physical education and sports as well as for the social tourism, finances the approved programs and projects of the sports organizations and carries out the control for the purpose spending of these funds;
20. distributes the subventions from the state budget and other state funds for sports to disabled persons and permanently disabled persons, as well as guides the projects connected with that activity;
22. approves the criteria, conditions and the procedures for prize awards of sportssmen, sportss specialists, public figures as well as young talents in different filed of public life;
23. proposes to the Minister of Finance for approval the schemes for distribution of the funds from the Bulgarian sports Totalizer;
24. allocates the resources from the funds of the Bulgarian sports Totalizer for development of physical education and sports in compliance with the national programme adopted by the Council of Ministers;
25. gives proposals and statements of harmonization of the legislation of Republic of Bulgaria in the field of physical education and sports as well as of the social tourism with the international statutory instruments;
26. exercises powers as an institution for appointing and dismissing in regard to the officials and as an employer in regards to the employees who are working on the grounds of labor legal relations;
27. introduces a report for the activity of the Ministry in CM every year.

4 At present for the reasons described in p. 1 of the present resume and the lack of amendment in the law, in accordance to Art. 17 from PESA the chairman of SAYS is the competent body for issuing, renewing and refusing to issue a sports license to sports federations and national sports organizations.

sports federation should be responding in order to receive a license and on the other, the procedure which should be followed in receiving the license is settled in an Ordinance for the procedure for gaining a license as sports organization in Republic of Bulgaria. In that sense, the conditions for gaining a sports license, numerously stipulated in Art 17 form PESA are - *the applying sports organization should have a registration as a non-profit legal entity for performing activity for public benefit with the purpose of organizing and conducting training and competitions in a specific or similar types of sport, should have an established structure as an association of sports clubs, have adopted rules for holding competitions included in the state sports calendar in the respective sport and have an adopted development programme in the respective subject area of physical education and sport and social tourism*. It should be pointed out that the law does not provide as a requirement for gaining a sports license the membership in a respective international sports federation. The membership in the respective international sports federation is firstly settled in the secondary legislation, namely the Ordinance for the procedure of gaining a license of the sports organizations in Republic of Bulgaria, issued by CM. Thus the Ordinance arranges additional conditions which are not stipulated in the law and for the settlement of which CM is not empowered by the law. At present, provision Art. 17 from PESA establishes regulatory competence of CM only in the frame for issuing a secondary statutory instrument which should provide *the procedure* of issuing, cancelling, amending and renewing of a sports license but not to provide any prerequisite legal material for license. In that connection, I consider the provision of Art. 11 from the Ordinance which stipulates that together with the package of documents for applying for a sports license there should also be enclosed a certificate that the respective sports organization is a member of the respective international federation, contradicts the law. [5]

Questions of dispute in the practice and theory are arising from the given capacity of sports federation in Art. 19, p. 9 from PESA to adopt rules and carry out sports jurisdiction and sports and technical arbitration. The regulation of Art 19, p.9 from RESA firstly places some dispute questions about the character of the issued by the Sports Federations /SF/ acts and the connected question about the admissibility for appealing of these acts in front of the court.

Each sports federation accepts a regulatory act with which it determines the basic points of its activity - organization structure, bodies of management and representation, powers of the bodies of the sports organization, the way of appealing theirs acts and others. The sports federations also issue regulations, ordinances connected with the contractual, sports and transfer rights of the sportsmen, regulations concerning the disciplinary procedures and sanctions.

Firstly, I consider that indisputably the sports federations have administrative competence and the acts that they issue have an administrative character. Actually the sports federation are not administrative bodies included in the administration of the state. They are sports organizations which are registered as separate legal entities under the regulations of the Law for the non - profit legal persons as I mentioned in the resume above. On the other hand, PESA assigns to the sports federations powers of management of the sports activity which are part of the government policy in the area of physical education and sport. Furthermore, sports federations are liable together with the specialized government body - the ministry or agency for the realization of the national program for development of the physical education and sports in Republic of Bulgaria. In that sense I consider that sports federations are organizations which are empowered by PESA with executive - order capacities in the field of physical education and sports and with the exercising of them they carry out administrative activity. I think that conclusion is also supported by the definition for an individual administrative act, settled in Art. 21 from the Administrative Procedure code according to which administrative acts could be issued by other empowered bodies or organizations besides the administrative authorities.[6]

Secondly, the question is about the kind of acts issued by sports federations - whether they are individual, general, or normative administrative acts. Considering that the individual administrative act is directed to a particular recipient, whereas the acts of the sports federations issued under art 19, p. 9 of PESA are directed to a broader circle of legal subjects and having in mind the material essence of the individual and normative (statutory) act, it could be concluded that the acts of the licensed sports federation have a normative character. The normative administrative acts in comparison to the individual administrative acts contains legal regulations which are determined by the theory as "secondary legislation" and for that reason their aim is to give datailization and concretization to the first line of regulatory rules and legislation. The material legal essence of the statutory administrative acts explains their application for many times over unlimited number of recipients. In that sense is the legal explanation for the statutory administrative acts stipulated in Art 75 from Administrative procedure code.

In connection to the abovementioned, the acts of the sports federations due to which they establish rules to organize their activities in connection with the different kind of sports, establish rules about the status and transfer of athletes, about disciplinary sanctions and statutory administrative acts due to which a secondary legislation is created.

In view to the legislative competence of the sports organizations established in art. 19 par. 1 from PESA an important notice should be made. Only the *licensed sports federations* which have gained their sports license under the procedure established have the expressly determined powers in art 19 par. 1 from PESA. Article 19, par, 1 says: Sports federations holding a sports license shall have the right to…"issue rules and to execute sports arbitration (p .9 of art.19 from PESA). Therefore the organizations which have not received a sports license under the procedure established do not have the rights stipulated in art. 19, p. 1, 1- 10 inclusive. On the next place the provision of Art. 19 par. 1 from PESA distinguishes the type of sports organizations that have the rights given in the aforementioned provision and these are only the *"sports federations*". Therefore in view to the difference between the sports organizations - sports clubs, sports federa-

5 In connection to the described contradiction in the legal settlement of the conditions for issuing a sports license should be mentioned a case from the practice database of the Supreme Administrative Court that confirms a refusal of the chairman of SAYS to issue a sports license to a federation which has not presented a certificate proving the membership in an international ports federation. In that hypothesis there has been an objective impossibility for the presenting of that certificate because there has not been such an international organization where a membership could be achieved. The Supreme Administrative Court confirmed the rejection for issuing a license of the chairman of SAYS and the court concluded that the requirement for membership in international sports organization was an obligatory one and that this requirement had been implemented in an imperative statutory institute and like such one it had to be fulfilled. In Decision 6694/27.06.2007, the Supreme administrative court accepts in a view to the quoted case that: "In regard to the obligatory membership in an international federation there is an objective impossibility of presenting a certificate required by Art. 11, p. 3 from the Ordinance because considering the statement of the appellant such an international organization does not exists. That condition regarding the present legal procedure is an obstacle for granting the appeal of the appellant because it is settled in an imperative legal form."
I consider that conclusion as wrong. As I mentioned above the law does not provide for a condition for gaining a sports license by a sports organization the membership in an international sports federation. That requirement is settled for the first time in a secondary normative administrative act - Ordinance for the procedure of gaining a license of the sports organizations in Republic of Bulgaria. Together with the acceptance of the provision of Art. 11, p. 3 from the Ordinance which settles the requirement for presenting a certificate proving the membership in an international organization as enclosure to the documents for applying of the license CM has gone out of the assigned regulatory delegation. It should be remarked as well the circumstance that the decision is issued during 1999 when the provision of Art. 17, par. 1 from PESA has not provided the expressly regulatory competence for issuing the ordinance for gaining a license by a federation. Although during the action of the legal provision of Art. 17 from its acceptance to the present moment a membership in an international organization for gaining a sports license has not been required. In that sense the settlement of additional material prerequisites for gaining a sports license which are not provided by the law but in secondary statutory norms is causing the nullity of these

tions and national sports organizations only the sports federations which have gained the license under art. 19, par. 1, p.1-10 have the legal competence of issuing normative acts regulating the behaviour of the subjects participating in the respective kind of sport.

The question is interesting regarding the legal character of the acts issued by the third type of sports association according to the PESA, namely the *national sports organizations*. National sports organizations, according to art.15 from PESA are voluntary associations of sports clubs and/or sports federations which coordinate their activities in a specific subject of activity in the system of physical education, sports and social tourism, and interact with the state and with the international sports organizations in forming and implementing the national sports policy. The State Agency of Youth and Sports (now the ministry of sport) acknowledges the status of national sports organizations of those organizations whose members constitute at least two thirds of the sports clubs and/or sports federations carrying out activities in the respective subject sphere of the system of physical education and sports.

National sports organizations shall be registered as non-profit legal persons for the public benefit. The national sports organizations participate principally in the development, implementation and reporting the results of the fulfilment of the National Programme for the development of physical education and sports.

It is indisputably accepted in the jurisprudence that the acts of the national sports associations have a normative obligatory character for the subjects addressed. As I outlined above however, only the licensed sports federation have normative authorization by the law to issue normative administrative acts establishing obligatory provisions. *In that connection the logical legal conclusion is that the acts of the national sports organizations do not consist of legal provisions with binding character.*

In the rare judicial practice connected with the acts issued by the Bulgarian Football Union, which is a national sports organization registered under the provision of art.15 of PESA, is accepted, as I mentioned, the vision that its acts are normative legal acts with binding character. Furthermore, it is accepted that the acts issued by the bodies of the BFU in some cases are excluded from judicial control.[7] I consider such a conclusion as completely irregular and even "frightening". Firstly, such provisions from the acts of BFU which excludes the courts control in regards to the administrative acts which are issued by the instituted BFU bodies contradict the Bulgarian Constitution and in specific, are in conflict with article 120, p.1 from the Constitution of Republic of Bulgaria where it is stipulated that citizens and legal persons may appeal against any kind of administrative act which they think affects them except for the expressly specified [as unappealable] by statute acts. Therefore the constitutional provision includes a rule for appealing of all kind of administrative acts regardless of their kind. In that sense, the excluding of courts control over some kind of administrative acts, on the other hand, should be settled in an express provision with legal (lawful) character. Therefore each one of the provisions of the statutory administrative acts which provides impossibility for appeal of the decisions of the bodies of the sports organizations contradicts the Constitution of Republic of Bulgaria.

4. Athletes

PESA distinguishes two types of athletes - amateur athletes and professional athletes. The status of the athletes - professionals or amateur is determined by the regulations accepted by the relative sports federations. The regulations of the sports federations about the status of the athletes, according to Art.35, par. 3 from PESA should be approved before issuing from the chairman of the state agency - now the minister of physical education and sport. That requirement is an obligatory prerequisite for the legal conformity of the statutory acts of the sports federations under art. 35, par. 3 from PESA and the non compliance of the same would lead to a defect in the administrative act which is a ground for its cancellation. In that connection, court decision 11634/08.10.09 of SAC which motives I fully support. [8]

One gains the capacity of an "athlete" by registering in the respective federation. After the registration the person receives "athlete rights" for competing for the sport club which initiated his registration in the respective sports federation. The competition rights are determined in PESA as "a combination of the athlete's right to participate in the training and competition activities of a sports club as well as the rights related to this participation". With the registration in the sports federation, the sports club which promoted the athlete for registration gains the transfer rights of the certain athlete. The transfer rights are designated by PESA as well as a "combination of the right to negotiate a change in an athlete's club affiliation and the right to receive a transfer price" (Art. 35 from PESA).

Together with the legal provisions connected with the statute of the athletes there is a secondary legislative act - Ordinance nr. 3 from 18TH of June 1999 for the statute of the persons which participate in training and sports-competitive activities and for transfer of competitive rights issued by the Chairman of the Commission for physical education and sports. The Ordinance determines the statute of the persons participating in the training and sports competitive activities - the amateur and professional athletes, the status of the coaches, the instructors and sports referees, as well as the basic principles in transferring competitive rights.

At first, the Ordinance lays down some basic principles connected with the establishment and the suspension of the competitive rights of the athletes. The registration of the athletes is done by the respective sports organization which issues a certificate to the athlete. The certificate gives the right for the person to participate in the training and sports - competitive activities of the respective sports organization. The registration is within the term of one sport - competitive year.

According to the Ordinance the athletes are divided in two kinds - athletes - amateurs and athletes - professionals. The criteria accepted for distinguishing the types of athletes is whether they receive a financial reward for their sport activity or not. The amateur athletes do not receive remunerations. For the sports competitive activity they have the right of funds that cover their expenses (Art.12 from the Ordinance). In contrast to them the professional athletes receive remuneration on the grounds of a labour contract or due to their professional activity in accordance to art. 13 of the Ordinance. The respective sports club that promotes the registration of a professional athlete determines the way of the legal relation between the sportsman and the organization -

norms and for that reason I consider the decision as wrong.

6 Art 21 from APC says: "Individual administrative act" shall be an express declaration of will or a declaration of will expressed by an action or omission of an administrative authority or another authority or *organization empowered to do so* by a law, whereby rights or obligations are created or rights, freedoms or legitimate interests of particular individuals or organizations are affected, as well as the refusal to issue any such act".

7 For example that is settled in Ruling 5853/27.09.00 of SAC, which is issued in connection with an appeal against the decisions of the executive committee of BFU for striking out a club from the professional "A" football league and it is accepted that the decision of the EC of BFU for excluding of the club is an administrative act but it cannot be a subject of an appeal procedure in front of the court because the provision of Art. 110, par. 1 from the Statute of BFU excludes the courts` control in regard to this kind of acts of the Executive committee of BFU. Article 65 form the Disciplinary Regulation of BFU is in analogy to the statement described above and due to it the decisions of the appeal commission towards BFU are accepted to be final and not liable for appeal in front of the court.

8 The decision is issued on an appeal against separate provisions from the Regulation of the international transfer of the Bulgarian Sports Volleyball Federation /BVF/, issued by the Managing Committee of BFU on 27th of July 2000, which Regulation was not confirmed by the chairman of SAYS under the provision of Art. 35, par.3 from PESA. In the decision in is appointed that: "Through a specification dating from 12-th of June 2008 the Court has given an expressly instruction of the Bulgarian Volley - Ball Federation that should have presented proves that the Regulation for international transfer had been approved by SAYS according to the requirements of the Physical education and sports Act. Such copy by the regulation has not been presented by the chairman of the federation in the case. There has changed the first statement of the defendant in the trial. That party at the beginning claimed that there had been such an approval by SAYS and then it changed its position and claimed that such an approval had not been necessary. That is why we accepted that the regulation of international transfers had not been approved by the chairman of SAYS. Having in mind the provisions of Art. 35, par. 2 from PESA and art. 8 from the Regulation for application of PESA such an approval is an obligatory one and the lack of it turns the secondary legislation as not legally conformed. "

whether it should be on the ground of a labour or civil contract. The football players, for example, are competing for the respective football clubs on the grounds of labour contracts which minimum requirements and contents are determined by the Bulgarian Football Union. The tennis players, for example, are competing on state championships and receive remunerations on the grounds of civil contracts which are concluded for each respective championship organized by the Bulgarian Tennis Federation. The way due to which the legal relationship between the professional athlete and the club is established does not affect legal conformity of the connection between the club and the athlete only if the respective tax and insurance obligations of the club are fulfilled.

The Ordinance determines the statute of the sports referees, the trainers and the instructors as well as the minimum requirements for the transfer of the competitive rights. The contracts for transfer should be concluded in written form with notary certification of the signatures of the parties after which they are entered in a special Transfer register (Art. 22, par 2 from the Ordinance). Art 23 from the Ordinance sets the principle of free agreement of the price of the transfer as well.

There is a provision in the Ordinance that provides an obligation for the sports clubs in cases of transfer to order a particular percentage of the transfer price on the account of the Ministry of education and sports. According to Art. 25, par 1 from the Ordinance: "The sports clubs pay 7 % of the transfer price in the account of the Committee of the Youth physical education and sports in a 14 days term after the conclusion of the contract for transfer."

It should be underlined that the quoted provision from the ordinance is grounded neither on the law nor in the Constitution of Republic of Bulgaria. With regard to this provision from the ordinance it is not legally conformed and should not be applied. That is because of the following:

Actually before the acceptance of the Ordinance, according to the provision of art. 57, p.2 from the Physical education and sports Act, the sports organizations had the obligation to order 3% from the price of the transfer of athletes in the account of SAYS. This sum was aimed to support and finance the sport. The provision of art. 57, p.2 from PESA was confronted in 2002 by the state prosecutor (the matter was referred to him by the Bulgarian Professional football league) in front of the Constitutional Court which has cancelled the provision as contradictory to the Constitution. In its decision 6/ 10.02.2002 the Constitutional Court marked that: "The legal institute in its essence settles additional financial weights out of the determined in Art. 60, pat 1 form the Constitution tax obligations in the form of withholds of amounts coming from incomes from legally completed transfer deals along with the obligation for payment of the respective taxes over the income coming of a transfer deal there is an obligation for payment towards the budget of The Ministry of Youth and Sports. The appealed provision has no constitutional grounds. There is no constitutional article from where it emerges the power of a state body which assigns over the physical and legal entities financial burdens including the burdens to finance the activity of children and youths in the field of the respective sports with the exclusion of the taxes and local fees. It is indisputable that such a financial burden is the appealed obligation settled in art.57, p. 2 from PESA. The Constitutional provision creates only the obligation for payment of taxes and fees but not the obligations for holding of amounts realized due to the activities permitted by the law." In the sense of the court's decision the norm of art. 57, p.2 from PESA was revoked and it remained no longer an obligation for sports organizations to withhold 3 % of the transfer sum for the Ministry of Youth and Sports. The provision from the Ordinance, in that connection, has no legal ground and its existence contradicts the law and the constriction, as mentioned.

The PESA does not distinguish between individual and team sport in the sense explained by Josef Corba in his article on the Slovak Act on the Organization and support of Sport.

5. Financing of the sports

The financing of the sports has two main origins in Republic of Bulgaria. The funds for sports are settled in the state budget, respectively in the municipal budgets, as well as funds for the sports are coming from the specially established state company - Bulgarian Sports Totalizator.

PESA settles the sports activities which are financed from state budget funds and the sports activities financed from the money collected from the Bulgarian Sports Totalizator. Resources from the state budget finance:

1. the construction, reconstruction and modernization of sports sites of national importance and the facilities for social tourism of national importance;
2. the expenses for educational, training and competition activities in the secondary specialized sports schools;
3. the scientific and research and applied activities in the sphere of physical education and sports;
4. the medical and doping control;
5. activities and measures from the National Programme for Promotion and Development of Physical Education and Sports;
6. other activities in the sphere of physical education, sports and social tourism determined by a law or by an act of the Council of Ministers;
7. programme for Olympic training;
8. preparation and organization of world and European championships hosted by the Republic of Bulgaria;
9. programme for youth activities (art.58, p.1 from PESA). The resources under this article are ensured on an annual basis with the Republic of Bulgaria State Budget Act and differentiate as a percentage each year.

In 2000 with an Ordering of Counsel of ministers 163 from 2-nd of August 2000 on the grounds of § 11 from PESA the Bulgarian Sports Totalistic (BST) was established as a state company under art. 62, par. 3 from the Commercial Act.

In fact BTS is the recipient of the rights and the obligations of the existing. Before its incorporation, the state owned so called "money lottery" which was a company that carried out lottery, toto and lotto games, especially betting over the results of sports games. The Minister of finance according to the schemes proposed by the Chairman of the State Agency for Youth and Sports (now Minister for Youth and Sports) approves the allocation of the money raised by the BST.

The law for the physical education and sports provides that the amounts coming from the BTS incomes should be kept and reported to the Chairman of SAYS and should be used for the designated purposes stated in art. 59b from PESA namely:

1. for activities of licensed sports organizations, sports clubs and members of licensed sports organizations;
2. for organization of internal championships and international competitions on the territory of the country which are included in the state and the international sports calendar;
3. for preparation and participation of Bulgarian athletes in European and world championships and Olympic games;
4. for construction, restoration and management of sports sites and social tourism facilities of national importance;
5. for granting of monthly bonuses to Olympic medallists who have ceased their active competition career.

The resources for the sports organizations are provided on the basis of contracts for sports development, by taking account of the social importance of sports activities which are being supported.

According to art. 63 from PESA the state and the municipalities support licensed sports organizations and their members under terms and procedures determined by the Minister of Finance, the Chairperson of the State Agency of Youth and Sports and the municipalities. Paragraph 2 of the same article provides that the state and the municipalities may also support *other non-profit associations and organizations* which organize and encourage children and young people to practice physical exercises, sports, sports games and tourism. Paragraph 3 of art. 63 of PESA says: "State resources and subsidies may not be used and the state and the municipalities may not support

organizations which are not registered as non-profit legal persons for the public benefit under the Non-Profit Legal Persons Act."

The legal regulation of the mentioned provision of art. 63 of PESA lead to the conclusion that the only criteria for determining the sports organizations which have the right to be subsidized and helped from the state budget is the received license. Another determining criterion this article does not contain.

The additional criteria are included in par 3 from the article and it provides that the sports organization should be instituted as a legal entity for non - profit purposes. As I mentioned above, the sports federations are voluntary associations of sports clubs of one or another kind of sports and should be registered as legal entities for non - profit purposes (art. 14, par. 1 and 4 of PESA). The national sports organizations are voluntary associations of sport clubs and/or sports federations and they are also registered as legal entities for non - profit purposes (art.15, par. 1 and 3 from PESA). Only the sports federations and the national sports organizations should be licensed and the logical conclusion of all is that the sports clubs are sports organizations which should not be licensed. That circumstance leads to the conclusion that art. 63, par 1 from PESA excludes the possibility of sports clubs to be supported by the state and the municipalities even if they are registered as legal entities for non - profit purposes for pursuing activities for public benefits. Only because they do not cover the requirement stipulated in that legal rule - to be licensed sports organizations.[9]

Also, it should be marked that the provision of Art. 63 should be rendered to the amounts for sport which come from the state budget.

In contrast to the abovementioned, the regulation of Art. 59b from PESA provides that the licensed sports organizations as well as the sports clubs which are members of the licensed sports organizations should use the amounts which are spread by BTS and the State money - object Lottery /SMOL/. The provision of Art. 59 b from PESA does not place a requirement about the sports organization for registering them in the form of legal entities for non - profit purposes for pursuing activities for public benefits in order to receive the amounts by BTS and SMOL for supporting their activity in a view to which the only condition for a national sports organization or sports federation is the same to be licensed and for the respective sports clubs to be a member of a licensed sports organization.

The stated regards the finance of the sport with funds from the state or municipality budget, as mentioned, and from the state organized and controlled lottery games carried out from the Bulgarian sport totalizer. Apart from this funding the sport organizations receive financial support from private persons in the form of sponsorship about which there are no legal restrictions or requirements.

Instead of conclusion:

The exposition tries to outline the most important questions related to sport matters stipulated in the Physical education and sport Act. It was not an easy task writing it since in the Republic of Bulgaria no sports law theory or jurisprudence exists. The court decisions mentioned in the writing are most of the court decisions in the sports related field. In fact "sports law" is not legally distinguished term and it is not used in the legal doctrine or in legislation at all. I think that the Bulgarian Act on physical education and sport, on the other hand, gives a relatively comprehensive regulation of the sport issues, regardless of the controversies described, so it stays for the scholars to interpret and for the practitioners to apply its regulations.

9 In that sense Decision 5484/03.06.2003, 5 member jury of SAC.

Sports Governance in Ireland

by **Laura Donnellan***

Introduction

In Ireland, the regulation of sport falls under the auspices of the Department of Tourism, Culture and Sport.[1] The Department, which is headed by Minister Mary Hanafin, has a number of important functions in relation to sport. Its primary function is the formulation, development and evaluation of sport policy (the implementation of which in the main is a matter for the Irish Sports Council) and overseeing major sports projects, including the National Aquatic Centre at Abbotstown; developing proposals for the provision of a national stadium; the administration of the Sports Capital and the Local Authority Swimming Pool Programmes.

There is a heavy state involvement in the regulation of sport in Ireland. The state's involvement can be characterised as both direct and indirect control. The Department of Tourism, Sport and Recreation exercises direct governmental regulation, while the Irish Sports Council, a body created by statute, exercises quasi-governmental regulation. The individual national governing bodies, while recipients of funding from the Department and the Irish Sports Council, are categorised as autonomous and private associations. Recent litigation has questioned the involvement of the Irish Sports Council and its interference in the internal affairs of the national governing bodies. The former chief executive of Athletics Ireland was recently dismissed after pressure was placed on the organisation by the Irish Sports Council. Although the matter was settled out of court, the matter highlighted the need for the Irish Sports Council to reassess its role in the promotion and development of sport in Ireland. Allegations of poor governance within the Irish Amateur Boxing Association have once again brought the tenuous relationship between the Irish Sports Council and national governing bodies to the fore.

This chapter will discuss the involvement of the Department of Tourism, Culture and Sport, the Irish Sports Council and the role of the national governing bodies in the regulating of sport in Ireland. The issue of funding will also be examined. The recent litigation was prompted by the Irish Sports Council's withholding of annual core funding to a governing body. The lack of transparency, independence and general lack of governance in Irish sport will also be discussed.

Status of sports governing bodies

The status of domestic sports bodies differs among sports organisations in Ireland. Some are created by way of legislation, these are called statutory bodies. The Irish Greyhound Board or Bord na gCon is one such statutory body which was established by the Greyhound Industry Act 1958.[2] Other governing bodies are established as private limited companies regulated by the Companies Acts 1963-2009. Some sports bodies have charitable status which gives them certain exemptions when it comes to income tax and corporation tax.[3]

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1 Previously called the Department of Tourism, Sport and Recreation and also the Department of Arts, Sport and Tourism.

2 The Board has wide powers ranging from issuing licences to use certain tracks, issuing of permits to officials, bookmaker and trainers. It controls 9 of the 17 licensed tracks in the Republic of Ireland. See http://www.igb.ie/top/About-Us/.

3 The Charities Act 2009 has excluded some sports bodies. The section 2 of the Bill excluded "bodies established for and existing for the sole purpose of promoting athletic or amateur games or sports".

Governmental regulation of sport

Sports Unit 1 and 2

There are two Sport units with the Department of Tourism, Culture and Sport. Sport Unit 1-Sport Policy and Capital Programmes Division is responsible for the development of sport and recreational policies. It liaises with the Irish Sports Council (ISC), Horse Racing Ireland (HRI) and Bord na gCon. It administers the Sports Council Programme, a programme funded by the National lottery.[4] It also administers the Local Authority Swimming Pool Programme, using funds from the Exchequer.[5] The Unit has an international role as it liaises with the European Union, the Council of Europe, the World Anti-Doping Agency (WADA) on matters pertaining to sports issues and policies. All applications from certified sports bodies seeking approval of sports capital projects are processed by the Unit as well as applications from certified bodies claiming tax relief.[6]

Sport Unit 2 is responsible for major sports capital projects, including the redevelopment of Lansdowne Road Stadium[7] and the current development of the National Campus of Sports Facilities at Abbotstown.[8] The Unit carries out audits of local sports facilities and presents awards to volunteers in sport. More recently, the Unit has been involved in devising a strategy to ensure that Ireland benefits from the proximity of the London 2012 Olympic and Paralympic Games.

Quasi-government regulation-agencies

The Department of Tourism, Culture and Sport is assisted by a number of agencies: the Irish Sports Council; the Campus and Stadium Ireland Development; Horse Racing Ireland and Bord na gCon. These agencies have all been created by way of statute and hold semi-state body status.

Irish Sports Council Act 1999 and the Establishment of the Irish Sports Council

The Irish Sports Council Act 1999 is the first piece of legislation pertaining to sport in Ireland.[9] The Act is important for a number of reasons. It not only reflected the state's commitment to the promotion and development of sport and sporting facilities, it also heralded the state's involvement in anti-doping procedures. The Act established the Irish Sports Council, a body which implements sports policy in Ireland. The ISC, a body corporate, has the following functions:

- To encourage the promotion, development and co-ordination of competitive sport and the achievement of excellence in competitive sport,
- To develop strategies for increasing participation in recreational sport and to co-ordinate their implementation by all bodies (including public bodies and privately funded bodies) involved in promoting recreational sport and providing recreational facilities,
- To facilitate, through the promulgation of guidelines and codes of practice, standards of good conduct and fair play in both competitive and recreational sport,
- To take such action as it considers appropriate, including testing, to combat doping in sport and to engage in research and the dissemination of information concerning either or both competitive and recreational sport,
- To perform any additional functions assigned by the Minister to the Council.[10]

Pursuant to its functions under the Act, the ISC established and implemented the National Sports Anti-Doping Programme.

The ISC consists of a Chairperson and ten ordinary members. The Minister appoints persons s/he judges to be have experience in a field of expertise relevant to the workings of the Council.[11] Section 16 of the Act provides for the appointment of a Chief Executive who is appointed by the Council with the Minister's approval. The Chief Executive is responsible for the carrying on, managing and control generally the administration and finances of the Council.[12]

The main of aim of the ISC is to encourage participation in sport from all ages and abilities, from recreational to high performance level. The ISC recognises the importance of sport and its contribution to enhancing the quality of Irish life.[13] The ISC comprises of eight major divisions:

1. Anti-Doping
2. Corporate Services
3. Finance
4. High Performance
5. Local Sports Partnerships
6. National Governing Bodies
7. National Trails Office, and the
8. Irish Institute of Sport.[14]

The ISC sets out its objectives for a three year period in its strategic documents. The first document *A New Era for Sport* (2000-2002), was replaced by *Sport for Life* in 2003. In 2006, the ISC launched *Building Sport for Life*, followed by the current document for the period of 2009-2011, Building Sport for Life: The Next Phase.[15]

The ISC carries out drug testing in all Irish Sport, both recreational and competitive. All national governing bodies are bound by the Irish Sport Council's Anti-Doping rules. In Ireland, the WADA Code is enforced by the ISC. Since 2008, Ireland is also a party to the UNESCO Anti-Doping Convention. The then Minister for Arts, Sport and Tourism, Martin Cullen, ratified the Convention. All National Governing Bodies in receipt of public funding in Ireland are bound by the WADA Rules and the Council of Europe Anti Doping Convention. As many governments cannot be legally bound by a non-governmental document, the Code was implemented by way of international treaty which the United Nations Educations, Scientific and Cultural Organisation (UNESCO) drafted. At the UNESCO International Convention against Doping in Sport in October 2005, the first global international treaty against doping in sport was adopted.[16] In 2007, the UNESCO Convention came into effect.[17]

In order to qualify for tax exemptions, the sports body must show the Revenue Commissioner that the income which has been or will be applied for the sole purpose of promoting that athletic or amateur game or sport. The body must be a not for profit, member controlled and owned organisation. See www.revenue.ie/en/tax/it/leaflets/gs1.pdf.

4 Applications for funding are advertised annually. The programme allocates funding to projects that are directly related to the provision of sports facilities and are of a capital nature. This would include the purchase of premises and other assets; improvements to assets and the purchases of non-personal equipment which will be used for a least five years. Those that may apply for funding include voluntary and community organisations (including sports clubs); national governing bodies and third level institutions where it can be shown that the proposed facility will contribute to the regional and/or national sporting infrastructure and in some circumstances primary and post-primary schools and local authorities.

5 This programme grants funding to local authorities to build new pools or refurbish existing ones. See http://www.arts-sport-tourism.gov.ie/grants_funding/Swimming_Pool.htm.

6 See http://www.arts-sport-tourism.gov.ie/sport/organisation/unit1.html.

7 In 2004, the Government agreed to provide funding of €191 million to the joint Irish Rugby Football Union (IRFU)/Football Association of Ireland (FAI) project for the redevelopment of the stadium as a 50,000-capacity all-seater facility. Works began in 2007 following the granting of planning permission and the revamped stadium will open later on in the year.

8 The development of the campus was approved in 2005. Detailed works began and have recently been completed. The campus has been built on a phase by phase basis. Phase 1 provided for the following: a National Field Sports Training Centre (catering for rugby, soccer, Gaelic games and hockey); a National Indoor Training Centre to provide world class training facilities for over thirty Governing Bodies of Sport; accommodation for sports men and women, sports science and medical facilities; all-weather synthetic pitches for community use; renovation of existing buildings to cater for needs identified by sports bodies. NOTE: GAA consists of a number of sports: Football, Hurling, Ladies Football, Camogie, Handball and Rounders. For details on GAA sports see www.gaa.ie/about-the-gaa/our-games/.

9 It has two parts and 28 sections. Part I details the Preliminary and General provisions while Part II provides for the establishment of the Council. This part further elaborates in the functions, powers, membership, the role of the Minister, remuneration etc.

10 Section 6 of the Act.

11 It is a five year term, see section 12 of the Act.

12 Section 17 of the Act.

13 See the website of the Irish Sports Council: http://www.irishsportscouncil.ie

14 The institute works with elite athletes and high performance coaches, see http://www.instituteofsport.ie.

15 See http://www.irishsportscouncil.ie/About_Us/Strategy/

Irish Sport Anti-Doping Disciplinary Panel

The Irish Sport Anti-Doping Disciplinary Panel was established by the ISC in 2004. The Panel is empowered to hear and determine the consequences of any Anti-Doping Rule violation that falls under the Irish Anti-Doping rules. A panel hearing consists of three experts from each of a legal, medical and sports (administration/ former athlete) background. The chair or one of the vice chairs will chair the Panel. In total, there is a chair and four vice-chairs, all of whom must be a registered solicitor or barrister of not less than years qualified or a retired High Court or Supreme Court judge. There are five medical practitioners of not less than ten years qualified and five sports administrators or athletes. It is a four year term which is renewable. The role of the Panel is hear cases fairly and impartially. When an athlete is alleged to have committed a doping infraction, the ISC refer the matter to the Panel to determine whether a violation has occurred. None of members of the Panel can have had any prior involvement in the case, except in the situation when the chair has been involved in an appeal on a decision to impose a provision suspension. Hearings are held in private and are confidential unless the Panel otherwise decides.

The national governing body, with the consent of the ISC, may use its own disciplinary panel to determine the case.[18] However, the national governing body is bound by the rules of the Panel. If the ISC is of the opinion that the national governing body's disciplinary panel is not adhering to the rules and regulations, the agreement is rescinded and the matter is referred to the Panel.[19]

Irish Sports Council and Governing Bodies

The ISC provides core funding to the national governing bodies. The national governing bodies, along with their member clubs and affiliates, organise and administer most of organised sport in Ireland. The ISC provides funding for competitive sports organisations and also local and recreational sports bodies. There are three main recipients of ISC funding: the Football Association of Ireland (FAI), the Gaelic Athletic Association (GAA) and the Irish Rugby Football Union (IRFU).[20] These sports have benefited from redevelopment of Lansdowne Road Stadium and the creation of the sporting campus at Abbotstown (see below).

In February 2010, the ISC allocated its 2010 grants. €11.85 million was invested in the core activities of 59 governing bodies. These core activities included: administration, participation programmes, coach development, hosting events, implementing strategic plans and the employment of professional staff.[21] Under the 2010 Women in Sport Programme, 27 sports were given €1.375 million in grants.[22] Horse Sport Ireland's funding was cut by €100,000,[23] while Special Olympics Ireland received €250,000 less than it received in 2009.[24]

Campus and Stadium Ireland Development

In November 2005, the Government approved the commencement of Phase 1 of the development of a campus of sports facilities at Abbotstown, Dublin. Phase 1 provided for the creation of modern sporting facilities for the three major sports: football, rugby and Gaelic sports. Developments are ongoing with further development planned.[25]

The National Sports Campus Development Authority (NSCDA), a statutory body, was created under the National Sports Campus Development Authority Act 2006 (came into effect on the 1ST of January 2007). The Authority, a body corporate, has the role of overseeing the planning and development of the campus and its future expansion. The Authority is authorised (with the consent of the Minister) to purchase land and dispose of assets. The Authority is empowered to furnish and equip the sports campus with appropriate plant and machinery and to manage, operate and maintain the sports campus. The role of the Authority is to encourage and promote the use of the sports campus by persons participating in both professional and amateur sport and by members of the general public. The Authority consists of a Chairperson and 12 ordinary members. The chairperson has five year term of office. Four members have a three year term, four members have a four year term and four have a five year term. The Minister determines the terms for the relevant ordinary members.

Horse Racing Ireland

Horse Racing in Ireland is regulated by Horse Racing Ireland.[26] The Horse and Greyhound Racing Industry Act 2001 Act established Horse Racing Ireland (HRI), which replaced the Irish Horseracing Authority.[27] The Horseracing Authority was established under the Irish Horse Racing Industry Act 1994. There are a number of legislative provisions that regulate the Horse Racing Industry in Ireland. There are three Acts that govern the industry: Horse and Greyhound Racing (Betting Charges and Levies) Act, 1999, Horse and Greyhound Racing Act, 2001 and the Horse Racing Ireland (Membership) Act, 2001.[28] While the Acts are general in nature, more specific legislation has been introduced by way of statutory instrument.[29]

The mission statement of HRI states that its aim is to develop and promote Ireland as a world centre of excellence for horse breeding and racing. Its main functions include: the overall administration of Irish horseracing; the development and promotion of the Irish horseracing industry, including the development of authorised racecourses, the guaranteeing of prize money at race fixtures and the costs of integrity services; the control of the operation of authorised bookmakers; the allocation of race fixtures and the setting of race programmes; the operation of racecourses which are owned by the Authority; the operation of a totalisator at race meetings; the promotion of the Irish thoroughbred horse; the making of grants, loans or other disbursements to authorised racecourses and to any subsidiary of the Authority;[30] the representation of horse racing internationally and the operation of the Registry Office.[31]

16 http://www.wada-ama.org/docs/web/editorials/sanctions_howman.pdf

17 The IOC will only consider applications to hold the Olympic Games from countries who have ratified the UNESCO.

18 Article 8.8 of the Irish Anti-Doping Rules 2009.

19 At Congress in 2005, the GAA adopted an Arbitration Rule and a Disputes Resolution Code. A Disputes Resolution Authority (DRA) was established to implement the Code. The DRA is independent of the GAA and bound only by provisions of the Code. The DRA has a panel of arbitrators, consisting of solicitors, barristers, arbitrators and persons "who, by virtue of their experience and expertise in the affairs of the Association, are properly qualified to resolve disputes relating to the Rules of the Association". The panels comprise of three members. In order to bring a claim, the claimant fills out the necessary forms and lodges € 1,000 with the DRA. In event of the claimant being successful, the applicant will be reimbursed. The respondents are required to reply and a hearing then follows. The parties may avail of mediation and negotiation at any time during the dispute resolution proceedings. The main types of cases the DRA hears are cases involving fair procedures, player eligibility and failure to abide by its own rules, interpretation or misapplication of the rules or an irrational decision or sanction. The arbitrators are all independent and impartial and decisions are usually given within 1 to 2 weeks. Recourse to the DRA is limited to GAA sports.

20 See http://www.irishsportscouncil.ie/Governing_Bodies/Our_work_with_the_FAI,_GAA_IRFU/. The funding is used to support both competitive and recreational sport. It is used to encourage young people from disadvantaged areas to play sport. It also funds local clubs and provides money for developing greater resources for coaches. For example, in GAA funding is used to develop Fun Do coaching resource packs for coaches and volunteers in both hurling and football.

21 "Sport Council allocate 2010 grants", Tuesday, 9th February, 2010, *RTE Sport*, http://www.rte.ie/sport/other/2010/0209/grants.html.

22 This initiative began in 2005 and was introduced to encourage women to participate in sport. Sports including GAA, volleyball and hockey were allocated funding under this initiative. The funding was down on last years. In 2009 Women in Sport were allocated € 1,572,386 while the figure was reduced to € 1,374,900 in 2010.

23 It received € 989, 217 in 2009 and € 890,295 in 2010.

24 It received € 2,564,269 in 2009 and € 2,307,842 in 2010.

25 See *supra* n.8 for details.

26 In 2002, responsibility for horse and greyhound racing was transferred from the Department of Agriculture to then Department of Arts, Tourism and Sport.

27 Prior to the 1994 Act, the Racing Board, founded in 1945 under the Racing Board and Racecourse Act, was the regulating body in Ireland.

28 The 1994 Act repealed two earlier acts, the Racing Board and Racecourses Act 1945 and the Racing Board and Racecourses (Amendment) Act 1975.

29 Statutory instruments (or delegated legislation) allow the relevant Minister to introduce legislation.

30 Racecourse Division (operates and runs a number of race courses in Ireland, including Leopardstown and Fairyhouse), Tote Ireland (operates a totalisator at all Irish racecourses including a credit betting service and a betting web site and returns profits made to HRI) and Irish Thoroughbred Marketing (a non-profit making organisation) are subsidiaries of HRI.

31 See www.goracing.ie/Content/HRI/hriinfo.aspx.

Bord na gCon

The Irish Greyhound Board (or Bord na gCon) regulates the greyhound racing industry Ireland. The Board is a semi-state body that was established under the Greyhound Act 1958. Under the Act, the Board has wide ranging powers including the licensing of tracks, the issuing of permits to officials, bookmakers and trainers. The Board ensures that the rules pertaining to the industry are enforced. There are 17 licensed tracks in the Republic, nine of which are owned by the Board. The remainder are run by private enterprises.

The primary piece of legislation is the Greyhound Industry Act 1958. This was amended by the Greyhound Industry (amendment) Act 1993. The 1993 Act amended Article 9 on membership of the Board and Article 36 of the Principle Act. Article 36 as amended provides that the Minister may make regulations on the following: the muzzling of greyhounds, the prohibition of a greyhound at an event who is not muzzled or muzzled in accordance with the regulations, the supervision by a veterinary surgeon of hares prior to and after the event, the marking of a hare, before the hares release into the wild after an authorised event and the prohibition of the use of a hare that has been used in a previous authorised event.

There are over 100 pieces of legislation pertaining to the Greyhound Industry in Ireland. The vast majority are statutory instruments. For example there are statutory instruments on admission charges, race card charges, greyhound trainers, artificial insemination of greyhounds, betting charges and levies, totalisation (jackpots) and various commencement order regulations.

There are four Acts: 1958 Act, the 1993 amendment Act, the Horses and Greyhound (Betting, Charges and Levies Act) 1999 and the Horse and Greyhound Racing Act 2001.

National Olympic Council

In Ireland, the Olympic Council of Ireland (OCI) promotes the Olympics in accordance with the Olympic Charter. The OCI has been in existence since 1922 and its main objectives are:

- To provide Team Ireland with the most effective athlete centred, performance driven operational planning and management at each Olympiad.
- To maximise commercial value of the Olympic brand and provide long term financial security for the OCI.
- To develop and protect the Olympic Movement in Ireland.
- To provide Strategic Leadership and representation of Olympic Sport within Government, EOC[32] and IOC.[33]

The Irish Constiution and sport

There is no specific article on sport in the Irish Constitution. Article 42 refers to education and acknowledges that the parents are the primary and natural educators of the child. The State guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children. The reference to physical education is the only reference to sport under the Constitution. The Constitution was accepted by referendum in 1937 and while it has been amended 28 times,[34] the development of sport has never been placed on a constitutional footing. However, as all laws must be in conformity with the Constitution, the various Acts relating to sport are in keeping with the ethos of the Constitution.

Recent problems: interference of a governmental body into the affairs of a non-governmental body

Irish Sports Council and Athletics Ireland

The Irish Sports Council has recently been embroiled in litigation over its involvement in the dismissal of the Chief Executive Officer (CEO) of Athletics Ireland (AAI). Mary Coghlan was appointed as CEO in April 2008 and took up office in May 2008 but was subsequently dismissed. In July 2009, Ms. Coghlan initiated legal proceedings in the High Court challenging the validity of her dismissal.[35] Ms. Coghlan sought a declaration from the High Court that her dismissal was invalid at the ISC had gone beyond the remit of its statutory powers by putting pressure on the AAI to dismiss its CEO.[36] Additionally, she sought a declaration from the High Court that she could not be dismissed unless an investigation had been carried out in accordance with the principles of constitutional justice.[37] Both the ISC and AAI denied any wrong doing with AAI holding that it had made an executive decision to dismiss Coghlan.

Ms. Coghlan's claim centred on two members of the ISC, namely the chairman, Ossie Kilkenny and the CEO, John Treacy. Coghlan submitted that both men had pressurised the AAI into firing her. She also claimed that the AAI President, Liam Hennessy, had defamed her in comments he made before an Oireachtas Committee.[38] It was alleged that Liam Hennessy had referred to Ms. Coghlan as a "cancer" that needed to be removed from AAI, and failure to remove her, he indicated, would affect the funding of AAI.[39] It was claimed by Coghlan, in reference to John Treacy, that there had been hostility towards from the day she took up her position. In defending the remarks, Liam Hennessy claimed that he was not referring directly to Coghlan when he said "cancer", but rather related to issues being discussed between the AAI and the ISC. Counsel for Coghlan, Brian Moore Senior Council, submitted that the dispute arose out of the ISC's, or more specifically, John Treacy's, need to control the AAI's high-performance unit and to oversee the appointment of the organisation's director of athletics.[40] Ms. Coghlan was not in favour of such involvement from the ISC and in response, the chairman of the high performance unit sent an email referring to Ms. Coghlan as "a silly bitch".[41] Ms. Coghlan complained to the board of AAI, however, before an inquiry was conducted, she was dismissed with the board of AAI dismissing her under a six month probationary clause.[42] A few days later, a meeting between the ISC and AAI was convened. AAI had not been granted its annual funding but have been allocated funding on a monthly basis. However, once Ms. Coghlan was dismissed, it was reported that John Treacy had stated that now that the core issue had been resolved, funding would be restored to normal.[43]

After four days of evidence, the case was settled out of court. In

32 European Olympic Committee, see http://www.eurolympic.org/jahia/Jahia?language=eng.

33 See http://www.olympicsport.ie/Content.aspx?pageid=59.

34 The most recent amendment concerned the amendment of Article 29 to facilitate the incorporation of the Treaty of Lisbon.

35 Ms. Coghlan was alleging misfeasance in public office against the ISC, a distributor of government funds.

36 Ms. Coghlan initiated legal proceedings against both the ISC and AAI.

37 Under the Irish Constitution every individual has the right to fair procedures. Implicit in the concept of natural justice is the right to fair procedures and due process of law. Every individual possesses inalienable rights which are derived from their mere existence. There is a rule against bias, the person making the decision should not be biased or appear to be biased. The individual must be given the opportunity to present the case. The applicant must be informed of the matter and given opportunity to comment on material furnished by the other side. See the case of *Quirke* v *Bord Luthchlease na hÉireann* (1988) IR 83; (1989) ILRM 129 where a discuss thrower was banned for 18 months by his governing body. The High Court overturned the decision on the grounds of lack of fair procedures.

38 Oireachtas is the Irish for Parliament. The Oireachtas Consists of the following: Dáil (Lower house), Seanad (Upper House) and the President of Ireland. Both the Dáil and the Seanad have their own committees. The Dáil and Seanad may have joint committees that include members from both houses. Counsel for Ms. Coghlan claimed that at a joint Oireachtas Committee meeting on Arts, Sport, Tourism, Community, Rural and Gaeltacht Affairs, Hennessy referred to Ms Coghlan as "a problem", Healy, T., "Powerful duo were 'hostile' to sacked athletics chief, court told", *Irish Independent*, 5th of March 2010, available at: http://www.independent.ie/national-news/courts/powerful-duo-were-hostile-to-sacked-athletics-chief-court-told-2089554.html.

39 It was also argued that AAI Mr. Kilkenny had directed AAI to publish a series of press articles that held Ms. Coghlan responsible for the crisis in Irish athletics, see "Former athletics chief starts action over dismissal", *Irish Times*, 14th July 2009, available at: www.irishtimes.com/newspaper/ireland/2009/0714/1224250637797.html.

40 "Legal action over dismissal settled", *Irish Times*, 11th March 2010, available at: http://www.irishtimes.com/newspaper/ireland/2010/0311/1224266045845.html.

41 These comments were made by Patsy McGonagle, a board member of AAI and a former member of the ISC.

42 Ms. Coghlan claimed that Ossie Kilkenny ordered the AAI to dismiss her under the six month probationary clause.

43 Healy, *supra* note 37.

44 The legal bill means that AAI overspent by almost € 400,000 in 2009, see Foley,

summing up, Ms. Coghlan's barrister asked the court: "Can the Irish Sports Council, a statutory body responsible for funding of sport in the State, effectively bludgeon and compel a non-governmental body to dismiss its chief executive?" Although the declaration sought by Ms. Coghlan was not given as the case was settled out of court, the cost of the case and damages paid to the former CEO amounted to €800,000. The amount paid shows that Ms. Coghlan had a case and the ISC and AAI, fearing further vilification, decided that it was best to settle.

The financial implications of the case have not only been damaging to Irish sport, the reputation of both bodies has been tarnished.[44] The ISC, a state body, showed a flagrant misuse of power, a lack of transparency, poor governance and a lack of adherence to its own rules and regulations. For example, John Treacy's five year contract was renewed in 2009 without the position being publicly advertised.[45]

The then Minister, Martin Cullen, asked the ISC to prepare an urgent report on the matter. An independent inquiry would have been expected. The State's involvement in the affairs of a statutory body only serves to highlight the lack of independence of the ISC. The new Minister, Mary Hanafin, has not dismissed Kilkenny and Treacy. Although, she has called for the introduction of guidelines in relation to the appointment of senior personnel and on mediation and arbitration for governing bodies that are in dispute over issues, particularly those who are in receipt of funding. Minister Hanafin has insisted that she does not want to get involved in the day to day affairs of the ISC.[46]

Both the ISC and the Olympic Council of Ireland have been criticised for their lack of efforts in promoting Ireland, due its close proximity to London, as a training venue for athletes due to participate in 2012 Olympics.[47] In light of the recent legal wrangling, it may find it increasingly difficult to attract athletes to come to Ireland to train.

The Irish Sports Council and the Irish Amateur Boxing Association

Minister Hanafin's call for the introduction of guidelines suggests a more hard-line government approach to the regulation of sport. The ISC have refused to fund the positions of chief executive officer and high performance director within the Irish Amateur Boxing Association (IABA) after it alleged that in the selection process best practice may not have been followed. The ISC is not alleging any impropriety on the part of IABA. The current head coach, Billy Walsh, had unofficially carried out the job of the high performance director since the departure of Gary Keegan after the Beijing Olympics. After a final round of interviews, three candidates were in contention for post of high performance director: Dominic O'Rourke, Billy Walsh and another coach. The IABA selected O'Rourke, a highly respected coach but with little experience of running a high performance unit.[48] The appointment came as a surprise to many as it was thought that Walsh would be chosen. Walsh had been part of the coaching team that produced three medals at the Beijing Olympics. Don Stewart was selected for the post of CEO. The ISC has refused to pay € 700,000 needed to pay the salaries of both men. As O'Rourke had been the IABA's president, his appointment as the high performance director suggests a conflict of interest.[49]

Boxing has been the one sport that Ireland has excelled in. Given the success of Irish boxers, it has been argued that the IABA is entitled to recruit on its terms.[50] It is feared that Irish boxing will be damaged irreparably. Boxing has been the template that other sports have used in Ireland in their attempts to emulate the success of our boxers. While there are merits to the argument, it could be argued that the ISC is actually following its own rules and regulations, in contrast to the situation with Coghlan. Minister Hanafin, in the wake of the Coghlan litigation, spoke of the need to introduce guidelines when it came to the recruitment of senior officials. The ISC, irrespective of its motive, has questioned the selection of the IABA's president as high performance director. This is a very valid argument. Had the ISC granted the funding then it would have been open itself to public scrutiny for allowing the appointment of O'Rourke. Perhaps in the aftermath of the Coghlan case, the ISC is treading warily and in doing so is highlighting the lack of transparency and poor governance within boxing. Discussions between the ISC and IABA are ongoing and it is hoped that a resolution will soon be found. Ireland's success at the European Senior Championships in Moscow in June 2010 highlights the importance of funding in sport and the need to invest in coaching and training especially at the high performance level.[51] It equally shows how Walsh, in his capacity as coach and unofficial role as high performance unit, can easily do the job of two. Perhaps the salary of the high performance director could be put to better use within the organisation.

Conclusion

The state is heavily involved in the regulation of sport in Ireland. Whether involved directly or indirectly, the state exercises immense control over the administration of both competitive and recreational sport. While the state leaves the internal rules and procedures to the national governing body, when it comes to funding, the influence of the state is more palpable. The ISC, a state body, has an important role in Irish sport. Great strides have been made in the last number of years. Capital has been invested in redevelopment and developed of sporting facilities. However, there is a need to delineate the powers of a statutory body and those of sports organisations. While guidelines and codes of best practice are welcomed, there needs to be a more concrete setting out of competences. Perhaps a future amendment to the Sports Council Act 1999 might be the forum to introduce such changes.

C., "Athletics: Sparks to fly at AAI Congress as huge legal costs revealed", *Irish Independent*, 23rd April 2010, available at: http://www.independent.ie/sport/ other-sports/athletics-sparks-to-fly-at-aai-congress-as-huge-legal-costs-revealed-2149456.html.

45 "Top Brass must go in wake of AI mess", *Sunday Independent*, 14th March 2010, available at: http://www.independent.ie/sport/other-sports/top-brass-must-go-in-wake-of-ai-mess-2098941

46 "Minister warns ISC over recent disputes", *The Daily Mail*, 25th of May 2010, available at: findarticles.com/p/news-articles/daily-mail-london-england-the/mi_8002/is_2010_May_25/minister-warns-isc-disputes-sports/ai_n53762241/.

47 Ruddock, A., "Athletics: This a chance for a new beginning", *Sunday Independent*, 21st of March 2010, available at: www.independent.ie/sport/other-sports/athletics-this-is-the-chance-for-a-new-beginning-2106309.html

48 Watterson, J., "Sports Council refuses to fund IABA post", *Irish Times*, 17th April 2010, available at: www.irishtimes.com/newspaper/sport/2010/0417/1224268542093.html

49 Hogan, V., IABA fall-out threatening to crush Olympic dreams", Irish Independent, 26th April 2010, available at: http://www.independent.ie/ opinion/columnists/vincent-hogan/vincent-hogan-iaba-fallout-threatening-to-crush-olympic-dreams-2152381.html.

50 O'Connor, R., "Boxing: Carruth wades into row", Irish Independent, 19th of May 2010, available at: http://www.independent.ie/sport/other-sports/boxing-carruth-wades-into-row-2184795.html.

51 Five Irish boxers proceeded to the semi-finals with Billy Walsh at the helm, Second only to Russia and on par with the Ukraine. See O'Brien, J., "Boxing: You never know what you've got 'til it's gone", *Sunday Independent*, 13th of June 2010, available at: www.independent.ie/sport/other-sports/boxing-you-never-know-what-youve-got-til-its-gone-2219047.html.

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Part II

Ithaca College London Center
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May 18, 19 & 20, 2011

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The Olympic Movement - Potential topics include, but are not limited to: the history of the Ancient Olympic Games; the legacies of the modern Olympic Games; the Future of the Olympic Games; and the politics of Olympic site selection.

The conference will feature keynote addresses by international sport leaders and scholars, as well as open paper sessions. Conference organizers encourage the submission of both individual presentations and panel session topics. Abstracts should be no longer than 250 words and should include the paper/session title, and presenter's name, affiliation and email address.

Deadline for the submission of abstracts is: **December 1, 2010.**

Accepted presentations will be notified as reviews are received, but no later than: February 4, 2011.

All abstracts and questions should be sent to the Conference Organizers:

Bill Sheasgreen: wsheasgreen@ithaca.edu
or
Genevieve Gordon: sportslaw@venire.co.uk

For more information, please visit: http://www.ithaca.edu/hshp/depts/smm/Conference/

Sport Governance in Lithuania

by **Liudas Karnickas and Julius Zaleskis***

1. Introduction

After Lithuania restored its independence in 1990, all spheres of public life, including sport, faced significant changes and challenges. Lithuania got rid of Soviet sport governance model which was based on purely state governance and where professional sport was officially non-existent. Lithuanian National Olympic Committee which was reestablished in 1988 and the newly established Department of Physical Education and Sports to the Government of Lithuania (the Sports Department) played a great role in reforming Lithuanian sports system, searching for new directions and making international contacts. Gradually, Lithuania began shifting to the modern world sport governance model. A club system was developed according to the example of Western countries, the federations of various sport branches gained total independence, and new public sports organisations were founded.

In 1992 the Constitution of Lithuania was adopted by Lithuanian citizens in the referendum. Article 53 of the Constitution stipulated that the State promotes physical culture of society and supports sport. In this regard sport became a Constitutional value in Lithuania. In 1995 the Parliament of Lithuania adopted the complex Law on Sports and Physical Education (the Sports Law) which became the basis for the legal regulation of sport in Lithuania. The Sports Law divided sport governance functions between state institutions and self-governance bodies, laid down legal grounds for professional sport, established the main principles for organisation of sport events. Even now when the Sports Law seems to be a bit outdated, it is still the only act comprehensively regulating sport governance in Lithuania.

Following the adoption of the European Union White Paper on Sport in 2007, a group of Lithuanian Parliament members proposed a new version of the Sports Law which is still pending in the Parliament. However, this proposal does not intend to bring significant changes to Lithuanian sport governance model.

2. General Legal Framework

Rules that govern the activities of institutions involved in determining and developing sport policy and specify the order for organising sports competitions in Lithuania could relatively be divided into two sections.

The first part of such rules is adopted by public authorities and lays down the main principles and general framework of sporting activity in Lithuania. The second part of rules is adopted by independent representative bodies established as self-governing sports authorities for particular branch of the sport in Lithuania. These include national federations, regional federations, various associations and clubs to name but a few. Independent sports organisations are granted with the right to set internal rules applicable for sportsmen and sport clubs that undertake the membership in the particular organisation.

The sports regulation in governmental level is mainly set by means of laws (legal acts of the highest legal significance). The Sports Law and the Law on Foundation of Support of Physical Education and Sport (the Sports Foundation Law) are the two main acts setting forth the basic framework for sport activities in Lithuania.

The Sports Law specifies the principles of sport, defines the competence of state and municipal institutions in the field of physical education and sport, regulates the organization of sport, as well as physical exercise in educational establishments. Basic competence of non-governmental physical sports organizations are also described by the Sports Law. In addition, development of sports competition system, regulation and developing process of amateur and professional sportsmen falls within the scope of the Sports Law.

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Various acts of secondary legislation set a more detailed framework for sports activities in Lithuania and in this way elaborates the mentioned laws. Various rules adopted by the Sports Department constitute the biggest, as well as the most relevant part of the secondary sports legislation in Lithuania.

3. State Governance

The Sports Law as the primary act governing sports activities in Lithuania gives the core principles upon which the further regulation and organisation of sports activities is based. The following abstract principles encompass the most relevant notions defining the essence of sport, namely: 1) equality; 2) safety of spectators and participants of sports events; 3) anti-doping; 4) fair play; 5) objectivity; 6) continuity.

The Sports Law clearly establishes and separates the competences of governmental authorities in the field of sport. National parliament is engaged into forming the policy of sport and approving sports strategy in Lithuania. Lithuanian government is entitled to approve the priority programmes for sports development and to lay down the procedure for paying annuities to former sportsmen and set the amount of bonus payments to reward the professional sportsmen.

In order to encourage engagement in sports activities in Lithuania, the Government forms the National Council for Physical Culture and Sport which is in charge of promotion of physical education and sport, as well as seeks that any development in these fields are compliant with international regulations on sport.

The most relevant governmental institution engaged in shaping sports policy and pursuing it in Lithuania is the Sports Department. It is this institution which prepares long-term strategies, strategic action plans for various branches of sport in Lithuania and controls their implementation. The Sports Department is competent to dispose of state budgetary funds, the assets of the Sports Foundation and exercises control over the usage of both these funds. Coordination of activities of different sports institutions in Lithuania makes also a significant part of responsibilities of the Sports Department. Following the evaluation of the achieved sport results during the last Olympic cycle, the Sports Department may recognise a particular branch of sport as being of strategic importance nation-wide after.

Separate ministries are responsible to organise and ensure appropriate conditions to engage into sporting activities and to maintain physical fitness for particular social groups such as army soldiers and police officers. Organisation of sports is also pursued at municipality level - the Sports Law delegates to municipal institutions the powers to form sports policy there.

4. Self-governance

Non-governmental institutions (generally in a legal form of associations or public enterprises) are given particular rights to develop Olympic, Paralympic, deaflympics and special Olympics movements and other kinds of sports in Lithuania. Such sports organizations must follow national legal acts, regulations of international sports organizations and other international documents in their activities.

A sport club is considered the main sport institution in Lithuania which might be established either for sport amateurs or for professional sportsmen. Amateur sport clubs are public legal entities as well as national branches of undertakings established in the European Union or the European Economic Area member states and share a public purpose to satisfy community interests in the field of sport, to unite sport amateurs for physical activity, healthy lifestyle, development of physical education and sport. Contrary to amateur sport clubs, professional ones are private legal entities or branches of undertakings established in the European Union or the European Economic Area member states and have a purpose of developing professional sports as an economic activity.

Sport clubs are granted statutory right to unite together with other organisations into more complex associations. As representatives of sport clubs national or regional sport club federations could be established. The Sports Department recognizes only one federation of particular kind of sport as national federation when it fulfils the following criteria:

1. official registration with the Register of Legal Persons; and
2. possession of a name "Lithuania" in federation's title; and
3. uniting sports organizations of that sport (that sport branch),
4. functioning in not less than three different counties (out of 10) in Lithuania.

The procedure and criteria for recognising a federation as a national sport federation are set by the Sports Department itself. It is important to note that only a recognized national sport federation is entitled to enter into official contract with the Sports Department and to acquire budgetary funds to finance its activities. National sport federation is provided with additional exclusive rights with respect to organising sport in Lithuania, i.e. the rights:

1. to organize an official national championship;
2. to form sport teams of Lithuania and represent Lithuania in international competitions;
3. upon permission of the Sports Department to organize international sport events, international, complex sport competitions in Lithuania;
4. to impose sanctions according to the international doping control rules for the use of doping, to organize doping control during competitions.

5. Financing of Sport

Lithuanian sport receives financial support from the state and municipal budgets, funds from organization of lotteries, the European Union structural funds and other legal sources. The state and municipalities allocate investments for the development of sport (construction, acquisition of the property, human resources, etc.) in accordance with the procedure laid down by the Law on the Approval of Financial Indicators of the State Budget and Municipal Budgets. Investment projects in the field of sport are drawn up by the ministries, the Sports Department and municipalities in compliance with the Programme of the Government, documents of strategic planning and strategic plans of municipalities.

The Sports Law entitles non-governmental sport organizations to receive funds of the state and municipal budgets for the implementation of sport programmes and projects. In such a case the state institution or the municipal administration signs contracts for the use of budget funds with the said organizations. The state and municipal institutions which appropriated funds for the purposes of sport programmes and projects are entitled to check how these funds are used, while the funded organizations have the obligation to submit a report on the use of these funds to the respective state and municipal institutions.

In addition, Lithuanian sport receives funds from the Sports Foundation which was established in 2008 by the special legal act - the Sports Foundation Law. The Foundation which is not a legal entity itself is administered by the Sports Department in accordance to Regulations of the Sports Foundation adopted by the Government. The Sport Foundation Law stipulates that the Foundation comprises of 1 percent of income received as excise duty for alcohol and processed tobacco, 10 percent of income received as tax of lotteries and gambling and other legal funds. The funds of the Foundation are allocated by the Sports Foundation Council for support of sport projects related to the sports for all movement, high-level sports mastership, development of sports science and education of sports specialists, maintenance and construction of sport centres, as well as acquisition of sports equipment.

6. Professional Sport

The Sports Law defines a professional sportsman as a sportsman who receives remuneration for preparation for and participation in competitions from a sports organization with whom he has concluded a sport activity contract. Thus, Lithuanian sport governance model acknowledges a financial reward as the main indication of professional sports. The status of professional sportsman is acquired upon the signing of the sport activity contract.

For the purposes of the Sports Law the sport activity contract is understood as a written agreement between a professional sportsman or coach and a sports organization under which the professional sportsman, sportsman or coach undertakes to prepare for sports competitions or to train sportsmen, to participate in competitions by adhering to the set internal procedure of the sports organization, and the sports organization undertakes to pay remuneration for sports or coaching activities and guarantees the conditions of training for and participation in competitions, as well as undertakes to implement other terms and conditions provided for in the contract.

The Sports Law also regulates mandatory terms and conditions of the sports activity contract which include the obligations of the professional sportsman to follow the rules and other provisions laid down by the sports organization, the sport branch federation and international federations to which the sports organization is a member, remuneration of the professional sportsman for sports activities, terms and conditions of mandatory health insurance of the professional sportsman, the procedure for compensation of the damages done to the health of the sportsman during the training for competitions and during the competitions, the right of the professional sportsman to rest, conditions of studying of an under-age professional sportsman.

Taking into account the terms and conditions laid down in the sport activity contract or agreements of sports organizations, a professional sportsman is entitled to move from one Lithuanian or foreign sports organization to another in order to participate in competitions. The conditions of changing organizations may also be regulated by the rules of the international federation of an appropriate sport to which the sports organization is a member.

The problematic question arises whether the sports activity contract should be regarded as an employment agreement or a civil contract for the purposes of various legal issues. Lithuanian legal doctrine suggests that the sports activity contract is more similar to the civil contract despite that it contains certain terms and conditions attributable to employment relations. The Supreme Court of Lithuania in its case law has elaborated that sport is working activity of specific nature for professional sportsmen which is regulated by the special law - the Sports Law. Therefore, employment laws are not applicable to professional sport. On the other hand, case law of Lithuanian courts suggests that in certain specific cases, for instance, for the purposes of paying the stamp duty in the course of litigation, a professional sportsman may be regarded as an employee, i.e. a weak party to the contract, and may be subject to certain payment exemptions.

It should also be noted that for the purposes of tax regulation, incomes from professional sport activities are regarded as incomes from any other individual economic activities in Lithuania.

National Models of Good Governance in Sport - Slovenia

by **Tone Jagodic***

1. Slovenian sports heritage

Sport has always been recognized as an important element of social life of the Slovenians who can proudly look back on their sports heritage. The number of associations, number of members, range of activities, material basis, achieved top sport performance and many others are elements of the common culture of a nation and a wealthy heritage, which is left over to later generations through sport. In Slovenia, rich and diverse life in associations reflects the general social characteristic, indeed, the desire of the Slovenenes to associate and it is true that almost every Slovenian village has got quite a number of sports organizations.[1] The very first Slovenian ever to participate in the Olympic Games was also the first Slovenian Olympic medal winner - Rudolf Cvetko who won silver as a member of the Austrian sabre team in Stockholm in 1912. The most outstanding Slovenian Olympic achievements were performed by their gymnasts, who received a total of 11 medals, five of them gold. Leon Štukelj, a triple Olympic champion (overall and horizontal bar in 1924, rings in 1928), was the most successful member of the legendary Sokol gymnastic team after the World War II and Miroslav Cerar added two gold medals on the pommel horse. At the Winter Olympics, the former Yugoslavia was represented almost exclusively by the Slovenians who consider skiing their national sport. In 1984 and 1988, Slovenian skiers claimed four medals in Alpine Skiing and Ski Jumping.

The Olympic Committee of Slovenia (hereinafter OCS) played a crucial role in the development of sports in recent years. The initiative for the founding of the Slovenian NOC was backed by the most important personalities of Slovenian sports and enjoyed full support by active athletes. Finally, on October 19, 1991, the OCS was solemnly founded in Ljubljana by the representatives of 34 national associations of Olympic sports. After Slovenia had been recognized as an independent state by the European Community, many other countries and some international sports associations, where the International Ski Federation (FIS) played the leading role, the OCS was granted recognition by the IOC Executive Board and IOC-Session in 1992. At the Winter Olympics in Albertville 28 athletes formed the first Slovenian national Olympic team and some months later in Barcelona they could even win the very first medals for the new country. The first athletes to receive Olympic medals under the Slovenian flag were the rowers from Bled who won two bronze medals in Barcelona. In 2000, at the Summer Olympic Games in Sydney, Iztok op, Luka Špik /Rowing/ and Rajmond Debevc /Shooting/ received the first two gold medals for the independent Slovenia.

2. Principles of organization

The basic element of organization of Slovenian sport is human self determination. The organization of sport is not permanent and should follow people's needs. One of the fundamental principles of a sports organization is to support and promote new forms of people self organization. Sports organizations /clubs/ decide by themselves freely which organization to join. The principle of autonomy is also fundamental for federations which are already structured of sports clubs.

Recent data show the following figures of membership in sport:

Sports Clubs	7300
Local Sports Federations	87
National Sports Federations	96
Members of sports organizations	370.000

Sport is governed by the Ministry of Education and Sport. State policy is formed in co-operation with sport organizations. The Sport Department of the Ministry administers financial support from the state budget for creating and developing the relevant prerequisites for sports activities. It implements a tax policy that fosters sport. The department is also involved in planning the construction and maintenance of sporting facilities. The government has established the Council of Sport Experts as a state appointed consultative body for sport policy. Along with a total of 17 members, the body includes recognized experts from various fields of sport supported by the state. Half of these experts have been appointed from the persons proposed by sports movement representatives.

The Olympic Committee of Slovenia, as an umbrella non - governmental Slovenian sports organization, endeavors, along with its affiliated National Sports Federations and Municipal Sports Federations, Sports Clubs and Sports Associations, members of these Federations, to ensure optimal conditions for the operation and development of Slovenian sport in all its various forms. The Olympic Committee of Slovenia and the Sports Confederation of Slovenia merged in December 1994 into common organization called Olympic Committee of Slovenia, Association of Sports Federations.[2] The OCS mission is to plan, organize and control the execution of the programmes of its three pillars: Sport for All, Commune Level Sport and Top Sports. An important part of the OCS activities is its mission to spread Olympism and enhance Olympic education in Slovenia, as well as to encourage the development of Slovenian sports on the international level.

3. Regulatory framework for sport

Sport has not been included in the Slovenian Constitution. In 1998, the Law on Sport was accepted by the Slovenian parliament, followed by the National Programme for Sport in 1999. Sports clubs existentially depend on the Associations Act that was first introduced in 1995. The Slovenian parliament later issued a new Law of Associations which entered into force in 2006 and was modified in 2009. The Law on the Associations enables sports and other Associations to do also certain economic activities from which the income has to be used only for the work of the Associations.

3.1. The Law on Sport of the Republic of Slovenia (Sports Law)[3]

The aim of the Sports Law was to enable a synchronized development of sport and ensure better material, personnel and educational possibilities. It should offer better personal protection and common security to citizens actively involved in sports, especially youth and top athletes, together with the prevention from health risks while, on the other hand also introducing necessary safety measures for other participants in sports activities.

The Sports Law provides a national system for regulating the status of top athletes and defines ownership questions related to sports facilities and their management, the principles, standards and recommendations for their planning, construction, equipment and maintenance. In Chapter III, it also ensures the provision of the state budget funds for the realization of the so called "national programme" of sport, both at the national as well as at the local level, giving a con-

* Dr. Tone Jagodic, Secretary General, NOC of Slovenia, Ljubljana.

1 Šugman Rajko, Sport in the Republic of Slovenia, dilemmas and perspectives, Ministry of Education and Sport, Ljubljana 1996, p. 99

2 Hereinafter OCS

3 Official Gazette of the Republic of Slovenia 22/1998

ceptual definition of global sports tasks, financed by the state from public funds (state and local budget). The purpose of the Sports Law was also to clean up what has been called the chaotic state of the sports system and its interdependent social sciences and sports connected activities, affecting the global development of sport and vice-versa (i.e. medicine, schooling, tourism, defence etc.), and last but not the least, to ensure that the protection of nature be incorporated at this stage with certain areas reserved for sport.

The provision of article 8 distributes the tasks and commitments between the governmental and non-governmental organizations in sport. It also introduces sets of principles and standards for the candidates wishing to organize major international sport events (Article 53). The legislation deals only with those areas of sport which are of public interest within the organized sports movement and where public finances are used to subsidise the activities. It deals furthermore with general conditions for practising sports activities in order to have the same standards for all performers of sports activities. The law introduced a new body, the Council of Experts on Sport in the Government of the Republic of Slovenia, to function as an advisory body in decision making in the national sports policy, as well as a special Committee for Sport on the local, municipal level.

The Sports Law defines the medical insurance, based on a prior medical examination of an athlete when competing at the official competitions organized by national sports associations. The legislation envisaged the introduction of the National Network of Sports Facilities to serve as a basis for the urban planning of facilities, their construction, adaptation and modernization. The system for using the facilities is in accordance with the guidelines of the National programme of sport.

The legislation introduced public institutions at the national as well as at the local level to carry out respective administrative, professional, organizational, technical and other tasks. It also introduced the terms such as a private sportsman (athlete) and a private sports employee (worker), these being new recognized professions. It imposes the requirement that everyone doing professional work in sports should have an adequate education or an acquired skill as defined by the Council of Experts on Sport of the Republic of Slovenia upon a prior opinion given by relevant authorized organizations.

It is interesting that the Sports Law introduced another legislation document on the same level to implement the common public needs in sport and the common issues on the national level. The National Programme for Sport is foreseen in Article 5 of the Sports Law and was adopted by Parliament in 2000 and defines the financial resources of the central budget for the execution of the National Programme.

3.2. The National Programme of Sport[4]

The scope of the National Programme of Sport covers the principles and aims of sports policy, the extent and the standard principles for the distribution of the public funds for the activities in certain areas of sport. Besides that it tries to indicate that the funds for the functioning, improvement and maintenance of sports facilities carrying out the national programme of sport shall be provided by the state. The state should also provide the finance for certain rights of the athletes such as medical insurance, social insurance, insurance in case of injuries and disability insurance, maternity insurance and the modification of studying and sporting obligations. On the basis of this legislation the state shall provide resources for the functioning of the National Olympic Committee.

The national Programme of sport determines short term, medium term and long term orientations. Short term orientations were to be set out until 2001, medium term until 2004, and long term orientations until 2010.

In accordance with the Law on Sport, the national programme covers the following areas:
- sports education of children and youth;
- sports recreation;
- elite sport;
- top sport and
- sport of the disabled.

The National Programme of Sport determines the development and expert assignments in sport. Among the latter, a special emphasis is given to education, qualification and training, and specialisation of sports experts, scientific and research work, publishing activities, monitoring of fitness of athletes and training advice, gig international sports events, prevention of doping and prohibited methods, sports facilities, sports information system, international activity and the role of the national sports federations, municipality sports associations and federations, sports institutes and sport related institutes, and the Olympic Committee of Slovenia.

It was expected that the national programme of sport be completed in 2010. The Ministry had already appointed a special working commission to prepare their proposal for the new national programme and also the amendments for the Sports Law. [5]

3.3. The Associations Act[6]

Legal organization of sport subjects is regulated by the Associations Act from 2006 (amended in 2009). In general, any sports subject (a club, a federation) is an association which should be a voluntary, autonomous, non profit association of natural persons who have joined together in order to exercise the jointly determined interests defined in the association's charter and in accordance with the law. An association may not perform exclusively profitable activities, nor may it be founded for such a purpose. Associations may be founded by persons who have reached the age of 18. Provisions regarding funding are quite significant. Following article 24 an association may acquire funding for its operation from membership fees, material rights and activities of the association, gifts and legacies, donations, public and other sources. The most important is the provision of Article 25 which determines that any surplus of income over expenditure may be spent only for the activities for which an association was established. Any surplus of income over expenditure generated by an association's direct performance of profitable activities may only be used to fulfill the purpose and objectives of the association in accordance with its charter. Any distribution of the association's property between its members shall be void. All associations with income or expenditure exceeding 1 million Eur should have their finances revised by an authorized reviser.

4. Good governance in sport

Sports policy in Slovenia complies with most fundamental principles of good governance in sport. Sports organizations have the autonomy to conduct their affairs independently from the state. The inclusion of sports NGOs into the policy making and funding procedures evidences the democratic nature of sport governance by the state.[7] There is no rule prohibiting a member of the governmental administrative authority from serving in the decision making bodies of sport organizations. Sports clubs and organizations are independent and are established pursuant to the Associations Act. As explained above, sports organizations are able to conduct profit-making activities where furthering the public-benefit purposes of the organizations. Approximately 40 % of all registered NGOs in Slovenia are sports NGOs. The key governance principles to be respected by sports organizations are transparency, fairness, democracy and equity.

4.1. Partnership between the NGOs and governmental institutions

The OCS as a non-governmental and non-commercial organization executes programmes responding to the fundamental interests and needs of its members (plurality, sports competition programmes, and programmes for promising young athletes and top sports athletes). It consists of 108 members coming from National sport Federations

4 Official Gazette of the Republic of Slovenia 24/2000

5 It is expected that the working commission will finish its work in 2010 and that the official proposal will be delivered to the parliament before the end of 2010

6 Official Gazette of the Republic Slovenia 61/2006

7 Chaker Andree-Noel, Good governance in sport, Country overview of sport legislation and sport governance, Council of Europe, Strasbourg, p. 89

(61), Municipal Sports Federations (84) and other Sports Organizations (14). There are only a few sports associations who are not members of the OCS, one of them being the Slovenian Sports Union. The independence of the OCS is gained through financing which is mainly based on marketing and others organization's own resources (70%) with public funds representing other 30 %. The OCS has established a local network of sport organizations with 12 Regional Sports Offices which have representatives in the General Assembly. The OCS also pays a special attention to the protection and development of voluntary work in sports clubs as well as to the sports activities for the disabled. The vision of the OCS is oriented towards enhancing the interest of all citizens in the active and healthy environment in sport, and particularly in encouraging the 40 % of the Slovenian citizens not currently taking part in sports to get involved in the organized sports movement. In elite sport, the OCS has established fruitful collaboration with the State in the issues related to sports legislation regulating the work and the life of athletes, sports organizations and all those actively involved in sports programmes.

The operations of the OCS are defined by the OCS Statutes, which form a part of the National Sports Programme. However, for a particular OCS activity to be co-financed by public funds, it must be included in the Annual Sports Programme. The marketing activities of the OCS are not part of the National Sports Programme but represent instead a part of the commercial activities of the OCS that are crucial for the creation of its own resources, and represent 70% of the total organizational budget.

Through its Fair Play Commission, the OCS has adopted a special set of governance guidelines. They contain basic ethical principles to be followed by sports organizations in order to promote the concept of fair play. Under the by-laws of the OCS Statutes, fines and other disciplinary sanctions can be taken against a member federation that does not respect good governance principles. Some federations need expert support from the OCS before taking legal steps to enforce these principles with their constituency. An independent Court of Arbitration with 40 arbitrators has also been established to serve the needs of sport subjects.

4.2. Examples of cooperation

The organized sports movement is constantly developing and adapting to stay competitive with other organizations appearing on the sports scene while also working to protect sport and preserve its friendly nature and voluntary character. This seems to be the best way to ensure a fruitful collaboration of sports NGOs with the State in the issues related to sports legislation regulating the work and life of athletes, sports organizations and all those actively involved in sports programmes.

Partners in common projects are the Ministry for Education and Sport representing the Slovenian government, the Faculty of Sport and the Institute of Sport (representing the educational and scientific side), the Foundation for the Financing of Sports Organisations which took the role of the distribution of lottery money for sport and the OCS representing sports federations and athletes with their needs. Several very useful projects for athletes and sport organizations were established.

In 1998, the OCS signed a special contract with the Government which enabled the employment of top athletes and top coaches within the Ministry of the Internal Affairs, the Customs Office of the Ministry of Finance and the Ministry of Defence. 127 top athletes are currently (2010) employed by different ministries in our Government. In 1999, the project of special scholarship was established to distribute scholarship to promising athletes aged 15 and more, winning one of the medals at the European, at the World Championships as well as at the EYOD. In Athletics, Gymnastics, Swimming and Alpine Skiing, the minimum criteria for an athlete are to be ranked among the first 8 places.[8] A system of special medical and health insurance for athletes has also been established. Over 400 top athletes have already decided to join the system, deciding to pay one quarter of the insurance fee. In 2007, a special fund for elite top athletes, winners of medals at the Olympic Games and World Championships in the Olympic sports was introduced.[9]

Following a special decision of the Slovenian Parliament, several especially skilled trainers of young promising athletes have been offered a special employment through an individual contract. The common aim is also to strengthen the fight against doping following the course which has been set by the joint Antidoping Commission. The umbrella organisation against doping in Slovenia is the National Antidoping Commission functioning for the purpose of the OCS and the Ministry. It deals with the activities in line with the regulations of the European Antidoping Convention, The Code of Doping of the IOC and the Antidoping Agency at the international sports federations. The Commission adopted its Rules of procedure confirmed by the establishing partners.

5. Financing of sport

Public financing for the activities or programmes of sports clubs is represented by the funds that are available to sports associations through a public tendering process. State aid for sport on the national and municipality levels is laid down in the National Sport Programme whereas the annual expenditure is defined by the Annual Sports Programme.

Public budget for sport

Year	Ministry	Foundation for sport
2004	13.488.160	5.880.571
2005	13.747.747	6.676.682
2006	14.566.735	10.558.180
2007	19.338.079	8.266.667
2008	17.539.957	12.635.167

It is obvious the public funds on national level were increasing constantly by 14 % on average per year. Here, we should bear in mind also the fact that the Local Communities allocate almost 4 times more money for sport than the central authorities. It the period of 9 years of national program the whole amount of public funds was 166 Million Eur (25% total share) and local communities contributed to the program 505 Million Eur (75% share).

All sport oriented organizations in Slovenia are able to generate more than 250 million Eur. Sports organizations /national and local sport federations and clubs/ collect about 160 million Eur. It means that public financing of sport represents less than 20 % of the income which is generated by sports organizations.

5.1. Distribution of money from games of chance

In Slovenia, games of chance represent an important source of funding needed to support a substantial part of the Slovenian society and sport, as a part of the society. During the years after the recognition of Slovenia (1991), a special system was adopted so as to secure the proceeds of the National Lottery for the state's budget earmarked to support organisations of the disabled, humanitarian and sports organisations.

A system of lotteries and the Foundation for the Financing of Sports Organisations was established in 1998. A general orientation in the national sports policy is to set up a system of financing of sports through the national lottery and other games of chance. The options are open to rise the 7% of the funds coming from games of chance before 1998, up to the present 30 %, and later on even up to 50% of the money

8 In the 2009/2010 school year, more than 150 scholarships were delivered. The value of scholarship is in the amount of the lowest guaranteed salary in the Republic of Slovenia.

9 In 2009, ten athletes were entitled to a special financial contribution. The amount of a contribution was between 800 and 1500 Eur monthly

from that source. The new Law on the Games of Chance established the Foundation for the Financing of Sport Organisations which, in 1999, provided almost the same amount of money for the functioning of sports organizations (not for sports infrastructure) as the funds allocated for sport from the central budget by the Government.

A normative system has been introduced for the distribution of the funds raised from the concessions for games of chance. The intention of the legislator was to have the funds distributed by the institutions composed by the representatives of the beneficiaries of the funds, and for this purpose, pursuant to the Gaming Act, two foundations (the FIHO and the FŠO) were founded. The Gaming Act defines also the ratio of the distribution of the funds between the organisations for the disabled, humanitarian organisations and sports organisations.

On the basis of the new Law on Games of chance, the OSC and the Slovenian Skiing Federation established the company "Sports Lottery" and the Government awarded a concession for several different games of chance. The funding is regulated so that the organisers of the games have to pay a concession, a part of which belongs to the beneficiaries. The distribution of funds is the responsibility of two public foundations which the state founded for that very purpose: the Foundation for the financing of the organisation for the disabled and humanitarian organizations (Hereinafter: the FIHO) and the Foundation for the Financing of Sports Organisations (Hereinafter: the FŠO). The particularity of these foundations is the structure of the monitoring bodies composed by the representatives of the beneficiaries of these funds, i.e. the representatives of the public sector. That seems to be an interesting solution which proved to be quite successful in practice and which may be the reason for practical and rational distribution of funds to particular segments of society.

The FŠO is therefore an organisation which has been distributing the funds from acquired concessions for games of chance to the Slovenian sport since 1988. The Council of the Foundation is composed of 17 members, officials of sports organisations and sports experts, who decide upon all significant matters of the Foundation. The funds are earmarked for the needs of top sports (40%), sport for all (7%), construction of sports infrastructure (40%), development and research (8%), whereas a smaller part goes for publishing in sport and other programs. Every year, the Foundation for the Financing of Sports Organisations co-finances on average almost 600 various programs to over 250 sports organisations on average, thus covering about 30% costs of these programs.

Compared to the funds that are earmarked for sport by the state from the state budget the funds of the Foundation represent a substantial share. Thus, for example, in 2005, the funds of the state budget (including the funds from the EU funds) amounted to EUR13.7 Million (in 2006 even EUR14.5 Million), whereas the FŠO funding amounted to EUR6.6 Million (in 2005) or EUR8.6 Million (in 2006), which means that the share from the games of chance is getting more and more important and is still increasing. The needs of sports organisations for the FŠO funding are getting bigger and bigger every year, since in 2005 and in 2006, in spite of the economic growth and increase of expenditure from public finances for sport in the past, there was clear evidence of the decrease of the revenues of sports clubs and federations compared to the GDP. In 2006, sports clubs, in relation to the GDP, created 18.5% less revenues compared to those in 1999. Consequently, the demand for the FŠO funding 5 times surpasses public official calls for applications for the funds.

5.2. Financing of the Olympic Committee of Slovenia

A significant share of the OCS own funds is created by the trade marking of the marketing projects, with a smaller part generated by the international competitions within the IOC programme and the results achieved by the Slovenian athletes at those competitions. Marketing issues are dealt with by the company OKS Olimp which was founded in 2006 in order to deal with the commercial issues of the OCS. The marketing programme is the backbone of the business activities offering its commercial partners, including sponsors, partners and donors, different opportunities linked with athletes and sport organizations programs.

Based on this knowledge, the OCS support is being upgraded by offering to its members as many benefits as possible in a fair and rational way. Financial management of sports organizations in a competitive economy is becoming a special challenge. The share of public money as a proportion of the funding of sports organizations is shrinking, and, every day, sport is being subjected to a more competitive marketing scene.

Average budget of the OCS	
Year	**Budget in EUR**
2004	3.823.000
2005	3.672.000
2006	3.726.000
2007	3.342.069
2008	4.303.573
2009	3.628.043

It is obvious that the budget of OCS is relatively small comparing with the amount which is available for sport on national and local level. It represents the share between 3 and 4 % only.

As in other sports associations, the income from private resources represents around 70% share of the total required for operation. It is clear that different strands of the OCS funding with private resources are clearly dominant. The data also reveal that both, the marketing income and the sponsorship agreements are bound to the Olympic cycles. Thus, marketing income reaches a peak at the end of the Olympic cycles and is at a minimum in the first year of the Olympic cycles, and this is also true for the resources that the OCS receives from the IOC. From the data below the average income structure of the OCS is evident.

50% marketing activities
20% Ministry of Education and Sport
15% Foundation for the Financing of Sports Organisations
10% other own activities
5% IOC (the Olympic Solidarity programmes and other programmes)

The income of the OCS enables maintenance and development of high-quality sports programmes. The fact that about 10% of total funds are needed for the operation of the organization, i.e. for its staff, means that by increasing its income, the OCS is granting more and more funds into sport - 90% of the total budget. The recession in 2009 already had some effects on the Slovenian sport and is slowing down the income from private partners. The majority of sport organizations including the OSC already made plans for cutting expenditure and rationalization of operational costs.

6. Conclusion

The general policy of sports development in Slovenia is to follow the needs and the interests of every individual. All the citizens should have an equal opportunity to practice sport according to their skills and capacities. On the other hand, more skilled and talented individuals should be provided with a possibility of top sports performance and adequate training in the appropriate circumstances and facilities. The common task is to draw close lines and encourage tight co-operation between different vertical systems, namely, a strong co-operation and co-ordination should be developed among the State authorities on the national and local levels, the whole education system, down to the pre-school period, and the so called civil sports movement from the national to the local level.

The organization of sport in Slovenia is specific and based on the Slovenian legislation. The role of the OCS is not as wide and complex as in some other countries (Italy, Germany and Croatia). Sports federations and clubs have autonomous position to get public funds and

the OCS, an umbrella non governmental sports organization, is not in a position to deliver public funds. The OCS, respecting the extraordinary efforts of the sports associations and clubs and its affiliated sports federations, has established a sound relationship with its members, fully realizing that they ensure the conditions for daily training and the development of athletes until they qualify to be included into the categorization system.

The best ways to establish good governance in sport are the examples of good collaboration between non governmental sport organizations and governmental institutions. It seems that a common solution has been achieved by realizing that sports subjects have to stick together if they do not want to lose contact with modern trends of the development of sport. Taking into account the specific situation of a small sport nation, the decision was taken to deliver specific tasks to the subjects for whom they were founded on the one hand and to work together in general for the benefit of the progress of our sport on the other hand. Many common activities have been carried out jointly by different subjects from the governmental and the non-governmental sides which are supposed to take care of the Slovenian sport. The relationship and understanding of different positions and responsibilities of governmental and non governmental sides is crucial for a small country like Slovenia. The changes of the Slovenian sport legislation in the near future will be an opportunity to find out the ways how to carry on successful examples of good governance in sport in the future.

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Sport Image Rights in Spain

by **Yago Vázquez Moraga and Andreu Sarrias***

1. Introduction

Over the last 20 years, professional sport (as a source of entertainment and business) has undergone spectacular growth, in large part due to the development and exploitation of one of the essential rights of human personality: the right to one's own image. Paradoxically, a right with a basically philosophical content, inherent to the legal and social status of the human personality as an external element, has become the financial manna of spectator sport, which today is something more than that.

As stated by Professor Parejo Alfonso[1] in the prologue of the main book on image rights in Sport (*"Los derechos de imagen en el ámbito del deporte profesional (Especial Referencia al Fútbol)"* by the professors Palomar Olmeda and Descalzo González; mainly due to the evolution of technology, economic exploitation rights deriving from the right to one's own image have driven the spectacular evolution that sport in general and football in particular have experienced over the past few years, becoming a matter of enormous social and economic importance, due to television and other forms of media.

Therefore the significance of this comparative study of sport image rights is obvious, particularly if we take into account the incomplete and sector-specific regulation of them in Spain, which the different operators in the sector have taken advantage of, using legal cunning, to fill in the gaps by means of complex and unusual legal formulas that serve their own interests. Therefore the patrimonial aspect of this right has been developed privately through hiring (employment and commercial), by means of which the different operators in the sport market (sportspeople, clubs, Sports Corporations, companies, etc.) have managed to perfect complex legal relationships, always tending to reduce the tax pressure on the income they receive from their respective image rights.

Hence the difficulty of this study, not only because it is more about casuistry than doctrine, but also because of the nature of the concept of "image rights" which, as with the majority of the so-called personality rights, far from having a universal and pacific definition, is often confused with other related fundamental rights, such as the right to dignity and personal and family privacy.

2. The right to one's own image: delimitation, content and regulation.

As already stated, there is not a single unequivocal concept of what is understood as the right to one's own image and it can be said that its content and definition varies depending on the level of scientific autonomy that different authors attribute to this right. In this sense, some consider that the right to one's own image forms part of a person's right to dignity, whilst others state that it forms part of the right to privacy, and others include it within the more general principle of respect for human beings. These digressions have sometimes even transcended the case law of the Spanish Constitutional Court[2].

As stated by the professor Blasco Gascó[3], this confusion may have been added to by the fact that *"the right to one's own image is not expressly recognised in all constitutions or in general in the European constitution, including the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950 and the Charter of Fundamental Rights of the European Union dated 7th December 2000, but rather, as has been stated; it is protected by the general principle of respect for human beings or respect for one's life and matters related to personal privacy (article 8 of the Convention and article 7 of the Charter)."*

Therefore, although it is true that *de lege lata* it appears that there is a legal lack of definition with regard to the right to one's own image, this should not lead us to erroneously to think that it does not have its own legal autonomy as, it does not only have this characteristic but rather, as explained by professor BLASCO GASCÓ in the aforementioned work, this is manifested in three different ways, given that (i) the right to one's own image has its own *nomen iuris*, (ii) its own conceptual autonomy (developed by means of the Case Law of the Supreme Court and the Constitutional Court) and, furthermore (iii) it also has legal autonomy, not only as a right consecrated in article 18.1. of the Spanish Constitution, but also due to its development by means of Organic Law 1/1982, dated 5th May, regarding civil protection of the right to dignity, personal and family privacy and one's own image.

This autonomy has also been declared by the Constitutional Court on several occasions, among others in its Decisions 231/1988, 99/1994, 81/2001, 139/2001, where, after acknowledging that there is a link between the right to one's own image and the right to dignity and privacy, in all cases the right to one's own image "*is an autonomous constitutional right which has a specific level of protection with regard to*

* Pintó Ruiz & Del Valle Law Firm, Barcelona, Spain.

1 Parejo Alfonso, L., Prologue to the book by Palomar Olmeda, A. and Descalzo González A., "*Los derechos de imagen en el deporte profesional (Especial referencia al fútbol)"*, Publisher: Dykinson, Madrid, 2001.

2 Compare, for example, the decision of the Constitutional Court number 170/87, dated 30th October, where it would appear that the right to one's own image forms part of the more general fundamental right of personal privacy, with judgement number 139/2001 of the same High Court, in which it is declared that the right to one's own image is an *"autonomous constitutional right, which has a specific level of protection."*

3 Blasco Gascó, F., *"Algunas cuestiones del derecho a la propia imagen"*, in *Bienes de la Personalidad*, Conferences of the Association of Professors of Civil Law (13.2007. Salamanca), Publisher: Murcia University, 2008, pages 13-92

reproductions of a person's image that, whilst affecting the personal sphere of its owner, do not damage their reputation or reveal their private life; constituting the safeguard of a personal and reserved area (although not private) with regard to the action and knowledge of others. Therefore individuals are attributed the power to prevent the unconditional distribution of their physical appearance, as it constitutes the primary element of the personal sphere of any individual, as a basic instrument for identification and exterior projection and an essential factor for their own recognition as an individual person."

It is not a trivial matter as, given the number of ways of capturing and reproducing images that exist today, the autonomous constitution of the right to one's own image is a guarantee against all of the illegitimate intromissions to which a person can be subjected.

2.1. Definition and constitutional regulation of the right to one's own image

Within the set of fundamental rights incorporated within the Spanish Constitution (hereinafter, "SC" or "Constitution"), which are considered fundamental rights because "*they are the basis for political order and social peace"* (article 10.1 of the SC) serving the essential values of our State under the rule of law, is the fundamental right to one's own image. In this sense, article 18.1. of the Spanish Constitution declares: "*The Constitution guarantees the right to dignity, the right to personal and family privacy and one's own image."*

Furthermore, after regulating a series of fundamental public freedoms in article 20.1 (freedom of expression, information and scientific and artistic creation) point 4 of the SC states "*These freedoms are limited by respect for the rights recognised in this document, the precepts of the laws that develop them and, in particular, the right to dignity, to privacy, to one's own image and the protection of youth and childhood."*

This right is such an important part of the Constitution that it even constitutes a limit on the execution of other fundamental rights, such as freedom of expression, that are so important in a modern democratic society.

In short, in contrast with other constitutional rights that "guide" legislative, political and judicial action, the right to one's own image is a *fundamental right* and is set apart from the actions of public authorities and particularly legislative power, in the sense that the exercise of this right can only be regulated by Law[4] (article 53.1 of the SC) whilst always respecting its essential content.

Before explaining the legal regulation of the right to one's own image, we should try to define it. As we have seen, the lack of a legal definition regarding this right means that its conceptualisation varies depending on the authority that defines it. In this sense, as this right has (as we shall see) two aspects, in order to define it we can either consider its *negative aspect*[5] (the power to prevent a third party from capturing or exploiting one's own image without authorisation) or its positive aspect[6] (the right of each person to freely create their personal image, as another part of their personality).

It is also possible to define the right to one's own image based on either the constitutional aspect of the right (which shall be the case whenever the illegal intromission affects the personal sphere -not property- of the person concerned[7]), or the property aspect of it[8] (all of the rights related to the commercial exploitation of image of an individual).

In short, in accordance with the doctrine of the Constitutional Court[9], from an eclectic point of view, the right to one's own image can be defined as the personality right[10] that gives its holder the power to freely determine their appearance and external physical characteristics, to publish and reproduce them freely and to prevent unauthorised third parties from obtaining, reproducing or publishing recognisable physical characteristics of their physical image without their consent.

Therefore, as with other personality rights, the holder of the image right is the physical person whose image is reproduced and, in principle, it is not possible for the holder to be a legal entity, as in this case their image is protected by other legal precepts, related to their trading name or trademark. However, as stated by Pina Sánchez and Ferrero Muñoz[11], obviously "*it is possible for the resulting ownership of these rights"* to be acquired "*by virtue of a contractual assignment by an individual."*

The right to one's own image, therefore, also has legal protection at two levels:

a Constitutional protection, in accordance with its status as a fundamental right (and therefore there is the possibility of appealing to the Constitutional Court).
This protection empowers the holder of the right to prevent the obtainment, reproduction or graphic communication of one's own image by an unauthorised third party, regardless of their purpose (informative, commercial, scientific, cultural), in order to protect the moral aspect of their holder.

b Ordinary protection, that is not recognised as constitutional, and

4 That, in accordance with the provisions of article 81.1 of the SC, must be an Organic Law that "develops" the Constitution directly in essential areas for the definition of this fundamental right" (Constitutional Court Ruling 127/1994, dated 5th May).

5 This is the opinion, for example, of professor Carreras Serra ("*Derecho español de la información"* Publisher: UOC, 2006, page 154), for whom *"From a theoretical point of view, we can define the right to one's own image as the right that empowers people:*
To reproduce one's own image
To prevent third parties from capturing, reproducing or publishing one's own image without authorisation."

6 In this respect, see Pérez De Los Cobos, F., *"Regarding the right to one's own image (with regard to the Constitutional Court Ruling number 170/87,* dated 30th October)" in the Judiciary Magazine (*Revista del Poder Judicial*) number 10, 1988, page 75; which explains that the content of the right to one's own image cannot be reduced to a right of exclusion i.e. to prevent others from using it, because, as professor Blasco Gascó explains (page 12 of the work cited), *"the right to one's own image is the pre-emptive right, linked to the most intimate personality and freedom of a person, to freely decide on their own external appearance."*

7 As declared by the Constitutional Court (Constitutional Court Ruling 81/2001, dated 26th March), *"the intention regarding the constitutional aspect of this right is that individuals can decide which aspects of their person they wish to keep from public view, in order to guarantee a private environment for the development of their own personality away from external interferences."*

8 In this regard, it is important to take into account the distinction made by the Constitutional Court (Constitutional Court Ruling 81/2001, dated 26th March), according to which:
"It is true that our Law (particularly Organic Law 1/1982, dated 5th May, regarding civil protection of the right to dignity, to privacy and one's own image) grants all people a set of rights regarding the commercial exploitation of their image. However, this legal aspect of the right should not be confused with the constitutional aspect, related to the protection of the moral sphere and human dignity and guaranteeing a private area free of external intromissions. The protection of the economic, property and commercial aspects of a person's image affect different legal interests from those of a personality right and therefore, although they deserve protection and are protected, they do not form part of the content of the fundamental right to one's own image of Article 18.1 of the SC. In other words, despite the growing establishment of property rights over people's images and "the necessary protection of the right to one's own image given the growing development of the media and procedures for the capture, publication and distribution of them" (Constitutional Court Ruling 170/1987, dated 30th October [Constitutional Court 1987, 170], F. 4), the right guarantee in article 18.1 of the SC, due to its "completely personal" nature (Constitutional Court Ruling 231/1988, F. 3), limits its protection to a person's image as an element of the personal sphere of the subject, as an essential factor for their own recognition as an individual."

9 According to which the right to one's own image can be defined as *"a personality right that gives its holder the power to control the representation of their physical appearance that allows their identification, which involves both the right to determine the graphic information generated by the physical characteristics that makes them recognisable that may be captured or publicly distributed and the right to prevent the obtainment or publication of their own image by an unauthorised third party,"* (Decision of the Constitutional Court number 72/2007 (First Courtroom), 16th April, 2007).

10 As opposed to other legal systems, such as that of the United States, where the right to one's own image is not considered a personality right, but rather is considered a property right related to an intangible asset. In this respect, as professor Blasco GASCÓ explains (page 32 of the work cited), the equivalent to the right to one's own image in Anglo Saxon law is in the *right of publicity,* deriving from the right to be alone or be left alone as part of the right to privacy. In this aspect, see the work of professor José Luís González (González, J.L., *"The right of publicity and the prohibition of false light" Comment regarding the STS, 1, 24.12.2003,* Indret Magazine (www.indret.com), Working Paper number 243.

11 Pina Sánchez, C. and Ferrero Muñoz, J., "*La comercialización de la imagen en el deporte profesional,*" in the joint work *"El deporte profesional,"* directed by Palomar Olmeda, A., Publisher: Bosch, 2009, page 611.

whose scope of protection is limited to the property aspect of the right to one's own image, which has the protection of an ordinary civil right.

This protection empowers the holder of the right to prevent the use of the name, the voice or the image of a person for advertising, commercial or similar purposes. I.e. the right is protected as an object of legal trade.

2.2. Legal regime of the right to one's own image: Organic Law 1/1982, dated 5th May, regarding civil protection of the right to dignity, personal and family privacy and one's own image

Aware of the importance of the right to one's own image in a modern society, Spanish legislators soon developed and protected this right by means of Organic Law 1/1982, dated 5th May, *regarding civil protection of the right to dignity, personal and family privacy and one's own image* (hereinafter, "OL 1/1982" or "OL").

The main objective of OL 1/1982 was to regulate the civil protection of the fundamental rights established in article 18.1 of the SC, including the right to one's own image. Therefore this regulation developed the provisions contained in article 53.2 of the SC[12], determining the legal channel for defence against the illegitimate interferences or intromissions that may affect these rights, as well as determining the injured party's rights in the event of these intromissions (including the right to compensation for the damages suffered, which must always be set in accordance with the provisions of this OL).

After declaring[13] in its First article, point One, that the right to one's own image "*shall be given civil protection from all types of illegal intromissions"* (specifically by means of "*the legal protection procedure envisaged in article 9 of this Act*," according to the current text of article 1.2 of the OL), article 1.3 of the OL then proclaims that this right is "*unrenounceable, inalienable and imprescriptible,"* and therefore "*The renouncement of the protection envisaged in this Act shall be invalid, without prejudice to the cases of authorisation or consent referred to in the second article of this Act."*

OL 1/1982 has the virtue of condensing or at least anticipating all of its regulatory content in a single article (the First article), by outlining the fundamental concepts of the legal regime of the right to one's own image I.e.:

- The right to one's own image is protected against *illegal intromissions.*
- This protection is granted by means of *the legal protection procedure envisaged in* article 9 of the OL.
- The right to one's own image is an *unrenounceable, inalienable and imprescriptible right* (which does not mean that, within the limits mentioned below, it cannot be ceded).
- In turn, the scope of the protection excludes cases in which *authorisation or consent* is given for the exploitation of the right to one's own image by a third party, which cannot be considered an "illegal intromission."

Before going on to study the specific regime applicable to the image rights of professional sportspeople, it is necessary to briefly describe (as a more extensive description would be outside of the scope of this study) the scope of two fundamental concepts of the legal regime of image rights: the express consent required for its use by third parties (which is necessary so that sportsperson can assign their image rights) and the concept of "illegal intromissions" contemplated by the OL.

a) Express consent

After establishing (Second article, One) that the scope of protection of the right to one's own image is limited "*by laws and social customs taking into account the area that, by their own acts, each person maintains reserved for themselves or their family,"* the OL prescribes that "*The existence of an illegal intromission in the protected area shall not be considered when it has been expressly authorised by law or when the holder of the right has granted their express consent "* (Second article, Two). This express consent[14], in accordance with the next point of this article "*shall be revocable at any moment, but any damages and losses caused in this case must be compensated, including those for justified expectations"* (Second article, Three, of the OL).

As can be seen, despite the fact that the right to one's own image is an *unrenounceable, inalienable and imprescriptible right;* given the possible value of this right as property which makes it tradable (as in the case of some professional sportspeople), the OL expressly allows the holder of the right to authorise third parties to exercise some of the powers that it confers to its holder. I.e. the OL allows its holder to freely dispose of their right, although within the limits envisaged in the SC and the OL itself (for example, not allowing the renouncement of the right).

This means that, in the event that a third party exploits the image of a professional sportsperson without their consent, this illegal intromission shall be covered by constitutional protection (ordinary and constitutional, as we shall explain in section 6 of this work) whereas, if for example there is a contract for the assignment of image rights (express consent), but the assignee goes too far when exercising them, violating the terms of this assignment, any disagreement in this respect shall be considered to be of a merely contractual nature and these circumstance shall not be considered illegal intromission, therefore receiving only *ordinary legal protection*.

As the form in which this consent must be provided has not been determined (without prejudice to how it has been said it should be expressed) this may be provided in any of the ways envisaged in the Civil Code, i.e. it may be provided verbally, although this is not recommended (not only because it is difficult to prove, but also due to the problems that may arise related to the limits and exact content of consent provided verbally[15].

A good example is the Decision of the Constitutional Court number 1225/2003 (Courtroom 1) dated 24th December 2003[16], in which the proven facts consist in the verbal consent provided by a young person for the capture of his image and its publication in a report regarding fashionable night clubs in Madrid. However, the photograph taken ended up being included in a very different report about drug and alcohol consumption by young people on the so-called "Bakalao Route" in Valencia. Whilst the young person stated that he had not given his consent for the inclusion of his photo in this report, the publisher claimed that he had given his verbal consent for his photo to be taken and therefore it was not necessary to get any further consent for its publication in the aforementioned report. In the end the Supreme Court ruled in the young person's favour, declaring that the consent given had been diverted and used by the publisher, exceeding what was consented to, as the young person only "*authorised the taking of his photograph to illustrate an advertising campaign about fashionable bars in Pozuelo de Alarcón and not to be inserted in reports that the aforementioned newspaper published on young people, synthetic drugs, alcohol and fast driving of motor vehicles, as he was not informed about this at all and therefore could not have authorised it."* This is why it is recommended that this consent should always be given in writing.

Therefore, one of the essential elements of any contract or agreement for the assignment of image rights, whether in exchange for pay-

12 According to which, any citizen may claim the freedoms and rights recognised in article 14 and Section one of Chapter two before ordinary courts through a procedure based on the principles of preference and preliminary hearings and, if applicable, through an appeal filed with the Constitutional Tribunal. The latter remedy shall be applicable to conscientious objection recognised in article 30.

13 For obvious reasons, from this point onwards we will only refer to the right to one's own image, leaving aside the other fundamental rights that are the object of this OL, i.e. and the right to personal and family dignity and privacy, which we shall only refer to when it is necessary for coherence.

14 It is worth mentioning that, if the holder of the image right is a minor or lacks legal capacity, in accordance with the Third article of the OL, the consent must be provided by them when their maturity permits or, if this is not the case, be granted in writing by their legal representative, with the prior consent of the Public Prosecutor.

15 For example, allowing someone to take a photograph and posing for the camera proves that consent was provided, but what happens if the person that takes the photo later publishes it in a magazine? Does the consent given verbally cover this publication?

16 See the comment made by professor GONZÁLEZ, JL, *(work cited)* in this regard.

ment or for free, is the express consent or the authorisation that must be provided by its holder for the assignee to obtain, reproduce, publish and exploit their image. Furthermore, this consent must have a *content that is limited by its holder,* specifying what the consent authorises, which powers are granted and which powers are not granted.

Lastly, it is worth remembering that, as we have already stated, the consent provided *may be revoked at any time,* without prejudice to the consequences in terms of compensation that this revocation may have in the event that it causes damages and losses to a third party.

b) Illegal intromissions

Together with the general concept of "illegal intromission," Organic Law 1/1982 (Seventh article) specifically lists the actions that shall always be considered illegal intromissions that, for our purposes (image rights) shall be:

- Seventh Article, section Five: "*The capture, reproduction or publication using photographs, film or any other procedure of the image of a person in places or moments related to their private life or outside of them, except in the cases envisaged in article eight, two,"* which shall be commented on below.
- Seventh Article, section Six: "*The use of the name, voice or the image of a person for advertising, commercial or similar purposes"*. I.e. that the image is not limited to the physical appearance of a person, but goes further, thereby including any other characteristics that, such as their voice or name, enables the person to be recognised by third parties.

These declarations must be considered taking into account the exceptions that the Law establishes in its Eighth article regarding illegal intromissions where, after excluding from the scope of the protection exceptions that are authorised or agreed by the competent Authority, or that have relevant historic, scientific or cultural interest, the regulation expressly declares (Eighth article, Two) that "*the right to one's own image shall not prevent: a) its capture, reproduction or publication by any means in the case of people that have a public position or a profession with notoriety or public exposure when their image is captured during a public act or in places that are open to the public."* And in the same sense, in accordance with the aforementioned article, an illegal intromission can not be considered to have been constituted by (b) the "*use of the caricature of these people, in accordance with social customs,"* or (c) "*graphic information about a public incident or event, when the image of a particular person appears merely as an accessory."*

If we apply these exceptions to the specific case of professional sportspeople, it can be concluded that:

- As professional sportspeople have undeniable fame and public exposure, illegal intromission shall not be considered to be constituted by the capture, reproduction or publication of their image when it is captured in a public act or in a location open to the public, as long as it is not used for commercial and advertising purposes.
- Illegal intromission shall also not be considered to be constituted by the caricature of professional sportspeople.
- Furthermore, the publication of photographs of professional sportspeople that accompany news related to sport events shall not be considered illegal intromissions.

3. Legal protection of image rights

As we have seen, Article 53.2. of the Constitution states that all citizens are protected by the fundamental rights "*before ordinary Courts through a proceeding based on the principles of preference and a preliminary hearing and (if applicable) through an appeal to the Constitutional Court."*

This precept consecrates the principle of subsidiarity in the protection of the fundamental rights, in accordance with which these first have a direct and immediate protection before the Ordinary Courts and Tribunals, i.e. the *ordinary* protection of these rights and, additionally, when this protection fails, they can appeal to the Constitutional Court, which shall give *constitutional protection* to these fundamental rights. In this respect, the Constitutional Court has two functions: one is subjective, related to the protection of the fundamental rights of citizens, and the other is objective and related to upholding the Constitution, as it creates a legal doctrine with regard to the interpretation of the Constitution, which ordinary Courts must comply with.

Within this procedural framework, the right to one's own image is covered by the civil protection proceeding envisaged in OL 1/1982, which incorporates certain material and procedural specialities into the ordinary protection proceeding.

In accordance with article 9.1 of OL 1/1982, legal protection shall be provided against the illegal intromissions that we have already explained, whilst studying the legal system contained in Organic Law 1/1982. To do this (article 9.2) it is possible to take *"all of the measures necessary in order to end the illegal intromission concerned and to re-establish the injured party's full enjoyment of their rights, as well as to prevent or impede subsequent illegal intromissions. These measures may include precautionary measures aimed at achieving an immediate cease to the illegal intromission, as well as the acknowledgement of the right to reply, the declaration of the judgement and the order to compensate the losses caused."*

One of the pillars of this legal protection consists of the legal consecration of a *iuris tantum* legal presumption: it shall be assumed that there has been a loss whenever an illegal intromission is proven (article 9.3). Furthermore, this intromission shall generate a right to be compensated, that "*shall cover the moral damage evaluated based on the circumstances of the case and the seriousness of the injury actually caused, taking into account (if applicable) the distribution or audience of the media through which it has occurred."* And in the same sense, article 9.3 concludes that the profit obtained by the party causing the injury as a consequence of it shall also be taken into account.

Finally, section Five, article 9, of the OL 1/1982 establishes a period of validity of 4 years for actions related to protection from illegal intromissions, to be counted from the date that the person entitled is able to exercise them.

The main peculiarity of this proceeding is based on the position that is normally adopted by the defendant that, rather than adopting a defensive attitude, normally makes a type of implicit counterclaim: claiming protection against being prevented from exercising one of the freedoms envisaged in articles 16.1 or 20 of the Constitution (freedom of ideology, of information or expression).

This means that the Judge must weigh up these rights and fundamental freedoms, in order to determine whether there has been an illegal intromission that damages the image rights of their holder, or whether this intromission, for example, is legitimised by one of the exceptions envisaged in the Eighth Article of OL 1/1982 that were referred to previously.

4. The assignment of image rights within the framework of the employment relationship of professional sportspeople

The multiple disciplines and variations that exist in sport make it necessary to divide the study of image rights into two different categories: (i) on the one hand, that corresponding to sportspeople that carry out their activities and compete within a collective structure (Sports Corporations, clubs, cycling teams, etc.) and (ii) on the other hand, the image rights of individual sportspeople, such as golf or tennis players, that carry out their activities autonomously, not within the scope of employment relations.

Furthermore, with regard to the first group (team sportspeople) it is also necessary to differentiate the regime applicable to their collective rights (resulting from the sum of the image rights of all of the members of the team, the team itself and the organiser of the competition, league or championship), which are generally granted through a work contract, from the individual rights that, at the same time, can be exploited by the sportspeople individually (generally through commercial contracts, as shall be analysed later).

4.1. The assignment of image rights within the scope of employment relationships.

There are many cases in which a business, during the exercise of its management powers, requires its employees to adjust, to a certain

extent, their image to the aesthetic directives of the company, without this in itself representing a violation of the workers' rights to their own image. In this sense, for example, it is normal for a football club to require all of its players to wear the same kit.

This is the case of certain activities, such as sporting activities, that due to their very nature involve a *certain restriction of the right to one's own image*, which implies the capture and reproduction of the image of this type of employee. Although the Statute of Workers' Rights does not contain express regulations in this regard (except for the general regulations regarding the privacy of workers, contained in article 4.2.e of this regulation); this has been confirmed by the Constitutional Court, (among others) in its well known Decision number 99/1994, dated 11th April (First Chamber), according to which: "*it is clear that there are activities that involve, due to a relationship of necessary connection, a restriction of the image rights of those that must carry them out, due to their very nature, such as activities that involve having contact with or being accessible to the public. When this occurs, persons that agreed to carry out this type of tasks cannot later invoke the fundamental right to avoid carrying them out, if the restriction imposed is not aggravated by damaging important parts of the person's dignity (article 10.1 of the SC) or their privacy.*"

Consequently, whenever the nature of a job requires the capture and reproduction of the image of a worker for the effective performance of this job, it is not even necessary to gain the worker's consent, as this is a consequence of the work carried out in accordance with the employment relationship[17]. This is the case of the majority of professional sportspeople (the main actors at any sports event), without which there could not be any competition at all.

The general rule applicable to the exploitation of the image rights of professional sportspeople can be found in Royal Decree 1006/1985, dated 26TH June, *regulating the special employment relations of* professional sportspeople[18] (hereinafter, "RD 1006/1985), which, when regulating the rights and obligations of the parties of a work contract (article 7.3) states "*With regard to the sharing of the profits resulting from the commercial exploitation of the image of sportspeople, this shall be as determined by Collective agreement or individual pact, except in the event of contracting by commercial companies or firms envisaged in point 3 of article 1 of this Royal Decree*[19] *".*

I.e. the regime applicable to the image rights of professional sportspeople shall be that envisaged in the Collective Agreement applicable, or that agreed between the sportsperson and the employer in the corresponding work contract.

Firstly, it should be noted that the aforementioned article 7.3. is incomplete in terms of its content and format, leaving certain doubts as to its interpretation. Firstly, due to its general lack of definition, in that it does not specify the extent of the assignment that the professional sportsperson grants to their employing club or sports corporation, or what limits or powers are included therein. Furthermore, it also fails to determine the legal nature of the financial income resulting from the exploitation of the image rights of sportspeople, which may or may not be considered part of their salary.

In fact, one of the main discussions regarding doctrine that have arisen regarding the interpretation of article 7.3 of RD 1006/1985 is related to the legal nature of the financial provisions received by professional sportspeople for the exploitation of their image rights by their employing clubs / Sports Corporations. In this sense, according to some doctrines, this retribution is not considered part of their salary, but rather it is considered financial compensation for the use of the image rights of the sportsperson by the club[20], due to the non-contractual profits that are generated for the latter, which should be shared with the sportsperson.

On the other hand, other doctrines have considered image rights as a salary, arguing that the amounts received by professional sportspeople for the assignment of the rights to exploit their image when this assignment is a product and direct consequence of sporting activity are fully incorporated into the salary, regardless of whether their work contracts or collective agreements make a distinction in this regard, and regardless of whether this assignment is carried out by means of an independent work contract.

In any case, as explained by professor González Del Río[21], mentioning the position of professor Tovillas Morán, "*the reference that article 7.3 of RD 1006/1985 makes to an individual pact between the parties or what is agreed within the framework of a Collective agreement means that it can be concluded that the regulation does not contain any actual rule regarding the possible financial exploitation of image rights and that it simply recognises this possibility, which must be expressly developed using a Collective agreement or an individual contract between the sportsperson and their sporting entity as a legal instrument."*

Furthermore, the literal content of the article appears to mean that there is no particular legal obligation to share with the professional sportspeople the profits that their employer may obtain from the exploitation of their image rights, which can undoubtedly lead to unfair situations where there is no applicable agreement (or an agreement that does not mention this matter) or individual pact, especially in the cases of medium-level sportspeople, which do not enjoy the privileges of superstars and the so-called "cracks."

As explained by Palomar Olmeda and Descalzo González[22], the aforementioned regulation means that professional sportspeople may assign their image within the scope of the collective regulation or that of the work contract. Furthermore, a *contrario sensu* interpretation of article 7.3. makes it possible to consider that image rights can be left outside the employment relationship, as they cannot be assigned or be assigned partially (as is common). Therefore, the mere signing of a work contract between a professional sportsperson and a team, club or Sports Corporation is not sufficient to allow the commercial exploitation of the sportsperson's image, but rather, in accordance with the regulation envisaged in OL 1/1982, there should be express consent empowering this assignment and commercial exploitation.

All of this brings us to an initial conclusion: that, given the lack of a true and uniform general regime applicable to professional sportspeople regarding image rights, we should study the general regulations envisaged in the collective agreements that exist for each of the different sports, always taking into account that this regime should be complemented with the specific legal relationship that each sportsperson has with their employing club / Sports Corporation.

4.2. Main Collective Agreements

4.2.1. Collective Agreement for professional football activities signed between the National Professional Football League (LNFP) and the Spanish Footballers' Association (AFE) (Official State Gazette number 266, Tuesday 4th November 2008).

The current Collective agreement signed between the LNFP and the AFE (applicable until the end of the 2010/2011 season) states that "*The salary items that constitute the remuneration of a Professional*

17 This is also the case with so-called audiovisual rights, regarding which, in general, each sportsperson assigns their image rights by virtue of their employment relationship with the club, Sports Corporation or professional team that employs them. The combined value of all of them (footballers, clubs/Sports Corporations and competitions) is the object of these audiovisual rights. However, despite being closely related to image rights, audiovisual rights are a different matter completely and fall outside of the scope of this work, which is why they shall not be discussed.

18 These are defined as *"whoever, by virtue of a relationship established with a regular nature, voluntarily practice a sport on behalf of and within the scope of the organisation and management of a club or a sporting entity in exchange for payment"* (article 1.2 of RD 1006/1985). The status of professional sportspeople is also held by coaches and trainers, but not national selectors and referees.

19 Which states *"The scope of application of this Royal Decree includes relationships of a regular nature established between professional sportspeople and companies in which the corporate object consists of the organisation of sports events, as well as the contracting of professional sportspeople by commercial companies or firms, for the realisation, in each case, of the sporting activities in accordance with the terms of the preceding point."*

20 This is how it is considered by the ACB-ABP Collective Agreement, which shall be studied in section 3.2.2. below.

21 González Del Río, JM., *"Naturaleza jurídica de los derechos de imagen de ciclista profesional"* (Comment on the Decision of the High Court of Justice of the Basque Country dated 29th January 2008), Aranzadi Sport and Entertainment Law Magazine, Issue 27, Year 2009-3.

22 Palomar Olmeda, A. and Descalzo González, A., *work cited page* 77.

Footballer are: Engagement / Signing Bonus, Game Bonus, Monthly Wages, Extraordinary Payments, Seniority Bonus and Image Exploitation Rights (if applicable).”

The proviso “if applicable” is clarified by article 28 of the Agreement (Image exploitation rights) that states that “*In the event that the Footballer exploits their image rights on their own behalf, as these have not been temporarily or indefinitely assigned to third parties, the amount that the Club / Sports Corporation pays the latter for the use of their image, name or figure for financial purposes shall be considered part of their salary, In accordance with the provisions of article 20. In this case, the amount agreed should be recorded in writing, either at an individual or Club / Sports Corporation workforce level.”*

Two conclusions can be made from this precept. Firstly, that when image rights are exploited directly by the player (by means of their assignment to the employing club / Sports Corporation), the amounts received shall be considered part of their salary. On the other hand, if the player has assigned their image rights to a company, the profits that this company receives for their exploitation shall be considered, in principle, of a commercial nature[23]. In this case, this assignment shall always be unrelated to the professional footballer’s work contract.

Furthermore, although it is not common, this regulation does not prevent the professional sportsperson from autonomously exploiting their image rights, without assigning them to any Club / Sports Corporation or any third party.

Finally, as an *exception* to this general regime, the Agreement envisages an *exceptional collective assignment:* that agreed for the commercialisation by the AFE and the LNFP of sticker collections, Stick Stacks, Pop Ups, Trading Cards and similar items. In this sense, in its article 38.1, the Agreement establishes that: “*The AFE and the LNFP agree, during the seasons of validity of this Collective Agreement, to the joint exploitation for commercial purposes of the image of the different names and emblems of the Clubs and Sports Corporations affiliated with the LNFP, as well as the image of the footballers on each team of the aforementioned Clubs / Sports Corporations, with regard exclusively to the manufacture, distribution, promotion and sale of stickers, stick stacks, pop ups, trading cards and similar items, with the respective albums to collect them, containing the images and names of the aforementioned footballers with the clothing, emblems and symbols of the Clubs that they belong to.”* The profit obtained from this exploitation shall be shared between the LNFP and the AFE at a ratio of 65% and 35%, respectively.

Again, the brevity of this regulation means that it is easy for there to be conflicts related to the exploitation of the image rights of the professional footballers, as, because the Agreement does not specify the scope of the image rights which (if applicable) the professional player assigns to their employing Club / Sports Corporation, it is possible for there to be conflicts between the image rights that have been assigned to the Club / Sports Corporation and those that the player may exploit by themselves or by means of a third party. Therefore, the regulations that the parties establish in the contracts governing the assignment of the footballer’s image rights (regardless of whether this is done via a work or commercial contract) are key, as they should determine the scope and the content of this assignment, in order to avoid the type of conflicts mentioned above.

4.2.2. Collective Agreement signed between the Basketball Clubs Association (ACB) and the Professional Basketball Players Association (ABP). (Official State Gazette number 29, dated 3rd February 1994).

Without any doubt, the ACB-ABP Collective Agreement is the clearest, most complete and most detailed set of regulations regarding the exploitation of the image rights of sportspeople (in this case basketball players) of those described here.

The General Provisions (article 11) of the Agreement state that “*Remuneration paid by the Clubs / Sports Corporations to players, either for their professional services or (if applicable) the express assignment of the exploitation of their image rights, shall be legally considered a salary for all purposes, except for items that are excluded due to current legislation.”*

It is surprising that, in the case of men’s basketball the Agreement applicable determines that the remunerations paid for the exploitation of image rights is considered part of the players’ salary, whilst the Collective Agreement applicable to women’s basketball[24] expressly states the opposite (*“except as otherwise legally provided this amount shall not be considered part of their salary*[25]*”).*

Furthermore, the Agreement (First Additional Provision) clarifies that, for the purpose of calculations regarding annual remunerations, extensions, compensation, etc. envisaged within, and also with regard to the calculation of the financial penalties envisaged in the Disciplinary regime; calculations shall include both amounts paid by the Club / Sports Corporation by virtue of work contracts, as well as others paid by virtue of “*other additional contracts for the assignment of the exploitation of a player’s image rights (signed with the same or any other company that (if applicable) is granted the aforementioned image rights), covering all of the amounts received.”* I.e. that these amounts shall be calculated both in the event that this assignment is carried out directly in the work contract, as well as when there is a double assignment (by the player to a company, and by the company to the employing Club / Sports Corporation).

Regardless of the two preceding general provisions (which almost exceed the regulations contained in the other employment agreements studied), the system for the exploitation of the image rights of the ACB is expressly regulated in *Annex III of the Agreement,* which basically envisages two types of exploitation: on the one hand the *joint exploitation* of the collective rights, which is carried out by ACB as the organiser of the competition, and on the other hand, the *exploitation of the individual rights,* which is carried out by each player, within the limits established in the Agreement.

This Annex III begins with a very significant general statement (“*As it is the firm wish of the parties for the legal regime applicable to the commercial exploitation of the image rights to be fully defined”),* stating the wish of the parties to fully regulate the exploitation of image rights, in order to avoid differences in the interpretation of the articles agreed.

Regarding this desire to avoid different interpretations, Annex III starts (Article 1) with a definition of the main concepts regarding the subject matter. I.e.:

*“1. **Sponsorship contract:** This shall be understood as a contract in which the party sponsored, in exchange for financial assistance for the conduction of sporting activities, undertakes to cooperate with the sponsor’s advertising.*
For the purposes of this Agreement, or any other related agreement, it shall be considered legally equivalent to a patronage contract.

*1.2 **Sponsor:** This is an individual or legal entity that, by means of a sponsorship contract, undertakes to pay a certain amount of money in exchange for the public exhibition of the trademark or product that they own.*

*1.3 **Sponsored Party:** This is the Club / Sports Corporation or the ACB that, by means of a sponsorship contract, undertakes to publicly exhibit a certain trademark or product belonging to the sponsor.*

*1.4 **Merchandising:** This is a type of commercial exploitation of images that, through the signing of merchandising contracts, allows the*

23 This is supported by Case Law including, among others, the Decisions of the High Court of Justice of Andalusia (Seville) dated 19th January 2005, or that of the High Court of Justice of the Canary Islands (Santa Cruz de Tenerife), dated 14th March 2005, which declared that it is not appropriate to consider amounts that companies receive from sporting entities by virtue of the work contracts that a sportsperson signs with their employer as salary items.

24 Collective Agreement for the activity of professional basketball in the women’s league organised by the Spanish Basketball Federation, approved by the Resolution of the General Directorate of Work dated 21st December 2007 (Official State Gazette number 13, dated 15th January 2008).

25 In particular, the Collective Agreement applicable to women’s basketball establishes in its article 24.7: “*Collective image rights - This is the amount stipulated between the parties as remuneration for the assignment of the collective image rights (see annex III to this Agreement). Except as otherwise legally provided, this amount shall not be considered part of their salary.”* Furthermore, in Annex III, the Agreement establishes a list of image rights, the annual remuneration for which is set based on the annual remuneration that the player agrees on in the work contract with the employing Club / Sports Corporation.

commercialisation and sale of photographs, posters or videos of the team, their figures and moments of the matches, as well as the appearance of their image in collections of picture cards, stickers or board games, also including all types of objects that can be sold on the market such as tracksuits, shirts, caps, scarves, flags, pins, pens, key rings, dolls, ashtrays and any other object on which an image can be reproduced […].

1.5 ***Collective Rights:*** *These apply when the image of the player appears related to the team to which they belong in an official competition, wearing the team's kit, or when they participate in public acts organised by the Club / Sports Corporation or by the ACB.*

1.6 ***Individual Rights:*** *These are rights directly related to the image of the player as a person (their privacy) or their image as a sportsperson in general (i.e., wearing sportswear and appearing before the public outside of their working hours, as long as they are not wearing the emblems and kit of the Club / Sports Corporation that they have signed a contract with, or any other that could be confused with them), and*

1.7 ***Competing Company:*** *These shall be considered as any companies whose products are similar to those of the companies that sponsor the ACB and its Clubs / Sports Corporations or that carry out activities that directly compete with the companies that sponsor the ACB and its Clubs / Sports Corporations."*

Next, after defining the conceptual framework applicable to the image rights of basketball, the Agreement regulates 3 specific types of exploitation:

a) Collective image rights: article 2 of the Agreement exclusively attributes ACB the right to commercially exploit the collective rights of players when *"acting as members of a Club / Sports Corporation, they participate in official competitions and when they wear the official kit of the Club / Sports Corporation, regardless of the provisions of individual work contracts."*

This exclusivity also applies to the financial income deriving from the commercial exploitation of collective image rights that, in accordance with this Agreement, shall all go to the ACB.

The ACB has the exclusive right to the commercial exploitation of the advertising activities related to merchandising, which cover not only by the objects listed in the preceding definition but *"any other object on which an image can be reproduced."* The only exception envisaged from this exclusive exploitation of merchandising is that envisaged in article 2.5 of the Agreement, by virtue of which it expressly excludes the commercialisation and sale of picture cards, which correspond exclusively to the ABP, which shall also receive the totality of the financial income derived from this exploitation.

With regard to the form in which this commercial exploitation should be carried out, the Agreement makes this the exclusive choice of ACB and the players undertake to cooperate in the execution of the form of exploitation chosen, as long as it respects the players' rights to holidays and rest, and as long as this exploitation does not adversely affect the individual image rights of the players.

Furthermore, with regard to this form of exploitation, the Agreement specifically contemplates the possibility that it is carried out by means of the figure of sponsorship and in this case the Agreement obliges the players to cooperate in the execution of any sponsorship contracts that may be signed by the ACB or the Clubs / Sports Corporations as a result of this obligation *"deriving directly from the assignment of their image rights and that must be compatible with the individual rights of the players regarding their image as people and sportspeople in general"* (article 2.4 of Annex III of the Agreement).

b) Individual image rights: rights whose commercial exploitation corresponds exclusively and individually to the player, as long as they do not wear the official kit of the Club / Sports Corporation to which they belong, or any other clothing that could be confused with it (article 3 of Annex III of the Agreement).

Without prejudice to this exclusivity, in accordance with the principle of contractual good faith, the Agreement puts a limit on the use of this right of exploitation, stating that players must abstain from participating in the advertising of products that compete with other similar products sponsored by the ACB and its Clubs / Sports Corporations, and from promoting companies that carry out activities that directly compete with the companies that sponsor the ACB and its Clubs / Sports Corporations[26].

c) Television match broadcasting rights.
Finally, with regard to the exploitation of the audiovisual rights related to competitions[27], the Agreement determines that "*All income from the broadcasting or rebroadcasting (live or at a later time, total or partial) of basketball matches on television shall correspond exclusively to ACB, in accordance with the provisions of Act 10/1990, dated 15th October, regarding Sport."*

4.2.3. Collective agreement for the activity of professional cycling (Official State Gazette number 79, Thursday 1st April, 2010).
The current Collective Agreement for the activity of professional cycling, published by means of the Resolution of the General Directorate of Work, dated 17th March 2010 (Official State Gazette number 79, 1st April, 2010), appears to put an end to discussions regarding the legal nature of financial payments resulting from the exploitation of image rights from cycling. This discussion is due to the fact that preceding Collective Agreements regarding cycling did not expressly determine whether the remuneration of image rights was considered salary, as the article that listed the financial entries considered salary did not expressly include amounts deriving from image rights.

On the other hand, the current Collective agreement clarifies the status as salary of image rights, when it establishes in article 17 that "*The salary items that constitute the remuneration of a professional sportsperson are: monthly wages, image rights, extraordinary payments and engagement / signing bonus."*

Furthermore, in the following article 22, the Agreement contains a definition of image rights, stating that: "*This is the amount received by a racer for the assignment of their image rights for advertising purposes, the specific conditions of which are stipulated in an individual pact,"* in which the remuneration of the cyclist for this concept should be established.

In turn, in its Technical Regulations, the Royal Spanish Cycling Federation (RFEC) has regulated the clothing and advertising of cycling teams.

In conclusion, we should refer to the contract signed between the cyclist and the team in order to find out the extent of and the regime applicable to the assignment of image rights by a professional cyclist.

4.2.4. Collective agreement for professional handball (Official State Gazette number 219, 13th September 2006).
After stating (article 21.1) that "*The remuneration paid to professional handball players by the clubs shall be considered a salary for all purposes, except for items that are excluded from this consideration by current legislation,"* in the subsequent article 22, the Agreement lists the items that are always included in the salary received by players, which are:

"Article 22. Salary items.

The salary items that constitute the remuneration of a professional handball player are: monthly wages, extraordinary ratifications, signing

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26 Furthermore, these limitations are qualified in articles 3.2 and 3.3 of Annex III of the Agreement, according to which:
"The foregoing excludes players involved in advertising for companies that make sports clothing (except as provided for in paragraph 3.3.), when the contract was signed before the contract related to the ACB or its Clubs and Sports Corporations (or is a renewal) and with the sponsor of the annual match that may be organised by the ABP.
For the purposes of the provisions of the preceding paragraph, the incompatibility is limited to sponsors of the ACB that are directly linked to the competitions or events organised by this entity.
Furthermore, if in the future the ACB decides to unify the sports clothing of the teams, the incompatibility shall also cover the company that is exclusively granted this assignment.
3.3 With regard to sports shoes, this shall be regulated by the agreement reached by the players and their Clubs / Sports Corporations, according to the provisions of annex 1 of the sector's second Collective Agreement (standard contract)."

bonuses, special bonuses, match bonuses and (if applicable), Image exploitation rights."

Therefore, in this case, the regulations envisaged by Collective agreement are only concerned with establishing that the amounts that the handball players receive for the exploitation of their image rights shall be considered a *salary,* without establishing a regime for the exploitation of these rights, which is therefore left outside of the Agreement and, in accordance with the provisions of the aforementioned article 7.3 of Royal Decree 1006/1985, shall be as the parties determine contractually.

4.3. Some considerations regarding the assignment of professional sportspeople to the National Selections

A particularity of the aforementioned legal regime is in cases of the assignment of sportspeople to the Spanish national selection for their participation in or preparation for international competitions. In these cases, there is an essential difference with regard to the legal relationships described up until now: the players that are taken on by the national team do not sign any type of work contract with the corresponding sports Federation and therefore, between them (the national selection and the players taken on) there cannot be an employment relationship[28]. This means that the regime described above cannot be applied.

Due to these circumstances, in the case of participation of sportspeople in the Spanish national selection, the legal formula used is based on a type of *forced free expropriation* (uncompensated). In this sense, the assignment of image rights in this case is carried out as follows:

- The player cedes part of their image rights to the employing Club / Sports Corporation through the corresponding work contract.
- In turn, in accordance with Act 10/1990, dated 15TH October, regarding Sport (hereinafter, "The Sport Act") and in accordance with the Articles of Association of the different Sports Federations, the clubs are obliged to assign their players to the national selection *for free*.

Although it is true that this obligation to assign their players can be found in article 29.1 of the Sport Act (*"Sports Corporations and other sports clubs, in order to form the national selection, must provide the members of their sports teams to the corresponding Spanish Federation in the conditions that shall be determined"),* on the other hand, the free nature of this assignment does not have any legal justification. The only thing that the Act says in this regard is that clubs must cede players to the national selection, but in no case does it state that this must be for free.

However, the fact is that the various Spanish Sports Federations were quick to establish the free nature of this assignment. In this sense, for example, the General Regulations of the Royal Spanish Football Association (RFEF) (July 2009 Version), after stating that participation in the national selection is "*a special honour and an important duty"* (article 327.1), states that "*Clubs are obliged to provide their cooperation and installations and to assign, without the right to any payment, any of their team's players that are asked for"* (article 327.2).

Therefore some doctrines consider this obligation of free assignment of players as *expropriation* and perhaps unconstitutional, as article 33.3. of the Spanish Constitution declares that "*Nobody may be deprived of their property or rights without just cause related to public or social interest, by means of the corresponding compensation and in accordance with the provisions of the Act."* In this specific case, although it is true that this compulsory assignment does have a legal justification, as it is required by the Sport Act; in contrast to the provisions of the Spanish Constitution, it does not envisage any compensation that could legitimise the sacrifice of the Club / Sports Corporation, i.e. the compulsory assignment of their players. Although it is true that the Act does not require that this be free of charge, in practice, as we have seen, the Sports Federations have taken it upon themselves to demand that it be free of charge[29].

In any case, without wishing to go into legal arguments, it seems reasonable to think that if a club is paying for the exploitation of the image rights of a player (either through their work contract or through contracts for the assignment of image rights), the Sports Federation that demands this player and therefore exploits and profits from the commercialisation of their image, should pay some type of compensation to the club that is the holder of these image rights. However, right now, given the current legal regime, Clubs / Sports Corporations cannot refuse to assign their players to the National Selections or refuse to allow the different Federations from exploiting their images within the framework of the sports competitions in which they participate.

5. The individual commercialisation of image rights.

Having analysed the regulations agreed on in the different Collective Agreements in accordance with the provisions of article 7.3 of Royal Decree 1006/1985, which in most cases is completely insufficient, it appears appropriate to highlight (without providing an exhaustive list) the main regulations governing image rights that, in practice, exist within the scope of professional sport.

This list does not include the assignment of collective image rights, which is normally carried out through work contracts in order to achieve a type of communion between the image of the company, the employing Club / Sports Corporation and the team's players (and trainers, coaches, etc), so that the sum of all of the members of the team and the team's trademark (sporting history, shields, tradition, symbols, etc.) can be exploited collectively (shirts, team photo, etc.). And this is not included in this section as, as we have explained, this assignment is inherent to sporting activity as otherwise, if it was necessary to obtain the consent of all of the participants of the sports event, the system would not work.

Focussing on the individual commercialisation of these rights, it is no secret that the different ways in which teams and players have arranged the exploitation of their image rights is due to the wish of the parties to reduce the amount of tax applicable to the income of the professional sportspeople, as we shall look at in the corresponding section[30]. But this should not lead us to think that this is the case for all professional sportspeople, as only some of them have the fame necessary to generate large amounts of profit by exploiting their image rights. And generally these sportspeople are the most well known and those that the world's most important teams pay the highest salaries (with the resulting tax issues).

In any case, regardless of the specific formula used for the assignment of rights; in order to avoid contingencies and controversies during the exploitation of image rights (which can easily occur when a sportsperson cedes some of their rights to a company and others to a Club / Sports Corporation, and there are conflicts between the two grantees of the rights) it is essential that the contract for the assignment of image rights that a player signs expressly states:

1. The specific scope of the assignment of their rights, i.e. which specific powers are assigned and which parts of their image rights are reserved for individual exploitation by the sportsperson.
2. Whether this assignment of image rights is exclusive or not.
3. The form of remuneration (this may consist in one part that is fixed and another part that is variable, depending on the results of this exploitation).

27 Regarding which, we repeat the statement made in the preceding footnote number 17.

28 This link has been defined by the Court of Justice of the European Communities (Decision dated 11th April 2000) as an autonomous link of a financial nature between the sportsperson and the Federation.

29 Compensation is only envisaged when the player demanded suffers, for example, some type of injury that prevents them from subsequently providing their services to the Club / Sports Corporation that has assigned them (this compensation, therefore, has nothing to do with that envisaged by the Spanish Constitution for cases of forced expropriation). In this sense, for example, article 327.2 of the aforementioned General Regulations of the Royal Spanish Football Association (RFEF), after requiring the free assignment of players to the national selection, states that *"Footballers called to any of the National Selections must be insured by the RFEF, at the expense of the latter, for the whole period during which they are under the discipline of the National Selections, and the clubs must always be the beneficiaries of this insurance."*

Essentially, the main legal formulas used nowadays for the assignment of the image rights of professional sportspeople are:

5.1. Assignment of image rights through third parties (work and commercial contracts).

This formula, which is possibly the most commonly used for team sport, takes the form of a double contract with the Club / Sports Corporation:

- On the one hand, the player signs a work contract with the club that employs them, through which they are paid for their professional services.
- On the other hand, the player signs a contract for the assignment of image rights with a third party (normally a company).
- In turn, this third party assigns these rights to the employing Club / Sports Corporation, by virtue of a contract for the assignment of image rights of a commercial nature.

This system benefits both the sportsperson and the sporting entity that hires them, as: (a) the professional negotiates their salary in "net" amounts, (b) the Club / Sports Corporation reduces the tax payable on the amounts paid to the sportsperson.

Sometimes clubs and sportspeople, when using the aforementioned contractual system (which is completely legal) have gone too far when applying it and have committed excesses (simulation of contracts, assignment of rights without a price or at a ridiculously low price, etc.) which have led to problems with the Spanish Tax Authorities. An example is the judgement passed by the Supreme Court[31] on 1st July 2008, regarding a particular case in which the implementation of this system was actually a contractual simulation, in which the High Court stated that:

"The Club benefits from the use of nominee companies. The sportspeople, particularly foreigners, negotiate their overall remuneration with the clubs in net terms, i.e. after tax, which means that they demand higher payment if a withholding is applied; in short, they transfer the tax charge for withholdings to the Club. If, by means of nominee mechanisms, this withholding can be avoided it is obvious that this benefits the Club.

Apart from this circumstantial evidence, there are specific cases that immediately demonstrate the Club's participation in the creation and use of nominee companies:

This observation is important as it proves that the Club is not unaware of the simulating mechanism created and that its statements regarding its lack of knowledge of these relationships is not credible."

Another variation of this legal formula is that: (1) the sportsperson signs a work contract with Club / Sports Corporation; (2) in turn, the sportsperson assigns their image rights to a company; on the other hand, (3) the company granted the rights assigns their exploitation to another third party (normally a television channel or a producer) so that the latter can exploit them in exchange for the corresponding financial remuneration.

With regard to the problems that may arise from this contractual formula (apart from tax problems, which shall be analysed in the corresponding section) it has been said, and in theory it is possible (although in practice it is not very common) for there to be a disassociation or difference between the period of validity of the work contract and the validity of the contract for the assignment of image rights by the third party to the club, so that, during the period of validity of the contract for the assignment of image rights, the player may have been transferred to a new Club / Sports Corporation and therefore their work contract has been rescinded.

Apart from the fact that, as far as we know, in practice this has proved to be very uncommon, we do not share the opinion of some authors that state that this possible contractual disassociation may make it impossible to exercise the power of unilateral resolution of a work contract that employment legislation attributes to professional sportspeople (article 13.i) of Royal Decree 1006/1985). And we do not share this opinion[32] because, this being the case, we believe that the sportsperson could also renounce the contract for the assignment of image rights, as this is, as we have seen, a power conferred by the Second article, section Three, of Organic Law 1/1982. This is without prejudice to any compensation payments that may apply in this case.

5.2. Assignment to the employing Club / Sports Corporation of all of the image rights of the professional sportspeople.

Apart from the aforementioned formula, since the beginning of the 2000/2001 season, some Clubs / Sports Corporations (mostly football) have started to directly exploit all of the image rights of some of the players in their ranks. This formula, rather than a system for the assignment of rights, is actually more of a business model that is normally used by more important football teams with higher incomes. In the case of Spain, we could even call this model the "Florentino model" as it was the president of Real Madrid, Florentino Pérez, who made it famous in Spain by implementing it at Real Madrid CF.

As explained by Ferran Soriano, the former Financial Vice-president of FC Barcelona, from the point of view of this model, the profit and loss account of a football club looks more like that of a global entertainment company such as *Walt Disney* or *Warner Bros*, which have content in the form of characters (Mickey Mouse or Bugs Bunny, for example) - they make films, arrange merchandising and operate theme parks. In the case of football the characters are the players, the films are the 90 minute television programmes, the merchandising are shirts, caps and various objects and lastly, the theme parks are the sports installations rented to companies.

This means that the teams that use this model consider footballers (or rather, certain footballers) as financial investments and expect them not so much to score goals, but rather to result in a fast increase to the Club's income, thanks to the exploitation of their image rights.

In this way and in contrast to the normal procedure during the hiring of sportspeople (who normally assign the collective aspect of their image rights, reserving those of an individual nature for themselves), here the assignment of image rights is almost complete and the Clubs / Sports Corporations exploit most aspects of the image rights of their players. By doing so, the Clubs / Sports Corporations try to offset the high signing bonuses of their players, receiving in exchange any remuneration that they generate, directly or indirectly, through the commercialisation of their individual and collective images.

Obviously, as explained by Palomar Olmeda y Descalzo González[33], "*the system is real and acceptable if it is selective and focussed on footballers that, due to their importance or social or sporting relevance, really have the capacity to generate an image that can be commercialised and this, obviously, is not the case with all of them.*"

Although nothing prevents the total assignment of these rights being carried out through the work contract between the player and the Club / Sports Corporation (in which case this shall be considered an employment agreement and the remuneration received by the player for this concept shall definitely be considered a *salary),* this assignment is normally carried out by means of a double contract system, through an exclusive contract for the assignment of image rights that the sportsperson signs with the Club / Sports Corporation that employs them.

This assignment contract, as it is an unusual type of contract, shall be regulated by the provisions of the Civil Code for contracts and obligations and, in this regard, must set out in detail the scope of the assignment of the image rights, defining in detail the content of the consent provided by the sportsperson for the commercialisation of their image rights.

30 See Section 5 of this study.

31 Decision of the Supreme Court (Administrative Disputes Chamber, Section Two), dated 1st July 2008.

32 Furthermore, as explained by Pina Sánchez and Ferrero Muñoz, it is possible to "*cite certain Civil Law judgements, such as a decision of the Provincial Court of Valencia* [Decision of the Provincial Court of Valencia (Seventh Section) dated 29th January 1999], *which determined that contracts for the assignment of rights cannot exist in isolation from work contracts, then their content means that they are inextricably linked. This unity exists when the image is assigned as a consequence of a player having joined the team of the hiring company or club and this assignment cannot continue to exist when the player joins the team of another Club.*" (Pina Sánchez, Carolina and Ferrero Muñoz, Javier; "*The commercialisation of image in professional sport,*" in the joint work by Various Authors: Professional Sport, directed by Palomar Olmeda, Publisher: Bosch, Barcelona, 2009.

6. The taxing of image rights.

These operations related to the assignment of image rights shall generate income subject to taxation by the Personal Income Tax (IRPF) or by the Non-Residents' Income Tax (IRNR), depending on whether the individual that obtains the income is considered a tax resident in Spain or a non-resident.

Income from the assignment of image rights shall be considered working income from investments or economic activities. Furthermore, Act 35/2006, dated 28th November, regarding IRPF (the IRPF Act), envisages a system of attribution of income in accordance with a special regime created in order to avoid the use of formulas for tax evasion by taxpayers subject to IRPF, by tracking the income from the assignment of an individual's own image (almost always sportspeople) with which there is a employment relationship.

As noted in the preceding paragraphs, the tax problem related to the assignment of image rights was a consequence of the search, mainly by football clubs, for alternative remuneration formulas that reduced the tax burden applicable to the hiring of elite sportspeople. This practice became more widespread during the period in which the hiring of players started to represent a large monetary and tax cost for Clubs, given the common practice of both resident sportspeople and foreigners of negotiating their remuneration in net amounts, i.e. tax free.

Remuneration for the services provided by players to clubs is considered to be of an employment nature and is therefore taxed as working income at marginal rates and a large amount is withheld. Consequently, the assignment of image rights to nominee companies that carry out their exploitation represents, as stated above, an option that makes it possible to obtain income and to greatly reduce the tax burden, both for the players and for the clubs.

However, the classification of the income generated by this type of assignment of image rights has generated enormous difficulties (both legal and tax-related). Due to these difficulties and evasive practices related to image rights, Act 13/1996 implemented a tax regime, as a Solomonic solution for resident sportspeople with an employment relationship that is based on the 85/15 rule, which shall be discussed further below.

6.1. Taxation on income from the assignment of image rights obtained by residents subject to Personal Income Tax (IRPF)

Individuals with tax residence in Spain that obtain income from the assignment of their image rights (normally sportspeople) shall pay tax on their worldwide income in Spain. As an exception to this rule, non-residents that, due to their transfer to Spain and even if they become Spanish tax residents, may choose instead to pay Income Tax for Non-Residents (IRNR), as non-residents, during the year in which they obtain Spanish tax residence and the following five years, if they comply with the requirements envisaged in the IRPF Act.

The type of income that is obtained from the assignment of image rights depends on the conditions in which the assignment is carried out and the type of income that is obtained by the person that assigns them for the conduction of the activities that enable them to obtain income from the assignment of their image. Taxpayers that obtain income from the assignment of their image rights are almost always sportspeople. Income for the assignment of one's own image can be obtained as a worker, businessperson or due to the mere obtainment of income from an investment or, alternatively, the special tax system may apply. Below is a brief description of these four types of income:

a) Obtainment of income from work

Sportspeople linked to a sports club obtain income that fits within the category of income from work. Within the range of types of income that they can obtain due to their status as workers, such as wages, bonuses, incentives, extraordinary payments, etc; players may also obtain income from the assignment of their own image. The aforementioned Royal Decree 1006/1985 expressly envisaged in article 7.3. that the remuneration of the work of sportspeople can include income from the commercial exploitation of their image rights.

This classification, which appears irrefutable when the assignment of their image to the club is inherent to and a consequence of the services provided by a sportsperson within the framework of a work contract, is more doubtful, at least in theory, when the IRPF Act classifies the assignment of image rights in its article 25.4.d) as income *from equity investments*. Therefore it appears that there are alternatives to the taxation of these rights as income from work. If classified as working income, the income from the assignment of image rights is subject to taxation based on the general scale, at the highest rate, and is subject to the corresponding withholding.

The evolution of the tax treatment of image rights and the implementation of the 85/15 rule by the Act 13/1996, was a result of the need to give legal coverage to the treatment as working income of the income obtained from the assignment of image rights, given the widespread practice of Spanish clubs (that began in the 90s) of reducing the tax burden on the hiring of elite sportspeople by means of the assignment of image rights by them to nominee companies (normally non-resident), which greatly reduced the amount of tax payable, given the fact that the commercial exploitation was carried out by the nominee company rather than the player.

The conflict between the Tax Authorities and the clubs has been resolved in an unsatisfactory manner by the Courts, as they have recognised the possibility that there may be an assignment of the rights to a nominee company[34] and that the income obtained by it from their exploitation are not included within the work remuneration obtained by the worker, but, in the formulas used during the years in conflict, prior to 1997 (year in which the Act 13/1996 entered into force) this alternative possibility of taxation is not allowed as it is argued that the contracts for the assignment of image rights were simulated with the sole purpose of reducing the tax burden for items that were previously included in the payroll of players[35].

In turn, the legislator reacted by introducing the 85/15 rule, so that it is permitted to receive income from the assignment of image rights as another type of income or via a nominee company, as long as these do not exceed 15% of the total compensation received from the club for the services provided by the player.

b) Obtainment of income from economic operations

This type of income is produced when the party assigning the image rights obtains income that is not related to an employment relationship, but rather resulting from an economic activity for which it has its own material and human resources to exploit. This is the case of sportspeople that carry out their activities in these conditions, such as tennis or golf players, that receive payments for their activities during

33 Palomar Olmeda, A. and Descalzo González, A., *work cited,* page 88.

34 A clear example of this express recognition is the distinction made by the Supreme Court in its decision dated 15th October 2009 (Appeal number 7150/2003):
In order to resolve this situation there are three hypotheses: a) That the player, due to their working relationship, assigns their image rights to the Club expressly. b) That the contract regulating the working relationship does not contain any stipulations regarding image rights. c) That the player expressly reserves these image rights. According to the first two hypotheses, either due to agreement between the parties or due to the application of the aforementioned current legislation (Decree 1006/85 and the 1992 Collective Agreement for footballers) the nature of this income is that of "income from personal work" and is subject, therefore, to withholding. According to the third hypothesis (the reservation of the "image rights" of their holder), the nature of the income and whether they are subject to withholding depends on their type of exploitation (always with regard to the legislation in force when the events occurred).

35 In our opinion, a much better explanation of these conclusions is provided by Ortiz Calle, E. ("The income deriving from the assignment of the image rights of professional sportspeople: their controversial Legal and Tax Classification," Sport and Entertainment Law Magazine, number 26, 2009, pages 113 to 126), when he states that, "regarding the "artificial nature" of the practice, the only relevant legal and financial effect of this double assignment is the reduction of the tax cost of the operation, as it avoids a taxable transaction with the resulting reduction in the tax burden. And the fact is that there is no valid financial motive (according to the business purpose test) that rationally justifies this triangular relationship, as the commercial exploitation of the image rights is carried out by the Club at which the player provides their services and therefore the prior assignment of these rights by the footballer to the nominee company is unnecessary; i.e. the behaviour does not have any business purpose other than to make a tax saving."

their participation in sports events, trophies, etc, as well as (particularly in the case of elite sportspeople) for the assignment of their image rights.

In this case, it can be more easily stated that income from the assignment of one's own image constitutes income from activity rather than equity investments, as article 25.4.d) of the IRPF Act specifically excludes from the concept of equity investments income from assignments obtained within the scope of an economic activity. There is economic activity when the right to one's own image is exploited by its holder, at their own cost and risk, and they have the resources to obtain the maximum possible income from its exploitation.

c) Income from investments

In accordance with the aforementioned article 25.4.d) of the IRPF Act, income from the assignment of the right to exploit a person's image or consent or authorisation for its use generate income from investments.

This type of income arises when the holder of the image rights assigns them to a third party that carries out their exploitation in return for payment. Obviously, this is the case as long as this assignment is not carried out within the framework of a work activity or an economic exploitation, as explained previously.

It should be highlighted that, due to the application of the rules for the determination of the tax base of IRPF set out in articles 45 and 46 of the IRPF Act, income from investments related to the assignment of image rights are included in the general tax base rather than the savings tax base and are likely to be taxed at the marginal rate (43%) rather than the reduced rate applicable to savings (19%).

d) Special tax regime for the taxation of income from the assignment of image rights. The 85/15 rule.

This special regime was introduced by Act 13/1996, dated 30th December, *regarding Tax, Administrative and Social Measures,* as a reaction by the legislator to the aforementioned practice of interposing a company between the club and the player and ceding it the image rights, in order to substantially reduce the amount of taxation, so that part of the income that the worker should have received as working income was received by the nominee company. This resulted in a reduction of the sportsperson's working income and the corresponding withholding, transferring the taxation of part of their remuneration to a company (resident or non resident) that paid substantially less tax and the player only had to pay tax again if they obtained income from the nominee company, but in this case the tax was paid as income from investments, in the form of dividends or similar items.

Given the proliferation of these practices, the Administration reacted, on the one hand, by inspecting the clubs and classifying amounts obtained by the company ceded the exploitation of the sportsperson's image as the sportsperson's *working income*. The final argument used by the inspection to reach this conclusion was that the whole process of assignment of rights was a simulation, as in reality what was being paid to the sportsperson was remuneration for the assignment of image rights, which was previously received as a salary. This criteria has been confirmed by various decisions of the Supreme Court such as those dated 25TH June 2008, 1ST and 10TH July 2008[36], as well as the more recent decision dated 15TH October 2009. On the other hand, the legislator introduced, with effect from 1ST January 1997 onwards, the special tax regime to prevent these practices and this regime has stayed almost unchanged up to the current date. It is currently set out in article 92 of the IRPF Act and applies when:

1. The worker (the player) has assigned their right to the exploitation of their image or has consented to or authorised its use by another person or entity (resident or non resident). For these purposes, it is irrelevant whether the assignment, consent or authorisation has taken place when the individual was not a taxpayer.
2. The player provides their services to a person or entity within the scope of an employment relationship (the Club).
3. The person or entity (the Club) with which the taxpayer has an employment relationship, or any other person or entity linked to them in accordance with the terms of article 16 of the Consolidated Text of the Corporation Tax Law; has obtained, by means of arranged acts with resident or non-resident persons or entities, the assignment of the right to the exploitation of (or consent or authorisation for the use of) the image of the individual.
4. The taxation shall not apply when the working income obtained during the tax period by the player within the framework of the employment relationship are not less than 85% of the sum of the aforementioned income, plus the total payment made by the club for the assignment of image rights[37].

In practice, with this regulation the legislator is allowing the assignment of image rights to companies, even if they are in territories with low or no taxation but, in turn, limiting the amount that can be ceded to 15% of the sum of the working income and that obtained from the assignment of the image rights. If this limit is exceeded, the taxation rule applies.

If the taxation of income applies for remuneration in cash or in kind, the entity with which the player has an employment relationship (the Club) must make a pre-payment for the value of the income subject to taxation (currently at the rate of 19%)[38].

The amount taxed shall be the value of the payment received by the entity granted the assignment of image rights, in cash or in kind, plus the value of the pre-payment, minus the value of the payment received by the player for the assignment of image rights to the entity granted the assignment, as long as it was obtained during a tax period in which the player was a Spanish tax resident.

The taxation of income shall be applied to the general tax base of the player during the tax period in which it is received. If it is obtained in a foreign currency, the exchange rate valid on the date of payment or receipt of the income shall apply.

There are two types of temporary taxation that are subject to controversy: (i) In the case of income received by non-residents prior to the time at which the sportsperson was a Spanish resident, the taxation shall be carried out during the first tax period in which the player is considered a resident. Another controversial case occurs (ii) if the payments are made once the player has ceased to be a resident - these are allocated to the last business year in which the player was a resident. Consequently, the time limits of the taxation rules are extended enormously and their practical application is complicated when there have been assignments before or after the obtainment or loss of residency, such as in cases in which the player was resident, stopped being so, and then recovered tax residency after a period of time.

When appropriate, the tax allocation shall deduct from the player's Personal Income Tax (IRPF) tax liability, apart from the pre-payments, (i) any income tax similar to Spanish income tax that has been paid by the entity granted the assignment of the rights corresponding to the income attributed, (ii) the IRPF or Corporation Tax paid in Spain by the first person or entity granted the assignment, that corresponds to the income subject to taxation, (iii) the amount paid for the distribution of dividends by the first entity granted the assignment, (iv) the tax paid in Spain by non-resident players for the payment obtained for the first assignment of the right to exploit their image and (v) any tax that is similar to our IRPF paid abroad for the first assignment of the right to exploit their image. In no case shall tax paid in countries or territories considered tax havens be considered deductible.

36 For more details about the arguments used in these decisions see the article by Martinez Pico J.G., "Assignment of the image rights of footballers: tax classification of the remuneration paid by the Club to the companies ceded the rights as working income: withholdings." Sport and Entertainment Law Magazine, issue 25 (2009), pages 61-70.

37 The rule does not specify whether the amounts that should be considered for the calculation of the 85/15 are gross or net. The most common interpretation is that they are gross, excluding withholdings and tax pre-payments (Quintana Ferrer, Esteban, Taxation of Sport, Published by Bosch, 2008, page 210).

38 It is surprising that this pre-payment must be made by the Club on the player's behalf (and they can deduct it in their tax declaration), whilst the Club does not have any way to offset (pass on) or reduce (deduct) this tax burden. This pre-payment has been harshly criticised by certain doctrines.

The application of the regime is carried out without prejudice to the provisions of the international treaties and conventions signed by Spain (Double Taxation Agreements, DTA). When the entity granted the assignment is a resident of a country with which Spain has signed a DTA, the rules established in the DTA shall have priority.

In this respect, according to article 17 of the OECD Model Tax Convention (OETC MCD), the income of artists and sportspeople is taxed in the State in which their activities are carried out. Furthermore, Article 17 includes an anti tax avoidance clause in section 2, which envisages that, when nominee companies are used by sportspeople subject to the employment regime, income shall not pay tax in the state of residence of the entity granted the assignment, but rather in the state in which the activities are carried out. This anti tax avoidance clause is included in most DTA's signed by Spain, the most well known exception being the DTA signed with Holland.

Despite this regime, other similar forms have appeared that try to avoid its application, mainly by means of the assignment of celebrity rights[39] or registration rights[40]. Another alternative used to avoid the tax regime is to involve other entities, such as sponsors or television channels[41] that break the rigid scheme envisaged by the special regime.

6.2. Taxation of the assignment of image rights obtained by non-residents subject to Income Tax for Non-Residents (IRNR)

Sportspeople that are not considered Spanish tax residents shall pay tax as non-residents, along with those that, although they are subject to Personal Income Tax (IRPF), choose to opt for the special regime of paying tax as Non Residents envisaged in Article 93 of the IRPF Act, also known as the tax regime for impatriates. In the event that there is a DTA with the country of residence, this shall be applied in order to determine the taxation in Spain, and if there is none, the IRNR Act shall apply.

a) Taxation in accordance with a Double Taxation Agreement (DTA)

The obtainment of income from the assignment of image rights may result in taxation in Spain. If there is a DTA in force, this shall have priority. The aforementioned article 17 of the OETC MCD and the anti tax avoidance clause contained in Article 17.2 may prevent the assignment of image rights to nominee companies from resulting in a lack of taxation in the State in which the sportsperson provides their services or carries out their activities. In DTAs that do not contain this clause, the taxation shall only apply in the state of residence of the entity granted the assignment. The only other way of taxing this income is to try to classify the income from the assignment of an individual's own image as royalties and apply article 12 of the OETC MCD in which, in turn, Spain has established the corresponding reservations regarding the criteria of taxation exclusively in the State of the beneficiary in order to be able to tax income from royalties in the source State (Spain).

b) Taxation in the Absence of a DTA

In the absence of a DTA the provisions contained in Article 13.1.f.3 of the Income Tax for Non-Residents (IRNR) Act shall apply, which states that royalties paid by persons or entities resident in Spanish territory, or by permanent establishments located within or that use Spanish territory, considering royalties, among other items, personal rights that can be assigned, such as image rights.

In this regard, there may be difficulties when taxing income received by non-residents from entities that are also non-residents. In practice, this occurs in the case of income received by residents that opt for the special tax regime for impatriates. These sportspeople, despite being Spanish residents, are not taxed on their worldwide income, but rather their taxable income is determined in accordance with the rules for non-residents. I.e. when their income is taxed in Spain in accordance with the rules of the IRNR[42].

Consequently, it can be seen that income for the assignment of image rights not paid by companies or permanent establishments situated in Spanish territory is only considered to be obtained in Spain if the income is considered to be obtained or used in Spain. This criteria regarding use can generate difficulties in terms of its practical application when the "use" or actual exploitation of the image rights, which is likely to generate income in any part of the world, takes place not only in Spain but in any other country. In these cases, the most reasonable action is to apply a percentage or fixed fee to the total received in order to determine which income from the assignment of image rights is used in Spain and, therefore, is subject to taxation in Spain[43] and which part is received abroad and not subject to taxation

39 As with the conflicts due to the assignment of image rights outside of employment relationships, the Administration argues, confirmed by the Resolution of the Central Administrative Economic Court dated 20th November 2003, that it is necessary to take into account their true legal nature and, although these operations are classified as transfers of celebrity rights, what they really represent is the assignment of image rights. This is also the essence of the Decision of the National High Court dated 23rd April 2009.

40 See Resolution of the Central Administrative Economic Court dated 15th June 2005.

41 There have been cases of television channels being used as the nominee company between the Club and the players so that the latter makes the payment of the image rights directly to the companies granted the rights of the players and therefore, in accordance with its literal text, it is not possible to apply the 85/15 rule.

42 According to the text of article 93 of the IRPF Act due to the last provision (13.1) of Act 26/2009, dated 23rd December, effective from 1st January 2010, the application of the tax regime for impatriates is limited to workers whose remuneration envisaged deriving from their work contracts in each of the tax periods in which this special regime is applied does not exceed 600,000 Euros per year.

43 Note that the tax regime for impatriates, article 93 of the IRPF Act, does not allow the deduction from the resulting tax bill of amounts paid in other States for the obtainment of income from the assignment of image rights.

Robert Siekmann Newly Appointed Sports Law Chairholder in Rotterdam

On 1 August 2010, Dr Robert C.R. Siekmann, Director of the ASSER International Sports Law Centre, was appointed Professor of International and European Sports Law at the Faculty of Law of the Erasmus University Rotterdam.

The special Chair was established by a Foundation to which inter alia belong representatives of the Netherlands Olympic Committee, the Municipalities of The Hague and Rotterdam and the Province of Southern Holland. Both cities contribute essential financial support which makes it possible to create an extra PhD assistantship at the University in Rotterdam.

One of the core areas of the Chair's research programme concerns the study of legal aspects related to the organization of and participation in Olympic Games, European and World Championships and international club competitions.

Sports Betting: Brazil

by **Maurício Ferrão Pereira Borges***

Introduction

According to a European Commission study, the global gambling Industry worldwide generates a huge sum of money, around US$ 384 billion, or 0.6% of global GDP (gross domestic product). Latin America represents 7% of all resources generated. As such, sports betting, if properly managed, can yield a lot of money.[1] It is a complex, fast developing and exciting subject. However, betting on sport is increasingly being used and exploited to manipulate the outcome of sports events, especially football matches. On account of this, the chapter on Brazilian Law of 'Sports Betting: Law and Policy', as part of a book that will certainly fill a yawning gap in the existing comparative literature on sports law, explains Brazilian legal provisions governing sports betting and gaming. We have also tried to set out our impressions on this subject below.

In the first part of this chapter we shall begin by looking briefly at the manipulation of sport through illegal betting. In the second part, we will provide an overview of the Brazilian law on betting and gaming before going into the legality of sports betting and gaming in Brazil, especially in its online form. The focus in the final part is on the recent legal amendments to the Fans' Bill of Rights Act and its influence on the so-called 'Edílson case'.

I. Manipulation of sport

1. Manipulation of sport through illegal betting

Manipulation of sport through illegal betting is the most recent controversy to be discussed in sports law, undermining and affecting, as it does, the sporting integrity of championships. Therefore fighting irregular betting and match-fixing is something that must be fought in the legislative sphere and should also be a basic demand of sports federations for them belong to the international sports community.

For most people though, betting on the outcome of sporting events, especially football matches, is a fun pastime. This is why gaming and betting have been treated alike in Brazilian Law. In Portuguese, the first activity is known as '*jogos de azar*' and the second as '*apostas*'.

These business activities have become a very sensitive and controversial topic in Brazil, since, throughout Brazil's recent history, they have been regarded as an area that goes hand-in-hand with illicit activities such as money laundering and organized crime. For a minority that deals with criminal activity in the field of sports betting, it is way of getting rich by fixing and throwing the results of matches and betting a lot of money on them.

Gaming, betting, manipulation and cheating should be treated separately, even though these four concepts are similar and can sometimes interact. From hereon we will discuss only the activities off the field, but recognizing that cheating occurs on the field and may be practiced by some players. In fact, it is not so easy to define. What kinds of behavior constitute cheating in sport and its relationship with fair play is a complex philosophical phenomenon.[2] In this regard, codes of ethics are able to challenge such behavior, which in high performance sports has invariably developed to circumvent the rules of play to the advantage of the athlete.[3]

2. Match-fixing in Brazilian football: the 'Edilson case'

The so-called 'Edilson case' is considered to be the worst corruption-related scandal in Brazilian sporting history. It was made public on September 23, 2005, when the former FIFA referee, Edilson Pereira de Carvalho, and his colleague, Paulo José Danelon, were found to have accepted bribes to fix matches in the highest division of Brazilian association football.[4] They were connected with the gambler Nagib Fayad, who used cash to bribe Edilson and his assistant with the aim of profiting from fixed match results through betting activities. Together they built a criminal organization that worked as follows: (i) Edilson was paid by the gambler and, as result, (ii) manipulated several football games in order to secure payoffs from high-stakes gamblers.[5]

Because of this, disciplinary proceedings were initiated before Brazil s highest sports law court, the STJD (*Superior Tribunal de Justiça Desportiva*). Before the STJD, Edilson admitted to having influenced the outcomes of several games with "hidden criminal acts" in the form of factual decisions. In its original report, the STJD provided the following:

"He, more than anyone, knew how to manipulate the results of matches (…) carefully grounded in the so-called factual errors, in an attempt to conceal his criminal acts".[6]

Due to a breach of sports dignity, a concept detailed in article 275 of the Brazilian Sports Justice Code (CBJD)[7], eleven matches were ordered to be replayed and Edilson was banned from refereeing for life.[8] This decision was taken with due consideration to the sporting integrity of the ongoing competition that was endangered by the referee s intentional errors as a result of negative betting influence.

FIFA accepts that games could be replayed in match-fixing cases. In accordance with article 72 of its Disciplinary Code, only the referee takes disciplinary decisions during matches, which are ordinarily final.[9] However, in certain circumstances as in cases of manipulation, the jurisdiction of the FIFA judicial bodies may apply to annul matches.

Although not solely a football matter, the Court of Arbitration for Sport (TAS/CAS) analyzed those circumstances in the case of Vanderlei Cordeiro de Lima vs. IAAF.[10] It concerned a Brazilian marathon runner who was attacked in the late stages of the event by a non-participant while leading the Athens 2004 Olympic marathon. On behalf of him, the Brazilian Athletics Federation requested that an

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1 A report issued by Crowe Horwath RCS - an independent audit firm - concludes that important companies are offering sports betting services in Europe. Ladbrokes, the biggest betting firm in the UK, for example, generated more than £ 1.1 billion in revenues in 2008. These sports betting firms are investing in clubs' sponsorship strategies. According to a study conducted by Sport+Markt, 10 significant betting companies invested more than €90 million in football club sponsorship in Europe in 2009-10.

2 See O. Leaman, Cheating and Fair Play in Sport, in W. Morgan (ed.), Sport and Humanities. A Collection of Original Essays (1981), Educational Research and Service, University of Tennessee, pp. 25-30; G. Luschen, Cheating in Sport, in D. Landers (ed.), Social Problems in Athletics (1977), Urbana, University of Illinois.

3 Some scholars have treated cheating in sport as a playing culture, see S. Gardiner; M. James; J. O Leary; R. Welch; I. Blackshaw, S. Boyes; A. Caiger (eds.), Sports Law, 3rd edition (2005), Cavendish Publishing, pp. 66-67.

4 On September 23, 2005; the *Veja* magazine published a cover story exposing how deeply the betting mafia has penetrated Brazilian football to make easy money from internet gambling and bribing referees (Edilson and his assistant Paulo Danelon).

5 For an overview of the Edilson case see my book Verbandsgerichtsbarkeit und Schiedsgerichtsbarkeit im internationalen Berufsfußball. Unter Berücksichtigung der verbandsinternen FIFA-Rechtsprechung in Bezug auf die *lex sportiva* (2009), pp. 24-26, Peter Lang.

6 STJD decision, December 1, 2005, process No. 195/05.

7 On December 10, 2009, by means of Bill No. 29 of the Sports National Council (CNE) the aforementioned CBJD version was replaced. The cited article 275 of CBJD, therefore no longer exists.

8 1th Disciplinary Commission of STJD, October 6, 2005, Process No. 95/05.

9 Manipulation is an exception to the theory of factual error and breach of rules in football association. See my article, 'Erro de Fato, de Direito e Prova de Vídeo', in: Revista Brasileira de Direito Desportivo 16, Jun-Dec 2009, pp. 119-134. See also H. Hilpert, Die Fehlentscheidungen der Fußballschiedsrichter (2010), De Gruyter.

10 See CAS 2004/A/727, V. C. de Lima v/ International Association of Athletics Federations (IAAF), award of September 8, 2005. Over the past few decades, the rights of sport have crystallized into a settled body of Law: the jurisprudence of

extra gold medal be awarded to him and posed the question of under what circumstances it may be reasonable for the Court of Arbitration for Sport to retrospectively alter the results of sports events.

Notwithstanding the CAS arbitration panel's denial of the athlete's appeal, the decision was very instructive in examining at some length the limits of the circumstances in which a sporting event can be annulled.[11] In this regard, the CAS panel confirmed that it could review a decision in the field of play only if a decision was made in bad faith, e.g. as a consequence of corruption.[12] Otherwise, "the flood gates would be opened and any dissatisfied participant would be able to seek the review of a field of play decision".[13]

In addition to disciplinary proceedings before the STJD, Edilson, Danelon and the gambler were prosecuted for fraud and conspiracy. On August 20, 2009, however, the 7TH Criminal Chamber of São Paulo s Court of Justice ordered the termination of the criminal proceeding. Reason: the conduct of the accused wasn t typically criminal under applicable Brazilian laws.

The most complex situation concerns the civil proceedings before the ordinary courts. In this regard, the State of São Paulo has prosecuted not only Edílson Pereira de Carvalho, Paulo José Danelon and Nagib Fayad, but also the Brazilian Football Confederation (*Confederação Brasileira de Futebol*/CBF) and the Paulista Football Federation (*Federação Paulista de Futebol*/FPF).

A class action lawsuit has been filed in São Paulo against them all seeking compensation for injuries to fans. Under Brazilian law, a relationship between fans and clubs or sporting governing bodies is considered as being a consumer relationship. The rights of fans as consumers are safeguarded by Law No. 10.671, dated May 15, 2003, widely known as the Fans' Bill of Rights Act (*Estatuto do Torcedor*). It is a vital instrument in Brazilian sports relationships for equating a fan as a consumer, and clubs and sports governing bodies as providers and, as a result, covers almost all problems that may arise from the legal (consumer) relationship between fans and providers of games and championships.[14]

Brazilian society was deeply shocked by the extent of the orchestrated manipulation carried out by the so-called 'whistle mafia', so the 'Edilson case' has been covered by the Brazilian press for a long time now. Nevertheless, at the time of writing, the Court still has not made a final decision on this issue.

The above discussion examined the consequences of the biggest match-fixing scandal in Brazilian sporting history and its relation to irregular betting. As Brazil has legislation regulating gaming, betting and also, nowadays, manipulation, the following section will focus on Brazilian betting law.

II. Overview of the Brazilian law on betting and gaming

1. Betting in the domestic law

Betting and gaming activities were definitively prohibited in Brazil with Decree-Law No. 9.215, of April 30, 1946. By means of such legislation, the last official roulette game was held at 11:00 p.m., on April 30, 1946, at the casino of the Copacabana Palace Hotel, in Rio de Janeiro. The preamble of this Decree-Law reflects the spirit that has generally been adopted in Brazil to ban unauthorized gaming and betting:

"Whereas the repression of gaming and betting is an imperative of the universal conscience; whereas the criminal legislation of all knowledgeable peoples contains provisions aiming at such objective; whereas the moral, legal and religious tradition of the Brazilian people is contrary to the practice and exploitations of gaming and betting...".

After a short comeback during the 1990s and 2000s due to the "Pelé Law" - legislation which governs sporting activities in Brazil - bingo parlors were definitively closed down in Brazil in 2004 by means of the enactment of a Provisional Measure. Nowadays, the legal framework governing gaming, betting and lotteries in Brazil includes:

(i) The Criminal Contraventions Law (articles 50 to 58 of Decree-Law No. 3,688/1941);
(ii) Brazilian Civil Code (articles 814 to 817 of Law No. 10,406/2002);
(iii) Pelé Law (articles 59 to 81 of Law No. 9,615/1998), which contains Bingo-related provisions;
(iv) Law No. 9,981/2000, which revokes articles 59 to 81 of Law No. 9,615/1998 closing down bingo parlors.
(v) Federal Constitution, article 22, clause XX, which provides that the Federal Union has the exclusive authority to legislate on consortiums and draws.
(vi) Binding Precedent (*Súmula Vinculante*) No. 2 of the Brazilian Supreme Federal Court (*Supremo Tribunal Federal*): "All state or district laws or normative acts dealing with consortiums and draws, including bingos and lotteries."[15]

It follows from the above-mentioned legal framework that offline gaming, betting and lotteries are legal in Brazil solely in the following situations:

(i) The Government Lottery (governed by Decree-Law No. 204/1967 and Law No. 6,717/1979) including the Mega-Sena, Dupla-Sena, Quina, Loteria Federal etc.
(ii) Horse Racing (governed by Law No. 7,291/1984), whereby bets can be placed at racecourses, authorized Jockey Club branches and accredited betting stations, by telephone and online.
(iii) The new sporting lottery named Timemania (governed by Law No. 11,345/2006, as subsequently amended by Law No. 11,505/2007). As far as permission for the use of their insignias is concerned, sports clubs involved in Timemania receive 22% of the earnings to be allocated to the payment of debts with the Federal Union (FGTS, Social Security and Federal Tax Authorities).

Sport is internally governed and subject to a complex interaction of normative rules, which comprise: (i) playing and administrative rules; (ii) unwritten conventions and values that have developed informally and, most importantly, (iii) state law. The approach indicated above attempts to show that sport has to pay due respect to mandatory national law, even more if the sport's internal regulatory structure is inconsistent or ineffective. Note that the direct application of national law is determined on a case-by-case basis and, as in the case of

the CAS, which has come to be known as the *Lex Sportiva*. It has consistently been applied and followed around the world by sport's regulating entities, federations and national associations.

11 See H. Hilpert, Sportrecht und Sportrechtsprechung im In- und Ausland (2007), De Gruyter, p. 169.

12 "Before a CAS Panel will review a field of play decision, there must be evidence, which generally must be direct evidence, of bad faith. If viewed in this light, each of those phrases mean there must be some evidence of preference for, or prejudice against, a particular team or individual (…) The Athlete is requesting to be awarded a gold medal. He does not request that such gold medal change the results of the race. To award a gold medal without changing the results of the race is, however, beyond the scope of review of the CAS. Had the appealed decision been taken arbitrarily or in bad faith, the remedy would not have been a change of the announced results, let alone awarding a supplementary gold medal without changing the results of the race. The only available remedy would have been to invalidate the race and order it be rerun. There is no regulatory basis upon which the Panel could award a medal alongside the medal already won by Stefano Baldini."

13 CAS OG 02/007, Korean Olympic Committee (KOC) v. International Skating Union (ISU), award of February 23, 2002. In paragraph 29 the CAS panel V. C. de Lima v. IAAF specifically refers to the approach taken in KOC v. ISU as is set out in the following passage of that decision: "The jurisprudence of CAS in regard to the issue raised by the application is clear, although the language used to explain such jurisprudence is not always consistent and can be confusing. Thus, different phrases such as 'arbitrary', 'bad faith', 'breach of duty', 'malicious intent', 'committed a wrong' and 'other actionable wrongs' are used apparently interchangeably, to express the same test (M. v/AIBA, CAS OG 96/006 and Segura v/IAAF, CAS OG 00/013). In the Panel's view, each of those phrases means more than that the decision is wrong or that no sensible person could have reached (it). If it were otherwise, every field of play decision would be open to review on its merits. Before a CAS panel will review a field of play decision, there must be evidence, which generally must be direct evidence, of bad faith. Viewed in this light, each of those phrases means there must be some evidence of preference for, or prejudice against, a particular team or individual."

14 See article 3 of the Fans Bill of Rights and articles 3 and 17 of the Consumer Defense Code (Law No. 8.078/1990).

15 Binding Precedent No. 2 of the Brazilian Supreme Federal Court approved on May 30, 2007.

online betting and gaming in Brazil, even the application of the law of the land is questionable.

2. Online Betting in domestic law

As far as online betting is concerned, the application of the above-mentioned legal framework within the industry is controversial because there are no specific regulations on this form of betting.[16] Accordingly, a detailed review of article 50 of the Criminal Contraventions Law is required. In this regard, note that the following is stipulated:

"Art. 50. Establishing or exploiting gaming/betting in a public place or place accessible by the public, with or without payment of an entrance ticket:

Penalty - simple imprisonment of three months to a year and fine (…), the effects of the conviction being extended to the loss of chattel and decorating objects at the venue.

§ 1 The penalty is increased by a third, if there are, amongst the employees or those participating in the game, persons under 18.

§ 2 He/she who is found participating in the game, as a pointer or better, shall be subject to a fine of (…).

§ 4 The following places are, for criminal effects, put on a par with publicly accessible places:

1. a private home in which gaming is conducted, where the usual participants are not the household family members;
2. the hotel or collective household to whose guests or dwellers gaming is offered;
3. the head offices or premises of a company or association in which gaming is conducted;
4. the establishment used for the exploitation of gaming, even if such activity is dissimulated."

The main discussion relating to the application of the above-mentioned article 50 to online betting is over whether the Internet may be considered a public place or one accessible by the public. First of all, it must be ascertained whether the language of article 50 is sufficiently broad to treat the Internet at least as a place accessible by the public. Second of all, the Criminal Contraventions Law was established during a period in time in which technology, such as the Internet, was inconceivable.

While Brazilian courts have not yet reviewed this issue, the general feeling in Brazil is certainly one that online gaming and betting does in fact satisfy the requirements established by article 50 of the Criminal Contraventions Law, especially since it can indeed be considered a place or space accessible by the public (and is indeed probably the most accessible space worldwide). For this reason, it is important that the legislation cited uses the word "place",[17] which can have several meanings, including space, site, location etc.) and not necessarily the need for a physical space. Given that there was no cyberspace or virtual world in the 1940s the general wording of article 50 appears to mean only physical spaces.

In a lower court decision, CONAR,[18] as a self-regulatory body with non-binding authority to oversee the regularity and ethics of advertisements released in Brazil, suspended the advertising of a website as well a variety of the online and offline advertising campaigns of a sports betting firm, including television advertisements and football stadium perimeter billboards.[19] According to this decision, the advertising itself was not irregular. However, it would have violated certain provisions of CONAR s Code of Ethics on the grounds that it promoted an offshore betting website, which Brazilian residents could access and bet, unless such practice were to be considered a criminal contravention in Brazil. Thereafter, though, this decision was overturned on appeal and the proceedings dismissed because CONAR accepted the argument that Brazilian law does not expressly prohibit online gaming and betting and, therefore, it couldn t discuss the means used by such industry in advertising. In other words, CONAR failed to establish whether the form of the advertising was appropriate.

In this context, it is important to stress that a change in Brazilian jurisprudence has occurred in recent years. The two highest Brazilian Courts have been recognizing and enforcing foreign judgments awarded to overseas casinos seeking to collect outstanding debts of Brazilian players. Until 2004, for example, the dominant position at the Brazilian Supreme Court was that debts owed by Brazilian residents and arising from gaming and betting activities overseas couldn t be enforced in Brazil due to violation of Brazilian public policy. With the enactment of Constitutional Amendment No. 45/2004 and the shift in authority from the Supreme Court to the Superior Court of Justice,[20] the new trend ascertained is to permit the recovery in Brazil of gaming and betting debts incurred overseas, given that such activities are legal in the jurisdiction where they were conducted and the governing law would be the law of the jurisdiction in which the gaming activity was conducted[21].

In light of the above, the question to be discussed is whether the concept of someone residing in Brazil and accessing the website of an online betting entity located in a foreign jurisdiction where gaming and betting is legally permissible, with such entity being duly licensed to carry on its gaming and/or betting activities in such jurisdiction, could also be deemed to be legal and not constitute a criminal contravention in Brazil, thus avoiding any negative consequences deriving from the activity if it were considered illegal in Brazil.

Doubtless it is easier to apply this to Brazilian residents physically travelling overseas to gamble and bet than to online gaming and betting since the Internet provides easy and quick access from the comfort of a persons' home in Brazil and there is a general principle contemplated by Brazilian criminal law that a crime is deemed to have been committed either in the jurisdiction where the action or omission was performed, in whole or in part, and also where the result thereof was or should be produced.[22] In accordance with article 2 of the Criminal Contraventions Law, Brazilian law is only applicable to criminal contraventions committed in national territory. In this regard, it can be argued that offshore online betting providers may be committing such criminal contraventions in national territory by permitting access by Brazilian residents to their websites.

It follows from the foregoing that it can be argued, under Brazilian law, that a criminal offense could be considered to be committed by the overseas authorized and licensed betting entity upon permitting access to Brazilian residents, especially if the website, despite being hosted in a foreign jurisdiction that legally permits online gaming and betting, is specifically aimed at the Brazilian market. This is the case if, for example, instructions and other language contained therein are in Portuguese and bets can be placed on Brazilian related sporting events. Additionally, it is important to say that there are also no express restrictions on advertising of offline or online betting activities in the Criminal Contraventions Law.

As far as poker is concerned, and in order for offline and online poker to escape falling under the scope of a criminal contravention in Brazil, it is imperative that it appears as a game of skill as opposed to a game of luck. Although there are some scholars who argue that poker is a game requiring skill,[23] since it has been ascertained that the skill of the player of this game depends on memorization of the characteristics (number and color) of the face cards appearing during the game and on the knowledge of the rules and strategy deriving from such functions, the final result of this type of game, however, being random, means that no private gaming operators can set up and provide such services in Brazil due the existing restrictions on the industry. However, the House of Representatives Bill No. 2254/2007 aims to legalize bingo parlors and all forms of e-gaming and e-betting.[24]

16 As per data provided by Crowe Horwath RCS online sports betting worldwide generated around US$ 40 billion or 10.4% of the global gambling industry in 2009.

17 *Lugar*, in Portuguese.

18 CONAR = Conselho Nacional de Auto-regulamentação Publicitária.

19 In the UK alone, for example, betting on the 2010 FIFA World Cup generated more than £1 billion.

20 *Superior Tribunal de Justiça* (STJ).

21 See the following precedents: Special Appeal No. 307.104/DF dated February 1, 2005; Special Appeal No. 606.171/CE dated February 15, 2005.

22 See article 6 of the Brazilian Criminal Code.

23 Including an official expert report issued by the Forensic Institute of the Public Security Secretariat of the State of São Paulo (*Instituto de Criminalística da Secretaria de Segurança Pública do Estado de São Paulo*) in 2009.

Such bill provides that parts of the proceeds of such activities are to be destined to the public health system and investment in culture and sport. It is still moving through Congress and may shortly be submitted to the Plenary of the House of Representatives.

III. Fans' Bill of Rights Act

If there were a similar scheme of manipulation of sport in Brazil today, the people involved would face a totally different fate than those who got involved with the 'whistle mafia'. The reason is simple. Any kind of manipulation, whether such be through betting and gaming or not, has recently been typified as a crime by Articles 41-C, 41-D, 41-E, 41-F and 41-G of Law No. 12,299 of July 27, 2010. It has amended the Fans' Bill of Rights Act imposing prison sentences of 2-6 years plus a fine for anyone who:

(i) requests or accepts, for one's own benefit or for the benefit of any third party, any economic or non-economic advantage or promise of an advantage in regard to any act or omission intended to change or forge the result of a sports competition (article 41-C);
(ii) gives or promises to give any economic or non-economic advantage for the purposes of changing or forging the result of a sports competition (article 41-D);
(iii) promotes or contributes, by any means, to a fraud in the result of any sports competition (article 41-E);
(iv) sells tickets for a sports event at prices higher than face value (article 41-F);
(v) supplies, misguides or facilitates the distribution of tickets for sale at prices higher than face value (article 41-G).

However, as there is no crime and no punishment without a previous penal law,[25] those involved in the 'whistle mafia' in 2005 were acquitted in the criminal sphere. Concerning the class action lawsuit filed against Edílson Pereira de Carvalho, Paulo José Danelon and Nagib Fayad seeking compensation for fans' injuries, it is expected that the state court of São Paulo will decide upon the matter in coming months.

Conclusion

Apart from the manipulation of sport, which is a crime under Brazilian law as may be seen from the above, the subject matter regarding gaming and betting is still highly controversial in Brazil. The general trend has historically been to prohibit offline and online gaming and betting. Notwithstanding, Bill No. 2254/2007 and favorable decisions like that mentioned above awarded by CONAR on appeal, are good indications that there is indeed space for sustaining the legality of online betting and gaming in Brazil, including in sport.

24 Article 1 of Bill No. 2254/2007: 'This Law deals with the exploitation of probability entertainment throughout the national territory' (…) Par. 1: 'For the purposes of this Law, probability entertainment comprises the conducting of games on equipment of virtual rotating figures, or virtual cards or electromechanical rotating figures, or, further, any other virtual or electromechanical means in which the player, in order to win, is required to obtain a specific combination of symbols and/or figures, in a physical environment." In turn, par. 2 of such article provides that the average winning probability should be 70%.

25 Nullum crimen, nulla poena sine praevia lege poenali.

Sports Betting: Is it Really Illegal in India?

by **Vidushpat Singhania***

Introduction

Man has always been captivated by gambling. The history books have shown that man has always indulged in this pass time and has sometimes even lead to his ruin. Indian history is strewn with such incidents. One of our most revered epics the 'Mahabharata' has highlighted the practice of gambling at the time and the evils associated with it. Betting and gambling gives man a chance to earn disproportionate amount of money in a short time without labour, this fuels the dream of avarice of men. This lures a man away from an honest days work and has therefore been termed as an evil in the religious scriptures and is generally shunned upon by the society. *The Times* in the 1890's had put it as '[it] eats the heart out of honest labour. It produces an impression that life is governed by chance and not by laws'.

In India the most popular sport is cricket. If betting in cricket is taken under review specifically, It is estimated that about Rs. 720 Crores (150$ Million) is bet on an average One Day International anywhere in the world[1]. The very rise of popularity of the sport can be attributed to betting in the sport, particularly during the 17TH century. The formulation of the rules and regulation of many of the modern games can be attributed to sports betting. This is particularly true for laws of cricket. The code of 1774 specifically mentioned:

'If Notches of one player are laid against another, the bet depends on both innings, unless otherwise specified. If one Party beats the other in one innings, the notches in the first innings shall determine the bet. But if the other party goes in a second time then the bet must be determined by the numbers on the score.'[2]

Therefore a question that comes to my mind is that since the popularity of the sport can essentially be derived from betting in the sport, is it prudent to now say, once the sport has become popular that betting is an evil and thus should not be a part of sport. This would take away one of the ingredients of the sport popularity. In this contribution the discussion will be limited to the legal position in India, especially pertaining duly to sports betting, specifically avoiding a discussion on moral codes, social view and religious beliefs.

Position of Sports betting in India

In India, the power to legislate has been divided between the Centre and the State. The Constitution of India through Article 246 and the Seventh Schedule, has divided the power of the Centre and the State in three Lists. The power to Legislate on matters listed in List I vests with the Centre (Central List), while the Power to Legislate on subjects enlisted in List II vests with the State (State List), List III known as the Concurrent List, consists of matters on which both the Centre and the State can legislate. Betting and gambling fall under the ambit of Entry 34 of the State List. Being a part of state list, it is the power of the state governments to regulate sports betting and gambling in India. Though, this has not always been the case. Pre-Independence before the existence of the Constitution and a clear division of power, betting and gambling were governed by a central legislation namely the Public Gambling Act 1867, which governed aspects of gambling in certain territories of India. After independence and coming of the Constitution various states have enacted their own laws pertaining to betting and gambling. The importance of the Public Gambling Act, 1867 though still remained since certain states adopted the Public Gambling Act to apply to their territory via Article 252 of the Constitution of India, which empowers the parliament to legislate for two or more states by consent and adoption of such legislation by any

* The author is a sports attorney and was a consultant to the Commonwealth Games 2010 Delhi. He acknowledges the guidance from Justice Mukul Mudgal and Advocate Nitin Mishra when drafting the article.

1 Lord Condon, Bounce Corruption out of Cricket leaflet (2002). Also see ICC Anti Corruption Unit Interim Report April 2001 (The Condon Report) - www.icc-cricket.com.

2 Mason.T, 'Sport in Britain'.

other state. By the Adoption of Laws Order, 1950 the jurisdiction of the Public Gambling Act was limited through the words 'Uttar Pradesh, Punjab, Delhi and Madhya Pradesh'. Thus the act applied only to these states with amendments promulgated hence forth. In the case of *Ganga v. Empress*[3], it was held that the court must take judicial notice of the act itself, but the fact whether or not portions of Act have been extended to a particular locality or whether the steps have been taken with this view are sufficient in law to effect it are questions of fact or law which the Criminal Court has to decide for itself. Subsequently, the importance of the Act has declined since the Act has been amended in Uttar Pradesh by U.P Act.34 of 1952, in Punjab by the Punjab Act.9 of 1960 and in Madhya Pradesh by C.P Acts.3 of 1954. The Delhi Gambling Act. No. IX of 1955 has repealed the Public Gambling Act for the territory of Delhi. The other states were free to enact their own state legislation to govern betting and gambling in their territories after coming into force of the Indian Constitution.

Individual state acts have been enacted governing the aspects of gambling and betting like the West Bengal Gambling and Prize Competitions Act, the Bombay Prevention of Gambling Act, the Madhya Bharat Gambling Acts, the Madhya Pradesh Public Gambling Act, the Madras Gaming Act, the Orissa Prevention of Gaming Act, the Punjab Public Gambling Act, the U.P. Public Gambling Act, the Rajasthan Public Gambling Ordinance, the Assam Gaming and Betting Act, the Delhi Public Gambling Act, the Kerela Gambling Act, the J&K Public Gambling Act, the Andhra Pradesh Gaming Act, the Karnataka Gambling Law, the Meghalaya Prevenion of Gambling Act, the Pondicherry Gaming Act, the Tamil Nadu Gaming Act. As intricate as may be, this contribution will attempt to discuss the scope of sports betting under the ambit of some state acts. There will also be an attempt to inculcate the recent controversies in the sports arena that have taken place in India.

If a general prospective behind the promulgation of the various state acts has to be undertaken, then a brief look at the preamble is warranted to see the reason why these acts have been enacted. The Preamble to the Public Gambling Act states that "whereas it is expedient to make provision for the punishment of public gambling and the keeping of common gaming-houses". The preamble to the Kerala Gaming Act states that "whereas it is expedient to make better provision for the punishment of gaming and keeping up common gaming house in the State of Kerala". The Preamble to the Assam Gaming Act states 'whereas gambling and betting on games and sports have widely spread throughout the state causing debasement of public morality and wide spread exploitation and threat to peace and order'. A broad perusal of the preamble of various acts reveals that most state acts except the Assam Gaming and Betting Act were made to curb the evil of gaming in a public house. The important words being 'gaming' and 'public house'. Therefore the object behind the act can be said to be prohibit 'gaming' and that too in a 'public house'.

Before proceeding further to discuss the legality of sports betting in India, it is necessary to establish various aspects of sports betting and differentiate it per se with gambling. This discussion becomes even more important considering the language of Section 12 of the Public Gambling Act which states: "Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played". The act makes a clear distinction between 'games of mere skill' and 'games of chance'. While gambling or gaming if they may be used interchangeably is solely based on a game of chance, sports' betting in my opinion is based on the evaluation of skills of the participants, though there is an element of chance since the outcome is uncertain. To make the position clear, we will evaluate the laid down definitions as to what is a 'Game of Chance'. The phrase is known to law has a settled signification[4]. A reference can be made to the case of Rex v. Fortier[5], where an interpretation of a game of chance was given. "It is a game determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all or are thwarted by chance". Whereas, a 'game of skill' is one in which nothing is left to chance and in which superior knowledge and attention or superior strength, ability and practice, gain victory[6]. A sport or an athletic game will definitely fall within the purview of 'game of skill' since a athlete with superior strength, skill, ability, practice and form will in most cases win over an athlete or a team with lower skill. The element of chance though present is outweighed by the element of skill involved. A game of chance and a game of skill are distinguished on the characteristics, as to what is the dominating element that ultimately determines the result of the game[7]. It has even been held in the case of *State v. Gupton*[8] that any athletic game or sport is not a game of chance. The Supreme Court of India in the case of *D.R. K.R. Laksmanan v. State of Tamil Nadu*[9] while considering the legality of horse racing held that horse racing, foot racing, boat racing, football and baseball is a game of skill. The rationale for the same lay in the fact that a person betting on a horse race applied his research and skill in order to determine the pedigree of the horse, his form etc. A pertinent question in my opinion is that if a person applies his skill to determine a result where a horse is involved, shouldn't a game where there is greater participation of human beings be placed on a higher mantle. A person can apply his skill in judging the strengths and weaknesses of a person in the game he is playing, his form can be determined from the statistics and a psychologist will even be able to determine the body language of the person when he is playing and his feelings during crucial moments through his face expressions. All the above evaluation in my opinion requires application of a persons' skill. The court followed the principle laid down in *Rex v. Fortier* regarding the aspects of 'game of skill'. The Supreme Court has even gone to the extent that certain game of cards like Rummy are a game of skill and not a game of chance.[10] The Public Gambling Act 1867, section12 states, "Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played". Carrom and Chess certainly require skill and hence in view of Section 12 of the Public Gambling Act 1867 itself has no application to these games[11]. Therefore games like Chess,Carrom and Billiards[12] are not considered a game of chance, similarly the game of rummy was held in the case of *State of A.P v. K. Satyanarayana*[13] a game of skill therefore outside the ambit of the Public Gambling Act.

Sports in my opinion would clearly fall within a game of skill and thus outside the ambit of the Public Gambling Act, 1867 or other state acts. An evaluation of same when undertaken brings to light that section.3 (b) of Kerala Gaming Act, 1960 provides that whoever being the owner or occupier of any house, room, tent, vehicle, vessel or place, knowingly or willfully permits the same to be opened, occupied kept or used by any other person for the purpose of gaming on any of the objects aforesaid shall be punishable with imprisonment which may extend to one year, or with fine which may extend to one thousand rupees or with both.

Section 2(b) of the Public Gambling Act, states that gaming includes wagering or betting but does not include a lottery. The Act is silent on betting on skilled or unskilled games and sports. Section 3 of Orissa Prevention of Gambling Act, 1955 provides that whoever takes part in gambling or gaming shall on conviction be punishable with imprisonment which may extend to one hundred rupees, or with both. For the purpose of the Act, gambling or gaming does not include lottery and means a play or game for money or other stake and includes betting and wagering and other act, game and contrivance by which a person intentionally exposes money or things of value to the risk or hazard of loss by chance.(s.2(b)).

Probably one of the few states expressly bringing sports betting under its ambit is S. 2(a) of the Assam game and Betting Act 1970, which provides *that bet with all its grammatical variations means any money or valuable security or thing staked by a person on behalf of himself or on behalf of any other person, by himself or through any agent or*

3 *Ganga v. Empress, 1885 P.R.No. 41(Cr) at p. 87.*
4 State v. Gupton, 30 N.C.271.
5 Rex v. Fortier, 13 Que K.B. 308.
6 Ibid.
7 Peo v. Lovin, 179 N.V.164.
8 State v. Gupton, 30 N.C.271.
9 *D.R. K.R. Laksmanan v. State of Tamil Nadu (1996) 2 SCC 226.*
10 State of A.P v. K. Satyanarayana (1968) 2 SCR 387; AIR 1968 SC 825.
11 Manakadu Elainger Nala Sports v. State of Tamil Nadu 2005 (29) A.I.C 440 at.440(Mad).
12 Squier v. State, 66 Ind. 317.

any person procured or employed acting for or on his behalf, to be lost or won on the happening or determination of an unascertained thing, event or contingency of or in relation to a game or sport and shall include acceptance of a bet. It shall further include wager, wagering contract, totalisator and pool transaction in relation to any game or sport but shall not include a lottery or betting on a horse race when such betting takes place-

1. On the day on which the race has been fixed to run,
2. In an enclosure which the racing club or the stewards thereof controlling such race have with the permission of the state govt. set apart for the purpose, and
3. With a licensed book-maker for horse racing or by means of totalisator as defined in s.14 of the Assam Amusement and Betting Tax Act, 1939

Therefore a limited view can be taken that sports being a game of skill would not fall within the ambit of most state acts till the time they have been expressly included it through words. If such position is deemed to be true then per se sports betting would not be illegal till the time its' not causing a public nuisance. Even the Indian Penal Code has considered the evil of lottery and made running of a lottery house punishable under Section 294A. The code is though silent on aspects of sports betting.

Therefore till the time a specific legislation bans sports betting like the Assam Game and Betting Act, the same cannot be assumed by mere connotation. Sports' betting essentially involves the practice of making a wager on the outcome of sports event. Therefore all sports betting contracts would tend to be wagering contracts. Wagering contracts under the Indian Contract Act 1872 are voidable contracts. On a broad evaluation of the laws in India, it can be said that the principle behind gambling and betting contract would fall within Section 30 of the Indian Contract Act, 1872 which treats a wagering contract as void. The Supreme Court of India in the case of *Gherulal Parakh v. Mahadeodas Maiya*[14] has held that a wagering contract is not an unlawful contract within the ambit of section 23 of the Indian Contract Act. Pollock and Mulla in their book on Indian Contract define the phrase 'forbidden by law' in section 23 thus;

"An act or undertaking is equally forbidden by law whether it violates a prohibitory enactment of the legislature or a principle of unwritten law. But in India, where the criminal law is codified acts forbidden by law seem practically to consist of acts punishable under the Penal law or acts prohibited by special legislation, or by regulation or orders made under the authority derived from the legislature".

To constitute a wagering contract there must be proof that the contract was entered into upon terms that the performance of the contract should not be demanded. Sir William Anson has defined 'wager' as a promise to give money or money's worth upon the determination or ascertainment of an uncertain event accurately brings the concept of wager declared void by section 30 of the Contract Act. The position of law thus is that a wagering contract is not illegal and merely void. A logical conclusion then would be is that betting is not illegal per se until an act of a legislature prohibits the same. The issue of gambling as a fundamental right was discussed in the *R.M.D. Chamarbaugwala case*[15]. The court held that the right to gamble was not within the freedom of right to practice a profession, business or trade guaranteed under Article 19 (1) (g). But the court clearly laid down that i) the competitions where success depends on substantial degree of skill are not 'gambling' and ii) despite there being an element of chance if a game is preponderantly a game of skill it would neverthless be a game of "mere skill".

Once we can establish that sports' betting contract are not illegal and are not banned in certain states, since they are outside the gambit of gambling, then would maintaining a prospective public betting in states where sports betting has not been included within the practice of gambling be illegal too? It has been highlighted that generally to constitute an offence for penalty of owning, keeping or having charge of a gaming house or being found in the gaming house, an essential ingredient is that gaming should be going on in such premises[16] and that it was used for the profit or gain of the accused[17]. Since sports betting would not fall within the ambit of gambling in my opinion the only laws which these sports betting houses would be violating could be causing public nuisance under Section 294A of the IPC and various other state police acts enacted in order to maintain public order in the state.

Online Sports betting

A unique situation that warrants a discussion is a situation 'A', where a person is allowed to bet from the U.K and countries where sports' betting is legal through legislation on games being played by India in India or abroad. While a person resident in India cannot bet on the same through a legally established betting house in India. So can a person in India bet on a sport through betting houses located outside the Indian territory. The answer to this would be in a negative. Though there is no particular law outlawing such betting. But a look at the provisions of the Information and Technology Act 2000, and provisions of Foreign Exchange Management Act would pose as a hindrance to the same. A person undertaking to carry out such a transaction would essentially be violating one of the provisions of these acts. Online gambling can generally be of two types. The first would be called gaming as it would casino style gaming and lotteries based on chance, the second type of online gambling would be sports betting. Here the events occur offline in real time and can be verified independently. The Information and Technology Act Section 67 states:

"Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees."

The authorities can use the provision in the context that gambling tends to appeal to the prurient interest or tends to deprave and corrupt persons. The ambit of this section is very wide and in a limited context will not govern sports betting since horse racing has expressly been recognized in many states as a game of skill and since it is already being regulated it cannot be said that betting on a game tends to deprave and corrupt persons. A view therefore is that sports' betting is not expressly prohibited within the provision of any law. But however assuming that if such was prohibited in India, how the Indian government will regulate sports betting for websites registered outside India where gambling and betting is legal. Such websites would fall outside the jurisdiction of the Indian law. In such a case a person resident in India would be able to place a bet on websites, hosted in countries where betting is recognized by law. He could do so by placing a bet on the website and paying for the same through his bank account, wire transfer, credit/debit card. Alternatively, he could also open an account in the country, where the website is located and pay for his bet from that account. This is curbed in India through provisions of Foreign Exchange Management Act. The first scenario of transferring money from India on betting would squarely fall under the ambit of Foreign Exchange Management (current account transactions) Rules, 2000. Rule 3 of the rules deals with the Prohibition on drawal of foreign exchange. It States:

"Drawal of foreign exchange by any person for the following purpose is prohibited, namely:-

1. a transaction specified in the Schedule I; or -
2. a travel to Nepal and/ or Bhutan; or
3. a transaction with a person resident in Nepal of Bhutan:

13 State of A.P v.K. Satyanarayana (1968) 2 SCR 387; AIR 1968 SC 825.
14 Gherulal Parakh v. Mahadeodas Maiya 1959 Supp (2) SCR 406.
15 AIR 1957 SC 699.
16 Gangadas Benerjee v. Emperor, AIR 1930 Cal. 365 at p. 365.
17 Emperor v. Walia Musaji, ILR 29 Bom.226: 7 Bom. LR 16: 2 Cr.L.J.26.

Provided that the prohibition in clause (c) may be exempted by Reserve Bank of India subject to such term and conditions as it may consider necessary to stipulate by special or general order.

A further look at the schedule is warranted which contains further clarifications as to Rule 3 as to what transactions are covered under it. It covers, 1). Remittance out of lottery winnings,2). Remittance of income from racing/riding, etc. or any other hobby.,3) Remittance for purchase of lottery tickets, banned/ prescribed magazines, football pools, sweepstakes, etc.

The rules makes it very clear that remittance for football pools, sweepstakes etc are prohibited. The said provision has left it open to cover other kinds of betting falling under the same genre. Therefore even cricket betting, hockey betting etc will fall under its purview and a person will not be able to pay on these websites without contravening the provisions laid out in Rule 3.

Another situation that can be comprehended is a situation 'B', where a person resident in India, could open a Foreign Currency Account in the country where sporting betting is legalized through legislation. The situation B would attract the provisions of The Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2000. Section 3 of the 2000 regulations states:

"Restriction on holding foreign currency account by a person resident in India:-

Save as otherwise provided in the Act or rules or regulations made thereunder, no person resident in India shall open or hold or maintain a Foreign Currency Account:

Provided that a Foreign Currency Account held or maintained before the commencement of these Regulations by a person resident in India with special or general permission of the Reserve Bank, shall be deemed to be held or maintained under these Regulations :

Provided further that the Reserve Bank, may on an application made to it, permit a person resident in India to open or hold or maintain a Foreign Currency Account, subject to such terms and conditions as may be considered necessary."

Therefore a person resident in India will not be able to maintain an account in foreign currency without contravening the provisions of the regulations or without the permission of the Reserve Bank of India.

Recent Controversies

A recent controversy that was bought to the forefront was the criticism of the SMS (Short Messaging Services) game during the recently concluded Indian Premier League. An opinion was expressed by the sports minister Mr. M.S. Gill, stated : "This is viewed as openly encouraging gambling and betting which official bodies do not resort to, even in countries where betting is legal — all this to make money and enlarge their TV viewership base."[18] The game involved the viewers predicting the ball by ball result for an over through an SMS services between the period 18TH April to 24TH May 2009. If the prediction was right that the viewer was entitled to various cash prizes. Based on the discussion undertaken above, in my opinion the viewer would be exercising his skill in making a prediction based on an assesment of the player, conditions of play and form. Though the SMS game was withdrawn, it clearly brings out the intent of the sporting bodies and the viewers to engage in sports betting.

An innovative way in which the IPL team owners had found to skirt the laws of betting was through betting not involving money. In a repeat match of the Ipl opener of 2008 Shahrukh Khan owner of the Kolkata Knight Riders and Vijay Mallya the owner of the Royal Challenger Bangalore were seen placing 'legal bets throughout the match with sattarules'. The consideration for the bet involved Shahrukh Khan trading his son to be a ball cleaner for the Bangalore team, his team being Kingfishers' flight attendant for a day etc[19].

Taxation of Sports betting

If the government considers the above arguments it could make provisions to tax sports betting as it taxes horse racing. A state legislature is competent to make laws on taxes on betting and gambling under Entry 62 of the State list. The rate of tax on horse racing in the state of Tamil Nadu has been assessed at 20%[20] of the money earned through sports betting. Further the income earned through such betting would be liable to be taxed under clause (ix) of Section 2(24) would include "any winnings from lotteries, crossword puzzle, races, including horse race, card games and other games of any sort or from any gambling or betting of any form or nature whatsoever". Explanation 2 to the same would cover "card games and any other game of any sort". Thus income from sports betting is liable to be taxed in all cases. The rate of taxation for the same would be governed by Section 115 (BB), which would impose a rate of 30% tax[21]. An acceptance of sports betting by the government would in one way curb the illegal betting market and corruption associated with it and additionally will give to the government much needed revenue which it could utilize to better the sporting infrastructure in the country and provide a stimulus to the youth by developing the sport at the grassroots level.

Conclusion

A parallel can be derived from the betting in Horse racing which has been legalized due to the reason that it is not a game of chance, since people who bet on the horse races research on the horses and the jockeys before betting. Therefore it is a game of skill. Deriving from the same logic in my opinion it would be right to hold that sports' betting too is wholly a game of skill. Since the outcome, though uncertain is dependant largely on the skill of the players involved in the sport. A person who studies the form of the players, their stats, conditions of play etc could in my opinion be able to predict outcome with a fair accuracy. Therefore should sports betting will not be within the ambit of gambling. Therefore the question posed that is sports betting really illegal in India? Would be answered in a negative since most states do not through their legislature prohibit it.

18 "Indian Premier League defends against 'gambling and betting' charge"; Accessed on 14th September 2009 at http://www.gamblingplanet.org/news/Indias-Premier-League-defends-against-gambling-and-betting-charge/051009

19 'IPL: Legalized Sports Betting Skyrockets; Embarassing stunts at stake'; Accessed on 20th July 2009 at news.techtribe.com/thecareerpigeon/thecareerpigeonv3/sports.html

20 *D.R. K.R. Laksmanan v. State of Tamil Nadu (1996) 2 SCC 226.*

21 www.incometaxindia.gov.in/Acts/INCOME%20TAX%20ACT/115BB.asp Accessed on 17th September 2009.

Sports Betting in New Zealand: The New Zealand Racing Board

by **Elizabeth Toomey* and Simon Schofield****

1. Introduction

In New Zealand, the sports betting contract exists within an efficient regulatory regime. Nonetheless, in our modern competitive environment, the gambling industry faces significant challenges. In this chapter, the term "sports betting" is used in its widest sense. It comprises racing betting (horses, greyhounds and dogs); animal fight betting; and general sports betting (betting on sporting events).

Sports betting is conducted by the New Zealand Racing Board. The Totalisator Agency Board (the "TAB") is its most recognisable arm. It liaises with the various national sporting organisations in order to provide on and off-course betting facilities for the public. Historically the TAB, that provides off-course betting, arose as a compromise. It essentially removed the commercialisation of betting through the bookmaker by reaching a balance between an enjoyable activity and the lessening of the effects of problem gambling. While horse racing was traditionally the most substantial gambling activity, gradually lotteries, instant kiwi, gaming machines, casinos, dog racing and general sports betting have dramatically changed the gambling landscape. The TAB is no longer hidden. It is a visible commercial entity. In addition to outlets, the TAB uses the Internet, Phonebet, Touch Tone and a SKYBET channel to bet. Its visibility has made the tendency to gamble, and the associated risk of problem gambling, more recognisable; and a significant public health approach has been adopted to identify, minimise and manage these risks. Gambling activity will always comprise attempts to rig a sport result for an easy dollar but reasonably effective anti-corruption measures exist. In modern times, the Internet and sport transactions abroad present significant challenges for the TAB. As a statutory corporation designed for taxation, it operates in a highly competitive market place. A telling example is the horse racing industry which currently faces record declining membership and public patronage;[1] and has been described as an "industry in crisis".[2]

2. The Bookmaker

2.1. Horse Racing and Trotting

Horseracing was adopted instinctively into New Zealand society. The first recorded horse race was held at Kororareka (Russell) in the Bay of Islands in 1835;[3] and the first recognised thoroughbred horse, Figaro, landed in Wellington in 1840.[4] Anniversary celebrations in Auckland, Wellington, Nelson, Canterbury and Otago all provided annual racing meetings. By the 1880s, statistics suggested that there were more racecourses and racing clubs, on a per capita basis, than anywhere else in the world.[5] A New Zealand- bred horse won the Melbourne Cup in 1883.[6] Gradually, local clubs evolved; racecourses were made reserves;[7] and attempts were made to nationalise racing rules. With the advent of the annual meetings, the bookmaker emerged. A loud and persistent commentator, the bookmaker tantalised the public to bet to select the winner against fixed odds. By 1875, 300 full time bookmakers were employed in the racing meetings throughout New Zealand.[8] The bookmaker's nemesis was the introduction of the totalisator which adjusted the odds according to the bets received. Before an Act was introduced in 1881, an unregulated gambling market was rife with corruption. In one instance, George North, a bookmaker, fled with £4,500 wagered on the Wellington Racing Cup.[9]

The legal position prior to the Gaming and Lotteries Act 1881 was precarious.[10] Strictly speaking, New Zealand adopted all the laws of Britain in 1840;[11] and at common law a bet was an enforceable contract.[12] Thus, the Imperial statutes of 1664,[13] 1710[14] and 1835[15] that addressed the prevention of excessive gaming applied. The applicable 1664 Act essentially prevented the enforceability of betting contracts where persons had lost more than £100 on credit. The 1710 Act provided that if a person lost £10 or more at any one time and paid his lost money to the winner, he could recover that money if an action was brought within three months. The 1835 Act provided that where the "securities were declared void [under the preceding statutes then] an innocent holder for value of a note given for a gaming consideration could not recover upon it."[16] In 1875, it was made clear in *Dogherty v Poole*[17] that a loser of a wager could be successful under s 2 of the 1710 Act. A number of Provincial Ordinances[18] and Acts[19] sought to regulate betting but none was comprehensive.

The Gaming and Lotteries Act 1881 filled that gap. Concern had grown over sweepstakes, lotteries, bookmakers, and gambling by young people and in clubs. During the Bill's passage, Edward Wakefield referred to bookmakers as "a lot of men who to all appearances [have] no right to be outside the walls of a gaol…".[20] In practical terms, the legislation was based upon the Gaming Act 1845 (UK) and the Gaming Houses Act 1853 (UK). Thus betting contracts were void but not illegal. Public gambling as well as gambling houses were made illegal and totalisators had to be licensed under the control of the Colonial Secretary. Bookmaking was not illegal per se as it was considered, albeit optimistically, that the totalisator would monopolise the horse racing market. Nonetheless, the courts interpreted the legislation cautiously.

Dark v Island Bay Park Racing Company [21] was the leading decision

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1 *Stratford Racing Club v New Zealand Thoroughbred Racing* (HC, Wellington, CIV 2005-485-555, 6/12/05, Miller J), [2];.
2 "Racing Awaits its Makeover", *The Press* ,Christchurch, 7/11/09.
3 D Grant, *Two over Three on Goodtime Sugar: the New Zealand TAB turns 50*, (2000), 11.
4 A McLintock (ed.), *An Encyclopaedia of New Zealand*, (vol.3, 1966), 13.
5 D Syme, "The Social Context of Horserace Gambling in New Zealand: An Historical and Contemporary Analysis," PhD thesis, Victoria University of Wellington, 264, as cited in R Graham, "Who killed the Bookies?: Tracking Totalisators and Bookmakers across Legal and Illegal Gambling Markets", MA Thesis, University of Canterbury, 2007, 9.
6 D Grant, *Two over Three on Goodtime Sugar: the New Zealand TAB turns 50*, (2000), 22.
7 For example, *Canterbury Provincial Council Racecourse Reserve Ordinance* Sess. XI, No.7 (1859) & *Wellington Council Ordinance* Sess. XVII No.3 (1869), Sess. IV No.7 (1857), and Sess. X No.3 (1863).
8 D Grant, "The Nature of Gambling in New Zealand: A Brief History", in B Curtis (ed.),*Gambling in New Zealand* (2002),77.
9 Ibid, at 79.
10 R Moodie, "Gaming and Wagering Contracts: Part I", (1975) 8 *Victoria University of Wellington Law Review* 22; R Moodie "Gaming and Wagering Contracts: Part II", (1975) 8 *Victoria University of Wellington Law Review* 170.
11 Section 1 English Laws Act 1858.
12 *Good v Elliott* (1790) 100 ER 808.
13 16 Car. II, c.7.
14 9 Anne, c.14.
15 5 & 6 Will. IV, c.41.
16 "Gaming and Racing: Report of the Royal Commission appointed by His Excellency the Governor General", *Appendices to the Journals of the House of Representatives*, 1948, H-23, 13.
17 R Moodie, "Gaming and Wagering Contracts: Part I', (1975) 8 *Victoria University of Wellington Law Review* 22, n 161.
18 For example, sections 2(6) and (7) *Otago Provincial Council Vagrant Ordinance* Sess. XIII No. 62 (1861) and section 4(1) *Canterbury Provincial Council Police Ordinance* Sess. X No.1 (1858).
19 For example, section 1 *Nelson Provincial Council Billiard Tables Act* Sess XII No.1 (1864); section 2(17) *Auckland Provincial Council Rural Police Act* Sess. XIX No.11 (1866); and section 5(44) *Auckland Provincial Council Auckland Municipal Police Act* Sess. XIX No.15 (1866).
20 *New Zealand Parliamentary Debates*, (1881), 38, 498.
21 *Dark v Island Bay Park Racing Company* (1886) 4 NZLR 301.

relating to the totalisator under the 1881 legislation. Two horses, Talebearer and Little Scrub, ran a dead heat. A second race was run and Little Scrub won. The plaintiff, who had backed Talebearer, argued that he was entitled to the dividend on the totalisator from the first race. The Court held that the wagering contract was unenforceable. Richmond J stated that:[22]

> the depositor in the totalisator backs the horse he selects, against the field. That is the wager, and it is laid with the backers of the other horses - whether the layers of the wager are known to one another or not signifies nothing - and those who are working the machine are stakeholders.

His Honour considered that the case fell "within the enactment of [s]33, which says that all wagering agreements are null and void, which means not that they are not legal, but that they cannot be enforced in a Court of Justice."[23] The legislation was designed to "save the time and dignity of the Court, for dignity could scarcely be preserved in the investigation of absurd disputes arising out of betting transactions."[24]

The criminalisation of bookmaking, a very contentious issue in this period, was affirmed in *Porter v O'Connor*.[25] Pursuant to s 18 of the 1881 Act, the defendants were charged with unlawfully conducting a scheme by which prizes of money were competed for by a mode of chance, namely a horse race. In 1886 at Riccarton Racecourse in Christchurch, they had a book comprising the names of horses in the various races; and they invited people to wager with them, declaring that they would pay the same as the totalisator.[26] Johnston J reasoned that this practice "had all the elements of chance in it which the totalisator has" [27] for which prizes of money were gained. Most importantly, "the licence to use the totalisator could not be invoked as legalising a scheme referring to the dividends declared on it."[28] The conviction was confirmed.

However, in similar circumstances, the Court in *Barnett v Henderson*,[29] declined to follow *Porter v O'Connor* stating that the laying "with two distinct persons distinct bets at totalisator odds"[30] was not a mode of chance but rather fixed at the odds of the totalisator. The Court considered that there was "nothing illegal in New Zealand in making a bet or in giving odds."[31]

The difficulty the courts faced in criminalizing bookmaking was evident in *Hyde v O'Connor.*[32] The Court in this case determined that horse racing was a game of chance. The defendant, standing on a box, had used cards and a book to wager with the public. The Court concluded that any profit depended "upon the state of betting with reference to the number of bets laid on or against the winning horse - a state of things fluctuating from one minute to another throughout the duration of the betting." [33] Thus totalisator betting was a matter of uncertainty and chance. The words of the statute clearly pointed to the use of the totalisator as an instrument of gambling, "not to a mere agreement that some part of the contract shall be determined by the results of the use of such instruments in other hands."[34] While that conviction was quashed, a second charge - that of using a public place for the purpose of betting - was upheld: [35]

> [A] fixed and ascertained spot defined in an enclosure by a moveable wooden box, at which a person orally advertises his willingness to bet, is a "place" within the meaning of the Act.

The laws relating to bookmaking were widely flouted. Even where bookmakers were prosecuted, many bookmakers had the resources to obtain expert legal help.[36] Punters were reluctant to tread the treacherous path of giving evidence in court. For example, in the absence of any substantial evidence against them, Matthew Barnett and Peter Grant, well-known Christchurch bookmakers, were acquitted three times in consecutive years from 1901.[37] Moreover, juries were often sympathetic to the bookmaker's plight, acquitting even in the face of compelling evidence.[38] The racing clubs were forced to take the initiative and began excluding professional bookmakers from their courses. The validity of these exclusions was tested in *Pollock v Saunders*[39] in which it was argued that the bookmaker was entitled to remain on the race course as he had made a bet on the totalisator. The Court disagreed, observing that, as the bookmaker knew he had been forbidden from the course, he had never had a licence to be there, and thus he was never entitled to a refund of the bets that he had made on the totalisator.[40] Similarly, racing clubs began to arrest and fine bookmakers for trespass although some racing clubs were reluctant to do so in the face of public opposition. Predictably, bookmakers devised different and more inventive ways of flouting the law.

By this time, the anti-gambling league had announced its presence. Associated with "intemperance, sexual immorality, and desecration of Sundays",[41] gambling was deemed a vice, a curse, and evil. Gambling ran counter to the protestant work ethic, self-discipline and the family unit. When the Governor visited the Grand National in Riccarton in 1897, Ministers of the Baptist, Methodist, Presbyterian and Congregationalist churches denounced his actions as popularising the gambling sin. Reverend Rutherford Waddell asserted in expressive tones that gambling was "a disease, spreading its subtle prehensile tentacles out of every sphere of our existence - tentacles whose touch at first is so delicate but whose clutch is so deadly on the developing life of a nation."[42] In 1899, Ada Wells at the National Council of Women deplored "our gambling hells and dens of impurity."[43] By 1907, the Women's Christian Temperance Union presented Parliament with 36,471 signatures to abolish the totalisator. However, this effort had to be balanced against Parliament's receipt of 311 other petitions with 36,219 signatures advocating its retention.[44]

Prime Minister Ward compromised, recognising both the popularity of horse racing and the tax intake from the totalisator. The passing of the Gaming Act 1908 confined all betting to the racecourse. Gambling houses, street betting and work betting were made illegal. The doubles totalisator was prohibited as were communications to the racetrack via telephone or telegraph and even notifications inducing betting. Bookmakers had to be licensed and were confined to the racetrack. This legislation was criticised by many for not being sufficiently hard-hitting. In 1910, Chapman J declared it as "one of the gravest mistakes of the legislators"; [45] and considered it his moral duty "to complain about a law which legalises the operations [of bookmakers] who come very close to the criminal class."[46] As a result of this backlash, in July 1910, Parliament voted 69 to 4 to prohibit bookmaking from the racecourse. While the practice of bookmaking itself was not made illegal until 1920, betting was made illegal in the street, in licensed premises, in a gaming house, on a race-course other than bets on the totalisator, or in a public place, thus making it "difficult to see where the bookmaker could legally conduct his business."[47] The public attitude was perhaps best illustrated by the observation that the "totalisator was democratic, egalitarian, organised and orderly, whereas bookmaking was the exact antithesis".[48]

Effectively, bookmakers were left with a monopoly on credit, small, double, and all off-course, betting. Bookmaking remained socially acceptable in everyday life. This is well-illustrated in *Quirke v Davidson.*[49] While a bookmaker's premises was being searched, a policeman answered the phone and was met with the reply: "£1 on Chimera, £1 Festivity, £1 on Likelihood".[50] Thirteen such messages were recorded. The information had been dismissed on the ground

22 Ibid, at 302.
23 Ibid.
24 Ibid.
25 *Porter v O'Connor* (1887) 5 NZLR 257.
26 Ibid.
27 Ibid, at 262 and 260.
28 Ibid, at 262.
29 *Barnett v Henderson* (1892) 11 NZLR 317.
30 Ibid, at 318.
31 Ibid.
32 *Hyde v O'Connor* (1893) 11 NZLR 723.
33 Ibid, at 725.
34 Ibid, at 727.
35 Ibid, at 728.
36 D Grant, *On a Roll: A History of Gambling and Lotteries in New Zealand*, (1994), 64.
37 Ibid, at 65.
38 Ibid, at 83.
39 *Pollock v Saunders* (1897) 15 NZLR 581.
40 Ibid, at 590.
41 D Grant, *On a Roll: A History of Gambling and Lotteries in New Zealand*, (1994), 76.
42 Ibid, at 78.
43 Ibid, at 79.
44 Ibid, at 84.
45 A Skene, "The Gamble for Power: New Zealand Gaming Legislation 1907-1910", Pg/Dip. Arts Thesis, University of Otago, 1989, 50.
46 Ibid.
47 Ibid, at 54.
48 Ibid, at 67.
49 *Quirke v Davidson* [1923] NZLR 546.
50 Ibid, at 547.

that the evidence as to the telephone messages was legally inadmissible; and also on the ground that an actual bet was required before action could be taken. The Court allowed the appeal holding that actual betting on the premises was not necessary to constitute an offence; and that the evidence as to the telephone messages was allowable. Subsequently, a general appeal by way of rehearing was brought focusing particularly on the question of the admissibility of the phone messages as evidence: *Davidson v Quirke*.[51] In this latter case, the Court affirmed that this evidence was admissible, observing that "a logically relevant method of proving [the offence] is to prove that on that day a large number of persons communicated with those premises by telephone for the purpose of making bets there."[52] Moreover, although such telephone communications were technically hearsay, the communications formed part of the *res gestae*.

In *Dolling v Bird*,[53] an information was dismissed when an undercover police officer made a series of bets. The Court held that betting is not in itself illegal, but the purpose and effect of the legislation is to prohibit betting carried on as a business on premises used for that purpose.[54] In this case, only two bets had been made and there was no further evidence "of any general business of betting, as distinguished from a willingness to bet on isolated occasions with a specific individual."[55]

In 1946, a Royal Commission on Gaming and Racing was constituted. Calls had been made to legalise bookmaking. The Dominion Sportsmen's Association gathered 80,511 signatures in 1924 to petition for the licensing. Private members' bills in 1927, 1930 and 1931 failed to legalise bookmakers; and, in December 1933, E F Healy's Bill for licensing also failed, albeit by a mere two votes at its third reading.[56] The Commission conducted a comprehensive review. It estimated that while £20 million had gone through the totalisator, almost £24 million had been handled by illegal bookmakers.[57] The Commission recommended a regulated off-course betting system controlled either by a governmental trust or by the Racing and Trotting Conferences. Doubles totalisators, publication of tips and dividends, and telephone betting were all permitted. The scheme was described as "reactionary…rather than a proactive and innovative concept to run off-course betting".[58]

In 1949, a referendum was called. 424,219 people voted for off-course betting and there were 199,406 opposers. The resultant TAB was the first legally authorised on and off course betting scheme in the world. The iconic Kiwi male found solitude in "the classic troika of rugby, racing and beer."[59]

Nonetheless, the legal boundaries continued to be challenged. In *Pine v Bailey*,[60] a competition took place at a pub whereby the competitors named the winner of each of the eight races held at a specified race meeting. Three points were awarded for a winner, two points for second and one point for third. The publican passed the money pool to the highest points total. The Court of Appeal held that while, prima facie, the publican was the occupier of a common gaming house, he was in fact a mere stakeholder. This meant that he was an agent holding the stakes of several principals. He did not receive anything out of the pool. With respect, this reasoning appears contrived. Although the money was not received as "consideration for any…promise to pay", consideration should include any such marketing enticements. A similar situation arose in *Bhana v Barriball*[61] where a winner of a sweepstake was entitled to recover. Although the betting contract was void, the actions to recover the money from his agent to whom it had been paid by the loser or the stakeholder were valid as the Gaming Act 1908 did not apply. The money had been won and the agent was not entitled to put the money in his pocket.

In 1970, a Royal Commission of Inquiry scrutinised the TAB. The local TAB had become a household name with TAB branches and agencies everywhere. The TAB became a favourite with the punter (increased stakes and better on-course facilities); racing clubs (profit distribution); and the tax department (9.35 percent of totalisator turnover).[62] The system was copied with some variations in all of Australia's major states. By the 1960s, horseracing betting provided more than 90 per cent of New Zealanders' gambling activity.[63] However, by the 1970s, calls were being made for the redistribution of profits in the racing industry; for the introduction of new bets (trebles, quinellas and triellas); and for the closure of uneconomic clubs. The Commission favoured the introduction of a National Racing Authority. It felt that tension between racing and trotting interests, as well as between rural and metropolitan clubs, could be avoided if the new chairperson was entirely independent. It also suggested that more tax be redirected to the TAB; same day payouts be introduced; and governmental control be relaxed. The consequential Racing Act 1971 created the New Zealand Racing Authority.

Despite the TAB, convictions for bookmaking continued, and legal arguments became very technical.[64] In *Police v Ford*, [65] the police had a warrant to seize evidence of bookmaking. Incoming calls were made, and the defendant warned the callers off. Despite being warned not to, she continued to do this on two further occasions and was consequently charged with obstruction. In the Court's view, the search warrant did not authorise the obtaining of evidence by answering the telephone without the consent of the subscriber.[66] This decision prompted a later statutory amendment.

However, in *Police v Machirus*,[67] a conviction was affirmed. The police obtained a search warrant but before the police arrived, the phone was ripped from the wall and documents burned. The police reconnected the phone and received five calls. The Court of Appeal held that the hearsay rule did not apply as the calls were "not tendered to prove the truth of any assertion but simply to indicate that there had been an apparent attempt to bet".[68] The appellant also argued that reconnecting the phone was in breach of the Telephone Regulations 1976 and that the evidence was inadmissible as it had been obtained improperly. Dismissing the appeal, the Court held that, under the circumstances, there was no overriding unfairness.[69]

To this day, bookmaking remains illegal, and convictions still occur despite the apparent omnipresence of the TAB.[70] In 2007, under the Gambling Act 2003 and Racing Act 2003, Internal Affairs inspectors caught a Gisborne woman taking bets on horse races at the Turanga Hotel. Given her financial situation, she was sentenced to 100 hours community work rather than a fine; and the Court ordered the forfeiture of the $1158 she had in her possession. The Department of Internal Affairs spokesman observed that "[b]ookmaking effectively diverts money from the community and from the racing industry, which gets much of its financial support through the TAB."[71] The hotelier was fined $3000 plus costs for allowing his premises to be used for illegal gambling; and $300 plus costs for taking part in the gambling.

2.2. The Gambling Act 2003 and the Racing Act 2003

The Gambling Act 2003 and the Racing Act 2003 provide an appropriate consolidation of the law. The Gambling Act 2003 provides that every contract relating to illegal gambling is an illegal contract for the purposes of the Illegal Contracts Act 1970.[72] However, gambling contracts authorised by the Gambling Act 2003 are now enforceable.[73] In essence, this renounces the previous law of unenforceable gambling

51 *Davidson v Quirke* [1923] NZLR 552.
52 Ibid, at 555.
53 *Dolling v Bird* [1924] NZLR 545.
54 Ibid, at 548.
55 Ibid, at 551.
56 D Grant, *Two over Three on Goodtime Sugar: the New Zealand TAB turns 50*, (2000), 15.
57 "Gaming and Racing: Report of the Royal Commission appointed by His Excellency the Governor General", *Appendices to the Journals of the House of Representatives*, 1948, H-23, 21.
58 D Grant, *Two over Three on Goodtime Sugar: the New Zealand TAB turns 50*, (2000), 22.
59 J Phillips, *A Man's Country?* (1996), 215.
60 *Pine v Bailey* [1960] NZLR 180.
61 *Bhana v Barriball* [1973] 1 NZLR 616.
62 D Grant, *Two over Three on Goodtime Sugar: the New Zealand TAB turns 50*, (2000), 663.
63 Ibid, at 61.
64 See also *McFarlane v Sharp and Another* [1972] NZLR 64; *McFarlane v Police* [1981] 2 NZLR 681; *Machirus v Police* [1983] NZLR 764; *Matthewson v Police* [1969] NZLR 218; *Sunlay v Hunter* (HC, Hamilton, M405/83, 26/3/1984, Tompkins J).
65 *Police v Ford* [1979] 2 NZLR 1.
66 Ibid.
67 *Police v Machirus* [1977] 1 NZLR 288.
68 Ibid, at 292.
69 Ibid, at 291.
70 *http://www.nzherald.co.nz/*, "Conviction of Illegal Pub Bookmaker Recalls Bygone Era" (28/2/07).
71 Ibid.
72 Gambling Act 2003, s 14(1).
73 Gambling Act 2003, s 14(2).

contracts.[74] Gambling is defined as paying or staking consideration on the outcome of something seeking to win money when the outcome depends wholly or partly on chance.[75] Thus, gambling incorporates the previous concepts of betting, gaming, wagering, and lotteries. Bookmaking (which is prohibited)[76] is defined as running a business or making (or endeavouring to make) a living, totally or partly from taking or negotiating bets; organising pool betting; matching gamblers; laying or offering odds; and offering to bet with more than one person.[77] Private gambling is authorised where gambling takes place at a private residence primarily as a social event in which all stakes are distributed as reward to the winners with no deductions of any kind; and all participants have an equal chance of winning.[78] A sales promotion scheme is authorised where there is the promotion of a sale of goods and the outcome is determined by skill and chance.[79] Other gambling is divided into categories that have various procedures relating to the necessity for licensing.[80]

The Racing Act 2003 deals specifically with betting on racing and sporting events. Its purpose is to promote the long-term viability of racing in New Zealand; to facilitate such betting; and to provide effective governance arrangements for racing.[81] The New Zealand Racing Board ("NZRB") comprises seven members appointed by the Minister of Racing: one from each of the three racing codes (New Zealand Thoroughbred Racing Inc, Harness Racing New Zealand Inc and the New Zealand Greyhound Racing Association Inc); three appointed by a nomination advisory panel; and a chairperson who is chosen after consultation with the racing industry. The functions of the NZRB are stated in s 9(1) of the Act. They are to:[82]

(a) develop policies that are conducive to the overall economic development of the racing industry, and for the economic benefit of people who, and organisations which, derive their livelihoods from racing;
(b) determine the racing calendar each year, and issue betting licences;
(c) conduct, make rules and distribute funds obtained from racing and general sports betting;
(d) administer the racing judicial system;
(e) develop or implement programmes for the purposes of reducing problem gambling and minimising the effects of that gambling;
(g) undertake research, development, and education, and use its resources (including financial, technical, physical and human resources), for the benefit of New Zealand racing;
(h) keep under review all aspects of racing and advise the Minister accordingly;
(j) perform any other functions that it is given by or under this Act or any other Act.

It is clear that the NZRB has a broad range of powers. It is required to prepare financial statements, statements of intent, a business plan and annual reports. It decides how to distribute surplus revenue after payment of successful bets and dividends, goods and services tax, totalisator duty and its operating expenses.[83] The amount distributed to the racing codes is distributed in proportion to how much they contribute to NZRB's financial turnover. Each racing code must apply the rules for its particular type of racing.[84] This allows for greater uniformity and specialisation. There are four club categories: galloping; harness racing; hunt and greyhound racing.[85] There are rules controlling or excluding the admission of specified classes of persons,[86] but these only apply where it is necessary to maintain public confidence in the conduct of horse racing and the integrity of racing betting.[87] Any person breaching these rules commits an offence and is liable to summary conviction to a fine of up to $1000. [88]

The Act defines the various types of betting. "Racing betting" includes all betting on races run at racecourses within and outside New Zealand;[89] and includes totalisator, equalisator and fixed-odds betting. "Sports betting" (referred to in this chapter as "general sports betting") is betting on sporting events within and outside New Zealand.[90] The NZRB must obtain the written agreement of the appropriate New Zealand national sporting organisation before any betting on that event is allowed.[91] The appropriate contract should include profit distribution to that national sporting organisation.[92] Unsurprisingly, betting with persons under 18 is an offence; and no person may make a bet on behalf of another under the age of 18.[93] Moreover, despite betting contracts authorised by the Act being enforceable at law when made, the TAB or any racing club has the right to refuse or accept all or part of a bet without having to give reasons. [94] Those associated with the NZRB or racing clubs commit an offence when they offer to provide credit to any person when they are aware that the credit is intended to be used to make a bet.[95]

While the NZRB is the overarching body of all sports betting in New Zealand, there is an "awkward tiered"[96] relationship among the various participant institutional structures. The members of the three codes described above are the associated regional or district racing clubs. A racing club is defined as a club (whether incorporated or not) that is "established for the purpose of promoting, conducting, and controlling races, and that is registered with a racing code in accordance with the constitution of that code; and includes a hunt club".[97] Under s 42 of the Act, the NZRB decides all racing dates; and pursuant to s 45, it must issue betting licences to the racing clubs to whom the racing dates have been allocated. This will include any terms or conditions that the NZRB considers appropriate.[98]

The legal position of these racing clubs was considered in *New Zealand Racing Industry Board v Attorney-General*[99] under the former Racing Act 1971. The Department of Internal Affairs refused to grant six racing clubs licences for gaming machines. It was argued that the racing clubs did not fit the definition of "societies" because they were not established for non-commercial purposes. The Court disagreed. It observed that in charting the flow of money, racing clubs were not commercial as the body in control of betting was the TAB. Although the racing clubs derived the majority of their money through on-course betting, subscriptions, entrance fees, and facilities, the money was spent on "maintaining tracks, buildings and improvements… and the like."[100] Racing clubs were "not established for the purpose of making a profit… only for the purpose of holding the racing meetings. Any profit derived is ploughed back into fulfilling their objective: namely, to promote, conduct and control race meetings."[101]

The TAB, by contrast, is primarily commercial in nature. The racing clubs are seen as "little more than conduits within the industry for money expended on on-course betting."[102] Effectively, the TAB conducts the retail operations of the NZRB.[103] The TAB has three different categories of outlets. First, there are branches that are directly controlled by the TAB. Secondly, there are agencies where the TAB leases the property and contracts an agent occupier. The TAB provides the equipment and administrative support; the agent finances the power, gas, SKY TV, and cleaning. The agent can employ the staff. He or she is paid by an agreed commission and is liable for any losses. The profitability of the agency depends upon the agent's work. The agent is an independent contractor, not an employee.[104] Finally, sub-agencies are similar to agencies but are run with other businesses - typically pubs or sports or social clubs.[105]

74 S Wellik, "Enforcing Wagering Contracts", (1999) 29 *Victoria University of Wellington Law Review* 371, 376.
75 Gambling Act 2003, s 4(1).
76 Gambling Act 2003, s 9(2).
77 Gambling Act 2003, s 4(1).
78 Ibid; Gambling Act 2003, s 9(1)(c).
79 Gambling Act 2003, ss 4(1), 18.
80 Gambling Act 2003, s 20(1).
81 Racing Act 2003, s 3.
82 Racing Act 2003, s 9.
83 Racing Act 2003, ss53(2) and 57(2).
84 Racing Act 2003, s 29.
85 Racing Act 2003, s 5(1).
86 Racing Act 2003, s 34.
87 Racing Act 2003, s34(5).
88 Racing Act 2003, s 35.
89 Racing Act 2003, s 5(1).
90 Racing Act 2003, s 5(1).
91 Racing Act 2003, s 55(1).
92 Racing Act 2003, s 55(2).
93 Racing Act 2003, s 63.
94 Racing Act 2003, s 65.
95 Racing Act 2003, s 63(2)(c).
96 *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268, 280.
97 Racing Act 2003, s 5(1).
98 Racing Act 2003, ss 42 and 45.
99 *New Zealand Racing Industry Board v Attorney-General* [2003] NZAR 85.
100 Ibid, at 93.
101 Ibid, at 95.
102 Ibid
103 *Lightbourne v New Zealand Racing Board* (HC, Auckland, CIV 2008-404-7273, 10 December 2008, Allan J), [1].
104 *Agius v Totalisator Agency Board* [2003] 1 ERNZ 601. For a full discussion on this aspect of sports law in New Zealand, see E Toomey and C Fife, " New Zealand Sports Law" International Encyclopaedia of Laws, Kluwer Law International (2008), Part II, ch 1.
105 Ibid, at 604.

In whom the ownership of the TAB vests is a somewhat academic question. In *Official Assignee v Totalisator Agency Board*,[106] the Court stated that while "[t]he Totalisator Agency Board is a creation of statute"[107] the particular transaction in that case was between Mrs R as an individual and the TAB as agent for the particular club conducting the race to which the transaction related. The TAB was "a mere channel of conveyance - a conduit pipe - for the transmission of the money to the particular totalisator operated by the particular racing club."[108] The bet was "a bet or a plurality of bets inter se made by all those who invest."[109] The Court observed that totalisator betting should be regarded "as a multipartite agreement between numerous parties divided into groups who bet to win or lose according as the uncertain event does or does not happen."[110] Racing clubs argued that this interpretation suggested that they owned the TAB because they were analogous to a society where each member has a proportionate share. However, in reality the TAB is more analogous to an independent statutory corporation.

The racing codes - the middlemen - occupy an unenviable position. Each regulates the conduct of racing by its code.[111] While this generally involves the control of the race such as licensing and the registration of participants, more onerous duties include punishment for breaches of the rules, determination of appeals and disqualifications and suspensions where appropriate.[112] As statutory bodies, they are unable to levy without authority. They are not private contractual bodies, but entities discharging a public function;[113] and they do not have power to control the internal procedures within the racing clubs other than to determine judicially that the sport has been brought into disrepute. Judicial review of any decision made by a club can be sought.[114] In *Adlam v Stratford Racing Club*,[115] the Stratford Racing Club blackballed new members because the committee members wanted to retain control. It also transferred its principal asset, a racecourse worth $3.4 million, to the Te Kapua Park Trust in order to avoid a sale of the racecourse and consequent expropriation of the proceeds. The Court, in two judgments[116] (the second of which was upheld on appeal in part),[117] held that the transfer was invalid and that the blackballing involved an irrational and improper purpose.[118]

The Judicial Control Authority governs the appointment of judicial committees of each racing code. It has a panel of suitable people from which members of a judicial committee or members of an appeals tribunal may be appointed.[119] A judicial committee comprises a chairperson, being a barrister and solicitor with at least seven years practice, and two members per code.[120] Judicial committees are appointed by the Authority (whether for matters that arise on a day of racing or otherwise) to hear, adjudicate and determine any matter brought before the committee in accordance with the racing rules of the relevant code. They also have the authority to exercise the powers, duties and functions, including the imposition of penalties or costs, conferred upon them by the rules.[121] An appeal tribunal may be appointed to hear and adjudicate on any appeal.[122]

2.3. Animals and Sports Betting

Animal fight betting has always been illegal. These fights usually involve inciting an animal to fight against another animal, often until death. The most popular contests comprise rat-fighting, dog-fighting and cock-fighting. These contests, a signature feature of which is the exploitation of animals' natural aggression, have been prohibited in Britain since 1365, and this prohibition was reiterated firmly in the Cruelty to Animals Act 1835 (UK).[123] Unfortunately, New Zealand has had an historical infatuation with this pursuit. For example, Hokitika's Shamrock Hotel was built specifically for the fights - it had a sunken pit of eighteen feet in diameter.[124] While efforts were made to ban the contests, keen participants simply moved into the bush and posted lookouts. It was clear there was "too much money, prestige and enjoyment at stake".[125] In 1866, the pastime was described as "the most disgusting exhibition of cruelty".[126] As late as 1931, a Sydney reporter described a fifteen round contest as involving "a mangled bleeding mess of malignity" when a bird had died before its fourteenth round.[127] Fortunately, these contests seemed to disappear soon afterwards.

Pursuant to s 31 of the Animal Welfare Act 1999, it is an offence to knowingly own an animal "for the purposes of having that animal participate in an animal fighting venture".[128] An "animal fighting venture" is defined as "any event that involves a fight between at least 2 animals and is conducted for the purposes of sport, wagering, or entertainment; but does not include any activity the primary purpose of which involves the use of 1 or more animals in hunting or killing an animal in a wild state."[129] In 2009, the media warned of a resurgence of the blood sport when an elderly ridgeback dog was used as dog fighting bait.[130] In 2004 and 2005, an inspector of the Society for the Prevention of Cruelty to Animals (the"SPCA"), when closing down animal fighting rings in Northland, observed not only that dogfighters enjoyed the depravity of seeing pain and suffering, but also the "big money in the bets [as] drugs are used as currency".[131]

The sports of hunting and angling sit on the fringe of sports betting In New Zealand, these sports involve the New Zealand Fish and Game Council (Freshwater Fish and Birds), the New Zealand Big Game Fishing Council (Saltwater Fish) and the New Zealand Deerstalkers' Association (Recreational Hunting). A member pays a fee to the incorporated body, enters the appropriate competition, and if he or she is successful, receives the associated prize. This is an indirect (Class 2) form of betting under the Gambling Act 2003.[132] The prizes may have a total value not exceeding $5000 provided the actual turnover does not exceed $25,000.[133] This form of gambling does not require a licence.[134] Most societies for hunting and angling are recreational. Legally, this form of gambling is a prize competition rather than a form of sports betting. It is akin to members of a rugby team each getting an award for winning an event. No third parties are involved.

2.4. Dog Racing

As with horse racing, settlers intuitively brought greyhound racing to New Zealand; and bookmaking betting became popular. The first major greyhound race took place in Christchurch in 1891.[135] However, as bookmaking became illegal, the sport became less popular despite cries for the legalisation of an on-course totalisator. The 1946 Royal Commission on Gaming and Racing rejected this pressure. Despite the legality of betting on greyhound racing in other countries (the United Kingdom, United States, and Australia), the Commission held that "gambling upon dog-races is [gambling of] a new form and in a form which it would be difficult to control."[136] In its view, horse racing provided "a sufficiently extensive gambling medium [and] the establishment of a further gambling medium [was] unnecessary and

106 *Official Assignee v v Totalisator Agency Board* [1960] NZLR 1064.
107 Ibid, at 1072.
108 Ibid, at 1073.
109 Ibid.
110 Ibid.
111 Racing Act 2003, s 29.
112 Racing Act 2003, s 29.
113 *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268, 288.
114 *Adlam v Stratford Racing Club* [2007] NZAR 544; *Stratford Racing Club Inc v Adlam* [2008] NZAR 329 (CA). For a related subsequent decision, see *Te Kapua Park Trust v Stratford Racing Club Inc,* 13/11/08, Andrews J, HC New Plymouth, CIV-2008-443-446.
115 *Adlam v Stratford Racing Club* [2007] NZAR 544.
116 Ibid; and, earlier, *Stratford Racing Club v New Zealand Thoroughbred Racing* (HC, Wellington, CIV 2005-485-555, 6/12/05, Miller J).
117 *Stratford Racing Club Inc v Adlam* [2008] NZAR 329 (CA).
118 *Adlam v Stratford Racing Club* [2007] NZAR 544. For further discussion of these decisions, see E Toomey and C Fife, "New Zealand Sports Law" International Encyclopaedia of Laws, Kluwer Law International (2008), [99], [100], [106].
119 Racing Act 2003, s 37.
120 Racing Act 2003, s 38.
121 Racing Act 2003, s 39.
122 Racing Act 2003, s 40.
123 S Gardiner, *Sports Law*, (3rd ed, 2006), 120.
124 D Grant, *On a Roll: A History of Gambling and Lotteries in New Zealand*, (1994), 32.
125 Ibid.
126 Ibid.
127 Ibid, 114.
128 Animal Welfare Act 1999, s 31.
129 Animal Welfare Act 1999, s 31.
130 *http://www.dompost.co.nz/*, "Bloody Sport" (25/4/09), accessed 22/6/09.
131 Ibid.
132 Gambling Act 2003, s 24.
133 Gambling Act 2003, s 24.
134 Gambling Act 2003, s 26.
135 D Grant, *Two over Three on Goodtime Sugar: the New Zealand TAB turns 50*, (2000), 324.

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undesirable". [137] A decisive fact was that dog-racing had been somewhat of a late-comer;[138] and it was felt that dog-racing gambling would introduce "a new and excessively attractive form [that would] immeasurably increase…the volume of gambling" in the country.[139]

The 1970 Royal Commission of Inquiry legalised greyhound racing betting. In granting on-course equalisator gambling on greyhounds, it took into account two significant petitions, signed in 1966 and 1968. It recommended that totalisators be adopted once greyhound racing was able to provide the necessary financial arrangements and had a robust administrative structure.[140] The advantages of dog-racing over horse-racing include smaller grounds, more frequent weeknight meetings, lower entrance charges, lower bets, and the maximum of eight runners in each field.[141] Nonetheless, off-course betting facilities through the TAB were not introduced until 1981, in part due to the difficulty of estimating the sport's economic viability. An added difficulty was the early-closing of the TAB, making weeknight meetings impossible.[142] By 1991, computerisation heralded routine evening meetings; [143] and, in 2008, following the introduction of televised *Trackside*, greyhound racing was able to boast $250,000 for a win.[144]

2.5. General Sports Betting

Betting on sporting events was a significant part of colonial New Zealand. Despite the obvious sports, "bookmakers prowled the country taking bets on such diverse sports as pigeon- and skeet-shooting, coursing, sculling, cycling, caber tossing, ploughing, wood-chopping, cricket, billiards, 24-hour walking contests, and scow racing on the harbours"[145] The Gaming and Lotteries Act 1881 expressly prohibited public betting on sports contests, but this did not deter the avid bookmaker.[146] However, from the start of the twentieth century, betting on sporting events declined as horse-racing became more dominant. Although a controversial issue, sports-event betting remained illegal. Until 1987, even Lotto was rejected as Prime Minister Muldoon considered that its introduction would devastate the horse-racing industry.[147] In 1991 the New South Wales TAB identified a market gap and advertised, quite successfully, its betting in New Zealand's metropolitan newspapers.[148] By 1994, New Zealanders were betting more than $2 million with the Australian-based betting agency Centrebet.[149]

On 3 June 1994 the TAB formally applied to the government to allow this type of sports betting. The Select Committee report recommended that no betting on sport should take place, either nationally or internationally, unless the governing body approved.[150] In late 1995, the Racing Amendment Act 1995 was passed; and, in pursuit of extra funding, rugby union, rugby league, motor sport, billiards and snooker embraced it enthusiastically. Softball, golf, tennis, soccer, athletics, Australian Rules, and lawn bowls followed. The three sports notably absent from this list were boxing (the TAB argued that corruption was rife in that sport); netball (Netball New Zealand thought it would degrade the sport); and cricket (New Zealand Cricket was cautious given the international corruption in the sport). The first sports betting occurred on a rugby match for the 1996 Bledisloe Cup.

The variety of sports and the bets placed with them are now phenomenal. Cycling, triathlons, American football and baseball signed up, as did the initially reluctant cricket, netball, and boxing. With the addition of the Super 12 (later the Super 14) rugby competition and the televised *TAB Sports Café*, the TAB has had unprecedented marketing success. Yachting New Zealand did not commit until 1999 as its principal sponsor, the New Zealand Lotteries Commission (the "NZLC"), argued that the TAB provided indirect competition. The new millennium brought more sports to the fore: basketball, ice hockey, speedway, shearing, and motorcycling. In 2008 with 29 committed sports, the TAB was able to boast an overall contribution of $20 million since 1996 to those sporting bodies involved.[151] In 2008, there were over 8.6 million sports bets across a variety of 35,000 different betting options.[152] Total turnover for that year was $137.9 million.[153]

2.6. The Internet and Sports Betting Transactions Abroad

While the international position on internet sports betting has generated a vast amount of literature, the New Zealand position is comparatively simple. The New Zealand courts will treat as unenforceable any cause of action for gambling that arises overseas.[154] The forum for any such dispute is the overseas jurisdiction. Thus, it is not illegal for a person in New Zealand to gamble over the internet on an overseas website.[155] Section 9(2)(b) of the Gambling Act 2003 prohibits remote interactive gambling. This includes gambling by a person at a distance by interaction through a communication device.[156] However, sales promotions conducted in New Zealand as well as internet gambling by the NZLC and the NZRB are both exceptions. It is questionable whether loans made overseas that are lawful in that jurisdiction for the purpose of gambling are recoverable in the New Zealand courts. It is unlikely that the gambling contract comes within those envisaged by the Act.[157]

The Act also prohibits a person from publishing or arranging to publish, in New Zealand, an overseas gambling advertisement.[158] It is a summary offence punishable by a maximum fine of $10,000.[159] An overseas gambling advertisement is legal where it is incidental to its purpose; is about minimising the harm of problem gambling; or is directed towards buyers of gambling equipment.[160] A further exception can be made if it is necessary to enable New Zealand to comply with its present or future international trade obligations.[161] In 2008, the NZRB estimated that 20 per cent of the New Zealand gambling market was being spent offshore. It warned that it could lose its monopoly over gambling as a result of "the relatively borderless and unregulated" internet; and that overseas internet gambling providers posed a significant threat to both our future growth and customer retention.[162]

The international position on all forms of online gambling is problematic because of the Antigua dispute.[163] The role of GATS ("General Agreement on Trade in Services") is to provide world-free trade. Antigua took the United States to the World Trade Organisation (the "WTO") dispute settlement panel on the ground that the United States, when enacting its anti-gambling laws, had violated its commitment to non-discrimination between foreign and domestic traders. In *United States v Cohen*, [164] an American citizen based in Antigua was prosecuted for providing internet gambling services to customers in the United States. As internet gambling is their second major economic earner, Antigua argued it had suffered economic loss as a result of

136 "Gaming and Racing: Report of the Royal Commission appointed by His Excellency the Governor General", *Appendices to the Journals of the House of Representatives*, 1948, H-23, 125.
137 Ibid.
138 Ibid.
139 Ibid.
140 "Horse Racing, Trotting and Dog Racing: Report of the Royal Commission of Inquiry", *Appendices to the Journals of the House of Representatives*, 1970, H-51, 254.
141 D Miers, *Regulating Commercial Gambling: Past, Present, and Future*, (2004), 307.
142 D Grant, *Two over Three on Goodtime Sugar: the New Zealand TAB turns 50*, (2000), 327.
143 Ibid.
144 New Zealand Racing Board, *Annual Report*, (2008), 10.
145 D Grant, *Two over Three on Goodtime Sugar: the New Zealand TAB turns 50*, (2000), 294.
146 Ibid, at 295.
147 D Grant, *On a Roll: A History of Gambling and Lotteries in New Zealand*, (1994), 248.
148 D Grant, *Two over Three on Goodtime Sugar: the New Zealand TAB turns 50*, (2000), 298.
149 Ibid, at 300.
150 Ibid, at 302.
151 New Zealand Racing Board, *Annual Report*, (2008), 34.
152 Ibid.
153 Ibid.
154 *Moulis v Owen* (1907) 1 KB 758.
155 Gambling Act 2003, s 4(1); definition of "remote interactive gambling" - exception (b)(iii).
156 For definition of "communication device" see Gambling Act 2003, s 4(1).
157 S Robson, "Betting, Gaming, and Lotteries"', *The Laws of New Zealand*, (2008), [43].
158 Gambling Act 2003, s 16.
159 Gambling Act 2003, s 16.
160 Gambling Act 2003, s 16.
161 Gambling Act 2003, s 16.
162 New Zealand Racing Board, *Annual Report*, (2008), 11.
163 M Murawski, '"The Online Gambling Wager: Domestic and International Implications of the Unlawful Internet Gambling Enforcement Act of 2006" [2008] 48 *Santa Clara Law Review* 441; R Yevgeniya, "Taking Chances: The United States Policy on Internet Gambling and Its International Implications" [2008] 26 *Cardozo Arts & Entertainment Law Journal* 873.
164 *United States v Cohen* 260 F3d 68 (2nd Cir. 2001).
165 M Murawski, "The Online Gambling Wager: Domestic and International Implications of the Unlawful Internet

the prohibition of offshore online gambling operators taking bets from the United States.[165] The United States argued that this was "necessary to protect public morals or to maintain public order" within the GATS exception in Article XIV - measures designed to "combat money-laundering, fraud, compulsive gambling, underage gambling and organized crime".[166]

The WTO Appellate Body agreed in part with the United States. However, it found that the Interstate Horseracing Act 1978 (US), a statute that allowed interstate betting on horses while disallowing offshore operators from providing the same services, was discriminatory. The obvious answer to the problem was to allow overseas internet gambling providers to bet on horses within the United States along with other United States providers. However, given the different laws of its various states, the United States chose to withdraw from its internet gambling commitments. In 2007, it was ordered to pay compensatory annual payments of $(US)21 million to Antigua, although this order is under appeal.[167] The United States is entering into negotiations for withdrawal with other WTO signatories including the United Kingdom and Australia. The true effect of this decision has not been felt directly in New Zealand, as New Zealand's position has been to tax and regulate rather than to prohibit internet gambling. Today, the NZRB and the NZLC compete with the ever-increasing world providers of internet gambling.

3. Location

In 1951 the early TAB branches and agencies were designed to be away from the public eye. It was common for TAB premises to be hidden away down side alleys so as not to attract "unwanted attention from moralists and from politicians and bureaucrats who did not want to see replicated the rowdy [betting shop atmosphere of] Australia".[168] Law prohibited employees from tout betting;[169] and advertising could only relate to the race itself, not the betting. The TAB could not advertise the establishment of a new agency. No other businesses were allowed on the premises; and the agencies had to provide a separate unobtrusive entrance. Prohibition extended to radios and seats. As loitering on the premises was banned, payouts on dividends were held over until the next day. While the TAB was not to encourage betting, it was to provide an appropriate alternative to bookmaking. Despite all these constraints, TAB premises flourished. They were seen as a necessary convenience.

From the 1980s, the TAB suggested that it would be more profitable to run the TAB via sub-agencies; and proposed the introduction of TAB terminals in dairies, gift shops, and even licensed premises. In 1982, Lion Breweries applied to the Licensing Control Commission for a TAB agency to be sited in the Wiri Trust Hotel.[170] It argued that s 83(4) of the Racing Act 1971 (that required a separate entrance and physical isolation from any other activity being carried out on in the same premises) and s 248(1) of the Sale of Liquor Act 1962 (that prohibited betting on licensed premises) both precluded the TAB from being part of the hotel premises. It was held that it would be an "artificial and unacceptable way of circumventing those provisions" by redefining premises.[171] On appeal, [172] the Court held that the word "premises" in the two Acts was defined differently. "Premises" meant the part of the building the agency was to occupy. A "separate entrance" meant a separate entrance into the agency; not a separate entrance from the street. Moreover, it was held that under the Sale of Liquor Act 1962, betting on the totalisator did not take place at the licensed premises at all. The bets were made among the individual investors themselves; and the betting contract was made on the racecourse.[173] A year later, s 83(4) of the Racing Act 1971 was repealed in an attempt to place greater restrictions on the bookmaker.[174]

Today, community involvement in decisions concerning the creation of gambling facilities is significant.[175] Under the Racing Act 2003, territorial authorities are required to devise policies (with a triennial review) on the venues of TABs in terms of the social impact of gambling within that territory. The policy must specify whether or not TAB venues should be established and, if so, where they should be located. The territorial authority is required to consider the characteristics of the district; the location of community facilities such as schools, kindergartens, early childhood centres and churches; and the cumulative effects of additional opportunities of gambling. These procedures are designed to accord with the special consultative procedures in the Local Government Act 2002. The TAB must obtain territorial consent whenever it seeks to establish a new venue. The consent can be granted or refused with appropriate notification. In 2008, the NZRB declared that its "seven new-look TAB stores in Auckland"' with "features…like designated theatre zones with soft seating and coffee lounges…flush-mounted… LCD televisions …and touch-screen information stations for sports options and internet browsing" were part of the "dynamic evolution of an iconic New Zealand institution".[176] Betting by phone and by the internet has suppressed the traditional problem of suitable sites. Betting is now available anywhere.

4. Corruption

The potential for match-fixing or corruption in sport betting will always exist. When a punter can preordain the outcome of a match, a guaranteed substantial amount of money can be made quickly if he or she places a bet. In such an event, the integrity of sport is compromised. The reputation of the particular sport is damaged; potential sportspeople do not play; spectators refuse to attend rigged matches; and sponsors of the sport cancel their support. Corruption is more likely to occur when betting is illegal; there is a low detection rate for cheating; player wages are low; prize money is scant; and there is minimal prestige for winning individual contests.[177] Nonetheless, match fixing has occurred in most sports. In 1961, 476 players from 27 United States universities were bribed by bookmakers in order to manipulate 43 games.[178] A number of warnings, bans, fines and prison sentences were issued; and college athletes were prohibited from betting on college sports events. In 1994, in the international cricket arena, Mark Waugh and Shane Warne accepted money from a bookmaker to provide insider information.[179] Another cricketer, South African Hansie Cronjé, admitted that he provided bookmakers with forecasting;[180] and in 2007, rumours that Nikolay Davydenko had match-fixed emerged when a British bookmaker reported unusual betting patterns.[181]

New Zealand has not remained immune. In 1891, Patrick Keogh, playing for the Otago Rugby Football Union, performed so appallingly that an investigation was launched to investigate whether he had a monetary investment in the outcome.[182] In his defence, he threatened to name other involved players. The union described his conduct as reprehensible. In *Caddigan v Grigg*,[183] a bookmaker deceptively transferred ownership so that a horse could participate in a race, thus skewing the odds. This conduct was considered seriously detrimental to

Gambling Enforcement Act of 2006" [2008] 48 *Santa Clara Law Review* 441, .455 458.

166 Ibid, at 455 and .456.

167 R Yevgeniya, "Taking Chances: The United States Policy on Internet Gambling and Its International Implications" [2008] 26 *Cardozo Arts & Entertainment Law Journal* 873, .888.

168 D Grant, *Two over Three on Goodtime Sugar: the New Zealand TAB turns 50*, (2000), 138.

169 Ibid, at 37.

170 *Re An Application by Lion Breweries Ltd* [1983] 3 NZAR 319; and, subsequently, *Re An Appeal by Lion Breweries Ltd* [1983] 3 NZAR 364; *Licensing Control Commission v Lion Breweries Ltd* [1983] 3 NZAR 468.

171 *Re An Application by Lion Breweries Ltd* [1983] 3 NZAR 319, 320.

172 *Re An Appeal by Lion Breweries Ltd* [1983] 3 NZAR 364.

173 Ibid, at 372.

174 Racing Amendment Act 1983, s 16(1).

175 Racing Act 2003, s 65A and 65E.

176 New Zealand Racing Board, *Annual Report*, (2008), 46.

177 D Forrest, "Sport and Gambling" in W Andreff and S Szymanski (ed.), *Handbook on the Economics of Sport*, (2006), .44

178 W Maennig, "Corruption in International Sports and Sports Management: Forms, Tendencies, Extent and Countermeasures", (2005) 5 (2) *European Sport Management Quarterly* 187.

179 S Gardiner, *Sports Law*, (3rd ed, 2006), 327.

180 Ibid, at 328.

181 *http://www.nzherald.co.nz/*, "Tennis: Backhand Play" (12/10/07), accessed 1/07/09.

182 D Grant, *On a Roll: A History of Gambling and Lotteries in New Zealand*, (1994), 70.

183 *Caddigan v Grigg* [1958] NZLR 708.

the interests of racing. In 1996, the Marlborough Rugby Union admitted that players had bet on their team to win (by 12 points or less) a semi-final against Canterbury - an action strictly prohibited by the New Zealand Rugby Football Union Rules.[184] In international cricket, following the revelations of Cronjé affair, New Zealand cricketer Martin Crowe was investigated in 2001 but allegations could not be proved.[185] In September 2009, allegations that his fours team deliberately lost a bowling match at the Asia Pacific bowls championships were strongly denied by double world champion Gary Lawson.

Today, professional players will usually have a clause in their sporting contracts stating that they will endeavour, to the best of their ability, not to bring their game into disrepute.

If a sport becomes involved in betting, the TAB mandates that anti-corruption measures be put in place. Generally, this reflects the position in the international arena. Regulation 6 of the International Rugby Board Regulations provides that:

> [n]o person may seek or accept any bribe or other benefit to fix a match… or to achieve a contrived outcome to a match… or to otherwise influence improperly the outcome of any other dimension or aspect of any match; [186]
>
> and
>
> [n]o person shall enter into any wager, bet or any form of financial speculation, directly or indirectly as to the result or any other dimension or aspect of any match.

Furthermore, anyone must inform the union of any activity, including unsolicited approaches from third parties, which he or she believes contravenes the regulation. When such notification takes place, each alleged breach must be investigated and appropriate action taken. While in most cases the disciplinary procedures of the appropriate sporting organisation will deal with the breaches of the rules, the Sports Tribunal of New Zealand may determine sports-related disputes if the Tribunal agrees to do so and all parties agree to that procedure.[187]

5. Problem Gambling

5.1. General Policy

In many ways, gambling is an innocuous activity. The opportunity for a quick monetary gain is exciting; and gambling is often part of a social occasion - going to the races is possibly the best example. Sports betting challenges the competitive psyche to test wits, skill and knowledge; and this creates an element of thrill-seeking and risk-taking. However, gambling to excess can damage relationships, careers and finances; and can lead to family violence, poor parenting, dishonesty offences and suicide. Problem gambling often coexists with other psychological problems such as depression, anxiety, obsessive-compulsive disorder and abuse of alcohol and other drugs. In one study, it was discovered that one in six of those admitted to Auckland Hospital following a suicide attempt met the criteria for problem gambling.[188] The problem can remain undetected, as gambling often becomes a secretive pursuit. A problem gambler is unlikely to gloat over a win as that may lead to others' resentment. It is safer to remain quiet.

Research shows that sports betting can be addictive as it is a continuous form of gambling (there is no real delay) and there is a perceived ability to beat the odds through tips or other knowledge.[189] Sometimes, the positive social racetrack associations can be outweighed by a gambler's financial disappointment and deteriorating mental health.[190] Sports betting, like other forms of gambling, is often practised those who can least afford it. In 2008 almost half of the 659 TAB outlets were in decile areas rated 8 or above.[191] Therefore the other half were located in the poorest twenty percent areas of the country. However, it must be noted that only about 7 per cent of those seeking treatment for problem gambling cited sport or track betting as their primary mode of gambling.[192] Non-casino gaming machines, some of which are in TAB outlets, account for 76 per cent; casino gaming machines 9 per cent; casinos 6 per cent; and lotto, instant kiwi, and other non-casino forms of gambling the remaining 2 per cent.

5.2. Fraud by Agents

Agents who commit fraud to support a betting habit are a continuing problem for the TAB. When it was first established, the TAB treated this type of conduct cautiously. Rather than involving the police, it adopted a policy of instant dismissal as long as there was some form of monetary restitution. To do otherwise meant risking adverse publicity. The fraudsters practised various schemes - some successful, others not. In 1955, a so-called burglary of a Te Kuiti agency was an unsuccessful cover- up for an agent's stealing; [193] and in 1968, a Papakura agent committed suicide after an audit revealed he had stolen $1440 from his agency to cover an extensive debt. [194]

However, in 1984, the TAB sought police intervention when an agent stole $8000 in two different betting transactions.[195] The agent was prosecuted for dishonesty. Later, in 1987 a further prosecution was made when a sub-agent misappropriated $43,968;[196] and, in 1994, an agent staged a sophisticated abduction and robbery to cover gambling debts.[197] Today, the TAB recruitment process is rigorous. Staff are trained to identify problem gamblers and any such person is given information about problem gambling services.[198]

5.3. Liability of the TAB

The liability of the TAB when problem gamblers become penniless has been addressed in a number of New Zealand cases. In *Official Assignee v Totalisator Agency Board,*[199] the Official Assignee claimed against the TAB for sums paid by the bankrupt gambler to the TAB and vice versa. The Court held that ss69 and 70 of the Gaming Act 1908 were "sufficiently comprehensive to afford a complete defence"[200] to the action - they rendered unenforceable any action to recover sums of money staked and won in betting transactions. The alternative argument was also considered valid: as the TAB had acted without notice of the bankruptcy, it was not bound to return the money. On appeal,[201] the Court held that no action could lie against the TAB as it was an agent of the racing clubs and even if each racing club were sued by the Official Assignee, it would have an effective defence under s 70 of the Act.

Two further cases, both failing to reach litigation, throw light on the seriousness of problem gambling. In 1992, a partner in a law firm was jailed for six years for stealing a total of $3.3 million from the solicitor's trust account to bet in part at the TAB.[202] The New Zealand Law Society, forced to indemnify the clients out of the solicitors' fidelity guarantee fund, filed a statement of claim arguing unjust

184 D Grant, *Two over Three on Goodtime Sugar: the New Zealand TAB turns 50*, (2000), 309.

185 S Gardiner, *Sports Law*, (3rd ed, 2006), 332.

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199 *Official Assignee v v Totalisator Agency Board* [1960] NZLR 1064.

200 *In re Richardson; Official Assignee v Totalizator Agency Board* [1959] NZLR 481.

201 *Official Assignee v v Totalisator Agency Board* [1960] NZLR 1064. Although the appeal was dismissed, it should be noted that the Court was divided on the issue of whether the unenforceable gaming contract had valuable consideration

enrichment and dishonest assistance of a breach of trust. As only a fraction of the money lost was spent at the TAB, proceedings were eventually withdrawn. In 1996, a financial controller of an export company stole money by drawing on company funds. He was charged with 440 offences involving just less than $3 million;[203] and sentenced to a 5 year imprisonment term. The export company advised the TAB of its intention to file a statement of claim on the ground that s 103 of the Racing Act 1971 applied to punters and not to victims of fraud. This too was subsequently withdrawn.

5.4. Responsible Gambling

Both the Gambling Act 2003 and the Racing Act 2003 are designed to minimise the harm caused by gambling. Harm is defined as harm or distress of any kind arising from, or caused or exacerbated by, a person's gambling; and includes personal, social, or economic harm suffered by the person, their spouse, civil union partner, de facto partner, family or wider community, or in the workplace, or by society at large.[204] All sectors of the gaming industry are required to fund problem gambling services.[205] Those involved must also identify, minimise and manage the inherent risks.[206] Under associated regulations, the NZRB is required to display clearly visible signage at its venues that encourages players to gamble only at levels they can afford and contains advice about how to seek assistance for problem gambling.[207] One notice advises:"Take a tip. Set your limits and bet responsibly."[208] Problem gambling awareness training is provided to every employee who supervises racing or general sports betting. At a minimum, the employee must approach a player reasonably suspected of experiencing difficulties relating to gambling; must provide him or her with information about the potential consequences and about problem gambling services; and must remind the player that the Board may refuse to accept a bet under s 65 of the Racing Act 2003.[209]

The NZRB has issued a Responsible Gambling Code of Practice and a Harm Prevention and Minimisation Policy. Under these policies, no automatic teller machines are allowed at NZRB venues;[210] the NZRB will periodically monitor TAB accounts for signs of problem gambling and take appropriate action if required; [211] all venues must have clearly visible working clocks;[212] and staff must discourage punters from leaving children unattended either at the venue or in the venue car park.[213] Under s 65H of the Racing Act 2003 regulations may be made under which problem gamblers are identified; prohibited from entering racecourses or venues; removed or restricted; or required to comply with certain conditions of re-entry. These regulations must specify the grounds for classifying a person as a problem gambler; identify those authorised to conduct such a classification; set out the steps to be taken to identify problem gamblers; and specify the rights of those identified or excluded.[214] Pursuant to s 65G of the Act, every person who enters a NZRB venue in breach of regulations will be treated as committing an offence under s 4 of the Trespass Act 1980.[215]

As part of this process, the NZRB provides a number of initiatives to combat problem gambling. Two programmes of assistance are the "Set Your Limits" programme and the "Self-Exclusion" programme. The former involves a suspension on the TAB customer's account when a weekly spending limit or weekly loss limit has been reached. Under the latter, a customer may be denied access to NZRB venues or racecourses. Both programmes operate indefinitely but can be revoked with the agreement of the NZRB. In 2008, about 100 problem gambling incidents were investigated and, of those, 37 exclusion notices were issued with a further seven customers being placed on the "Set Your Limits" programme.[216] The NZRB must also provide the Secretary of Internal Affairs with information for research, policy analysis and development purposes.[217] Policy initiatives seek to control the growth of gambling; prevent and minimise the harm caused by it; authorise and prohibit some gambling; facilitate responsible gambling; ensure the integrity and fairness of games; limit the opportunities for crime associated with gambling; and ensure that money from gambling benefits the community.

6. Conclusion

The Report of the Royal Commission in 1948 found it inevitable that off-course betting should be regulated so that "'active solicitation into the habit of betting" would be eliminated; interest in the sport of racing would be enhanced; and tax would be paid.[218] This heralded the introduction of the TAB which became part of New Zealand's social laboratory. It has "metamorphosed into a national industry and become a major revenue producer".[219] Despite its success, it must always be remembered that rampant gambling can ruin families, careers and lives. With the expansion of gambling services, the risk of problem gambling and corruption is always alive. The NZRB has strived diligently to find the correct balance and must be commended for its appropriate policy making. The betting contract has been removed from the bookmaker and now exists within an efficient regulatory regime. However, in today's climate, the competitive market for betting abroad available via the Internet threatens the monopoly that the NZRB has enjoyed. In order to compete in this new environment, the NZRB must sharpen its creative tools.

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Sports Betting: United Kingdom

by **Adrian Barr-Smith***

1. Brief history of betting on sports

1.1. History of Regulation

Great Britain[1] has a long tradition of gambling generally, and betting on sports in particular. The first Gaming Act was passed by Parliament in 1710, 300 years ago, so the activity has always been regulated. The betting activity initially revolved around horse races, cricket matches, prizefights and other pursuits such as hare coursing and cock fighting. The first definition of 'cheating' was included within the Gaming Act of 1835. One advantage of legitimating this betting activity is that the UK Government has been able to tax it. One disadvantage of taxing it has meant that online gambling operators have needed no further encouragement in order to choose a tax-neutral jurisdiction for their establishments.

In the same way that gambling has long since evolved from its origins within the aristocracy, the legislation has been extended from "gaming" (playing games of chance and/or still e.g. in casinos) to include "betting" (see 3.2 below) and "lotteries" (games exclusively of chance). The most recent legislation - Gambling Act 2005 - consolidated all earlier regulation into one Act of Parliament.

1.2. The role of bookmakers

Before recent advances facilitated gambling by use of interactive technology and through betting exchanges, the market for betting on sports was exclusively controlled by 'bookmakers'. The name is derived from the practice of creating a market on a racecourse by accepting wagers which were duly noted in a ledger or book. The market would be created by the bookmaker making an actuarial estimation and offering the 'odds' of a participant winning. Subsequently more ingenious combinations of wagers and outcomes were devised. Bookmakers also later accepted bets over the telephone and opened call centres for this credit betting. The moral high ground was preserved by the legislators who decreed that such wagers should not be enforceable at law.

1.3. Establishment of the Tote

The Racecourse Betting Control Board ("RBCB") was established by the Racecourse Betting Act 1928. The function of the RBCB was to operate pool-betting on-course as an alternative to fixed odds betting with bookmakers. Its object was to distribute profits for "purposes conducive to the improvement of breeds of horses or the sport of horseracing". Off-course and credit bets were accepted by a company called Tote Investors Ltd from 1930 and these monies were also channelled into the on-course pools.

1.4. Betting off-course

The landscape was altered significantly by the Betting Levy Act 1961. For the first time, bookmakers were permitted to open betting shops and operate off-course. There are now over 9,000 shops (usually referred to as 'licensed betting offices' or 'LBOs') in the UK and Ireland. Surprisingly, the turnover in these LBOs has not been since eroded by the inception of on-line or 'remote' betting, although there are indications that betting exchanges are impacting turnover. Under this Act, bookmakers were obliged to pay a levy ("the Levy") on their off-course horseracing turnover to the Horseracing Betting Levy Board ("the Levy Board") which in turn assumed many of the funding responsibilities of the RBCB.

Under this Act, the RBCB was reconstituted as the Horserace Totalisator Board ("the Tote") and it subsequently acquired Tote Investors Ltd. Although the Tote was now permitted to open shops off-course, it was restricted to offering only horseracing pool bets. This restriction on the Tote was lifted in 1972 and thereafter it was permitted to operate as a bookmaker accepting bets on all sports.

1.5. Establishment of the Levy Board

The Levy Board was created by the Betting Levy Act 1961. Its object was to redistribute funds generated from the Levy in order to improve horse breeds and to facilitate horseracing. The level at which the Levy is fixed is determined by the UK Government, failing agreement between the horse racing and betting industries. Revenues from the Levy rose as successive Governments liberalised the restrictions on LBOs. In 1986, live TV pictures were introduced into betting shops. In 1993, LBOs were permitted to remain open in the evenings. Recently revenues have dropped dramatically as betting activity on sports other than horseracing has increased.

2. Current position

2.1. The Levy Board

The role of the Levy Board is to assess and collect financial contributions from bookmakers and the Tote by means of the Levy. It distributes funds received, principally as prize money for horse races and also to subsidize the cost of integrity services. Integrity services include drug testing and research, filming of races and photo finish services.

The UK Government announced its intention to abolish the Levy mechanism and the Levy Board in March 2000. However, an acceptable alternative for the funding of horse racing could not be found and in December 2006, the Government announced that the current

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1 This note details the legislation applicable to England, Scotland and Wales. Most of the legislation does not apply to Northern Ireland, for good reason. For example, horseracing is administered in Northern Ireland under rules made in Dublin, not in London.

structure would be retained until a suitable alternative could be identified.

2.2. The Tote

Legislation enabling the UK Government to sell the Tote was passed in October 2004. The legislation also prescribed that the Tote's exclusive licence to operate pool betting on horseracing would be restricted to 7 years from inception of the newly privatised operation.[2] Upon expiry, other operators would be free to offer pool betting in Great Britain on horseracing in competition with the Tote. In October 2008, however, the UK Government announced that the sale of the Tote would not be pursued for the time being due to market conditions. As a result, the Tote has retained its exclusivity in relation to pool betting on horseracing for the time being. The Tote remains on the list of publicly-owned assets which the UK Government would like to liquidate.

3. Gambling Act 2005

3.1. Betting

The body of law which regulates betting on sports in Great Britain[3] is contained within the Gambling Act 2005 ("the Act"). It is highly technical and comprehensive legislation, so the respective sections of the Act are referenced in this note. The Act makes provision for the licensing of "gambling", which is defined as including "betting" (section 3(b)). Betting is defined in part as "*making or accepting a bet on … the outcome of a race, competition or other event or process …*" under section 9 of the Act. The person making or placing the bet is known as the "backer". The person accepting the bet is known as the "layer". For the first time, a contract involving a bet will be legally enforceable (sections 334/335), unless it is void for some other reason.[4] The Gambling Commission reserves the right to freeze any obligation to pay out on bets while it decides whether or not a bet is void.

3.2. Types of betting

There are essentially 4 different types of betting activity. "Fixed odds" betting involves the backer placing a bet, usually with a bookmaker who will offer odds on the bet being successful. These odds may vary according to the volume of bets placed in the lead-up to the event. The final odds offered at commencement of the event are known as the 'starting prices'. "Pool betting" is betting where the winnings are determined by reference to the aggregate of stakes paid which are then divided amongst the winners (section 12(1)). There are specific licensing provisions which relate to pool betting on horse racing and dog racing.[5] There are also specific provisions which relate to licences to operate "football pools", where the results of football matches are forecast (see below). "Spread betting" involves making a contract for differences or for the purpose of making a profit/avoiding a loss by reference to fluctuations in a predicted score line. It is specifically excluded by section 10(1) from this licensing regime.[6] "Betting exchanges" are not a distinct type of betting as such, but are a platform through which a backer can place and a layer can accept a bet i.e. two individuals wager on an outcome with each other. A betting exchange will require an operating licence as a "betting intermediary" (section 13).[7]

In addition, prize competitions which involve a payment to enter are classed as betting, except where elements of prediction and wagering are not present (section 11). This definition would include a 'fantasy football' league, for example. "Payment to enter" includes a financial equivalent e.g. by use of a premium rate, but not a standard rate, telephone line (Schedule 1).

3.3. Remote and non-remote operating licences

The licensing regime for betting is orchestrated by the regulator, the Gambling Commission. Anyone providing facilities for betting commits a criminal offence unless holding an operating licence authorising the activity, always providing the activity is carried on in accordance with the terms and conditions of such licence (section 33).

The Act also catches providing facilities for betting "remotely" (i.e. on-line or otherwise than face to face), but only if at least one piece of equipment used in the provision of facilities is situated in Great Britain (section 36(3)). It is irrelevant, for this purpose, where in the world the facilities are intended for use. Equipment includes "*electronic or other equipment used … to store information relating to … participation*", or "*to present … a virtual game … or race*" or to determine or store information relating to a result.

There are 3 different types of operating licence for betting: general, pool betting and betting intermediary. The operating licence may cover one or more of those 3 categories. However, the licence may cover either non-remote (i.e. premises-based) or remote facilities, but not both. Whilst one person may hold a licence for both, they need to be granted separately and may not be combined.

An operating licence is also subject to 'change of control' provisions (section 103). In that sense, the operating licence is personal to the holder and may not be transferred.

3.4. Personal licences

Every operating licence must specify not less than one management officer who holds a "personal" licence (section 80). In this way the operating licence is dependent upon the satisfactory credentials and performance of at least one individual. Both operating and personal licences are administered by the Gambling Commission.

3.5. Premises licences

A specific criminal offence is committed (section 37) by someone who uses or permits premises (including vehicles and vessels) to be used for betting (whether by making or accepting bets, acting as a betting intermediary or providing other facilities for the making or accepting of bets). The local government authority is responsible for the licensing of premises. An applicant for a premises licence must already possess the appropriate operating licence. Unlike operating licences, a premises licence is transferable (with permission from the licensing authority) to another holder of an operating licence. Provided that a premises licence is in force, however, someone accepting bets "on-course" (section 37(4)), or accepting entries into football pools (section 93(3)), does not fall foul of this provision. Betting may be conducted on a "track" up to 8 times per year without a premises licence, provided notice is given of such "occasional use" (section 39(1)). Track covers a horserace course, dog track or other venue at which a race or match is held.[8]

3.6. Betting software

Another offence is committed by someone who manufactures, supplies, installs or adapts betting software without a licence, although network operators and internet service providers are specifically excluded (section 41(3)).

3.7. Cheating

The Act also creates the specific offence of "cheating", by someone who cheats at betting or enables or assists another person so to cheat (section 42). Cheating may consist of actual or attempted deception or interference in connection with the betting process or with a real or virtual game, race or other event or process (section 42(3)). No account is taken of whether the offender improves his chances of winning anything or wins anything (section 42(2)).[9] There are also obli-

2 The licence had never previously been limited in time.

3 The Act does not apply to Northern Ireland, except for the offence of advertising "foreign betting" (see below).

4 Gambling debts were previously unenforceable at law.

5 For example, only someone holding a premises licence may accept pool bets "on-course" at a horserace course or dog track (section 179). Nor may someone holding a premises licence elsewhere accept pool bets on dog racing, except by arrangement with the occupier of the track in question (section 180).

6 Spread betting is regulated by the Financial Services Authority ("FSA") under the Financial Services and Markets Act 2000.

7 One opportunity which betting exchanges may offer is 'in-running' betting (placing a bet after commencement of a race); this is not offered by bookmakers.

8 This occasional use notice would typically be used to legitimate betting at a point-to-point race meeting.

9 The Parry report (see 4.2 below) recom-

gations imposed on licence holders to comply with requests for information from the Gambling Commission (section 122).

3.8. Under-age betting
Another offence is committed by a person who invites causes or permits an under-18 to bet (under-16 in the case of the football pools).

3.9. Private betting
No offence is committed by someone who makes or accepts a bet, or offers to do so, if not acting in the course of a business (section 296(3)). Someone who makes a living from betting may in theory require a licence, but 2 friends who wager amongst themselves on the outcome of a match are clearly not doing so in contravention of the law. "Domestic betting" (between people living in the same premises) and "workers' betting" (between employees of the same employer) are both "private betting" and excluded from the licensing requirements (section 296).

3.10. Advertising
Advertising of betting is closely controlled by regulation. It is an offence to advertise unlawful betting (section 330) or foreign betting. "Foreign" betting means (section 331(2)) non-remote betting taking place in a territory outside the European Economic Area (EEA) or remote betting which is not subject to the betting laws of another EEA state (notionally including Gibraltar).[10] Remote advertising of betting must be targeted at people in Great Britain in order for the regulations to apply.

4. Integrity

4.1. Report of Inquiry into the Effects of Betting on Sport
Where problems have occurred in the context of betting on sports, it is invariably because a bet has been placed on one of the participants to lose a match or race ('laying to lose'). Frequently, in such situations it is a player who lays his team to lose, thus profiting from a poor performance. For example, footballers of Accrington Stanley FC laid their team to lose against Bury FC in 2008. An England international cricketer Ed Giddins laid his domestic team to lose a county match in 2002 and was banned for 5 years. 2 rugby league players bet against their team in 2004 knowing that St. Helens would field a weakened side against Bradford Bulls. The problem is not a recent one. The most notorious case occurred when 3 footballers were banned for life and imprisoned following convictions in 1964 for laying their team Sheffield Wednesday FC to lose a match against Ipswich Town FC. The opportunity unlawfully to lay a team to lose is one which the advent of the betting exchanges has exacerbated. This in turn offers scope for corruption. Although, as the examples above demonstrate, the problem occurs in team sports, it is potentially even more acute in the case of individual sports such as tennis or snooker.

Concerns of this type were aired in 2004 during the run-up to the implementation of the Gambling Act 2005. The Parliamentary Betting & Gaming Group ("the Group") heard evidence from both bookmakers and the national governing bodies ("NGBs") of various sports.[11] Their report was published in February 2005. Many of its recommendations were implemented. Some have not yet been. Perhaps the most important concerns that which facilitates communication between the betting industry and sport. The Group recommended that all major betting operators (including LBOs, remote operators and betting exchanges) should conclude memoranda of understanding (MoUs) with the NGBs of the sports on which their business is based.

Most of such MoUs, although frequently not of legal effect, envisage mutual co-operation with the aim of improving the integrity of betting on that sport. At its simplest, the MoU allows the betting operator to report to the NGB the outcome of any investigation into irregular betting patterns and to notify it whenever anyone, who may be prohibited from so doing by the rules of that sport, attempts to place a bet.

The Group's report also highlights the difficulties faced by NGBs in convicting the guilty and punishing them appropriately without the benefit of any statutory powers.[12] The risk management procedures adopted by the bookmakers lack transparency.

They also recommended that a common approach with the FSA should be adopted in relation to the use of 'inside information'. The problem with inside information is naturally one of definition. One man's bread and butter is to another man the water of life.

4.2. Sports Betting Integrity Panel
The most recent development, at the instance of the UK Government, was the establishment of a Sports Betting Integrity Panel ("the Panel") in summer 2009. The Panel's terms of reference included:

1. to assess the current and potential risk of corruption in British sport, including how suspicious betting patterns are identified and assessed (both in markets within and outside the UK);
2. whether effective rules were in place and enforced to aid management of the risk of corruption[13];
3. support to help participants and officials understand the risks and how to protect themselves;
4. co-ordination of management of cases at national/international levels between NGBs, the Gambling Commission and the police;
5. adequacy of powers/resources available to these organisations;
6. suitability of the terms and conditions under which bets are currently offered and information shared between the various parties.

The over-arching objective of the Panel was to design and implement an integrated strategy to uphold integrity in sports and associated betting. It specifically did not consider issues of funding. In accepting the Panel's report in February 2010[14] and fully endorsing its proposals, the UK Government predictably expressed their view that any funding necessary to implement the proposals "*should be provided by sport and the betting industry as those who stand to benefit most from the new arrangements*".

In framing its recommendations, the Panel focussed on 3 areas:

- adoption of rules and disciplinary procedures
- education programmes for participants
- creation of an integrity unit, capable of gathering and analysing intelligence.

The principal recommendations were:

1. a review of the definition of "cheating" in the Gambling Act;
2. a review of the adequacy of the powers available to the Gambling Commission;
3. introduction of a new Code of conduct on integrity in sports in relation to sports betting ("the Code") which includes minimum standards for individual sports to cover in their rulebooks;
4. each NGB to demonstrate compliance with the principles of the Code within 12 months;
5. each NGB to possess effective mechanisms to ensure compliance, to investigate potential rule breaches and to impose sanctions;
6. each NGB to establish an education/communication programme on sports betting integrity for all their competitors and participants, involving player associations and also leagues and clubs;
7. each NGB to put in place mechanisms for capturing and relaying betting intelligence;
8. betting industry to progress convergence of reporting standards under licence condition 15.1 (requirement to notify suspicious betting patterns to the Gambling Commission) and to ensure that

mended that the definition of cheating should be revisited.

10 This highlights the territorial limitations of the Act. In many cases, bets from backers based in countries where betting is illegal are accepted by British-based bookmakers. However, the Act does not apply if such bookmaking operations are based off-shore.

11 The write appeared at one hearing on behalf of the England and Wales Cricket Board.

12 All NGBs are created by private, not public, law. Whilst this means that their actions cannot be judicially reviewed, but it hampers their investigations.

13 In October 2009 two bookmakers bowed to pressure from the football authorities and agreed to suspend betting on youth football matches.

14 Report of the Sports Betting Integrity Panel: February 2010

contravention of sports rules on betting constitutes a breach of the betting operator's own terms and conditions;

9. establishment of a specialist Sports Betting Intelligence Unit ("the Unit") within the Gambling Commission, with the specific capability to monitor the betting activity of particular individuals.

4.3. Data protection

Whilst the Unit is already being established, others of the recommendations will require funding in order to be implemented. It remains to be seen how much funding will be required and whether sport, in particular, will be able to contribute its proportion.

A potential problem which inhibits the use of electronic data generated during online betting activities is that posed by the Data Protection Act 1998. Any transfer of such data may constitute the processing of personal data, raising question marks about its lawfulness. Whilst there are specific provisions in the Gambling Act (section 350) which permits state officials to share information and (section 30) which permit NGBs to supply information to the Gambling Commission, these do not override the restrictions in the 1998 Act. This lacuna was identified in evidence submitted to the Group in 2004, but it was not addressed before the Gambling Act was enacted.

5. A right to bet?

Emboldened by legislative innovation in New Zealand, the state of Victoria, Australia and most recently France[15], in the UK a campaign has been waged for the creation of a requirement on bookmakers to obtain a licence from event owners in order to accept bets on their events. The proponents of this 'right to bet' - the Sports Rights Owners Coalition (SROC) - accept that legislation would be required in order to introduce the right. They do not believe that bookmakers will voluntarily agree to such arrangements.

SROC argues that it is necessary to introduce this right so that the revenues generated in return for the grant of the right to bookmakers may be invested in improving the protection of the integrity of events. It maintains the need for such a right is justified by the specificity of sport and by the public's expectation that the event result should be of unimpeachable integrity.

The proposal is that the legislation would create a civil right, enforceable against both UK-based bookmakers and those accepting bets from UK backers although based elsewhere.

Despite its efforts, SROC recognises that opposition from bookmakers will be fierce.

15 Rather than a right to bet, the French innovation was the creation of the event organiser's right.

Prof. Stephen Weatherill key-note speaking at the 9th Asser/Clingendael International Sports Lecture on the Lisbon Treaty and EU Sports Policy in The Hague on 6 October 2010.

Anticipation of Registration Periods without Informing the Clubs Previously about the Modification: Where is the Sporting Integrity of Ongoing Competitions?

by **Maurício Ferrão Pereira Borges***

1. Introduction

Since September 1, 2001, when the FIFA Regulations on the Status and Transfer of Players, also known as RSTP, came into force, FIFA has provided the international football world with a legal basis. Through these rules FIFA has inserted three fundamental pillars to guarantee the contractual stability of players' employment contracts and regulate their international transfers more properly. It should bring more certainty in the football industry. The three pillars are: (i) contractual stability, (ii) protection of minors and (iii) two annual registration periods pre-established by the relevant association, i.e. one fixed in the end of the season and another in the middle of the season.

The main principle that safeguards the predictability of the football industry as well as equality of chances in planning sports activities, i.e. the registration period, has been recently breached in Brazilian football, which can dismantle, from now on, the whole doctrine of registration periods.

2. Facts

The Registration Periods in Brazil were stipulated by the CBF through Regulations named "RDP 02/2005". These Regulations laid down two periods per year during which players transferred from another National Association may be registered, one established from January 2 to March 25 and the other from August 3 to August 31. RDP 02/2005 was reiterated by Circular no. 534/2010, issued on July 12, 2010, expressly stating the following: "Please be informed that, pursuant to RDP no. 02/2005, the second player registration period shall be from August 3 to August 31 of the current year."[1]

On July 19, 2010, CBF anticipated the second Registration Period of the 2010 season without communicating the new dates to FIFA at least 12 months before they come into force, as provided in Article 6 of the RSTP and without informing the clubs previously about such modification.

On July 28 and August 5, 2010, at a knockout stage, the *São Paulo Futebol Clube* and *Sport Club Internacional* contested two play-offs for the semi-finals of *Copa Santander Libertadores de América 2010*.

Regarding the Regulations of *Copa Santander Libertadores de América 2010* (article 10.6), "*after the Second Phase of the competition, and no later than 48 hours before the semi-final, each club may substitute up to a total of three players from the initial list of 25 (twenty five)*".[2]

It was only because of the above-mentioned modification in the rules that *SC Internacional* was able to register for the *Copa Santander Libertadores de América* three players transferred from other National Associations.

3. Governing Law

First of all, the law upon which this case is grounded is the last version of the RSTP which came into force on October 1, 2009 after its amendment was approved by the FIFA Executive Committee on September 29, 2009. In fact, Definition no. 8 of the RSTP is self-explanatory. It provides for the following: "Registration period: a period fixed by the relevant association in accordance with article 6".

Article 6 of the RSTP, specifically in its paragraph 2, stipulates that: "(…) The two registration periods for the season shall be communicated to FIFA at least 12 months before they come into force."

If a National Association fails to comply with such regulation, then FIFA will determine the dates for its registration periods as the National Association did not communicate FIFA about them on time and established the dates in disagreement with the spirit of the registration periods.[3] In accordance with the Commentary on the RSTP, page 21, definition 3, "the registration periods apply primarily to competitions with the participation of professional (…) players and are meant to regulate these competitions by safeguarding the sporting integrity of the ongoing championship".

In this respect, the extemporaneous anticipation of the second registration period by the CBF has a direct impact on the ongoing international championship, i.e. the *Copa Santander Libertadores de América*, a competition organized by CONMEBOL. FIFA Circular no. 801 addressed to the National Associations described the spirit of the registration period by granting the Associations time to establish it, "so as to avoid a direct interference with (…) ongoing (…) championships and in order to allow for adaptation time".

The Regulations of *Copa Santander Libertadores de América 2010* determine, in article 10.12, that "The registration of a player is subject to the provisions in force in the respective National Association and, for international transfer of players, according to the FIFA rules."[4]

Such anticipation breaches the principle of fair competition between clubs of the same National Association and at the same time it gives rise to competitive distortions between clubs participating in an ongoing championship. Based on the direct confrontation between the Brazilian clubs *São Paulo FC* and *SC Internacional* for the semi-finals of *Copa Libertadores de América 2010*, we have to consider that just one of them had privileged information from CBF, i.e. it was able to strengthen its team with new players internationally transferred by relying on the knowledge that their registration would not be restricted by the transfer window.

As disclosed by the local press, the President of the South Brazilian Football Federation was informed by the President of CBF, during the FIFA World Cup Africa 2010, that the second registration period of the Brazilian calendar would be anticipated and informed its affiliated club about it immediately. *SC Internacional*, thus, hired three new players to play the semi-finals of *Copa Libertadores de América 2010*.

This situation shows clearly that the anticipation of the registration period took from *São Paulo FC* the chance to plan its sporting activities in the same way as its opponent. From a sporting point of view, the fact that *SC Internacional* was able to include in its squad new players internationally transferred during the competition in violation of the established rules, affected the predictability of the ongoing competition and, consequently, violated the sporting integrity thereof.

If, on the one hand, Circular no. 801, dated 28 March, 2010, granted the National Associations time for adaptation to the registration periods, on the other hand, article 6 of RSTP ensures to the clubs that some time - 12 months! - is required to change the international transfers market, so that the clubs have enough time to plan - or re-plan - their sporting activities. The aforementioned situation, i.e. the extemporaneous anticipation of the registration period cannot be allowed, so that the affiliated clubs must trust that they will acquire new players from another National Association only within a specific period of time, i.e. during the transfer window. Should this expectation not be met, as in the case at hand, the ongoing competition, particularly a championship already at a knockout stage, suffers sporting instability

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1 Circular no. 534/2010, issued on July 12, 2010: "*Comunicamos que, de acordo com a RDP nº 02/2005, o segundo período de inscrição de jogadores será compreendido entre os dias 03 e 31 de agosto do corrente ano*".

2 Article 10.6, *Reglamento del Campeonato Sudamericano de Clubes "Copa Santander Libertadores De América 2010"*: "*Finalizada la Segunda Fase, y hasta 48 horas antes de comenzar la Semifinal, se podrán sustituir hasta un total de tres jugadores de la lista de 25 (veinticinco)*".

3 Article 6 par. 2 of RSTP: "(…) FIFA shall determine the dates for any association that fails to communicate them on time".

4 Article 10.12, *Reglamento del Campeonato Sudamericano de Clubes "Copa Santander Libertadores De América 2010"*: *"La inscripción del jugador estará sujeta a las disposiciones vigentes en la respectiva Asociación Nacional y, tratándose de jugadores con transferencia internacional, conforme a las reglas de la FIFA".*

that may severely harm the contest itself by having an impact on the play-offs result.

If every National Association must inform FIFA about the dates of the two registration periods at least 12 months before they come into in force, then, what has been done constitutes an illegal act through which the rules of a championship are changed after its beginning and in favor of just one side. As a result, the principle of equality of chances in sports and the integrity of the ongoing competition are violated.[5]

Furthermore, in light of the specificity of sports activities, the National Associations should ensure a solid legal basis for its affiliated members. In fact, CBF should "keep vigil over the maintenance of the integrity of the ongoing championships and hinder any potential abuse", in compliance with FIFA Circular no. 818 of September 12, 2010. By benefiting just one affiliated club over another, however, CBF also violated article 13 par. 1 *a* of the FIFA Statutes, in accordance with which Members are obligated "to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time (…)".

4. Conclusion

CBF's failure to follow the FIFA rules, combined with the direct interference with an international ongoing championship, led to a situation in which many basic principles of sports law have been breached. The extemporaneous anticipation of a registration period in disagreement with the spirit of the rules established in the RSTP was certainly completely unlawful in the football industry and will dismantle the whole doctrine of registration periods.

5 For the principle of equality of chances in sport see Maurício Ferrão Pereira Borges, "Verbandsgerichtsbarkeit und Schiedsgerichtsbarkeit im internationalen Berufsfußball. Unter Berücksichtigung der verbandsinternen FIFA-Rechtsprechung in Bezug auf die *lex sportiva*", 2009, p. 84-87.

FIFA Players' Agents Regulations and the Relating Jurisprudence of FIFA and CAS

by **Georgi Gradev***

Preamble

The author herewith pays special attention only to a few key points of the edition 2008 of FIFA Players' Agents Regulations (PAR)[1] in force (since 1 January 2008), which are conducive to confusions or conflicts among the football stakeholders, and to the relating important past decisions rendered by FIFA and the Court of Arbitration for Sport (CAS).

The "natural person" requirement

Agents' activity may only be carried out by natural persons who are licensed by the relevant FA for this purpose. An agent may organize his occupation as a business as long as his employees' work is restricted to administrative duties connected with the business activity of an agent. The following examples of FIFA and CAS jurisprudence clarify the situation, as it appears to be some general confusion as to how agents should utilize such companies:

Patrizia Pighini vs. Atletico de Madrid

In a case of 2006 opposing the licensed agent, Mrs. Pighini, acting for Image Promotion Company of Monaco, to Club Atletico de Madrid, FIFA, applying the edition 2001 of PAR, decided that the claim filed by the Agent would be partly accepted and ordered the Club to pay the Agent a certain amount of money.

The Agent appealed against the FIFA Decision before CAS.[2] CAS decided that the Agent is not a party to the Contract at stake and therefore, not entitled to submit a claim - the only party entitled to a claim is the Company. The Panel was of the opinion that a company is, in principle, entitled to file and pursue a claim at FIFA and that the 2001 PAR provisions do not preclude such claim being filed. CAS held that the *lex specialis* rule stipulated in 2001 PAR, pertaining to the right of an agent to organize his/her occupation as a business, overrides the *lex generalis* provisions contained in 2001 PAR[3], as well as that article 22 of 2001 PAR (particularly par. 2 which governs international disputes) does not provide that legal entities cannot claim before FIFA. CAS finally ruled that in the particular case FIFA lacked jurisdiction to entertain the matter and dismissed the appeal.

Pinhas Zahavi vs. Besiktas

In an arbitration of 2007, conducted by FIFA pursuant to the edition 2001 of PAR, between Club Besiktas and the renowned licensed agent, Mr. Zahavi, acting for GOL INTERNATIONAL LTD., FIFA adjudicated that it has no jurisdiction and rendered the Agent's claim for commission payment inadmissible. FIFA first pointed out that it has jurisdiction only on those individuals who carry a valid agent's license issued by the relevant FA. FIFA recalled, among others, that an agent license is issued to natural persons only - applications from companies are not permitted, and that this fact constitutes one of the crucial principles of PAR and is based on the general approach that, in the relationship between an agent and his client, the personal element is of outstanding importance. FIFA concluded that the Agent is "*not legitimated to sue as the proper party*", since the Agreement was apparently concluded between the Club and the Company. For the sake of good order, FIFA referred to article 6 par. 1 FIFA Procedural Rules in order to remind that only members of FIFA, clubs, players, coaches or licensed match and players' agents are admitted as parties before the relevant decision-making bodies of FIFA.

On 5 December 2008, the Agent and the Company filed jointly a Statement of Appeal at CAS.[4] The Panel first decided that the edition 2001 of PAR is applicable to the appeal of the Agent, whilst the edition 2008 of PAR is applicable to the claim of the Company.[5] CAS then noted that none of the Appellants has ever tried to suggest that the Agreement implemented a partnership agreement or an active solidarity between the Agent and the Company, creating a co-ownership of the whole claim and enabling each of them to demand from the Club the payment in dispute. CAS pointed out that in any event the claim of the Company is prescribed. CAS used the floor to refute its own case-law established in the before-mentioned "Pighini" matter, relied upon by the Appellants in this case, by submitting that the cited CAS award was taken under PAR as they stood before 1 January 2008 and that the wording of article 22 par. 2 of 2001 PAR is quite ambiguous. However, the case of the Company has to be reviewed by 2008 PAR, which clarifies the situation under article 30 par. 2 and 5, in combination with article 6 par. 1 FIFA Procedural Rules. For these reasons, CAS concluded that the Company is not only late to file a claim before FIFA, but also that it cannot be admitted as a party to proceedings before FIFA. The Panel, relying on the CAS Code in con-

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1 The editions 2001 and 2008 of PAR are available on FIFA.com.

2 CAS 2007/A/1260.

3 *Lex specialis derogat legi generali.*

4 CAS 2008/A/1726.

5 *Tempus regit actum.*

junction with article 62 par. 1 FIFA Statutes, held that the Company has no standing to be a party in this appeal procedure at CAS. In continuation, CAS was of the opinion that the Agent was not a party to the Agreement. The Panel was comforted in its position, among others, by the fact that, as an experienced professional, the Agent could not ignore that, if he was acting in his name, he was required to use the FIFA standard representation contract and to send copies to the competent FAs. The Agent did not fulfill these requirements. Formally, he did not have to do so since he was acting "on behalf of" the Company. For these reasons, CAS upheld the FIFA Decision.

Out of the scope of its considerations on the merits, CAS emphasized that the representation contract between the agent and the client must be properly concluded and strongly recommended the use of the FIFA standard representation contract contained in Annex 3 PAR. CAS said that the agent should ensure that he/she is a party to the contract, so he/she is able to enforce his/her rights under it. Using words such as "*on behalf of*" or "*representative of*" leave the agent outside of the contract. Words such as "*and*" or "*along with*" would seem to be more appropriate, so that both the agent and his/her company are parties to the contract. Likewise and as for billing, if the agent wants the invoice to go through his/her company, then the remuneration section of the agency contract should state that the company receives the commission. Finally, CAS recommended that the parties to the agreement should consider the possibility to include an arbitral clause, submitting a possible dispute exclusively to CAS. Such a clause would enable all the parties to the contract (incl. a company) to have their case heard by CAS, in an expedited manner, in a neutral forum, with the ability to choose at least one member of the decision-making body.

The representation contract

Agents conducting agency activity on behalf of a club or player must have a written contract in place before they conduct any agency activity. Such a contract must contain the following minimum details: the names of the parties, the duration and the remuneration due to the agent, the general terms of payment, the date of completion and the signature of the parties. The contract is only valid for two years and it may be extended in writing only. If the player is a minor, the player's legal guardians have also to sign the contract. The representation contract must explicitly state who is responsible for paying the agent and in what manner. Payment is to be made exclusively by the client of the agent directly to the agent. Clubs may only discharge the player's obligation to pay the agent via a deduction from the player's salary, if there is written consent from the player for the club to pay the agent on his behalf. Such payments should only be paid in accordance with the general terms of payment agreed between the player and the agent. Every agent has to ensure that his name, signature and the name of his client appear in any contracts resulting from transactions in which he is involved. These provisions are without prejudice to the client's right to conclude an employment contract or a transfer agreement without the assistance of a representative. The agent has to abide by further formal requirements laid down in PAR.

Vincenzo Morabito vs. Ittihad Club

On 9 December 2005, the licensed agent, Mr. Morabito, lodged a claim against Ittihad Club for outstanding commission for a couple of transactions allegedly brought about by the Agent himself. FIFA concluded that, given that the Agent did not present any written agreement between him and the Club, it cannot be established that the Club agreed to pay to the Agent any commission in connection with his supposed services as an agent with respect to both transfers at stake.

The Agent appealed against the FIFA Decision to CAS.[6] CAS held, among others, that in order for the Agent to succeed in his appeal he has to substantiate and prove primarily that a contract was concluded between him and the Club regarding the transfers concerned. The Agent admitted that no written contract was entered into and submitted in his Appeal Brief that "*An oral agreement … had clearly been concluded*". Based on the evidence in file, CAS pointed out that it is likely that the Club mandated the company PromoSport to arrange the transfers at the center of the dispute, but that the legal personality of a company is distinct from that of its members, i.e. the Agent *in casu*. Consequently, CAS confirmed the FIFA Decision, on the ground that the Agent did not have a right to file a claim against the Club (*legitimatio ad causam*).

Christian Casini vs. Vestel Manisaspor

In a letter of 26 November 2007, the licensed agent, Mr. Casini, lodged a claim with FIFA against the Club Vestel Manisaspor, in which he purported that he was owed commission payments. The Agent, among others, maintained that the Club had already made a partial payment of 1/3 of the alleged total outstanding commission and has therefore acknowledged its debt. In its decision passed on 2 September 2008, FIFA, among others, recalled that an agent may represent the interests of a player or a club only if he has concluded a written contract with the client and that such contract must explicitly mention who is responsible for paying the agent's fee, the type of fee and the prerequisite terms for the payment of the fee. Furthermore, FIFA underlined that for every transaction in which an agent represents the interests of a club, his name and signature must, without fail, appear in the relevant transfer and/or employment contract(s). The Agent did not remit to FIFA any kind of a written contract signed between him and the Club, or between the Club and the player in question, to corroborate his entitlement to receive any commission from the Club. On account of that, FIFA decided that the demand of the Agent must be rejected.

Dual representation and conflicts of interest

Agents have to avoid all conflicts of interest in the course of their activity. An agent may only represent the interests of one party per "transaction"[7]. In particular, an agent is forbidden from having a representation contract, a cooperation agreement or shared interests with one of the other parties or with one of the other parties' agents involved in the player's transfer or in the completion of the employment contract. A good illustration of the application of this rule is the following pertinent CAS case:

Bruno Heiderscheid vs. Franck Ribéry

On 15 April 2005, the non-licensed agent, Mr. Heiderscheid[8], signed an exclusive agency contract with the renowned player, Mr. Ribéry, valid for 24 months. Two months later the Player concluded an employment contract and an annex to it with the Club Olympique de Marseille - the Agent acted for the Club. On 30 November 2005, the Player and the Agent entered into a new representation agreement, valid until 30 November 2007, which replaced the first contract. Thereafter, the Player and the Club entered into three additional agreements, amending the terms and conditions of the existing employment contract - the Agent acted for the Player this time. On 2 May 2007, close to signing with Bayern Munich, the Player terminated the Second Agreement with the Agent.

On 20 June 2007, the Agent filed a claim against the Player directly to CAS[9]. On the basis of the provisions in the Second Agreement, CAS retained its jurisdiction over the case and established that the dispute will be resolved in accordance with French law. CAS decided that the Second Agreement was null and void, because: i) under the relevant provisions of the French Code of Sport (and PAR), the Agent was not entitled to act as agent, since, in 2000, he was sentenced to one year imprisonment for forgery, false bankruptcy, swindle and violation of Belgian accounting law. Likewise, he did not possess a valid

6 CAS 2007/A/1274.

7 "[…] *a normal understanding of the word "*transaction*" covers more than the final negotiations, thus preventing an agent from switching side if he has taken care of the interest of the player at an earlier stage of the transfer*", Ronny-V. van der Meij for ASSER International Sports Law Journal 2009/1-2, p. 46.

8 Mr. Heiderscheid was licensed as an agent later by the Luxembourg FA and he continues to be a licensed agent even until now, which fact breaches the PAR rule for impeccable reputation of the applicant, set out in article 6 par. 1 PAR.

9 TAS 2007/O/1310 (jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1310.pdf).

agent license. CAS further stated that the Second Agreement is not only unlawful, but error and fraud; and ii) the Agent was acting as dual representative for both the Club and the Player, which is also forbidden by the French Code of Sport (and PAR). As a result of the nullity (*quod nullum est nullum producit effectum*), the effects of the First Agreement were restored, as neither of the parties questioned its validity. Consequently, CAS, on the one hand, condemned the Agent to restitution of payments to the Player, and, on the other hand, ordered the Player to pay a certain fee to the Agent due under the First Agreement in connection with the Player's contract with the Club - CAS ordered a set-off of the parties' respective claims. CAS further established that the Agent is not entitled to a fee for the subsequent transfer of the Player to Bayern Munich, because the Player moved to Germany only after the expiration of the First Agreement, as well as the Agent did not bring about this transaction. All other parties' motions or claims were dismissed.

Entitlement to remuneration

The agent's fee is calculated on the basis of the player's guaranteed annual basic gross income, including any sign-on fee, when he/she has negotiated the employment contract. Such amount will not include the player's other benefits or privilege which are not guaranteed. The agent and the player may choose to pay the agent by means of a lump sum at the start of the employment contract that the agent has negotiated for the player or annual installments at the end of each contractual year. If no agreement is reached in this respect, the agent is entitled to receive 3% of the annual guaranteed income of the player, including any sign-on fee. If the agent and the player do not agree on upfront payment and the player's contract negotiated by the agent on his behalf lasts longer than the agency agreement between them, the agent is entitled to annual remuneration even after expiry of the representation contract. This entitlement lasts until the relevant player's contract expires or the player signs a new contract without the involvement of the same agent. Payments to agents in respect of agency activity on behalf of a club must be made by the club only, in a lump sum that has been agreed upon in advance.

Mujdat Gorel vs. Alpay Ozalan

On 10 February 2003, the licensed agent, Mr. Gorel, and the player, Mr. Ozalan, entered into a standard 2-year representation agreement. The Agreement was exclusive and provided for commission due to the Agent, amounting to 10% of the annual gross salary due to the Player as a result of the employment contracts negotiated by the Agent. On 27 January 2004, the Player signed a 2-year employment contract with the Club Incheon United. The Player signed the employment contract by himself. On 21 May 2004, the Agent complained to FIFA that he had acted for the Player as an agent and as a personal assistant, having negotiated the terms of settlement between the Player and Aston Villa (signed on 23 October 2003) and that, on 18 January 2004, the Agent sent to the coach of the Club a fax to commence negotiations on behalf of the Player, informing that he represents the Player "*solely and exclusively*". On 21 November 2005, FIFA rejected the claim of the Agent. FIFA in its Decision referred to the function of an agent, which briefly stated brings players and clubs together, so as to explore the possibility of establishing working relations, stressing that the agent's actions should culminate in the signing of a mutually acceptable contract between the player and the club. In this respect, FIFA referred to a letter/direction, dated June 1999, whereby the Bureau of the Players Status Committee informed and/or advised the licensed agents of the circumstances under which they could demand their remuneration where contracts were concluded between players and clubs without the agents' involvement. The gist of the Bureau's standpoint was that the agent's activities must be causal to the conclusion of the employment contract. Considering the issue of "exclusivity", FIFA correctly found that these operated with respect the player's effort to appoint other agents, if this would be the case.

The Agent filed a Statement of Appeal against the FIFA Decision with CAS.[10] The Agent insisted, among others, that he is entitled to 10% of all sums received by the Player from the Club. The Player replied, among others, that the Agent's activities were not causal to the conclusion of the employment contract. CAS held that, in principle, the agent does not become entitled to his commission until the event has occurred, upon which his entitlement arises. CAS was of the opinion that the mere introduction of the player to the club is not sufficient, because in law even where such an introduction may lead to a contract, the introduction itself does not create a contract between the player and the club. It is CAS understanding that commission is not payable on the introduction of the player, but when the contract is actually concluded. An agency contract, where the principal is bound to pay a commission for an introduction, must be expressed in writing. In the particular case, the Agreement did not contain express provisions that the Agent will be remunerated in any event, even in the case he does not bring about the particular transaction, i.e. the signing of the contract with the Club. Without an express provision for the agent to be remunerated, notwithstanding his involvement and the bringing about of a certain event, i.e. the conclusion of an agreement for the provision of the player's services, he will not be entitled to claim a reasonable remuneration on a contractual quantum merit basis. In the absence of an agreement to the contrary, the fact that the Player placed his "placement rights" exclusively with the Agent does not prevent the Player from contracting himself and having done so, before the Agent concluded any contract (which he did not), the Player is under no liability to pay any commission. If the Player had appointed the Agent as a "sole agent", the Player could not employ any other agent, but if he contracted himself, he could not be liable to the Agent to pay commission or damages. The facts of the matter at stake did not evidence the involvement in bringing about the conclusion of the transaction, i.e. the signing of the contract with the Club, the Agent himself having failed to produce evidence of any significant involvement, save for the act of introduction mentioned above. Accordingly, CAS was of the opinion that the FIFA Decision was and is correct and should be upheld.

10 CAS 2006/A/1019.

Match-Fixing. FK Pobeda et al. v. UEFA (CAS 2009/A/1920)

by **Jean-Samuel Leuba***

I. Introduction

The arbitral award issued by the Court of Arbitration for Sport on 15 April 2010 in the case FK Pobeda - Prilep, Aleksandar Zabrcanec, Nikolce Zdraveski v/ UEFA (hereinafter "the award" or "the award against Pobeda") is a first in several respects, not only for UEFA but also for the CAS.

With regard to the substance first of all, it is one of the very first procedures that has led to sanctions being imposed against a club and individuals in relation to the fixing of football matches. The subject of match-fixing has attracted a great deal of media attention since the revelations made by the Bochum public prosecutor's office. However, the Pobeda case is totally unconnected to those revelations. It is the result of numerous investigative measures taken by the UEFA disci-

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plinary bodies without the help, it should be stressed, of any state investigative or judicial authority.

This arbitral award is also a first from a procedural point of view, since the most important among numerous procedural questions that the arbitrators had to consider concerned whether or not they should accept UEFA's request that the identity of certain witnesses should be withheld and that they should therefore be examined by the CAS without their identity being made known to the appellants.

Finally, this award represents a first in terms of its outcome, since it is the first time a club and its president have been sanctioned for match-fixing in a European competition.

II. Summary of the Facts

Insofar as the present publication contains the full text of the arbitral award, there is no need to describe the facts of the case in detail, but readers are invited to examine the facts as they appear in the award.

Readers are therefore merely reminded that UEFA had opened a disciplinary investigation against FK Pobeda, a club from the Macedonian city of Prilep, on the basis of information suggesting that the home and away matches between FK Pobeda and FC Pyunik, an Armenian club, in the 2004/05 UEFA Champions League had been fixed. The UEFA Control and Disciplinary Body (first instance body), on the basis of the findings of the investigation, sanctioned FK Pobeda, its president and the team captain at the time.

Following an appeal lodged by the three parties (club, president and captain, hereinafter "the appellants"), the UEFA Appeals Body (second instance body) confirmed the first instance decision. The three appellants lodged an appeal against this UEFA Appeals Body decision with the CAS.

III. In Substance

For various reasons, particularly certain procedural reasons which are discussed later, the Panel carried out a full review of the case. The CAS confirmed the decision of the UEFA Appeals Body in relation to the sanctions imposed against the club and its president, but set aside the sanction imposed against the captain.

In the examination on the merits, the arbitral award contains some extremely important recitals.

a. Fundamental principles for sport

Firstly, while noting that the regulations applicable in 2004 did not contain any specific provisions on the sanctioning of match-fixing activities, the award states that match-fixing "touches at the very essence of the principle of loyalty, integrity and sportsmanship".

The CAS therefore considered that match-fixing and sports betting activities violated the general clause of Article 5 of the UEFA Disciplinary Regulations, which states that "***member associations, clubs, as well as their players, officials and members, shall conduct themselves according to the principles of loyalty, integrity and sportsmanship.***" Similarly, the CAS pointed out the high social significance of football in Europe. It is therefore fundamental that the public is sure that all players (in the broad sense) act with the sole objective of beating their opponent and that all decisions are based on that objective (award, p. 14, rec. 76 to 78; see also CAS 98/2000/AEK Athens & SK Slavia Prague v/ UEFA).

It is therefore clear that the rule prohibiting match-fixing activities is based on conduct rather than on the outcome of such activities. In other words, it is not necessary for the match to have actually been fixed. The result is not indispensable. As soon as club officials or players behave in a way which violates the principles of loyalty, integrity and sportsmanship, they may be sanctioned. This also means that any attempt and any action in breach of these principles, even if it does not result in a match being fixed, should be punished. Conduct that infringes the aforementioned principles cannot be allowed to go unpunished simply because the intended outcome did not materialise.

b. Reasoning of the CAS

1 Fixed matches

When examining the merits, in particular the appellants' culpability, the CAS considered, firstly, whether the matches between Pobeda and Pyunik had been fixed[1]. The Panel explained very clearly its opinion that they had indeed been fixed. It mentioned various reasons for this conclusion, particularly the report of the sports betting expert, who had stated that the variations in betting patterns and odds for the first leg had clearly been extraordinary and abnormal, which proved that the match had been fixed. The appellants made no attempt to refute this.

The Panel also based its view on the testimony of the various witnesses, who reported not only that the Pobeda club was in financial difficulty, but also that the club president had mentioned his intention to fix the match against Pyunik. The witness statements on which the Panel's conclusion was based were not made by anyone who had seen money being exchanged between an intermediary and a club representative. It must therefore be concluded that, in order to establish that a match was fixed, it is not necessary to have direct proof (documentary evidence or witness statements) of every stage of the fixing of a match, particularly real evidence that money was given to a player or club representative. The witness statements contained elements confirming, sometimes indirectly, that the match had been fixed. For example, one witness stated that Pobeda players had bet on their own team losing. Reference should also be made to the recitals of the award. It is important to note that the convergence of a range of clues and evidence, even indirect, can be sufficient to justify the decision of disciplinary bodies required to rule on possible match-fixing. Finally, the Panel stated that the degree of proof required should be the same as in doping cases, i.e. "*to the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made*" (award, rec. 85, page 17, and CAS 2005/A/908).

It can also therefore be noted that, in order to establish that a match was fixed, technical data linked to sports betting and unusual variations in odds and/or betting patterns represent significant evidence[2].

2. Involvement of the appellants

Having concluded that the match had been fixed, the CAS considered the extent to which the appellants had been involved in the match-fixing plot. On the basis of the witness statements, the CAS decided that the president, Zabrcanec, had been actively involved in attempts to ensure that his team would lose the matches against Pyunik.

As mentioned above, the Panel considered that the witness statements were not sufficient to establish that the captain had been involved.

One interesting aspect concerns the club's involvement. The CAS firstly confirmed the application of Article 11 of the UEFA Disciplinary Regulations, which provides for the possibility to sanction member associations or clubs, particularly if "*a team, player, official or member is in breach of article 5*". In other words, the club may be sanctioned for acts committed by its officials. Since the Panel was "comfortably satisfied" that the president was guilty of influencing players and the coach in order to fix the match, the club could be sanctioned on the basis of Article 11.

The award also states that, in the Panel's view, it was important to underline that there was no evidence that the president manipulated the games for personal gain.

This comment in the award raises a question. If the president had said that the match-fixing and his conduct had been exclusively dictated by a strictly personal interest and not by the interests of the club, could the club have been sanctioned in the same way? The award does not answer this question directly.

In the author's view, the answer must be yes. It is unacceptable that

1 It should be noted that a fixed match does not necessarily have to be fixed by both teams. In the present case, there was no evidence that the Pyunik club was involved. Generally, only the team that is meant to lose or concede a certain number of goals fixes the match, while the other team, which is not involved, plays its best in order to achieve the best possible result.

2 The media have recently reported on the control and monitoring measures that have been implemented, in particular by UEFA, and then by FIFA, in this area.

a club should be able to escape any sanction simply by arguing that one of its officials acted in his own personal interest and that the club should not, therefore, suffer the consequences of his actions. Such a scenario would provide too easy a way out for club officials found guilty of breaking the rules. Furthermore, by enabling the club to escape any sanction, it would go against the very objective laid down by the CAS in the same Pobeda award (see award, rec. 116, page 25). According to the award, strong sanctions against clubs are likely to provoke reactions within the clubs when attempts are made to manipulate matches. As was pointed out in the Pobeda case, the president clearly could not have manipulated matches without the assistance of players on the pitch. This shows that it was possible, within a club, to fix a match without provoking adequate reactions. By imposing strong sanctions against the club, it is possible not only to prevent individuals from manipulating matches, but also to encourage other club officials, players or members to take action when they become aware of an attempt to manipulate a match. In other words, it is important that clubs or associations should be punishable when officials or players are involved in match-fixing activities. The prospect of a sanction against the club is likely to encourage the club's directors and other officials to keep a close eye on the proper running of the club and to fight against any attempt to fix matches, and even to encourage the players to refuse to participate in such activities.

Finally, it does not appear necessary to decide who will benefit from the crime. Even if the only beneficiary were a friend or acquaintance of the club president who fixed a match result with the help of certain players, it seems logical and well-founded to punish the club itself.

3. Sanctions

Finally, still concerning the merits, it should be noted that the CAS thought that the sanctions imposed against the club and the president were appropriate. The club was banned from all European competitions for eight years, while the president was given a life ban from all football-related activities. The fact that this sanction was considered appropriate demonstrates the gravity of the actions committed, which violated the very essence of sport and the fundamental principles of loyalty, integrity and sportsmanship.

IV. Various Procedural Questions

During the appeal procedure instigated by Pobeda, the Court of Arbitration for Sport had to consider various procedural questions, some of which are examined in this chapter.

Firstly, for example, we will study UEFA's request that certain witnesses be given anonymity. Unless the author is mistaken, this is the first time the Court of Arbitration for Sport has examined witnesses whose identity has been withheld from one of the parties.

A second question concerned Article R56 of the Code of Sports-related Arbitration, in particular UEFA's request, submitted after it had lodged its response, that an additional witness be heard.

The Court of Arbitration for Sport also had to consider complaints made by the appellants concerning the procedure followed by the UEFA disciplinary bodies. On this occasion, the CAS confirmed its case-law relating to Article R57 of the Code. It should be noted that one of the questions relating to this provision was not dealt with in the award.

Finally, we will not go back over a point previously discussed: the degree of proof required by the CAS, i.e. "to the comfortable satisfaction" of the arbitrators. Reference is made to what has already been said on this subject.

a. Protection of witnesses by means of anonymity

UEFA asked the CAS if it could examine witnesses without their identity being revealed to the appellants.

During the procedure before the UEFA disciplinary bodies, some witnesses had been heard without their identity being revealed. UEFA wanted to protect their anonymity mainly because of the risk to the lives and safety of the witnesses and their families. UEFA pointed out that, between the decisions of UEFA's first and second instance bodies, the identity of certain witnesses testifying against the club had been disclosed on the Pobeda club website, which had announced that it intended to publish photos of these witnesses. As a result, some witnesses had expressly asked for protection.

In support of its request, UEFA mentioned the practice of the Swiss state courts and the case-law of the Swiss Federal Court and the European Court of Human Rights.

The CAS decided to follow strictly the case-law of the Swiss Federal Court with regard to the protection of witnesses. It should be noted that the Swiss Federal Court itself applies the case-law of the European Court of Human Rights (Article 6 ECHR and Article 29 para. 2 of the Swiss Constitution; ATF 133 I 33).

Bearing in mind all the circumstances, the Panel considered that the fears expressed by some of the witnesses could not be ignored. It therefore maintained a balance between the rights of the appellant, particularly the right to examine the witnesses, and the need to protect the witnesses.

The CAS therefore applied the case-law of the European Court of Human Rights and the Swiss Federal Tribunal. However, it should be noted that this case-law applies to criminal procedures. A disciplinary procedure within a sports organisation cannot automatically be put in the same category as a criminal procedure. It is therefore questionable whether it is really necessary to demand that all the requirements of a criminal procedure are met.

In practical terms, the appellants received copies of the minutes of the interrogations of the protected witnesses, with all clues to the witnesses' identity deleted.

In addition, the witnesses were examined by telephone. Their voices were disguised. A CAS representative was with the witnesses during this process, in order to ensure that they were answering the questions alone and, of course, to check their identity, which was known to the Panel. In this way, the appellants, who did not know the identity of certain witnesses, were able to interrogate them remotely. This procedure therefore protected the interests of the appellants as well as those of the witnesses to have their identity protected.

It is possible that, in the future, the CAS will need to use the same procedure again for hearing witnesses who need protection. Since the CAS tries to apply Article R57 of the Code in a broad way, giving the Panel full power to examine the facts and the law, it is indispensable that the examination of protected witnesses should be possible before the CAS. It should therefore be possible, where necessary, to apply practical procedures in accordance with the case-law of the Swiss Federal Tribunal and the European Court of Human Rights[3].

b. Examination of an additional witness (Article R56)

After submitting its response, UEFA requested that an additional witness (anonymous witness Z) be examined. UEFA asked for permission to call this witness on the basis of Article R56 of the Code, particularly mentioning the existence of exceptional circumstances.

UEFA explained that it had not become aware of the testimony of witness Z until after it had filed its response. It also produced minutes of an interrogation carried out after its response had been submitted. The CAS refused to allow witness Z to be examined on the grounds that the existence of exceptional circumstances had not been established.

On reading the award, it is impossible not to imagine that the Panel refused to allow witness Z to be examined because it wanted to avoid another procedural problem. Should the fact that a party did not become aware of an additional piece of evidence until after it had submitted its written pleadings not be treated as an exceptional circumstance under Article R56? The discovery, after the submission of

3 Incidentally, one of the witnesses who was meant to remain anonymous declared at the hearing that he was prepared to reveal his identity and be examined in the presence of the parties and the arbitrators. He was therefore taken to the hearing chamber and examined as an ordinary witness. This witness was a former coach of the Pobeda club, who was coaching another Macedonian team when the hearing took place. A few days after the hearing, he was sacked by his Macedonian club, particularly on the grounds that he had tarnished the image of Macedonian football. In principle, the club who sacked this coach has no links with the Pobeda club.

written pleadings, that an additional witness could provide important evidence should constitute an exceptional circumstance under Article R56.

When it filed its response, the respondent did not know what this witness might subsequently say. It therefore had no reason, at that time, to request that he be examined by the CAS.

It is logical that the CAS should have accepted that this was an exceptional circumstance in the sense of Article R56 of the Code.

When a party does not become aware of the existence of an additional piece of evidence until after the deadline fixed for the submission of its written pleadings, it should be allowed to submit that evidence to the CAS.

With regard to witness Z in the present case, the Panel probably felt uncomfortable about the issue of the minutes of the interrogation of witness Z.

For UEFA requested that these minutes should not be transmitted to the appellants because their content would enable them to identify the witness. We cannot dismiss the idea that the Panel faced a two-fold problem: on the one hand, it was asked not to transmit the minutes because the safety of the witness might have been endangered, while on the other, it feared it might infringe the appellants' rights by allowing the minutes to be submitted without allowing the appellants to see them.

In the author's opinion, this problem could have been resolved either by refusing to accept the minutes of the interrogation or by asking UEFA to submit excerpts from the minutes which would not lead to the identification of the witness.

In any case, it would have been possible to examine witness Z without agreeing to the submission of the written minutes.

While it may be admitted that the aim of Article R56 of the Code is to define the parameters of the subject of arbitration and to avoid the submission of multiple written pleadings and evidence, it should not be applied in such a restrictive way that new evidence or evidence which a party did not discover until after it submitted its written pleadings is rejected[4].

c. Procedural error by the UEFA disciplinary bodies (Article R57)

The appellants complained, initially to the UEFA disciplinary bodies and then in their appeal pleadings to the CAS, that their procedural rights were breached by the UEFA disciplinary bodies. It may be even be suggested that the main grounds of the appeal concerned the alleged procedural errors and the violation of the appellants' rights by the UEFA disciplinary bodies.

The award does not examine these procedural complaints in detail, nor answer them. Indeed, it dismisses them with reference to the rule laid down in Article R57 of the Code, under which the Panel can hear the case *de novo*. Article R57 states that ***"The Panel shall have full power to review the facts and the law".***

According to CAS case-law, any procedural errors committed by a lower instance body are cured by the fact that the Panel carried out a full review. The award also points out that CAS case-law is in line with the decisions of the ECHR. The award mentions various examples of relevant case-law (award, page 17, rec. 87).

This CAS case-law is helpful insofar as it avoids debate surrounding possible procedural errors allegedly committed by lower instance bodies. However, it does create a number of perverse effects. For example, since it does not re-examine in detail the procedure followed by the lower instance bodies, the CAS does not decide whether a particular form of procedure is acceptable or not. In other words, the lower instance bodies and the federations do not obtain a decision confirming that their procedure was correct or indicating what aspects of their procedure were incorrect. This creates the risk that procedural errors are perpetuated in different procedures before the federations, since the CAS does not comment on such errors.

Furthermore, the notion of hearing a case *de novo*, i.e. carrying out a free examination with full power to review the facts and the law, raises a problem in terms of appeal procedures against UEFA decisions.

For although the first sentence of Article 57 para. 1 clearly states that "*The Panel shall have full power to review the facts and the law*", this provision is not in line with the UEFA Statutes.

Article 62 para. 6 of the UEFA Statutes stipulates that "*The CAS shall not take into account facts or evidence which the appellant could have submitted to an internal UEFA body by acting with the diligence required under the circumstances, but failed or chose not to do so".*

Article 62 of the UEFA Statutes concerns the jurisdiction of the CAS as an appeals arbitration body. It is this same provision (Article 62 para. 1) that recognises the jurisdiction of the CAS to hear appeals against decisions taken by a UEFA organ.

In other words, the rules laid down in Article 62 of the UEFA Statutes form part of the arbitration clause that binds the parties (UEFA and the other parties). However, as an arbitration clause, it must also bind the CAS.

The CAS and some legal writers are very restrictive and doubtful as to the possibility of limiting the powers of the CAS to review cases in an arbitration clause (see Antonio Rigozzi, "L'arbitrage international en matière de sport", p. 557 ff and references to case-law). As far as we are concerned, it is hard to see why the restriction created by the UEFA Statutes should not validly limit the jurisdiction of the CAS.

Moreover, in a recent award in the "Valverde" case (CAS 2009/A/1879, page 19), the CAS accepted the need to base its jurisdiction on the rules of the federation concerned. It wrote: "*The jurisdiction of the CAS to rule de novo must be based on the rules of the federation concerned, which the CAS follows. As a private arbitration body, the jurisdiction of the CAS is limited by the jurisdiction of the arbitral procedure on which the appeal is based*"[5].

The restriction imposed by Article 62 para. 6 of the UEFA Statutes is extremely precise and limited. It only concerns facts or evidence which the party could have submitted to an internal UEFA body, but did not.

In other words, if a procedural error was committed by a UEFA body and resulted in the violation of a party's right to a fair hearing, such as the right to examine or submit evidence, the limitation of Article 62 para. 6 would not apply in any case. For in such circumstances, the CAS would be able to conclude that the party did not have the opportunity, even with the diligence required, to submit the facts or evidence concerned.

Furthermore, the examination of an alleged procedural error could lead the CAS to set aside the decision and refer the case back to the UEFA bodies.

This limitation of Article R56 of the Code by Article 62 para. 6 of the UEFA Statutes did not raise any particular problem in the Pobeda procedure. However, this question could one day become a serious issue.

It is not out of the question that the failure to respect the limitation set out in Article 62 para. 6 of the UEFA Statutes might be considered as a valid reason to appeal to the Swiss Federal Tribunal against the CAS award, in accordance with Article 190 para. 2 of the LDIP (Swiss Federal Code on Private International Law).

In other words, such a complaint could be one of the few grounds on which an appeal to the Swiss Federal Tribunal against a CAS award is allowed under Swiss law.

Perhaps this question will be answered in the future.

V. Conclusions

As mentioned above, the CAS award in the case UEFA v/ Pobeda is a first in several respects.

Quite clearly, it is extremely important because of the fact that it is the first decision connected with the fixing of football matches at European level. Unfortunately, it is unlikely to be the last.

4 **The CAS applied the version of Article R56 that was in force before 1 January 2010. The amendment of this provision does not concern an element that was crucial to the question being dealt with here.**

5 **Unofficial translation of the following:** ***"La compétence du TAS à juger de novo doit être fondée sur les règlements de la fédération intéressée, limite à laquelle souscrit ce Tribunal. En tant qu'instance arbitrale privée, la compétence du TAS se trouve limitée par la compétence de la procédure arbitrale sur laquelle est fondé l'appel".***

This award also appears very significant insofar as it is sure to remain a reference point for some time as regards the evidence that is necessary and sufficient to establish the involvement of certain individuals or sports organisations and, therefore, to sanction them.

This award is also extremely important because it is the first time that CAS arbitrators have had to examine protected witnesses, i.e. witnesses whose identity was withheld from one of the parties.

Finally, as is often the case where CAS case-law is concerned, the award as a whole raises for discussion a number of interesting items related to the arbitration procedure.

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Andrew Webster CAS Award Commentary

by **Juan de Dios Crespo Pérez***

Preamble

As the lawyer of Andrew Webster, I have probably talked and wrote about the "Webster case" more than a hundred times and it is somehow difficult to summarize such a *long and winding road* in some minutes or pages. The case was known as a new revolution in football when I had never had that idea. Article 17 of the FIFA Regulations for the Status and Transfer of Players is so uneasy to interpret for anyone in football, even the most experienced lawyer, that I must say that Webster is just *another brick on the wall* of the construction of the relationship between clubs and footballers.

We shall see other bricks and some layer between them coming in the future and this case was just the beginning of the story but at least it was known as the first one where a player correctly and regulatory used his right to end his contract after the FIFA "protected period".

Facts

Remember just a few of the facts of the case. On 30 March 2007 18 year old Andy Webster signed for Heart of Midlothian LC (Hearts) from Arbroath club, two Scottish clubs, for a transfer fee of 75,000 GBP.

Webster signed a contract due to run from the 31st of March, 2001 to the 30th of June, 2005. On July 1st, 2003 Andy Webster signed a contractual extension with Hearts until the 30th of June, 2007.

Andy Webster's progression as a player was steady and strong. He had become one of the most important player's at Hearts as a leader in their defence, and a Scottish international. Hearts were keen to tie down Mr. Webster to a longer contract with improved terms in order to secure the long term future of one of their prize players.

However, Andy Webster rejected this contractual offer until 2009, in fact he rejected several subsequent offers, giving the impression that Andy Webster was ready to move on to a bigger club, despite his success with his long term Scottish club.

During this period of contractual negotiations Mr. Webster was seemingly frozen out of the first team and forced to watch many of his team's matches from the sidelines. Hearts went even through the Scottish Cup to its final and Andy was not in the starting team when he had been of its best components. For a Scot not to be in his final was surely a big disappointment and the beginning of the end of the relationship.

The relations between him and the club continued to simmer until eventually they reached their boiling point. One of the Club's major shareholders made negative and critical remarks regarding Andy Webster to the media.

Mr. Webster decided he had enough of what he perceived to be unfair treatment and approached the Scottish Professional Footballer's Association (SPFA) seeking counsel and recourse against his club for the statements of their most important shareholder.
They advised Mr. Webster that the best action would be to lodge a claim in writing requesting to terminate his contract with just cause according to Article 18 of his employment contract. However, with the prospect of missing the entire 2006-2007 season because of a ongoing court procedure Mr. Webster opted to take an alternate rough and unilaterally terminate his contract without just cause making his case falling under the scope of Article 17 of the FIFA Regulations for the Status and Transfer of Players.

After having notified Hearts of his intention to breach his contract, and leaving the club without their official consent Andy Webster signed a three year contract with English Club Wigan Athletic FC (Wigan). When the English FA asked the Scottish FA association for the International Transfer Certificate (ITC) of the Player the Scottish FA told the English FA that they would not issue the ITC because the Player was still under contract with Hearts.

On the 31st of August, having approached FIFA with their grievance regarding the issuance of the Player's ITC, Wigan was granted the provisional registration by the Single Judge of the Player's Status Committee.

Claim

Hearts submitted claim against both Andy Webster and Wigan to the FIFA Dispute Resolution Chamber (DRC). They claimed for GBP 5,027,311 compensation and a two month long playing ban from all official competitions against the Player; and a payment of compensation from Wigan and a one registration period long ban from registering any new players against the Club.

The DRC had to consider what criteria should be considered when evaluating a unilateral termination case. The criteria for cases of this nature were found in Article 17.1 of the Regulations on Status and Transfer of Players 2005 (RSTP in force then) which states:

> *"In all cases, the party in breach shall pay compensation, Subject to the provisions of Article 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing of contract and/ or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortized over the term of the contract) and whether the contractual breach falls within a Protected Period."*

Later in the commentary section of this article will be critique regarding the above article and its deficiency's however for now we will discuss how the DRC in the Webster dispute interpreted this article in light of particular facts of this case.

Following the decision of the European Court of Justice in the *Bosman*[1] case, it has been established that a Player is free to sign an employment contract with another club of his choice anywhere within the EU, and cannot be denied his Article 39 right to work freely.

* LL.M. (International Sports Law), Sports Lawyer, from Ruiz Huerta & Crespo, a Spanish law office dedicated to sport and entertainment.

Therefore there is no question that Andy Webster was entitled to breach his contract and move from Hearts to Wigan. He could have left without reason, it just so happens in this case he was unhappy with the behaviour and the comments of the members of the club hierarchy and wanted to continue the development of himself as a Player at another, perhaps bigger, club.

However, FIFA have established a set of various rules and regulations to deter playing from doing this, including playing suspensions based on when the contract was breached, and the aforementioned Article 17 principles of compensation in the interest of the "Maintenance of Contractual Stability.[2]"

The previously referred to "Protected Period" is a provision which is designed to discourage "contract jumping[3]. The protected period enshrined in Paragraph 7 of the Definitions of the Regulations states that the protected period is defined as:

"A period of three entire Seasons or three years, whichever comes first, following the entry into force of a contract, is such contract concluded prior to the 28th birthday of the Professional, or a period of two entire Seasons or years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28th birthday of the Professional."

Andy Webster had signed a new contract with Hearts on the 1ST of July 2003, and was 24 years old when he breached his contract in July 2006. Three full seasons, and years had elapsed by the time Mr. Webster had breached his contract, however it was unclear if he had properly complied with all the time regulations involving notification of intention to breach one's contract.

Anyway, FIFA is not always so clear about the sanctions for breaching a contract within the "protected period" and sometimes the clear obligation that is established in the its Regulations[4] for a sporting sanctions to whom has breached his contract during that period is not followed by the DRC and even CAS has join the same understanding[5], which is something really strange and contrary to both the exact wording of the article and the aim of the change agreed between FIFA and the EU Commission: the protection of the integrity of sport.

Furthermore, it was unclear which criteria the FIFA DRC would consider because of the absence of a "buy-out" clause[6], it was only clear that their decision would be made "in light of the applicable national law.[7]" Due to a lack of jurisprudence, different interpretations of the reading of the Regulations, or legal savvy, the parties also had completely differing views on an acceptable amount of compensation. Webster and Hearts believing the compensation payment amount should be EUR 200,000 and EUR 5,027,311 respectively.

FIFA DRC Decision

On the 4th of April 2007, the FIFA DRC determined that Webster had unilaterally breached his contract, an assertion which was not contested, outside the "Protected Period." The DRC decided that the residual value of the contract was GBP 199,976. The DRC also noted that Andy Webster was due to earn GBP 10,000 per week with Wigan.

Then the FIFA DRC started to discuss criteria related to the "specificity of sport", which might impact on the final amount due to be awarded to Hearts. They mentioned that Hearts should have paid transfer compensation to Arbroath club, which was a consideration which should not have factored in their claim against Webster for breach of contract legally[8], but showed the club in a bad light in the realm of sport. The DRC also stated that Webster had served 5 years at Hearts, during which time the Club had played a significant part in the Player's development and growth in profile as a footballer.

They stated that limiting the amount of compensation due to Hearts to the residual value of the contract would "undermine the principle of the 'maintenance of contractual stability'", and it would inadequately compensate the injured party.

The DRC decided that the final amount that Webster had to pay Hearts was GBP 625,000. This amount was based on the residual value of the playing contract with Hearts in Webster's 1ST year with Wigan, and multiplying this amount by a co-efficient of 1.5[9]. Finally, as per the Regulations[10], Wigan was found to be jointly and severally liable for the compensation amount for assumed induced breach of contract. None of the 3 parties were satisfied with the decision and they all appealed the decision to the Court of Arbitration for Sport (CAS)[11].

CAS Decision

One of the most obvious and important point of contention was made by Wigan during the CAS hearing. They stated that the DRC had contravened Article 13.4f)[12] of the Rules Governing the Procedures of the Players Status Committee and the DRC by failing to give adequate explanation for the reasons of the decision they made against Webster and Wigan. The CAS agreed with Wigan stating that the FIFA DRC had failed to give a proper account of the manner in which they calculated the sum of GBP 625,000 awarded against Webster and Wigan.

"[I]n the final analysis it is impossible to understand from reading the decision what weight was giving to what criteria determining the quantum (GBP 625,000)."

The CAS Panel dismissed the decision of the DRC and decided to make their judgement on the matter, based on R57 of the CAS code[13]. They stated that because of the absence of a clause in the contract which would specify the amount of compensation that would be paid in the event of a breach of contract; it was the duty of the case to determine the level of compensation, on the basis of article 17 of the Regulations[14].

The Panel decided that they would not consider compensating Hearts for the training of the Player because this was not one of the criteria discussed in Article 17. Perhaps it was their view that the consideration one reviews in exchange for successfully training a Player is the sporting benefit gained by having a talented player in one's squad rather than having a Player who is incapable of contributing to the overall team performance. In other words, you train a player in order to help your team play well on the field, not to sell him later on[15].

In order to determine the appropriate level of compensation according to Article 17 of the Regulations, the CAS needed to take into account three criteria.

1 *Union Royale Belge des Sociétés de Football Association ASBL & others v. Jean-Marc Bosman; Case C-415/93, ECR I-4921*

2 Chapter IV of the FIFA Regulations on the Status and Transfer of Players, 2005 ed.

3 Janwillem Soek; *The Prize for Freedom of Movement: The Webster Case*; EU, Sport, Law, and Policy; T.M.C. Asser Instituut, 2009

4 Article 17.3 "*In addition to the obligation to pay compensation, SPORTING SANCTIONS SHALL ALSO BE IMPOSED on any player found to be in breach of contract during the protected period.*"

5 CAS 2007/1358 and 1359 FCPyunik Yerevan vs Carl Lombe, Apoula Bete, Rapid Bucuresti and FIFA.

6 Penalty clauses are adjudged to be illegal according to Scottish Law. However Article 17.3 of the FIFA regulations allows for the insertion of contractually agreed unilateral termination compensation clauses. By the way CAS has already ruled in a case in which the unilateral termination amount was considered to be an abusive figure (CAS 2006/A/1082 & 1104 Real Valladolid vs Barreto)

7 Article 17.1 of the Regulations

8 It is the responsibility of Arbroath club to claim against Hearts if they have not been paid the training compensation which they are entitled. Although Hearts have an obligation to pay this amount, it has nothing to do with how much they should be compensated from Webster as a result of breach of contract.

9 The method of calculation for the figure of 1.5 as a co-efficient remains questionable at best, and there is no indication, statutory, jurisprudential, or otherwise, whether this figure came from.

10 Article 17.2 of the 2005 Regulations

11 As per Article 63 of the FIFA Statutes

12 Article 13.4f) - Written decisions shall contain… f) the reasons for the findings

13 Article R57 - The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged…

14 One would assume that some compensation was to be paid because of the first sentence of Article 17 of the Regulations. "In all cases, the party in breach shall pay compensation."

15 However, these days with the increased role business has to play in Sport and the current global financial climate. Some clubs make their living just by training and selling quality footballers.

1. The national law of the country concerned
2. The specificity of sport
3. Any other objective criteria

The CAS did not accept Hearts request to have the amount of compensation calculated according to the rules and principles of Scottish law regarding damage for breach of contract (*restitutio in integrum)*. They said that Article 17 only required that the adjudicating body make their award for damages with due consideration for the law of the country concerned. In other words, it is not necessary to calculate the amount in accordance with the national law, but rather to contemplate whether the award will infringe the principles of the national law concerned.

The CAS then considered how they should evaluate "specificity of sport" when determining compensation. They took the view that the specificity of sport was about balancing the need for contractual stability with the need to ensure the free movement of players[16].

The Panel took the view that the "protected period" was a measure which existed in order to preserve contractual stability. They believed it existed in order to give players and clubs bans and suspensions if they unilaterally terminated the contract within a certain number of years since the commencement of the contract.

Furthermore, they stated that even if the protected period has expired the level of compensation for the unilateral breach of contract should not act as punishment nor enrichment for said breach. The panel said the following about compensation:

> "[It] should be calculated on the basis of criteria that tend to ensure clubs and players are put on an equal footing in terms of the compensation they can claim or required to pay.[17]"

One of the most important things to be drawn from this decision was when the panel stated that:

> "It is in the interest of the football world that the criteria applicable in a given type of situation... be as predictable as possible.[18]"

In order for contracting parties to know what they potential damages are when they are about to enter into an employment contract with another it is important that the CAS, or whomever the adjudicating body in the future is, sets out a sound precedent which can be referenced and followed by contracting parties and judges alike.

For this reason the CAS refused to consider Heart's GBP 4,000,000 valuation of Webster. They stated to consider this as part of the damages would both enrich the club and punish the Player which was not the goal of Article 17, nor the objective of the CAS. It had not been mentioned in the contract between the two parties as an amount to be considered in the event of breach of contract, and the CAS stated that even if it had there would be no moral or judicial justification for the existence of such a clause; the merits of said clause would have to be examined[19].

The CAS also refused to considered the GBP 75,000 request from Hearts for the amount that they paid to Arbroath Club and sated that this matter should have been resolved during the contract with Webster and was not a matter for discussion[20].

The CAS also said that the remuneration and consideration to be received by the Player under the terms of his new contract was no subject to review because it was not focusing on the content of the employment contract which had been breached, and could be seen as punitive in nature.

Compensation awarded to Hearts

The CAS stated that they believed the most suitable criterion to consider in accordance with Article would be the remaining salary due to the Player. They said that just as a Player is entitled to receive the remainder of his salary if his contract his unilaterally terminated by his employer, the Club should be entitled to claim a similar amount of money against the Player. In this that amount was GBP 150,000[21]. The Panel stated that the criteria of Article 17.1 of the Regulations were not necessarily cumulative and they couldn't find any other reason to award with more damages than the value of the outstanding salaries of the Player[22].

The Panel also said that the GBP 150,000 should carry with it the rate of 5% annual interest rate from the date of the breach. They stated that because neither of the parties contested this rate of interest imposed by the FIFA DRC that they saw no reason to change it.

Several and Join Liability of Wigan

In accordance with Article 17.2 of the Regulations, the CAS determined that Wigan shall be jointly and severally liable for the payment of the compensation paid to Hearts. Wigan contended that they should not be held liable because they had no part to play in Webster's decision to unilaterally terminate his contract and leave Hearts.

While Wigan protested their innocence and in this instance there was no reason for the Panel to doubt otherwise, however, the wording of Article 17.2 was not conditional on fault and Wigan did not present any real evidence to demonstrate that Article 17.2 should be interpreted in any other than the literal sense.

Commentary

Expanding on the Specificity of Sport or Equity

The decision made by the CAS in the Webster case is by all means a legally sound decision. The CAS has taken into account all three criteria which should be reviewed when awarding compensation because of an Article 17 breach of contract.

1. The award is made with due consideration for national law.
2. The award takes into account the specificity of sport.
3. The award considers objective criteria; in this case the future salaries owed to the Player.

However, there is a stark contrast between this case and other Article 17 breach of contract by the Player cases: the amount of money awarded to the Club at the end of the proceeding.

In recent years we have seen Mexes[23] (previously to Webster) condemned to pay EUR 7,000,000, Matuzalem[24] condemned to pay 12,000,000 euro and Mutu[25] (both *post-Webster* awards) condemned to pay EUR 17,000,000[26], whereas in the Webster case we saw Andy Webster[27] given a GBP 150,000 sanction. These cases are not only distinctly different because of the vast discrepancies in the levels of compensation awarded. That could be explained simply by examining the difference in quality, and subsequently pay, and acquisition costs of the Players. The main difference between the three cases and Webster is the approach of the CAS to the award with regard to the "specificity of sport".

While the CAS does not specifically state that one of the criteria that was considered when they awarded damages against Andy Webster in favour of Hearts was the Club's treatment of the Player. It is clear that the Arbitration panel were hesitant to grant a big award in favour of a Club who had so badly mistreated one of their most promising players. Thus, it seems that the "just cause" that Andy Webster initially used to end his contract and then replaced by article 17, was into the arbitrator's mind.

As I said, Andy Webster had played a large part in Hearts' run in the Scottish Cup competition and he was denied a place on the playing field in the final, which they won on penalties, because of the con-

16 Paragraph 132 of the Decision
17 Paragraph 138 of the Decision
18 Also Paragraph 138 of the Decision
19 Paragraph 139 of the Decision
20 Paragraph 140 of the Decision - When you review their request to cover the purchase cost of almost GBP 100,000 for the Player together with their request for GBP 4 million; the Club appear to be claiming GBP 3.9 million for the training of the Player, a Player with which they have played a huge amount of games and also benefited from said training.
Furthermore, they said that attaching the transfer cost to a Player after he had unilaterally breached his contract would be the realm of Sport back to the *"pre-Bosman days where freedom of movement was unduly hindered by transfer fees."*
21 Paragraph 153 of the Decision
22 Paragraph 154 of the Decision
23 TAS 2005/A/902
24 CAS 2008/A/1519
25 CAS 2008/A/1644
26 The three figures are proximate and not intended to be read as the actual amounts awarded by the case, but as round numbers to emphasis the difference in amounts awarded to the parties.
27 CAS 2008/A/1644

tractual dispute he was having with the club. He was bad mouthed in front of the press by his employers, and he was mistreated within the club. They asked him to sign a new contract, and when he said no because he believed his playing career was destined for bigger and better things and also because of the treatment he has received during the previous month, Hearts representatives tried to, in a way, force him into renewing his deal.

Without saying so, the CAS took the human element of sport into consideration and evaluated the behaviour of each of the parties when making their final award. Webster, a Scottish international, had probably, with no disrespect intended, grown too big for a Club of Hearts' stature. Rather than handing in a transfer request and demanding a move, Webster was passive in his behaviour and just chose not to resign with Hearts. He was treated badly as a result, and when one party has acted maliciously towards another they do not deserve to be rewarded for said bad behaviour. This can be called criteria within the realm of specificity of sport, but not overtly mentioned at trial, or simply equity, but it certainly had a part to play in the decision making of the CAS.

The FIFA Regulations; Article 17

"In all cases, the party in breach shall pay compensation, Subject to the provisions of Article 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing of contract and/ or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortized over the term of the contract) and whether the contractual breach falls within a Protected Period."

Article 17 is really well intentioned. It is designed to protect something which is surely essential to the preservation of world football; "The Maintenance of Contractual Stability." The common idea of the EU Commission and FIFA to "maintain the contractual stability" is something to follow in order to avoid the possible lack of fair play within a competition. Competitors need to know that few changes are going to be done without an agreement between the parties involved and that a club could prepare its team and the consequent championship in which it participates without sudden shocks of players leaving just before the beginning of the season.

But, in case that such shock happen, the players and the inducting clubs shall have a sporting sanction if the breach is done during the so-called "protected period" and always an indemnity to pay within or outside that period.

And, it was also drafted in order to give clubs and players an idea of how much compensation they may have to pay to each other in the event of unilateral termination of a contract without an indemnification clause. But that idea is not clear in any case and it will be different from case to case.

While some of the criteria which are discussed carry with them merit such as the due consideration for national law, and the specificity of sport. The article is sometimes poorly worded and often misinterpreted.

First and foremost, there is a line which states:

"[C]ompensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria."

This sentence is poorly written, and although it may seem nit-picky it does not make grammatical or logical sense. The "problem" word is *other* when referring to "*other objective criteria.*" The reason why this word cannot be there is because the word other implies that both the national law of the country concerned and the specificity of sport are already objective criteria. We can see from case law and the fantastic amount of academic commentary about the "specificity of sport" that it is not a well defined category and cannot be seen as objective criterion.

Secondly, and most importantly with regard to the Webster decision, the line which reads "*the remuneration and other benefits due to the player under the existing of contract,"* is continuously misinterpreted by the courts, and only recently have the changed their mind with regard to the interpretation of the intentions of the drafters[28].

This sentence was surely included in Article 17 in order to provide indication to what amount of money should be given to the player if his club unilaterally breached the contract. In other words, if the club cancels the contract without just cause, they must pay the player the remainder of the wages he was due to receive during the contract.

However, in this decision both FIFA and the CAS believed that this amount of money should be considered as a means to determine the compensation owed to a club when the player unilaterally terminated the contract. This is wrong. The club is effectively getting "double compensation" in this scenario. When the player breaches his contract and leaves the club, the employer no longer has to pay their employee. Therefore the club is already being "awarded" this compensation. The remaining value of the contract no longer must be paid to the player; the club can keep this money.

The CAS say that they do not wish to consider the amount of money spent training the Player because there is no provision made for such a consideration in Article 17. This is also incorrect. Article 17 says that "other objective criteria" should be considered this idea leaves a lot of room for judicial interpretation. It also says that an example of said objective criteria could be "*the fees and expenses paid or incurred by the Former Club."* It is clear that this could be and perhaps should be interpreted as the money spent on training the player during his time at the club.

While it is true that different clubs spend different amounts on training players, it could also be said that the clubs with higher quality training facilities who spend more money on the development of their players, give their players a higher probability of success in the world of professional football, and perhaps even develop better players. Therefore, when the clubs choose to sell these players they should be except to recoup higher figures for the sale of their assets.

Webster, by breaching his contract, could have denied Hearts such an opportunity, which means that the money which they had spent developing his talents and skills was lost. Although they were able to benefit from said training because of the performances of Mr. Webster on the football pitch whilst a member of the Club. But the main issue is that a football player in also an employee and when someone decides to end prematurely his contract, he would not be asked to pay any "compensation" for leaving his job. Football and sport in general have that "specificity" that has created article 17, which is that a competition is something more than just a business or a mere employer-employee contractual scheme.

So, in one side there is the freedom for employees/footballers and in another one there are the "sporting aspects" of a contractual relationship, which is not related only to the relationship between those two parties, but have to share it with other competitors (clubs) and a competition (League).

And, there is still a business aspect of football which has should have some room to be recognized, which is the transfer value and the sale of a talent like Webster, a talent which had been brooded by the Club for several years, would have generated a lot of revenue, and perhaps this is why the Webster award was so misunderstood as the way to end contracts without having to pay anything else but the remaining of the contract. Of course this appears to be a mistake as soon another sputnik was to be seen in the sky: Matuzalem. But this is another story…

Finally, this case was compared to Bosman. It was said that it might have a similar "liberating effect" on the rights of players, and their freedom to move between clubs whenever they wanted to. It was frequently stated that players would have the ability to buy-out their contracts, without playing suspension, if they waited until the pro-

28 The choose not to consider the outstanding salaries of the player as damaged caused to the club in the Mutu decision because they recognize that these are salaries which Chelsea will not have to pay the player anyway.

tected period of their contract had expired and they paid the remaining salaries owed to the club.

This information was incorrect, for two reasons. First, because in countries where indemnification clauses are legal, and contracts where said clauses are inserted the opportunity to have an Article 17 case heard is virtually nonexistent; and second because, the decision in the Webster case was very facts specific and had a lot to do with the behavior of the parties.

It will be seen later in the Matuzalem[29] case why said jurisprudence did not last and the "Webster buy-out" theory did not manifest itself in the world of sports law.

29 CAS 2008/A/1519 - FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA

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Matuzalem CAS Award Commentary*

by **Juan de Dios Crespo Pérez****

Preamble

After the revolutionary road that the Webster's case seemed to have opened in 2008, only a year after appeared a new award that hit the news and became the latest of the legal sports law gossip.

In that particular moment, as the lawyer of the winning side, the Ukrainian club Shakhtar Donetsk, I received a lot of felicitations and calls regarding the final decision of one of the (again) leading cases from the CAS.

One of them, from a journalist, focused his questions not on the legal points or on the issues where that award could drive the football world but merely on how I feel to have won against myself.

I was really happy, as any lawyer is when winning such a relevant dispute but that precise thought has not crossed my mind. However, I commenced to wonder about that remark and I immediately reminded that my first thought was that article 17 of the FIFA Regulations for the Status and Transfer of Players is like the 1001 Nights of the legendary Arabic tales, *"all different and marvelous"*. So, the contractual stability and the possibility to terminate a professional contract by a footballer *ante tempus* was not to be decided on a single angle but on a case-by-case basis and each proceedings will end with a different award, depending on several factors and multiple criteria.

Facts

On the 27th of November 2007, The FIFA Dispute Resolution Chamber awarded FC Shakhtar Donetsk, the sum of 6,800,000 € to be paid by Matuzalem Francelino da Silva, hereinafter "Matuzalem" or "the Player", and for the first time explained how and why the final sum of a compensation has been reached. As it is well known, FIFA deciding bodies were not specially prepared to give their thoughts about how an amount for indemnity is reached when a contract has been breached.

Matuzalem arrived at Shakhtar Donetsk from Brescia Calcio Spa, hereinafter "Brescia", in the summer of 2004 for a fee of EUR 8,000,000. In two seasons the player had developed into the team's most talented player and was appointed as the captain.

On the July 2 2007, Matuzalem terminated his playing contract with his Ukrainian club, Shakhtar Donetsk. He had served three years of a five year playing contract worth approximately EUR 1,200,000 each year. When Matuzalem terminated his contract, his club was two weeks from the commencement of their UEFA Champion's League qualification rounds. Matuzalem signed a playing contract with Real Zaragoza for three seasons with an annual remuneration of approximately EUR 1,000,000 not including bonuses on 19 July.

On July 17 2008, the Player was transferred to SS Lazio Spa, "Lazio", after the clubs and the Player agreed to a loan agreement. Included in the loan agreement was an option to purchase the Player's registration rights for EUR 13,000,000 or EUR 14,000,000 plus VAT[1].

Matuzalem signed a three year playing contract with Lazio, the final two years of which would become active should Lazio choose to exercise their purchase option. The annual salary for the first season of this contract was EUR 895,000 and EUR 3,220,900 for the second and third seasons.

Matuzalem decided to terminate his contract with Shakhtar prematurely and unilaterally using the possibility given by article 17 of the FIFA Regulations. The Club informed him that he could only extinguish his contract and a join a new club if he paid the EUR 25,000,000 buy-out clause stipulated in Article 3.3 of the Player's contract.

It is likely that the Player had received advice that he would be able to terminate his contract prematurely and he would only have to pay his former Club the amount that was owed to him as future contractual salaries.

He also would not receive any sporting sanctions as the "Protected Period[2]" of his contract had expired. This would have been strict compliance to the jurisprudence set by the CAS in the *Webster*[3] decision.

Main Submissions and CAS Decision[4]

Parties' Submissions

Both parties appealed the FIFA DRC decision issued on the 12th of November 2007 to the CAS. The CAS decided that they were competent to hear the dispute in accordance with CAS[5] and FIFA Statutes[6], the order of the procedure of the two parties[7] and the decision given by the FIFA DRC.

Shakhtar Donetsk made several requests to the Panel. They requested that:

- The FIFA DRC decision be annulled and that the CAS issue a decision stating that the EUR 25,000,000 clause was an indemnification clause, and not a transfer clause[8], and that they award the Club EUR 25,000,000.
- That the CAS award compensation to the Club as per all the objective criteria contained within Article 17 of the CAS Regulations[9].

* CAS 2008/A/1519 - *FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA* or, hereafter "the Decision".

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1 EUR 14 million if Lazio qualified for the Champions League.

2 A period of time, determined by FIFA, at which, depending on the age of the Player when he signs the contract, the Player may unilaterally breach his contract without receiving a playing suspension.

3 CAS 2007/A/1298 Wigan Athletic FC v/ Heart of Midlothian; CAS 2007/A/1299 Heart of Midlothian v/ Webster & Wigan Athletic FC; CAS 2007/A/1300 Webster v/ Heart of Midlothian

4 CAS 2008/A/1519-1520 Shakhtar Donetsk v/Matuzalem & Real Zaragoza

5 Article R47 and R57 of the CAS code

6 Article 60ff. of the FIFA Statutes

7 Paragraph 47 of the Decision

8 If this clause was met it would give any club the right to negotiate a playing contract with Matuzalem.

- They requested the CAS force Matuzalem to pay 5% annual interest on the amount awarded from the date the Player broke his contract, the 2nd of July 2007.

Matuzalem and Real Zaragoza filed a joint answer and appeal to the Panel with the some of the following requests for relief[10]:
- To reject the appeal lodged by the Club.
- To set aside the challenged DRC decision.
- To establish that the amount of compensation due by the Player is EUR 2,363,760 or EUR 3,200,000.

Both parties also requested that the legal expenses and costs of the arbitration procedure were paid by the other party.

The Main Issues and the Decision

The Panel noted that the main issues to be considered when deciding this dispute were the following:
1. Was Shakhtar Donetsk entitled to any compensation?
2. If so, how much?
3. Are there any reasons to adjust the award given by the FIFA DRC?
4. Is Real Zaragoza jointly and severally liable for the payment of said compensation?

Point 1

The Panel duly noted that neither the Player nor his representatives ever argued the existence of just cause or sporting just cause for the breach of the contract. Therefore Matuzalem was essentially admitting that he had rescinded the contract unilaterally and without just cause.

According to the first sentence of Article 17.1 of the Regulations on the Status and Transfer of Players, hereinafter "the Regulations" or "the FIFA Regulations", "*in all cases, the party in breach shall pay compensation.*"

Therefore it was pretty clear that given the unilateral and premature nature of the termination of contract and because of the absence of any just cause or sporting just cause[11].

Point 2

Clause 3.3 of the employment contract between the parties which stated that:

"During the validity of the Contract, the Club undertakes - in case the Club receives a transfer offer in amount of EUR 25,000,000 or [more] the Club undertakes to arrange the transfer within the agreed period."

The CAS came to the conclusion that this clause could not be interpreted as an indemnification clause and therefore they would have to calculate damages in light of Article 17. They noted that the calculation should be made with "due consideration[12]" for:
- The law of the country concerned
- The specificity of sport
- Any other objective criteria including:
  - The remuneration and other benefits due to the player under the existing and/ or new contract
  - The amortized fees and expenses paid or incurred by the Former Club
  - Whether the breach occurred within the protected period[13].

The Panel considered the aforementioned elements in mixed order in the following manner:

a. The Remuneration Element

The Panel deemed that very important non-exclusive criteria mentioned in Article 17 paragraph 1 of the FIFA Regulations is the remuneration and other benefits due to a player under the existing and the new contract. However, they also felt that the *difference* between the value of the new contract and the value of the old contract should be considered as it may give an appropriate indication of the "actual market value," which may give a better indication of the "actual loss" suffered by Shakhtar for their player unilaterally breaching their employment contract.

The Panel observed that the yearly remuneration of Matuzalem at Shakhtar at the moment of unilateral termination was approximately EUR 1,200,000.

The Panel, after a series of calculations[14], that the Player would be paid EUR 1,000,000 plus bonuses for the 2007/2008 season and EUR 2,445,600 plus bonuses in the 2008/2009 season.

The Panel took the view that because third parties (Zaragoza and Lazio) and the Player himself valued the services of the Player at this level that it would be appropriate to consider this as part of the calculation of the loss suffered by Shakhtar Donetsk.

b. The Value of the Services

The Panel was keen to acknowledge that the services provided by a player are traded and sought after and therefore worth legal protection when determining the economic value of a unilateral breach of contract[15].

The Panel then examined how much both SS Lazio and Real Zaragoza valued the services of the Player per year by examining their loan agreement and the average yearly salaries they would pay the player[16]. SS Lazio had declared that they were willing to pay an average EUR 14,000,000[17] to transfer the player, plus EUR 7,112,267 in salaries to the player over three years time[18]; they valued the player at EUR 7,336,800 per season. Real Zaragoza were willing to sell the player for an average of EUR 14,000,000 plus pay the player EUR 6,546,667 in salaries to the player over three years time[19]; they valued the player at EUR 5,640,000 per season.

The Panel was not willing to consider the penalty clause of EUR 22,500,000, should the player not return to Real Zaragoza following the loan, as an indication of the value of the services of the Player. They believed that from the evidence submitted by Player and the Club that the amount of EUR 22,500,000 was designed to act as a deterrent rather than a valuation.

c. Lost Earnings: Missed Transfer Fees

The Panel recognized that the loss of earnings or *lucrum cessans* could be included when calculating the damages for an unjustified termination of an employment contract[20].

The major point of discussion regarding the loss of earnings is the club's lost opportunity to sell the player and receive compensation because they have terminated their contract early.

"[C]laim of his former club for the opportunity to receive a transfer fee that has gone lost because of the premature termination of the employment contract[21]."

The Panel stated that offers made by third parties for the player could help determine the value of the damage suffered by the club for two reasons.
1. Offers could help determine the value of the services of the player
2. The loss of the transfer fee may be a compensable damage head[22]

9 Point 28 of the Decision the Club requested (in Euro):
- 4,788,431 for non-amortized expenses
- 2,400,000 for the remuneration of the player
- 5,000,000 for the *lucrum cessans* - They mentioned the USD 7,000,000 offer made for Matuzalem by U.S. Città di Palermo Spa and stated the minimum amount that should be considered for *lucrum cessans* is the value of an offer made by another club.
- No less than 5,000,000 for sports-related damage

10 Paragraph 30 of the Decision

11 Which allow parties to breach their employment contracts according to Article 14 and 15 of the Regulations respectively

12 As per Article 17 of the Regulations

13 Paragraph 76 of the Decision

14 Found at Paragraphs 96 - 100 of the Decision

15 Paragraph 103 of the Decision.

16 Paragraph 107

17 The option clause in the loan agreement was between EUR 13,000,000 and 15,000,000.

18 EUR 2,445,600 - Average yearly salary while on loan at SS Lazio

19 2007/2008 - EUR 1,000,000; 2009/2010, 2010/2011 - EUR 2,320,000

20 CAS 2005/A/902 & 903, *Mexes & AS ROMA v/ AJ Auxerre*, N 136; diss. CAS, *Webster Decision*, N 141 et seq.

21 Paragraph 117 of the CAS Decision; Cf. Haas, *Football Disputes between Players and Clubs before the CAS*, in Bernasconi/ Rigozzi (editors), *Sport, Governance, Football Disputes, Doping and CAS Arbitration: CAS & FSA/SAV Conference,* Lausanne 2008, at fn 156 et seq.

22 A loss or hardship for which loses can be obtained - Depending on whether the club can prove that the timing of the ter-

The Panel said that the EUR 7,000,000 offer for Matuzalem's services from Palermo should not be immediately disregarded because Shakhtar Donetsk turned said offer down. Although no direct damage was suffered by Shakhtar Donetsk, the offer could still be considered as a watermark in order to find the best valuation of the Player's services. The Panel did state that in the dispute, Shakhtar Donetsk was not entitled to claim the EUR 7,000,000 offer from Palermo as a compensable loss of profits[23].

d. The Fees and Expenses Paid or Incurred by the Former Club

According to Article 17 paragraph 1 the fees and expenses that were required to obtain the player *should* be amortized[24] and taken into account when awarding compensation.

The Panel calculated the non-amortized value of the transfer fee to be 2/5 of EUR 8,000,000 or EUR 3,200,000 which was the fee Shakhtar Donetsk paid Brescia to negotiate an employment contract with the Player. However the Panel would not consider any solidarity contributions paid by Shakhtar as expenses[25] nor did they consider that the payment of agent's fees were linked to the transfer of the player, and they would not consider this in the amount to be determined for expenses incurred by the former club[26].

e. "Law of the Country Concerned"

The Panel acknowledged that the amount of compensation awarded could vary depending on the laws of the country concerned, which is the law governing the employment contract between the player and the club; generally the laws of the country in which the club is domiciled[27]. However, the Panel concluded that in light of the submissions made by the parties to the dispute there were no particular arguments made in light of Ukrainian or Swiss law which could be taken into consideration by the panel in order to alter the amount of compensation due.

f. Additional Objective Criteria

It is important to note for future cases that the Panel stated that if the club could prove that as a result of the player's premature breach of contract that they were unable to fulfill their contractual obligations with a third party, such as a sponsorship agreement, then it would be possible to factor this into their determination of compensation[28].

g. The Specificity of Sport

Finally the Panel considered the specificity of sport. The Panel recognized that sport plays an important role in society, as have sports organizations, the courts[30], the White Paper on Sport[31], and even the European Commission[32]. They went on to justify the existence of the concept, and the concept serves the Panel quoted the Panel from the *FC Pyunik*[33] decision to best explain what purpose the ideal serves.

> "The criterion of specificity of sport shall be used by a panel to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football word (and of parties being stakeholders in such world) and reaching therefore a decision which can be recognized as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football.[34]"

In other words, the Panel will assess the amount of compensation that should be awarded according under Article 17, with adherence to the objective criteria listed in said article. Afterwards the Panel shall review the amount of compensation in light of the world of sport, and evaluate the decision s ability to protect the interest of sport. The Panel must make an award that is legally correctly and respects the specific nature of sport[35].

Final Calculation

More criteria were considered by the Panel when discussing what should be the final amount of compensation awarded in light of the guidelines of Article 17[36], the Specificity of Sport, and Articles 42.2 and 99.3 of the Swiss Code of Obligations[37]; however they did not sufficiently affect the outcome of the calculation to merit discussion in this article.

The Panel stated that the value of lost services of the Player would amount to EUR 11,258,934, and the Player would have to pay an additional 6 months' salary because of the poor timing of his breach of contract[38]. Furthermore, in accordance with the request for relief from Shakhtar Donetsk and Swiss law[39], the Panel awarded 5% annual interest on the sum of EUR 11,858,934 payable from the 5th of July 2007.

Joint and Several Liability

Article 17.2 of the Regulations says that the new club who contracts a player who has unilaterally terminated his contract shall be presumed jointly and severally liable.

The Panel confirmed the position of the DRC and the FIFA Regulations and held Real Zaragoza jointly and severally liable.

Costs

Both Parties had claimed costs against each other in the dispute, and the Panel took the view that because both parties had filed an appeal against the award of the DRC the costs should be shared by the parties. They stated that the costs would be paid 2/10 by Shakhtar Donetsk, 4/10 by Matuzalem, and 4/10 by Real Zaragoza.

Finally, the arbitration costs of Shakhtar Donetsk would be equally split by Matuzalem and Real Zaragoza. They would have to pay CHF 7,000 each.

Commentary

This case was quite different from that of *Webster*, as the transfer amount was not amortized when the player terminated his contract, with two remaining years still existing and no renewal of contract was involved. So a sum was granted to the club for such pending amortization of the transfer fee.

Another amount was given on the basis of the "remuneration and other benefits due to the player under the previous and the new contract", which is a quite different position of the CAS award on Webster.

Finally, another amount was decided to compensate the "sports-related damage… in the light of the stability of sport" which is, also, a totally diverse application of article 17 than that of the Panel in Webster's case.

All the parties appealed to the CAS and the novelty in the procedure at the CAS has been the presence of FIFA, which has requested to be a party, even though it was initially not admitted by Matuzalem and Zaragoza. This is a clear sign that FIFA wanted, at last, not to be taken out of the legal decisions of the CAS, contrary to its previous insistence not to be a party in the appeal.

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mination infringed with their ability to accept an offer.

23 Paragraph 121

24 CAS 2006/A/1141, *Moises Moura Pinheiro v/ FIFA & PFC Krilja Sovetov*, N 87; Ongaro, *The FIFA Players' Status Committee and the FIFA DRC*, in Bernasconi/ Rigozzi

25 Paragraph 128

26 The Panel also viewed agent's fees as potentially part of the costs incurred by the club to acquire the player, however in this case Shakhtar were not able to prove that such payments were linked to the transfer of the Player.

27 FIFA Commentary on the FIFA Regulations, fn. 74

28 Paragraph 151 of the Decision.

30 CAS, *Webster Decision*, N 131 et seq.

31 COM [2007] 391 final.

32 Treaty of Lisbon, 2007/C 306/ 01, para.124, revised Article 149;

33 CAS 2007/A/1358, *FC Pyunik Yerevan v/ Carl Lombe, AFC Rapid Bucaresti & FIFA*

34 CAS *FC Pyunik Yerevan* decision, N 104-10

35 Paragraph 155 of the Decision

36 FIFA RSTP *et seq.*

37 The Panel deemed that this was the applicable law to the present dispute: When a judge cannot establish the exact amount of compensation then the judge may assess the amount of damages in a discretionary manner.

38 The Player, who was the Club's most influential player and team captain, terminated his contract with the Club just a few weeks before the start of the qualification rounds of the UEFA Champions League.

39 Article 104 paragraph 1 of the Swiss Code of Obligations. NB. Swiss law was additionally applicable to the dispute because of FIFA's existence in Switzerland.

The EUR 25,000,000 "buy out" or transfer clause

The CAS clearly thinks that the way the clause was drafted indicates that it was a kind of a transfer clause or an offer to the player to ask a third club to pay the agreed amount as a transfer. This is acceptable, as the buy-out clause or indemnity clause should be drafted, in my opinion, clearly mentioning article 17 and that the sum specified is "*the one due as compensation in the event of a unilateral breach, respectively termination of the contract by either of the parties".*[40]

The Decision

The factual circumstances of the case were completely different to those in *Webster;* therefore the CAS did not apply the "test" developed in *Webster.* Instead they used several criteria, mainly the loan agreement between Real Zaragoza and Lazio with which to determine the value of the player[41]. They reviewed the figure reached in light of the hotly debated "Specificity of Sport[42]" and gave an award in favor of Shakhtar Donetsk for the amount of EUR 11,858,934[43].

The amount is widely explained in the award itself but let's face that the new evidences requested by Shakhtar before the hearing and given at that time, had made a total change in respect of the claim by Shakhtar itself and that was the way the Panel decided to follow.

The importance of the loan agreement, the new contract (after the previous one signed) between Zaragoza and Matuzalem and the labor contract between Matuzalem and Lazio (the loan was for one year but the contract for three…) was an indispensable tool for the Panel to decide the final indemnification. What is important to mention is that such documents have to be requested by Shakhtar in order to know their contents and they were initially denied by Matuzalem and Zaragoza but finally disclosed in the very same hearing, which was a sort of luck to the Ukrainian club, as it served finally for its purposes as it was widely used by the Panel in order to settle the final indemnity amount. Of course, the whole request made in the statement of claim by Shakhtar has to be reviewed with those new documents but it was worth to do it.

The CAS reached the most equitable decision they could, and gave some of the proverbial power back to the clubs at a time when top Player's can behave as mercenaries and hold billion dollar businesses for ransom[44].

However, they have not been given the tools with which to issue a confident decision which sets a precedent and gives clubs and players an indication of what value a unilateral breach of contract may carry in the future. But, as I said in the preamble, this is something difficult to venture as each case has so different issues that it would be quite impossible to pretend to know what kind of indemnity should be paid.

The "right to terminate a contract" by article 17

The CAS state in their decision that,

> "*The authors of Article 17 of the FIFA Regulations45 achieved a balanced system according to which the judging body has on one side the duty to duly consider all the circumstances of the case and all the objective criteria available, and on the other side a considerable scope of discretion,"*

The statement made by the CAS is absolutely correct. The drafters of Article 17 did indeed create an article which gives the decision making bodies ample room with which to make a discretionary decision based on equity and fairness. However, the purpose of Article 17 is the "Maintenance of Contractual Stability.[46]"

The CAS goes on to state that:

> "*[A]ny party should be well advised to respect an existing contract as the financial consequences of a breach or a termination without just cause would be, in their size and amount, rather unpredictable.*[47]"

Unfortunately, the previous statement is contrary to the very ethos of stability itself. We have seen how different the awards in a unilateral breach case can be in the *Matuzalem* and *Webster* decisions[48].

In the situation of unilateral breach we will have players and clubs who take a chance to breach the employment contract unilaterally because they will believe that their result will be better than had they observed their contract.

And to clearly sustain that article 17 is not a weapon to use in any case, CAS stated that:

> "*However, a termination of a contract without just cause, even if this occurs outside of the Protected Period and following the appropriate notice period remains a serious violation of the obligation to respect and existing contract… In other words, Art. 17* FIFA Regulations does not give to a party, neither a club nor a player, a free pass to unilaterally breach an existing agreement…"[49]

Future of Article 17

The future is simple. Either the CAS sets out a test which has certain definable objective criteria which will govern each article 17 dispute, or FIFA redraft Article 17 and make it more definitive, in order to increase contractual stability. Or clubs should agree with players on buy-out or indemnity clauses.

FIFA have stated that "Contractual stability is of paramount importance in football, from the perspective of clubs, players, and the public.[50]" The existence of Article 17 goes some of the way to address this issue; however, it is not drafted in a sufficiently comprehensive manner in order to ensure real solidity of contract between clubs and players.

The article mentions the calculation of compensation for breach of contract in light of the "specificity of sport," a concept which they fail to define in their regulations[51]. Furthermore they say that "any other objective criteria" should be defined without defining objective. This infringes the ethos of the word itself. It orders for something to be objective it must be defined, and not left for someone to give their subjective opinion of the constitution of objective. Perhaps an exhaustive list not entirely necessary but a list including more provisions than:

1. The remuneration and other benefits due to the player under the existing contract and/ or the new contract, the time remaining on the existing contract up to a maximum of five years,
2. The fees and expenses paid or incurred by the former club (amortized over the term of the contract), and
3. Whether the contractual breach falls within the protected period[52].
4. The sporting loss and the specificity of sport.

The latest has been, for the very first time, included in a CAS award regarding a breach of contract and even though, the six months salaries that the Panel has thought would be enough for the sporting loss (within the specificity of sport) this should be discussed and surely would be in the future.

We have to face that players, when reaching a certain point of their career and due to personal or external matters as pressure of the club to renew, non-agreement on the new salaries, family issues, sporting needs of the player or whatever other reason, will utilize article 17 and this should not be considered as an illegal treatment to the clubs but

40 Point 74 of the Decision

41 They took the value of the lost services as being approximately EUR 14,224,534 and EUR 13,093,334 minus the salaries which they would not have to pay to the Player.

42 EUR 600,000 or the equivalent of approximately 6 months' salary was awarded solely in light of the specificity of sport.

43 Plus an interest rate of 5% from the 5th of July - shortly after the player had breached his contract. This was in accordance with Swiss Law, Article 339.1 of the Swiss Code of Obligations; and Jurisprudence, Decision of the Swiss Federal Tribunal of 4 May 2005, in *re X c/ Y*, case no. 4C.67/2005, consid. 6; Decision of the Tribunal Cantonal du Canton du Vaud of 20 February 1980

45 FIFA Regulations on Status and Transfer of Players 2008 ed.

46 Suggested by the title of Chapter IV of the FIFA Regulation on Status and Transfer of Players 2008 ed.

47 CAS 2008/A/1519 - FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA; CAS 2008/A/1520 - Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v/ FC Shakhtar Donetsk (Ukraine) & FIFA

48 Comparing and contrasting final awards of approximately EUR 11,858,934 and

49 CAS award on Matuzalem, point 63.

50 FIFA Circular Letter 769

51 It is arguable that nobody has managed to give an adequate definition of the specificity of sport - Not the EU courts, not the Lisbon Treaty, and not FIFA.

merely as an abrupt termination of the contract established in the Regulations that might permit clubs to obtain an indemnity for such termination.

The way resolve the issue of how much compensation shall be awarded in case of a unilateral termination of contract is simple: **Contract**.

Where possible[53] the parties should seek to impose reasonable, variable, structured and tiered indemnification clauses where the contract specifically states how much the parties will have to pay each other in case of a unilateral breach. The value can vary based on the remaining years of the contract, the performance of the player[54], the performance of the team, or any other criteria the parties deem appropriate.

For example, a player signs a 5 year long employment contract. If in the first year of the contract either party breach, they will pay have to pay the other party 50 million. In the second year they will have to pay 40 million, and so on and so forth. Of course, this is only one of the criterion to be used with that kind of "changing clause" but we should think about it as the only way to avoid decision that could not be the one that we expect.

This is the future; a clause which encourages "*the maintenance of contractual stability*" and, if not, which permits to objectively know the detailed and contractually agreed criteria to apply when the contract is breached.

52 Article 17.1 RSTP

53 In jurisdictions where indemnification clauses are permitted.

54 It should be noted that performance related unilateral breach clauses may not be the most desirable criterion as they encourage player's who seek to prematurely terminate their contract to perform poorly, thus encouraging either a sale or a lower level of contractual compensation.

CAS 2006/A/1100 Tareq Eltaib v. Club Gaziantepspor, dated 15 November 2006

by **Gianpaolo Monteneri**

I. Preamble

1. One of the most joyful moments for a football club and its fans is the signing of a new player for the club. The new player is meant to give to the club the vitality and strength it needs, so as to be competitive in the new season. The signature is usually widely broadcasted in the local media and based on the pictures offered to the public, the relationship between the player and the club is supposed to last forever. The reality, however, sometimes develops in a completely different way than the expectations of the parties and the agreements concluded between the clubs and the players are not performed in a proper way. Often the misunderstandings and failure to conform to the contractually agreed terms lead the parties to the breach or even the early termination of such agreements.
2. In the same way, regrettably, it has become fashionable that clubs and players use minor infringements of their agreements as a ground for an exit of the employment relationship and subsequent claims for compensations of alleged damages. However, some termination of contract could have been avoided had the parties clearly comprehended their contractual capabilities prior to committing any of such actions. But since football is first of all passion and emotion, now and again rational thinking and balanced handling are neglected in a crisis situation between a player and club, with usually devastating effects for all parties involved.
3. The public opinion, in particular the own fans, play an important role in the handling and decision making process of a club but also of a player, creating pressure and expectation on them. But what appears to be reasonable from the point of view of an average person or fan cannot be often appreciated in the same manner in the light of applicable legal frame of State law or sports body regulations and reserves often surprises when the relevant decision is notified to the parties concerned.
4. Fact is that employment related disputes are increasing (both in number and in the value of the dispute), which is on one side explicable with the complete globalization of football (more and more players are ready to leave their home countries and go to play abroad, even to the most unusual football destination) and on the other side with the increase of revenue generated by the leagues and clubs which is based primarily on television and commercial rights.
5. The reasons for the disputes have always a simple common denominator: *remuneration*! For a player it is either a default in payment on the side of the club or a better financial offer coming from a third club. For a club it is the default in paying the salary of a player on time, which can be based either on a provisional cash flow problem or on the intention to part from the player since he has become uninteresting from a sporting perspective. The parties then use their tailor-made strategies so as to be released from their respective engagements.
6. Whenever an employment related dispute between a club and player occurs, the aggrieved party seeks recourse to the competent State or sports courts. In the event of a dispute which has an international dimension the parties have a tendency to start legal procedure before the FIFA Dispute Resolution Chamber ("DRC")[1] with the possibility to appeal the decision of this body to the Court of Arbitration to Sport ("the CAS"). The main reason for this choice is the fact of having an independent international body investigating and deciding on the matter with the possibility to have the decision taken respected and enforced through disciplinary measures in case of non-compliance.
7. The first question to which these sports courts have to give an answer while analyzing a dispute who is right and who had therefore *just cause*, i.e. a valid reason for the termination of an agreement?
8. As far as the definition of the term "just cause" is concerned, the legislator (both at State and sports law level) has always preferred not to give a comprehensive definition but has left its assessment to the circumstances of the case, trusting in the correct evaluation of the judges. This had as an end result that the decisions about "just cause" depend solely on the appreciation of the concrete circumstances of a case by the judge(s) in question and may thus find slight divergences in understanding, interpretation and application depending on the person that is deciding and the legal background he is coming from.
9. This article will provide the reader with the review and analysis of an award rendered by the CAS few years ago in respect of a dispute between the Libyan player, Tareq Eltaib ("the Player") and a Turkish Club Gaziantepspor ("the Club"), which has become a bench mark in establishing general guidelines for the evaluation of "just cause"

1 For more details on the procedure before the FIFA Dispute Resolution Chamber please refer to the Regulations on the Status and Transfer of Players as well as on the Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber.

as well as for determining the due conduct for the termination of an employment contract.

II. Facts of the case

10. The entire factual underlying of this case is rather hackneyed. The Player and the Club entered into an employment agreement for three seasons (from 2004/05 to 2006/07). However, in the middle of the second season, on 14 March 2006, the Player suddenly submits to the DRC a letter, claiming for his release from the employment relationship with the Club due to the repeated delays of payments under the agreement and non-payment of two monthly salaries, namely those of December 2005 and January 2006.
11. In the same time the Club directed to the DRC its own claim relating to the unexcused absence of the Player. Thereof, the Club requested the DRC to order the Player to immediately return to the Club. The Club further maintained that it fulfilled its financial obligations towards the Player.
12. The DRC, as the first instance deciding body, after due consideration of the positions submitted by both parties, issued an order to the Player to immediately resume duty with the Club ("the challenged Decision"). The decision taken by the DRC has for sure a big *Solomonic* component, as this body had clearly identified that the Player had left the Club without just cause and instead of straight away establishing that the Player breached and terminated the employment contract without just cause, with all the disciplinary and financial consequences of such decision, it offered to the Player the possibility to repair to his mistake and resume duty with the Club, particularly considering that the latter was more than happy to welcome him back, since he was a key player of the squad.
13. The Player had however a different agenda and for sure no intention to go back (probably because he started to receive financially and sportive interesting offers) and instead appealed against the decision of the DRC requesting as provisional measure the stay of execution of the challenged Decision allowing him thus to enter into a contract with a new clubs pending the outcome of the appeal procedure.

Overview of the submissions of the Player

14. The Player requested the Panel to annul the challenged Decision asserting that he terminated the employment contract with just cause due to the repeated violations committed by the Club. In this respect, the Player also asked to recognize him as a free agent and to condemn the Club to the payment of compensation for the damage he had allegedly suffered.
15. In addition, in order to explain the Player's reluctance to return to the Club and to resume with his obligations under the employment contract, the Player's submissions referred to an articles published in a Turkish newspaper, where the attempt to smear the Player's integrity was expressed by a high Club's representative.

Overview of the submissions of the Club

16. The Club in its turn rejected any assertion or assumption related to the just cause of the Player for termination of the employment contract and reasserted its interest in respecting what had been contractually stipulated with the Player. The Club alleged that it has always acted in perfect compliance with the provisions of the employment contract and never produced any valid reason for such illicit conduct of the Player.
17. As regards to the consequences of the Player's behavior, the Club requested the Panel to condemn the Player to the payment of compensation as well as to impose the sporting sanctions on him as consequence of the breach of the employment contract. Additionally, the Panel was called for holding the new club of the Player jointly and severally liable with the compensation for the payment of the compensation.

III. Questions posed before the CAS

18. Prior to commencing with the legal analysis of the Panel's considerations of the case in question, it is essential to determine the main issues that are at stake and will need a closer scrutiny.
19. The two central questions that have to be addressed are the following: figure: first, whether the Player and/or the Club committed a breach of the employment contract, and second, in the event any of the parties committed a contractual breach, to define the consequences thereof.
20. The Panel was hence asked to establish the existence or non-existence of "just cause" in the sense of the FIFA Regulations on the Status and Transfer of Player ("the Regulations"), which would permit the Player either to be released from its contractual obligations or to be found liable for the breach of the contract and sanctioned accordingly.

IV. Legal analysis of the case

21. Within the entire discussion made by the Panel with respect to the grounds of termination of the employment contract, one can follow the general line of adherence to the *principle of contractual stability* established in Chapter IV of the Regulations. The Regulations want to ensure that, in the event a club and a player choose to enter into a contractual relationship, this contract will be honoured by both parties and that unilateral termination of contract is therefore only admissible whenever there is a valid reason for it, a just cause.

"Just cause" for the termination of an employment agreement

22. Article 13 of the Regulations provides that in principle a contract between a professional player and a club can only be terminated solely on expiry of the term or on mutual agreement of the parties. Obviously, the said principle is called to caseharden globally the system of contractual relations and its stability in football.
23. However, Articles 14 and 15 of the Regulations establish two exceptions from the general rule announced above. Thus, a contract can be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) in the case of just cause.
24. Beside the general just cause, the Regulations distinguish the so-called *sporting just cause*, described in more detail in Article 15 thereof, which is though not related to the "classical" just cause and will therefore not be considered at this stage in detail.
25. However, if in respect of sporting just cause the FIFA legislator gives at least its general outline on its definition and general application, nothing is provided for the definition of a "just cause". Consequently, in each particular event the surrounding circumstances need to be considered separately and objectively, on case by case manner.
26. A behaviour which is in violation of the terms of an employment contract can still not justify the termination of the contract for just cause. However should the violation persist for longer time or should many violations be added all together over a certain period of time, or should the violation be a severe one, then it is most probable that the breach of the contract reaches a dimension that the party suffering the breach is entitled to unilaterally terminate the contract for just cause.
27. In the case in question the Panel addressed the issues of the "just cause", however, being faced to the absence of clear guidance on the applicable law, as the contract did not provide for such a clause, the Panel, in application of the Code of Sport-related Arbitration established that in such circumstances one must fall back on Swiss law. Pursuant to this, an employment contract which has been concluded for a fixed term can only be terminated prior to the expiry of the term of the contract if there are valid reasons for the parties or if the parties reach a mutual agreement.
28. In this respect, the CAS Panel cited Article 337 of the Swiss Code of Obligations which reads as follows:

    "*A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship*".

29. According to Swiss case law, whether there is "just cause" for termination of a contract depends on the overall circumstances of the case; the existence of a valid reason has to be admitted when the

essential conditions, of an objective or personal nature, under which the contract was concluded are no longer present. In other words, as the Panel concluded, "it may be deemed as a case of application of the *clausula rebus sic stantibus*".

30. Swiss law provides that only a breach which is of a certain severity justifies termination of a contract without prior warning. This is however an exception to the rule that finds application only in few selected cases where the stance of the defaulting party is extremely reproachable and the violation of massive gravity.
31. In all other cases, the party that intends to terminate the employment relationship has to notify the other party about the violation of the contractual engagement and if this party does not rectify the violation within a short timeframe, the correct handling party is entitled to unilaterally terminate the contract.
32. In principle, the breach is considered to be of a certain severity and justifies the premature termination of the employment contract when there are objective criteria which do not reasonably permit to expect the continuation of the employment relationship between the parties such as a serious breach of confidence.[2]
33. The Panel took into account that in the case in question the Player was naming mainly two reasons for justification of his early termination of the employment contract. On the one hand, the Player referred to the alleged non-payment of contractually agreed amounts, and on the other hand, he affirmed that the publication of articles in the Turkish newspapers made it unreasonable to resume his employee's duties.
34. First, the Panel noted that the newspaper publications mentioned by the Player were published only after the termination of employment contract indeed took place. In this respect the Panel noted:

    "*(…) the citations referred may not constitute a valid reason for the Appellant to terminate the Contract, as the newspaper articles were published only after the letter of termination and therefore at a time when the Appellant had left his place of residence and (…) thereby expressed that he no longer wished to resume his work with the Respondent*".
35. Consequently, the circumstances which occurred after the declaration of termination shall not be taken into account while determining whether there was or not a valid reason to terminate contract.
36. Furthermore, the Panel considered the alleged delays in payments provided under the employment contract. Actually, none of the parties to the dispute argued that certain payments were in delay. The only thing disputed between the parties is how late the payments were effectively made.
37. In the final analysis this question can be left unanswered. In the Panel's opinion, the fact that payments owed under the employment contract were made late does not constitute in general a valid reason for termination of the contract, particularly considering that the Player had accepted in the past the delayed payments of his salary without opposing or complaining to the Club about the delays. The Player should have clearly notified the Club about his frustration about the delays and the fact that he would not tolerate them any longer. But the Player has clearly failed to do so and has *de facto* accepted that the Club was making the payments with a certain delay.
38. In any event, it is to consider that many clubs are not always in the position to pay the players' salary on the due date and light delays are usually accepted and acceptable as long as they do not represent a financial hardship for the player concerned.

Necessity to give warning

39. Having considered the arguments exposed by the Player, in particular the fact that the Player left the Club for the continuous breach of the employment relationship and delays in fulfilling its financial commitments, the Panel made a fundamental conclusion related the early termination of a contract:

    "*A prerequisite for terminating because of late payment is that the player should have given a warning. This follows from the principle of good faith; for the breach of duty is - objectively - from the outset not so grave that it would have been unreasonable to expect the Appellant to continue the employment*".
40. Thus, before the Player has terminated the employment contract, it should have been not only advisable but compulsory to let the Club know, firstly, that he is complaining that the Club's conduct is not in accordance with the contract and, secondly, that he is not prepared to accept such breaches of contract in future. But the Player did not send any warning to the Club.
41. Moreover, the Panel established that:

    "*If the Appellant did not at the time consider the belated payments to be a "significant" breach, then this fact cannot on its own later constitute a valid reason for termination of a Contract. Instead, the player's silence must be considered to be acceptance of the club's conduct, which would make it appear to be in bad faith to justify termination of the contract by reference to the belated payments*".
42. The party who terminates the contract and who blames the other party must act without delay; if he does not act immediately he is deemed to have renounced to the right of termination.
43. The Player claimed that the Club was not only unpunctual in payments, but also that the Club did not pay the salaries for the two last months of employment. Nevertheless, even with respect to this argument of the Player, the Panel noted that it is important to understand whether the salary has already been in arrears for a considerable amount of time or whether the arrears amount to a considerable amount. What is also of relevance is whether the debtor simply refuses to make payment and if there are circumstances that could easily be resolved through a warning notice.
44. The Panel thus concluded that at the time of termination, the Player had no reason to assume that a warning notice would not change the Club's conduct, particularly considering that the Player was a key player of the Club and that the disappearance and thus breach of the Player occurred in an extremely delicate phase of the championship while the Club was competing for not being relegated to the second division.
45. Consequently, it would in good faith have been reasonable to expect the Player first to warn the Club prior to terminating the contract. However, a warning addressed to the Club may have given to the latter the chance to possibly rectify an alleged illicit situation and the Player did maybe not want to go through the risk to have to remain with the Club in case of full compliance with the terms of the contract on the side of the Club.
46. In essence, the Panel therefore decided that the Club had not committed a breach of contract and consequently the Player had no just cause for the termination of the employment contract.
47. The award does not give any elucidation with respect to the procedure, the form, the contents, etc. regarding the warning of the early termination. In this respect, it is advisable to observe the mandatory formal requirement existing under the national labour law under which the employment contract is concluded, which is in the majority of the cases the law of the country where the club is domiciled, unless the party have agreed in the contract to put the same under the application of another law.
48. The party who declares the contract terminated must have previously fixed an additional period of time of *reasonable length* for performance by the other party. In such a case, the party who declares the contract terminated must normally send two communications to the other party, the first one putting the counterparty officially under default and the second one terminating the contractual relationship if the defaulting party has still not complied with it.

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2 Rémy Wyler. Droit du Travail. Berne, 2002. P. 364. See also: Pierre Tercier. Les contrats spéciaux. Zurich, Bale. Geneve, 2003. P. 496.

3 Although there is in general no form requirement for notice giving, one main problem is that oral/telephonic notices are difficult to prove. The burden of evidence of notice giving is clearly on the party giving notice, and if this cannot be proven, the judge will not allow this party to rely on the notice, and this will result in the loss of a remedy. For notices of major importance like the termination of an employment contract written form is therefore indispensable. Moreover, so as to have sufficient evidence in case of dispute it is advised to sent notices via registered mail, courier, plaintiff or any other form that guarantees to prove safe receipt by the counterparty. Where national law imposes a qualified notification of notices, these shall be complied with for the notice to be valid.

49. The termination of a contract is made by unilateral declaration of the party faithful to the contract to the other party; it does in general not require a specific form, unless it is compulsory imposed by law, but it has to be notified within reasonable time. It is generally made in writing but theoretically it could be even made orally[3].
50. While there may not be any specific requirements as to form or content, the aggrieved party's declaration must at least make it clear that the other party no longer can count on the former's performance in respect of the contract concerned.
51. That is to say, the notice must express with sufficient clarity that the party will not be bound by the contract any longer and considers the contract terminated. A high standard of clarity of the notice is necessary, i.e. the unequivocal terms that the party wanting to terminate the contract believes that the contract is terminated. That is to say, it must be evident to a reasonable person that the notice in question must clearly express the aggrieved party's wish to terminate the contract as a remedy in consequence of a particular breach.

Employment freedom of the Player

52. One further issue referred to by the Panel in the case in question was the Player's argument about his employment freedom. The Player refused to return to the Club following the challenged Decision asserting that he could choose to sign for a new club. The Panel in this respect concluded that:

> "*A player cannot be compelled to remain in the employment of a particular employer. If a player terminates his employment contract without valid reason, then the latter is not withstanding the possibility of sporting sanctions - obliged to compensate for damages, if any, but is not obliged to remain with the employer or to render his services against his will.*"

53. According to the CAS jurisprudence in principle a person should not be compelled to remain in an employment relationship of a particular employer, if he does not wish so. An employee who breaches an employment contract by wrongful and premature withdrawal from it may be liable in damages or even imposed sanction according to the Regulations, but is not subject to an injunction to remain with his employer. This position is under Swiss law (Article 337d of the Swiss Code of Obligations) and under CAS jurisprudence.[4] Should the Player be compelled to remain as an employee of the Club he would *"suffer irreparable harm, be it because he would have to renounce to other job opportunities or simply because he would be forced to work for an employer against his own will"*[5] .
54. The general position of the CAS regarding employment freedom of a player as an employee is in compliance with the relevant international standards. The freedom of employment is recognized by the numerous conventions of the International Labor Organization as well as by the international human rights acts.
55. The fact of not being compelled to remain with the club despite the existence of a valid employment contract may not be understood from a practical point of view, considering the remuneration the player is receiving or the acquisition costs incurred by the club so as to guarantee the services of the player from his former club.
56. Moreover, this is a situation that has been used (but also abused) many times by players, that simply refuse to resume duty with the club and disappear, putting the club before an accomplished fact. There is in most of the situations already the complicity of a new club interested in hiring the services of the player.
57. The club risking to lose the player is put before a dilemma: on the one side, insist on the performance of the contract and establish its termination by fault of the player, who did not come back, or on the other side accept the requests of the player and allow his transfer to rather favourable conditions for the new club and the player.
58. It is extremely difficult for a club to hold a player who intents to leave, irrespective of the existing employment contract. Accepting the transfer of the player avoids to the club having to enter into a legal battle that may lasts for years and that may give only partial satisfaction to the aggrieved club and keeping a player in the squad that is not motivated causes sportive damage, both on the pitch as well as in lockers as such player may have a negative impact on the other. The right balance for the welfare of the club (under due consideration of the situation of the player) has to be found in each case.

Calculation of the compensation due to the Club

59. Since the DRC while passing the challenged Decision did not make any thorough investigation of the facts and did not make any conclusions on the amount of compensation due, but instead decided on the Player having to return to the Club, the Panel preferred to refer the case back to the DRC so that this body could calculate the compensation due to the Club.
60. The Panel however gave some guidelines on the method of calculating the compensation, so as to assist the DRC in this respect.
61. Thus, the Panel, pointed out that the amount of compensation must particularly be guided by the effective loss suffered by the Club. The particular importance is attached in this case to the "law of the country concerned", and in the present case this is Swiss law. Article 337d para. 1 of the Swiss Code of Obligations grants an employer the right to receive compensations for the damage due to the termination of the contract by the employee if the latter, without valid reason, does not appear at the working place, or if he leaves it without notice. The amount of compensation equals to one quarter of the wage of one month.
62. The Club is however entitled to claim compensation for additional damages that goes beyond that in Article 337d para. 1 of the Swiss Code of Obligations. If the existence or the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of events and measures taken by the damaged party in equity and on the basis of the ordinary course of the events.
63. Since the moment the present award was rendered, many subsequent awards have dealt with the calculation of the damage following a termination of an employment contract and the case law at CAS level is continuously developing, completing in this way the general guidelines given in this case.

4 **Preliminary Decision of 17 August 2004 in the matter CAS 2004/A/678 Apollon Kalamarias F.C. v/ FIFA and Oliveira Morais; Preliminary Decision of 30 August 2004, in the matter FC Barcelona v/Manchester United F.C.**

5 **CAS 2006/A/1100, Order rendered by the President of the Appeals Arbitration Division of the Court of Arbitration for Sport, dated 6 July 2006.**

Maltese Doping Cases

by **Claude Ramoni***

Background facts

At the end of 2007 and the beginning of 2008, three Maltese football players, Mattocks, Martin and Grech tested positive for prohibited substances.

Following a test performed on 26 December 2007, the player Mattocks tested positive for 19-norandrosterone. He explained that the source of this prohibited substance was a contaminated food supplement. The Malta Football Association (MFA) accepted his explanation and suspended him for a period of four months.

Several days later, on 2 January 2008, two other Maltese football players tested positive for prohibited substances, as a consequence of excessiveness on the occasion of New Year's Eve:

- Grech tested positive for cocaine. He did not challenge the adverse analytical findings reported by the laboratory and explained to the MFA that cocaine was purportedly put in one of his drinks by one of his friends on New Year's Eve. The MFA Control and Disciplinary Board did not believe this explanation and imposed a one-year suspension period on Grech. Grech appealed this decision with the MFA Appeals Board, which reduced the sanction down to nine months.
- Martin tested positive for both cocaine and amphetamines. He admitted having taken both substances during a New Year's Eve Party and was suspended by MFA for a period of one year.

Both WADA and FIFA appealed all three decisions rendered by MFA. It seemed quite obvious to FIFA and WADA that the sanctions imposed by the MFA were not in line with the provisions of the then applicable FIFA Disciplinary Code (the 2007 FDC) or of the World Anti-Doping Code (WADC). According to the WADC or the 2007 FDC, a reduction of the ordinary two-year suspension period sanctioning the presence of a prohibited substance in a player's bodily sample may occur in exceptional circumstances only, where the player is able to demonstrate that his fault is not significant. The minimum period of suspension, except if the player is able to demonstrate that he bears no fault at all, is one year. FIFA and WADA therefore were of the opinion that all three sanctions imposed by MFA were too lenient. Furthermore, the sanctions of four months imposed on Mattocks, as well as the sanction of nine months imposed on Grech were not compliant with the set of sanctions provided for by the 2007 FDC and the WADC for the substances detected in the players' samples.

Admissibility of the appeal

The 2002 edition of the MFA statutes (which were then applicable) contained a clause providing that:

> "*in so far as the affiliation to FIFA is concerned, the Association recognizes the Court of Arbitration in Lausanne, Switzerland (CAS) as the supreme jurisdictional authority to which the Association, its Members and members thereof, its registered players and its licensed coaches, licensed referees and licensed players' agents may have recourse to in football matters as provided in the FIFA Statutes and regulations*".

The CAS panel observed that the players were validly bound by the MFA Statutes. It therefore came to the conclusion that article 61 of the 2007 FIFA Statutes providing, *inter alia*, for WADA and FIFA's right of appeal to the CAS in doping matters was validly incorporated by reference in the MFA Statutes. It therefore held that the CAS had jurisdiction.

This conclusion by the CAS panel is fully in line with a long standing jurisprudence by the CAS, confirmed by the Swiss Federal Tribunal, admitting the validity of an arbitration clause by reference[1].

Applicable Rules on the merit - FIFA or MFA regulations?

The key issue in all three cases was the one of the applicable regulations on the merits.

On the one hand, the MFA Statutes in force at that time provided that MFA was bound to "*observe the rules, bye-laws, regulations, directives and decisions of the Federation International de Football Association (FIFA)*". According to the 2007 FDC, which was adopted in compliance with the WADC, the duration of the period of ineligibility sanctioning the presence of a prohibited substance in a player's sample was *two years*.

On the other hand, MFA had adopted a "Doping Charter", which provided that the use of a prohibited substance by a player would result in the player being sanctioned with a *twelve-month* period of suspension (for a first doping offence). This suspension period could be scaled down or extended in particular circumstances.

In the present case, WADA and FIFA submitted that the Maltese players had to be sanctioned in accordance with the 2007 FDC and applied that the CAS impose a two-year suspension period on all three players. The MFA, as well as Martin, submitted that the only applicable rules were the Maltese rules, in particular the MFA Doping Charter.

Was the FIFA Disciplinary Code directly applicable?

In the proceedings, FIFA submitted that all FIFA anti-doping regulations in force at that time, namely the FIFA Doping Control Regulations and the 2007 FDC, which entered into force on 1 September 2007, were directly applicable to Maltese players, to the exclusion of MFA Doping Charter. FIFA in particular relied on article 60 par. 2 of the 2007 FIFA Statutes, which provided that "*CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law*".

The panel held that, as a matter of principle, national football federations were issuing their own national regulations and, then, retained their own regulatory competences, notably with regard to national competitions. FIFA regulations were applicable to international games only. However, the panel also held that FIFA was also entitled to issue regulations, which could be directly applicable at national level. When adopting regulations, FIFA can therefore decide whether such regulations shall be directly applicable to the whole football family, as a consequence of the affiliation of a national federation and its members to FIFA or, whether they need to be implemented by each FIFA member in order to then apply them at national level.

In order to answer this question, the panel made a thorough literal analysis of the then applicable FIFA anti-doping regulations. Article 2 of the 2007 FDC provided that the 2007 FDC applied to "*every match and competition organized by FIFA*", as well as, "*beyond this scope […] if the statutory objectives of FIFA are breached, especially with regard to […] doping*". This provision could mean that the 2007 FDC would directly apply in order to sanction any doping offence committed by a football player, even in the course of a control organised by a national federation.

However, the panel did not follow this interpretation based on article 152 of the 2007 FDC, which provided for the obligation of the national federation to adapt their own provisions to comply with the code and to incorporate anti-doping regulations into their own regulations. Furthermore, FIFA circular number 1059 provided the national federations with a deadline to adapt their anti-doping regulations.

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1 See e.g CAS 2007/A/1370 & 1376 FIFA, WADA v/ CBF, STJD & Dodo; Swiss Federal Court, Judgement of 9 January 2009 4A_460/2008, published in ASA Bulletin Vol. 27, p. 540.

The panel therefore held that the 2007 FDC was clearly excluding its direct applicability at national level. It concluded that FIFA could therefore not claim that the 2007 FDC was applicable directly at national level, but that FIFA had to take disciplinary measures against national federations in order to ensure that they adopt national anti-doping regulations in line with the 2007 FDC and the WADC.

On the occasion of the entry into force of the revised WADC on 1 January 2009, FIFA amended its anti-doping regulations and replaced the provisions relating to doping in both the FDC and the FIFA Doping Control Regulations by the "FIFA Anti-Doping Regulations". According to article 1 par. 1 of these regulations,

"*These regulations shall apply to FIFA, its member associations and the confederations and to players, clubs, player support personnel, match officials, officials and other persons who participate in activities, matches or competitions organised by FIFA or its associations by virtue of their agreement, membership, affiliation, authorisation, accreditation or participation.*" Paragraph 2 of the same article further specifies that: "*These regulations shall apply to all doping controls over which FIFA and, respectively, its associations have jurisdiction.*"

Therefore, the new FIFA Anti-Doping Regulations which entered into force on 1 May 2009 clearly state that they apply at both international and national levels. The ruling by the CAS panel in the Maltese cases with regard to the scope of application of FIFA anti-doping rules would therefore no longer be valid under the new regulations.

Nevertheless, according to the 2009 edition of the FDC, which is currently in force, the wording of article 2 FDC has not been amended compared to the 2007 edition. Furthermore, the 2009 FDC also includes a provision similar to article 152 of the 2007 FDC providing for the obligation of member federations to adopt regulations incorporating mandatory provisions of the FDC and sanctioning members' federations failing to comply with such obligation with a fine and, possibly, further sanctions (art. 145 of the 2009 FDC). Therefore, for all other offences, which are defined by the FDC and which have to be implemented by the national federations (such as, for example, infringements of the Laws of the Game, misconduct, offensive or discriminatory behaviour, threats, coercion, corruption, match fixing, etc.), the ruling by the CAS panel in the Maltese cases that the FDC is not directly applicable at national level, shall still be valid.

Did article 60 par. 2 of the FIFA Statutes compel the panel to apply FIFA regulations?

Article 60 par. 2 of the 2007 FIFA Statutes provided that "*CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law*". The appellants interpreted this provision as meaning that all parties, when agreeing to the arbitration clause contained in the MFA Statutes, by reference to the FIFA Statutes, also agreed that CAS had to primarily apply FIFA regulations. This reasoning was followed by the CAS in the Dodo case[2], as well as in numerous other cases[3].

However, the panel in the Maltese cases did not follow this approach. It held that the MFA regulations showed a lack of intention to extend the scope of application of the FIFA and the UEFA regulations per reference. Therefore, the CAS competence could not be interpreted as an admission of the applicability of the FIFA Regulations to national cases by virtue of article 60 par. 2 of the 2007 FIFA Statutes.

The conclusion of the panel in the Maltese awards with regard to the rules applicable to the merits of the case and the scope of article 60 par. 2 of the 2007 FIFA Statutes does not seem to be in line with a longstanding CAS jurisprudence. Does it mean that article 60 par. 2 of the 2007 FIFA Statutes is not *per se* sufficient in order to create a valid agreement between the parties as to the applicable rules in the meaning of article R58 of the Code of Sports-related Arbitration? We do not believe that the Maltese awards have to be interpreted this way. In our opinion, the ruling made by the panel as to the applicable rules should not be applied broadly, but only in very specific cases (for example in doping matters) where the CAS has jurisdiction to rule on matters involving national players, who are bound to comply with national rules, in purely internal matters. In such cases, one could understand that the panel does not feel comfortable in imposing the application of FIFA rules and Swiss law to national-level players in the absence of any decision rendered by FIFA and in the frame of a dispute, which does not have any international dimension. This is particularly true in doping matters where CAS arbitration is not agreed upon by the parties, but provided for by anti-doping rules[4].

Was the FIFA Disciplinary Code applicable by reference?

In the Maltese cases, WADA adopted a slightly different approach than FIFA in order to support that FIFA regulations were applicable to the players. WADA supported that the 2007 FDC was applicable as being part of the national anti-doping regulations by reference and that such rules prevailed in case of conflict. MFA Statutes stated that MFA had the obligation to comply with FIFA rules, by-laws, regulations, directives and decisions. The purpose of such provision was to implement, for the MFA, the obligation of FIFA members, provided under article 13 of the 2007 FIFA Statutes, to fully comply with the Statutes, regulations, directives and decisions of FIFA bodies at any time. As a consequence of such, WADA submitted that FIFA regulations were applicable by reference and that, in case of conflict between FIFA rules and MFA rules, FIFA rules shall prevail, in order for MFA to comply with its own statutes.

In several awards, rendered prior to the Maltese awards, the CAS ruled that FIFA anti-doping regulations were applicable at national level in doping matters, ruling that the FIFA regulations had been validly implemented in national regulations.

- In an award rendered on 21 December 2007[5], the panel noticed that there was a contradiction between the rules of the Football Association of Wales (FAW), which stated that the sanction for a first infringement of doping control regulations was, at least, a six-month suspension and a fine, and the FDC, which provided for the ordinary two-year suspension for a first doping offence. In this case, as the rules of the FAW expressly stated that, in case of a conflict between the FIFA rules and the FAW rules, FIFA rules prevail, the panel held that the FIFA rules, in particular the FDC, were applicable.
- In two awards rendered in August 2008 in connection with two Qatari players[6], the panel observed that the Qatari regulations did not contain detailed provisions governing anti-doping. The regulations of the Qatar Football Association only provided that it was "*prohibited to use illegal drugs for activation according to FIFA regulations...*" and that players found guilty of doping offences were subject to several sanctions, amongst other a suspension period, whose duration was however not specified. The Qatari regulations also contained several references to FIFA rules and regulations. The panel held in both cases that FIFA anti-doping rules were applicable, inasmuch as the Qatar Football Association had not adopted national anti-doping rules. Nothing in the regulations of the Qatar Football Association prevented the direct application of FIFA statutes, regulations and directives in such cases.
- In an award rendered on 11 September 2008 with regard to a Brazilian football player[7], the panel held that the FIFA rules, in particular the FDC, were primarily applicable, the rules of the Confederação Brasileira de Futebol (CBF) being applicable subsidiarily. The panel relied on Brazilian law, which imposed on Brazilian sport federations and athletes the adherence to international sport rules. In this Brazilian case, the panel further referred to article 65 of the CBF statutes, which provided that the prevention, fight, repression and control of doping in Brazilian football had to be done complying also with international rules.

In the Maltese cases, the CAS panel came to another conclusion. It held that the MFA statutes and the MFA anti-doping rules did not

2 CAS 2007/A/1370 & 1376 FIFA, WADA v/ CBF, STJD & Dodo, §104

3 See CAS 2008/A/1519 & 1520, Shakhtar Donetsk v/ Matuzalem, Real Zaragoza & FIFA; CAS 2007/A/1298, 1299 & 1300 Heart of Midlothian v/ Webster & Wigan Athletic FC; CAS 2009/O/1808 Kenya Football Federation v/ FIFA

4 See in this respect Judgement of the Swiss Federal Tribunal of 22 March 2007, ATF 133 III 235.

5 CAS 2007/A/1364 WADA v/FAW & James

6 CAS 2007/A/1445 WADA v/QFA & Mohadanni ; CAS 2007/A/1446 WADA v/QFA & Alanezi

provide that FIFA rules and regulations were applicable by reference and/or should prevail in case of conflict between the 2007 FDC and the MFA Doping Charter. On the contrary, the panel held that the MFA Doping Charter should be applied "*independently and without any reference to the FDC anti-doping regulations which [were] therefore not applicable in the present case[s]*". The panel also took into consideration the fact that the players were national level football players.

Comment

The Maltese cases are amongst numerous cases, where a CAS panel had to deal with national regulations, which were contradicting international regulations. The panel came to the conclusion that the MFA national regulations were solely applicable on the merits by ruling (i) that the 2007 FDC was not directly applicable at national level without proper implementation by the national federations and (ii) that the MFA anti-doping rules did not leave room for the application of the 2007 FDC.

In case of conflicts between several sets of rules, the situation is clear if the national rules explicitly provide that, in such a case, international regulations prevail. In several cases, CAS panels relied on such provision to rule that the regulations of the international federation were applicable and prevailed over national rules[8].

In the absence of such a provision, it is difficult to draw a final conclusion from the CAS jurisprudence. For example, in the Maltese cases, the CAS held that the MFA Doping Charter prevailed. In the Brazilian case of Dodo, the CAS panel came to the opposite conclusion, despite the fact that the rules applicable in this case (i.e. CBF rules, FIFA rules and Brazilian law) were similar or even identical to the rules applicable in the Maltese cases[9]. In another precedent about a Portuguese player, the panel held that the rules of the Portuguese Football Federation and Portuguese law were applicable (and not FIFA rules)[10]. In the Qatari cases, the panel held that the absence of specific national provisions and the references to FIFA regulations provided for in national regulations resulted in the "direct" applicability of FIFA anti-doping rules to Qatari players[11]. On the contrary, in a Pakistani cricket case, the panel held that a general reference to the WADA Code in the Pakistani rules was not a valid arbitration clause by reference allowing WADA to appeal decisions rendered in doping matters with CAS[12].

One should not forget that the ruling by CAS is influenced by the conduct of the parties during the proceeding and the argumentation they put forward. Most of the time, national football federations are reluctant to challenge the applicability of the FDC or to claim that national regulations shall prevail, as this would constitute a breach of their obligations toward FIFA[13]. In the Maltese cases, the MFA strongly submitted that FIFA anti-doping regulations were not applicable. On the contrary, in the Brazilian or the Qatari cases, the Brazilian Football Federation or the Qatari Football Federation did not fully exclude the application of FIFA rules in their submissions before CAS.

CAS panels face an uncomfortable situation when several contradicting sets of rules may be applied (national rules v international rules incorporated by reference; anti-doping rules adopted by an anti-doping organisation v international standard issued by WADA and incorporated by reference[14]). Most of the time, CAS panels start from a literal interpretation of the rules in order to come to a conclusion.

In our opinion, in order to solve such issues, CAS panels should refer to the general principles that govern the interpretation of disciplinary rules. It is undisputed that in order to impose a sanction on an athlete convicted of a doping offence, the offence and its consequences (sanction) have to be provided for in a rule which has to be accessible and predictable (principle of legality). In other words, the players must have access to anti-doping rules and be able - if need be with appropriate advice - to foresee the consequences, which a given action may entail[15].

Another principle, which is often applied in order to interpret sport regulations, is the principle that any provision with unclear wording has to be interpreted against the author of the wording (*contra proferentem*). As the CAS stated in an award rendered in 2008: "*this means that in principle, if no other reasons require a different treatment, any ambiguous, or otherwise unclear, provision of the statutes has to be interpreted against the association that has drafted the statutes, and not against the members*"[16]. This would mean that any ambiguity due to contradictions between national and international rules should in no way be interpreted against the addressees of the rules, namely the players.

Nevertheless, in order to interpret anti-doping rules, one should not forget that the WADC has now been implemented worldwide in all sports and constitutes a standardised uniform set of rules providing clear definitions of doping offences, as well as the disciplinary consequences thereof. The WADC is furthermore an appendix to the International Convention against Doping in Sport, adopted under the patronage of UNESCO and now in force in 137 countries throughout the world. In good faith, nowadays, no player or athlete may support that he/she is unaware of anti-doping rules adopted in compliance with the WADC, or at least of the main principles of the WADC. We remind however that neither the UNESCO Convention nor the WADC are of direct application and that, therefore, contradictory regulations should not be automatically overruled by the WADC or the UNESCO Convention.

Based on the foregoing, it is interesting to note that the panel in the Maltese cases has adopted a relatively strict "legalist" approach, by deciding that Maltese national rules prevailed over the 2007 FDC adopted in conformity with the WADC. As a result, the awards rendered in the Maltese cases did not hesitate to adopt the interpretation of the rules, which was more favourable to the players, even though the panel did not refer to the principle "*contra proferentem*".

Sanctions

The panel, applying the MFA Doping Charter, examined whether the periods of suspension imposed on each of the players by the MFA were admissible in view of Section 6 MFA Doping Charter, which provided for a one year sanction for a first doping offence, which may be scaled down or extended in certain circumstances. The panel did not agree with WADA's submissions that the MFA Doping Charter should be interpreted in compliance with the 2007 FDC, which would mean that the suspension period should be extended up to two years unless the nature of the substance, or particular circumstances, justify a less severe sanction. The panel held that the objective of the MFA Doping Charter was clearly to impose a one-year sanction for doping offences, to be scaled up or down in specific circumstances and that the provisions of the 2007 FDC providing for a two-year sanction were not a circumstance justifying a departure from the clear wording of the MFA Doping Charter.

The panel then ruled as follows with regard to the sanctions imposed on the three Maltese players:

– Mattocks, sanctioned by the MFA to a suspension period of four months for use of a contaminated supplement.

7 CAS 2007/A/1370 & 1376 FIFA, WADA v/ CBF, STJD & Dodo

8 See e.g. CAS 2007/A/1364 WADA v/FAW & James where the rules of the Wales Football Federation stated that in case of conflict between FIFA and FAW rules, FIFA Rules shall prevail; CAS 2008/A/1558 & 1578 WADA & FEI v/ SANEF & Gertenbach, where the constitution of the South African Equestrian Federation stated that in case of conflict between national rules and rules issued by the International Equestrian Federation (FEI), the FEI rules will apply.

9 CAS 2007/A/1370 & 1376 FIFA, WADA v/ CBF, STJD & Dodo

10 CAS 2006/A/1153 WADA v/ Assis & FPF

11 CAS 2007/A/1445 WADA v/QFA & Mohadanni ; CAS 2007/A/1446 WADA v/QFA & Alanezi

12 CAS 2006/A/1190 WADA v/Pakistan Cricket Board & Assif & Akhtar

13 See for example the statement by the Mexican federation in the Carmona case: CAS 2006/A/ 1149 & CAS 2007/A/1211 WADA v/ FMF & Carmona, §66

14 See e.g. CAS 2008/A/1607 Varis v/ IBU

15 See Kaufmann-Kohler, Malinverni, Rigozzi, Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, 26 February 2003, available on the WADA website, §§76-77 & 86; CAS 2001/A/330 R v. FISA, published in Digest of CAS Awards III, pp. 197 *et seq.*, esp. p. 203.

16 See CAS 2008/A/1622, 1623, 1624 FC Schalke, SV Werder Bremen & FC Barcelona v/ FIFA, §§50-51, published in Court of Arbitration for Sport, CAS Awards Olympic Games 2008, 2009, pp. 219 *et seq.*

The panel held that the risk related to contaminated supplements was well-known and that Mattocks did not demonstrate that he had made any inquiry as to the content of the nutritional supplements he was taking nor that he exercised any caution when using such products. On the contrary, the panel relied on the well established CAS jurisprudence on contaminated supplement, which constantly refused to consider as an exceptional circumstance justifying a reduced sanction the contamination of supplements, unless the athlete demonstrate that he exercised a specific caution to enquire whether the supplement was "reliable"[17].

Therefore, the panel ruled that no specific circumstance justified a reduction of the ordinary one-year suspension period provided for under Section 6 of the MFA Doping Charter and increased up to one year the sanction imposed on Mattocks;

- Grech, sanctioned by the MFA Appeals Board to a suspension period of nine months, further to an appeal by the player against the twelve-month ban imposed by the MFA Control and Disciplinary Board.

  The panel held that it did not believe the player's explanation that the origin of the cocaine found in his bodily specimen was due to a spiked drink. On the contrary, the panel ruled that taking cocaine on the occasion of a New Year's Eve party could not be considered as an exceptional circumstance justifying to depart from the ordinary sanction of one year suspension provided for under the MFA Doping Charter. The panel therefore increased the sanction imposed to Grech up to twelve months.
- Finally, regarding Martin, who was sanctioned by the MFA to a one-year period of ineligibility for use of cocaine and amphetamine on the occasion of a New Year's Eve party, the CAS panel confirmed this sanction, which was the ordinary sanction provided for under the MFA Doping Charter.

Conclusion

The ruling by the CAS panel in the Maltese cases that national rules shall prevail over FIFA regulations seems justified in view of the wording of both the MFA rules and regulations, as well as of the 2007 FDC. This award confirms the necessity that all federations worldwide adopt rules compliant with the International Federation regulations and the WADC, in particular in order to ensure that all athletes worldwide are submitted to the same treatment in case of an anti-doping rule violation, albeit their nationality, domicile or origin.

The systematic of the FIFA rules in force at that time, which provided for FIFA and WADA's right of appeal to the CAS in the FIFA Statutes, when the provisions applicable on the merit of the case were contained in the FDC and the FIFA Doping Control Regulations results however in a somehow contradictory result, with regard to the Maltese case.

The appeals by WADA and FIFA were held admissible. The purpose of such appeals is mainly to ensure that decisions rendered by anti-doping organisations, such as a national football federation, comply with FIFA regulations governing doping and/or the WADC. However, in the case at stake, the panel ruled that the FDC was not applicable, and chose to apply rules, which were not compliant with the WADC.

In application of the MFA Doping Charter, the panel increased the sanctions pronounced in two out of the three cases.

Therefore, the effect of the appeals lodged by FIFA and WADA in the cases of the Maltese players was to allow the CAS to review decisions rendered in application of national Maltese rules, which do not provide for a right of appeal by FIFA or WADA... The panel partially upheld two out of the three appeals, imposing however, sanctions which are not in line with the FDC or the WADC. This (practical) result does not seem in line with the purpose of the appeal by FIFA and WADA in doping matters as provided for under the FIFA Statutes.

17 See e.g. CAS 2005/A/847 Knauss v/ FIS ; CAS 2008/A/1510 WADA v/ Despres & CCES ; CAS 2008/A/1597 Akritidis & al. v/ IWF

From left to right: Robert Siekmann and Dr Emanuel Macedo de Medeiros meeting at EPFL headquarters in Nyon, Switzerland, 17 June 2010, within the framework of the stakeholders' consultation for the purpose of the EP-commissioned Study on "The Lisbon Treaty and EU Sports Policy".

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by **Ian Blackshaw**

Togo Ban to be Lifted Following CAS Mediation

The Confederation of African Football (CAF) banned the Togo National Football Team from competing in the next two Africa Cup of Nations Competition, for government interference, after they withdrew from the tournament following the fatal attack on their team bus in the Cabinda province of Angola in January of this year.

The CAF President, Issa Hayatou, has agreed to ask his executive committee to lift the ban imposed on Togo, following mediation of their dispute, in which the Togo Football Federation agreed that it had not complied with the CAF regulations.

The mediation was led by the FIFA President, Sepp Blatter, after both parties agreed to interrupt a case due to be heard by the Court of Arbitration of Sport.

"I am very pleased that we have been able to find a solution which is satisfactory for both parties," said Blatter, adding: "The success today is for the entire football community, in particular for African football. This shows that we can solve internal disputes within the football family for the benefit of all those who are involved in our game, and in particular for the players".

The CAF Executive is due to meet on 15 May and is expected to confirm the lifting of the ban on Togo.

Apart from arbitration for settling sports-related disputes, the CAS also offers a mediation service, which was introduced on 18 May, 1999. And, as Ousmane Kane, the former Senior Counsel to the CAS and, during his tenure as such, responsible for mediation, has remarked:

"*The International Council of Arbitration for Sport took the initiative to introduce mediation alongside arbitration. As the mediation rules encourage and protect fair play and the spirit of understanding, they are made to measure for sport.*"

Article 1, para 1 of the CAS Mediation Rules defines mediation in the following terms:

"*CAS Mediation is a non-binding and informal procedure, based on a mediation agreement in which each party undertakes to attempt in good faith to negotiate with the other party, and with the assistance of a CAS mediator, with a view to settling a sports-related dispute".*

The CAS has published a 'Mediation Guide' Booklet and there are currently some 65 CAS mediators, of which the author of this Opinion is one of them

Although, to date, there have not been many CAS mediations, the ones that have been held have been successful. Mediation lends itself particularly to the settlement of sports disputes, as the process is confidential - sports bodies and persons prefer to settle their disputes (as noted above) 'within the family of sport' - and relatively quick and inexpensive. In any case, mediation is a '*without prejudice*' process, thereby allowing full rein in any subsequent court proceedings that may have to be brought, in the event of the mediation not being successful.

But, mediation, as a former Lord Chancellor of Great Britain and Northern, Lord Irvine of Lairg, has pointed out is "*not a panacea for all disputes*". For example, it is not appropriate in doping cases - in fact, the CAS Mediation Rules expressly exclude it in such cases - and also where injunctive relief is sought. However, generally speaking, mediation has a success rate of 85% in appropriate cases!

Football Finances: German Bundesliga Outperforms English Premier League

With the kick-off on 11 June of the 2010 World Cup in South Africa comes the latest news of the finances of the 'beautiful game' proving that football is not only the world's favourite sport but also its most lucrative one.

In 2009, the turnover of FIFA, the world governing body of football, amounted to more than US$1 billion and the profit for the year was US$196 million. In addition, FIFA has assets (equity) of US$1.061 billion. Impressive figures indeed!

At the same time, the Sport Business Group of the international accountancy firm Deloitte's has just published its latest Annual Football Finances Review. Again, some very impressive figures!

Here are some of the highlights of this Review:

Perhaps the most important fact to emerge from this Review is that the operating profits of the English Premier League fell by more than 50% to £79m - their lowest level since the 1999/2000 season; whilst the German Bundesliga overtook the English Premier League to become the world's most profitable football league - at least, for the moment!

Nevertheless, the English Premier League continues to be the world's most popular league, drawing world-wide audiences of several billions in total. Naturally, the Deloitte's Review concentrates on the financial fortunes of the English Premier League, where the wages bill continues to be very high and is causing concern in football and government circles.

According to Dan Jones, the Editor of the Review: "For every *£100* that comes into Premier League clubs *£67* goes on wages, and that's too high."

In fact, soaring wages are threatening the stability of the English Premier League clubs, according to a recent report into football finances in the UK.

English Premier League clubs spent 67% of their revenues, or £1.3 billion, on player wages during the 2008/09 season; with Chelsea again topping the wages bill, at £167 million, whilst Manchester City's wages bill rose from £54 to £83 million!

The wages bills of the top English Premier League clubs in the 2008/09 season were as follows:

- Chelsea - £167m (£172m)
- Man Utd - £123m (£121m)
- Liverpool - £107m (£90m)
- Arsenal - £104m (£101m)
- Man City - £83m (£54m) (2007/08 season wages bills in brackets)

The UK Sports Minister, Hugh Robertson, has described the rise in wages as "very worrying" but has also stated that the Government should not intervene, but rather be looking to put pressure on football governing bodies to improve financial practice:

"The concern is that the operating profits have halved and the wages bill has increased and we will be pushing football's regulatory authorities very hard to take some action. This report points to a very worrying problem and we are very keen to see action in four areas: financial transparency, the relation of debt to turnover, the fit and proper person test and more independent governance on the board. It is absolutely right that we should give football the first opportunity to sort this out."

Dan Jones added that the wages ratio was above the 58% to 63% range of the past decade:

"The result is that profit margins are very thin or non-existent, and with the tightening of credit as well, that is really making that problem come into sharp focus now, and those debt levels start to pinch."

In the graphic below are the comparative wages/ turnover ratios for the leading European football countries over the last 10 seasons.

The wages bills of the English Premier League clubs have recorded double-digit percentage growth for the last three years running. In the 2008/09 season, they were up by £132 million, or 11%, to £1.3 billion.

Total wages bills have grown by 55%, or £474 million, in that three-year period.

"The growth in wages is difficult to slow down, given existing three or four-year [player] contracts, but must nonetheless be reined back to address clubs' declining profitability," Jones remarked.

Adding that the wages bills ratio in the English Football League was 86% as a whole and 90% in the Championship, which Jones considers is too high and needs to be brought back under control.

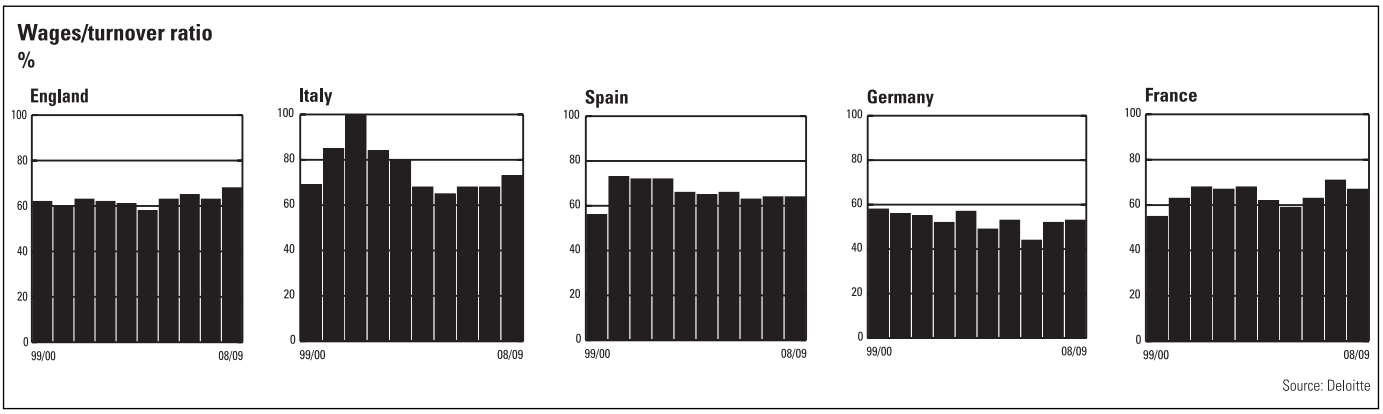
Of course, the challenging economic environment has taken its toll in restricting revenue growth at the English Premier League clubs of 3%, leaving it just short of the £2 billion level, at £1.981 million.

Also, only 10 of the 20 top league clubs made an operating profit in the 2008/09 season, one less than a year before.

Furthermore, the English Premier League club's net debt at the end of the 2008/09 season has increased to £3.3 billion from £3.2 billion the year before. However, just under half of that represented 'soft loans' from club owners.

Almost two-thirds, or more than £1.9 billion, of the total net debt related to Arsenal, Chelsea, Liverpool and Manchester United.

The Deloitte's Review could not be more timely, coming, as it does, hard on the heels of the recent publication of the UEFA 'Financial Fair Play Rules'. Against this background, it will be interesting to see how these rules are applied across Europe in the future and also how strictly they will be enforced by UEFA where European football clubs fail to 'break even' - in other words live - as many of them are already doing - beyond their means!



Source: Deloitte

Is CAS Confidentiality Being Eroded?

One of the attractions of arbitration for settling disputes of various kinds is the confidentiality of the proceedings. This is particularly true of sports disputes, where the sporting community in general do not wish to 'wash their dirty sports linen in public'.

The Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, since its foundation in 1983, is establishing itself, as its founders intended, as 'the supreme court of world sport'. Its workload is increasing year on year, not only because sport is big business and spawning a wide range of disputes, but also as a result of FIFA becoming a member of the CAS in 2002 as the final court of appeal for football disputes, especially international transfer cases of which every year there are many.

In theory, CAS cases are subject to a general rule of confidentiality. Article R43 of the CAS Code of Sports-related Arbitration 2010 provides as follows:

"*Proceedings under these procedural rules are confidential. The parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of the CAS.*"

However, the last sentence of this Article provides the following exceptions to the CAS general rule of confidentiality:

"*Awards shall not be made public unless all parties agree or the Division President so decides.*"

But, in practice, more and more CAS Awards are being published,[1] especially on the CAS official website.[2] This is particularly due to the fact that the CAS is interested in developing a '*Lex Sportiva*' - a discrete and consistent body of sports law - as the following extract at page xxx from Volume II of the CAS Digest of Awards makes clear:

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

The aim of developing a '*Lex Sportiva*' is a noble one, but, in order to achieve it, the Awards of CAS need to be published and made available to a wider audience.

In fact, as the work of the CAS continues to expand and becomes more widely known and discussed, especially in the media and articles in learned journals, the need for such publicity also increases. Accordingly, a 'public interest' argument comes into play and needs to be satisfied in appropriate cases.[3] But, in this context, what interests the public is not necessarily the same as what is in the public interest![4]

However, it must be remembered that CAS proceedings and decisions are a matter of private law and confidential to the parties, as CAS, by its inherent nature, is a private arbitral body. And therein lies the paradox: the need, on the one hand, of the sporting community for confidentiality; and, on the other hand, the need of a wider public to know how cases are being decided, including details of the arguments put forward and the evidence adduced to the CAS, as well as the legal grounds for the CAS decisions, particularly for future guidance and reference.

Some commentators argue that the confidentiality of CAS proceedings is being eroded as more and more CAS Awards are being published; whilst others argue that the CAS is maintaining a fair balance between, on the one hand, protecting and safeguarding the confidentiality of the parties and, on the other hand, contributing to a wider knowledge of the workings of the CAS and the '*ratio decidendi*' of its decisions and thereby providing transparency and confidence as well as some much-needed legal certainty.

What do you think?

The International Sports Law Journal

1 The Secretary General of CAS, Matthieu Reeb, has, to date, edited and published three Digests of several CAS cases covering the periods 1986-1998; 1998-200; and 2001-2003. A further volume in the series is expected shortly.

2 'www.tas-cas.org'. The CAS official website under the title 'Jurisprudence' contains a relatively new section, entitled, 'Archive', which, at the time of writing (August 2010) is being steadily developed. Once this section is fully operative, it will be interesting to see how comprehensive it is and what it covers.

3 See, for example, the Decision in the Gaia Bassani Case (CAS 2003/O/468), where the author of this Opinion was the Sole Arbitrator and, because of the particular circumstances of the case and the need for a wider audience to know about the case and its outcome, directed, under the then procedural rules, that the Award be published.

4 On this point, see the discussion in the English case of Lion Laboratories Ltd v Evans [1984] 2 All ER 417.

Sports Sponsorship Is Flourishing Despite the Recession

Usain Bolt, the 24-year old Jamaican triple Olympic gold and world record sprint champion, has just signed what is believed to be the biggest sponsorship deal in the history of Athletics with PUMA, the Swiss-based sports clothing and shoes manufacturer, with whom he has been associated and financially supported since he was 15 years old. He has extended his current sponsorship contract for three years until 2013 for a sum reputed to be in the region of US$20 million and is due to bring out a new clothing line with his own branding in December 2010!

Bolt, who is currently out of action due to a hamstring injury, wants to be a legend in his sport and make his sporting brand as big as that of the legendary former American professional basketball player Michael Jordan. Puma is reported to have gained the equivalent in advertising exposure of US$105 million from the publicity derived from its association with Bolt! This shows the value of sports sponsorship to a company engaged in the manufacture, promotion and sale of consumer products around the world. As they say in marketing circles: one good brand deserves another and each feeds off each other!

According to Jochen Zeitz, chairman and chief executive of Puma, Bolt could achieve a similar profile to David Beckham who, of course, is a brand in his own right:

"*He's the best paid athlete in history and also one of the best paid athletes overall. I would say if you asked about the rareness of Usain Bolt he's up there with some of the best in any sport. He connects to the fans in a unique way, and not just in a stadium - he can connect on the performance side as well as the lifestyle side - and I think that's the difference to many other athletes who do great things but cannot really find that connection to the fans.*"

And I would add that is what successful sports sponsorship is all about: sporting prowess; lifestyle; and connecting with the fans! And, that, incidentally, is where Tiger Woods came unstuck!

The new Usain Bolt sponsorship deal raises the question of how sports sponsorship generally has been faring due to the general economic slowdown, which despite politicians' claims that we are coming out of the global recession, is still reverberating and having adverse economic effects on various business sectors around the world.

On the other hand, it appears that the global sports industry - worth more than 3% of world trade - is, in fact, faring very well under the present economic circumstances, if current major football sponsorship deals, that have recently been announced, are anything to go by!

Here are the top ten football sponsorship deals that have been reported to date and are quite impressive:

1. Manchester United and Nike - £302.9 million over 13 years
The biggest of all club-level football sponsorship deals was agreed in 2002 between Nike and Manchester United. Nike replaced Umbro as United's kit provider, agreeing to pay United a mind-blowing sum of £302.9 million!

2. Juventus and Tamoil - £165 million over 10 years
At the time this sponsorship agreement was signed in 2005, the potential ten-year shirt naming rights deal - worth £75m over the first five years, and £90m if renewed for the next five - between Juventus and the Libyan-owned oil company, Tamoil, was claimed to be the biggest in football history. However, just over a year later, the football corruption scandal erupted in Italy and, not surprisingly, the deal came to an abrupt end! Juventus only received £24 million of the £165 million pledged.

3. Barcelona and Nike - £130 million over five years
In 2006, Barcelona secured a sponsorship deal with their kit manufacturer, Nike, worth over £26m per year.

4. Chelsea and Adidas - £100 million over 10 years
Also, in 2006, Chelsea signed a £10 million per year sponsorship agreement with Adidas for a term of 10 years.

5. Arsenal and Fly Emirates - £100 million over 15 years
So far, the biggest naming rights - as opposed to kit manufacturer - deal has been signed between Arsenal and the Dubai-owned airline Fly Emirates. It is worth £100 million, and includes naming rights on Arsenal's shirts as well as their new state-of-the-art stadium. The deal was signed in 2004 and is for a term of 15 years.

6. Liverpool and Standard Chartered Bank - £81 million over four years
Starting with the 2010 - 2011 season, Standard Chartered Bank will pay Liverpool over £20 million a year for a 4- year term for pride of place of their name on their jerseys.

7. Manchester United and Aon Corporation - £80 million over four years
Manchester United have secured a shirt sponsorship deal for 4 years starting with the current 2010 - 2011 season worth £80 million with the American Insurance Group Aon Corp.

8. Bayern Munich and Deutsche Telekom - £72 million over three years
Bayern Munich have signed a shirts sponsorship deal with Deutsche Telekom worth £24 million a year for 3 years starting from the 2010-2011 season.

9. Real Madrid and Bwin - £54.9 million over three years
Real Madrid have extended their sponsorship deal with Austrian betting provider Bwin for £18.3 million per year until 2013.

10. AC Milan and Fly Emirates - £52 million over five years
Fly Emirates, who, incidentally, are fast becoming the biggest name in football sponsorship, has recently signed a new sponsorship deal with AC Milan, which is worth at least £52 million over 5 years, plus performance-related bonuses.

According to football blogger Steve Chappell:

"*Sponsorship, especially in the form of logos on jerseys, has become a part of football culture. But football sponsorship, of course, offers much more than sentimental or aesthetic value. In an increasingly dicey financial era for football clubs, precious few can claim to be safe from potential disaster …..Sponsorship deals are a crucial source of income for football clubs, and the clubs that associate themselves with the highest bidders will have a better chance of surviving a tumultuous time in a dangerous business. For sponsors, football can be an extremely effective boost for brand recognition*."

The value of football sponsorship, as mentioned above, is borne out by the fact that this year (2010), English Premier League Clubs have reportedly negotiated a world record level of shirt sponsorships of some £100 million for the new season (2010 - 2011).

So, sports sponsorship - at least as far as the 'beautiful game' and athletics are concerned - is very much alive and well despite the world economic recession!

Match Fixing in Cricket: It is All a Matter of Proof*

Sadly match fixing is prevalent in many sports, including the genteel game of cricket, as the latest affair concerning the match between England and Pakistan during the Fourth Test has shown - exposed by the '*News of the World*', a UK Sunday newspaper. It is alleged that 'no balls' were deliberately bowled to order so that bets could be placed and won on that outcome. The bowlers concerned had been paid - again, it is alleged - several thousand pounds to bowl 'no balls' at agreed points in the play.

But, of course, bowling a 'no ball' *per se* is not against the laws of cricket. 'No balls' happen naturally from time to time during the course of a game, even with experienced bowlers when the bowler miss-judges his run up. So that event alone is not illegal. What is illegal is where a 'no ball' is bowled deliberately and to order at a pre-arranged moment as appears to have happened in this particular case.

Certainly match fixing (perhaps, in the present case, it is more accurate to use the term 'spot fixing'), where someone deliberately affects the outcome of a game by not playing naturally and according to its rules, is illegal under the laws of cricket. Where proved, the cricketing authorities may impose penalties under their disciplinary procedures, which all professional cricketers are required to accept. Sanctions include fines and, in serious cases, bans ranging from several games to life. Hanse Cronje, the late South African cricketer, suffered a life-time ban ten years ago for match fixing. But, as with any 'offence', establishing guilt is a question of proof. Cronje's case was straight-forward only because he confessed. More recently, there were allegations of match fixing after the surprise defeat of Pakistan in the 2007 Cricket World Cup by Ireland, followed the next day by the sudden death of the Pakistan head coach, Bob Woolmer.

Whether, the Pakistani bowlers alleged to be involved in the present affair will, like Cronje, admit anything is perhaps unlikely. But it will all depend on what is uncovered in the course of the investigations, which are underway.

Apart from sporting sanctions, is match fixing a criminal offence punishable under the Criminal Law? Would it constitute fraud? The UK Fraud Act 2006 added the offence of fraud to the list of criminal offences covered by the UK Gambling Act 2005, under which a prosecution can be brought, especially against those beyond the reach of the sporting authorities. If the police feel they have enough evidence, players and anyone else deemed to be involved in the allegations can be charged with fraud. The allegation that the person who took the alleged illegal bets suffered loss, where there is actual or imputed knowledge, does not change anything so far as the criminal responsibility is concerned - two wrongs do not make a right! But, again, as to whether the criminal law has been infringed, proof is needed.

Any evidence gathered by the '*News of the World*' newspaper, including a video of the operation in which the offer to spot fix was made, would, *prima facie*, be admissible in court, so that would make the job of the police a little easier. On the other hand, because there is no suggestion that the '*News of the World*' went on to place any bet on the back of the deal they had struck, and so no book-maker was, in fact, defrauded, this makes establishing a complete case that much more difficult for the police.

Certainly, the UK police investigating the allegations will have their work cut out to get the required evidence to mount a criminal prosecution. To obtain a conviction, the higher standard of proof - beyond reasonable doubt - must be satisfied rather than the lesser civil law standard of a balance of probability. In other words, they will have to prove that the incidents did not happen by chance, but were, in fact, pre-arranged. To prove fraud, they will also have to prove that someone - a bookmaker - was to be defrauded: the criminal intent ('*mens rea*') in addition to the wrongful act ('*actus reus*') - the two legal elements required to constitute a crime under UK law. The onus rests with the prosecution to prove these allegations under the presumption of innocence principle.

Calls for Pakistan to be banned from international cricket until

* This article is an extended version of an article which appeared in 'The Times' of 31 August 2010 following the revelations of alleged match fixing by the Pakistan National Cricket Team in the Fourth Test played against England at the Lord's Cricket Ground in London

they can show that they have put their house in order are completely incompatible with the above principle - a basic human right. On the other hand, the four Pakistani players under investigation, should, as a matter of sporting honour, stand down and take no further part in their national team's fixtures until their names have been cleared, if that ultimately turns out to be the case.

Certainly, match fixing or spot fixing, like any other form of cheating, is anathema and completely contrary to the idea of sport which requires fair play - both on and off the pitch - and should be visited with the severest of penalties where proved to have taken place!

The America's Cup: New Rules Introduced to Avoid Controversies in Future

The America's Cup, which is the oldest trophy - 159 years' old - competed for in international sport and, in recent years, mired by controversies, has introduced new rules for the 34th edition of the competition, scheduled to take place in 2013. The new rules are designed to eliminate disputes in the future.

This major international sailing competition predates by 45 years the Modern Olympic Games, introduced in 1896. In 1851, the schooner 'America', funded by a group of businessmen from New York City, sailed across the Atlantic Ocean to race against a fleet of British yachts considered to be the best of their time. 'America' was a radically designed pilot boat with low topsides and raked masts - said to be a triumph of new world technology - and very different from anything that plied British waters at that time.

On August 22, 1851, 'America' took on and beat the fleet of British boats in a race around the Isle of Wight to win the trophy that later came to bear her name.

In 1887, the syndicate of owners donated the trophy to the New York Yacht Club under a Deed of Gift, which sets out the terms and conditions for future challenges. These still govern the competition today. The main aim of the event is described in the following terms:

"This Cup is donated upon the conditions that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries."

Initially, a one-on-one sailing competition between teams representing foreign yacht clubs, in modern times, the America's Cup has evolved into one of the leading global sports events, in which teams from around the world compete in a series of eliminations for the right to race against the Defender in the America's Cup Match.

Surveys have shown that the America's Cup provides the third largest economic benefits in sport to host countries, after the Olympic Games and the FIFA World Cup. So, apart from the sporting side of the competition, which is very keen and quite aggressive, there is much to play for financially speaking as well!

For 2013, wing sail catamarans will be used and other innovations introduced to attract commercial sponsors, who have been deterred by legal wranglings prior to the 2012 event, which took place in February.

These changes include a shorter race format and a series of cost-cutting measures; and, according to the chief executive of the 2010 winner of the event, BMW Oracle of the USA:

> "*This new format and boat will put the America's Cup back at the pinnacle of our sport.*"

Another significant change for 2013 will be the introduction of an independent race management with an international jury to oversee the event. Again, according to the same source:

> "*These changes will give equal opportunity to competitors and long-term economic stability to all teams and all commercial partners. We promised fairness and innovation and this is what we've delivered.*"

According to Team Origin, the British America's Cup entry:

> "*Russell Coutts and Larry Ellison* [head of BMW Oracle] *promised Challengers a level playing field - giving teams a fair chance of winning; neutral event management and cost containment. We now need to study the new Protocol document and determine whether it matches these promises. Team Origin will only challenge if the 34 America's Cup is fair and neutrally managed."*

The 33rd America's Cup was marred by over two years of legal battles between the head of BMW Oracle, and the owner of the Swiss team, Alinghi.

The dispute over the hosting rights and race rules resulted in a rare two-boat match in February 2010, which was won 2-0 by BMW Oracle against Alinghi. There was no challengers' series, that boosted interest in previous editions of the America's Cup, and this cost the event millions of dollars in lost sponsorship and broadcast rights.

The America's Cup traditionally uses monohulls, but the 2010 edition was a multihull duel. The change from monohulls to catamarans for 2013 should provide faster and more exciting racing and, therefore, increase television coverage of and wider interest in the event.

The venue for the 2013 America's Cup will be announced at the end of 2010. However, the leading contenders to host the event are San Francisco; Valencia; and a Port near Rome.

Like Formula One, the America's Cup is a very rich man's sport, and it will be interesting to see whether the new organisational and management rules that are being introduced will, in fact, eliminate controversies in the future amongst competitors.

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